8. CIVIL PROCEDURE

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Appeals

Application for court to order new trial

8.1 In *Susilawati v American Express Bank Ltd* [2009] 2 SLR(R) 737, the appellant sought leave to advance a new line of argument before the Court of Appeal, on the basis of a referral agreement, the existence of which had been revealed on the second day of the trial. Alternatively, the appellant applied to the Court of Appeal for a new trial, for leave to adduce further evidence, or for leave to amend the pleadings. The Court of Appeal was not persuaded that any notions of fairness or justice required it to allow the appeal or any of the appellant's applications (at [20]).

8.2 The Court of Appeal considered that the principles applicable to an application for a new trial were conceptually similar to those applicable to an application for leave to adduce further evidence (*Susilawati v American Express Bank Ltd* [2009] 2 SLR(R) 737 at [23]). First, it had to be shown that the evidence could not have been obtained with reasonable diligence for use in the trial; secondly, the evidence had to be such that, if given, it would probably have an important influence on the result of the case, although it did not need to be decisive; thirdly, the evidence had to be apparently credible, although it did not need to be incontrovertible (at [24]). On the facts, the second and third conditions had been satisfied. However, V K Rajah JA held that there was no question that with reasonable diligence, the appellant's solicitors would have discovered the existence of the referral agreement prior to the trial, or would at least have realised its significance before the end of the trial (at [30]). Accordingly, the appellant failed to meet the first condition and the two applications were dismissed (at [38]).

New point raised on appeal

8.3 In respect of the application for a new point raised on appeal to be heard, V K Rajah JA warned that the courts had to be vigilant against excessively indulging counsel, who had an abiding professional responsibility to examine and to cover all aspects of a matter prior to the commencement of trial. V K Rajah JA further noted that the courts would not allow the main arena for the resolution of evidential disputes to be moved from the trial court to the appellate court, as to do so would fundamentally alter the limited role of appellate review (*Susilawati v American Express Bank Ltd* [2009] 2 SLR(R) 737 at [51]). Even if the appellant's circumstances could have been considered exceptional, the Court of Appeal was not satisfied beyond doubt that it had all the material facts bearing upon the new contention before it. Neither was it satisfied that no satisfactory explanation could be offered by the respondent if its witnesses were accorded the opportunity to clarify matters in the witness box (at [52]). The Court of Appeal therefore did not allow the new point to be raised and argued in the appeal.

8.4 Finally, the Court of Appeal noted that the considerations which permeated the exercise of discretion to grant leave to amend pleadings were very similar to those underpinning the discretion to allow a new point to be raised and argued on appeal (*Susilawati v American Express Bank Ltd* [2009] 2 SLR(R) 737 at [59]). It would be plainly inappropriate and unjust to allow the amendments, which would necessitate a retrial, especially since the appellant's solicitors could have, with reasonable diligence, addressed all these evidential and pleading shortcomings before or during the trial phase (at [63]). Further, an amendment at this stage would severely prejudice the respondent, for which a costs order could not sufficiently compensate. Accordingly, the application for leave to amend pleadings failed (at [60]).

8.5 In contrast, there were two other cases reported in 2009 in which the Court of Appeal allowed a new point to be raised on appeal. In *Chua Choon Cheng v Allgreen Properties Ltd* [2009] 3 SLR(R) 724, V K Rajah JA affirmed that the Court of Appeal could, in appropriate matters, entertain a new point on appeal if no new evidence was required in relation to the new point, and no explanation could be usefully offered in response. As the new point which the appellant sought to raise, namely, whether there was an implied term in law, was based largely on policy considerations, there was little standing in the way of allowing it to be argued on appeal. The appellants were thus allowed to raise the new point since there would be no prejudice caused to the respondents, apart from incurring additional costs (at [34] and [35]).

8.6 Similarly, in *PT Jaya Sumpiles Indonesia v Kristle Trading Ltd* [2009] 3 SLR(R) 689, the Court of Appeal granted an application for leave to amend the notice of appeal, which was in truth an application for leave to insert an entirely new ground of appeal. Chan Sek Keong CJ reasoned that the new ground raised an issue of law and not of fact, and that the application had been filed at a relatively early stage, giving the respondent more than enough time to respond. Significantly, even counsel for the respondent had acknowledged that there was no prejudice to the respondent (at [19]).

Leave to appeal

8.7 In *Virtual Map (Singapore) Pte Ltd v Singapore Land Authority* [2009] 2 SLR(R) 558, the Court of Appeal provided guidance as to the circumstances in which leave to appeal pursuant to s 34(2)(*a*) of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) was required.

8.8 Andrew Phang JA, delivering the judgment of the Court of Appeal, noted that the operative phrase in s 34(2)(*a*) of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed), "the amount or value of the subject-matter at the trial", meant the entire claim of the plaintiff at the trial, regardless of the actual amount awarded by the trial judge or the part(s) of the trial judge's decision appealed against by the appellant. This amount or value did not include non-contractual interests and costs, and the expression "trial" included any judicial hearing, whether in open court or in chambers (*Virtual Map (Singapore) Pte Ltd v Singapore Land Authority* [2009] 2 SLR(R) 558 at [16]–[18]). Andrew Phang JA also affirmed that s 34(2)(*a*) was a process to screen appeals to the Court of Appeal as the legislative intention was to allow "only one tier of appeal *as of right* for civil claims" up to a certain amount or value (at [19]).

