8. CIVIL PROCEDURE

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Appeals

Extension of time

8.1 In *Lioncity Construction Co Pte Ltd v JFC Builders Pte Ltd* [2015] 3 SLR 141, the High Court held that an application to extend time to appeal against the decision of a District Judge in chambers which was made after the expiry of the 14-day time limit for appealing should be heard by the High Court, not the District Court. This was consistent with the uniform position for other appeals, that an application to extend time after the expiry of the time limited for appeal should be heard by the court with the jurisdiction to hear the appeal. The decision affirms the Singapore courts' preference for a streamlined and consistent approach towards extension applications, and it is in line with the practice adopted by the Supreme Court Registry.

Capacity

Representation of companies

8.2 Order 1 r 9(2) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("Rules of Court") allows corporations to seek leave for an officer of the company to act on its behalf. The application of this rule was considered by the High Court in two separate applications in 2015 by applying the factors relevant to the exercise of its discretion earlier identified in *Bulk Trading SA v Pevensey Pte Ltd* [2015] 1 SLR 538 ("*Bulk Trading*"). Both applications were dismissed by the court.

8.3 In the first case, *Allergan, Inc v Ferlandz Nutra Pte Ltd* [2015] 2 SLR 94 ("*Allergan, Inc*"), the company sought leave under O 1 r 9(2) to be represented by its sole director and shareholder on the basis of financial impecuniosity. The High Court held that where financial impecuniosity was the sole or main reason for the application, the court

would have to take account of the extent of the financial constraints on the company and the company's ability to engage counsel. Even where the court was satisfied that the company was facing financial difficulties such as to impede its ability to engage counsel, the court would still have regard to all other relevant factors in deciding whether to grant leave, including but not limited to the following factors identified in *Bulk Trading* (*Allergan, Inc* at [20]):

(a) whether the application for leave was properly made pursuant to the Rules of Court;

(b) the financial position of the corporate applicant and/or its shareholders;

(c) the *bona fides* of the application;

(d) the role of the company in the proceedings;

(e) the structure of the company;

(f) the complexity of the factual and legal issues;

(g) the merits of the company's case;

(h) the amount of the claim;

(i) the competence and creditability of the proposed representative; and

(j) the stage of the proceedings.

8.4 The High Court held that a single bank statement and letters from the company's former solicitors requesting payment were, by themselves, insufficient to show that the company was financially impecunious. There was also no information provided on the finances of the sole director and shareholder for whom leave was being sought. Further, the court expressed some concern about the competence of the layperson to conduct the trial, present the case and assist the court, bearing in mind that some of the issues of law were technical. In these circumstances, the High Court concluded that this was not an appropriate case to grant leave.

8.5 In the second case, *Elbow Holdings Pte Ltd v Marina Bay Sands Pte Ltd* [2015] 5 SLR 289, the plaintiff company sought leave to be represented by a foreign lawyer who had been providing legal services to the plaintiff on the matter even before the main action was commenced. The foreign lawyer was appointed as a director of the plaintiff on the day that the plaintiff's former solicitors discharged themselves. The High Court found that the foreign lawyer was appointed as a director of the plaintiff for the very purpose of allowing him to apply under O 1 r 9(2) to act on behalf of the plaintiff. However, O 1 r 9(2) could not be used to circumvent the strict and structured framework in the Legal Profession

Act (Cap 161, 2009 Rev Ed) governing when and how foreign counsel could practise in Singapore. Accordingly, the plaintiff's application was dismissed.

Standing

8.6 Two judgments relating to the standing of parties to bring applications before the court were also issued in 2015. Of particular significance is one relating to the standing of a party to commence proceedings relating to a violation of constitutional rights.

8.7 Whether a beneficiary or creditor of an unadministered estate has the requisite standing to bring a claim to preserve the assets of the estate generally was the key issue for determination in *Foo Jee Boo v Foo Jhee Tuang* [2015] SGHC 176. The High Court followed the Court of Appeal's decision in *Wong Moy v Soo Ah Choy* [1996] 3 SLR(R) 27, and held that ordinarily, beneficiaries had no equitable or beneficial interest in any particular asset comprised in an unadministered estate. However, there were certain limited, special circumstances under which a beneficiary of an unadministered estate could institute an action to recover assets of the estate. All the circumstances of the case should be considered and the court would ultimately decide whether it was impossible or at least seriously inconvenient for the representatives to take proceedings such that the beneficiaries ought to be given the right to sue.

8.8 In this case, the first plaintiff, a beneficiary of the estate, and the second plaintiff, a creditor of the estate, had commenced proceedings to preserve the assets of the estate in their personal capacities. It could hardly be said to be inconvenient for the first plaintiff, as joint executor and trustee of the estate, to bring the claims given that he was clearly willing and able to prosecute the claims in his personal capacity. Accordingly, the court concluded that the plaintiffs in their personal capacities had no standing to bring the proceedings.

8.9 *Madan Mohan Singh v Attorney-General* [2015] 2 SLR 1085 concerned the issue of *locus standi* to commence proceedings under O 53 r 1 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) on the basis of a violation of constitutional rights. The court held that the test for determining standing in the context of private rights applied equally if the right was a constitutional one, namely: (a) the declaration or prerogative order sought had to relate to a right which was personal to the applicant and enforceable against an adverse party to the litigation; (b) the applicant had to have a real interest in bringing the action; and (c) there had to be a real controversy between the parties to the action for the court to resolve.

8.10 The applicant, a volunteer Sikh religious counsellor at the Singapore prison, sought a quashing order against the Singapore Prison Service's hair grooming policy for inmates on the ground that the policy infringed the rights of Sikh inmates to practise their religion. The applicant submitted that he had standing to seek the quashing order for three reasons. First, the applicant owed a duty to the Sikh inmates who came to him for religious guidance and counselling. Secondly, the Sikh inmates' right to practice their religion was inextricably linked to the applicant's right to propagate his faith. Thirdly, the applicant had a very personal and close relationship with the Sikh inmates. All three reasons were rejected by the High Court. The court held that the applicant's right to propagate his religion was not curtailed by the hair grooming policy, and the applicant had no *locus standi* to bring judicial review proceedings on the basis that the policy violated the constitutional rights of Sikh inmates. Accordingly, the application was struck out under O 18 r 19 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed).

Costs

8.11 Although costs for legal proceedings are awarded at the court's discretion (see *Wing Joo Loong Ginseng Hong (Singapore) Co Pte Ltd v Qinghai Xinyuan Foreign Trade Co Ltd* [2009] 2 SLR(R) 814 at [200]), this is not to say that the awarding of costs is an arbitrary exercise. The Court of Appeal has held that its discretion is to be exercised with the overarching concern to achieve the *fairest* allocation of costs between the parties (*Aurol Anthony Sabastian v Sembcorp Marine Ltd* [2013] 2 SLR 246 at [103]). In line with this endeavour, 2015 saw several decisions relating to (a) the circumstances in which indemnity costs are awarded; (b) the awarding of interest on costs; (c) the setting of costs between a plaintiff and three defendants; (d) the approach to adopt in awarding costs under the "two counsel rule"; and (e) whether costs should be awarded against a body serving a public function. All of these decisions contribute towards clarifying the exercise of the court's discretion in respect of costs.

Indemnity costs

8.12 In *PT Sandipala Arthaputra v STMicroelectronics Asia Pacific Pte Ltd* [2016] 1 SLR 748, the plaintiff commenced a fresh action in Jakarta almost three years after the Singapore action had commenced. The defendants applied for, and obtained, an interim anti-suit injunction and a final anti-suit injunction to restrain the plaintiff's pursuit of the Jakarta action. The court held that indemnity costs were appropriate for both applications. It was wasteful and oppressive for the plaintiff to have commenced proceedings on the same subject matter in two separate jurisdictions without good reasons for doing so. The defendants'

applications for the anti-suit injunctions would not have been necessary but for the fact that the plaintiff had sued in one place too many. Nevertheless, the court emphasised that it does not necessarily follow that indemnity costs would be appropriate in every case where an anti-suit injunction was granted. Each case would turn on its own facts. It should be noted that, at the time of writing, this decision is currently being appealed.

8.13 In *Telemedia Pacific Group Ltd v Credit Agricole (Suisse) SA* [2015] 4 SLR 1019, the High Court elaborated on the relevance of costs agreements in deciding whether to award indemnity costs and the principles governing costs of third-party proceedings. In this case, the defendant bank transferred shares out of the plaintiff's bank account on the instructions of a third party. The plaintiff brought a claim against the defendant, which in turn brought a claim against the third party. At trial, the plaintiff's claim was dismissed in its entirety and the third-party claim thus did not arise for consideration. The issue of costs then fell to be determined.

8.14 In respect of the plaintiff's claim against the defendant, the High Court upheld the costs agreement between the plaintiff and the defendant and ordered the plaintiff to pay the defendant indemnity costs. Significantly, the High Court explained that where there was a costs agreement between the parties to the litigation, the winning party could assert its entitlement to indemnity costs in one of two ways. First, the winning party could directly invoke its contractual rights under the costs agreement. If so, the winning party should clearly and properly plead such a cause of action. Secondly, the winning party could rely on the court's statutory discretion to award costs and urge the court to consider the costs agreement as a relevant factor in deciding whether to award indemnity costs. The court would tend to exercise its statutory discretion to uphold the parties' contractual bargain unless it would be manifestly unjust to do so. Once a party had obtained costs via one avenue, it would no longer be able to invoke the alternative avenue to obtain further costs, as otherwise the rule against double recovery would be offended.

8.15 As regards the third-party proceedings, the High Court observed that exceptionally, a plaintiff might be made to bear the costs of third-party proceedings when those proceedings were inevitable as a direct result of the plaintiff's claim. Inevitability could be demonstrated if the real issue at the heart of the action was one that ought to be properly litigated between the plaintiff and the third party or if the plaintiff's claim against the defendant was clearly against the wrong party and there was another party that the plaintiff should have sued. While the third-party proceedings must have been properly instituted by the defendant, the touchstone was whether the plaintiff's conduct

justified making the plaintiff bear the costs of proceedings instituted by the defendant. Ultimately, costs were in the discretion of the court and these principles were only guidelines for the exercise of a court's discretion to award costs. In the present case, the court held that the circumstances were not sufficiently exceptional to justify requiring the plaintiff to bear the costs of the third-party proceedings. The court thus ordered that these costs be borne by the defendant on a standard basis instead.

Interest

8.16 In *Citiwall Safety Glass Pte Ltd v Mansource Interior Pte Ltd* [2015] 5 SLR 482 ("*Citiwall*"), the Court of Appeal considered whether interest had to be paid on a judgment sum when the judgment was overturned but later restored. The decision builds upon principles adopted by the Court of Appeal in two previous cases, *Crédit Agricole Indosuez v Banque Nationale de Paris* [2001] 1 SLR(R) 609 and *Singapore Airlines Ltd v Fujitsu Microelectronics (Malaysia) Sdn Bhd* [2001] 1 SLR(R) 38. Those two cases concern the *same* issue of whether interest on a judgment debt should be payable when a lower court's judgment is later reversed by a higher court, and it is clear from *Citiwall* that the outcome of such an inquiry is intensely fact-specific.

8.17 In *Citiwall*, an adjudication determination in favour of the appellant was made under the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed). The respondent applied to set aside the adjudication determination before an assistant registrar but failed. The assistant registrar's decision in favour of the appellant was reversed by the High Court but later restored by the Court of Appeal. The respondent then refused to pay interest on the adjudication sum for the period during which the High Court decision was in force.

