8. CIVIL PROCEDURE

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Amendment of pleadings

Amendments during trial

8.1 While amendments to pleadings may be allowed at any stage, the court will generally be more reluctant to allow such amendments once trial has commenced. In *Parakou Shipping Pte Ltd v Liu Cheng Chan*,[1] the plaintiff orally applied to amend its statement of claim to include a new cause of action against the first to fourth defendants during trial. The High Court disallowed the plaintiff's amendments for three main reasons. Firstly, if the plaintiff's amendments were allowed, the first to fourth defendants would seek a vacation of the remaining trial dates to prepare to meet the proposed claims, which were based on facts known to the plaintiff from the very beginning. Secondly, allowing the plaintiff's proposed amendments would be giving the plaintiff a second bite of the cherry, given that the plaintiff's original case had been considerably weakened in the course of cross-examination. Thirdly, allowing the amendments would affect the management of the courts' resources and scheduling due to the need to vacate the rest of trial. These, coupled with the absence of a good explanation for the plaintiff's failure to seek the amendments earlier, led the court to hold that the surprise occasioned by the proposed amendments caused prejudice, which was not compensable in costs.

Limitation periods

8.2 In two recent decisions, the Court of Appeal dealt with amendments to pleadings after the relevant limitation period had expired.

1 [2016] SGHC 48.

8.3 In *Multistar Holdings Ltd v Geocon Piling & Engineering Pte Ltd*,[2] the respondent applied to amend its pleadings after trial and after written closing submissions had been tendered by both parties. The appellant argued that the amendment introduced a new cause of action which was time-barred. In its decision, the Court of Appeal clarified that "cause of action" simply means the essential factual material that supports a claim, rather than (as the High Court below had found) the relief or remedy sought. While the respondent had sought different reliefs in its proposed amendments, no additional factual material was required to advance the alternative reliefs. The factual material the respondent relied on in its proposed amendments had been pleaded sufficiently in an annexure to the respondent's original statement of claim. Thus, the court allowed the proposed amendments on the basis that they did not introduce any new causes of action.

8.4 The Court of Appeal also observed that O 20 r 5(1) of the Rules of Court[3] ("RoC") do not give the court an unfettered discretion; instead, O 20 rr 5(2)–5(5) are meant to cut down the scope of the court's general discretion under O 20 r 5(1), where limitation has set in. It would have been incongruous for the draftsman to prescribe parameters under O 20 rr 5(2)–5(5), within which the court may allow an amendment notwithstanding the expiry of the limitation period, only to leave the court with a discretion-at-large to allow amendments under O 20 r 5(1) even if they fail to meet the requirements prescribed. The Court of Appeal, thus, found that the High Court had erred in dealing with the respondent's amendment application without reference to O 20 r 5(5).

8.5 In *Management Corporation Strata Title Plan No 3322 v Mer Vue Developments Pte Ltd*,[4] the appellant, a management corporation, sought leave to amend its further and better particulars to represent an additional 113 subsidiary proprietors after the relevant limitation period had expired. The Court of Appeal held that the power to grant an amendment under O 20 rr 5(2)–5(5) is subject to O 15 r 6, which sets out the broad principle on which the court will allow the addition of a new party or order that a named party cease to be a party. The court found that the plaintiff's proposed amendment amounted, in substance, to joining 113 new parties to the proceedings and that the plaintiff's application was accordingly both a joinder application as well as an amendment application. The plaintiff's proposed amendment, thus, engaged both O 15 r 6 and O 20 r 5.

2 [2016] 2 SLR 1.
3 Cap 322, R 5, 2014 Rev Ed.
4 [2016] 4 SLR 351.

8.6 In respect of O 20 r 5, the Court of Appeal found that the court below had erred in immediately concluding that O 20 r 5(1) could have no application once it determined that the relevant limitation period had expired. The court clarified that not all amendments brought after the relevant limitation period had expired would prejudice the defendant's limitation defence. In determining whether the defendant's limitation defence would be prejudiced by such an amendment, courts should have regard not only to the form, but also to the practical effect of the amendment, and a key consideration was whether the amendment effectively allowed the plaintiff to prosecute a claim which would otherwise have been time-barred if it were brought under a new writ. If the amendment would not be prejudicial to the other party's limitation defence, the court would consider whether it would be just to allow the amendment under O 20 r 5(1). On the other hand, if the amendment would prejudice the other party's limitation defence, the court would only allow the amendment under O 20 rr 5(2)–5(5).

8.7 In this case, the court found that the appellant's proposed amendment would clearly prejudice the respondent's limitation defence because allowing the proposed amendment would have effectively enabled the 113 subsidiary proprietors to prosecute their claims for breach of contract even though these claims would otherwise have been time-barred, and the claim for damages would increase substantially if the proposed amendment were allowed. The Court of Appeal, ultimately, agreed with the High Court that the proposed amendment should not be allowed.

Appeals

8.8 Section 34(2)(*b*) of the Supreme Court of Judicature Act[5] ("SCJA") states that leave is required "where the only issue in the appeal relates to costs or fees for hearing dates". In *Clearlab SG Pte Ltd v Ma Zhi*,[6] the Court of Appeal clarified that under s 34(2)(*b*) of the SCJA, an appellant who commences appeals separately against the substantive merits of a High Court decision, and then against the costs order that is subsequently made in the same matter, requires leave to file an appeal against the costs order.

8.9 The court also commented *obiter* that as a practical matter, an application for leave to appeal the question of costs made on the basis that the appeals on costs and on the substantive merits will then be consolidated will likely be granted, because there will be no real issue of

5 Cap 322, 2007 Rev Ed.
6 [2016] 3 SLR 1264.

wasting scarce judicial resources. In the light of this decision, a party who wishes to commence appeals against a High Court decision both on the substantive merits and on costs will be well-advised to bring its leave application on the basis that both appeals will be consolidated. As the appellant in this case did not do so and had also filed its leave application with undue delay, its leave application was dismissed.

8.10 In the first written decision on when an appellate court should interfere with a court of first instance's exercise of discretion with regard to rr 512 and 590(3) of the Family Justice Rules 2014[7] ("FJR"), the High Court in *TDA v TCZ*[8] held that the standard for overturning a judge's exercise of discretion not to order conversion to a writ action is a high one, notwithstanding the fact that the High Court and the Court of Appeal decide such appeals by way of rehearing. In so holding, the High Court sought guidance from decisions concerning O 28 r 8 of the RoC but added that a court hearing proceedings involving the Mental Capacity Act[9] ("MCA") plays a protective role and should not shy away from taking control of MCA proceedings. In view of the court's expanded role in directing MCA proceedings, it was held that a judge hearing an MCA matter should be accorded a greater degree of discretion than a judge hearing an ordinary civil matter in which the parties are, by and large, the masters of the litigation.

8.11 *The Xin Chang Shu*[10] concerned the interpretation of para (*e*) of the Fifth Schedule to the SCJA, which provides that leave to appeal is required in relation to orders made in any "interlocutory application" unless specifically exempted in sub-paras (i)–(x). The High Court found that this paragraph is a "catch-all" provision and summarised the applicable principles as follows:

> (a) An "interlocutory application" is one which relates to a matter arising in the course of the proceedings and which does not concern the eventual outcome of those proceedings.
>
> (b) An "interlocutory order", for the purposes of the Fifth Schedule, is one which does not finally dispose of the substantive rights of the parties.
>
> (c) In determining whether an order is an interlocutory order, the test to be applied is whether the judgment or order, as made, finally disposes of the rights of the parties.

7 S 813/2014.
8 [2016] 3 SLR 329.
9 Cap 177A, 2010 Rev Ed.
10 [2016] 3 SLR 1195.

(d) In applying this test, the focus is on the cause in the pending proceedings and not the specific purpose of the application.

8.12 In this case, the High Court found that an order that the plaintiff pay the defendant damages to be assessed for the wrongful arrest of a vessel is an interlocutory order for the purposes of para (*e*) of the Fifth Schedule to the SCJA. The court was persuaded by the analysis of the Court of Appeal in *Wellmix Organics (International) Pte Ltd v Lau Yu Man*[11] ("*Wellmix Organics*"). In *Wellmix Organics*, the court had held that an interlocutory judgment with damages to be assessed is an interlocutory and not a final order because damages were really what the plaintiff was seeking, and determining liability was a necessary step towards deciding whether damages were payable, and if so, what the appropriate amount was. The court found that the order that the plaintiff pay the defendant damages to be assessed for the wrongful arrest in the present case was similarly an interlocutory order for which leave to appeal was required.

8.13 The court then considered whether the plaintiff should be granted an extension of time to apply for such leave. Considering all the circumstances of the case, the court rejected the plaintiff's application for an extension of time because there had been a substantial and inexcusable delay on the plaintiff's part in bringing the application and the plaintiff's chances of success on appeal were low.

Anton Piller orders

8.14 In *Peh Yeng Yok v Tembusu Systems Pte Ltd*,[12] the defendants applied to set aside an Anton Piller order that the plaintiff had obtained on an *ex parte* basis. The High Court held that an Anton Piller order is a draconian measure and will only be granted if necessary in the interests of justice. A plaintiff applying for such an order has to show that:[13]

(a) there is an extremely strong *prima facie* case;

(b) the damage that would be suffered if a search order was not granted is very serious;

(c) there is a real possibility that the defendant(s) would destroy relevant documents; and

(d) the effect of the [Anton Piller] order would not be out of proportion to the legitimate object of the order.

11 [2006] 2 SLR(R) 525.
12 [2016] 2 SLR 781.
13 *Peh Yeng Yok v Tembusu Systems Pte Ltd* [2016] 2 SLR 781 at [14].

The court set aside the Anton Piller order because:

(a) The plaintiff had failed to meet the threshold of an extremely strong *prima facie* case.

(b) There was no real possibility that the defendants would destroy evidence.

(c) The effect of the Anton Piller order was out of proportion to the legitimate object of the order.

8.15 In considering whether there was a real possibility that the defendants would destroy evidence, the court found that surreptitious behaviour alone did not compel the conclusion that a defendant would destroy evidence in contempt of court to frustrate a claim brought by the plaintiff. The court clarified that it was not sufficient for an applicant to allege nefarious conduct or that the defendant was untrustworthy; the question was whether a defendant's conduct or untrustworthy nature showed a propensity to destroy relevant evidence. In this regard, the court drew an analogy with *Bouvier, Yves Charles Edgar v Accent Delight International Ltd*,[14] in which the Court of Appeal had found in the context of Mareva injunctions that an allegation of dishonesty is no substitute for examining whether there is in fact a real risk of dissipation of assets, and had remarked that it is incumbent on the court to examine the precise nature of the dishonesty and the strength of the supporting evidence. This decision clarifies that the principles to be applied in deciding whether a defendant has the propensity to destroy evidence in the context of Anton Piller orders are consistent with those in respect of whether there is a real risk of dissipation of assets in the context of Mareva injunctions.

Costs

Party-and-party costs

8.16 In *Airtrust (Hong Kong) Ltd v PH Hydraulics & Engineering Pte Ltd*,[15] the High Court summarised the legal principles on when the court will award costs on an indemnity basis. The court held that an order for indemnity costs is the exception rather than the norm and required justification. The court also held that there are four non-exhaustive categories of conduct by a party which may provide good reason for an order of indemnity costs to be made:[16]

14 [2015] 5 SLR 558.

15 [2016] 5 SLR 103.

16 *Airtrust (Hong Kong) Ltd v PH Hydraulics & Engineering Pte Ltd* [2016] 5 SLR 103 at [23].

(a) where the action is brought in bad faith, as a means of oppression or for other improper purposes;

(b) where the action is speculative, hypothetical or clearly without basis;

(c) where a party's conduct in the course of proceedings is dishonest, abusive or improper; and

(d) where the action amounts to wasteful or duplicative litigation or is otherwise an abuse of process.

The court also recognised that these categories are neither closed nor necessarily distinct analytically.

8.17 The court made three further observations:

(a) whether, and if so, to what extent, a party's conduct causing prejudice to the other party is a relevant consideration;

(b) it is important for the court to bear in mind the context and nature of the dispute in ascertaining whether the case is of such an exceptional nature that it is appropriate to depart from the standard basis of costs; and

(c) there is in general a penal element to the ordering of indemnity costs as a stigma will attach to the making of such an order, and while indemnity costs may be ordered despite the absence of unreasonable conduct where there is some compelling and exceptional reason for indemnity costs, such cases are rare.

