8. CIVIL PROCEDURE

Cavinder **BULL** SC
MA (Oxford), LLM (Harvard);
Barrister (Gray's Inn), Attorney-at-Law (New York State);
Advocate and Solicitor (Singapore).

Jeffrey **PINSLER** SC
LLB (Liverpool), LLM (Cambridge), LLD (Liverpool);
Barrister (Middle Temple), Advocate and Solicitor (Singapore);
Professor, Faculty of Law, National University of Singapore.

Affidavits

8.1 In *Drydocks World LLC v Tan Boy Tee* [2010] SGHC 248, the High Court reiterated that as O 41 r 5(2) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("RoC") (which enables an affidavit deponent to refer to statements of information or belief) only applies to interlocutory proceedings, it does not operate where the plaintiff is seeking final relief affecting the rights of the parties.

Amendments

8.2 In *Navigator Investment Services Ltd v Acclaim Insurance Brokers Pte Ltd* [2010] 1 SLR 25 ("*Navigator*"), the Court of Appeal allowed an amendment to a summons that had been filed in proceedings commenced by originating summons. The amendment was to include s 6 of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA") as a ground for staying the originating summons. The Court of Appeal held (*Navigator* at [26]) that whilst the appellant had sought to amend the summons at a very late stage, the issue of whether an arbitration was governed by the IAA or the Arbitration Act (Cap 10, 2002 Rev Ed) ("AA") was a question of law and it was difficult to see how there could be any prejudice that could not be compensated by an appropriate costs order. Further, the respondent had made extensive arguments before the High Court and the Court of Appeal as to the applicability of the IAA. As such, the court would consider whether the IAA or the AA was the applicable legislation in the context of the proceedings before it.

Appeals

Admission of further evidence

8.3 In *ACU v ACR* [2010] SGHC 322 at [14], the High Court held, in an appeal from a District Judge in Chambers to a High Court Judge in Chambers, that there was no requirement for special grounds (as described in *Ladd v Marshall* [1954] 1 WLR 1489) in order that fresh evidence may be adduced. It was also decided that the conditions laid down in *Ladd v Marshall* were not strictly applicable although the court may decide whether the facts justified the application of *Ladd v Marshall* (and if so, to what extent).

8.4 In *Martek Biosciences Corp v Cargill International Trading Pte Ltd* [2011] 1 SLR 1287 ("*Martek*"), the Court of Appeal dismissed an appeal against the High Court's decision (see [2010] 3 SLR 927) not to grant leave to the appellant to adduce further evidence in an action in the High Court challenging the decision of the deputy registrar of patents and the principal assistant registrar of patents to revoke the appellant's Singapore patent. The application to adduce further evidence was brought under O 55 r 6(2) and/or O 87A r 13(2) of the RoC.

8.5 The Court of Appeal reasoned (*Martek* at [10] and [13]–[14]) that the Rules of Court prescribed a separate set of rules, with different wording, for patent proceedings and trade mark proceedings because of their special nature and observed that an opposition to the registration of a trade mark or patent would have repercussions on the market at large and would affect the public's interests. As such, the Court of Appeal held that the considerations which were relevant in determining whether to grant leave for further evidence to be admitted in an appeal to the High Court from a decision of the Patents Registrar or a decision of the Trade Marks Registrar should be examined bearing in mind the objectives of the Patents Act (Cap 221, 2005 Rev Ed) ("PA") and the Trade Marks Act (Cap 332, 2005 Rev Ed) ("TMA") respectively. It was not profitable to interpret O 87A r 13(2) of the RoC by making a literal comparison with either O 55 r (2) or O 57 r 13(2). Instead, the starting point should be to look at O 87A r 13(2) itself.

8.6 On the face of it, O 87A r 13(2) of the RoC gave the court an unfettered discretion to allow further evidence to be adduced. However, the Court of Appeal held (*Martek* at [15]) that it was important that the discretionary power in O 87A r 13(2) was exercised in a principled manner. The Court of Appeal did not lay down any rigid test for the exercise of the discretion other than to identify the factors or considerations which the court should take into account in deciding whether or not to allow further evidence to be adduced pursuant to O 87A r 13(2). The Court of Appeal stated (*Martek* at [16]) that the

factors listed by Laddie J in *Hunt-Wesson Inc's Trade Mark Application* [1996] RPC 233 were useful (but not exhaustive) guidelines in patent proceedings. These factors included the factors set out in *Ladd v Marshall* (above, para 8.3) as well as the following factors:

> (a) whether the evidence could have been filed earlier and, if so, how much earlier;
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> (b) what explanation for the late filing had been offered to explain the delay if the evidence could have been filed earlier;
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> (c) the nature of the trade mark;
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> (d) the nature of the objections to the trade mark;
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> (e) the potential significance of the new evidence;
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> (f) whether or not the other side would be significantly prejudiced by the admission of the evidence in a way which could not be compensated, *eg*, by an order for costs;
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> (g) the desirability of avoiding multiplicity of proceedings; and
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> (h) the public interest in not admitting onto the register invalid trade marks.

8.7 The Court of Appeal emphasised (*Martek* at [17]) that ultimately, in each case, the court had to decide, based on the facts of the particular case at hand, whether it was justified to admit the further evidence in question, bearing in mind also the public's interests.

Appeal from disciplinary tribunal

8.8 *Gobinathan Devathasan v Singapore Medical Council* [2010] 2 SLR 926 ("*Devathasan*") involved an appeal against the decision of a disciplinary committee ("DC") of the Singapore Medical Council ("SMC") which found Dr Devathasan guilty of one charge of professional misconduct under s 45(1)(*d*) of the Medical Registration Act (Cap 174, 2004 Rev Ed) ("MRA"). The appeal was allowed. The High Court held (*Devathasan* at [27]–[29]) that its jurisdiction in such appeals was appellate in nature and it was fully entitled to substitute its own decision for that of the DC although it would only interfere with the findings of the DC if those findings were "unsafe, unreasonable or contrary to the evidence" pursuant to s 46(8) of the MRA. Be that as it might, the court would not defer to a decision of the DC if it was not in accordance with law and/or the established facts. The High Court held, *inter alia* (*Devathasan* at [32]–[34]), that the DC had exceeded the scope of the second charge in convicting Dr Devathasan. The High Court expressed its concern (*Devathasan* at [77]) that the DC's failure to understand the nature of the charge against Dr Devathasan and the

evidence required to prove the same left much to be desired and commented that it was just as well that the MRA had been recently amended to allow the appointment of a legally trained person to sit as one of the members in the SMC's disciplinary committees. The High Court believed that having a legally trained member as part of a DC would ensure due process and a fuller appreciation of the nature of the proceedings against alleged errant doctors.

Assessment of damages

8.9 In *Teo Ai Ling v Koh Chai Kwang* [2010] 2 SLR 1037, the High Court held (at [46]) that an appeal to a judge in chambers from a decision of the assistant registrar on an award of damages was not treated as an appellate court hearing an appeal from a decision of a trial judge. Instead, Steven Chong JC (as he then was) held that the appropriate level of damages were assessed *de novo*.

8.10 The basis upon which the Court of Appeal may review a High Court judge's decision on an appeal from an assistant registrar's award of damages was set out by the Court of Appeal in *The "Asia Star"* [2010] 2 SLR 1154 ("*Asia Star*"). The Court of Appeal held (at [21]) that even though the Court of Appeal would give proper deference to an appellate decision of a High Court judge *apropos* an assistant registrar's assessment of damages, the High Court judge would normally be in no better a position than the Court of Appeal when it came to evaluating the evidence. The Court of Appeal noted that in *Asia Star*, the High Court judge had drawn her own inferences from the documents tendered to the court, the affidavits filed by the respective parties and the notes of evidence of the hearing before the assistant registrar in determining whether the respondent had acted reasonably to mitigate its loss. The Court of Appeal stood in a similar position and could draw the appropriate inferences from the same record of proceedings.

Extension of time to serve notice of appeal

8.11 In *Anwar Siraj v Ting Kang Chung John* [2010] 1 SLR 1026 ("*Anwar Siraj*"), the Court of Appeal allowed an application to strike out an appeal where the notice of appeal had been served out of time. The Court of Appeal held (*Anwar Siraj* at [21]–[24]) that the court had the inherent jurisdiction to strike out a notice of appeal filed or served out of time since an appeal only came into being when both the filing of the notice of appeal as well as its service were made within the prescribed time. The Court of Appeal further noted (*Anwar Siraj* at [26] and [27]) that, under O 57 r 17 of the RoC (above, para 8.1), the High Court had the power to extend time to file or serve a notice of appeal to the Court of Appeal out of time only if the application was made before

the expiration of the prescribed period and that any application made after the prescribed period had to be made to the Court of Appeal.

8.12 In determining whether the court ought to exercise its discretion to extend time, several factors ought to be taken into consideration: (a) the length of delay; (b) the reasons for the delay; (c) the chances of the appeal succeeding if time for appealing was extended; and (d) the degree of prejudice to the would-be respondent if the application was granted. The significance of each factor had to depend on the facts and circumstances of each case and the overriding consideration was that the RoC had to *prima facie* be obeyed, with reasonable diligence being exercised (see *Anwar Siraj* at [29] and [30]).

8.13 The Court of Appeal held (*Anwar Siraj* at [31]–[43]) that the circumstances of that case did not merit an extension of time. First, the delay in the service of the notice of appeal was more than five times the prescribed period of one month in O 57 r 4 of the RoC. Second, the reason for the delay was the appellants' attempt to use the service of the notice of appeal as a bargaining chip to prevent the respondent from proceeding with the taxation of a bill of costs ordered by the High Court. The Court of Appeal held that the appellants' explanation that the delay was due to their "uncertainty" over their right to appeal was unconvincing in light of their conduct in filing the notice of appeal notwithstanding such "uncertainty". Third, the appeal was, in any case, a hopeless one – the appellants had failed to submit any authorities that the court had the power, in a civil suit, to make a mandatory order against a law enforcement agency when it was not a party to the proceedings. Moreover, the appeal was wholly without merit.

8.14 On the other hand, the High Court in *Management Corporation Strata Title Plan No 2911 v Tham Keng Mun* [2010] SGHC 326 ("*Tham Keng Mun*"), applying the factors set out in *Anwar Siraj*, granted an extension of time for the service of a notice of appeal against the decision of the District Court even though the delay of nine days was not *de minimis* and the appellants' reasons for the delay were not entirely satisfactory (see *Tham Keng Mun* at [29]–[30]). Woo Bih Li J explained (at [35]) that this was because of the high likelihood that the appellants would succeed in the appeal and the absence of any relevant prejudice that the respondent would suffer if time were extended.

Order 57 r 9A(5)

8.15 The respondents in *Lim Eng Hock Peter v Lin Jian Wei* [2010] 4 SLR 331 ("*Lim Eng Hock Peter*") contended, *inter alia*, that contrary to the trial judge's finding, the relevant passages in an explanatory statement ("the ES") by Raffles Town Club Pte Ltd to members of Raffles Town Club were not defamatory of the appellant. This was

notwithstanding that they did not appeal against the judge's decision on this issue. The respondents argued that they were entitled to do so pursuant to O 57 r 9A(5) of the RoC (above, para 8.1) as interpreted by the Court of Appeal in *Siti v Lee Kay Li* [1996] 2 SLR(R) 934 ("*Siti*"). The Court of Appeal disagreed with the respondents.