8.9 The appellant had argued that no leave to appeal was required because the subject matter of the suit exceeded $250,000. However, the Court of Appeal held that the appellant was estopped from asserting that the monetary value of the subject matter exceeded $250,000 because the appellant had accepted that the District Court had jurisdiction and had proceeded to trial on that basis (*Virtual Map (Singapore) Pte Ltd v Singapore Land Authority* [2009] 2 SLR(R) 558 at [24]).

8.10 The Court of Appeal also rejected the appellant's argument that leave of court to appeal under s 34(2)(*a*) of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) was not required because the subject matter at trial had no specific monetary value (*Virtual Map (Singapore) Pte Ltd v Singapore Land Authority* [2009] 2 SLR(R) 558 at [25]). Significantly, the Court of Appeal clarified that its earlier

decision in *Hailisen Shipping Co Ltd v Pan-United Shipyard Pte Ltd* [2004] 1 SLR(R) 148 ("*Hailisen Shipping*") was not authority for the proposition that leave of court was not required for an appeal to the Court of Appeal where the subject matter of the trial from which the appeal stems does not have a specific monetary value. *Hailisen Shipping* concerned an admiralty claim, which was governed by the High Court (Admiralty Jurisdiction) Act (Cap 123, 2001 Rev Ed) and the court in *Hailisen Shipping* could simply have decided the issue on the ground that s 34(2)(*a*) of the Supreme Court of Judicature Act had no application to any action commenced under the High Court (Admiralty Jurisdiction) Act (*Virtual Map (Singapore) Pte Ltd v Singapore Land Authority* [2009] 2 SLR(R) 558 at [28]–[30]).

8.11 Therefore, the Court of Appeal struck out the notice of appeal on the basis that the appellant had not obtained the requisite leave of court to appeal pursuant to s 34(2)(*a*) of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed).

8.12 Without prejudice to its position that no leave of court to appeal was required, the appellant had also applied for leave from the Court of Appeal to appeal against the lower court's decision. This application was also dismissed as the appellant failed to satisfy any of the three limbs which a party could rely upon when seeking leave to appeal, namely, that there was: (a) a *prima facie* case of error; (b) a question of general principle decided for the first time; and (c) a question of importance upon which further argument and a decision of a higher tribunal would be to the public advantage (*Virtual Map (Singapore) Pte Ltd v Singapore Land Authority* [2009] 2 SLR(R) 558 at [32] and [39]).

Nature of appeals from Strata Titles Boards

8.13 In *Ng Eng Ghee v Mamata Kapildev Dave* [2009] 3 SLR(R) 109, the Court of Appeal examined s 98(1) of the Building Maintenance and Strata Management Act (Cap 30C, 2008 Rev Ed) ("BMSMA"), which states that "no appeal shall lie to the High Court … except on a point of law". The Court of Appeal affirmed that "*ex facie* errors of law" would entitle a party to appeal under s 98(1) of the BMSMA. Such an approach afforded the court greater oversight over administrative and other inferior tribunals, and thus accorded better protection to private rights (at [101]).

8.14 Significantly, V K Rajah JA added that it was not necessary in the present case to rely on the proposition in *Edwards v Bairstow* [1956] AC 14, namely, that a determination may be challenged on a point of law (in addition to an error of law *ex facie* that bears upon the ultimate determination) if the facts were such that no person acting judicially

and properly instructed as to the relevant law could have come to the determination under appeal. This was because the present appeals were undoubtedly on points of law. Specifically, the misinterpretation of a statutory term, misconceiving the factual issue to be decided and a misapprehension as to the burden of proof were *ex facie* errors of law against which appeals may lie (*Ng Eng Ghee v Mamata Kapildev Dave* [2009] 3 SLR(R) 109 at [102]).

Bifurcation order

8.15 The court may make a bifurcation order for various reasons as a matter of practicality. Accordingly, the order may vary in its scope, terminology and effect. For example, the court may order *liability is to be determined at the first stage, to be followed by the assessment of damages in the second stage*. In *Beckkett Pte Ltd v Deutsche Bank AG* [2009] 3 SLR(R) 452, which involved, inter alia, the purchase of shares in certain companies and a related pledge of securities, the Assistant Registrar had made a bifurcation order to the effect that the value of shares in a certain year was to be determined at a subsequent stage of the proceedings (as the parties were not ready to present on the issue). A major issue was whether the bifurcation order required the claimant to prove its actual loss at trial. In the view of the Court of Appeal, there was no evidence justifying the High Court's interpretation of the bifurcation order as obliging the claimant to adduce evidence of actual loss at the trial (at [79]).

8.16 Furthermore, the order was only a procedural order which did not bind the judge. According to the Court of Appeal, if there was any doubt as to the scope of the order, and if it was necessary to modify or set aside the order in the interest of justice, the judge had the power to do so, and to give such directions as he thought fit. The Court of Appeal also determined that the judge should have ruled on the dispute when it arose so that the claimant would be aware of the position and have the opportunity to decide whether to apply to re-open its case to adduce evidence of actual loss on the basis of the judge's interpretation of the order. Although both parties had closed their cases, it would have been within the power of the judge to grant the application because of the absence of prejudice (*Beckkett Pte Ltd v Deutsche Bank AG* [2009] 3 SLR(R) 452 at [81]).

Costs

8.17 On four occasions in 2009, the Court of Appeal provided guidance on the general principles governing orders for costs.