In this case, the court found that the defendant did not display such a degree of unreasonable or improper conduct as to warrant a departure from the usual costs basis. Specifically, the court was not satisfied that the defendant had sought to deliberately suppress evidence, witnesses or key facts. In fact, the defendant's failure to provide such evidence ultimately undermined its own case and led the court to draw adverse inferences against it. Little or no prejudice was caused to the plaintiff by the defendant's conduct. The court, thus, declined to make an order for indemnity costs.

8.18 In *Likpin International Ltd v Swiber Holdings Ltd*[17] ("*Likpin*"), the Court of Appeal cautioned that counsel who submit excessive and indefensible costs schedules that reflect disregard for the court's guidance may find themselves open to sanctions, including being made to bear the costs of any argument on costs personally. The court

17 [2016] 4 SLR 1079.

explained that while the costs guidelines in Appendix G of the Supreme Court Practice Directions (1 January 2013 release) serve only as a general guide and the precise amount to be awarded remains at the court's discretion, the costs guidelines are, nonetheless, there to guide the court in making costs awards and, therefore, to guide counsel so that they may prepare costs schedules that are genuine estimates of their party-and-party costs and defensible at the outset without regard to the outcome of the appeal. This requires counsel to, *inter alia*, fairly assess their client's case, the legal and factual complexity of the live issues, and the nature and complexity of the arguments that have to be canvassed and/or responded to.

8.19 In this case, the entire substantive appeal had been a relatively simple matter and had been disposed of within an hour. The court was of the view that even S$45,000 for costs would have been generous in the circumstances. However, in their respective costs schedules, both the appellant and the respondents had submitted claims for costs exceeding this figure. The court held that the parties' costs submissions should be taken into account and assigned the appropriate weight as part of the multi-factorial analysis undergirding the exercise of the court's discretion in assessing and awarding costs. This would be subject to the court's overriding duty to ensure that any costs order was not unduly prejudicial to the paying party. Ultimately, considering that the appellant's own claim for costs would have been on the high side (at S$60,000) had it prevailed, the court fixed the costs payable by the appellant to the respondents at S$50,000.

8.20 In *Lim Mey Lee Susan v Singapore Medical Council*,[18] the appellant doctor brought an appeal against a High Court decision on the taxation of costs payable by her to the respondent, the Singapore Medical Council ("SMC"). The issue on appeal concerned the reasonableness of the second legal assessor's fees to the second disciplinary committee that had been appointed by SMC for the disciplinary inquiry of the appellant. The court held that the legal assessor's fees were reasonable given, *inter alia*: the legal assessor's seniority; the complexity of the matter; and the fact that the appellant was liable for the costs associated with the recusal of the first disciplinary committee.

8.21 The court expressed some reservations about the fact that work appeared to have been done before the second disciplinary committee was formally constituted. However, the court found that the amount of such work was modest and would have been done in any event. Nevertheless, the court stressed that it was incumbent on SMC to ensure

18 [2016] 2 SLR 933.

in the future that a legal assessor's work would commence only after the formal constitution of the disciplinary committee, save for any preliminary work which might be necessitated by the special facts of a case. The court also found that it was permissible for SMC to state the second legal assessor's fees as a disbursement item without elaboration, though reasonable particulars should be furnished upon request by the paying party. In this regard, the court found that SMC's solicitors had provided such reasonable particulars by way of a letter stating the legal assessor's hourly rate and reproducing the particulars provided in the legal assessor's invoice.

8.22 *Ong Chai Hong v Chiang Shirley*[19] concerned the appropriate costs orders to be made in respect of disputes amongst the siblings of a wealthy family over the estate of their late father. The High Court found that the plaintiff as sole executrix had acted reasonably in the proceedings and had not incurred unnecessary costs for the estate or caused unnecessary costs to be incurred by the other parties in the conduct of the proceedings. The court also held that the estate, through the plaintiff as executrix, had acted reasonably and that the defendants should, therefore, be made to bear the estate's costs.

8.23 The court also considered the applicable principles for making an adverse costs order against a litigant in person. The court held that while it is every layperson's right to represent himself without the aid of counsel, litigants in person are still subject to the same rules and procedures of the court. While the courts are more indulgent of the mistakes of a litigant in person, this does not mean that a litigant in person can act without regard to these rules and procedures. In that case, the first defendant, who was a litigant in person, had conducted her case unreasonably and without due regard to the rules and procedures of court, thereby causing the other parties in the litigation to incur unnecessary costs. In particular, the first defendant had used her status as a litigant in person to gain an unfair advantage by conducting a lengthy cross-examination on issues derived from a withdrawn application. Her conduct unnecessarily protracted the proceedings and wasted valuable court time. She had also been a difficult witness. The court ordered that the first defendant bear 90% of the plaintiff's costs and 70% of the second to fourth defendants' costs.

8.24 In *Seng You Morris v International Bank of Qatar*,[20] the applicant filed an application for review of an assistant registrar's ("asst registrar's") taxation order. The applicant contended that he was entitled to Section 1 costs in the quantum of the security for costs that he had previously

19 [2016] 3 SLR 1006.
20 [2016] SGHC 22.

obtained. The High Court disagreed. In dismissing the application, the court held that the quantum of security for costs was only a reasonable estimate of expected costs made at the time of the order. It could serve as a reference, but was not conclusive. Should parties, subsequently, discontinue the proceedings, the court was entitled and indeed ought to carry out a review to determine the appropriate costs order, having regard to all the relevant circumstances. In that case, the court found that there was no reason to disturb the taxation order made by the asst registrar that taxed costs should be less than the security for costs.

Solicitor-and-client costs

8.25 *Pang Giap Onn v Harmesh Singh s/o Ram Singh*[21] concerned the taxation of solicitor-and-client costs. The High Court held that the indemnity basis of the taxation of solicitor-and-client costs do not mean that a taxing registrar or judge should invariably accept whatever is claimed by the receiving party at face value. In determining the appropriate costs, the court must still have regard to all the relevant circumstances as listed at Appendix 1 to O 59 of the RoC, such as the complexity of the action, the amount of work actually done, and the skill and knowledge required of the solicitor in performing such work. In the present case, the court found that the asst registrar's taxation order was not unreasonable having duly considered the complexity of the matter, the nature of the work done, and the period of engagement.

Appeals against cost orders

8.26 In *Kosui Singapore Pte Ltd v Thangavelu*,[22] the Court of Appeal clarified that the term "costs" used in s 34(2)(*b*) of the SCJA applies to solicitor-and-client costs in addition to party-and-party costs. The court clarified that an issue relating to costs for the purposes of s 34(2)(*b*) of the SCJA can relate to a whole host of matters, including whether or not costs should be awarded at all or whether parties should be allowed to argue about costs in a taxation. Further, the policy behind s 34(2)(*b*) is to restrict access to the Court of Appeal where the only issue involved relates to costs, except in proper cases. This policy will be served by extending the scope of s 34(2)(*b*) to applications made under s 122 of the Legal Profession Act[23] ("LPA") for leave to tax a solicitor's bills out of time. The court also held that the word "costs" in s 34(2)(*b*) is not qualified in any way and that bearing in mind the Parliament's intention to assist the efficient working of the Court of Appeal by allowing the

21 [2016] SGHC 149.
22 [2016] 2 SLR 105.
23 Cap 161, 2009 Rev Ed.

screening of certain categories of appeals, s 34(2)(*b*) of the SCJA should not be limited to party-and-party costs.

Pro bono *representation*

8.27 In *SATS Construction Pte Ltd v Islam Md Ohidul*,[24] the High Court held that costs can be ordered in favour of a party whose lawyers are representing him on a *pro bono* basis. The court held that such a costs order does not unjustly benefit the successful party or punish the unsuccessful one and, hence, there is no inconsistency with the rationale behind the indemnity principle. Instead, such a costs order will redress what will otherwise be an unjust benefit to an unsuccessful party litigating against a *pro bono*-aided party in that the unsuccessful party may never be liable for costs. While the court raised a concern about whether the arrangement between the respondent and his counsel was a champertous agreement that would be prohibited under s 107 of the LPA, the court ultimately drew a distinction between impecunious clients who will not otherwise be able to afford legal representation and other litigants. In the former case, it will be permissible and even honourable for a lawyer to represent the client.

Costs against a non-party

8.28 In *SIC College of Business and Technology Pte Ltd v Yeo Poh Siah*[25] ("*SIC College*"), the Court of Appeal set out the principles on when costs should be awarded against a non-party. The court held that there are two factors that ought almost always to be present to make it just to award costs against a non-party. First, there has to be a close connection between the non-party and the proceedings and in this regard, it will be sufficient that the non-party either funded or controlled legal proceedings with the intention of ultimately deriving a benefit from them. Secondly, the non-party must have caused the incurring of the costs as it will not be fair to order costs against the non-party if the litigant will have incurred the costs anyway.

8.29 The court held that it was not in the interests of justice for costs to be ordered against the non-parties for the main claim as well as for the counterclaim. For the main claim, the non-parties, who were the shareholders and directors of the claimant company, had funded a *bona fide* claim which had only been dismissed for failure to provide security for costs. Further, the impecunious corporate plaintiff was clearly the proper claimant and there had been no finding of any

24 [2016] 3 SLR 1164.
25 [2016] 2 SLR 118.

impropriety or bad faith from the shareholders. As for the counterclaim, the court held that where an insolvent company is forced to defend a claim and its defence is *bona fide*, a court shall lean against an award of non-party costs because it will generally not be in the public interest or the interests of the other creditors to deter the directors or shareholders from assisting the company to pursue a legitimate defence. In the present case, the court did not find that the company's defence to the counterclaim was lacking in *bona fides*.

8.30 In *SIC College*, the Court of Appeal also considered *obiter* the effect of delay on an application for security for costs under s 388 of the Companies Act.[26] The court held that the weight to be given to the factor of delay may depend on the reasons for the delay, the length of the delay and crucially, the prejudice caused by the delay. The rationale for this is that where the defendant is well aware from an early stage of the proceedings that the plaintiff company is impecunious but only applies for security for costs late in the day, the plaintiff may have incurred costs and adopted certain positions under the fair assumption that the defendant, who knows of the plaintiff's financial position, will not be seeking security. Additionally, the court found that it is often inappropriate to award security for costs where the claim and counterclaim are co-extensive. Granting security in such a situation can amount to indirectly aiding the defendant to pursue its counterclaim.

Sanderson/Bullock orders

8.31 A plaintiff who commences an action against two defendants and succeeds only against one may be ordered to pay the successful defendant's costs. In such a case, the court may order that the plaintiff recover those costs together with his own costs from the unsuccessful defendant (a Bullock order); alternatively, the court may order that both the plaintiff and the successful defendant recover their costs directly from the unsuccessful defendant (a Sanderson order). The legal principles relating to Sanderson/Bullock orders were considered by the Court of Appeal in *Grains and Industrial Products Trading Pte Ltd v Bank of India*.[27] In this case, the court explained that the object in making a Sanderson/Bullock order is to avoid causing injustice to a plaintiff who, faced with two or more defendants, reasonably does not know whom to pursue for the wrong done to him.

26 Cap 50, 2006 Rev Ed.
27 [2016] 3 SLR 1308.

8.32 In deciding whether to grant a Sanderson/Bullock order, the court will consider the following factors:[28]

> (a) what facts are reasonably ascertainable by the plaintiff before the decision is made to join the successful defendant;
>
> (b) whether the facts are unclear to such an extent that it is necessary and prudent to safeguard the plaintiff's position by bringing in the successful defendant;
>
> (c) whether the unsuccessful defendant has tried to shift all or some of his liability to the successful defendant or has characterised the facts in such a way as to suggest that the successful defendant is more blameworthy and should bear a greater proportion of the damages; and
>
> (d) whether the plaintiff's claim against the two defendants are separate and distinct.