8.16 The Court of Appeal held (*Lim Eng Hock Peter* at [26]) that the purpose of O 57 r 9A(5) of the RoC was to allow a successful respondent to support the decision of the court below in his favour, by varying or affirming it, on a ground which the court had not relied on. In *Lim Eng Hock Peter*, the High Court had decided that: (a) the relevant passages were defamatory of the appellant; (b) they were published on an occasion of qualified privilege and so the respondents were protected by the privilege; and (c) the appellant had failed to prove that the respondents were actuated by malice and therefore the defence of qualified privilege succeeded and the claim had to be dismissed. The Court of Appeal observed (*Lim Eng Hock Peter* at [28]) that the respondents' contention that the relevant passages in the ES were not defamatory of the appellant could not be relied on to vary or affirm any of the judge's three decisions.

8.17 The Court of Appeal further held (*Lim Eng Hock Peter* at [31]) that the decision in *Siti* (above, para 8.15) should be confined to its own peculiar facts because counsel for the respondent vendor of a flat in *Siti* was, in truth, not seeking to affirm the judgment of the court below, but to reverse it, *but* with the intention of not enforcing the judgment.

New point raised on appeal

8.18 In *Ang Sin Hock v Khoo Eng Lim* [2010] 3 SLR 179 ("*Ang Sin Hock*"), the Court of Appeal dealt with a threshold issue of whether it could address a substantive issue that had not been addressed in the court below, *ie*, whether a fresh contract had been entered into between the parties.

8.19 The Court of Appeal stated (*Ang Sin Hock* at [55]–[59]) that although the appellant had not made the argument that a fresh contract had been entered into between the parties before the trial judge, his pleadings had included all the facts that were required for such a claim. Bearing in mind the general principle that the operation of rules of court should not itself engender substantive injustice, the fact that a fresh contract would overcome the respondent's general defence of a time bar under s 6(1)(*a*) of the Limitation Act (Cap 163, 1996 Rev Ed) ("Limitation Act") as well as the fact that a party was only required to plead facts (as opposed to law), there was no reason in principle why the appellant could not raise the issue of a fresh contract based on para 19 of his Reply. This was especially so where the appellant was relying on

his consent to the respondent's various requests for additional time to make payment of the moneys due to him and the respective issues of whether or not there was an acknowledgment under s 26(2) of the Limitation Act and whether or not the parties had entered into a fresh contract were dependent, in the final analysis, on the same set of facts which had been pleaded by the appellant at para 19 of his Reply such that the respondent would not be prejudiced if the latter issue was raised and considered by the Court of Appeal.

8.20 The Court of Appeal held (*Ang Sin Hock* at [60]–[63]) that, in any event, even if the issue as to whether or not the parties had entered into a fresh contract was treated as a new point on appeal, this issue could be raised and considered as a new point of law pursuant to O 57 r 13(4) of the RoC because it was one which the Court of Appeal was in just as advantageous a position as the court below to adjudicate upon since no new evidence was required to be adduced and the issue turned simply upon an interpretation of the legal effect of the relevant documents in their context – in particular, whether or not a fresh contract had been entered into by the parties. The Court of Appeal had invited the parties to tender further submissions on this particular issue in order to ensure, beyond peradventure, that all the relevant arguments were before the court.

Case stated

8.21 The nature of a case stated was discussed in *Cheok Doris v Commissioner of Stamp Duties* [2010] 4 SLR 397 ("*Cheok Doris*"). The Court of Appeal held (*Cheok Doris* at [14]) that the only purpose of the case stated was to facilitate the court to answer the stated questions on the basis of facts as stated and that there was no burden of proof on any party as the issues to be decided were issues of law. The Court of Appeal noted (*Cheok Doris* at [15]) that a case stated was a different kind of court proceeding from ordinary adversarial proceedings with respect to disputed issues of fact. A case stated was an established forensic device whereby questions of law were referred to the court for determination on stated facts on the basis that the facts were true. If the stated facts were not sufficient to enable the court to answer the questions referred to it, the court should direct that the case stated be amended to include the necessary additional facts for the questions to be answered. The court should not dismiss the case stated on the ground that inadequate facts had been stated or another interested party had not been made a party to the proceedings. The case stated an issue or issues of law between the stated parties. In *Cheok Doris*, the case stated was filed by the respondent and he was estopped from denying or resiling from the facts in the case stated. Furthermore, for the same reason, the Court of

Appeal held that the appellant should not have been made to bear the costs of the dismissal.

Consent order

8.22 The High Court held in *Nim Minimaart v Management Corporation Strata Title Plan No 1079* [2010] 2 SLR 1 ("*Nim Minimaart*") at [11] that the applicable test for setting aside a consent order on the basis that the appellant was pressurised into a settlement as a result of various remarks made by the trial judge during the proceedings was whether "a reasonably minded person" having read the remarks made by the judge would consider that there was at least an appearance that the consent order was brought about by judicial pressure. Steven Chong JC (as he then was) held (*Nim Minimaart* at [28]) that the trial judge in *Nim Minimaart*, by repeatedly observing that the plaintiff would not recover any damages even if it was successful in proving that the defendants had breached the contract and that an adverse cost order would likely be made against the plaintiff even if the claim on liability was successful, had given rise to a reasonable appearance that the consent by the plaintiff may have been tainted by judicial pressure.

8.23 Chong JC further held (*Nim Minimaart* at [33] and [34]) that the plaintiff need not commence fresh proceedings to set aside the consent order. The usual requirement to institute fresh proceedings to set aside consent orders was premised on a contract having been concluded between the parties on the terms set out therein. Typically, the grounds to set aside such consent orders would relate to the conduct of the parties to the proceedings. However, if the alleged vitiating factor was the conduct of the judge, it would not be appropriate to commence fresh proceedings since the ground did not arise from the conduct of the other party.

8.24 In *Woo Koon Chee v Scandinavian Boiler Service (Asia) Pte Ltd* [2010] 4 SLR 1213 ("*Woo Koon Chee*"), by consent of the parties following certain proceedings, the High Court ordered ("the consent order") that the second, third and/or fourth respondents would purchase the appellant's shares in the first respondent at a fair value to be determined by an independent valuer. After a series of delays on the part of the appellant in complying with the consent order, the relevant respondents applied to the court for a direction that any assistant registrar and/or the Registrar of the Supreme Court be authorised to sign the share transfer forms on behalf of the appellant in order to effect completion of the sale and purchase of the shares in the first respondent as directed under the consent order.

8.25 The Court of Appeal held (*Woo Koon Chee* at [11] and [23]) that the relevant respondents were entitled to initiate execution proceedings to enforce the consent order between the parties. The Court of Appeal observed that there was, in substance and even in form, no real difference between an "order" and a "judgment" and stated that it should make no difference whether a judgment or order was made by the court pursuant to a contested hearing or by consent of the parties. The consent order was automatically enforceable in the same way as any other judgment or order of the court might be enforced and there was no necessity for the respondents to institute a fresh action to compel due compliance with the consent order.

8.26 The Court of Appeal further held (*Woo Koon Chee* at [31]) that the consent order, encapsulating the terms of the settlement agreement arrived at between the parties, was "a judgment or order for the specific performance of a contract" within the meaning of O 45 r 8 of the RoC (above, para 8.1) since it envisaged a contract of sale of the relevant shares from the appellant to the relevant respondents. Order 45 r 8 reiterated and reinforced s 14 of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) which provided that where there was a judgment or order for the execution of a deed or the signing of a document or the endorsement of a negotiable instrument and the party required to do the act was absent or neglected or refused to do so, an interested party was entitled to carry out that act by tendering the document or instrument to the court for execution. Order 45 r 8 also conferred upon the court the power to require a defaulting party to bear whatever expenses that may be incurred arising from the court authorising an interested party or a third party to execute an act on behalf of the defaulting party. Accordingly, the trial judge was well entitled, pursuant to O 45 r 8, to make the order authorising the registrar or an assistant registrar to execute the share transfer form on behalf of the appellant.

Contempt of court

8.27 In *Tan Beow Hiong v Tan Boon Aik* [2010] 4 SLR 870 ("*Tan Beow Hiong*"), the appellant ex-wife had not complied with an order ("the 5 March Order of Court") to move out of the matrimonial flat within five months and had resisted her ex-husband's solicitors' attempt to take possession of the matrimonial flat. The respondent subsequently applied for an order for committal of the appellant for contempt of the 5 March Order of Court. The District Court granted an order for committal committing the appellant to prison for 30 days ("the committal order") but ordered that the sentence was not to be executed if the appellant moved out of the matrimonial flat by noon on 14 March 2010. The appellant was also ordered to pay the respondent's costs. The

appellant lodged an appeal against the committal order on 12 March 2010, but failed to move out of the matrimonial flat by 14 March 2010, thinking that the appeal operated as a stay of the committal order. On 15 March 2010, the respondent's solicitors applied *ex parte* to the Subordinate Courts for the execution of the committal order via the expedited issuance and enforcement of a warrant for committal. The warrant for committal was granted and the appellant was committed to prison for 30 days.

8.28 The High Court held (*Tan Beow Hiong* at [30], [31], [33], [36], [38], [42] and [43]) that an appellate court had the power to hear and adjudicate an appeal against an order for committal and sentence and, if necessary, quash the order for committal and sentence, notwithstanding that the sentence had already been fully served. The traditional grounds for appellate intervention were applicable in determining whether orders for committal should be set aside or varied. Orders for committal in family cases were remedies of very last resort and should only be considered where there was a continuing course of conduct and where all other efforts to resolve the situation had been unsuccessful. The court would use that measure where it was clear that a person was deliberately and persistently refusing to obey a court order.

8.29 On the facts before him, Steven Chong J held (*Tan Beow Hiong* at [64]) that the committal order had been appropriate as there had been a continuing course of conduct by the appellant, who was deliberately and persistently refusing to obey the 5 March Order of Court, in circumstances where all other efforts to resolve the situation had been unsuccessful. However, where a suspended order for committal had been made, and the contemnor breached the terms and conditions on which the order was suspended, the court was not obliged to impose the suspended sentence, but had a discretion to do what was just in the circumstances. In order for this discretion to be properly exercised, there had to be a renewed application *inter partes*, by way of an amended application for an order for committal under O 52 r 3 of the RoC, to lift the suspension and activate the sentence, and which called upon the contemnor to show cause as to why the suspended sentence ought not to be imposed. There had to be another hearing *inter partes*, at which the court could then decide, after considering all the relevant facts, what the consequence of the breach, if any, ought to be (see *Tan Beow Hiong* at [69], [74], [76] and [77]). On the facts, the procedure had not been followed. The interests of justice required the warrant for committal and the sentence it activated to be quashed, in view of the prejudice to the appellant, as well as the fact that there was a reasonable chance that the lower court would have acted differently if the proper procedure had been followed: *Tan Beow Hiong* at [85], [87] and [88].

8.30 In view of the fact that the appellant had, by her initial contempt of court, brought the entire proceedings upon herself, Steven Chong J ordered each party to bear their own costs: see *Tan Beow Hiong* at [94] and [95].

Costs

Entitlement to costs

8.31 In *Devathasan* (above, para 8.8), the High Court did not order the Singapore Medical Council to pay costs for the proceedings before the disciplinary committee and the High Court even though Dr Devathasan's appeal against the disciplinary committee's decision was allowed. Rather, the parties were to bear their own costs. The High Court (*Devathasan* at [76]) gave the Singapore Medical Council the benefit of the doubt that it had acted in good faith and in the public interest in trying to stop what it believed to be an inappropriate treatment for a particular medical condition.

8.32 The issue of whether the circumstances of the case justified a deviation from the general rule that costs should follow the event arose in the three recent High Court decisions discussed below.