8.18 The Court of Appeal held that this interest had to be paid by the respondent for four reasons. First, where a first instance judgment was reversed and subsequently restored, it remained standing from the date when it was given. Interest accrued from that date, if not earlier. Secondly, the awarding of interest on judgment sums was pursuant to the court's equitable jurisdiction and the technicalities of what basis interest was awarded upon should not unduly distract judges from the overriding concern to do justice to the parties. The respondent's failure to pay over the adjudication sum despite the adjudication determination and the assistant registrar's ruling in the appellant's favour was inexcusable. Thirdly, the respondent's wrongful withholding of the adjudication sum and interest due to the appellant justified antedating the Court of Appeal's judgment. Finally, the lengthy period in which the

High Court decision was in force was caused partly by the respondent's own unsuccessful application to strike out the appellant's appeal and it would not be just for the respondent to avoid paying interest on the adjudication sum during this period.

8.19 The Court of Appeal's decision reinforces the position that judgment debts are to be promptly paid regardless of whether there is a pending appeal, and parties should seek a stay of proceedings should they wish to defer payment of a judgment debt. The tenor of the recently decided cases on the grant of stays, however, suggests that such stay applications will not be easily granted so as not to deprive a deserving litigant of his rightful entitlement pursuant to a judgment rendered; a stay will only be granted if the result of a successful appeal will be rendered nugatory otherwise (see paras 8.111 to 8.123 below).

Set-off

8.20 *Gimpex Ltd v Unity Holdings Business Ltd* [2015] SGCA 17 ("*Gimpex*") showed that the commonality of positions adopted and the relationship between the parties are significant considerations when the court decides whether two sets of legal costs should be set off against each other. In this case, the plaintiff sought to set off costs due to the three defendants from the plaintiff against the costs due to the plaintiff from the first defendant. The plaintiff had earlier succeeded in its breach of contract claim against the first defendant, but had failed to establish its piercing of the corporate veil claim against the third defendant and its conspiracy claim against the three defendants.

8.21 The Court of Appeal held that while the plaintiff's claims in conspiracy and piercing the corporate veil had failed, the three defendants nevertheless shared a common interest among them from the way they conducted their defence. All three defendants were represented at the trial, as well as the appeals, by the same solicitors and had adopted common positions in the action. Further, the first defendant had been reticent in respect of the judgment debt due to the plaintiff and the plaintiff had valid concerns that it might not be able to obtain its costs due from the first defendant. Thus, the Court of Appeal ordered that any costs in favour of the three defendants should be set off against the costs payable by the first defendant to the plaintiff.

8.22 *Gimpex* must be contrasted against an earlier Court of Appeal decision, *Sabnani Kan v Lachmandas Ramesh* [1994] 2 SLR(R) 474 ("*Sabnani Kan*"), which declined to set off two sets of legal costs. In *Sabnani Kan*, the first appellant had succeeded in part against the two respondents while the second appellants had failed against them. One set of costs was hence due to the first appellant, while another was due

from the second appellants, and the Court of Appeal thought it unjust to set off the two sets of costs since the parties were not identical. This was despite them being represented by the same set of solicitors. What this shows then is that the fact that parties are represented by the same set of solicitors is not a decisive factor in the inquiry.

8.23 What might be relevant is the fact that in *Gimpex*, the Court of Appeal opined that there might be a risk that if the costs were treated as distinct, the plaintiff might not recover its costs from the first defendant which it had succeeded against as it was a company controlled by the second and third defendants; such concerns were absent in *Sabnani Kan*.

"Two counsel rule"

8.24 Order 59 r 19 of the Rules of Court provides that costs of more than two solicitors for a party shall not be allowed unless the court so certifies or upon an application by that party within one month from the date of the judgment or order. In *Trans Eurokars Pte Ltd v Koh Wee Meng* [2015] SGHCR 6, two possible approaches to the "two counsel rule" were considered by the court. The first was the "headcount" approach, under which the applicant would have to elect two named counsel for which costs were claimed. Costs claims for the work done by third, fourth or subsequent lawyers working on the case would be precluded. The second approach was the "notional" approach, under which the "two counsel rule" would apply to a notional team of two counsel and the court might award costs for the work that would reasonably have been done by a notional two-man team.

8.25 The assistant registrar preferred the "notional" approach for several reasons. First, taking into consideration the work done by the legal team as a whole would at least assist the court in formulating a fuller picture of the magnitude of the legal task at hand, although the time spent and actual costs incurred were not conclusive of the costs to be awarded and the court remained free to tax the bill downwards to reflect the absence of a certificate for more than two counsel. Secondly, the "headcount" approach would reward law practices where solicitors, regardless of seniority, specialise full-time on a particular file, while prejudicing law practices where teams of solicitors of varying seniority are deployed to work on different files. This did not appear to be an intended or desired effect of the "two counsel rule". Thirdly, the "notional" approach appeared to be more in line with the overarching principle of proportionality. Finally, adopting the "notional" approach would not render O 59 r 19 of the Rules of Court nugatory, as a claimant would still be unable to claim for costs exceeding what would have

proportionately and reasonably been incurred by a notional two-man team.

8.26 In the present case, the two senior lawyers in the applicant's team had spent approximately 847 hours of work for the suit, while the two junior lawyers had spent approximately 553 hours of work. Having regard to the relative complexity of the suit and the fact that the legal proceedings had taken 2.5 years, the assistant registrar held that the total amount of hours claimed would not have been entirely disproportionate, nor could the amount of time spent be said to be unrealistic for a notional team of two counsel. The assistant registrar also considered that if the time spent by the junior lawyers could not be considered, there would be a drastic reduction in the hours taken into consideration which seemed neither proportionate nor reasonable. Accordingly, the assistant registrar took into consideration the time spent by the two junior lawyers in the taxation of the applicant's bill of costs.

Which party to bear costs

8.27 *Ng Chong Ping v Ng Chih-Ming Daren* [2015] 3 SLR 292 considered what costs order would be appropriate where a plaintiff applies to join a third or fourth party as a defendant. The High Court held that in such circumstances the order for costs should ordinarily be costs in the cause since the court would have found it reasonable to allow the joinder. Costs could be ordered against a party specifically at interlocutory proceedings in some circumstances, for example, where the delay was deliberate or where opposing parties had incurred costs unnecessarily. However, in the present case, the plaintiff had insufficient grounds or knowledge as to the involvement of the third and fourth parties to join them in the action initially. Further, no prejudice had been shown to the third party that could not be made good by an order for costs in the cause. In the circumstances, an order for costs in the cause was appropriate.

8.28 *Ong Eng Kae v Rupesh Kumar* [2015] SGHC 163 concerned the issue of whether a solicitor acting on behalf of a bankrupt should be made personally liable for costs. The High Court applied the Court of Appeal decision of *Tan King Hiang v United Engineers (Singapore) Pte Ltd* [2005] 3 SLR(R) 529 and observed that the principal issue arising for determination was whether that solicitor had failed to conduct proceedings with reasonable competence and expedition. In the present case, the High Court found that the Official Assignee had essentially authorised the solicitor to take further steps in the proceedings and that the solicitor's representation of the bankrupt in the proceedings could not be said to be without reasonable competence or expedition.

Accordingly, the court refused the plaintiffs' application for the costs to be borne by the solicitor personally.

8.29 The issue of a solicitor's personal liability for costs was also considered in *Yong Vui Kong v Attorney-General* [2015] SGHC 178, albeit in a different context. In this case, a solicitor sought to amend an originating summons out of time, even though there was no legal basis for the amendments sought and she had been informed why the allegation in the originating summons was untenable. The solicitor also failed to file the supporting affidavits in time despite being warned about her possible exposure to a costs order. The applications to amend the originating summons and to admit the supporting affidavits were dismissed and the Attorney-General's application to strike out the originating summons was allowed. Importantly, the court held that the solicitor's conduct was so egregious as to warrant making the solicitor personally liable for costs. The court ordered the solicitor to personally pay the Attorney-General's disbursements of both the amendment and striking out applications as well as the Attorney-General's costs for the striking out application.

8.30 The High Court commented that a court should be slow to award costs against a lawyer personally and lawyers were expected to proceed fearlessly to advance their clients' interests. However, this did not mean that lawyers could knowingly advance untenable claims. Where a lawyer had acted knowing that there was no valid basis for his action, he took the risk of being made personally liable for costs. This was not to say that a lawyer would be personally liable for costs each time a claim was struck out or dismissed. All the facts would have to be considered. If the omission was due to the lawyer's own negligence or egregious conduct, there would be a strong argument that the lawyer should be personally liable, and not his client.

Discovery

8.31 2015 saw several significant decisions relating to discovery, namely, relating to when discovery should be granted and the application of the *Riddick* principle for documents produced pursuant to discovery applications. While there have been no significant changes to the principles relating to discovery, it is the application of the principles in the context of the specific cases that are important and provide guidance for future cases.

Applications for discovery

8.32 *AXY v Comptroller of Income Tax* [2016] 1 SLR 616 dealt with a discovery application in the context of leave to commence judicial

review. The Comptroller of Income Tax ("Comptroller") had issued notices to various banks in Singapore under ss 65B and 105F of the Income Tax Act (Cap 134, 2008 Rev Ed) ("ITA"), seeking information relating to the accounts of the applicants and their companies ("Notices"). The Notices had been issued pursuant to a request for assistance from the National Tax Service of the Republic of Korea for provision of information pertaining to the applicants' banking activities in Singapore.

8.33 The applicants applied for leave to commence judicial review of the Comptroller's decision to issue the Notices, and sought to obtain discovery of 14 categories of documents to be produced for inspection. The assistant registrar denied their request, and they appealed. Their appeal was partially allowed by the High Court, which ordered the production of, *inter alia*, the request for assistance from the Korean tax authority, correspondence between the Comptroller and the Korean tax authority, and documents which the Korean tax authority provided to the Comptroller at a meeting in Korea.

8.34 In considering the applicants' discovery application, the court was mindful that while the exchange of information between tax authorities was crucial in combating tax evasion, judicial review of the Comptroller's decision remained an important safeguard of the taxpayer's interest subject to the overriding principle that the judicial review proceedings would not prejudice the tax investigations. Thus, in order to enable the applicants a fair chance to establish a *prima facie* case against the Comptroller that it had failed to independently exercise its discretion before issuing the Notices, it was necessary for the request by the Korean tax authority to be produced as it was the starting point from which the court could assess the Comptroller's exercise of discretion and consider whether the applicant had established an arguable case. On the other hand, the application for documents relating to the investigation in Korea was disallowed, as the court's role was not to second-guess what the foreign authority had done in Korea or to question the factual accuracy of its request, especially when these were matters of Korean law. Notably, the High Court rejected the Comptroller's arguments regarding secrecy and confidentiality as news had broken in Korea concerning the investigations against the applicants and the Korean tax authority was no longer objecting to redacted copies of the relevant documents being disclosed.

8.35 The tension between the need for discovery and international comity was explored in *Ram Parshotam Mittal v Portcullis Trustnet (Singapore) Pte Ltd* [2015] SGHCR 12. In that case, the plaintiff made an application for the defendants to produce several categories of documents for inspection. The defendants objected on the basis that disclosure would potentially contravene s 149 of the Labuan Companies

Act 1990 (Act 441) (M'sia) ("Labuan Companies Act") and breach a Labuan court order. The assistant registrar held that the production of documents should be ordered, and in doing so considered, *inter alia*, the relevance of foreign law and foreign court orders in determining whether discovery should be ordered.