However, the court clarified that while these factors may be helpful indicators, their value is limited to the extent they can guide the court in considering the real question, which is ultimately one of fairness and justice. This will often turn on whether the costs have been reasonably and properly incurred by the plaintiff as between himself and the successful defendant and whether the conduct of the unsuccessful defendant contributed to these costs being incurred by the plaintiff. In the present case, the court agreed with the court below that a Sanderson/Bullock order should not be made.

Discovery

Confidentiality

8.33 In *Long Well Group Ltd v Commerzbank AG*,[29] the plaintiffs sought discovery of, *inter alia*, an arbitral award. The High Court held that while arbitral awards are confidential in nature, there are exceptions to such confidentiality. The court could, for instance, order discovery of documents generated in an arbitration if it considers them relevant and necessary for the fair disposal of the case. In this case, however, the court declined to order discovery of the arbitral award, finding that the arbitral award was neither relevant nor necessary for three main reasons. First, the plaintiffs were not parties to the arbitration and the arbitral award only shed light on the obligations between the fourth defendant and a third party. Secondly, the arbitral award could not be used to "test

28 *Grains and Industrial Products Trading Pte Ltd v Bank of India* [2016] 3 SLR 1308 at [146].

29 [2016] SGHC 158.

the consistency" of the positions taken by the defendants' witnesses because the plaintiffs had failed to prove that there were positions taken in the arbitration to be compared with in the first place. Thirdly, as the plaintiffs had admitted that they had been supplied information about the arbitral award, the court found that there was no further need to disclose the arbitral award.

8.34 The court also affirmed the importance of considering the relevance of documents sought in discovery by reference to the pleaded issues. While the plaintiffs' pleaded case was that the defendants had provided no funding at all, the plaintiffs sought discovery of documents to establish that the defendants were under "funding obligations". The court dismissed the plaintiffs' application because the plaintiffs had failed to demonstrate that these documents were relevant and necessary. This case illustrates that a lack of consistency with a party's own pleaded case may lead to discovery requests being rejected by the court for failing to meet the requirements of relevance and necessity.

Pre-action discovery

8.35 Two cases concerning pre-action discovery against non-party banks came before the High Court in 2016.

8.36 The first case was *Success Elegant Trading Ltd v La Dolce Vita Fine Dining Co Ltd*[30] ("*Success Elegant*"); the asst registrar's decision may be found in *La Dolce Vita Fine Dining Co Ltd v Deutsche Bank AG*.[31] In that case, the plaintiffs alleged that a Mdm Zhang had fraudulently manipulated the accounting information of a company. The plaintiffs commenced China International Economic and Trade Arbitration Commission arbitration proceedings and had obtained freezing injunctions from the Hong Kong and Singapore courts against her. The plaintiffs then applied under O 24 r 6(5) of the RoC for pre-action discovery of documents relating to two Singapore bank accounts, into which the plaintiffs believed Mdm Zhang had transferred funds arising from allegedly fraudulent transactions. The plaintiffs filed the application in order to identify third parties for the potential commencement of proceedings against them, to ascertain the full nature of wrongdoing perpetrated by Mdm Zhang and to trace assets in support of their proprietary claim against Mdm Zhang and third parties.

8.37 The asst registrar granted the plaintiffs' application under O 24 r 6(5) and, alternatively, under the court's inherent jurisdiction.

30 [2016] 4 SLR 1392.
31 [2016] SGHCR 3.

The High Court dismissed the subsequent appeal but disagreed with the asst registrar's reasoning on several points.

8.38 The High Court first examined whether the requirements for pre-action discovery under O 24 r 6(5) of the RoC or the inherent jurisdiction of the court were satisfied. The High Court applied the three requirements drawn from the test for pre-action interrogatories in *Dorsey James Michael v World Sports Group Pte Ltd*[32] ("*Dorsey James*") that:

(a) The defendant banks had facilitated wrongdoing.

(b) There was wrongdoing on the part of Mdm Zhang.

(c) Disclosure was necessary, just, and convenient.

In determining whether these requirements were satisfied, the court applied the standard of proof in *Bankers Trust Co v Shapira*[33] that the plaintiffs had to show a *prima facie* case of fraud and good ground for thinking that the money in both bank accounts was the plaintiffs' money. On the facts, the court was satisfied that there was a *prima facie* case that Mdm Zhang had fraudulently manipulated the relevant financial records. Coupled with the fact that large sums of money had been transferred from Mdm Zhang's Hong Kong bank accounts to the two bank accounts in Singapore, the court held that the requirements under O 24 r 6(5) were satisfied. The High Court found it unnecessary to determine the extent to which the inherent jurisdiction of the court to order pre-action discovery interacts with the provisions of O 24 r 6(5).

8.39 Next, the court examined whether there was a likely prospect of subsequent proceedings being held in Singapore as required by para 12 of the First Schedule to the SCJA. The court agreed with the asst registrar that because the bank accounts were in Singapore, there was a real possibility of proceedings being commenced in Singapore. The High Court, therefore, found it unnecessary to decide whether or not the asst registrar was right to hold that the orders could also be made under the inherent jurisdiction of the court in order to ensure that the funds were not dissipated or put out of the plaintiffs' reach by the time a decision in the arbitration was rendered.

8.40 The High Court then examined whether there was a "legal proceeding" as required by s 175 of the Evidence Act[34] such that disclosure could be ordered as an exception to banking secrecy under

32 [2014] 2 SLR 208.
33 [1980] 1 WLR 1274.
34 Cap 97, 1997 Rev Ed.

the Banking Act.[35] The court held there indeed was a "legal proceeding" within the meaning of s 175, although it disagreed with the asst registrar's interpretation that s 175 requires a *separate* legal proceeding from the pre-action discovery applications. According to the High Court, the "legal proceeding" in s 175 refers to the very application for disclosure, in which the applicant will demonstrate a right to discovery independent of s 175. The court explained that if an independent set of legal proceedings are required before pre-action discovery can be granted, this will have the unintended effect of banks being generally exempt from pre-action discovery orders, unless there are on-going separate legal proceedings.

8.41 Two questions on the scope of pre-action discovery orders against non-parties remain open. The first question concerns the purposes for which Norwich Pharmacal and Bankers Trust relief may be sought. On the express wording of O 24 r 6(5), an order for pre-action discovery against a non-party is limited to "the purpose of or with a view to identifying possible parties to any proceedings". In the present case, the plaintiffs had indeed sought to identify the recipients of the moneys for the potential commencement of proceedings against them. The Norwich Pharmacal order, however, has been extended in England to enable claimants to pursue other legitimate purposes connected with the action, even though the disclosure sought will not identify any wrongdoers.[36] It remains to be seen whether the Singapore courts will grant such orders under O 24 r 6(5) or its inherent jurisdiction.

8.42 Another open question concerns the court's jurisdiction to grant pre-action discovery against a non-party in aid of foreign proceedings. It appears that the English, Hong Kong, and New South Wales courts have held it appropriate to order Norwich Pharmacal relief in aid of foreign proceedings.[37] Given the Court of Appeal's decision in *Dorsey James* that the High Court's jurisdiction to order interrogatories in s 18(2) of the SCJA (and *a fortiori* the High Court's jurisdiction to order discovery) is limited to proceedings before the Singapore courts, it remains to be seen whether the court will invoke its inherent jurisdiction to grant pre-action discovery against a non-party in aid of foreign proceedings.

35 Cap 19, 2008 Rev Ed.

36 See Paul Matthews & Hodge M Malek, *Disclosure* (Thomson Reuters (Legal) Limited, 4th Ed, 2012) at para 3.06, citing *CHC Software Care Ltd v Hopkins & Wood* [1993] FSR 241 and *Jade Engineering (Coventry) Ltd v Antiference Window Systems Ltd* [1996] FSR 461.

37 See Paul Matthews & Hodge M Malek, *Disclosure* (Thomson Reuters (Legal) Limited, 4th Ed, 2012) citing, *inter alia, United Company Rusal plc v HSBC Bank plc* [2011] EWHC 404, *Manufacturers Life Insurance Company of Canada v Harvest Hero* [2002] HKCA 83 and *Davis v Turning Properties* [2005] NSWSC 742.

8.43 The second case on pre-action discovery against a non-party bank was *Toyota Tsusho (Malaysia) Sdn Bhd v United Overseas Bank Ltd*[38] ("*Toyota Tsusho*"). Prior to the discovery application, the plaintiff had commenced two suits in Singapore alleging that the second defendant and its director had engineered a series of fraudulent transactions that induced the payment of large sums of the plaintiff's moneys. Both suits were, subsequently, stayed by consent orders in favour of Malaysian proceedings. After the suits were stayed, the plaintiff brought an application for pre-action discovery under O 24 rr 6(1) and 6(5) of the RoC against the defendant bank who was neither a party to the Singapore suits nor a party to the Malaysian proceedings, to seek information about the recipients of moneys that had been paid out from the bank account. The second defendant contended, *inter alia*, that the discovery application should have been made in the Malaysian proceedings instead, and that the plaintiff had to first succeed in the Malaysian suit before it was entitled to trace the proceeds of the alleged fraud against the second defendant and its director.

8.44 The High Court rejected the second defendant's objections, holding that the second defendant and/or its director had no *locus standi* to object to the application. The court held that the present application had nothing to do with either the Singapore suits or the Malaysian suit, and the second defendant's director had "conflated the issues" by asserting that the plaintiff could apply for discovery in either suit. Additionally, the court stated that forcing the plaintiff to wait until the successful outcome of the Malaysian suit before commencing proceedings against third parties might well have been a case of "too little too late". By then, the plaintiff's moneys might have been dissipated.

8.45 The High Court's clarifications in *Success Elegant* and *Toyota Tsusho* will greatly assist plaintiffs who seek pre-action discovery against non-party Singapore banks. It appears that as long as a plaintiff can show that the bank accounts are located in Singapore, a real possibility of proceedings being commenced in Singapore will not be difficult to establish. There is now also no need to establish the existence of separate legal proceedings apart from the discovery application itself in order to rely on the exception to banking secrecy in s 175 of the Evidence Act. A plaintiff must of course still show a *prima facie* case of fraud or wrongdoing, and an arguable case for thinking that the money in the accounts is his.

38 [2016] SGHC 74.

Extension of time

8.46 In *Chan Siew Lee Jannie v Australia and New Zealand Banking Group Ltd*,[39] the Court of Appeal declined to grant an extension of time to a debtor whose application to set aside a statutory demand under r 98(2) of the Bankruptcy Rules[40] was 70 days late. The debtor's reason for her delay was that parties had been in negotiations, and that she had applied for the extension of time the day after the negotiations had fallen through. The Court of Appeal dismissed the appeal on the merits of the setting-aside application, but remarked *obiter* that the entry into settlement negotiations did not and could not stop time from running. Parties who were in the midst of negotiations had to prepare for any eventuality and take the necessary steps to preserve their legal positions in case settlement negotiations failed.

8.47 In *Teng Cheng Sin v Law Fay Yuen*,[41] the High Court dismissed the husband's application under r 834 of the FJR for an extension of time to file his case for appeal against the District Court's dismissal of his counterclaim. The four factors that the High Court considered on whether to allow the extension were the length of the delay, the reasons for the delay, the chances of the appeal succeeding if time was extended, and the prejudice caused to the would-be respondent if the application were granted. The High Court was unconvinced by the husband's purported inability to retain a lawyer to represent him given that he had around six months after the filing of the notice of appeal to retain and instruct counsel. The High Court also found that there was "little chance" that the husband's appeal would succeed, even if time was extended.

Garnishee orders

8.48 The Court of Appeal clarified the burden of proof at the *inter partes* stage of garnishee proceedings and the scope of garnishee orders in *The State-Owned Company Yugoimport SDPR v Westacre Investments Inc*.[42] This case is significant because the Court of Appeal held that a judgment creditor may garnish a bank account held by a bare trustee where the beneficiary has demanded that the trust moneys be handed over to him or be dealt with in accordance with his instructions. In that case, the applicant judgment creditor sought to make provisional garnishee orders absolute against two different garnishees. The first garnishee was a subsidiary of the judgment debtor, and the issue was

39 [2016] 3 SLR 239.
40 Cap 20, R 1, 2006 Rev Ed.
41 [2017] 3 SLR 193.
42 [2016] 5 SLR 372.

whether there was a debt that could be garnished where the subsidiary was merely a trustee of a trust in favour of the judgment debtor. The second garnishee was a bank with which the first garnishee had accounts, and the issue was whether the judgment creditor could "step into the shoes" of the judgment debtor and thereafter collapse the bare trust as against the first garnishee.