Costs for separate representation

8.18 In *Wing Joo Loong Ginseng Hong (Singapore) Co Pte Ltd v Qinghai Xinyuan Foreign Trade Co Ltd* [2009] 2 SLR(R) 814, the Court of Appeal reiterated the general principles governing the award of costs, namely, that costs were in the discretion of the court and that costs should follow the event unless it appeared to the court that some other order should be made in the circumstances of the case. In cases where there were two (or more) co-defendants, it was a trite principle that only one set of costs would normally be payable to them if both (or all) of them succeeded. This principle would apply even if they were separately represented, unless reasonable grounds for the severance of defences can be shown (at [200] and [201]).

8.19 In this case, the Court of Appeal ordered only one set of costs to be paid to the first and second defendants. This was because there were no reasonable grounds for the severance of defence and no need for the co-defendants to file separate defences. Thus, the co-defendants could have instructed one set of lawyers for the entire proceedings as their positions on the issues in dispute were common. Significantly, the Court of Appeal added that the proper avenue for the plaintiff to clarify the issue of costs would have been by writing to the judge for clarification, instead of by appealing against the judge's costs order (*Wing Joo Loong Ginseng Hong (Singapore) Co Pte Ltd v Qinghai Xinyuan Foreign Trade Co Ltd* [2009] 2 SLR(R) 814 at [202] and [203]).

8.20 The issue of the costs of separate representation was further addressed by the Court of Appeal in *Ng Eng Ghee v Mamata Kapildev Dave* [2009] 4 SLR(R) 155.

8.21 V K Rajah JA held that the right to separate counsel did not invariably carry with it an entitlement to recover all the attendant legal costs incurred. Instead, the court would balance this right against the possibility of unduly penalising the losing party with unreasonably incurred costs (*Ng Eng Ghee v Mamata Kapildev Dave* [2009] 4 SLR(R) 155 at [22]).

8.22 The Court of Appeal reiterated that the usual order where different parties with similar interests were separately represented was just one set of costs. However, each determination of whether to award more than one set of costs turned on the facts of the case and the court would consider the following factors: (a) the degree of the community of interests existing among the parties; (b) the size of the sum or the importance of the interest that is the subject matter of the dispute; and (c) the degree of overlap in the pre-hearing preparations and conduct of proceedings. Ultimately, the key consideration of the court was whether there had been an unnecessary duplication of work and/or wastage of

time as a result of the separate representation (*Ng Eng Ghee v Mamata Kapildev Dave* [2009] 4 SLR(R) 155 at [24]–[26]).

8.23 In addition, the Court of Appeal examined the issue of costs in the situation where a lower court or tribunal had made a decision against two or more parties with overlapping interests and the appeal succeeded on grounds earlier raised by parties who had chosen not to appeal. The Court of Appeal held that it had the discretionary power to order payment to the non-appealing party under O 59 r 4 and O 57 r 13 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed). However, the Court of Appeal hastened to add that there was no general rule that all parties to proceedings in a lower court would ordinarily be able to receive their costs incurred in the lower court if that court's decision was ultimately overturned at the appellate level (*Ng Eng Ghee v Mamata Kapildev Dave* [2009] 4 SLR(R) 155 at [11]–[16]).

When indemnity costs are ordered

8.24 In *Tjong Very Sumito v Antig Investments Pte Ltd* [2009] 4 SLR(R) 732, the Court of Appeal reiterated that where a party to an arbitration or jurisdiction agreement breaches that agreement and causes the opposite party reasonably to incur legal costs, the innocent party will recover the whole, and not merely part, of its reasonable legal costs. Where a party seeks to derive an unjustifiable procedural advantage from its own breach of contract, that party also misuses the judicial facilities offered by the courts and such conduct requires judicial discouragement (at [19]). On the facts of the case, the appellants had pursued an unmeritorious appeal against the stay proceedings in favour of arbitration as it was beyond doubt that there was a dispute falling within the terms of the arbitration agreement. The Court of Appeal therefore dismissed the appeal with indemnity costs (at [71]).

Sanderson order

8.25 The Court of Appeal in *Chua Teck Chew Robert v Goh Eng Wah* [2009] 4 SLR(R) 716 considered the situations in which a *Sanderson* order would be appropriate. The purpose of a *Sanderson* order is to avoid the injustice of a successful claimant having the damages he recovers being eroded by an order to pay costs to the successful defendants whom it was reasonable for him to sue, when the claimant did not know which of them to sue (at [40]).

8.26 In deciding whether to grant a *Sanderson* order, the principal consideration for the court is whether it would be fair and reasonable for the unsuccessful defendant to bear the costs of the successful defendant(s). One factor of particular relevance in this case was that the

unsuccessful defendant had tried to shift blame to the other two defendants, who had in turn denied responsibility and had sought to pin the blame back on the unsuccessful defendant. In these circumstances, the Court of Appeal held that it was reasonable for the plaintiff to have also sued the other co-defendants (*Chua Teck Chew Robert v Goh Eng Wah* [2009] 4 SLR(R) 716 at [40]–[44]).

Security for costs

8.27 In *Ong Jane Rebecca v Pricewaterhousecoopers* [2009] 2 SLR(R) 796, Judith Prakash J applied a two-stage test to determine whether to allow an application for security for costs. First, the court's discretion to grant security for costs can only be invoked if the plaintiff is ordinarily resident out of the jurisdiction. Secondly, the court will consider all the circumstances in determining whether security for costs should be ordered, including the strength or weakness of the plaintiff's claim and whether the plaintiff's claim is a *bona fide* one with a reasonable prospect of success. The decision as to whether the plaintiff's claim is a *bona fide* one with a reasonable prospect of success is made without a detailed examination of the merits of the case (at [20]–[22]).