8.36 First, the assistant registrar considered the effect of s 149(1) of the Labuan Companies Act and its requirements. He held that s 149 of the Labuan Companies Act should not *ipso facto* be used as a basis for the defendants to withhold documents that were clearly relevant as that would extend the reach of the Labuan Companies Act to the extent that it interfered with proceedings in the Singapore court and hamper the Singapore court's ability to dispose of the matter fairly.

8.37 Secondly, the assistant registrar emphasised the need to balance the interests of the Singapore proceedings in having the relevant and necessary evidence before the court against recognising the Labuan court order. The question to be asked is "whether comity is being weighed against simply something that is the convenience of a party or public policy". The assistant registrar concluded that to allow the defendants to avoid their discovery obligations in Singapore on the basis of the Labuan court order would be to offend the public policy of ensuring that the Singapore court has all the relevant and necessary evidence in order to dispose of the matter fairly.

8.38 The High Court was faced with the question of whether the documents sought were legally privileged in *CIFG Special Assets Capital I Ltd v Polimet Pte Ltd* [2016] 1 SLR 1382. The defendants had sought disclosure of documents and written communications between the plaintiff and its solicitors in relation to an unsigned agreement in 2011. It was undisputed that the documents would not be privileged if there was joint privilege, and that there could only be joint privilege if the parties had jointly retained the solicitors. However, the plaintiff contended that the retainer was only between him and the solicitors and so the documents which the defendants sought were privileged. The High Court found that the defendants had not shown that there was a joint retainer or an implied retainer between the solicitors and themselves. This being the case, the documents sought were protected by privilege and therefore did not have to be disclosed.

Use of documents

8.39 The ability of litigants to use documents disclosed in legal proceedings for purposes other than the litigation was considered by the High Court in two cases that came before it.

8.40 *Foo Jong Long Dennis v Ang Yee Lim* [2015] 2 SLR 578 ("*Dennis Foo*") concerned the plaintiff's use of documents previously disclosed in a separate suit instituted in 2006 by the Raffles Town Club ("RTC") against the plaintiff, the defendants and another party. In *Dennis Foo*, the documents sought to be relied on were crucial to the plaintiff's claim, but the defendants contended that their use breached the *Riddick* principle, namely, the implied undertaking owed to the court not to use documents disclosed in litigation for any collateral or ulterior purpose.

8.41 The sole issue before the court was whether the *Riddick* principle ceased to apply once the document had been used in open court. As this issue was being decided in Singapore for the first time, the High Court surveyed authorities from the UK, Australia, Canada, Hong Kong and New Zealand, and held that the *Riddick* principle ceased to apply once a document had been used in open court. In doing so, the High Court departed from the majority decision of the House of Lords in *Harman v Secretary of State for the Home Department* [1983] 1 AC 280 ("*Harman*"), where a bare majority held that the *Riddick* principle continued to apply even to documents which had been used in open court.

8.42 The High Court considered that the *Riddick* principle arose from a balancing exercise between the public interest in the administration of justice and the need to protect privacy and confidential information, and the appropriate balance in Singapore prioritises the administration of justice. This is because the principle of open justice is engaged once a document has been used in open court, and holding that the *Riddick* principle ceases once a document is used in open court gives proper deference and recognition to the principle of open justice. The court also found that the majority approach in *Harman* was fraught with difficulties and may lead to absurdity, and observed that the minority approach in *Harman* was the preferred approach in most common law jurisdictions. It should be added, however, that the court affirmed that even though the *Riddick* principle ceased to apply once a document was used in open court, it remains open for a party to apply to the court for the implied undertaking to continue.

8.43 *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2015] SGHC 153 ("*I-Admin*") concerned a discovery application in respect of an intellectual property dispute. In *I-Admin*, the plaintiff claimed that sensitive data from its copyrighted software systems had been taken by the first and second defendants (who were formerly its employees) without its authorisation and passed to the third defendant. The plaintiff thus obtained an *Anton Piller* order and seized computers belonging to the third defendant. There was also an injunction order prohibiting

disclosure of the information extracted from the defendants' computers. In this application, the plaintiff sought leave to provide the police with the extracted information.

8.44 The High Court denied the plaintiff's leave application, holding that while it was entitled to lodge a complaint to the police, it was unnecessary to show the police the precise information which had been obtained and subjected to a judicial injunction. Moreover, giving information to the police was a different purpose than for pursuing the action in which the discovery of the confidential information was given. The police remained free to invoke its own powers to seize the information, and there was no compelling reason why the information had to be disclosed to the police for the purposes of making the police report.

8.45 The circumstances in *I-Admin* stand in sharp contrast to those in *Dennis Foo*. Whereas the document in *Dennis Foo* was previously used in open court, the discovered documents in *I-Admin* had not been brought into the public domain and were in fact subject to an injunction. This led the court in *I-Admin* to remark that "exceptional circumstances" were required before the release of such information can be justified.

Injunctions

8.46 The relation between dishonesty and dissipation of assets was brought to the forefront in *Bouvier, Yves Charles Edgar v Accent Delight International Ltd* [2015] 5 SLR 558 ("*Bouvier*"), a case involving Dimitry Rybolovlev ("Mr Rybolovlev"), a Russian billionaire and art collector. His dispute was with Yves Charles Edgar Bouvier ("Mr Bouvier"), whom he alleged had assisted him with building his art collection by acquiring art pieces from sellers and then selling them to the respondent companies which were controlled by Mr Rybolovlev. Mr Rybolovlev alleged that Mr Bouvier had breached his duties as an agent and overcharged for the paintings which he had purchased. Mr Bouvier disputed that he was Mr Rybolovlev's agent and asserted he was an independent seller who was free to sell the paintings to the respondent companies at the prices agreed to. The respondent companies applied for and obtained a worldwide *Mareva* injunction against Mr Bouvier from the High Court. Subsequently, Mr Bouvier attempted to set aside the injunction, but the High Court refused his application. He thus appealed to the Court of Appeal for the injunction to be discharged.

8.47 The decisive issue before the Court of Appeal was whether there was sufficient evidence to justify a finding that there was a real risk that Mr Bouvier would dissipate his assets. After consulting several local,

English and Australian authorities, the Court of Appeal held, first, that any alleged dishonesty must have a "real and material" relation to the risk of dissipation such that the necessary inference of fact may be drawn. In so doing, it disagreed with a passage from *Spectramed Pte Ltd v Lek Puay Puay* [2010] SGHC 112 ("*Spectramed*") at [19] which appeared to suggest that as long as a person has acted fraudulently, dishonestly or unconscionably, it was unnecessary for any further specific evidence on the risk of dissipation to be adduced. The court noted that the High Court had relied on a passage from Steven Gee QC, *Mareva Injunctions and Anton Piller Relief* (Sweet & Maxwell, 4th Ed, 1998) at p 198, and a later edition of the book, *viz*, Steven Gee QC, *Commercial Injunctions* (Sweet & Maxwell, 5th Ed, 2004), had retreated from the absolute position advocated by the earlier edition which had been relied on in *Spectramed*. The passage from *Bouvier* (at [93]) is worth citing in full:

> In our judgment, if there is a unifying principle that can adequately rationalise and explain the circumstances in which a court may legitimately infer a real risk of dissipation from nothing more than a good arguable case of dishonesty, it is this – the alleged dishonesty must be of such a nature that it has a real and material bearing on the risk of dissipation. It will be evident from our analysis of the cases that it is in such circumstances that the courts have been willing to draw the necessary inference. This is sensible because whether or not such an inference may be drawn is ultimately a question of fact. In assessing whether the inference is warranted as a matter of fact, it is appropriate, in our judgment, for the court to segregate the two questions (*ie*, whether there is a good arguable case on the merits of the plaintiff's claim and whether it has been shown that there is a real risk of dissipation) and answer them separately. We accept that the evidence relied on to answer the first question may be the same as that relied on to answer the second. But, once the inquiries are segregated, it will be clear that whether the evidence pertinent to the first stage of the inquiry is sufficient also for the purposes of the second stage is an assessment that cannot – and emphatically must not – be made mechanistically; and in that context, if an allegation of dishonesty is all that is relied on, that allegation must be such as to say enough about a real risk of dissipation in the circumstances.

8.48 On the facts, the Court of Appeal set aside the *Mareva* injunction issued against Mr Bouvier as the allegations of dishonesty made against him did not have a real and material bearing on the risk of dissipation. The respondent companies were "independent entities" which had known what they were bargaining for at the price they were willing to pay, and the real dispute was the characterisation of the legal relationship between Mr Bouvier and Mr Rybolovlev. The court observed that while it may be that Mr Bouvier was a crafty businessman who made his money through a questionable approach to business, he had made no attempt to conceal his identity or mask his connection

with the transactions through which the art pieces were acquired by the respondent companies. Additionally, the court opined that to infer a real risk of asset dissipation from the fact that Mr Bouvier was wealthy, well advised and sophisticated would be to unfairly penalise him for what might be characterised as his commercial success as an art dealer.

8.49 Secondly, the court held that asset disclosure orders which were given as ancillaries to *Mareva* injunctions served a limited and focused purpose of giving the plaintiff a snapshot of the defendant's assets *at the time of disclosure* and enable the plaintiff to police the injunction to keep the defendant's assets at the steady state which the injunction was to preserve. All that would be disclosed were the assets in the defendant's name at the time the disclosure was made (the figures would often be rough and ready ones) and would not show whether a systematic and unexplained attrition of the defendant's assets over time had taken place. Only in two narrow situations would ancillary disclosure orders be relevant to the risk of dissipation: (a) where the defendant refuses to provide any disclosure of his assets at all; and (b) where the disclosed assets were *so glaringly deficient* that the deficiencies could not be attributed to urgency or any other accounting inaccuracies which might arise. At the same time, the court observed that compliance with asset disclosure orders did not militate against the conclusion that there is a real risk of asset dissipation – such conduct was to be expected and did not diminish the risk of dissipation if such risks existed in the first place.

8.50 Thirdly, the court recognised that *Mareva* injunctions could be obtained to oppress defendants, and held that the injunction obtained by the respondent companies was an abuse of the court's process. The respondents (a) were tardy in applying for the *Mareva* injunction and the asset disclosure orders, showing their lack of belief in the risk that Mr Bouvier would dissipate his assets; (b) had failed to comply with the Supreme Court Practice Directions by not giving Mr Bouvier notice of the application for the injunction; (c) obtained an unjustifiably broad *Mareva* injunction against Mr Bouvier; and (d) put the *Mareva* injunction into wider circulation than necessary for its efficacy while disseminating information in a misleading manner.

8.51 The decision in *Bouvier* confirms that the Singapore court's power to grant urgent interim *Mareva* injunctions will not be readily exercised merely on the basis of an allegation of fraud; there has to be good reason to ground one's belief that assets will be dissipated to frustrate enforcement of an anticipated judgment. Additionally, it is important to recognise the potential for *Mareva* injunctions to be used to oppress defendants. *Bouvier* shows that the courts will be alive to this possibility and will guard against such abuse by litigants.

8.52 Section 12A(2) of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA") empowers the High Court to make many of the orders available to an arbitral tribunal under s 12 of the IAA. If the case is urgent, the High Court can make such orders to preserve evidence or assets (see s 12A(4) of the IAA). In *H&C S Holdings Pte Ltd v Mount Eastern Holdings Resources Co Ltd* [2015] SGHC 323 ("*H&C*"), these provisions in the IAA were considered in the context of an application for an interim injunction.