8.33 In *Zaiton Bee Bee bte Abdul Majeed v Chan Poh Teong* [2010] 3 SLR 697 ("*Zaiton*") at [59], the High Court held that the assistant registrar was incorrect to award costs against the plaintiff where the plaintiff had grossly overstated her claim in an assessment of damages for personal injury arising from a traffic accident. The plaintiff's claim for damages was for over $6m whilst the amount awarded to the plaintiff by the assistant registrar was $188,146.63 and this was revised to $291,646.63 on appeal before the High Court. Judith Prakash J stated (*Zaiton* at [73]) that as a successful claimant, the plaintiff should have been entitled to some amount of costs unless there was some other ground on which to reproach her. Additionally, as the plaintiff recovered an award exceeding the District Court limit, she was entitled to costs of the assessment on the High Court scale.

8.34 The High Court in *Raffles Town Club Pte Ltd v Lim Eng Hock Peter* [2011] 1 SLR 582 ("*Raffles Town Club*") decided not to award costs to Peter Lim pertaining to the issue of whether he was a director with a substantial shareholding in the plaintiff at the material time even though the plaintiff's action was eventually dismissed. Chan Seng Onn J explained (*Raffles Town Club* at [38]) that Peter Lim's raising of the unmeritorious defence that he was not a director with a substantial beneficial shareholding in the plaintiff had unnecessarily protracted the proceedings and added to the complexity of those proceedings because

of the adroit manner in which Peter Lim concealed his beneficial shareholding of some 40% in the plaintiff and the very substantial payments of monies and distribution of other benefits from time to time arising out of that large beneficial shareholding. In the circumstances, Chan J held that it would be fair to deprive Peter Lim of his costs in litigating that defence.

8.35 In *Mohamed Amin bin Mohamed Taib v Lim Choon Thye* [2010] SGHC 341 ("*Amin*"), the High Court made no order as to costs. The plaintiffs had succeeded in their appeal before the High Court to have a decision of the Strata Titles Board ("the Board") set aside and to have their original application for approval of the collective sale of a condominium development remitted to the Board for a fresh decision. It subsequently transpired that the purchasers had not stamped the agreement relating to the collective sale ("the SPA") before bringing their original application before the Board. If the SPA had been properly stamped or the fact of its non-stamping discovered much earlier, costs could have been saved. Judith Prakash J held (*Amin* at [20]) that the plaintiffs were not to be deprived of their costs on the ground that the SPA was not stamped as it was not the plaintiffs' own conduct that led to the non-stamping of the SPA and there was no evidence that the plaintiffs knew, but dishonestly failed to disclose, the fact of the SPA's non-stamping to the Board and the defendants. Whilst Prakash J accepted that the plaintiffs were the best-placed to check on the status of the SPA and that their omission to check on the SPA should constitute relevant conduct for the purposes of determining the appropriate costs order, the learned judge noted (*Amin* at [17]) that this was only one factor to be considered and should not be given more weight than it deserved particularly where it was by no means evident that early discovery of the non-stamping of the SPA would have obviated the need for the proceedings before the High Court and where the defendants' conduct in filing summonses to set aside the plaintiffs' application in the main action had prolonged and complicated the proceedings. However, on a separate note, Prakash J (*Amin* at [32]) drew an adverse inference against the plaintiffs upon their refusal to disclose the terms of their solicitors' retainer despite strong evidence to suggest the existence of an agreement stating that the plaintiffs' solicitors would not be looking to the plaintiffs for their legal fees. Prakash J therefore found that there was an agreement between the plaintiffs and their solicitors for the latter to look to a non-party (the purchaser's property agent who was responsible for arranging the collective sale) for their legal costs. As the plaintiffs were not primarily and potentially legally obliged to pay their solicitors at all, Prakash J held (*Amin* at [22]) that they were not entitled to their costs in the action.

Liability to pay costs

8.36 In *Basil Anthony Herman v Premier Security Co-operative Ltd* [2010] 3 SLR 110 ("*Basil Anthony*"), the Court of Appeal ordered a new trial on the ground that the subpoenas of the appellant's witnesses ought not to have been set aside by the trial judge. The Court of Appeal observed (*Basil Anthony* at [85]) that the reasons for ordering a new trial were substantially attributable to the conduct of the respondents in misguidedly resisting the subpoenas of the disallowed witnesses on questionable grounds right up to the trial and that it was therefore appropriate to award the appellant the costs of the appeal and half of his costs below. The Court of Appeal stated (*Basil Anthony* at [85]) that "[t]he vindication of a party's interests must not come through misguided procedural strategies of attrition, which deep-pocketed litigants will, in particular, be tempted to resort to".

8.37 With regards to the costs of third party proceedings, the High Court in *Raffles Town Club* at [46] (above, para 8.34) surmised that in order to justify visiting the costs of the third party proceedings on the plaintiff, he must have instituted the claim against the defendant under such circumstances that it became *inevitable* that the costs of the third party proceedings had to be incurred *as a direct result* of the plaintiff's claim. Chan Seng Onn J declined to order the plaintiff to pay the costs of third party proceedings.

8.38 The issue of whether a non-party to proceedings should be ordered to pay costs arose in *DB Trustees (Hong Kong) Ltd v Consult Asia Pte Ltd* [2010] 3 SLR 542 ("*DB Trustees*") and *Raffles Town Club*. Whilst the Court of Appeal and the High Court in both cases respectively applied the principle that an order for costs of court proceedings could be granted against a non-party where it was just to do so, the courts in both cases arrived at different conclusions on the facts of the respective cases.

8.39 The Court of Appeal held (*DB Trustees* at [23]) that there was no rule limiting the court's power to award costs in favour of or against a non-party and there was no reason why the court should be so precluded. The overarching rule with regard to ordering costs against a non-party in court proceedings was that it had to, in the circumstances of the case, be just to do so. The Court of Appeal stated (*DB Trustees* at [29], [30], [35] and [36]) that two particular factors, which though not indispensable should be given considerable weight, ought ordinarily to be present to make it just to award costs against a non-party. First, there had to be a close connection between the non-party and the proceedings. Secondly, the non-party had to have caused the incurring of costs. Moreover, there was no indispensable rule of practice that a non-party had to be given prior warning before an adverse order for

costs was made although it was essential that the non-party had to be accorded due process and his or her views adequately considered before such an order was made. The Court of Appeal in *DB Trustees* ordered that costs be borne personally by the non-party even though it was her company which was the party to the proceedings for three main reasons: (a) the non-party was "solely responsible" for all the underlying actions that the company had participated in; (b) the non-party was the only shareholder and director of the company and was the real and only beneficiary of any successful outcome of the company's litigation; and (c) the company appeared unable to satisfy the adverse orders made (see *DB Trustees* at [37]–[43]).

8.40 Chan J in *Raffles Town Club* at [25]–[28] referred to and distinguished the Court of Appeal's decision in *DB Trustees* on the facts of that case. Chan J was not persuaded that it was just in all the circumstances to grant an order for personal costs against two non-parties to the proceedings because there was an insufficiently close connection between the non-parties and the main action; there was no causal link between the non-parties and the incurring of the costs in the main action; and there was no evidence that the unsuccessful party would not be able to pay the costs of litigation.

Indemnity costs

8.41 In *Lim Eng Hock Peter v Lin Jian Wei* [2010] SGHC 254 ("*Lin Jian Wei*"), the plaintiff had successfully brought a defamation action against the defendants and the Court of Appeal had ordered the defendants to bear the costs of the plaintiff for the trial on an indemnity basis and for the appeal on a standard basis. Costs of two counsel were allowed. The High Court awarded the plaintiff costs of $650,000 for section 1 of the plaintiff's bill of costs for the trial. Chan Seng Onn J accepted (*Lin Jian Wei* at [5]) that the award of party-and-party costs on an indemnity basis does not entitle the receiving party to recover from the paying party all costs which the receiving party paid to his solicitors and that the receiving party is only entitled to reasonable costs albeit that the burden falls on the paying party to show, on a balance of probabilities, that the costs claimed by the receiving party are unreasonable. Chan J (*Lin Jian Wei* at [6]) was mindful that full regard must be had to all the relevant circumstances including those set out in Appendix 1 of O 59 of the RoC (above, para 8.1) to ensure that the amount of costs awarded was reasonable in all the circumstances of the case. Chan J stated (*Lin Jian Wei* at [7]) that counsel must produce as much relevant information as he could in his bill of costs to justify his claim for the costs drawn up for the amount of work done so that the court could be well assisted to determine the appropriate and reasonable quantum of costs to be awarded. What was most important for the purpose of taxation was to study the particulars in the bill of costs and

assess, *inter alia*, how much time and effort needed to be reasonably spent or how much work needed to be reasonably done to attend to the specific matters or issues listed in the particulars therein. Chan J opined (*Lin Jian Wei* at [14]) that it was more worthwhile not to debate the degree of the overall complexity, simplicity or novelty of the matter but to look at the actual particulars provided in the bill of costs in order to assess holistically how much time and effort was reasonably needed given the nature of each of the numerous matters set out in the bill which had to be attended to.

8.42 With regards to the comparable cases brought up by counsel, Chan J stated in *Lin Jian Wei* at [42] that one cannot really compare based solely on the absolute quantum of costs as every case tends to be very different and the information is often not detailed enough to make proper comparisons. However, assuming the number of hours claimed by counsel in the bill of costs for the comparable cases were *bona fide* and accurate, Chan J held that this would be a good proxy or indicator for the amount of time and effort needed to attend to all the matters in each case. Nevertheless, Chan J (*Lin Jian Wei* at [43]) cautioned against comparing the hourly rate computed for the "hours *allowed*" with the hourly rate computed for the "hours *claimed*". Chan J stated (*Lin Jian Wei* at [45]) that the best way was to compare the hourly rate based on the "hours *allowed*" and the second best way was to compare the hourly rate for the "hours *claimed*" (assuming genuine claims by counsel on hours spent) when no information was available on the number of hours *allowed* by the court during the taxation of comparable cases.

8.43 In *Raffles Town Club* (above, para 8.34) at [29], the High Court held that costs on an indemnity basis should only be ordered in a special case or where there are exceptional circumstances. Chan Seng Onn J declined to award costs on an indemnity basis because the plaintiff's actions did not evince such a degree of dishonesty, impropriety or abuse of judicial process to warrant a departure from the usual basis of costs.

Scale of costs

8.44 In *OTF Aquarium Farm v Lian Shing Construction Co Pte Ltd* [2010] SGHC 245 ("*OTF Aquarium Farm*"), the entire proceedings were conducted in the High Court and there was an appeal by the defendants to the Court of Appeal but the damages assessed only amounted to $12,700. The plaintiff sought costs on the High Court scale regardless of the fact that the final compensation was below the High Court's jurisdiction. Section 39 of the Subordinate Courts Act (Cap 321, 2007 Rev Ed) and O 59 r 27(5) of the RoC (above, para 8.1) restricted the costs to the costs of the court of appropriate jurisdiction unless there was a sufficient reason for bringing the action in the High Court. Kan Ting Chiu J held (*OTF Aquarium Farm* at [33]) that to constitute

sufficient reason, the plaintiff must show not only that its claim came within the High Court jurisdiction but also that it was a proper claim. The plaintiff's claim included a claim for economic loss of $600,647, without which the plaintiff's claim would have come up to $134,160 at the highest, well within the jurisdiction of the Subordinate Courts. Whilst Kan J acknowledged that the claim for economic loss may have been a sufficient reason if there was a proper basis for such a claim even if it failed ultimately, the learned judge held (*OTF Aquarium Farm* at [34]) that the plaintiff's claim was misconceived and should not have been made at all. In the circumstances, Kan J affirmed the decision of the assistant registrar that costs for the entire proceedings were to be taxed on the Magistrate's Court's scale.