8.28 Judith Prakash J also affirmed the following key principles:

(a) the fact that a defendant is insured is irrelevant in determining whether an order for security for costs should be made (*Ong Jane Rebecca v Pricewaterhousecoopers* [2009] 2 SLR(R) 796 at [25]);

(b) the court would take into account the extent of any overlap between the defence and counterclaims in considering whether security should be ordered and the quantum of any security to be provided, because the costs incurred in defending the action could be regarded as costs necessary to prosecute the counterclaim (at [26] and [27]);

(c) the mere bankruptcy or impecuniosity of the plaintiff is not sufficient to justify granting security for costs against the plaintiff, although it would not prevent the court from making the order as well (at [29]);

(d) where the litigant is a natural person, public policy leans much more towards encouraging access to the courts (at [30]); and

(e) a court hearing a security application should invariably take a conservative approach in order to balance the interests of all the parties (at [34]).

8.29 On the facts of the case, Judith Prakash J held that while the plaintiff had shown she was in difficult circumstances, she had failed to give sufficient particulars to establish that she could not raise any funds at all to provide any amount of security. However, as it appeared probable that an order for security for costs in the full amounts argued for by the defendants would stifle her claims, the quantum of security was reduced (*Ong Jane Rebecca v Pricewaterhousecoopers* [2009] 2 SLR(R) 796 at [33] and [34]).

8.30 Judith Prakash J reiterated the two-stage test in her subsequent decision in *Zhong Da Chemical Development Co Ltd v Lanco Industries Ltd* [2009] 3 SLR(R) 1017. In this case, the defendant, a company incorporated in India, had obtained an arbitration award against the plaintiff, a company incorporated in China, at the Singapore International Arbitration Centre. The plaintiff applied to set aside the arbitration award and the defendant applied for security for costs in these proceedings.

8.31 Judith Prakash J acknowledged that in international arbitration proceedings under the International Arbitration Act (Cap 143A, 2002 Rev Ed), it was common to find that both parties to the proceedings were foreign to the forum as parties would have chosen a neutral forum. It was therefore a matter of chance as to which party subsequently became the foreign plaintiff and was subjected to an application for security by the defendant (*Zhong Da Chemical Development Co Ltd v Lanco Industries Ltd* [2009] 3 SLR(R) 1017 at [11]).

8.32 Therefore, Judith Prakash J opined that in a case where relief had been sought under the International Arbitration Act (Cap 143A, 2002 Rev Ed), the approach to security for costs should be somewhat different from the norm. In agreeing to the foreign arbitral forum, the successful party must be taken to have agreed that any further action to set aside the arbitral award would take place in the courts of the forum which would not be the court of the jurisdiction in which the successful party is resident. The unsuccessful party should therefore not be penalised for being ordinarily resident out of the jurisdiction. Thus, where the circumstances were evenly balanced, it would ordinarily be just to dismiss the application for security (*Zhong Da Chemical Development Co Ltd v Lanco Industries Ltd* [2009] 3 SLR(R) 1017 at [13]).

8.33 On the facts of the case, Judith Prakash J concluded that the plaintiff had a propensity to resist paying cost orders made against it and that the defendant would have difficulty in enforcing any costs order it might receive in Singapore in a foreign jurisdiction such as China (*Zhong Da Chemical Development Co Ltd v Lanco Industries Ltd* [2009] 3 SLR(R) 1017 at [19]). For these reasons, the defendant's application for security for costs was granted.

Offers to settle

8.34 Order 22A r 9 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) was again considered in *CCM Industrial Pte Ltd v Uniquetech Pte Ltd* [2009] 2 SLR(R) 20. Chan Sek Keong CJ determined that r 9(5) gives the court an overriding discretion to manage costs in offers to settle. The provision also addresses the situations in which the offer to settle is beyond the ambit of the requirements in rr 9(1) and 9(3). Rule 9(5) is expressed to be "without prejudice to paragraphs (1), (2) and (3)" (just as r 12 is expressed to be without prejudice to rr 9 and 10). However, unlike r 12, r 9(5) provides that where an offer to settle has been made, and notwithstanding anything in the offer to settle, the court shall have full power to determine by whom and to what extent any costs are to be paid, and the court may make such a determination upon the application of a party or of its own motion. The court stated that "[t]hese are empowering words not found in r 12" (at [44]).

8.35 The learned Chief Justice determined that r 9(5) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) was applicable to the facts whether or not r (3)(*b*) applied: "The reason is that r 9(5) vests the court with full power to determine by whom and to what extent any costs are to be paid, so long as it is exercised without prejudice to rr 9(1), 9(2) and 9(3)" (at [45]). Even if r 9(3)(*b*) did not apply, "any decision by the court under r 9(5) would not have diminished or impaired r 9(3). The introduction of r 9(5) has made it unnecessary for the court to rely on O 59 to determine costs in relation to offers to settle" (*CCM Industrial Pte Ltd v Uniquetech Pte Ltd* [2009] 2 SLR(R) 20 at [45]). Rule 12 assumes a case where r 9(3)(*b*) is applicable, and given that that rule allows the court to decide otherwise than in accordance with the prescribed costs, no such impairment will occur (at [27]–[29]). The Court of Appeal also determined that it should have applied its discretion under r 9(5) rather than r 12 in *Singapore Airlines Ltd v Tan Shwu Leng* [2001] 1 SLR(R) 439 to reduce the costs of the plaintiff (*CCM Industrial Pte Ltd v Uniquetech Pte Ltd* [2009] 2 SLR(R) 20 at [26]).