8.49 The Court of Appeal held that the legal burden to prove the existence of a debt remained on the judgment creditor at the *inter partes* stage, notwithstanding that provisional garnishee orders had already been obtained. This burden remained even though the judgment creditor had previously obtained an *ex parte* order, and did not shift to the judgment debtor and garnishees to show why the provisional order should not be made absolute. In contrast, the legal burden to *show cause* as to why the court should exercise its discretion not to make the order absolute lay with the garnishee or the judgment debtor. The court noted that the garnishee and judgment debtor in the present case chose to dispute the liability of the garnishee, instead of arguing that the attachment would be inequitable or unfair.

8.50 The court made the provisional garnishee order against the first garnishee absolute. Although the court agreed that a trust is not, in and of itself, a debt, the court held that a simultaneous debtor–creditor and trustee–beneficiary relationship can arise once the beneficiary has demanded that the trust moneys be handed over to him or to be dealt with in accordance with his instructions. Once such a demand has been made by the beneficiary, a liquidated sum of money in equity accrued to the beneficiary and the bare trustee will owe the beneficiary a debt in equity. Such an equitable debt can be garnished because a "debt" in the context of garnishee proceedings encompasses not only legal debts but also equitable debts. On the facts, the judgment debtor had called upon the moneys in the first garnishee's accounts, who accordingly sought a withdrawal and transfer of the moneys into another account. The court found that such a transfer was directed by the judgment debtor. Given the court's disposal of the issue on this ground, the court did not examine counsel's alternative argument that a bare trustee owes a beneficiary an equitable debt by way of implied contract.

8.51 In contrast, the court declined to make the provisional garnishee order absolute as against the second garnishee because the second garnishee owed a debt only to the first garnishee, and not to the judgment debtor. The court held that a pre-existing debt had to be shown to exist for the judgment creditor to intercept the debt owed to the judgment debtor, and as the procedure in *Vandepitte v Preferred*

Accident Insurance Corp of New York[43] is only a procedural mechanism that allows a beneficiary to bring an action against a third party in his own name but does not affect the substantive rights of the parties, the judgment creditor could not avail itself of the procedure to establish a debt owed by the second garnishee to the judgment debtor.

Injunctions

Mareva injunctions

8.52 The High Court had the occasion to consider the requirement that there be a real risk of dissipation of the defendant's assets in the context of applications for Mareva injunctions in two cases.

8.53 First, in *AYK v AYM*,[44] the High Court found that there was a real risk of dissipation of the defendant's assets because:

(a) The defendant had voluntarily entered into obligations with the plaintiff in the form of a deed but had failed to fulfil these obligations.

(b) The defendant had systematically disposed of his assets since the commencement of the arbitration arising out of the deed.

(c) The defendant had sought to set aside the arbitral award on flimsy grounds.

The High Court granted a worldwide Mareva injunction in aid of enforcement of a foreign arbitral award pursuant to s 4(10) of the Civil Law Act[45] ("CLA") and s 12A(2) read with s 12(1)(*h*) of the International Arbitration Act[46] ("IAA").

8.54 In the second case of *He&C S Holdings Pte Ltd v Mount Eastern Holdings Resources Co Ltd*,[47] the High Court clarified that a risk that moneys will be used to pay creditors do not, in and of itself, constitute a risk of dissipation of assets. On the facts, the High Court dismissed the application for relief under ss 12(1)(*h*) and 12(1)(*i*) of the IAA, holding that there were no allegations of wrongdoing with respect to the anticipated payments to creditors, which was a decision that the respondent was entitled to make.

43 [1933] AC 70.
44 [2015] SGHC 329.
45 Cap 43, 1999 Rev Ed.
46 Cap 143A, 2002 Rev Ed.
47 [2015] SGHC 323.

Interim injunctions

8.55 In *Elbow Holdings Pte Ltd v Marina Bay Sands Pte Ltd*,[48] the High Court discharged an interim injunction that restrained the defendant landlord from re-entering into possession of the premises, as the plaintiff tenant had failed to comply with the conditions imposed by the court. Although the court noted that the discharge of the injunction would mean that the plaintiff's lease would be determined about eight months prematurely, the court took the view that the plaintiff could and would be compensated should the main suit be resolved in its favour. Notably, the High Court stated that such injunctions should not be lightly granted and, when granted, should not be lightly disturbed. Otherwise, the result would be that the landlord and tenant take turns to move in and out of the disputed premises while waiting for trial.

Joinder of parties

8.56 In *Actis Excalibur Ltd v KS Distribution Pte Ltd* ("*Excalibur*"),[49] the court granted a joinder application where two directors applied under O 15 r 6(2)(*b*)(ii) of the RoC to intervene in a leave application under s 216A of the Companies Act. In the s 216A leave application, the plaintiffs had sought leave to commence an action against both directors for breaching their fiduciary and directors' duties. In granting the joinder application, the asst registrar took the view that he was bound by a preponderance of consistent and undisturbed precedents that showed that the present application would have been granted as a matter of course by a High Court judge. The asst registrar also held that the test in *Attorney-General v Aljunied-Hougang-Punggol East Town Council*[50] would in any event have been satisfied because the questions or issues between the parties were clearly and directly linked to the relief claimed in the s 216A leave application, and it was just and convenient to allow the directors to intervene because the directors were best placed to deal with the personal allegations raised by the plaintiff in the s 216A leave application.

Recusal of judges

8.57 In *Ong Wui Teck v Ong Wui Soon*,[51] the High Court heard an application for a judge to recuse himself on grounds that he was biased and that he faced a conflict of interest as he had made unfavourable

48 [2016] SGHC 90.
49 [2016] SGHCR 11.
50 [2016] 1 SLR 915.
51 [2016] 2 SLR 1067.

findings against the applicant in a previous suit. The High Court rejected the allegations of conflict of interest and bias, holding that the mere fact that a judge had made an adverse ruling or comment against a litigant did not necessarily mean that he should recuse himself in the same or a subsequent matter involving that litigant. Only if the views were expressed in such outspoken, extreme, or unbalanced terms as to cast doubt on the judge's ability to approach the subsequent case with an open judicial mind should he recuse himself. The judge also noted that the applicant did not appeal the substantive decision in the previous suit, and also did not complain about any conflict of interest or bias until the recusal application, despite having had opportunities to do so.

8.58 Ultimately, the judge recused himself, not because there was merit in the applicant's allegations against him but because he was contemplating making a complaint against the applicant for making allegations that were not made *bona fide* and were in contempt of court.

Originating processes

8.59 In *Independent State of Papua New Guinea v PNG Sustainable Development Program Ltd*,[52] the High Court clarified that while it is true that an originating summons is appropriate where no substantial dispute of fact exists, the court has the discretion, if disputes of fact exist, to allow the originating summons to continue as such rather than converting it to a writ action. In that event, if the originating summons cannot be decided on the undisputed facts, it will have to be dismissed.

8.60 *TDA v TCZ* concerned originating processes in the context of an application under s 23(1)(*i*) of the MCA for court sanction to make and seal a statutory will. The appellant contended that the judge should not have decided the application in the court below summarily because the matter involved disputes of fact and allegations of undue influence which required the calling and cross-examination of witnesses. The High Court held that allegations of undue influence or fraud will strongly incline a court toward ordering conversion to a writ provided there is, firstly, controversy concerning the facts *per se* and, secondly, at least a credible matrix of facts supporting the allegations or denials. Only then can a party be said to have raised a sufficient factual dispute to incline a court toward ordering conversion to a writ action. However, the court also stated that a party can lose the ability to ask the court to order such a conversion, if he has elected to forgo an opportunity to apply for conversion to a writ action, or if he has elected to forgo an opportunity to call and cross-examine witnesses.

52 [2016] 2 SLR 366.

8.61 On the facts, the court found that the appellant had failed to establish at least a credible matrix of facts supporting his position because the appellant's affidavit failed to go beyond a bare denial of allegations of undue influence and fraud against him. The court also found that the appellant had elected to forgo opportunities to convert the action into a writ action and, although he was explicitly directed to apply for cross-examination of witnesses, had chosen not to call and cross-examine witnesses when he attended several pre-trial conferences.

Proceedings at trial

8.62 In *Seagate Technology International v Vikas Goel*,[53] the High Court exercised its discretion under O 35 r 1(2) of the RoC to enter judgment on the merits of the case even though the defendant had not entered an appearance. Noting that the place of enforcement (India) required a judgment on the merits for enforcement, the High Court allowed evidence to be adduced in the normal course of the trial in order that the plaintiff would not be forced to commence Indian proceedings and suffer further delay in obtaining relief.

Judgments and orders

Sealing orders

8.63 In *BBW v BBX*,[54] the court considered the source of its power to grant sealing orders. In that case, the plaintiff sued the defendants on the basis of an indemnity agreement given in connection with arbitration proceedings at the Singapore International Arbitration Centre. The plaintiff made an application pursuant to the inherent power of the court for, *inter alia*, the sealing of all court documents in the action and for third-party access to the documents to be withheld.

8.64 While the court acknowledged that the power to grant sealing orders has no statutory basis, it affirmed its ability to grant sealing orders pursuant to its inherent power for the following reasons. Firstly, the court noted that such orders are an accepted part of Singapore's civil procedure. Secondly, the court considered the power to grant sealing orders to fall within the description given of the court's inherent power in O 92 r 4 of the RoC to be exercised in exceptional circumstances where there is a pressing need to ensure a just outcome. Thirdly, the

53 [2016] SGHC 12.
54 [2016] 5 SLR 755.

court observed that courts in other jurisdictions have similarly recognised an inherent power to grant sealing orders.

8.65 The court granted the application pursuant to its inherent power as there is a public policy of keeping arbitrations confidential. The court took the view that the evidence adduced in the suit would compromise the confidentiality of the arbitration if no sealing order was granted since the facts in the suit and the arbitration overlapped significantly. Moreover, the court noted that the suit concerned a private contractual agreement and there was nothing to suggest that there was a legitimate public interest in favour of disclosure.

Stare decisis

8.66 Divergent views were expressed on the issue of whether asst registrars are bound by decisions of High Court judges in two cases, namely *Chan Yat Chun v Sng Jin Chye*[55] ("*Chan Yat Chun*") and *Excalibur*.

8.67 The asst registrar in *Chan Yat Chun* opined that asst registrars were not bound by decisions of a High Court judge for two main reasons. First, horizontal *stare decisis* did not prevail in Singapore. Secondly, s 62 of the SCJA provides that asst registrars shall have such jurisdiction, powers, and duties as may be prescribed by the RoC, and O 32 r 9 of the RoC provides that an asst registrar exercises "all such authority and jurisdiction under any written law as may be transacted and exercised by a Judge in Chambers" and, thus, has the same powers and jurisdiction as a judge in chambers.

8.68 The asst registrar in *Excalibur* disagreed with *Chan Yat Chun* and took the view that asst registrars are bound by decisions of High Court judges. First, the asst registrar considered that while horizontal *stare decisis* does not prevail in Singapore, this is only in the context of decisions by High Court judges and nothing in the case authorities cited dealt with the proper treatment to be given by asst registrars in respect of decisions from High Court judges. Secondly, a distinction has to be drawn between powers, authority, and jurisdiction of asst registrars and the principle of judicial hierarchy. While s 62 of the SCJA deals with the former, the decision in *Herbs and Spices Trading Post Pte Ltd v Deo Silver (Pte) Ltd*[56] ("*Herbs and Spices*") had dealt with the latter and had held that High Court judges enjoy in substance a "confirmatory jurisdiction" over asst registrars. Thirdly, while asst registrars are conferred with powers, authority, and jurisdiction of the High Court as a matter of

55 [2016] SGHCR 4.
56 [1990] 2 SLR(R) 685.

"internal organisation of judicial work", they are necessarily obliged not to overreach the premise on which their powers, authority, and jurisdiction are derived unless there are conflicting decisions of the High Court or a High Court judgment which patently contradicted a decision of the Court of Appeal.