8.53 The applicant in *H&C* had applied to court to prevent moneys which it had been previously ordered to pay into court from being paid to the respondent pending an appeal to set aside an arbitration award. The application was dismissed by the High Court as it was not convinced that there was a risk of dissipation. The court had found no evidence of fraud by the respondent or its alleged insolvent state and also considered that the respondent's anticipated use of the moneys to pay its creditors neither objectionable nor illegitimate if done in good faith. Therefore, there was insufficient reason to grant the injunction sought, and the court dismissed the application.

8.54 *PT Sandipala Arthaputra v STMicroelectronics Asia Pacific Pte Ltd* [2015] 5 SLR 873 considered the question of whether an anti-suit injunction application could be commenced by way of summons in the existing proceedings instead of an originating process indorsed with a claim for an anti-suit injunction. After reviewing the English position set out in *Glencore International AG v Exeter Shipping Ltd* [2002] CLC 1090 and *Masri v Consolidated Contractors International (UK) Ltd (No 3)* [2009] QB 503, as well as the local case of *Beckkett Pte Ltd v Deutsche Bank AG* [2011] 1 SLR 524 (upheld by the Court of Appeal in *Beckkett Pte Ltd v Deutsche Bank AG* [2011] 2 SLR 96) where a similar injunction had been sought and granted by way of summons, the court found that the applicants were entitled to apply for an anti-suit injunction by way of a summons in the existing proceedings before it. The court held that in alternative-forum cases such as the present, the right to apply for an anti-suit injunction is not itself the cause of action, but merely ancillary and incidental to the existing proceedings. The object of the application was to safeguard the integrity of the Singapore proceedings. Although the court postulated that it was arguable that anti-suit relief ought to be sought by way of an originating process in situations where a contractual right was being asserted (*eg*, where foreign proceedings have been commenced in breach of an exclusive jurisdiction clause), the court declined to make a definitive ruling on this point as it did not arise for determination. Aside from holding that the application was procedurally sound, the court also found that the granting of an anti-suit injunction was warranted on the facts as the parties were amenable to the jurisdiction of the Singapore courts, Singapore was the natural forum, and the foreign proceedings were

vexatious and oppressive. It should be noted that this decision is presently being appealed.

Interpleader

8.55 Section 18(2) of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) confers power on the High Court to grant interpleader relief in accordance with the conditions laid down in O 17 r 1 of the Rules of Court. In *Precious Shipping Public Co Ltd v OW Bunker Far East (Singapore) Pte Ltd* [2015] 4 SLR 1229 ("*Precious Shipping*"), the High Court considered the proper exercise and limits of its power, including whether it had the power to determine the merits of the competing claims when interpleader relief is denied.

8.56 In *Precious Shipping*, the sellers had agreed to supply bunkers to various purchasers, and had separately contracted with bunker traders to have them deliver the bunkers directly to the purchasers' vessels. The bunkers were duly delivered and consumed, but as the sellers subsequently went into liquidation, the bunker traders were never paid. The purchasers also had not paid the sellers because the bunker traders had written directly to them seeking recovery of the price of the bunkers. Although the purchasers accepted that payments for the bunkers were due, they were unable to ascertain which party to pay and therefore sought interpleader relief.

8.57 The High Court held that the objective of interpleader relief was to assist applicants who wanted to discharge their legal obligations but did not know to whom to discharge them, and sought to prevent a situation where the applicant discharges his obligation to one claimant only to be faced with a suit from the other. It was also emphasised that the power to grant interpleader relief was statutorily conferred and hence only available where the condition precedents laid down in the statute had been met.

8.58 Order 17 r 1 of the Rules of Court sets out the following conditions to be met before interpleader relief is available: (a) the applicant has to be under a liability for a debt, money, goods or chattels; (b) the applicant must have an expectation that he would be sued by at least two persons; and (c) there has to be adverse claims for the debt, money, goods or chattels from the persons whom the applicant expected would sue. Whilst it was not disputed that condition (a) was satisfied, the sellers contended that the remaining two conditions had not been made out. On the facts, the High Court found that both conditions had not been satisfied. With regard to condition (b), the court held that in order to show that the applicant had an expectation that he would be sued by at least two persons, the competing claims

must have a *prima facie* basis. This was an objective basis in law and fact, and could not be based on an applicant's subjective apprehension of competing claims. This condition was not satisfied in *Precious Shipping* as the competing claims apprehended by the purchasers were legally and factually unsustainable.

8.59 As for condition (c), the court explained that in order for a claim to be "adverse", it had to be "symmetrical" in that the competing claims must relate to the same subject matter, "mutually exclusive", and there had to be "actual disagreement" in that the applicant must face an actual dilemma as to how he should act. This condition was likewise not satisfied as there was neither symmetry nor mutual exclusivity on the facts. The bunker traders had no contractual right to be paid the price of the bunkers under the contract between the sellers and purchasers, and the extinction of the bunker traders' claims would not impact on the sellers' claims and *vice versa*. Therefore, interpleader relief was ultimately denied.

8.60 While this disposed of the applications for interpleader relief, two other points raised by the court in *Precious Shipping* are worth noting. First, the High Court declined to summarily determine the merits of the competing claims and order payment in favour of the sellers. In so doing, the court explained that the remit of its inquiry was limited to whether the conditions precedent had been satisfied and its power to summarily determine the merits (which is tightly circumscribed) only arises where these conditions have already been satisfied. Secondly, the High Court observed that a "light-touch" approach towards the grant of interpleader relief should be avoided, as a liberal approach was prone to open the floodgates and invite claimants who did not legitimately have a belief that they had a sustainable cause of action to participate in the interpleader summons to gauge the court's assessment of their claims. This would be improper and border on an abuse of the process.

Joinder

8.61 In 2015, the Court of Appeal considered two significant questions pertaining to joinder applications: (a) whether joinder applications made on conditional bases should be upheld; and (b) in the context of probate proceedings, whether and in what circumstances beneficiaries must be joined to an action before they are bound by the court's decision.

8.62 In *Attorney-General v Aljunied-Hougang-Punggol East Town Council* [2016] 1 SLR 915, the Court of Appeal held that a joinder application which was made on a conditional basis was untenable. In

this case, the Housing and Development Board ("HDB") had applied to be joined as a party to the proceedings in the event that the court found that (a) the Ministry of National Development ("MND") did not have the requisite standing and entitlement to the various reliefs it was seeking; and (b) HDB was the proper party to bring the action. However, if the Court of Appeal concluded that MND was not entitled to the reliefs sought, then that would be the end of the matter. Further, until HDB had been joined as a party, there would be no reason for the court to consider whether HDB was the proper party to bring the action. The Court of Appeal indicated at the start of the hearing that it was not prepared to entertain HDB's application on the conditional basis and it invited HDB to decide whether it wished to apply unconditionally to join as a party. HDB chose to do so.

8.63 In respect of O 15 r 6(2)(*b*)(i) of the Rules of Court, the Court of Appeal held that the applicant would have to show that his presence was necessary for the purpose of adjudication. Specifically, a plaintiff would only be added if it was necessary to establish the question at issue to be determined. In the present case, however, the Court of Appeal was not satisfied that HDB's presence was necessary to determine the question in dispute, which was whether MND was entitled to the reliefs sought.

8.64 In respect of O 15 r 6(2)(*b*)(ii) of the Rules of Court, the Court of Appeal explained that the applicant would have to establish that the question or issue between one of the parties and the proposed new party was linked, factually or otherwise, to the relief or remedy claimed in the cause or matter. This was subject to the overriding consideration that it must be just and convenient to order a joinder. While the lateness of the application would go towards the assessment of whether it was just and convenient to order a joinder, there was nothing to prevent the joinder of a party simply because the matter was at the stage of an appeal. The critical question was prejudice and this could not be automatically assumed merely from delay.

8.65 In this case, the claims by HDB and MND arose out of the same set of facts and the reliefs sought by HDB were substantially the same as those sought by MND. Further, only very limited changes would have to be made to the originating summons in order to reflect the joinder of HDB and no discovery would be needed. It would be a waste of time and expense to dismiss the joinder application and require HDB to initiate fresh proceedings giving rise to the same or similar issues. Accordingly, the Court of Appeal found that it was just and convenient for HDB to be joined in the proceedings and thus granted HDB's joinder application.

8.66 In *V Nithia v Buthmanaban s/o Vaithilingam* [2015] 5 SLR 1422, the Court of Appeal considered whether beneficiaries of an estate/trust must be joined as parties to an action to be bound by the court's decision. In this case, a beneficiary advanced a resulting trust claim against the co-administratrices of the estate. The co-administratrices took differing positions during the litigation. The Court of Appeal held that O 15 r 14 of the Rules of Court made it unnecessary to join the beneficiaries of the estate/trust as parties to any action against the estate/trust if the estate/trust was represented by personal representatives/trustees. It was only where the court considered that the personal representatives/trustees could not or did not represent the interests of the beneficiaries that it might join them as parties, or if they could not be found, appoint persons to represent their interests. The present case concerned an adversarial claim between a beneficiary and the estate, rather than a dispute between the parties as beneficiaries. Therefore, representation by one administrator, in a situation where both administrators were parties to the action, was sufficient for the purpose of protecting the interests of the non-party beneficiaries.

Judgments and orders

Enforcement

8.67 *Ang Tin Gee v Pang Teck Guan* [2015] 5 SLR 836 considered whether money held by a stakeholder pursuant to a court order is ring-fenced for the benefit of the judgment creditor. The plaintiff had obtained judgment in her favour, and a taking of accounts between her and the defendant was ordered. The defendant sold a property while the taking of accounts was taking place, and the proceeds from the sale were held by a law firm ("Stake Money"). As the plaintiff believed that the Stake Money was the defendant's only significant asset, she sought to obtain release of the Stake Money from the law firm. Her actions caused the defendant to file an application for a stay of execution pending the appeal against the various decisions relating to the taking of accounts and costs, and a stay of execution was ordered pending the appeals.

8.68 After the appeals were resolved, the plaintiff applied for the Stake Money to be released to her solicitors. The defendant objected to the payment out application on the ground that the Stake Money was not ring-fenced to pay his judgment debt to the plaintiff but formed part of his estate to be administered by the Official Assignee. This objection was prompted by the filing of a bankruptcy application against the defendant by his wife.

8.69 The High Court held that the Stake Money was ring-fenced in favour of the plaintiff. It reasoned that the character of the money

ordered to be paid to a stakeholder under such circumstances should generally have the same effect as a payment into court. Citing a line of English authorities, and also the Court of Appeal's decision in *Cheng Lip Kwong v Bangkok Bank Ltd* [1992] 1 SLR(R) 941, the court reiterated the principle that where money is paid into court, whether voluntarily or by order of court, the other party for whom the payment is made is considered a secured creditor to the extent of the sum paid into court. Although the present case involved a payment not made into court but to a stakeholder, the court viewed the difference as immaterial. Therefore the plaintiff was a secured creditor to the extent of the Stake Money and the court ordered the Stake Money to be paid out to the plaintiff's solicitors. Further, the defendant's counsel had admitted in the course of proceedings that the defendant's solicitors were holding the defendant's share of the net sale proceeds as *stakeholder* to secure the "fruits" of the litigation which the plaintiff was entitled to, and this admission further bolstered the strength of the plaintiff's application.