Security for costs

8.45 The proceedings in *Tjong Very Sumito v Chan Sing En* [2010] SGHC 344 ("*Tjong Very Sumito*") raised the interesting issue of whether a plaintiff can be ordinarily resident both within and out of the jurisdiction for the purpose of ordering security for costs against him, and if so, whether such security should be ordered. The High Court held (*Tjong Very Sumito* at [19]) that it was not precluded from finding that, for the purposes of ordering security for costs, an individual plaintiff was ordinarily resident out of, as well as within, the jurisdiction. Provided that the court found that an individual plaintiff was ordinarily resident out of the jurisdiction, it was seized of an unfettered jurisdiction to exercise the discretion to order security for costs against such a plaintiff although the plaintiff may also be ordinarily resident within the jurisdiction where this was just in all the circumstances of the case. The fact of ordinary residence within the jurisdiction did not say anything about the ease of enforcement of a costs order against a plaintiff, particularly where he had also been found to be ordinarily resident abroad – there was an attendant risk that the defendant may be left with a costs order which would be "unenforceable or only enforceable with great difficulty and expense, plus delay", for example, if the plaintiff had no substantial assets in Singapore and retreated to the other ordinary residence outside the jurisdiction: see *Tjong Very Sumito* at [34].

Default judgments

8.46 In *Nanyang Law LLC v Alphomega Research Group* [2010] 3 SLR 914, which concerned a regularly obtained judgment, the defendant raised a *prima facie* defence of set-off on the basis of money had and received. The defendant showed that in a previous suit the court had found as a fact that money had been inappropriately paid out of the defendant's funds to the plaintiff. The defendant claimed that it

was entitled to set off these funds (as a liquidated debt) against the plaintiff's claim. As the defendant's cross-claim was a legal set-off it did not matter that it was wholly unrelated to the plaintiff's claim. The court added that the cross-claim also amounted to an equitable set-off. The court set aside the judgment as the defendant had shown an arguable case (albeit reluctantly because of the defendant's conduct).

8.47 It is rare for a plaintiff to apply to set aside a judgment in default which has been entered in his favour. However, as shown in *Panin International Credit (S) Pte Ltd v Ngan Ching Wen* [2010] SGHC 332 ("*Panin*"), such a situation is conceivable. The plaintiff entered a judgment in default of appearance against the defendant in Singapore and then registered the judgment in Malaysia. Litigation ensued in Malaysia concerning the validity of the judgment which finally terminated in the Court of Appeal's decision to set aside the judgment. The plaintiff then applied to set aside the judgment in Singapore in order to obtain a fresh one for enforcement in Malaysia. The High Court decided that O 13 r 8 of the RoC (above, para 8.1) was not limited to applications by the defendant, and could be relied upon by the plaintiff to set aside his own judgment (relying on *Messer Griesheim GmbH v Goyal MG Gases PVT* [2006] EWHC 79 (Comm)). Woo Bih Li J stated (*Panin* at [9]): "In my opinion, subject to considerations of prejudice to the defendant, there is good reason for setting aside a default judgment where the default judgment is not capable of being enforced in the foreign jurisdiction in which the defendant's assets are located such that the plaintiff's claim would effectively be lost." His Honour also concluded that the delay in the proceedings had been satisfactorily explained by the plaintiff (*ie*, the primary cause was the litigation concerning the issue of enforceability in Malaysia). The High Court affirmed the registrar's order to set aside the judgment.

Discontinuance

8.48 In *Yip Kong Ban v Lin Jian Sheng Eric* [2010] 3 SLR 718 ("*Yip Kong Ban*"), Choo Han Teck J ruled that the principles propounded in *Moguntia-Est Epices SA v Sea-Hawk Freight Pte Ltd* [2003] 4 SLR(R) 429 concerning an application to reinstate an action pursuant to O 21 r 2(8) of the RoC apply where the applicant is the plaintiff or defendant. In *Yip Kong Ban*, the defendant had failed to pursue his claim for damages during the 12-month period after a preceding judgment that the defendant was so entitled. The High Court further observed that mere inadvertence on the part of the applicant (*ie*, accidental failure to take a step in the proceedings) does not normally justify reinstatement of the action under O 21 r 2(8). He has to provide the court with a "sound

reason" for failing to act during the prescribed period in order for the court to exercise its discretion.

8.49 The relationship between s 299(2) of the Companies Act (Cap 50, 2006 Rev Ed) (which imposes automatic restrictions on court proceedings subject to the leave of the court) and O 21 r 2(6) of the RoC, which provides for automatic discontinuance of an action which has been dormant for one year, was considered by the High Court in *Laser Research (S) Pte Ltd v Internech Systems Pte Ltd* [2011] 1 SLR 382. Section 299(2) states: "After the commencement of the winding up no action or proceeding shall be proceeded with or commenced against the company except by leave of the Court and subject to such terms as the Court imposes." Where s 299(2) applies, the action is not subject to O 21 r 2(6) and therefore the dormancy of the action under s 299(2) does not count for the purpose of the one-year period under O 21 r 2(6). This rule is intended to apply to court proceedings that have become dormant because one party has not taken any action when he could have done so. This principle applies to other provisions in the Companies Act and Bankruptcy Act (Cap 20, 2009 Rev Ed) which have the same purpose as s 299(2) of the Companies Act (Cap 50, 2006 Rev Ed). In the case itself, the High Court decided that as the court action had been stayed by reason of the operation of s 299(2) (winding-up proceedings had been commenced against the company concerned), the suit had not been automatically discontinued under O 21 r 2(6).

Discovery

8.50 Order 24 r 6(2) of the RoC provides that a discovery application must be made by way of summons, which must be served on every party to the proceedings. This necessarily means that every party to the proceedings has the *locus standi* to make submissions where its interests in the main suit may be affected by an order concerning discovery. Therefore, in *Xing Rong Pte Ltd v Visionhealthone Corp Pte Ltd* [2010] 4 SLR 607, the respondent had sought discovery pursuant to O 24 r 6(2) of the Rules of Court against the respondent's bank in order to obtain information concerning the movement of a sum of money. The Court of Appeal ruled that the respondent's bank was entitled to oppose the discovery application before the registrar. It followed that the respondent was entitled to appeal against the registrar's decision. Ultimately, the registrar's decision to grant the application for discovery was correct because the documents were relevant and necessary.

8.51 If a party is required to disclose documents pursuant to a court order, he is not entitled to refuse to perform this obligation on the basis that the opposing party failed to comply with his own duty to disclose

documents at an earlier time. In *Rajaratnam Kumar v Estate of Rajaratnam Saravanamuthu* [2010] 1 SLR 864, the plaintiff claimed that he had not complied with the order of court requiring general discovery because the defendant had earlier failed to abide by an order mandating specific discovery. On appeal, the High Court ruled that the plaintiff could have given general discovery subject to the qualification that further discovery might be necessary after the defendant complied with his own obligation. Where the later order for discovery is dependent on the earlier order being first fulfilled by the other party, this should be made clear to the court as soon as possible so that the necessary condition may be imposed.

8.52 Where an application for pre-action discovery is made against a non-party in the course of proceedings pursuant to O 24 r 6(2), an appeal against the decision granting discovery is generally only available to that non-party. In *VisionHealthOne Corp Pte Ltd v HD Holdings Pte Ltd* [2010] 3 SLR 97, Chan Seng Onn J ruled that the second defendant had no *locus standi* to appeal against the registrar's decision to grant the plaintiff's application for discovery against the non-party bank. This is clear from the terminology of O 24 rr 6(1), 6(2) and 6(8), all of which indicate that the order for discovery is directed solely against the non-party from whom discovery is sought. The fact that the application is required by r 6(2) to be served on the parties in the action does not confer upon them the standing to file an appeal. This is the position even if the party concerned is affected or aggrieved by the order. Accordingly, the plaintiff's application to strike out the second defendant's appeal was granted. The principle applies to pre-action discovery pursuant to O 24 r 6(1). The learned judge pointed out that the second defendant might have asked the non-party to appeal within the prescribed period for filing an appeal. As the non-party did not do so, the case was finally concluded and the second defendant's application was invalid because of the doctrine of *res judicata*. Therefore, even assuming that the second defendant had the *locus standi* to appeal, and succeeded, the outcome would not have affected the non-party's obligation to furnish the documents pursuant to the order against which it had never appealed.

8.53 An application for specific discovery of certain documents pursuant to O 24 r 5 of the RoC was disallowed in *DBS Bank Ltd v Yamazaki Mazak Singapore Pte Ltd* [2010] SGHC 204, as they were not relevant to the issues in the case. And in *Chiang Sing Jeong v Treasure Resort Pte Ltd* [2010] SGHC 65, the High Court disallowed an application for discovery as it constituted an attempt to fish for information.

8.54 Concerning electronic discovery pursuant to Practice Direction No 3 of 2009, the High Court in *Deutsche Bank AG v Chang Tse Wen*

[2010] SGHC 125 observed that it is not the purpose of this direction to change the law on discovery. Its purpose is to set out the procedures which the parties need to comply with when they are concerned with the discovery of electronically stored documents. The direction is essentially a protocol which the parties may agree to. However, it does not derogate from the court's power to order discovery of electronically stored documents under the rules of court. The opt-in nature of the Practice Direction No 3 of 2009 applies either on the mutual agreement of the parties or when one party opts into the electronic discovery framework by making an application.

8.55 In *Lee Chang-Rung v Standard Chartered Bank* [2011] 1 SLR 337, the High Court considered the circumstances in which an action might be struck out as a result of non-compliance with an unless order concerning discovery. Having considered the various instances referred to in *Alliance Management SA v Pendleton Lane P* [2008] 4 SLR(R) 1, Tay Yong Kwang J concluded that the assistant registrar's decision to strike out the plaintiffs' action was correct and dismissed the appeal. As a result of the failure to comply, there was a "serious risk" that a fair trial was no longer possible. Even if a fair trial was possible, "the deliberate suppression of highly relevant documents …" justified this outcome.

8.56 In *Lee Shieh-Peen Clement v Ho Chin Nguang* [2010] 3 SLR 807, an application was made for a further and better list of documents pursuant to O 24 r 3 of the RoC. The applicants argued that the initial list failed to comply with the requirements of this rule. The High Court concluded that there had been full compliance and dismissed the application.

Experts

8.57 The purpose of O 40A r 3 of the RoC is to remind the expert preparing the report that his duty to assist the court will override any obligation to the party from whom the instructions emanated. However, the overriding obligation of an expert to assist the court is in substance and not mere form and there is no "magic" in the expert's written acknowledgment of his paramount duty to the court. The presence or absence of a written acknowledgment in the expert's report cannot *per se* determine the admissibility or probative value of the report: see *Teo Ai Ling v Koh Chai Kwang* [2010] 2 SLR 1037 ("*Teo Ai Ling*") at [20] and [22].