Declaratory orders

8.36 In *Wing Joo Loong Ginseng Hong (Singapore) Co Pte Ltd v Qinghai Xinyuan Foreign Trade Co Ltd* [2009] 2 SLR(R) 814, the Attorney-General's Chambers had granted fiats to prosecute the plaintiffs via private summonses for infringements under the Trade Marks Act (Cap 332, 2005 Rev Ed) and the Copyright Act (Cap 63, 2006 Rev Ed). Before the High Court, the plaintiff obtained a declaration that it had not infringed any copyright against the first defendant, which meant that the plaintiff was not guilty of the charges under the Copyright Act.

8.37 On appeal, the Court of Appeal affirmed that the court had the discretion to grant declarations upon any matter as long as it does not exceed its general jurisdiction or contravene any express statutory provision in doing so. Specifically, a court in a civil action had the jurisdiction to grant a declaration even if it pertained to criminal proceedings (*Wing Joo Loong Ginseng Hong (Singapore) Co Pte Ltd v Qinghai Xinyuan Foreign Trade Co Ltd* [2009] 2 SLR(R) 814 at [176] and [180]).

8.38 However, Chao Hick Tin JA cautioned that a civil court, in normal circumstances, should be slow in granting a declaration relating to the criminal consequences of conduct as such a declaration would have a prejudicial effect on the criminal proceedings without binding the court in those proceedings. The circumstances in which it will be appropriate for a civil court to grant such a declaration are likely to be very rare and exceptional. For example, it must be shown that the criminal proceedings had not been properly brought or are vexatious or amount to an abuse of process in that the facts alleged by the Prosecution do not in law prove the offence charged (*Wing Joo Loong Ginseng Hong (Singapore) Co Pte Ltd v Qinghai Xinyuan Foreign Trade Co Ltd* [2009] 2 SLR(R) 814 at [181] and [192]). As no such exceptional circumstances were present, the declaratory order by the High Court was overturned (at [196]).

Default judgment

8.39 In *Oversea-Chinese Banking Corp Ltd v Frankel Motor Pte Ltd* [2009] 3 SLR(R) 623 at [14], the High Court determined that there are two avenues open to a party against whom a judgment in default has been entered, subsequent to substituted service, to set aside that judgment. He may apply to set aside the order for substituted service, and proceed to have the judgment set aside on the basis that it is an irregular judgment. Alternatively, he may apply to set aside the judgment on the basis that it is a regular judgment, and proceed to have it set aside on the merits. The principles in *Mercurine Pte Ltd v Canberra Development Pte Ltd* [2008] 4 SLR(R) 907 were applied by the High Court (the defendant failed to raise a triable or arguable issue).

Discovery

8.40 The Court of Appeal in *Susilawati v American Express Bank Ltd* [2009] 2 SLR(R) 737 considered briefly the appropriate approach to be adopted by an appellate court when determining whether a new trial should be ordered when discoverable documents were not disclosed by the successful party. The factors which the court would consider in such circumstances were, in addition to general considerations relating to the

administration of justice, the degree of culpability of the successful party, any lack of diligence on the part of the unsuccessful party and the extent of any likelihood that the result would have been different if the order had been complied with and the non-disclosed material had been made available (at [35] and [36]).

8.41 Significantly, V K Rajah JA cautioned that parties must appreciate that a lack of honesty in the pre-trial process can, in egregious cases, have exceptionally adverse consequences. V K Rajah JA also highlighted that legal advisers ought to, at the earliest appropriate opportunity, inform their clients in writing of their unwavering obligation to provide all relevant material that may either be supportive or destructive of their case theories (*Susilawati v American Express Bank Ltd* [2009] 2 SLR(R) 737 at [36]).

8.42 In *TCL Industries (Malaysia) Sdn Bhd v ICC Chemical Corp* [2009] 2 SLR(R) 218, the High Court considered whether the defendant was entitled to further discovery of documents that the plaintiff's solicitor said he had considered irrelevant. It transpired that the plaintiff's solicitor had considered the documents "not in the sense of actually looking at the documents, but from a description of the documents from the clients" (at [11]). Lee Seiu Kin J held that since the plaintiff's solicitor had not viewed the documents in question to form a view that they were not relevant, and as those documents were referred to in a relevant document, the defendant was entitled to further discovery of the said documents (at [13]). In addition, Lee Seiu Kin J noted that an advocate and solicitor is an officer of the court and should guard against any possibility that his words might be misconstrued by the court, especially on a matter that was material to the decision that the court was asked to make (at [12]).

Discontinuance

8.43 *Jagbir Singh s/o Baldhiraj Singh v Lim Keh Thye* [2009] 4 SLR(R) 305 concerned the defendants' application for a declaration that the action be deemed discontinued pursuant to O 21 r 2(6) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed). As the case stood, interlocutory judgment against the defendants had been obtained but the quantum of damages had not been assessed. However, there were two developments in the intervening period which the plaintiff contended were steps or proceedings under O 21 r 2(6), namely, a notice of change of solicitors filed on behalf of the defendants, and payment of a costs order by the plaintiff to the defendants.