8.70 In *Chan Shwe Ching v Leong Lai Yee* [2015] 5 SLR 295, the High Court had to determine the issue of whether an interest of a joint tenant in land can be attached and taken in execution to satisfy a judgment debt under a writ of seizure and sale ("WSS"). The court held that the severance of a joint tenancy into undivided shares was not a prerequisite for a WSS to be issued against a joint tenant's interest in land. Although a joint tenant did not have an undivided share of the land for as long as the joint tenancy subsisted, the joint tenant had an interest in land which was identifiable and capable of being determined. When a joint tenant's interest in property was seized under a WSS, this had no bearing on another joint tenant's interest in that same property as the judgment creditor only took what the judgment debtor was entitled to, and nothing more. It is noteworthy also that the alternative of appointing a receiver over the property was observed by the court to be potentially unsatisfactory, and it must be borne in mind that it was precisely the lack of profit and rental which drove the plaintiff to commence action in the first place. The execution of a WSS hence presents an alternative mode of enforcement for judgment creditors seeking monetary relief where the appointment of a receiver does not bear fruit.

Examination of judgment debtor order

8.71 The issue of whether a judgment creditor may ask questions on the historical aspect of a judgment debtor's estate under O 48 r 1(1) of the Rules of Court was considered in *Pacific Harbor Advisors Pte Ltd v Tiny Tantono* [2015] SGHCR 3 ("*Pacific Harbor*"). In *Pacific Harbor*, the judgment debtor was the litigation representative of the estate of the deceased, who had passed away in 2009. Final judgment in two suits was

entered against the judgment debtor on 28 March 2014, and the judgment creditors obtained orders for the examination of judgment debtors. During the examination, the judgment creditors sought to ask questions relating to the "historical aspect" of the estate, namely, questions concerning the estate's property from 2009 (*ie*, the date the deceased had passed away) to date. The judgment creditors argued that such questions were permissible as long as they had a nexus to the estate's property. The judgment debtor, on the other hand, contended that any questions should be restricted to the *current* assets of the estate from the date of final judgment, *ie*, 28 March 2014. The assistant registrar agreed with the judgment debtor, and held that a judgment creditor was not permitted to ask questions concerning the historical aspect of the deceased's estate even if such questions had a nexus to the estate's property. He observed that O 48 r 1(1) provided that a judgment debtor may be "orally examined on whatever property the judgment debtor *has*" [emphasis added], and not property that it *had*.

8.72 The assistant registrar consulted cases from Hong Kong, Australia and England and concluded that to allow questions relating to the historical aspect of the estate merely because there was some nexus to the existing property of the estate was to descend on a slippery slope. This was because all assets and property previously held by the estate could be shown to have a link or nexus with the current assets and property – the previous assets or property would have to be sold or mortgaged to raise the capital or generate the income to purchase current assets and property. The touchstone was therefore not whether there was a nexus with the current property, but whether the questions allow the judgment creditors to obtain information on the estate's existing property as well as property that may become available.

Setting aside orders

8.73 In 2012, the Court of Appeal held in *Poh Huat Heng Corp Pte Ltd v Hafizul Islam Kofil Uddin* [2012] 3 SLR 1003 ("*Poh Huat Heng*") that a consent judgment or consent order was generally binding and could not be set aside unless exceptional reasons warranted so. This was because the consent judgment would form a basis for the doctrine of *res judicata* to operate. A consent judgment was defined as "a real agreement between the parties, which is to be contrasted with the scenario where a party merely does not object to a course of action" (following the distinction drawn in the English Court of Appeal decision of *Siebe Gorman & Co Ltd v Pneupac Ltd* [1982] 1 WLR 185): *Poh Huat Heng* at [18].

8.74 This position was reaffirmed in *Sentosa Building Construction Pte Ltd v DJ Builders & Contractors Pte Ltd* [2015] SGHCR 18, where the

assistant registrar followed the distinction adopted in *Poh Huat Heng* and inquired whether the "by consent" order was of the "no objection" type or the "binding contract" type, also referred to as an uncontested consent order and a contractual consent order respectively. He held that where the latter was concerned, the order had to fulfil the requirements of contractual formation giving rise to a valid and binding contract. Whether a "by consent" order is capable of constituting a binding contract is necessarily dependent on the facts. In so far as one seeks to draw a distinction between the two categories of "by consent" orders, this was held to be a factual inquiry.

8.75 The assistant registrar proceeded to examine the parties' correspondence in determining whether the "by consent" order was one which was uncontested as opposed to one which was negotiated by the parties and hence can be said to be in the nature of a "binding contract", and concluded that the order in question was an uncontested consent order. The approach adopted by the assistant registrar coheres with the current approach to contractual formation which is a contextual one – the Court of Appeal in *Gay Choon Ing v Loh Sze Ti Terence Peter* [2009] 2 SLR(R) 332 had held that the court should examine the whole course of negotiations between the parties and apply a less dogmatic or mechanistic approach to the application of the concepts of offer and acceptance. Interesting questions of law arise in the light of the contextual approach where, for example, acceptance by silence is concerned – where the court is faced with the question of whether there is acceptance by silence, the difference between acceptance by silence of a contractual consent order and the formation of an uncontested consent order may be difficult to discern. Questions concerning the interaction between technical rules of contractual formation and the formation of "by consent" orders may hence feature in future cases in this area.

Variation

8.76 *Ong Chai Hong v Chiang Shirley* [2015] 3 SLR 1088 involved the interpretation of a consent judgment. Pursuant to the consent judgment, the second defendant was to divide the balance of the moneys in a bank account between her and the first and third defendants equally within six months. Costs were to be reserved to the trial judge. However, more than six months after the date of the consent judgment, the parties were unable to agree on costs, which were headed for taxation proceedings.

8.77 The second defendant wanted the distribution to the first defendant to be made after the taxation and costs ordered against her. In a letter to the parties, the trial judge confirmed that payment to the first defendant would be made after costs were determined. The issue was

whether the trial judge had, by his letter, varied the consent judgment. The court held that the confirmation did not amount to a variation of the consent judgment for the following reasons:

(a) the confirmation to the parties was made with the view that it would be administrative in nature, not a direction pursuant to any particular provision in the judgment or he would have heard from both parties before doing so;

(b) it made practical sense that the distribution of a fixed sum to the first defendant came after costs were determined;

(c) time was not of the essence when the terms of the consent judgment were construed, since the first defendant's entitlement to the proceeds of distribution remained; and

(d) the substance of the consent judgment was unaffected.

Jurisdiction

8.78 The exercise of the court's inherent jurisdiction featured prominently in 2015. Notably, the exercise of such powers has been made clearer – the court will not invoke its inherent jurisdiction as a tool of convenience for the parties to circumvent existing statutory limitations to possible remedies or to reopen cases which have been decided with finality.

8.79 *The Royal Bank of Scotland NV v TT International Ltd* [2015] 5 SLR 1104 ("*RBS*") dealt with whether the Court of Appeal has the jurisdiction or power to set aside a decision which it had made previously. The case concerned an application made by nTan Corporate Advisory Pte Ltd ("nTan") to set aside a previous Court of Appeal decision made in the context of a scheme of arrangement ("Scheme") concerning TT International Ltd ("TT International"). The Court of Appeal had previously sanctioned the Scheme in which nTan was listed as an "excluded creditor". Under the Scheme, a value-added fee was to be paid to nTan by TT International after, *inter alia*, the court sanctioned the Scheme. The Scheme was eventually sanctioned by the Court of Appeal, and nTan became the scheme manager as well as entitled to the value-added fee. Importantly, the existence of the value-added fee was never made known to the court or to the creditors. Disputes arose subsequently concerning the payment of the value-added fee to nTan.

8.80 Following a series of correspondence between the parties and the court, nTan, TT International and the Scheme's management committee were directed to agree on the proper amount of professional fees to be paid to nTan, failing which nTan's fees were to be assessed by the High Court ("VAF Decision"). Dissatisfied with the turn of events,

nTan applied to set aside the VAF Decision. nTan contended, *inter alia*, that: (a) the Court of Appeal did not have jurisdiction to make the VAF Decision since the Court of Appeal's statutorily-conferred jurisdiction over the Scheme did not extend to the creditors of the company who were not parties to the Scheme and so could not make findings and orders that would directly affect an agreement between nTan and TT International; and (b) the Court of Appeal did not have the power to order the value-added fee to be taxed. A further issue raised by the Court of Appeal was whether nTan was estopped by the doctrine of *res judicata* from advancing the point on jurisdiction.

8.81 In the context of schemes of arrangement, the Court of Appeal held that the High Court had the authority to hear and determine only disputes as to the sanction of a scheme and that was the extent of its jurisdiction. However, this did not mean that the court could not inquire into matters relating to an agreement between the company and a non-creditor *if* those matters might bear on the sanctioning of the scheme; the court was not a rubber stamp in sanctioning schemes and must be satisfied that they are substantively reasonable ones. In this regard, the authority to hear disputes which might have a bearing on the sanctioning of a scheme neither diminished nor ceased after the court had sanctioned a scheme. If new facts emerged, casting doubt on the validity of the sanctioning of the scheme, the court had the authority to determine whether the new facts should have any bearing on the scheme. Moreover, the doctrine of *res judicata* did not bar the court from hearing the matter further as it did not work against the court but against litigants to bar them from raising issues or contentions. nTan thus failed in its application to set aside the VAF Decision for want of jurisdiction.

8.82 nTan also failed in its alternative contention that the Court of Appeal did not have the inherent power to order the value-added fee to be taxed. The Court of Appeal had requested the parties to submit on the issue of whether it had the inherent power to tax the value-added fee through its correspondence with them. As it then ordered the value-added fee to be assessed if the parties failed to agree on an appropriate sum, it must have addressed its mind to the issue of its inherent power and decided that it did have such powers.

8.83 An interesting question was posed by the Court of Appeal: can a decision made by a court without jurisdiction give rise to *res judicata*? While the court thought that this issue was immaterial, it made useful observations concerning the applicability of *res judicata* in the context of civil proceedings. *Koh Zhan Quan Tony v Public Prosecutor* [2006] 2 SLR(R) 830 ("*Tony Koh*"), a case relied on by nTan for the proposition that a party may never be estopped from challenging the court's jurisdiction if the court has not made a decision as to its jurisdiction,

was distinguished from the present case for three reasons. First, the court observed that *Tony Koh* was a *criminal* case which literally dealt with a matter of life and death, and given the gravity of the consequences and the public interest in ensuring that the State's exercise of its powers in criminal justice were beyond reproach, it would be wrong for the court to uphold a wrongful finding of fact on the grounds of finality alone. This was not a consideration in civil litigation, and so a court's readiness to admit additional evidence on appeal for a criminal case might not be constrained to the same degree as in a civil case. Secondly, *Tony Koh* was a case of "extended" cause of action or issue estoppel at best and can be likened more to the defence of abuse of process rather than issue estoppel (see *Goh Nellie v Goh Lian Teck* [2007] 1 SLR(R) 453 at [41]). This was a more flexible concept necessitating a broad, merits-based judgment which accounted for the public and private interests and all the facts of the case. Thirdly, the parties in civil litigation were often on par with each other while in criminal cases accused persons needed to be protected from oppression by the State. Therefore criminal cases might require a more flexible and less unyielding attitude and the doctrine of *res judicata* might not be as apt.

8.84 Eventually, the court concluded by observing that it was doubtful whether the extended version of cause of action or issue estoppel could never apply to civil cases to bar a litigant from raising a belated jurisdictional objection, but it did not see why such an attempt by a litigant should not be viewed as an abuse of process with the result that it be estopped from doing so.