8.69 It is important to bear in mind that the views espoused in both *Chan Yat Chun* and *Excalibur* were not necessary to the decisions that were at hand and are, thus, *obiter*. Therefore, *Herbs and Spices* arguably remains the most authoritative judgment on the topic given that it was issued by the High Court in respect of appeals from deputy registrars to district judges and made specific reference to appeals from asst registrars to High Court judges in its decision.

Variation of a consent judgment

8.70 *Rosemawati bte Rafdi v Buang bin Ani*[57] concerned an application to the High Court to vary a consent judgment under O 45 r 6(1) and O 92 r 4 of the RoC. The consent judgment, which had been obtained after the parties had reached a settlement, provided for, *inter alia*, the transfer or sale of a Housing & Development Board flat. However, execution of the consent judgment was not possible as the minimum occupation period of the flat had not been fulfilled.

8.71 As a preliminary point, the court observed that it would have been more appropriate to bring the application under O 3 r 4 instead of O 45 r 6(1), which confers on the court power to make an order requiring an act to be done within another time. This is because O 45 r 6(1) of the RoC has to be read in the context of enforcement of judgments under O 45, which was not the remedy sought in this case.

8.72 The court, nevertheless, held that the principles for extension of time for compliance with a consent judgment are largely aligned with the principles which guide the court's exercise of its inherent power to vary or amend a consent judgment under O 92 r 4 of the RoC. The court observed that the consent judgment in question represented a real contract between the parties and was not of the type where one party simply did not object to the order being made. In such cases where the parties have agreed in clear terms on a particular course of action, the court shall place great weight on the agreement and shall be slow to depart from it.

57 [2017] 3 SLR 89.

8.73 On the facts, the High Court declined to vary the consent judgment despite finding that the parties were labouring under various mistakes as to the transferability of the flat when the consent judgment was recorded. Varying the consent judgment would alter the original intent and position of the parties and the amendments could not be said to be consequential since they would have affected the substantive rights of the parties. The court, thus, held that the correct course of action was for the plaintiff to apply to set aside the consent judgment and, accordingly, dismissed the application.

Jurisdiction

8.74 In *The Chem Orchid*,[58] the Court of Appeal held that it lacks the jurisdiction to hear an appeal from a decision by the High Court not to set aside a ship's arrest based solely on affidavit evidence. The Court of Appeal took the view that an application to set aside a ship's arrest for want of jurisdiction on the basis of affidavits is, in substance, a request to strike out the *in rem* writs on a basis similar to that under O 18 r 19 of the RoC. That being the case, s 34(1)(*a*) of the SCJA read with para (*e*) of the Fourth Schedule will preclude an appeal against the High Court's decision and the Court of Appeal has no jurisdiction to hear any such appeal.

8.75 The Court of Appeal, however, observed that it is possible for a defendant to dispute the court's jurisdiction by applying to set aside the writ issued against it under O 12 rr 7(1) and 7(4) of the RoC. On such an application, the court will be empowered to make any directions which are appropriate, including directions for the trial of the jurisdictional issue as a preliminary issue. The Court of Appeal also observed that O 14 rr 12(1) and 12(2) of the RoC allow it to determine any question of law or construction of documents arising in any cause or matter if the question is suitable for determination without a full trial of the action and such determination will fully determine the entire cause or matter. The appellants were, thus, informed that they were free to make an application under O 14 r 12 of the RoC and if it were dissatisfied with the judgment there, that judgment could be appealed. In the light of this decision, it is important for parties to be sensitive to the relevant provisions under which applications are made as, depending on the specific provision in the RoC proceeded upon, a right to appeal may or may not be available.

58 [2016] 2 SLR 50.

Representation of companies

8.76 In *HG Metal Manufacturing Ltd v Gayathri Steels Pte Ltd*,[59] the High Court considered a leave application by the defendant company under O 1 r 9(2) of the RoC for its director, a co-defendant, to represent it in its defence against legal proceedings brought by the plaintiff as the defendants' lawyers had discharged themselves. The director was the guarantor of the company's debts.

8.77 The court dismissed the application on both procedural and substantive grounds. Firstly, the court found the application to be defective as the supporting affidavit had not been sworn by any other officer of the company as required, but by the officer who intended to represent the company. While this could be rectified by the filing of a fresh affidavit, there were other factors to be considered before such an application could be granted. Secondly, the facts did not favour the grant of the application as:

> (a) The defendants' counterclaim involved legal issues and assistance from lawyers would be required to do justice to the counterclaim.
>
> (b) The director was in a potential conflict of interest with the company as he would be personally liable as guarantor if the company's defence failed at trial.

Service of process

8.78 In *Storey, David Ian Andrew v Planet Arkadia Pte Ltd*[60] ("*Storey*"), the High Court addressed the issue of substituted service through social media and instant messaging platforms. The decision aligns the position in Singapore with that in other common law jurisdictions such as England, Australia, New Zealand, and South Africa.

8.79 The plaintiff in *Storey* had obtained leave to serve the defendant, who was resident in Australia, out of jurisdiction at the defendant's last known address. However, the defendant's neighbour informed the process server that she had never heard of the defendant. The evidence showed that the defendant was active on two e-mail accounts, a Skype account, Facebook, and an internet message board and this was tendered as evidence before the court.

59 [2016] 5 SLR 238.
60 [2016] SGHCR 7.

8.80 The asst registrar ordered substituted service through Skype, Facebook, and internet message boards in which the defendant showed an active presence and offered five reasons for his decision. Firstly, the language of O 62 r 5 of the RoC is broad enough to encompass service through electronic means. Secondly, O 62 r 5 was introduced in 2011, and does not dictate the platforms on which service is permissible. Thus, the exact mode of service will be "left to the court of the day". Thirdly, the principle behind O 62 r 5(3) of the RoC is that the mode of substituted service must alert the recipient to the service of the originating process against him. Statistics were cited which indicated the greater use of social media platforms as communication platforms rather than e-mail and the asst registrar reasoned that if these platforms were more effective than e-mail in alerting the recipient to the service of originating process against him, the court should be open to substituted service through those means. Fourthly, other common law jurisdictions have begun allowing substituted service through social media such as Facebook. Fifthly, a consultation paper by the Supreme Court of Singapore published in August 2010 had concluded that substituted service by social media is permissible under existing law.

8.81 The court went further to opine that smartphone messaging platforms linked to mobile phone numbers also fall within the scope of O 62 r 5(4) of the RoC as these platforms allow for the transmission of PDF attachments.

8.82 The decision in *Storey* is to be welcomed as a step in the right direction given the pace of technological progress in the world today. It ensures that the RoC do not lose their relevance in the face of such technological change. Nevertheless, as the various electronic platforms possess unique characteristics that may impact the effectiveness of service through such platforms, parties should acquaint themselves with the limitations of such platforms and ensure that such limitations are brought to the attention of the court.

Stay of proceedings

8.83 Several judgments were issued regarding applications for a stay of proceedings. As illustrated in the following cases, the established principles laid down in *Spiliada Maritime Corp v Cansulex Ltd*[61] ("*Spiliada*") continue to be applied to a myriad of situations.

61 [1987] AC 460.

Minority oppression under s 216 of the Companies Act

8.84 *Fan Heli v Zhang Shujing*[62] concerned a minority oppression action brought by the plaintiff under s 216 of the Companies Act. The plaintiff and the first and second defendants owned 12 companies (which included the third and fourth defendants) in the proportion 25:65:10. The fourth defendant commenced two sets of legal proceedings in China against the plaintiff. The first set of proceedings had yet to be completed while judgment had been rendered in respect of the second set. Against this backdrop, the first and second defendants applied for a stay of proceedings in Singapore on the basis that China was the more appropriate forum and, alternatively, that the proceedings in Singapore be stayed pending the disposal of the Chinese proceedings.

8.85 Applying Stage 1 of the *Spiliada* test, the court held that as the action brought by the plaintiff was for minority oppression based on a Singapore statute giving specific rights to shareholders and the company involved was a Singapore company, it was not possible to show that another forum was competent to resolve the dispute and was clearly the more appropriate forum. Also, the structure of the group, the location of witnesses, documents and linguistic abilities of the witnesses, the on-going Chinese proceedings and differences in law pointed away from China being the more appropriate forum or were at best neutral factors in the *Spiliada* analysis. The following findings are noteworthy. Firstly, the court rejected the defendants' argument that the companies in the group were treated as a single undivided whole as the companies were not in a formal structure. Secondly, the court took the view that the location of the witnesses and documents and linguistic abilities of the witnesses were not crucial considerations as the Singapore court is used to having foreign witnesses testifying in languages other than English and where necessary, such witnesses could testify from overseas. Thirdly, the court found that the Chinese proceedings were largely irrelevant to the Singapore proceedings and, in any event, the risk of conflicting judgments was merely a factor to be weighed against the other factors. Fourthly, the court considered to be important the fact that Chinese law prescribes different rights and obligations from Singapore law and the type of claim brought by the plaintiff could not be brought in China.

8.86 Applying Stage 2 of the *Spiliada* test, the court held that the question of the specific remedy or juridical advantage available to the plaintiff under s 216 of the Companies Act was not available under Chinese law and, thus, it would be unjust for the plaintiff to be deprived of it. Thus, the court declined to stay the Singapore proceedings.

62 [2016] 1 SLR 1457.

Cases involving trust arrangements

8.87 In *SKP Pradiksi (North) Sdn Bhd v Trisuryo Garudo Nusa Pte Ltd*,[63] the plaintiffs claimed that the defendant held certain shares on trust for them. The shares were transacted under two Shares Sale Purchase Deeds ("Deeds"). The defendant denied that it held the shares on trust for the plaintiffs and sought a stay of proceedings on the following two grounds:[64]

> (a) [the Singapore action] was commenced in breach of exclusive jurisdiction clauses in the Deeds which provided for all disputes regarding the Deeds to be heard in the District Court of South Jakarta; and/or
>
> (b) in any event, Indonesia was the proper forum for the resolution of the … dispute.

8.88 The High Court declined to stay the Singapore proceedings. It noted that if a dispute falls within an exclusive jurisdiction clause which confers jurisdiction on a foreign court, an action commenced in Singapore shall be stayed unless strong cause can be shown for not doing so. While the court held that the dispute fell within the scope of the exclusive jurisdiction clauses, it accepted that strong cause had been shown by the plaintiffs for breaching the exclusive jurisdiction clauses. In particular, the court found that it is unlikely that a trust claim will be recognised under Indonesian law and, on this basis, took the view that compelling the plaintiffs to bring their trust claim to Indonesia is no different from compelling a plaintiff to sue in a foreign court where a time bar exists, which is not applicable in Singapore. If the latter constitutes strong cause, there will be no reason why the former does not. The court also commented that it is also arguable that Singapore law governs the trust as the express creation of the trust points towards a governing law of a jurisdiction which recognises and effects trusts.

8.89 In the final analysis, the court held that:

> (a) There was no reason why granting a stay would meet the ends of justice and it seemed that the defendant could not have been acting in good faith by submitting that the trust claim should be brought in Indonesia despite the likelihood of it not being recognised.
>
> (b) The submission that a Singapore judgment was not enforceable in Indonesia was unmeritorious and would only

63 [2016] SGHC 200.

64 *SKP Pradiksi (North) Sdn Bhd v Trisuryo Garudo Nusa Pte Ltd* [2016] SGHC 200 at [7].

arise if the defendant and its directors chose to disobey the Singapore court order.

(c) Indonesia was not the proper forum as the plaintiffs' trust claim would unlikely be recognised in Indonesia.

8.90 Leave to appeal was granted as the question of how a Singapore court should view trust arrangements involving trust property situated in foreign jurisdictions which do not recognise trusts or which expressly prohibit them was one which would benefit from the Court of Appeal's analysis. Flowing from the observations of the English Court of Appeal in *Akers v Samba Financial Group*,[65] the court noted that "there must be large numbers of trusts established under the laws of common law jurisdictions that comprise registered shares in civil law countries amongst their assets; yet, questions as to the effect of such arrangements have seemingly never been fully addressed before".

8.91 In a related case, *Southern Realty (Malaya) Sdn Bhd v Chen Jia Fu Darren*,[66] the plaintiff claimed that the shares in a Singapore company, TriSuryo Garuda Nusa Pte Ltd ("TGN"), were held on trust for it by the first and third defendants, who were the registered owners of the TGN shares. The defendants applied for the proceedings to be stayed in favour of Indonesia, where related proceedings had been commenced by TGN.