8.44 Kan Ting Chiu J noted that two 2005 decisions conflicted on whether a notice of change of solicitors was a step or proceeding under

O 21 r 2(6) of the Rules of Court. In *Chellaiya Chandra v Cheng Song Thiam* (Suit No 600011 of 2001), V K Rajah J (as he then was) held that it was such a step or proceeding. Conversely, in *James Lee Chong Hwa v Phang Yen Hoong* (Magistrate's Court Suit No 3456 of 2002), Lai Siu Chiu J held that it was not. However, no grounds of decision were delivered in either case (*Jagbir Singh s/o Baldhiraj Singh v Lim Keh Thye* [2009] 4 SLR(R) 305 at [6]).

8.45 In the circumstances, Kan Ting Chiu J applied the Court of Appeal's holding in *The Melati* [2004] 4 SLR(R) 7, that an entry in the court's records was a step or proceeding even if it did not on its own bring the action forward. Accordingly, the notice of change of solicitors was a step in the action which the defendants had to take, and there was no reason to exclude the filing of a notice of change of solicitors from the open category of *any* step or proceeding (*Jagbir Singh s/o Baldhiraj Singh v Lim Keh Thye* [2009] 4 SLR(R) 305 at [16]–[18]).

8.46 On the other hand, the plaintiff had not taken a step or proceeding under O 21 r 2(6) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) when he paid the defendants the costs that he had been ordered to pay. This was because the payment itself was not a matter which was in the court records (*Jagbir Singh s/o Baldhiraj Singh v Lim Keh Thye* [2009] 4 SLR(R) 305 at [24] and [25]).

Enforcement of judgments

8.47 The Court of Appeal considered s 3(1) of the Reciprocal Enforcement of Commonwealth Judgments Act (Cap 264, 1985 Rev Ed) ("the RECJA") in *Westacre Investments Inc v The State-Owned Company Yugoimport SDPR* [2009] 2 SLR(R) 166. The case concerned an application to set aside the registration of an English judgment which had been registered in Singapore more than six years after it was obtained. The Court of Appeal ruled that if a foreign judgment is enforceable in the jurisdiction in which it had been obtained, it would be enforceable in Singapore subject to the fulfilment of the conditions imposed by the RECJA. V K Rajah JA rejected the argument that the foreign judgment sought to be registered pursuant to statute is subject to the Singapore Limitation Act (Cap 163, 1996 Rev Ed): "… this argument was entirely and fundamentally misconceived as it unhappily conflated a distinct statutory right [the right of registration under the RECJA] with a common law action for a debt" (at [4]). Also see *Re Cheah Theam Swee* [1996] 1 SLR(R) 24 for an analysis of the distinction between statutory registration and a common law action.

8.48 Having determined that the foreign judgment was enforceable in England (the proceedings before the Court of Appeal were adjourned

so that this issue could be specifically determined by the English High Court: see *Westacre Investments Inc v The State-Owned Company Yugoimport SDPR* [2009] 2 SLR(R) 166 at [13] and [17] ("*Westacre*")), the Court of Appeal in *Westacre* considered whether the requirements of s 3(1) of the Reciprocal Enforcement of Commonwealth Judgments Act (Cap 264, 1985 Rev Ed)were satisfied for the purpose of registration. A primary issue was whether the registration of the judgment approximately six years and seven months after the date of the English judgment undermined the registration. The Court of Appeal considered the requirement in s 3(1) that an application for the registration of the judgment may be made "at any time within 12 months after the date of the judgment, or such longer period as may be allowed by the court". The court also examined the basis of its discretion to enforce the judgment: "if in all the circumstances of the case it thinks it is just and convenient to do so". Having endorsed the position taken in *MBF Finance v Yong Yet Miaw* [1990] 2 SLR(R) 799 that the court must take into account the interests of justice and the practical effect of the enforcement, the Court of Appeal explained how a court is to approach its task when faced with a judgment which has been registered after substantial delay.

8.49 In deciding whether it is "just and convenient" to enforce the judgment, the court must consider all the circumstances of the case in accordance with s 3(1) of the Reciprocal Enforcement of Commonwealth Judgments Act (Cap 264, 1985 Rev Ed) (*Westacre Investments Inc v The State-Owned Company Yugoimport SDPR* [2009] 2 SLR(R) 166 at [24]). According to the Court of Appeal, these factors include (but are not limited to): considering whether the delay has prejudiced the judgment debtor; whether the judgment creditor can give a reasonable explanation for its delay; whether the judgment creditor has been reasonably diligent in seeking to enforce the judgment; and whether the judgment debtor has been obstructive. Although the greater the delay, the more cogent and compelling the judgment creditor's explanation must be in order to justify the registration, the delay must be considered in the context of other factors to which it is inextricably linked, such as the judgment creditor's diligence in seeking to enforce the judgment (at [27]–[30]), and whether the delay has prejudiced the judgment debtor (at [31]–[37]). V K Rajah JA pointed out that even a diligent judgment creditor may require a considerable period of time to discover and track down money or property belonging to the judgment debtor so as to enforce his judgment when "faced with an uncooperative judgment debtor whose assets might be furtively squirreled away all over the globe" (at [26]).