8.85 *RBS* was referred to in *Lai Swee Lin Linda v Attorney-General* [2015] SGHC 268, in which the plaintiff wanted to file an originating summons directly to the Court of Appeal, thus raising the question of whether the Court of Appeal has inherent jurisdiction to hear an originating summons at first instance. It was held that there were no special circumstances that warranted the court to hear the summons at first instance.

8.86 The plaintiff was dissatisfied with the circumstances of the termination of her employment with the Land Office of the Ministry of Law, alleging that the previous decisions made by the Court of Appeal pertaining to this issue had been biased. She wished for the court to revisit these issues on the basis that they involved "fundamental issues" and "questions of law of public interest". These concerns were held to be caught by the doctrine of *res judicata* and therefore failed. The exception of *res judicata* was that there must be "special circumstances" that justified such a departure, none of which were shown in this application.

8.87 In *Lee Siew Ngug v Lee Brothers (Wee Kee) Pte Ltd* [2015] 3 SLR 1093, the court considered whether shareholders could invoke the

court's jurisdiction or power to circumvent s 194(4) of the Companies Act (Cap 50, 2006 Rev Ed) ("Companies Act"), which prohibits any entry in a company's register from being rectified if the entry was made 30 years before the date of the court application. The case came before the High Court as the defendants had appealed against the assistant registrar's dismissal of their application to strike out the plaintiff's action. All parties were minority shareholders of the same company except the second defendant, who was a majority shareholder. The defendants contended that the plaintiff's application to remove the second defendant from the company's register was prohibited by s 194(4) of the Companies Act as it had been registered as a member of the company for more than 30 years. In response to the striking out application, the plaintiffs sought to rely on the inherent power or jurisdiction of the courts and their contractual right as members of the company to enforce Art 6 of the memorandum of association (membership of the company being limited to natural persons under Art 6). The High Court allowed the defendants' appeal, ordering that the plaintiff's action be struck out.

8.88 The court expounded on the principles upon which it would exercise its inherent power. It stated that its inherent jurisdiction or power was not simply a tool of convenience to turn to whenever there was a problem to overcome, but one that was invoked sparingly when needed in order to effect justice or to prevent injustice between parties. In a situation where there was an existing rule, a party which urged the court to invoke its inherent jurisdiction or power to circumvent the rule had to show that it was in the interests of justice to disregard the rule.

8.89 In this case, no special or exceptional circumstances had been shown which would persuade a court to invoke its inherent powers and to ensure that justice was done. The more appropriate course of action for the plaintiff to take, instead of seeking to circumvent s 194(4) of the Companies Act, would be to file an oppression action or other action in court, prove its case, and seek the appropriate relief and redress. This did not mean, however, that s 194(4) extinguished the possibility of a court exercising its inherent power in all cases. An example of such exceptional circumstances would include instances such as where the parties had made an agreement supported by consideration for a rectification, and one party reneges on the agreement and refuses to proceed with the rectification after receiving the consideration. In such a scenario, the inherent power of the court might be invoked to do justice for the aggrieved party.

8.90 In *Naseer Ahmad Akhtar v Suresh Agarwal* [2015] 5 SLR 1032 ("*Naseer Ahmad*"), the High Court reaffirmed that it had the inherent jurisdiction to recall its decision and hear further arguments provided the order has not yet been perfected.

Offer to settle

8.91 Two cases involving offers to settle raised novel questions concerning the application of the statutory regime of offers to settle under O 22A of the Rules of Court. In both cases, the High Court and the Court of Appeal took the opportunity to reinforce the purpose of this regime, and shed light on issues ranging from what constitutes a genuine offer to the application of contractual principles to O 22A. In the process, previous decisions on offers to settle were clarified or departed from.

8.92 The High Court's decision in *Ram Das VNP v SIA Engineering Co Ltd* [2015] 3 SLR 267 arose in the context of a bifurcated trial in which the issue of liability was first dealt with. Two offers to settle were made, one each from the appellant and the respondent. The appellant's offer stated that the respondent was liable for 80% of the damages to be assessed, while the respondent's offer stated that it should only be liable for 50% of the damages to be assessed. Neither offer was accepted.

8.93 At the High Court, the respondent was found liable for 50% of the appellant's injuries. Consequently, the parties came to a settlement on the quantum of damages owed. However, they were unable to agree on the quantum of costs from the date of service of the respondent's offer to the date of the High Court's decision on liability. The respondent argued that it was entitled to indemnity costs under O 22A r 9(3) of the Rules of Court as the judgment obtained by the appellant was not more favourable than its settlement offer. The appellant disagreed on the basis that the offer to settle was invalid as it offered to settle at a percentage of an unliquidated sum, and was therefore not a serious and genuine offer. Hence, the legal question was whether the cost consequences under O 22A r 9(3) were attracted. The High Court answered the question affirmatively, and provided guidance in interpreting the settlement regime under O 22A of the Rules of Court.

8.94 The High Court emphasised the purpose of O 22A as set out in *The Endurance 1* [1998] 3 SLR(R) 970 at [44] where the Court of Appeal held that the rationale of the offer to settle regime was to "encourage the termination of litigation by agreement of the parties – more speedily and less expensively than by judgment of the court at the end of trial". This was echoed in *Singapore Airlines Ltd v Tan Shwu Leng* [2001] 3 SLR(R) 439. Therefore, in cases where the trials were bifurcated into issues of liability and damages, it would accord with the purpose of O 22A for parties to settle only the issue of liability with damages to be assessed later. This would have led to savings in time and costs, as the hearing on liability need not have proceeded. Therefore, the High Court held that the respondent's offer was capable of attracting the cost consequences found under O 22A r 9(3).

8.95 *Ong & Ong Pte Ltd v Fairview Developments Pte Ltd* [2015] 2 SLR 470 ("*Ong & Ong*") dealt with the applicability of general contractual principles in the context of settlement offers made under O 22A of the Rules of Court (see also "Contract" at paras 12.6–12.8). The suit comprised two claims by the plaintiff and a counterclaim by the defendant. The plaintiff had made an offer to settle to the defendant, offering to settle both claims as well as the counterclaim. Subsequently, the suit was bifurcated, resulting in the High Court issuing an interlocutory judgment allowing one of the plaintiff's claims and dismissing the defendant's counterclaim. Both appealed the High Court's decision in relation to the plaintiff's claims but there was no appeal against the dismissal of the defendant's counterclaim.

8.96 Before the parties filed their notices of appeal, the defendant asked if the plaintiff was amenable to not appealing the decision. The plaintiff replied by saying that its offer to settle remained open. The plaintiff's appeal was allowed by the Court of Appeal, resulting in the plaintiff succeeding entirely on both of its claims. Immediately after that decision, the defendant sent a notice of acceptance of the plaintiff's offer to settle. The plaintiff took the position that the offer to settle was no longer open for acceptance, and the defendant then sought a declaration from the Court of Appeal that the offer to settle was validly accepted.

8.97 A central question in the appeal was whether the plaintiff's offer to settle remained available for acceptance following the Court of Appeal's first decision. In particular, the Court of Appeal had to determine whether the phrase "may be accepted at any time before the court disposes of the matter in respect of which it is made" in O 22A r 3(5) of the Rules of Court should be interpreted to mean: (a) that so long as the court had disposed of any part of the matter in respect of which an offer to settle was made, the offer was no longer open for acceptance; or (b) that so long as there was an outstanding matter not disposed of which was within the scope of the offer to settle, the offer remained open for acceptance.

8.98 The Court of Appeal preferred the second interpretation. The court opined that when an offer to settle was made and had not been withdrawn or expired, the court should be slow to find that the offer had lapsed. This is consistent with the purpose of the offer to settle regime, which seeks to encourage the settlement of disputes which saves time and costs. The Court of Appeal reasoned that any unfairness to the offeror would be mitigated as it could withdraw the offer as *per* the procedure in O 22A of the Rules of Court or by the court refusing to give effect to the terms of the offer since it retained discretion to decide whether to enter judgment on those terms.

8.99 The Court of Appeal also considered the application of general contractual principles to the offer to settle regime under O 22A, and held that contractual principles governing offer and acceptance are not applicable. The rules in O 22A modified some of the most basic principles governing the formation of the contract, and gave birth to a *sui generis* arrangement to be interpreted on its own terms. In doing so, the Court of Appeal departed from the approach adopted by the High Court in *Chia Kim Huay v Saw Shu Mawa Min Min* [2012] 4 SLR 1096 (see (2012) 13 SAL Ann Rev 195 at 197–198, paras 12.8–12.15) and *S&E Tech Pte Ltd v Western Electric Pacific Pte Ltd* [2006] 2 SLR(R) 7, where it was held that the application of contractual principles should be the default position, unless the rules expressly stipulated for those principles to be displaced.

8.100 However, while the Court of Appeal in *Ong & Ong* held that general contractual principles relating to formation of contract are not germane when determining whether an offer to settle has been validly accepted, it considered that contractual principles are applicable to O 22A where the question is whether an accepted offer should be enforced. In exercising its discretion in deciding whether to enforce the terms of an offer to settle, the court will have regard to ordinary contractual principles, as well as principles of justice and fairness.

Pleadings

Amendment

8.101 In *Geocon Piling & Engineering Pte Ltd v Multistar Holdings Ltd* [2015] 3 SLR 1213, the High Court granted the plaintiff's application to amend its statement of claim after trial and after the parties had exchanged their written closing submissions, but before the parties presented their oral closing submissions. The High Court held that typically, a party would be allowed to amend its pleadings if the amendments enabled the real issues between the parties to be tried and would not cause any prejudice to the opposing party for which it could not be compensated by costs. The High Court endorsed the principles set out in *Chwee Kin Keong v Digilandmall.com Pte Ltd* [2004] 2 SLR(R) 594, noting that the lateness of the application was not determinative, and the overarching consideration was whether, in all the circumstances, the amendment would operate unfairly to the opposing party.

8.102 In this case, the amendments raised only issues of law, not issues of fact. The parties had already placed before the court all the evidence necessary to deal with the amended case. Critically, the plaintiff did not ask for an opportunity to adduce further evidence to support its

amended case, and the court was of the view that the defendant did not need to adduce any additional evidence to deal with the plaintiff's amended case. The amendments merely formalised what was already in play in the suit so that the submissions and decision could concentrate on the real dispute at hand. Accordingly, the court granted the amendment application. Further, to ensure that the amendments did not operate unfairly on the defendant, the court ordered the plaintiff to pay the defendant the costs of and incidental to its amendment application, as well as the costs occasioned by the amendments. The court also granted the defendant leave to consider and address the court on the extent to which it wished to reopen the evidential phase of the suit, and it secured the plaintiff's confirmation that there was no further need to amend the statement of claim.

8.103 The defendant's appeal against the High Court's decision was dismissed by the Court of Appeal in *Multistar Holdings Ltd v Geocon Piling & Engineering Pte Ltd* [2016] 2 SLR 1. However, the Court of Appeal clarified that the judge had erred in defining what constitutes a new "cause of action" within the meaning of O 20 r 5(5) of the Rules of Court as "relief or remedy", and not the "underlying facts" that support a claim. The Court of Appeal also observed that the judge had erred in treating the amendment as a routine application under O 20 r 5(1) of the Rules of Court when the correct provision to apply should have been O 20 r 5(2) read with O 20 r 5(5) of the Rules of Court. Order 20 r 5(2) to O 20 r 5(5) of the Rules of Court cut down the scope of the general discretion under O 20 r 5(1) of the Rules of Court in circumstances where limitation has set in.