8.58 In *Teo Ai Ling*, the defendant appealed against the damages awarded by an assistant registrar at an assessment of damages hearing. The plaintiff had called six medical experts to testify on her behalf at the assessment hearing. The six medical experts failed to comply with

O 40A r 3 of the RoC because they did not depose in their affidavits of evidence in chief that in preparing their respective reports, they were aware that their primary duty was to the court and not to the plaintiff from whom the instructions were received. On the basis of this non-compliance, the defendant's counsel submitted that the plaintiff's expert evidence ought to be disregarded and/or not to be given the weight it otherwise might have. The High Court held (*Teo Ai Ling* at [22]) that the omission by the experts to comply with O 40A r 3 of the RoC was probably due to a drafting oversight by the solicitors. The High Court also noted that the objection to the evidence of the experts had also been raised by the defendant's counsel before the assistant registrar. Given that all the six medical experts had confirmed at the assessment hearing that they were aware of their primary duty to the court and that they had duly complied with the duty, and in light of the fact that all the six medical experts testified at the hearing and were extensively cross-examined by the defendant's counsel such that the assistant registrar who heard their evidence was able to assess their evidence and attach the appropriate weight to it, Steven Chong JC (as he then was) agreed with the assistant registrar that there was no prejudice to the defendant and dismissed the defendant's counsel's objection to the evidence of the six medical experts: see *Teo Ai Ling* at [20]–[22].

Injunctions

8.59 In *Rivkin Consultancy Pte Ltd v Pardeep Singh Boparai* [2010] SGHC 191 ("*Rivkin*") Choo Han Teck J reiterated the pronouncement of the Court of Appeal in *NCC International AB v Alliance Concrete Singapore Pte Ltd* [2008] 2 SLR(R) 565 that an interim mandatory injunction is a "very exceptional discretionary remedy" and can only be justified in "special circumstances". In *Rivkin*, Choo J expressed the view that the applicant "must at least show that it would suffer irremediable prejudice" if the injunction is not granted. One of the issues in *Rivkin* was whether the injunction was mandatory or prohibitive in nature. Choo J observed that the application would have failed even if the *American Cyanamid* (*American Cyanamid Co v Ethicon Ltd* [1975] AC 396) principles had applied (*ie*, if the injunction had been classified as prohibitive rather than mandatory in nature). (The *American Cyanamid* principles were applied in *Astrata (Singapore) Pte Ltd v Tridex Technologies Pte Ltd* [2011] 1 SLR 449 ("*Astrata*").)

8.60 In *Lee Shieh-Peen Clement v Ho Chin Nguang* [2010] 4 SLR 801 ("*Lee Shieh-Peen*"), the Court of Appeal re-emphasised "the paramount importance of respecting and obeying orders of court." Chao Hick Tin JA declared (*Lee Shieh-Peen* at [15]): "At the core of this principle … is the public interest in the administration of justice, including the dispatch of litigation as expeditiously as justice in the case requires." The primary

issue in this case was whether the terms of a Mareva injunction had been breached. The court left no doubt that the party against whom the injunction operates must obey both the "letter" and "spirit" of the terms.

8.61 A periodic payment (such as a monthly allowance) may be an asset within the scope of the Mareva injunction if the defendant is legally (in law or equity) entitled to it. This is the case even if the payment is received after the due submission of the affidavit of assets. Accordingly, where the respondent's disclosed assets are not sufficient to secure the claim, and the order of court does not limit the injunction to the disclosed assets, the injunction extends to assets acquired subsequent to the date of the injunction to the extent necessary to meet the monetary amount set by the court when it granted the injunction.

8.62 In *Spectramed Pte Ltd v Lek Puay Puay* [2010] SGHC 112 at [18], Chan Seng Onn J reiterated that evidence of dishonesty on the part of the defendant is relevant to the issue of whether there is a risk of dissipation of assets. More specifically, if there is "a good arguable case" showing that the defendant has acted dishonestly or unconscionably, this in itself may be sufficient to justify an Mareva injunction. The nature of the assets sought to be injuncted is also a factor to be considered for the purpose of determining the risk of dissipation (particularly the ease with which they can be liquidated, realised, transferred or moved).

8.63 In *Astrata* (above, para 8.59), the plaintiff sought an injunction to restrain the defendant from making a call on a performance bond on the ground that it was unconscionable for it to do so. Philip Pillai J set out the principles (distilled from the case law) as follows (*Astrata* at [73]):

> (a) Whether there is unconscionability depends on the facts of each case. There is no pre-determined categorisation.
>
> (b) In determining whether a call on a bond is unconscionable, the entire picture must be viewed, taking into account all the relevant factors.
>
> (c) The concept of unconscionability involves unfairness, as distinct from dishonesty or fraud, or conduct of a kind so reprehensible or lacking in good faith that a court of conscience would either restrain the party or refuse to assist the party.
>
> (d) While in every instance of unconscionability there would be an element of unfairness, the reverse is not necessarily true. Unfairness *per se* does not constitute unconscionability.

(e) In intervening in a call on an on-demand bond/guarantee, the court is concerned with abusive calls on the bonds.

(f) Mere breaches of contract by the party in question would not by themselves be unconscionable.

(g) It is important that the courts guard against unnecessarily interfering with contractual arrangements freely entered into by the parties. The parties must abide by the deal they have struck.

8.64 Concerning the standard of proof which must be discharged by the party seeking to restrain a call on a performance bond on the basis of unconscionability, his Honour reiterated the requirement that it has to be clearly established.

Interim payment

8.65 In *Main-Line Corporate Holdings Ltd v United Overseas Bank Ltd* [2010] 2 SLR 986, the Court of Appeal ruled that the High Court had incorrectly exercised its discretion in declining to order an interim payment pursuant to O 29 r 12(*a*) of the RoC (above, para 8.1). The fact that the sums of money in issue cannot be precisely ascertained should not be a basis for depriving a party of an interim payment against the interests of justice. This is particularly the case if the information necessary to the ascertainment of the monetary amount is in the exclusive possession of the party against whom the application is made. In such circumstances, the court may estimate the amount which ought to be payable. This is justified by O 29 r 17 which enables the court to make necessary adjustments to the final judgment to take into account any overpayment in the interim amount. The court is to balance the interests of the parties by only requiring a "reasonable certainty" that the amount of the interim payment is likely to be the minimum sum recoverable. The fact that the party to be paid resides out of the jurisdiction is not a basis for requiring the interim payment to be paid into court (in the event that the amount in excess of what ought to have been paid is irrecoverable from the payee). If the court determines that the party is able to repay any excessive amount, it will be paid to him directly.

Interpleader proceedings

8.66 Order 17 r 8 states a broad proposition that the court should make such orders as might be just (as, for example, in *De Rothschild Freres v Morrison Kekewich & Co* (1890) 24 QBD 750). However, r 8 is not to be construed to the effect that costs should be borne by the losing

claimant in all circumstances: *Jurong Shipyard Pte Ltd v Petrorig I Pte Ltd* [2010] 3 SLR 209.

Judgments, orders and their enforcement

8.67 The principles formulated by the Court of Appeal in *Su Sh-Hsyu v Wee Yue Chew* [2007] 3 SLR(R) 673 concerning the absence of a party at trial were applied in *Lee Ngiap Pheng Tony v Cheong Ming Kiat* [2010] 4 SLR 831. The defendant was absent at trial. His counsel informed the court that he had no instructions to defend the case. Furthermore, he did not ask the plaintiff and his three witnesses any questions during cross-examination. The plaintiff obtained judgment against the defendant. Although the judgment was given in 2003, the plaintiff did not seek to enforce it until 2009 (because of the defendant's financial circumstances). The defendant applied to set it aside pursuant to O 35 r 2(2) of the RoC. The judgment was not set aside because of the defendant's delay in making the application and his inability to persuade the court that such an outcome would be in the interest of justice. *Su Sh-Hsyu v Wee Yue Chew* was distinguishable on the facts.

8.68 In *Lee Shieh-Peen* (above, para 8.60), the Court of Appeal reiterated "the paramount importance of respecting and obeying orders of court." Chao Hick Tin JA declared (at [15]): "At the core of this principle … is the public interest in the administration of justice, including the dispatch of litigation as expeditiously as [the] justice of the case requires." His Honour further stated (*Lee Shieh-Peen* at [16]) that "a court will not hesitate to punish any lawyer or litigant who fails to obey its orders or who seeks to undermine the effectiveness of its orders. The courts will jealously guard against any interference by any party which would disturb the proper administration of justice." The court also stressed (in the context of a Mareva injunction) that the party concerned is required to comply with the "letter" and "spirit" of the terms of the order.

8.69 In *Woo Koon Chee* (above, para 8.24), the Court of Appeal ruled that a consent order may be enforced in the ordinary way and that there was no need to institute fresh proceedings to compel compliance with it. In these circumstances, the original cause of action ceases to exist and is replaced by compromise agreement (subject to any terms to the contrary).

8.70 According to the Court of Appeal in *Woo Koon Chee* at [26], there is no difference between a "judgment" and an "order" regarding their legal consequences: "Each represents the ruling of the court in the matter in dispute. … [I]n practice, a ruling of the court in a writ action would ordinarily be regarded as giving rise to a judgment. In all other

cases, it would give rise to an order of court. But this is hardly a matter of principle; more a matter of preference. The two terms could, indeed, be used interchangeably and are often so used." The Court of Appeal further observed (*Woo Koon Chee* at [20]) that a Tomlin order is "a court order … under which a court action is stayed, on terms which have been agreed in advance between the parties and which are included in a schedule to the order. It is a form of consent order, and permits either party to apply to court to enforce the terms of the order, avoiding the need to start fresh proceedings".

8.71 Order 45 r 8 of the RoC concerns the enforcement of "a mandatory order, an injunction or judgment or order for the specific performance of a contract" by the court's direction that the required act be done by the successful party or a person appointed by the court. In *Woo Koon Chee*, the Court of Appeal ruled that the High Court was entitled to make an order authorising the registrar to execute a share transfer form on behalf of the appellant pursuant to O 45 r 8 pursuant to a consent order. Order 45 r 8 applied to the consent order because it constituted a judgment or order for the specific performance of a contract in accordance with the rule. Incidentally, the Court of Appeal (*Woo Koon Chee* at [37]) preferred a conjunctive interpretation of the phrase "a mandatory order, an injunction or judgment or order for the specific performance of a contract" in the first line of O 45 r 8:

> Throughout the rest of O 45, the words 'judgment or order' are used together in a conjunctive fashion. The wording of the disputed phrase and the placement of commas also point towards a conjunctive reading. Most persuasively, if the word 'judgments' was to be read as a disjunctive standalone, its generality would render the remaining three categories countenanced by O 45 r 8 redundantly specific. Moreover, as we have pointed out earlier, the words 'judgment' and 'order' *do* really mean the same thing and are being used interchangeably. It will make no sense to give the word 'judgment' a standalone meaning and yet, for the word 'order', a qualification by the phrase 'for the specific performance of a contract'. [emphasis in original]

8.72 In *Bellezza Club Japan Co Ltd v Matsumura Akihiko* [2010] 3 SLR 342, the plaintiff obtained summary judgment on its claim to enforce a judgment against the first defendant given by the Tokyo District Court and upheld by the Supreme Court of Japan. In upholding the judgment of the assistant registrar, Belinda Ang Saw Ean J re-declared the general rule that a party may enforce a foreign judgment by an action in Singapore if it is a money judgment of a court of competent jurisdiction and it is final and conclusive as between the parties. As her Honour pointed out, there are three exceptions to this rule: that the plaintiff procured the foreign judgment by fraud; its enforcement would be contrary to public policy; or the proceedings which led to the judgment breached the rules of natural justice.

8.73 In *Focus Energy Ltd v Aye Aye Soe* [2010] 2 SLR 889, the High Court considered the requirements of O 49 r 7(1) of the RoC, which states that payment of money (pursuant to O 49 r 1) is not to be made to a judgment creditor resident outside the scheduled territories unless there is a certificate evincing permission from the Monetary Authority of Singapore ("MAS") under the Exchange Control Act. MAS had issued a circular in 1978 (MAS 1103, Reference: ID Circular 6/78 dd 25/5/78) lifting all exchange controls. As MAS had already given its permission for such payments to be made to persons beyond the scheduled territories, no further permission was required under O 49 r 7(1) while the circular remained in force.