8.50 Therefore, in certain circumstances, "even a substantial delay" may be justified (*Westacre Investments Inc v The State-Owned Company Yugoimport SDPR* [2009] 2 SLR(R) 166 at [26]). A pivotal consideration

is the relative prejudice to the judgment creditor and the judgment debtor. For this purpose, the court will take into account the conduct of both parties, including unreasonable delay on the part of the former and whether the latter has caused any delay by concealing his assets: "the tilting of the judicial scales will in the final analysis depend on the assessment of both parties' conduct in terms of who was more responsible for the delay" (at [28]). As to the diligence of the judgment creditor, the court should take into account his efforts in enforcing the judgment in the jurisdiction which the judgment debtor's assets are most likely to be located and, in particular, his conduct in discovering any of the judgment debtor's property in Singapore. If the judgment creditor has been reasonably diligent in both jurisdictions, "a court would almost invariably be more inclined to allow rather than dismiss a late RECJA application" (at [29]). Furthermore, in these circumstances, the judgment debtor is unlikely to be able to show that he suffered prejudice, particularly if there is evidence that he had evaded enforcement through the concealment of his assets (at [29]).

8.51 The fact that the judgment creditor may not have taken certain actions which could have minimised delay in registering the judgment would not necessarily prevent enforcement. If he is able to establish that he was reasonably diligent in pursuing enforcement "on the whole", the court may consider his position favourably (*Westacre Investments Inc v The State-Owned Company Yugoimport SDPR* [2009] 2 SLR(R) 166 at [30]). V K Rajah JA emphasised "that the court should usually be slow to find fault with a judgment creditor by applying 'infallible' conclusions reached with the benefit of hindsight" at [30]. According to the court, the judgment creditor's lack of diligence in pursuing enforcement should not usually in itself be a reason for the court to dismiss a late application under the Reciprocal Enforcement of Commonwealth Judgments Act (Cap 264, 1985 Rev Ed) unless the prejudice to the judgment debtor if registration is allowed is greater than the prejudice to the judgment creditor if registration is refused.

8.52 In *Westacre Investments Inc v The State-Owned Company Yugoimport SDPR* [2009] 2 SLR(R) 166, another issue arose as to whether the method of enforcement in Singapore of an English judgment (which was not enforceable by writ of execution in England because of the lapse of time) could be limited. The assistant registrar had directed that enforcement be limited to the garnishee process to avoid the prejudice which might result if the judgment creditor was put in a better position regarding enforcement in Singapore than in England. The High Court ruled that a Singapore court does not have power to restrict the manner of enforcement of a foreign judgment under the Reciprocal Enforcement of Commonwealth Judgments Act (Cap 264, 1985 Rev Ed).

8.53 The Court of Appeal preferred to regard such an issue as falling within the scope of consideration of whether it would be "just and convenient" to enforce the judgment. If the foreign judgment is enforceable by some method in the foreign jurisdiction, it is *prima facie* registrable under the Reciprocal Enforcement of Commonwealth Judgments Act (Cap 264, 1985 Rev Ed) ("RECJA"). The RECJA does not preclude the registrability of a judgment simply because of restrictions in the manner of enforcement in the jurisdiction of the judgment. However, in determining whether it is "just and convenient" to enforce the judgment, the court will take into account any factors which bear on the issue of relative prejudice to the parties (*Westacre Investments Inc v The State-Owned Company Yugoimport SDPR* [2009] 2 SLR(R) 166 at [51] and [52]).

8.54 In *AmBank (M) Bhd v Yong Kim Yoong, Raymond* [2009] 2 SLR(R) 659, the Court of Appeal confirmed that the words "enforceable by execution in Singapore" in s 61(1)(*d*) of the Bankruptcy Act (Cap 20, 1985 Rev Ed) should be construed narrowly and, consequently, leave for this purpose must be obtained under O 46 r 2(1)(*a*) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) (at [49] and [52]). The Court of Appeal considered O 46 r 2(1)(*b*) and determined that this provision is concerned with the change of a party's identity (as when a party has died or the judgment has been assigned), and not merely a change of name (at [53]). As for the scope of the application of the Rules of Court, the Court of Appeal confirmed that they do not apply to proceedings excluded by O 1 r 2(2), unless there is a procedural *lacuna* in the applicable legislation and reference to a rule of court is appropriate.

Injunctions

Variation

8.55 *Metalform Asia Pte Ltd v Holland Leedon Pte Ltd* [2009] 4 SLR(R) 83 concerned an application to the Court of Appeal to vary an injunction which it had granted. The Court of Appeal had previously restrained Holland Leedon Pte Ltd ("HL") from commencing winding-up proceedings against Metalform Asia Pte Ltd ("MA") for an unpaid and undisputed debt, on the ground that MA had a genuine cross-claim against HL which could equal or exceed the undisputed debt.

8.56 Pursuant to the sale and purchase agreement between HL and MA, a sum had been held in escrow as security to meet any claims by MA for breach of warranties by HL. Significantly, an escrow letter from HL and MA to the escrow agent provided that the escrow agent had no obligation to release the escrow sum or any part thereof unless it had been jointly instructed in writing by HL and MA (*Metalform Asia Pte*

Ltd v Holland Leedon Pte Ltd [2009] 4 SLR(R) 83 at [4]). MA commenced arbitration proceedings against HL for breach of warranties, and HL subsequently served a statutory demand against MA to pay an undisputed debt, which was less than the amount claimed by MA in the arbitration proceedings.

8.57 MA applied for an injunction to restrain HL from commencing winding-up proceedings against MA. Although its application was dismissed by the High Court, its appeal was allowed by the Court of Appeal. It was this injunction which HL sought to vary, such that the continuation of the injunction would be conditional upon MA agreeing to release the escrow sum.