8.92 The court applied the *Spiliada* test and found that Indonesia had more real and substantial connection to the dispute as the substantive business dealings took place in Indonesia, and were related to assets and events in Indonesia. It also held that as TGN had no business operations of its own and was incorporated solely to hold the shares for tax reasons, Indonesian law had a closer connection to the dispute. In addition, the defendants raised a defence of illegality under Indonesian law and the court held that, assuming Indonesian law governed the dispute, questions of Indonesian public policy would be raised and were best determined by the Indonesian courts. Even if Singapore law applied, it was part of Singapore's public policy to respect the public policy of foreign and friendly states and so it remained important to determine the scope of Indonesian public policy concerns. Finally, there were related Indonesian court proceedings and while none of them related directly to the ownership of the TGN shares, there was a real risk that contrasting findings of fact would be arrived at on material issues. For these reasons, Indonesia was the more appropriate forum for the trial of the issue over the ownership of the TGN shares.

65 [2015] 2 WLR 1281.
66 [2016] 5 SLR 1307.

8.93 In the premises, the court granted a limited stay of the Singapore action pending the outcome of the actions in Indonesia. The stay granted was of a limited form to allow the parties to return to the Singapore suit if necessary since TGN was a Singapore company and an order for the transfer of its shares might be required after the Indonesian cases were concluded.

Relevance of foreign proceedings

8.94 *Trung Nguyen Group Corp v Trung Nguyen International Pte Ltd*[67] concerned civil proceedings stemming from the breakdown of the marriage of the couple who built the Trung Nguyen Vietnamese coffee brand. The defendants sought a stay of proceedings on the ground that the heart of the dispute between the parties lay in the breakdown of the marriage between the plaintiff and the second defendant and the dispute was Vietnam-centric since it flowed from a spill over of the marital breakdown between the couple.

8.95 Under Stage 1 of the *Spiliada* test, the court held that the personal connections of the parties pointed to Vietnam as the more appropriate forum as all the parties except the first defendant were Vietnamese nationals or entities. The assets, events, and transactions which led to the disputes also pointed in favour of Vietnam as the more appropriate forum for the hearing of the dispute. The court also noted that the choice-of-law rule applied was the double actionability rule. The main cause of action was one in conspiracy which took place in Vietnam and there was no evidence led by the plaintiff as to whether the defendants' actions constituted a tort in Vietnam. The court did not regard the compellability of the witnesses as a major factor as most of the material witnesses were either in the employ of the plaintiff or the first defendant. Finally, the court found that there was a real risk that the Singapore court and Vietnamese court might reach different findings of fact on material issues and it was more efficient for all the players to be brought together in a single forum so that the dispute could be adjudicated collectively.

8.96 As the plaintiff failed to show why a stay should not be granted but for an issue which was raised about Vietnamese jurisdiction over the first defendant, a stay was granted. However, the stay was granted only pending the outcome of Vietnamese proceedings as the court was of the view that the first defendant was a Singapore company and a remedy under s 194 of the Companies Act for rectification of the register of members for companies might be needed. Such a limited stay would

67 [2016] SGHC 256.

enable the plaintiff to return to the Singapore court to obtain a remedy under s 194 of the Companies Act or to effect the transfer of the first defendant's shares.

8.97 The saga involving the Humpuss group of companies continued in *Humpuss Sea Transport Pte Ltd v PT Humpuss Intermoda Transportasi TBK*[68] ("*Humpuss*"). The liquidators of the plaintiff sought repayment of two unpaid inter-company loans and to set aside two transactions which the plaintiff had purportedly entered into as part of an alleged restructuring of the Humpuss group. The first defendant was embroiled in a court-assisted debt restructuring process in Indonesia and had obtained court approval for its restructuring plan. The first defendant claimed that the transactions in question in the Singapore proceedings had been admitted into the plan endorsed by the Indonesian court and, thus, sought for a partial stay in respect of the two transactions which were the subject of the Singapore proceedings. The High Court dismissed the application.

8.98 The court held that a partial stay will be relevant where claims under a forum's statutory laws are brought together with other claims but will not be permitted if there is a high degree of overlap in the claims as there will be the possibility of inconsistent findings by different courts. Applying Stage 1 of the *Spiliada* test, the court found that the natural forum was Singapore as the plaintiff was a Singapore-incorporated company being wound up in Singapore and Singapore law governed the setting aside of the transactions. Moreover, such a remedy could not be sought in Indonesia and the absence of the remedy in Indonesia was a strong ground to refuse a stay under Stage 2 of the *Spiliada* test. The court also rejected the defendants' submission that the judgment of the foreign court was not readily enforceable under Indonesian law was a relevant factor since the choice of forum for enforcement was at the liquidators' prerogative. Moreover, this submission suggested that the defendants did not intend to honour the judgment from the Singapore court and, thus, it was intuitively wrong for the defendants to raise this as a relevant factor. For these reasons, the court dismissed the application, holding that Singapore was the natural forum and there were no compelling reasons for the grant of a stay.

Striking out

8.99 2016 saw a number of striking out applications in the High Court on various grounds. Several of the cases related to the extended doctrine of *res judicata*, otherwise also known as abuse of process.

68 [2016] 5 SLR 1322.

Abuse of process

8.100 The question whether a plaintiff's strategy to carry out litigation incrementally constitutes an abuse of process was addressed in *Antariksa Logistics Pte Ltd v Nurdian Cuaca*[69] ("*Antariksa*"). The dispute arose out of a failed attempt by the plaintiffs to ship cargo into Indonesia due to the first defendant's failure to make the necessary arrangements and the subsequent conversion of the cargo by McTrans Cargo (S) Pte Ltd ("McTrans"). The plaintiffs successfully sued McTrans for conversion of the cargo but failed to recover certain incurred expenses from McTrans. They subsequently sued the defendants for conspiracy, deceit, and unjust enrichment to seek an indemnity for all liabilities, losses, and expenses arising from the conspiracy or fraud and for the expenses which had not been recovered from McTrans. The defendants applied to strike out the latter set of proceedings on the grounds of abuse of process.

8.101 The court held that the plaintiffs' actions were not an abuse of the court's process. The asst registrar noted that abuse of process was developed to enable the court to deal with the problems to which the rules do not provide satisfactory solutions or fail to address altogether. Thus, it operates in the shadow of cause of action and issue estoppel, and is only used when the estoppel doctrines are unavailable.

8.102 The asst registrar followed *Henderson v Henderson*,[70] which held that abuse of process is targeted at the raising of issues previously unlitigated but which ought to have been ("*Henderson* rule"). Since it prevents a litigant from raising an issue which has never been determined, it shall be applied only in very limited circumstances. Merely failing to raise an issue earlier is insufficient to attract the operation of the *Henderson* rule; more will be required to trigger the operation of the rule. This is because:

(a) The plaintiff may have had a private interest or derived some personal benefit from incremental litigation.

(b) There is no requirement that a plaintiff has to make a case management decision which will result in the most efficient and economical use of the court's resources.

(c) It is relevant whether adding the claims in the later proceedings will "transform" the action.

69 [2016] SGHCR 10.
70 (1843) 3 Hare 100.

(d) The court shall be cognisant of the reality that parties shall be allowed the freedom to choose whom they sue in a complex commercial matter.

8.103 On the facts, the asst registrar found that the plaintiffs' decision to litigate incrementally was not a wholly unreasonable one and there was no question of the first defendant being twice vexed by the litigation. There was good reason for the plaintiffs to desist from the conspiracy, deceit, and unjust enrichment claims earlier as the most pressing issue then had been to obtain the release of the cargo – the plaintiffs could be potentially liable to their customers if the cargo was unreleased. After assessing the public and private factors in a broad, holistic manner, the asst registrar held that there was no abuse of process and dismissed the application accordingly.

8.104 The second case involving the issue of abuse of process was *Venkatraman Kalyanaraman v Nithya Kalyani*.[71] The parties entered into a settlement agreement under which the plaintiff was to pay the defendants S$100,000. The plaintiff failed to pay and the defendants sought to enforce the settlement agreement. The plaintiff then claimed for relief under the common law derivative action and minority oppression but his suit was struck out by an asst registrar under various limbs of O 18 r 19 of the RoC. The plaintiff appealed and the question was whether the plaintiff was barred from doing so by reason of the *Henderson* rule.

8.105 The High Court upheld the asst registrar's decision and held that the *Henderson* rule could apply even where an earlier action resulted in a settlement and did not result in judgment as the public policy reasons for the rule is to provide finality to litigation and prevent a defendant from being subject to successive actions concerning the same subject matter. In this regard, the court would embark on a broad merits-based judgment inquiring into whether the relevant party was abusing the court's process. Upon examining the scope of the earlier settlement agreement, the court found that part of the allegations brought by the plaintiff were the same or similar to the allegations made in the earlier suit which had been settled and there was no *bona fide* reason why the causes of action could not have been brought earlier. The allegations were accordingly struck out.

8.106 The third case which involved the issue of abuse of process was *Humpuss*, where the defendants sought to strike out the Singapore proceedings on the basis that it had obtained consent from the Indonesian court to proceed with a restructuring plan which had

71 [2016] 4 SLR 1365.

incorporated the relevant transactions impugned in the Singapore proceedings.

8.107 The court dismissed the defendants' application for the following reasons. The court held that the Indonesian judgment had to be recognised by the Singapore court before it could be *res judicata* either through cause of action or issue estoppel or abuse of process. For a foreign judgment to be recognised, it has to be the final and conclusive judgment of a court which has jurisdiction to grant that judgment and there cannot be any defences to its recognition. As there was evidence that the plaintiff could include a debt omitted from the composition plan and the judgment could be varied if the admitted debts were tainted by fraud, the Indonesian court's consent was neither final nor conclusive. Even if it was, the Indonesian court would not have jurisdiction over the plaintiff as the plaintiff was not involved in the Indonesian proceedings. The Indonesian judgment, thus, could not be recognised by the Singapore court for the purposes of *res judicata* and the Singapore proceedings could not be struck out for abuse of process.

8.108 The fourth case which involved the issue of abuse of process was *Lim Seng Choon David v Global Maritime Holdings Ltd*,[72] where the High Court was faced with an appeal from an asst registrar's decision to strike out the suit. The plaintiff's previous suit had been struck out by the asst registrar for his failure to plead an oral contract on which he was relying to prove his claim. The plaintiff chose not to appeal, but to file a fresh suit with the oral agreement pleaded in his claim. The asst registrar decided to strike out his case a second time and held that it was factually the same claim as that brought in the plaintiff's previous suit against the same defendants and so issue estoppel arose to preclude him from suing again. The assistant registar also held that the suit was an abuse of process as the plaintiff had the opportunity to amend his pleadings in the previous suit but chose not to do so.

8.109 The High Court allowed the plaintiff's appeal, holding that issue estoppel could not arise as the asst registrar had struck out his previous suit for his failure to plead the oral agreement and the plaintiff was free to choose to not amend his pleadings in the previous suit but to commence a fresh suit as long as he was not time-barred. The court next held that abuse of process could not arise as the *ratio* for the striking out in the previous suit was based on the oral agreement not being pleaded. Given that the plaintiff's case was premised on the oral agreement, it was reasonable for the plaintiff not to appeal the striking out of the previous suit as any such appeal would have to be accompanied by an application to amend his pleadings before bringing the appeal. The

72 [2016] SGHC 163.

court finally held that the claim was not factually unsustainable as even though the evidence proffered suggested that the plaintiff would have a difficult case, it was not impossible for him to prove his claim. Therefore, the plaintiff's appeal was allowed.

Admiralty proceedings

8.110 In *The Chem Orchid*, the Court of Appeal held that the High Court's refusal to set aside a ship arrest for lack of jurisdiction on the basis of affidavit evidence was akin to a refusal to strike out under O 18 r 19 of the RoC. In reaching this conclusion, the court recognised that as a ship arrest can take place under urgent conditions, an arresting party may only be able to obtain a limited amount of information which sufficiently supports the grant of the *in rem* writ and arrest warrant. A defendant may later wish to set aside the writ and warrant of arrest via affidavit evidence, but by doing so, the court can only determine the issue of admiralty jurisdiction on a *prima facie* non-conclusive basis since the court can only conclusively determine the issue of jurisdiction at the trial itself after a full hearing on a balance of probabilities. Thus, the court held that an application to set aside a ship's arrest for want of jurisdiction on the basis of affidavits is in substance a request to the court to strike out the *in rem* writs on a basis similar to that under O 18 r 19 of the RoC.