8.74 Also see *Lee Shieh-Peen* (above, para 8.60) at [44]–[49] concerning the principles governing the sanctions which may apply when there has been a breach of a court order.

Jurisdiction

8.75 In *Management Corporation Strata Title Plan No 301 v Lee Tat Development Pte Ltd* [2010] SGCA 39 at [55], the Court of Appeal confirmed that it has the inherent jurisdiction to re-open and re-hear an issue which it decided in breach of natural justice as well as to set aside (in appropriate cases) the whole or part of its earlier decision founded on that issue. If the Court of Appeal (or any other court) has decided an issue against a party in breach of natural justice, it cannot be said that the court was fully apprised or informed at the material time of all the relevant considerations pertaining to that issue, and, therefore, cannot be said to have applied its mind judicially to the matter. In other words, the court would not have exercised its jurisdiction properly *vis-à-vis* the question in consideration, and, therefore, it cannot to be said to be *functus officio* in the sense of having exhausted its power to adjudicate on that issue. As the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) ("SCJA") does not address this situation, the court must have the inherent jurisdiction to re-open a matter which has been decided in breach of natural justice.

8.76 The amendments to the Subordinate Courts Act (Cap 321, 2007 Rev Ed) ("the SCA"), which were introduced by Act 31/2010, came into operation on 1 January 2011. Although *Tham Keng Mun* (above, para 8.14) was decided prior to the amendments, the High Court had the opportunity to consider the Bill which had been presented to Parliament for the first reading. The court expressed the view that the Bill supported its conclusion that the SCA prior to the amendments limited the jurisdiction of the subordinate courts to causes of action specified under the subject matter jurisdiction provisions (ss 20 and 21, which have been repealed by the amendments).

Limitation

8.77 *Chip Hup Hup Kee Construction Pte Ltd v Yeow Chern Lean* [2010] 3 SLR 213 ("*Chip Hup Hup Kee*") concerned the applicability of the Limitation Act (Cap 163, 1996 Rev Ed) to a claim for moneys had and received in respect of two United Overseas Bank cheques issued by the majority shareholder and managing director of the plaintiff company. The High Court held (*Chip Hup Hup Kee* at [21]) that since the plaintiff's claim did not seek to recover title to the two cheques but rested instead on establishing that the defendant had wrongfully converted the two cheques and received the proceeds thereof, whether the claim could proceed depended not on s 7(2) but on s 6(1)(*a*) of the Limitation Act. The High Court further held (*Chip Hup Hup Kee* at [22]) that from the perspective that the plaintiff essentially had to prove that the defendant had converted the two cheques, the foundation of the plaintiff's restitutionary claim therefore lay in the conversion of the two cheques and would be time-barred by virtue of s 6(1)(*a*) of the Limitation Act. Since the plaintiff was barred from pursuing its claim under the tort of conversion, it was likewise barred from its claim for money had and received founded on the tort since it was in substance only a choice in remedy. Accordingly, Andrew Ang J found that s 6(1)(*a*) of the Limitation Act was sufficiently broad to encompass the plaintiff's claim for moneys had and received in respect of the two cheques and the assistant registrar was correct in striking out the plaintiff's claim on the basis that it was doomed to fail.

New trial

8.78 In *Basil Anthony* (above, para 8.36), the Court of Appeal emphasised the principle that a new trial will not be ordered on the ground of improper admission or rejection of evidence unless this lapse has resulted in "some substantial wrong or miscarriage of justice". In this case, the Court of Appeal ruled that the evidence of certain witnesses had been improperly excluded. It ordered a new trial as the rejected evidence had a real prospect of making a significant difference to the outcome of the case. Furthermore, as it was necessary for the witnesses to be cross-examined, it was appropriate for the case to be re-tried in the High Court.

Originating processes

8.79 The court will not exercise its discretion under O 28 r 8(1) of the RoC to order an action commenced by originating summons to be continued as if it had been initiated by writ of summons unless it is clear that there is an actual dispute of fact which justifies such conversion. In *Drydocks* (above, para 8.1), the court dismissed an

application as there was no real dispute on the facts and the applicant hoped by this means to obtain unjustified discovery. *Drydocks* may be distinguished from *Woon Brothers Investments Pte Ltd v MCST Plan No 461* [2010] SGHC 349, in which an application for conversion to proceedings begun by writ was permitted as the allegations of fraud and other misconduct required the engagement of the pleading process and (potentially) the eventual examination of witnesses.

Parties

8.80 A court will not normally add a party to the proceedings if an application for joinder has been made and there is no appeal against its dismissal. Similarly, where the court makes "no order" on the joinder application, and the applicant does not appeal or takes no further action in response to the court's decision (and fails to explain his inactivity), he is unlikely to receive the court's further indulgence on the matter. This is because the court has no real basis on which to exercise its discretion in his favour. See *Indulge Food Pte Ltd v Torabi Marashi Bahram* [2010] 2 SLR 540, in which these and other issues were raised.

Pleadings

Application to amend pleadings

8.81 Order 20 r 5 of the RoC (above, para 8.1) provides that the court has a wide discretion to allow pleadings to be amended at any stage of the proceedings on such terms as might be just.

8.82 The guiding principle of O 20 r 5 is that amendments to pleadings ought to be allowed if they would enable the real question and/or issue in controversy between the parties to be determined. Delay *per se* is not a valid objection. An important caveat to granting leave for the amendment of pleadings is that it must be just to grant such leave, having regard to all the circumstances of the case (see *Review Publishing Co Ltd v Lee Hsien Loong* [2010] 1 SLR 52 ("*Review Publishing Co Ltd*") at [113] and *Hwa Lai Heng Ricky v DBS Bank Ltd* [2010] 2 SLR 710 ("*Hwa Lai Heng Ricky*") at [12]). The courts differentiate between an amendment that merely clarifies an issue in dispute and one that raises a totally different issue at too late a stage (see *Tang Chay Seng v Tung Yang Wee Arthur* [2010] 4 SLR 1020 ("*Tang Chay Seng*") at [11]).

8.83 The respondent in *Review Publishing Co Ltd* and the appellant in *Hwa Lai Heng Ricky* had applied for leave to amend their respective statements of claim only after the summary judgment applications had been heard and the parties' respective written submissions for those

applications tendered to the court. The Court of Appeal in *Review Publishing Co Ltd* at [115] that the judge was entitled to exercise and had properly exercised his discretion to allow an amendment of pleadings because the delay in that case was only apparent but not real in the sense that it was caused to a large extent by the appellant's own doing. Similarly, in *Hwa Lai Heng Ricky* at [13], the Court of Appeal held that whilst the delay in the appellant's application to amend his pleading was a relevant factor, it was not in and of itself decisive in precluding an amendment of the pleadings. The Court of Appeal in *Hwa Lai Heng Ricky* granted the appellant leave to amend his pleadings because the judgment in favour of the respondent in that case was a summary judgment which was not based on a clear and unambiguous admission on the part of the defendant. Also, permitting the appellant to amend his defence would raise squarely for decision an important issue between the parties that had not seen the light of day in the courts below. It would also not prejudice the respondent who had been allowed to adduce further evidence to help counter the amended defence raised by the appellant. To avoid any prejudice resulting to the respondent in consequence of the Court of Appeal's decision to allow the appellant to amend its defence, the Court of Appeal in *Hwa Lai Heng Ricky* granted the respondent's application to adduce further evidence.

8.84 In *Tang Chay Seng* (above, para 8.82), an application to amend pleadings after the trial had been completed was allowed because no new evidence was required in relation to the proposed amendment and the issues raised in the proposed amendments had been ventilated at trial during cross-examination. The High Court held (*Tang Chay Seng* at [17]) that allowing the application would serve the ends of justice and would enable the real issues between the parties to be tried without causing any injustice or injury which could not be compensated in costs.

Function of pleadings

8.85 The nature of a "claim" was examined by the Court of Appeal in *Bachoo Mohan Singh v Public Prosecutor* [2010] 4 SLR 137 ("*Bachoo Mohan Singh*"). The questions of law of public interest raised in the criminal references before the Court of Appeal in that case included, *inter alia*, the following three questions: (a) whether an offence under s 209 of the Penal Code (Cap 224, 1985 Rev Ed) ("Penal Code") of dishonestly making a claim before a court of justice which a person knows to be false is committed at the point of filing of the statement of claim or defence in court; (b) whether a claim before a court can be held as false if the defendant settles the claim in whole or in part before the claim is tried in court, or if the defendant submits to judgment to the whole or part of the claim; and (c) whether an advocate and solicitor who files a statement of claim in court on behalf of his client with the knowledge that the claim is based on facts which are false and that his

client was dishonest in making the false claim commits an offence under s 209 read with s 109 of the Penal Code.

8.86 The majority of the Court of Appeal (Choo Han Teck J dissenting) set aside the conviction of Bachoo Mohan Singh ("BMS"), a lawyer who had been convicted of abetting (by aiding) his client to dishonestly make a false claim in court, under s 209 (read with s 109) of the Penal Code. A settlement had been reached on the claim filed by BMS shortly after BMS filed the statement of claim and the action was discontinued before any defence or reply was filed.

8.87 Both V K Rajah JA (*Bachoo Mohan Singh* at [76]–[78], [82] and [137]) and Andrew Phang Boon Leong JA (*Bachoo Mohan Singh* at [170]) held that a claim was "made" at the close of pleadings for actions commenced by way of writs and when affidavit evidence was filed in court as directed for actions commenced by way of originating summons. If an action was settled before the close of pleadings (for actions commenced by writs) or before affidavits were filed as directed (for actions commenced by originating summonses), no "claim" was "made" for the purposes of s 209 of the Penal Code. Where only part of the action was settled or the defendant submitted only to part of the action, a claim would be "made" at or after the close of pleadings stage or the filing of affidavits, as the case might be. Given that a settlement was reached shortly after BMS filed the statement of claim and the action was discontinued before any defence or reply was filed, it was not possible to say that a "claim" had been "made" for the purposes of s 209 of the Penal Code. Rajah JA opined (*Bachoo Mohan Singh* at [69]) that a statement of claim, on its own and unaccompanied by a reply, contained only *part of* the plaintiff's claim – it was the statement of claim and the reply, *read in totality*, which constituted the plaintiff's plea for judicial assistance and the basis on which he sought relief from the court.

8.88 With regards to the falsity of a claim, both Phang JA (*Bachoo Mohan Singh* at [172]–[174]) and Rajah JA (*Bachoo Mohan Singh* at [85], [86] and [137]) held that a claim was "false" if it was made without factual foundation and that a claim was not "false" if it involved a question of law. Rajah JA stated (*Bachoo Mohan Singh* at [92]–[94]) that the test for falsity was not considered by reference to the pleadings in isolation, but had to take into account the wider factual context, including facts not revealed in the pleading itself. The real issue was whether the litigant's action had a proper foundation which entitled him to seek judicial relief.