Failure to plead

8.104 In *V Nithia v Buthmanaban s/o Vaithilingam* [2015] 5 SLR 1422, the Court of Appeal considered whether it was entitled to make a finding based on a claim which was not pleaded. The Court of Appeal explained that the general rule was that parties were bound by their pleadings and the court was precluded from deciding on a matter that the parties themselves had decided not to put into issue. There were exceptions to the general rule, namely, where no prejudice would be caused to the other party or where it would be clearly unjust for the court not to permit an unpleaded point to be raised. However, such cases were likely to be uncommon. The Court of Appeal also stated that if the court raised a new issue or a new cause of action on its own motion after hearing the evidence at trial, it should invite the parties to amend their pleadings and allow the affected party to re-examine the witnesses and/or call rebuttal evidence on the previously unexplored point. The court should also be mindful that such a step should not be taken if it would cause irreparable damage to the other party.

8.105 In the present case, the High Court had found that the plaintiff had a good claim in proprietary estoppel even though the claim for proprietary estoppel was not pleaded. The Court of Appeal held that whilst the words "proprietary estoppel" did not have to be specifically pleaded, the pleadings had to disclose the material facts which would support such a claim, so as to give the other party fair notice of the substance of the claim. However, the pleadings did not support a claim for proprietary estoppel, and irreparable damage was caused to the defendant by the judge's direction that the parties submit on the existence of proprietary estoppel. Accordingly, the Court of Appeal overturned the High Court's decision.

Further and better particulars

8.106 In *Prima Bulkship Pte Ltd v Lim Say Wan* [2015] SGHCR 10, the plaintiff companies alleged that the defendant directors had breached their director's duties. The plaintiffs argued that the further and better particulars requested by the directors should only be provided after discovery and interrogatories for three reasons: (a) the defendants were fiduciaries of the plaintiffs; (b) the plaintiffs' circumstances placed them in an inferior position of knowledge relative to the defendants; and (c) the plaintiffs had declared that they had already provided the best particulars they could. All three reasons were rejected by the court and the defendants' request for further and better particulars was allowed.

8.107 The court was not persuaded that an allegation of the existence of a fiduciary relationship would trigger, without more, the postponement of the provision of better particulars. Further, the court held that where a respondent claimed to have no knowledge of the particulars sought, and claimed to be unable to obtain that information pending discovery and interrogatories, the court had to assess whether the specific averments for which particulars were sought had a "substantial foundation". If they did not, the court should ordinarily order better particulars. The court also observed that it was strictly immaterial whether a respondent had asserted blankly that it was not able to provide better particulars, since the key issue was whether there was a substantial foundation for the respondent's averments.

Service

8.108 *Humpuss Sea Transport Pte Ltd v PT Humpuss Intermoda Transportasi TBK* [2015] 4 SLR 625 ("*Humpuss*") was a significant decision in which the High Court provided important guidance on the methods of service out of jurisdiction under O 11 of the Rules of Court and departed from a previous High Court decision in *Ong & Co Pte*

Ltd v Chow Y L Carl [1987] SLR(R) 281 ("*Ong & Co*"). In this case, the plaintiff sought to commence proceedings against two defendants which were both incorporated in Indonesia. Personal service on the defendants in Indonesia was effected through a private agent. The defendants argued that as Indonesia was not a country with which Singapore had a Civil Procedure Convention, service through a private agent was not an acceptable method of service. However, as the defendants failed to demonstrate that the method of service employed was contrary to Indonesian law, the High Court held that service on the defendants was valid.

8.109 The High Court clarified that O 11 rr 3 and 4 provided alternative and complementary methods of effecting service out of jurisdiction. There were four methods of service under O 11 rr 3 and 4 which were available irrespective of where the defendant resided: (a) personal service, provided it did not contravene the law of the foreign jurisdiction; (b) substituted service with leave of court, provided it did not contravene the law of the foreign jurisdiction; (c) service by a method specifically authorised by the law of the foreign jurisdiction for the service of foreign process; and (d) service through a Singapore consular authority. Depending on where the defendant resided, additional methods of service may also be available.

8.110 In *Ong & Co*, the High Court had held that the service of a writ was an exercise of judicial power and could not be extended to another State except with that State's consent so service of the notice of a writ could only be effected through the Government of that country or the Singapore consular authority (and in the case of Malaysia and Brunei, through the judicial authority in the area where the defendant is resident). In *Humpuss*, the High Court noted the amendments introduced in 1991 to the Rules of the Supreme Court 1970 (GN No S 274/1970) ("1970 Rules") had changed the form of writ from being issued as a command in the name of the President to one which was just a notification to the defendant, and it was only thereafter that the writ and not just notice of it would be served out of jurisdiction. It acknowledged the difference between the service of a writ, which is an expression of judicial power, versus a service of the *notice* of the writ, which is not. Further, the court held that personal service through private means overseas was still the default position even after the enactment of the 1970 Rules and service through official means was merely supplementary.

8.111 *Humpuss* further observed that in cases where service failed to bring notice of the claim to the defendant or was contrary to the law of the foreign jurisdiction, the irregularities in service were not curable. Conversely, in cases where service failed to comply with a procedural requirement provided for in the Rules of Court but successfully brought

notice of the claim to the defendant and was not contrary to the law of the foreign jurisdiction, the irregularity could be cured if it would be just for the court to do so. In deciding whether to cure the irregularity, the court would consider, *inter alia*: (a) the blameworthiness of the respective parties; (b) whether the plaintiff had made a good faith effort to comply with the rules; (c) whether the defendant would be prejudiced if the court's discretion were exercised in the plaintiff's favour; and (d) the reasons which caused the non-compliance. The appeal against the decision in *Humpuss* was dismissed by the Court of Appeal.

8.112 *The Ursus* [2015] SGHCR 7 highlighted the differences between service of a writ *in rem* and *in personam*. In this case, the plaintiff issued writs *in rem* against the defendants' vessels as a protective measure to preserve the plaintiff's right to arrest the vessels as security for foreign arbitration proceedings. These writs were not served on the defendants' vessels. The defendants entered appearance *gratis* and sought a dismissal, or in the alternative, a stay of the plaintiff's admiralty proceedings.

8.113 The court ordered a stay of the *in personam* aspects of the admiralty proceedings, but declined to stay or dismiss the *in rem* proceedings. The court held that it was not possible to dismiss or stay the *in rem* proceedings as the court's *in rem* jurisdiction had not yet been invoked. A writ *in rem* had to be served on the *res* against which the action was brought, except where the property was freight or the property had been sold by the Sheriff. While there was deemed service on the defendants by virtue of them having entered appearance *gratis*, deemed service on a defendant did not equate to deemed service on the *res*. Accordingly, the defendants' entry of appearance only invoked the *in personam* jurisdiction of the court, while the *in rem* contents of the action remained dormant.

Stay of proceedings

8.114 Several decisions pertaining to a stay of proceedings were rendered in 2015. Of significance is *PT Selecta Bestama v Sin Huat Huat Marine Transportation Pte Ltd* [2016] 1 SLR 729 ("*PT Selecta*"), which dealt with the validity of an exclusive jurisdiction clause in favour of the Batam courts which required the parties to negotiate before any action is commenced.

8.115 *PT Selecta* saw the defendant applying to set aside a default judgment and stay the Singapore proceedings in favour of the Batam courts. This was in the light of an exclusive jurisdiction clause which required the parties to negotiate before commencing any action in the Batam courts. The assistant registrar had held that because the parties

had failed to negotiate with each other, the precondition to the exclusive jurisdiction agreement had not been performed and so the parties' promise to submit to the exclusive jurisdiction of the Batam court was not yet enforceable. The defendant's appeal against the assistant registrar's decision was allowed by the High Court.

8.116 First, the High Court held that the effect of the parties' failure to negotiate was that the Singapore courts should *decline* to accept jurisdiction and not that the exclusive jurisdiction clause became ineffective. This was because it would be illogical for the parties who were in breach of the conditions precedent in a multi-tiered dispute resolution clause not to have recourse to the secondary dispute resolution mechanism under the exclusive jurisdiction clause, but to have recourse to a mode of dispute resolution which had *not* been contracted for. Additionally, it would go against principle for the plaintiff to circumvent the exclusive jurisdiction clause by relying on its own failure to negotiate.

8.117 Secondly, the High Court held that it was entirely possible for the defendant, who was challenging the validity of the contracts on the ground of misrepresentation, to rely on the exclusive jurisdiction clause in seeking to stay the Singapore proceedings. The courts would ordinarily give effect to exclusive jurisdiction clauses as parties should be held to their contractual bargains unless exceptional circumstances which amounted to strong cause can be shown. The High Court noted that a dispute relating to the validity of the underlying agreement was nonetheless a dispute arising under the exclusive jurisdiction clause, and there was no reason in law or principle why the exclusive jurisdiction clause should not be effected especially since the plaintiff's case was that the contracts were valid and the commencement of the Singapore proceedings was *ex facie* in breach of the exclusive jurisdiction clause.

8.118 *PT Selecta* is consistent with *HSBC Institutional Trust Services (Singapore) Ltd v Toshin Development Singapore Pte Ltd* [2012] 4 SLR 738 which commended the inclusion of negotiation clauses in commercial contracts as being in the public interest. The effect of the ruling is that parties who have agreed to negotiate before commencing legal action will have to do so; the Singapore court will not allow them to escape the consequence of their actions by rendering ineffective the exclusive jurisdiction clause.

8.119 In *Koh Kow Tee Michael v Lee Ewe Ming Edward* [2015] SGHC 60, three Lamborghini cars belonging to the plaintiff and the two defendants were involved in a chain collision along the North South Highway. The plaintiff commenced the action personally (as opposed to claiming through an insurer) to seek damages and the replacement cost

for his car amounting to $1.3m. The two defendants each sought indemnities from their insurers.

8.120 The second defendant's insurer, AIG Asia Pacific Insurance Pte Ltd ("AIG"), sought to stay the action under the court's inherent jurisdiction pursuant to O 92 r 4 of the Rules of Court. It claimed that the first defendant's insurer, Liberty Insurance Pte Ltd ("Liberty"), was liable to the plaintiff under a Market Agreement (Barometer of Liability) ("the Market Agreement"). Liberty disagreed that the Market Agreement applied and one of its reasons was that the plaintiff's claim was not made by an insurer. AIG then sought a ruling from the General Insurance Association of Singapore Panel of Adjudicators ("Panel") on whether Liberty was liable to pay under the Market Agreement, and asked for a stay of proceedings pending the release of the Panel's ruling.

8.121 The High Court dismissed the stay application. It reaffirmed the position that a stay would *rarely* be granted under the court's inherent jurisdiction and would only be granted *if the interests of justice warranted so*. The touchstone was one of need (citing *Wee Soon Kim Anthony v Law Society of Singapore* [2001] 2 SLR(R) 821). On the facts, AIG's stay application was dismissed as the High Court found that the Market Agreement was only binding as between AIG and Liberty, and the plaintiff could not derive any benefit from the Market Agreement. Thus, even if the Panel decided that Liberty was liable to pay the cost of the plaintiff's car under the Market Agreement, the plaintiff's claim would still have to proceed. There was therefore no reason to stay the court proceedings.