8.111 In *Likpin*, the appellant claimed against the first respondent on the basis of an alleged concluded procurement agreement for the intended charter of a pipe-laying vessel. The appellant alleged that the second respondent procured or induced the breach of the procurement agreement and, thus, the claim fell within s 3(1)(*h*) of the High Court (Admiralty Jurisdiction) Act[73] ("HCAJA"), which provides that the High Court will have admiralty jurisdiction for "any claim arising out of any agreement relating to the carriage of goods in a ship or to the use or hire of a ship".

8.112 The central issue was whether the appellant's claims were legally and factually unsustainable so as to be struck out as the High Court had done. The Court of Appeal observed that the words "relating to" in s 3(1)(*h*) of the HCAJA shall be read *narrowly* such that a collateral or separate agreement independent of the charterparty or bill of lading will be excluded unless it is *intrinsically related to* the use or hire of a vessel. The Court of Appeal affirmed the High Court's decision that the appellant's claims were legally and factually unsustainable and, thus, dismissed the appeal.

73 Cap 123, 2001 Rev Ed.

Limitation

8.113 In *AXF v Koh Cheng Huat*,[74] an action against a hospital and the doctor had been struck out on the basis that the three-year limitation period provided for under s 20(5) of the CLA was absolute and had expired. While the Court of Appeal agreed substantially with the reasons of the High Court, the appeal was allowed by the Court of Appeal as the appellants had proceeded on a "slightly different footing than it did at the court below". The Court of Appeal agreed substantially with the High Court that:

(a) Section 20(5) of the CLA created an absolute time bar.

(b) The concept of unconscionable reliance on a time bar could not be invoked as it came close to importing through the back-door the defence of concealment of a cause of action under s 29(1)(*b*) of the Limitation Act[75] and s 24A of the same.

8.114 On appeal, the issue as framed was whether the court should exercise its inherent power to prevent the respondents from raising limitation as a defence on the ground that there had been fraudulent concealment by their withholding of essential medical records. The Court of Appeal held that as the application was one for striking out, it was neither possible nor necessary for it to make a definitive pronouncement as to whether it had such a power. As the reasons given by the respondents for the delay in the release of medical records were not "altogether convincing", it would be premature for determinations to be made on the disputed issues based purely on affidavit evidence without the benefit of the discovery process and without oral evidence being tested by cross-examination. Therefore, the appeal was allowed as the appellants' case could not be said to be legally or factually unsustainable.

Pleadings

8.115 *EA Apartments Pte Ltd v Tan Bek*[76] concerned an appeal against striking out and an amendment application in respect of a statement of claim ("SOC") pertaining to a tenancy agreement. It was alleged that:

(a) The defendants had made misrepresentations by concealing information on the suitability of certain premises leased out for use as a dormitory ("Misrepresentation Claim").

74 [2016] SGCA 22.
75 Cap 163, 1996 Rev Ed.
76 [2017] 3 SLR 559.

(b) There was breach of the tenancy agreement between the plaintiff and the first defendant ("Contractual Claim").

(c) There was a breach of duty of care owed to the plaintiff by the lawyer and the law firm hired by the first defendant which had prepared the tenancy agreement ("Negligence Claim").

An asst registrar had struck out the SOC on the basis that no reasonable cause of action was disclosed. The decision was upheld on appeal.

8.116 The court held that O 18 rr 7 and 15(1) of the RoC require parties to set out all the material facts (defined as those necessary for the purpose of formulating a complete cause of action) relied upon for the claim and to state the relief or remedy sought. In respect of misrepresentation and fraud, every pleading has to contain the necessary particulars relied upon and for a cause of action to have *some* chance of success, it has to be supported by material facts or be struck out. While amendments will be generally allowed where it will allow the real question between the parties to be determined, an amendment which will itself be struck out will not be allowed.

8.117 The court found that there were problems with the SOC, in which the three causes of action were not properly characterised. Furthermore, the plaintiff had not identified the person against whom each cause of action was brought or the relief or remedy claimed in those actions. There was, thus, a serious lack of material facts and necessary particulars without which the causes of action were incomplete and the claims could not possibly succeed.

8.118 First, the Misrepresentation Claim could not succeed as it did not state whether fraudulent, negligent, or innocent misrepresentation was being relied upon and no positive representation of fact had been pleaded, which even an allegation of active concealment would require. Secondly, the Contractual Claim was premised on the defendant exercising her right of re-entry in breach of the tenancy agreement, but there was no explanation as to how exercising the right of re-entry was a breach, and of what term of the tenancy agreement. Thirdly, the Negligence Claim could not succeed as the SOC had not particularised the circumstances in which it could be said that the first defendant's solicitors acted on behalf of the plaintiff rather than just for the defendant. For these reasons, the court upheld the asst registrar's decision to strike out the SOC.

8.119 Similarly in *Antariksa*, the court was faced with a striking out application relating to a common law derivative action claim and a minority oppression claim. Both claims were struck out due to

deficiencies in the pleadings. With respect to the common law derivative action claim, the court found that:

(a) The procedural requirements for bringing the common law derivative action had not been met.

(b) The plaintiff had failed to plead that the company suffered losses for the wrongs.

(c) The plaintiff's proposed amendments to the SOC on this claim were devoid of the necessary details required to support the common law derivative action claim.

With respect to the minority oppression claim, the court found that the plaintiff's claim based on minority oppression lacked the necessary details to sustain the claim or show what his personal loss was. The plaintiff's common law derivative action claim and minority oppression claim were, thus, struck out.

8.120 *Tan Swee Wan v Lian Tian Yong Johnny*[77] concerned a striking out application in respect of a paragraph in the SOC. The plaintiffs' cause of action was based on fraudulent misrepresentation and had included a paragraph in the SOC that asserted the defendant's perpetration of a scam and lack of intention to carry out any of the representations made to the plaintiffs. The particulars supporting the paragraph related to, *inter alia*, the defendant's previous conviction under s 82(1) of the Securities and Futures Act[78] ("SFA") for dealing in securities without a valid capital markets services licence from the Monetary Authority of Singapore. The defendant's application to strike out the paragraph under O 18 r 19(1) of the RoC was dismissed and he appealed.

8.121 The High Court allowed the defendant's appeal and ordered the paragraph to be struck out. The court stated that the important question was whether the paragraph was relevant to proving the defendant's state of mind at that time and noted that the paragraph was based on the facts as stated in the agreed statement of facts leading to the defendant's conviction. The court opined that it could not see how the paragraph could be used as evidence to prove the defendant's state of mind as the conviction under s 82(1) of the SFA was a strict liability offence. Leaving the paragraph in the SOC would only serve to prejudice the defendant's case or prejudice him. The court further considered that the paragraph was not closely connected to the suit and was likely to unduly delay the fair trial of the suit as the defendant would have to provide discovery of

77 [2016] SGHC 206.
78 Cap 289, 2006 Rev Ed.

all relevant documents relating to his previous offence above and beyond the agreed statement of facts and conviction referred to. The paragraph was struck out accordingly.

8.122 *Ng Kong Choon v Tang Wee Goh*[79] concerned an appeal from the district judge's decision to strike out the plaintiff's suit. The plaintiff and defendant had been involved in a road traffic accident with two other vehicles and the plaintiff and his insurer brought three different claims under three different writs against the defendant for: "(a) uninsured loss; (b) cost of repairs; and (c) personal injury".

8.123 The claims for uninsured loss and personal injury were settled and the plaintiff brought a subrogation action against the defendant to recover the cost of repairs. The district judge struck out his claim as he held that the plaintiff's suit violated s 35 of the Subordinate Courts Act ("SCA"),[80] which states that a cause of action shall not be divided for the purpose of bringing two or more actions.

8.124 The High Court held that s 35 of the SCA will not apply if there are two or more causes of action as the provision refers to a single indivisible cause of action. On the facts, the claim for uninsured loss, personal injury, and cost of repairs were the same in that the same kind of wrong was alleged. As the plaintiff had divided his cause of action into parts as demonstrated by the existence of three writs, each for different heads of loss, and there was no statutory exception to the application of s 35 of the SCA, the appeal was dismissed and the district judge's decision upheld.

8.125 In *United Overseas Bank Ltd v Lippo Marina Collection Pte Ltd*,[81] the plaintiff sought summary determination on a question of attribution. Depending on the outcome of that application, the plaintiff also sought to strike out certain portions of the defence which set out the facts leading to the attribution. The plaintiff also sought to rely on O 92 r 4 of the RoC to strike out the paragraphs in the defendants' defence.

8.126 At the outset, the court clarified that O 92 r 4 of the RoC had no application as striking out applications are governed by O 18 r 19 of the RoC and if none of the grounds has been met, a party will not be allowed to rely on O 92 r 4 to circumvent O 18 r 19. The court further held that if the plaintiff could succeed in proving that it was a victim of fraud or a conspiracy to which the defendants were complicit with its

79 [2016] 3 SLR 935.
80 Cap 321, 2007 Rev Ed.
81 [2016] 2 SLR 597.

agent, the defendants would be precluded from relying on the rules of attribution which would otherwise apply to attribute the knowledge and acts of the plaintiff's agent to it. This being the case, the paragraphs which sought to rely on the attribution of the plaintiff's agent's knowledge to the plaintiff were struck out as the cause of action would be legally unsustainable.

8.127 The plaintiffs in *Tong Seak Kan v Jaya Sudhir a/l Jayaram*[82] pleaded that they had contracted with the defendant's company for the provision of services relating to the supply of liquefied natural gas from Indonesia and had given personal loans to the defendant. The suit was commenced after the defendant failed to repay those loans. The defendant pleaded that he had been tricked into signing the documents as the first plaintiff had represented to him that the documents were meant only to assure the plaintiffs' creditors and the Macao court as to the first plaintiff's ability to pay his debts and were never meant to create binding obligations. He also pleaded that the agreements were void for illegality as they were created to defraud and pleaded that the plaintiffs had harassed him.

8.128 The plaintiffs' application to strike out portions of the defence relating to harassment was allowed by an asst registrar. The defendant appealed and sought to add a defence of promissory estoppel to his defence. His appeal and application were dismissed as:

(a) The alleged harassment was irrelevant to the defence that the documents were shams and/or illegal.

(b) His submission that the harassment was relevant to the defence of promissory estoppel which was to be added to the Defence was untenable since detriment was a requirement to found promissory estoppel and harassment could not constitute such.

Use of illegally-obtained privileged documents in court

8.129 On 15 April 2016, a vast number of privileged and confidential documents, widely referred to as the Panama Papers, were leaked from the database of a Panamanian law firm. *HT SRL v Wee Shuo Woon*[83] is a High Court decision which stands out for its similarities in that the plaintiff's computer servers were hacked and privileged documents disclosed. As a result, e-mails with a solicitor containing confidential

82 [2016] 5 SLR 887.
83 [2016] 2 SLR 442.

legal advice relating to a pending suit were uploaded onto the Internet and accessed by the defendant in the pending suit.

8.130 The defendant sought to strike out the bulk of the plaintiff's claim, contending that it was an abuse of process and only instituted for the collateral purpose of allowing the plaintiff to obtain documents for other proceedings. As the defendant had relied on the privileged e-mails in its affidavit, the plaintiff filed an application to expunge the e-mails from the defendant's affidavit. The question was whether the e-mails should be so expunged.

8.131 The court discussed the concepts of admissibility, privilege, and confidentiality in the judgment. At the outset, the court found that the Evidence Act was irrelevant to the application as it did not apply to affidavits presented to any court and the matter before the court concerned only affidavit evidence. The court also noted that privilege and admissibility are distinct and different concepts. Privilege is asserted by someone who insists that he has a right to resist the compulsory disclosure of information. In contrast, admissibility describes the quality of a certain piece of evidence and relates to the question of whether the evidence may be received by the court to prove certain facts. Thus, while legal professional privilege would protect the plaintiff and its lawyer from being compelled to disclose privileged material through the legal process, it had nothing to do with whether the e-mails which were already in the defendant's possession might be adduced as evidence.