8.89 On the other hand, Choo Han Teck J (dissenting) held (*Bachoo Mohan Singh* at [149]) that a claim was any prayer a litigant made before a court in expectation of a ruling in his favour and thus sanctioning his claim and that a claim had been made when BMS filed

the statement of claim in court. Choo J explained that the offence under s 209 of the Penal Code could not be contingent upon a subsequent event, even if that event was a procedural step in the civil process, since there was nothing in s 209 of the Penal Code to suggest that Parliament had intended such a narrow scope for this offence and since the reply arose from the Rules of Court, which could be changed or removed without reference to Parliament. With regards to the opinion of the majority that the plaintiff had a strategic right to "reserve facts to be included in the reply", Choo J expressed his view (*Bachoo Mohan Singh* at [150]) that it was a time-honoured rule of pleading that a plaintiff had to plead all material facts in his statement of claim and not reserve parts for later – the reply was meant only to address fresh issues raised in the defence which required a rebuttal. Choo J stated (*Bachoo Mohan Singh* at [153]) that a claim in a court of justice should be understood as any demand or assertion of right made before any court and requiring the sanction of that court. All the trial judge had to determine was whether the claim was true or false and whether it was made with a dishonest intention to injure another. There was no need to depend on the progress or outcome of the civil claim in which the alleged false claim was made.

Whether an amendment of pleadings was necessary

8.90 A defendant is bound by the four corners of his pleadings only at the trial of the action but not in summary judgment proceedings. In *Poh Soon Kiat v Desert Palace Inc* [2010] 1 SLR 1129, the Court of Appeal declined to hear an application by the appellant to amend his defence and held (at [15]) that the defendant in summary judgment proceedings could raise defences in his affidavit even if they were not referred to in the pleaded defence.

8.91 Whilst parties to an action generally have to amend their pleadings before the court would make an order on a claim that has not previously been pleaded, the High Court in *Tan Keaw Chong v Chua Tiong Guan* [2010] 2 SLR 374 held that an amendment of pleadings was not necessary in the circumstances of that case. The plaintiff had brought the action against the first defendant claiming a share in a property which was purchased in the first defendant's name. The plaintiff's case was that he had entered into an oral agreement with the first defendant whereby they would purchase the property in equal shares. The first defendant died before the trial and his daughter, as administrator of his estate, was joined as a party to the suit as the second defendant. Choo Han Teck J held (at [3]–[4]) that although no loan had been pleaded, an amendment of the pleadings was unnecessary because the incontrovertible evidence before the court clearly showed that a sum of $196,000 was paid out as a loan, and also because the first defendant was dead and unable to give instructions on any amendment. The

plaintiff's claim, based on an agreement to purchase the property, was dismissed but a claim based on a loan was subsequently allowed without requiring an amendment of the pleadings.

8.92 It is a basic principle of pleading that facts, not law, have to be pleaded. Once material facts have been averred, the legal consequences of the same can be developed in submissions. In *Lin Chao-Feng v Chuang Hsin-Yi* [2010] 4 SLR 427, the High Court held (at [15] and [19]) that the plaintiff did not need to mention expressly in his pleading that he was relying on the doctrine of resulting trust – it was sufficient to plead the necessary factual ingredients on which a legal submission of resulting trust could be made.

Proof of foreign law

8.93 In *D'Oz International Pte Ltd v PSB Corp Pte Ltd* [2010] 3 SLR 267 ("*D'Oz International*"), the Court of Appeal observed that the presumption of similarity of laws is "a rule of convenience which the courts may resort to unless it is unjust and inconvenient to do so": *D'Oz International* at [25]. Furthermore "[w]hether a common law court will presume foreign law to be the same as the *lex fori* in any case where foreign law is not pleaded or not proved (if pleaded) depends on the circumstances of each case": *D'Oz International* at [25]. The issue is "whether, in the circumstances of the case, it would be unjust to apply [the foreign law] against a party so as to make him liable on a claim subject to foreign law when the claimant has failed to prove what the foreign law is and how liability is established under that foreign law": *D'Oz International* at [25]. It was not necessary for the Court of Appeal to enter into this deliberation in the circumstances of the case.

Restraint of foreign proceedings

8.94 In *Beckkett Pte Ltd v Deutsche Bank AG* [2011] 1 SLR 524 ("*Beckkett*"), Judith Prakash J reversed the decision of the assistant registrar, who had permitted the plaintiff to elect to proceed in Indonesia. The plaintiff had obtained judgment from the Singapore Court of Appeal on its claim for damages but not on its claim that the sale of certain pledged shares should be set aside. Just after presenting its appeal, the plaintiff filed proceedings in Indonesia concerning the sale of the shares. Where proceedings are being conducted by the plaintiff in two or more jurisdictions, the plaintiff has the burden of justifying the concurrent proceedings. In these circumstances, the court may (a) require the plaintiff to elect which set of proceedings he wishes to continue; or (b) stay the proceedings; or (c) grant an "ante-suit injunction" restraining the plaintiff from pursuing the foreign proceedings. In exercising its discretion, the court will determine whether it serves the interests of

justice to permit the plaintiff to make the election or to order that one set of proceedings be stayed or restrained by injunction. Prakash J ruled that the plaintiff should not be permitted to elect to proceed with the action in Indonesia which amounted to "a second attempt to recover the pledged shares". An ante-suit injunction was appropriate in the circumstances as the plaintiff had acted in a manner which "undermined the processes of the Singapore courts and the principle of finality of litigation". Her Honour stated (*Beckkett* at [43]): "In my view it would not be right for this court to allow its judgments to be ignored by litigants who have sought the aid of this court by starting their litigation here." An ante-suit injunction was granted because it would service the interests of justice for all litigants who seek to litigate in good faith in Singapore courts.

8.95 Although considerations of international comity may be taken into account by a court in exercising its discretion as to whether to restrain foreign proceedings (particularly if those proceedings having been ongoing for a significant period of time), they must be weighed against the public policy of the Singapore legal system. If public policy demanded the restraint of the foreign suit, the court would act accordingly even if such a course may be perceived as not promoting international comity: *Beckkett* at [46]; also see *Q & M Enterprises Sdn Bhd v Poh Kiat* [2005] 4 SLR(R) 494 at [25]. This was the position in *Beckkett* (at [46]): "It cannot be acceptable to our public policy to permit a litigant to begin a duplicate law suit in a foreign jurisdiction just after being heard by the Court of Appeal. I would go so far as to say that it cannot be acceptable to permit the start of such a duplicate law suit after the completion of a full trial in Singapore, even though judgment may have been reserved and not yet delivered." The Court of Appeal affirmed the judgment of the High Court, pointing out (*Beckkett Pte Ltd v Deutsche Bank AG* [2011] 2 SLR 96 at [20]) that "there was not only an abuse of court process … but also blatant, opportunistic and egregious abuse."

Remedies

8.96 On a plain reading of O 15 r 16 of the RoC (above, para 8.1), the fact that *certiorari* is or could be claimed (pursuant to O 53) is not a ground for refusing declaratory relief. The wide powers of the court to give declaratory relief also mean that there is likely to be a large degree of overlap between declaration and *certiorari*. This was the observation of the High Court in *Yip Kok Seng v Traditional Chinese Medicine Practitioners Board* [2010] 4 SLR 990. The court also referred to the unsatisfactory relationship between O 15 r 16 and O 53 under which the remedies (for a declaration and a prerogative order respectively) have to

be sought through separate procedures. The High Court has called for reform.

Service

8.97 In *Sinwa SS (HK) Co Ltd v Morten Innhaug* [2010] 4 SLR 1, proceedings were commenced by originating summons when the action ought to have been initiated by writ of summons. The plaintiff had mistakenly engaged the procedure concerning a statutory derivative action. There were other errors in the proceedings (including the fact that the title of the suit did not show that the action was representative in nature). Although the court considered that these errors were curable, it did not exercise its discretion under O 2 of the RoC in favour of the plaintiff as it was bound to fail to obtain leave to bring derivative proceedings.

8.98 In considering the requirement of *forum conveniens* in respect of an application to serve a writ out of the jurisdiction, the court will consider whether Singapore is the most appropriate forum for the adjudication of the dispute. In so holding, the Court of Appeal in *Siemens Aktiengesellschaft v Holdrich Investment Ltd* [2010] 3 SLR 1007 ("*Siemens*") stated that the court will consider all relevant circumstances and not simply compare the connecting factors to Singapore and other countries (as connecting factors to various jurisdictions do not necessary point to the most appropriate forum). The following observations of the Court of Appeal (*Siemens* at [19]) are instructive on the process which the court is to undertake in determining this issue:

> [W]e would reiterate that the purpose of the *forum non conveniens* analysis is to identify the *most appropriate* forum to hear the substantive dispute. It is not an exercise in comparing the sheer number of connecting factors which point to this or that jurisdiction. What matters is the weight to be given to each connecting factor in the light of all the circumstances of the case. In a finely-balanced case such as the present, a single connecting factor could well be decisive. It is also well to remember that while the connecting factors may not always point decisively to only one jurisdiction, there must in every case be a most appropriate forum in which to try the dispute – as we said earlier, the *forum non conveniens* doctrine would be brought into ridicule if it yields the result that an international dispute is stuck in jurisdictional limbo because the connecting factors are finely balanced. In this regard, it bears emphasis that while the analysis in a service out of jurisdiction case must necessarily begin with the principle that the plaintiff bears the burden of persuading the court that Singapore is the *forum conveniens*, this should not overly detain the court as it engages in the exercise of identifying the most appropriate forum on a close scrutiny of the facts before it.

8.99 The Court of Appeal also pointed out that it is sufficient if the plaintiff proves that Singapore is the most appropriate forum. He does not have to establish his case to any degree (or as the Court of Appeal put it (*Siemens* at [8]): "by a hair or by a mile"). Although the court did not expressly refer to the standard of proof, it would be reasonable to assume that the ordinary civil standard applies. The plaintiff must prove that Singapore is the most appropriate forum on a balance of probabilities. Similarly, where the defendant applies to set aside the order for service of a writ on the basis that Singapore is not the proper forum, he would have the burden of proof on a balance of probabilities. (Also see *Holdrich Investment Ltd v Siemens AG* [2010] 1 SLR 1237, from which the appeal was dismissed.)

8.100 Section 387 of the Companies Act (Cap 50, 2006 Rev Ed) governs the service of documents on a company. It states that "a document may be served on a company by leaving it at or sending it by registered post to the registered office of the company". In the *Nanyang Law LLC v Alphomega Research Group* [2010] 3 SLR 914, Andrew Ang J ruled that the word "may" is permissive and not prescriptive. Accordingly, service of the writ at the defendant's principal place of business was held to be good service.

Striking out

Striking out for lack of locus standi

8.101 In *VisionHealthOne Corp Pte Ltd v HD Holdings Pte Ltd* [2010] 3 SLR 97 ("*VisionHealthOne*") at [15], the High Court held that *locus standi* to appeal against any and/or all orders made in a discovery application against a third person who was not a party to the main suit did not arise automatically from a person's status as a party to the main suit. To demonstrate that one had *locus standi* to file an appeal against an order, one had to show that one was affected or aggrieved by the court order and, where it was in the nature of an appeal, the appellant had to generally be a party to the application below that gave rise to the orders that formed the subject of his appeal: *VisionHealthOne* at [19]. Chan Seng Onn J struck out an appeal filed by the second defendant in the main suit against an assistant registrar's decision in a discovery application to which the second defendant was neither a party nor was it the subject of the assistant registrar's order. Chan J held (at [46]) that the order for discovery made by the assistant registrar against a non-party was a matter exclusive to the plaintiff and the non-party and any legal grievances stemming from the order for discovery should be raised and vented by either of the two parties who were privy to the order.