8.122 In *PT Sariwiguna Binasentosa v Sindo Damai Shipping Pte Ltd* [2015] SGHCR 20 ("*PT Sariwiguna*"), the court was faced with the question whether a stay of execution pending an appeal should be granted if a judgment debtor was willing to pay the judgment sum plus interest into court pending the resolution of the appeal. The application in this case was brought by the first defendant under O 45 r 11 of the Rules of Court, which allows a party to apply to the court for a stay of execution of the court order in the light of matters which occur after the grant of the court order.

8.123 In coming to a decision, the assistant registrar assessed a number of factors, namely, the merits of the appeal, the risk of dissipation by the judgment creditor and the judgment debtor, the risk of a winding-up petition made against the judgment debtor and the balance of prejudice between the parties. However, it was observed that the key touchstone was that a stay would only be granted if a successful appeal would be rendered nugatory in the circumstances. In this regard, he adopted the principles stated in *Strandore Invest A/S v Soh Kim Wat* [2010] SGHC 174 at [7]: (a) first, the court would not deprive a

successful party of the fruits of litigation and prevent him from obtaining funds to which he was *prima facie* entitled pending the appeal; (b) secondly, the court should see that the appeal would not be rendered nugatory; and (c) thirdly, special circumstances must be shown before a stay would be granted.

8.124 The assistant registrar held that the first defendant's offer to pay the judgment sum plus interest into court appeared to give weight to the first principle as it would ensure that the plaintiff would not be deprived of the fruits of its litigation in due course. However, this by itself was not a factor justifying the grant of a stay of execution, for it would then be possible for judgment debtors to justify obtaining a stay pending the appeal by paying the judgment sum into court rather than to the judgment creditor. This would still result in a locking up of funds and deprive the plaintiff of the fruits of litigation. The assistant registrar thus dismissed the appeal.

8.125 A similar issue arose in *Naseer Ahmad* (above, para 8.90) where the defendants applied orally for a stay of execution of court orders: *Naseer Ahmad* at [95]. The case involved a company with three members – the plaintiff who was the majority shareholder and the two defendants. Disagreements arose between the plaintiff and the first defendant, who was the managing director, and the plaintiff tried to convene a meeting to pass certain resolutions, one of which was to remove the first defendant from his directorship. The defendants refused to attend, and the plaintiff applied for a court order that the meeting be convened and for the court's direction that the presence of one member would be sufficient to form a quorum. The defendants resisted the application, but were unsuccessful. Their counsel thus applied orally for a stay of execution of the court order pending an appeal. The High Court reiterated that a successful litigant should not be deprived of the fruits of litigation, and a stay would be granted only if special circumstances could be shown. In the event, the High Court found that there was no basis for the defendants' oral application for the grant of a stay.

8.126 Five days later, the defendants filed a formal application to seek a stay of execution of the court order. Of significance is the fact that the High Court invoked its inherent jurisdiction to recall its decision and hear further arguments as long as the order has not yet been perfected. It recognised, however, that this power was to be exercised judicially and not capriciously. On the facts, the High Court exercised its power to review its previous decision not to grant the stay of execution as the defendants' counsel might not have had sufficient time to prepare for the matter and draw the court's attention to all the relevant factors to be considered when the oral application was made. Upon consideration of all the relevant factors, the court declined to grant a stay as the plaintiff

gave an undertaking not to draw down a sum of money held by the company (save as to pay for the ordinary business expenses of the company with the consent of the first defendant) pending the appeal, and this meant that there was no risk that the defendants' appeal would be rendered nugatory.

8.127 *Naseer Ahmad* also recognised the concurrent jurisdiction of the High Court and Court of Appeal to stay proceedings pending appeals. This was borne out of the defendants' indicated wish after the High Court had dismissed their stay application to file a separate application to the Court of Appeal for a stay of execution and consequent application for a partial stay of the High Court order until their stay application was heard by the Court of Appeal. As there was a possibility that in the interim the plaintiff would convene a meeting where the first defendant would be removed from his directorship and succeeded by another person, hence rendering the substantive appeal nugatory, the High Court granted a partial stay of its order until the defendants' stay application was heard by the Court of Appeal: *Naseer Ahmad* at [110].

8.128 *PT Sariwiguna* and *Naseer Ahmad* serve as reminders that the court's power to stay proceedings pending appeals is not easily invoked. The critical consideration remains whether not granting a stay will render the appeals nugatory. In the absence of this, the court will be exceedingly slow to deprive a successful party of the fruits of the litigation which may be deployed to embark on legitimate economic activity.

Striking out

8.129 In 2015, there were two judgments issued on striking out. It is now clear that advancing the law in the presence of facts which cannot sustain the action is insufficient reason for allowing an action to proceed to trial, and that contumelious conduct can lead to an action being struck out.

8.130 In *AYW v AYX* [2016] 1 SLR 1183 ("*AYW*"), the High Court recognised that novel questions of law generally should not be resolved at the striking out stage and should generally be litigated in full at trial, even if the novel questions were pure questions of law. In so doing, it disagreed with the assistant registrar below, who had declined to strike out the action as "there were novel questions of law involved". The court held that the mere assertion of novel legal issues would not automatically preclude the striking out of an action, particularly if the facts pleaded did not justify the legal remedy prayed for on any reasonable resolution of the novel questions of law, and in such a case,

the legal interest in pushing the frontiers of the law was not reason enough to allow the action to proceed to trial.

8.131 In this case, a 15-year-old student sued her former secondary school for negligence in failing to intervene effectively to stop bullying by her peers. The court struck out the plaintiff's entire claim on the ground that it was legally and factually unsustainable. The court held that even if the plaintiff were able to prove all the facts pleaded in her statement of claim, she still would not be able to demonstrate that the school owed her a duty of care in the pleaded factual matrix. The court further held that the plaintiff's claim for damages would have been struck out in any case because her assertion of causation was unsustainable and there was no factual basis for an award of aggravated damages.

8.132 It is important to view *AYW* in its context; the action was struck out not only because the case advanced was legally unsustainable, but also because it was also *factually* unsustainable. Indeed, it is the latter that was decisive in *AYW*. It must be borne in mind, however, that the court did not embark on a minute examination of the evidence and was cognisant of the standard by which striking out proceedings were to be assessed. The comments of the High Court are worth setting out (*AYW* at [41]):

> Thus, while the plaintiff's claim in the present case undoubtedly raises a novel situation in the tort of negligence (*ie*, the existence and scope of a duty of care to safeguard students from bullying) which has never been considered before by the Singapore courts, serious consideration must still be given *to whether the facts (within the reasonable bounds of the pleading) may even remotely form the basis of an actionable tort*. [emphasis added]

8.133 *Likpin International Ltd v Swiber Holdings Ltd* [2015] 5 SLR 962 concerned the defendant's appeal against the assistant registrar's refusal to strike out the action. The plaintiff had filed its statement of claim after the defendant filed its striking out application and after the assistant registrar had dismissed the defendant's striking out application. At the Registrar's Appeal, the plaintiff argued that the court should not take the statement of claim into consideration. The plaintiff's argument was rejected by the High Court as being "plainly wrong", as taken to its logical conclusion, the effect of the plaintiff's submission was that at the hearing of a Registrar's Appeal, the court was only entitled to consider matters which had been placed before the assistant registrar. The court also observed that since it was free to allow the admission of fresh evidence at an appeal hearing, it would be odd if the court were unable to take cognisance of pleadings filed after the hearing before the assistant registrar. (This decision is currently on appeal.)

8.134 In *Ramindo Sukses Perkasa Pte Ltd v Sim Kwang Oo* [2015] 3 SLR 403, the court struck out the claim of a plaintiff who had wilfully and contumaciously breached interlocutory court orders without providing any good explanation or justifiable excuse for such breaches. The plaintiff had further sought to mislead the court through evasive and mendacious statements in its affidavits. The High Court held that committal proceedings, a stay of proceedings and striking out were all methods of enforcing court orders and it was up to the applicant to decide on an efficacious method of enforcement. Where there was a total disregard of the court's orders such that it could properly be viewed as contumelious conduct, this would warrant a striking out order regardless of whether a fair trial was possible and without having to make an unless order. There was a public interest in upholding the authority of the court and the court had the discretion to strike out when it was in the public interest to do so. (This decision is currently on appeal.)

Summary judgment

8.135 In *Wee Cheng Swee Henry v Jo Baby Kartika Polim* [2015] 4 SLR 250, the High Court took the opportunity to reaffirm the summary judgment process. First, the plaintiff has to show a *prima facie* case for summary judgment. If he fails, his application should be dismissed with the usual adverse costs consequence. But if the plaintiff is able to cross the *prima facie* threshold, the defendant then comes under a tactical burden under O 14 r 3 of the Rules of Court to raise triable issues.

8.136 That the defendant will not be given leave to defend based on mere assertions alone in an application for summary judgment is trite; the court has to be convinced that there is a reasonable probability that the defendant has a real or *bona fide* defence in relation to the issues (*Goh Chok Tong v Chee Soon Juan* [2003] 3 SLR(R) 32 at [25]). Alternatively, the defendant can attempt to show that there ought to be a trial for some other reason, even though there is no reasonable probability of a real or *bona fide* defence in relation to the issues in dispute which ought to be tried. Such a defendant bears both the legal and evidential burden of proof – the court will enter judgment against the defendant if the plaintiff can show that there is no reasonable probability that the defendant has a real or *bona fide* defence in relation to the issues in dispute which ought to be tried and that there is no other reason why there should be a trial.

8.137 *TMT Asia Ltd v BHP Billiton Marketing AG (Singapore Branch)* [2015] 2 SLR 540 dealt with the importance of public interest in a summary judgment application. The plaintiff had appealed against the

assistant registrar's decision, which held that the question of whether forward freight agreements were considered "future contract[s]" for the purpose of s 208 of the Securities and Futures Act (Cap 289, 2006 Rev Ed) ("the SFA") was suitable for summary determination under O 14 r 12 of the Rules of Court. Order 14 r 12 allows for questions of law or construction of documents to be determined if: (a) the question was suitable for determination without a full trial of the action; and (b) such determination would fully determine the entire cause or matter or any claim or issue therein.

8.138 The High Court referred to *ANB v ANF* [2011] 2 SLR 1, which noted that the court retained the discretion to decide whether it was appropriate to proceed with summary determination even if the requirements set out in O 14 r 12 had been met as the overriding consideration was whether summary judgment would lead to a saving of costs and time. On the facts, the court deemed the questions referred to it as unsuitable for summary determination. This was because the questions concerned whether forward freight agreements traded on multilateral trading facilities were future contracts traded on futures markets. Such questions had significant industry implications and were matters of sufficient public importance. In addition, a number of factual findings regarding industry practice needed to be made before these questions could be answered. Hence, these questions could not be summarily determined and should proceed to trial.

8.139 In *Sinwa SS (HK) Co Ltd v Nordic International Ltd* [2015] 2 SLR 54, the Court of Appeal held the High Court could make "no order" on a summary judgment application. Order 14 r 3 of the Rules of Court was not exhaustive of the possible outcomes which could arise out of a summary judgment application. While O 14 r 3(1) stated that the court could grant summary judgment where the right conditions were fulfilled, it neither dictated the possible outcomes of a summary judgment application in a ternary manner, nor precluded the possibility that the court hearing a summary judgment application would make no order on the application. The Court of Appeal further observed that while it was infrequent that an order of "no order" was made on a summary judgment application, it was deemed appropriate on several occasions where a stay of proceedings pending arbitration was granted.