8.132 The court proceeded to consider the interaction between the concepts of privilege and confidentiality and held that there can be no privilege without confidentiality and equity will intervene to prevent the unauthorised use of confidential information in privileged material as evidence in court proceedings through the use of injunctions. In this regard, the court adopted the following propositions:[84]

> … First, the fact that a document is privileged is not a barrier to the admissibility of copies of the same into evidence. Second, the court may … restrict the disclosure and use of privileged documents which have been disclosed to third parties to protect its confidential character. Third, the court may restrain the use of the privileged documents by way of an order to expunge offending portions of pleadings or affidavits [and is] not limited to an order for delivery up or the grant of an injunction. Fourth, such an application must be filed before the privileged documents have been formally admitted into evidence …

84 *HT SRL v Wee Shuo Woon* [2016] 2 SLR 442 at [40].

8.133 The court held that it was confidentiality that would provide the legal basis for the expunging of the documents. While the documents had entered the public domain in the broad sense, the plaintiff still had a compelling interest in restraining the use of the privileged e-mails as it desired to avoid having the contents of its discussions with the lawyer being used against it and a prayer to expunge would serve this very purpose. The fact that the plaintiff was the victim of a cybercrime also weighed heavily on the mind of the court.

8.134 The court, thus, exercised its discretion to expunge the documents and considered that while the documents were available to the larger public in cyberspace, the cornerstone of legal professional privilege was full, free, and frank communication between persons and their legal advisers, without which the effective administration of justice was impossible. It was also held that the balance between the public policy consideration of having all relevant information placed before the court and having full, free, and frank communication between persons and their legal advisers had been struck in favour of the latter.

Summary judgments

8.135 Three judgments relating to applications for summary judgments were issued in 2016.[85] While the principles relating to summary judgments are well-established, the High Court made some noteworthy observations in two of the cases.

8.136 *Sim Kim Seng v New West Coast Shipyard Pte Ltd*[86] concerned an application for summary judgment by the plaintiff who was engaged by the defendant to carry out steel works to eight vessels in the defendant's shipyard. The plaintiff's primary claim was for S$333,300 based on eight invoices issued and it claimed in the alternative for a reasonable sum on a *quantum meruit* basis.

8.137 A preliminary issue raised by the defendant was that the plaintiff had not specifically prayed for a remedy under the heading "[a]nd the plaintiff claims" and so fell foul of the requirements for a summary judgment application. It cited *Ngai Heng Book Binder v Syntax Computer Pte Ltd*[87] ("*Ngai Heng*") in support of its proposition. The court disagreed with the defendant's submissions, and held that *Ngai Heng* was decided in the context of O 14 r 3(1) of the RoC, which is not

85 *JP Choon Pte Ltd v Lal Offshore Marine Pte Ltd* [2016] SGHC 115; *Sim Kim Seng v New West Coast Shipyard Pte Ltd* [2016] SGHCR 2; *Shi Wen Yue v Shi Minjiu* [2016] 4 SLR 911.

86 [2016] SGHCR 2.

87 [1988] 1 SLR(R) 209.

meant to preclude a scenario where summary judgment is sought in respect of a remedy identical to the nature of that prayed for, albeit for a lower amount. This is made expressly clear in O 14 r 1 of the RoC, which allows a plaintiff to apply for summary judgment on a "particular part of such a claim".

8.138 *Shi Wen Yue v Shi Minjiu*[88] arose out of an appeal from the decision of an asst registrar[89] ("asst registrar's decision"). There, the plaintiff applied for summary judgment on certain sums due under a settlement agreement which was capable of being enforced without a further order. The question was whether this agreement was to be construed as a mediation agreement or a consent judgment from the Chinese court.

8.139 The asst registrar allowed the application for summary judgment. The asst registrar commented that when adjudicating upon a conflict of laws issue, common law courts have to be conscious of the unexamined assumptions and biases of the common law and noted the difference in approaches between the common law courts and the civil law courts in which judges play "an active inquisitorial role". Thus, he held that a mediation agreement under Art 97 of the People's Republic of China Civil Procedure Law is not a judgment as the civil law tradition considers it the "proper and exclusive function of judges to judge and issue judgments", although he ultimately held that the mediation agreement was, nonetheless, enforceable as an agreement and, thus, granted summary judgment to the applicant.

8.140 The asst registrar's decision was reversed on appeal. The High Court held that an application for summary judgment to enforce a foreign judgment might be made if the defendant had no defence to the claim but it should not be granted if there is a fair or reasonable possibility of a *bona fide* defence to the claim. As expert evidence by affidavit had been obtained by both parties regarding the status of the mediation paper (whether it was a judgment or not) and there was stark disagreement between the experts as to the status of the mediation paper, a trial was required to test the views of the experts and summary judgment was inappropriate. The court could not offer its own translation and interpretation of the provisions as the use of documents in foreign languages in court is governed by O 92 r 1 of the RoC. Moreover, it was difficult for the Singapore court to competently interpret raw sources of foreign law without expert evidence. Further, as the pleadings of the applicant were unclear as to whether the applicant

88 [2016] 4 SLR 911.
89 *Shi Wen Yue v Shi Minjiu* [2016] SGHCR 8.

was applying for summary judgment on a breach of contract or agreement, summary judgment could not be granted.

Singapore International Commercial Court

8.141 The Singapore International Commercial Court ("SICC") was launched on 5 January 2015 to grow the legal services sector and expand the scope for the internationalisation and export of Singapore law.[90] 2016 saw the first series of written decisions handed down by SICC, several of which pertained to civil procedure.

8.142 *Teras Offshore Pte Ltd v Teras Cargo Transport (America) LLC*[91] concerned the definition of an "offshore case". There, the claims and counterclaims arose out of three liquefied natural gas projects in Australia. The relationship between the parties had broken down and the plaintiff had sued the defendant for sums allegedly owed. The defendant filed an application with SICC, *inter alia*, for a declaration that the case was an "offshore case".

8.143 The court observed that O 110 r 1(1) of the RoC defines an "offshore case" as one which has no substantial connection with Singapore. Accordingly, the focus is on the absence of a substantial connection with Singapore rather than the suit's substantial connection with other jurisdictions. The court explained that whether a case is an "offshore case" has to be determined with reference to the particular action and whether it can be said that it has no substantial connection with Singapore. In this regard, it is assumed that this refers to both the underlying dispute and the other matters which are relevant to the action as a whole including the factors listed at para 29(3) of the SICC Practice Directions.

8.144 On the facts, the court held that the action had no substantial connection with Singapore even though there were several procedural and administrative factors connecting the action with Singapore, such as the fact that the plaintiff was a Singapore company and the fact that it had assets in Singapore. This was because the claims and counterclaims related to services provided in Australia, which had absolutely nothing to do with Singapore.

8.145 Whether the Singapore High Court should assume long-arm jurisdiction over a case and the impact of SICC on the assumption of long-arm jurisdiction were questions addressed in *IM Skaugen SE v*

90 Singapore International Commercial Court website <http://www.sicc.gov.sg/About.aspx?id=21> (accessed 8 February 2017).

91 [2016] 4 SLR 75.

MAN Diesel & Turbo SE.[92] An asst registrar held that while the establishment of SICC does not affect the legal principles in respect of the long-arm jurisdiction of the High Court, a factors-based test was applied to determine if Singapore was the *forum conveniens* for the dispute. That being the case, it is consistent with the *Spiliada* test for the presence of SICC to be considered in determining whether Singapore is the natural forum and for certain factors to have less weight because of its presence. However, the presence of SICC should only affect the weight assigned to the *Spiliada* factors in the context of long-arm jurisdiction and only if: the case was transferred from the High Court to SICC on the plaintiff successfully resisting a writ being set aside *ex juris*; or, the case was transferred from the High Court to SICC upon the plaintiff successfully resisting the proceedings being stayed.

8.146 The asst registrar also observed that a case may be transferred to SICC if, *inter alia*, the action is international and commercial in nature and it is more appropriate for the case to be heard in SICC. He held that the requirement of appropriateness is a counterweight to the requirements of "international" and "commercial" in O 110 r 7(1)(*a*) of the RoC as it is possible for a claim to meet these requirements in the formal sense but be substantively unsuited for determination in SICC.

8.147 The asst registrar further noted that the High Court decision in *Accent Delight International Ltd v Bouvier, Yves Charles Edgar*[93] ("*Accent Delight*") did not appear to have considered SICC as part of the *Spiliada* test and that decision had been appealed to the Court of Appeal. He encouraged the parties to apply for the appeals to be heard at the same time as the appeal in *Accent Delight* if they chose to appeal.

8.148 In *BNP Paribas Wealth Management v Jacob Agam*,[94] the defendants applied for a limited stay of proceedings in SICC until the conclusion of French proceedings, which pertained to the same issues to be decided. The application was brought by the defendants pursuant to s 18(2) of the SCJA and alternatively, the inherent jurisdiction of the court.

8.149 At the outset, the court noted that the defendants did not object to the Singapore court having jurisdiction over the dispute due to the presence of clauses stipulating that Singapore law was the governing law and jurisdiction clauses in favour of the Singapore courts. The court also noted that the application was filed by the defendants almost six months

92 [2016] SGHCR 6.
93 [2016] 2 SLR 841.
94 [2016] SGHC(I) 5.

after they were sued in Singapore and just shortly after they commenced the French proceedings.

8.150 The court first held that it had full discretion to stay any proceedings before it with conditions imposed under s 18(2) of the SCJA or its inherent jurisdiction. It acknowledged that its discretion was triggered whenever there was a multiplicity of proceedings and was entitled to consider all the circumstances in deciding whether a stay should be ordered. It distinguished the cases which dealt with stay of proceedings involving concurrent arbitration proceedings as it considered that, in those cases, the court was concerned with preventing the circumvention of arbitration clauses while the overlap between Singapore court proceedings and those in a foreign court was a consequence of the cross-border nature of the dispute.

8.151 On the facts, the court found that the overlap between the Singapore and French proceedings was entirely a result of the defendants' own actions and the French proceedings were strategically commenced after the Singapore proceedings. The defendants' lawyers had also acknowledged that the Singapore action would be rendered otiose especially if the French court found in favour of the defendants. As such, this factor was decisive and the court declined to grant the stay of proceedings sought by the defendants as it considered it an attempt by the defendants to stifle the Singapore proceedings.

8.152 SICC also issued a judgment dealing with costs in *Telemedia Pacific Group Ltd v Yuanta Asset Management International Ltd*[95] ("*Telemedia*"), which was issued pursuant to the earlier judgment in *Telemedia Pacific Group Ltd v Yuanta Asset Management International Ltd*.[96] The judgment considered the effect of para 152 of the SICC Practice Directions and O 110 r 46(1) of the RoC, which provide that the costs of any proceedings in SICC is to be borne by the unsuccessful party unless the court orders otherwise. In this context, the court stated that the exercise of the discretion to award costs is not an exact science and it is necessary to account for the realities in the outcomes and assess the successful parties' entitlements where some of the claims are unsuccessful. As the plaintiffs were successful in establishing the breaches and only failed in one claim which did not add significant time to the trial, the court ordered that the defendants pay 75% of the plaintiffs' costs of the proceedings and the plaintiffs pay the defendants' costs incurred in defending against the unsuccessful claim brought by the plaintiffs. The court also ordered that 10% of the costs be paid on an indemnity basis as the defendants had not been forthcoming with

95 [2017] 3 SLR 47.
96 [2016] 5 SLR 1.

various aspects of the evidence. Interestingly, the court seemed to have left open the question of whether the guidelines provided by O 59 in respect of the court's discretion to award costs will be useful in determining a reasonable quantum of costs notwithstanding that O 110 r 46(6) of the RoC provides that O 59 of the RoC does not apply to proceedings in SICC.

8.153 *Telemedia* also dealt with the issue of interest which was payable on damages awarded. While the court noted that SICC has the power to award compound interest in a deserving case, it declined to do so as the plaintiffs did not lead evidence as to what they would have done with the moneys they would have otherwise received. It was, thus, speculative at best what the plaintiffs would have done with the money.