8.102 In *Standard Chartered Bank v Loh Chong Yong Thomas* [2010] 2 SLR 569 ("*Loh Chong Yong Thomas*") at [12]–[14], the Court of Appeal struck out the respondent's claims against the appellant bank for breach of duty in contract and tort in its administration of two of the respondent's accounts with the appellant on the ground that the respondent, having been declared bankrupt, had no *locus standi* to sue in his own name on those claims because those claims had vested in the Official Assignee ("OA") under s 76(1)(*a*)(i) of the Bankruptcy Act (Cap 20, 2000 Rev Ed). On the other hand, the Court of Appeal noted that as far as the respondent's claim for defamation was concerned, it was not property that vested in the OA as it related to "pain felt by the [respondent] in respect of his body, mind, or character, and without immediate reference to his rights of property" and the respondent could sue in his own name on that claim subject to his obtaining the necessary sanction from the OA. The Court of Appeal further held (*Loh Chong Yong Thomas* at [15], [16] and [29]–[30]) that the bankrupt could only sue in his own name property which had vested in the OA if the OA assigned such property back to the bankrupt. If the OA did not assign the property back to the bankrupt but only merely granted sanction required by s 131(1)(*a*) of the Bankruptcy Act, the bankrupt could not sue in his own name but had to sue in the OA's name instead.

Striking out of claims/winding-up petitions

8.103 In *Pacific King Shipping Pte Ltd v Glory Wealth Shipping Pte Ltd* [2010] 4 SLR 413 ("*Pacific King*"), the charterer and guarantor of a vessel sought to strike out winding-up petitions filed against them on the ground that the winding-up petitions were an abuse of process because there was a *bona fide* dispute on substantial grounds. The High Court held (*Pacific King* at [4]) that the threshold which the plaintiffs had to meet to support their application to stay or strike out the winding-up petitions was to show that there was a *bona fide* and substantial dispute of the alleged debt for which repayment was sought by the defendant and (*Pacific King* at [5]) that to obtain the stay or striking out of a winding-up petition, the debtor company must show that the dispute is *bona fide* in both a subjective and objective sense. Philip Pillai J noted, however, that the debtor-company need not show that the debt did not exist – it merely needed to raise a triable issue. The applicable standard for determining the existence of a substantial and *bona fide* dispute was "no more than that for resisting a summary judgment application".

8.104 The High Court in *United Overseas Bank Ltd v Tru-line Beauty Consultants Pte Ltd* [2010] SGHC 363 ("*Tru-line*") declined to strike out the defendant's counterclaim for damages for the plaintiff's alleged wrongful cancellation of an irrevocable letter of credit. Woo Bih Li J observed (*Tru-line* at [24]) that an irrevocable documentary credit

constituted an independent contract between an issuing bank and the beneficiary which, in the absence of fraud, was not affected by any irregularities in the underlying contract in pursuance of which the credit was issued. The plaintiff's pleaded defence to the counterclaim, *ie*, that it was entitled to recall all banking facilities granted to the defendant (including the letter of credit) was irrelevant to the issue of whether it ought to pay on the letter of credit. In view of the disputed facts and the plaintiff's failure to raise the issue of discrepancies in the letter of credit in its pleadings, Woo J held (*Tru-line* at [27]) that it was arguable that the defendant had positively responded to the plaintiff's enquiry whether to pay on the letter of credit. On the other hand, Woo J noted that there was evidence to suggest that the non-payment by the plaintiff under the letter of credit was not the true cause for the damages claimed by the defendant. However, as no further evidence was given on this issue, Woo J was unable to reach any conclusion on it. Accordingly, Woo J declined to strike out the defendant's counterclaim.

Summary judgment

8.105 In *Tru-Line*, the plaintiff bank claimed against a borrower and two guarantors (the defendants) for sums due under two banking facilities. In response to the plaintiff's application for summary judgment, the defendants argued that the borrower had a counterclaim (which constituted a set-off) against the plaintiff for failing to honour a letter of credit. On appeal to the judge in chambers, the judge ruled that the counterclaim was not sufficiently proximate to the plaintiff's claim to justify a set-off. Summary judgment was granted without a stay of execution because the counterclaim "was suspect and it might even turn out fraudulent" (this was the primary reason), the lack of connection between the claim and counterclaim and the fact that the bank would undoubtedly be able to satisfy any judgment which the borrower obtain on its counterclaim at trial.

8.106 The Court of Appeal in *Basil Anthony* (above, para 8.36) emphasised that the court will not make a preliminary determination of the defamatory meaning of words pursuant to O 14 r 12 of the RoC (above, para 8.1) if there are triable defences. The reason for this approach is that separate determinations of different issues at different stages of the proceedings (*ie,* the preliminary issue of whether the words are defamatory and the subsequent adjudication of defences) would render the litigation more costly, complex and time-consuming (particularly if they lead to multiple appeals).

8.107 In reiterating this principle in *ANB v ANF* [2011] 2 SLR 1, Steven Chong J pointed out that where there are triable defences, it is more appropriate for the issue of whether the words are defamatory to

be determined at trial prior to the examination of witnesses pursuant to O 33 r 2 of the RoC. His Honour considered the impact of *Basil Anthony* on previous cases which had applied O 14 r 12, and concluded that while this rule may be used to decide separate issues of law or construction (including the effect of words alleged to be defamatory), the rule should only be engaged where it would have the practical effect of saving expenditure and time. It should not be assumed that the use of O 14 r 12 will always be cost and time efficient. Chong J conducted thorough review of the background to O 14 r 12 and its scope in the context of defamation proceedings in *ANB v ANF* [2011] 2 SLR 1.

8.108 An appeal against summary judgment does not operate as a stay of execution (see O 56 r 1(4) of the RoC and s 41 of the SCJA (above, para 8.75). In *HSBC Institutional Trust Services (Singapore) Ltd v Picket & Rail Asia Pacific Pte Ltd* [2010] 4 SLR 326, the High Court reiterated the principles set out by the Court of Appeal in *Lee Sian Hee v Oh Kheng Soon* [1991] 2 SLR(R) 869 at [5]:

> While the court has power to grant a stay, and this is entirely in the discretion of the court, the discretion must be exercised in accordance with well-established principles (*Lee Kuan Yew v Jeyaretnam Joshua Benjamin* [1990] 1 SLR(R) 772). First, as a general proposition, the court does not deprive a successful litigant of the fruits of his litigation, and lock up funds to which *prima face* he is entitled, pending an appeal (*The Annot Lyle* (1886) 1 PD 114 at 116). However, when a party is exercising his undoubted right of appeal, the court ought to see that the appeal, if successful, is not nugatory (*Wilson v Church (No 2)* (1879) 12 Ch D 454 at 458–459). Thus, a stay will be granted if it can be shown by affidavit that, if the damages and costs are paid, there is no reasonable probability of getting them back, if the appeal succeeds (*Atkins v The Great Western Railway Co* (1886) 2 TLR 400). [Also see *Lian Soon Construction Pte Ltd v Guan Qian Realty Pte Ltd* [1999] 1 SLR(R) 1053.]

8.109 Where the court has granted summary judgment without staying its execution pending the trial of a counterclaim, the defendant may, if he has good grounds, apply for an amendment of the counterclaim with a view to applying for a variation of the initial order (so that execution of the judgment may be stayed). However, the court will not entertain an application to amend unless the amendment satisfies the requirements of O 20 r 5 of the RoC and related case law principles, and would result in a plausible counterclaim (*Elitegroup Computer Systems Co Ltd v Kobian Pte Ltd* [2010] SGHC 37).

Transfer of proceedings from District Court to High Court

8.110 The likelihood that a plaintiff's damages would exceed the jurisdictional limit of the District Court would ordinarily be regarded as

"sufficient reason" for the transfer of proceedings to the High Court under s 54B of the SCA (above, para 8.76). However, the mere existence or presence of a "sufficient reason" does not automatically entitle a party to have the proceedings transferred. A holistic evaluation of all the material circumstances needs to be undertaken in every case where a transfer application is made. In particular, the court needs to assess the prejudice that might be visited upon the party resisting such a transfer. See *Keppel Singmarine Dockyard Pte Ltd v Ng Chan Teng* [2010] 2 SLR 1015 ("*Keppel Singmarine Dockyard Pte Ltd*") at [16]–[17].

8.111 The parties in *Keppel Singmarine Dockyard Pte Ltd* had entered a consent interlocutory judgment and agreed to a split in liability, with damages to be assessed, in the context of a claim for personal injury and losses by the respondent. The proceedings had been conducted, and the consent interlocutory judgment had been entered, in the District Court despite the fact that the total damages claimed by the respondent exceeded the jurisdictional limit of the District Court. The Court of Appeal reversed the decision of the High Court which had allowed the respondent's application to transfer the District Court action to the High Court pursuant to s 54B of the SCA. The Court of Appeal (*Keppel Singmarine Dockyard Pte Ltd* at [18]–[20]) held that a transfer of proceedings would cause the appellant to suffer prejudice apart from the fact that the damages awarded could exceed the District Court's jurisdictional limit. First, at the time the parties entered the consent interlocutory judgment, it was thought that the parties would be taken to have affirmed the jurisdiction of the District Court and would, therefore, be barred from transferring proceedings to the High Court. It was rather unlikely that the appellant would have agreed to a consent order on the same terms had it known otherwise, and the appellant would be prejudicially exposed to increased damages if the Court of Appeal were to allow for the transfer of proceedings. Second, both parties had accepted and relied on the consensual agreement for a substantial period of time. Third, even if the proceedings were transferred on the condition that the consent order was to be set aside, the appellant would still be prejudiced. Certain interlocutory processes had already been completed since the interlocutory judgment was entered. Furthermore, taking into account the many practical difficulties that might arise if the issue of liability had also to be re-opened, to require the appellant to defend its case on liability despite the significant lapse of time since the accident occurred would be severely prejudicial to its interests.

Translation of documents

8.112 The court will not normally order documents to be translated pursuant to O 92 r 1 if it is uncertain (for example, prior to discovery

and production) whether they will be made available or are to be used in the proceedings. The duty to arrange translation is that of the party who seeks to rely on the documents: *Lee Shieh-Peen Clement v Ho Chin Nguang* [2010] 3 SLR 807.

Witnesses

8.113 The litigant has a fundamental right to adduce all relevant evidence in support of his case subject to the applicable procedural requirements. In delivering the judgment of the Court of Appeal in *Basil Anthony* (above, para 8.36), V K Rajah JA stressed this principle (*Basil Anthony* at [24]): "This general right is so fundamental that it requires no authority to be cited in support of it; in fact, to say that the right derives from some positive decision or rule is to understate its constitutive importance to the adversarial approach to fact-finding." The right to adduce relevant evidence is subject to certain conditions (*Basil Anthony* at [25]):

> The adduction of relevant evidence must, as far as practicable, take place in accordance with the rules of procedure whose purpose is to ensure the *fair*, economical, swift and orderly resolution of a dispute. Finally, a litigant is prohibited from manipulating the court's machinery to further his ulterior or collateral motives in an abusive or oppressive manner. [emphasis in original]

8.114 The fact that a procedural condition is not met by the party seeking to adduce relevant evidence does not necessarily mean that the evidence will be excluded. The court is required to strike the proper balance between the general right and the conditions. In doing so, it "must not only be guided by the applicable rules and decisions, but must look beyond the mechanical application of those rules and decisions, and carefully assess the interests at stake in every case to ensure that a fair outcome is reached": *Basil Anthony* at [26]. Where the relevancy of the evidence is "unclear" or "even doubtful", it is "both prudent and just to err in favour of admission rather than exclusion": *Basil Anthony* at [26].

8.115 One of the primary issues in this case concerned the trial judge's decision to set aside five subpoenas issued by the appellant (who had previously obtained leave for the five individuals to give oral evidence in court). The trial judge had also dismissed a subsequent application by the appellant to issue five fresh subpoenas in respect of the same individuals. The Court of Appeal determined that as the evidence of the five witnesses was relevant (even crucial in some respects) to the issues, the trial judge ought to have permitted them to testify. A new trial was ordered.