8.58 Without examining any of the grounds advanced by the parties both in support and in rebuttal of HL's application, Chan Sek Keong CJ held that HL's application was misconceived because this was simply a matter of contract between the parties (*Metalform Asia Pte Ltd v Holland Leedon Pte Ltd* [2009] 4 SLR(R) 83 at [10]). In truth, HL's application was not to vary an injunction, but an attempt to entreat the court's assistance to order MA to agree to the release of the balance sum against the latter's wishes (at [12]). The court could not interfere with the escrow arrangements between the parties unless the escrow agent was in breach of its obligations as an escrow agent.

8.59 Further, while the court had the power to dissolve or revoke the injunction where there was a material change of circumstances affecting its continuance (*Metalform Asia Pte Ltd v Holland Leedon Pte Ltd* [2009] 4 SLR(R) 83 at [12]), the circumstances in which the Court of Appeal had initially granted the injunction had not changed. The escrow sum was still held as security for MA's cross-claim against HL which had yet to be determined in the arbitration (at [17]).

8.60 The Court of Appeal also clarified that the injunction was in substance a final, and not an interlocutory, injunction. This was because it was the only relief that had been sought in the proceedings, and it had not been granted as part of ongoing proceedings. However, the injunction was also a provisional one, because its basis could disappear. For example, the arbitrator could make an award on MA's cross-claim which was less than the undisputed debt, in which case HL could issue a fresh statutory demand to MA for the amount outstanding and commence winding-up proceedings if MA defaulted on that demand (*Metalform Asia Pte Ltd v Holland Leedon Pte Ltd* [2009] 4 SLR(R) 83 at [14]).

Anti-suit injunction

8.61 The fundamental principles relating to anti-suit injunctions in Singapore were reiterated by the Court of Appeal in *John Reginald Stott Kirkham v Trane US Inc* [2009] 4 SLR(R) 428 at [24]–[27].

8.62 First, the jurisdiction is to be exercised when the "ends of justice" require it. Secondly, where the court decides to grant an injunction restraining proceedings in a foreign court, its order is directed not against the foreign court but against the parties so proceeding or threatening to proceed. Thirdly, an injunction will only be issued to restrain a party who is amenable to the jurisdiction of the court, against whom an injunction will be an effective remedy. Fourthly, since such an order indirectly affects the foreign court, the jurisdiction is one which must be exercised with caution.

8.63 The Court of Appeal also approved four elements which Belinda Ang J had considered in determining whether an anti-suit injunction ought to be granted in *Evergreen International SA v Volkswagen Group Singapore Pte Ltd* [2004] 2 SLR(R) 457. The four elements are: (a) whether the defendants were amenable to the jurisdiction of the Singapore court; (b) the natural forum for resolution of the dispute between the parties; (c) the alleged vexation or oppression to the plaintiffs if the foreign proceedings were to continue; and (d) the alleged injustice to the defendants as an injunction would deprive the defendants of the advantages sought in the foreign proceedings (*John Reginald Stott Kirkham v Trane US Inc* [2009] 4 SLR(R) 428 at [28]).

8.64 To this list, the Court of Appeal added a fifth element, namely, whether the institution of the foreign proceedings was in breach of any agreement between the parties. Where there is such an agreement, the court may not feel diffident about granting an anti-suit injunction as it would only be enforcing a contractual promise and the question of international comity is not as relevant (*John Reginald Stott Kirkham v Trane US Inc* [2009] 4 SLR(R) 428 at [29]).

8.65 On the facts of the case, the relevant factors were far from pointing towards Singapore as being the more appropriate forum. Notwithstanding this, the Court of Appeal made clear that even if it had found that Singapore was the natural forum to adjudicate the claim, it would be inconsistent with international comity to restrain a party from proceeding in a foreign court on this ground alone (*John Reginald Stott Kirkham v Trane US Inc* [2009] 4 SLR(R) 428 at [45]). It must be only in the clearest of circumstances that the foreign proceedings are vexatious or oppressive before an injunction can be granted and justified. Otherwise, the injunction would deprive a party of his right to sue in

the jurisdiction which is most convenient for him and which he is clearly entitled to (at [46]).

8.66 Significantly, the Court of Appeal also endorsed the High Court's clarification in *Evergreen International SA v Volkswagen Group Singapore Pte Ltd* [2004] 2 SLR(R) 457 (*John Reginald Stott Kirkham v Trane US Inc* [2009] 4 SLR(R) 428 at [41]), that the question for consideration is whether foreign proceedings are vexatious or oppressive and are hence unconscionable. The Court of Appeal noted that cases where the courts had held that there was vexation or oppression could be suitably described as unconscionable, such as where a party is subjected to oppressive procedures in the foreign court, bad faith in the institution of the foreign proceedings, commencing the foreign proceedings for no good reason, commencing proceedings that are bound to fail, and extreme inconvenience caused by the foreign proceedings (at [46] and [47]).

Mareva injunction

8.67 In *Bahtera Offshore (M) Sdh Bhd v Sim Kok Beng* [2009] 4 SLR(R) 365 at [19]–[33], the High Court provided a comprehensive summary of the principles relating to the obligation on the plaintiff to make full and frank disclosure of all material facts at the time of application for an *ex parte* injunction.

> (a) The judge hearing an *inter partes* application to discharge an *ex parte* injunction on the ground that the plaintiff has failed to make full and frank disclosure may not sit in appeal over the decision to grant the *ex parte* injunction. Instead, the court would have to determine whether, on the full facts, the injunction should be continued or discharged, or a fresh injunction be issued.
>
> (b) The plaintiff in an *ex parte* application is under a clear duty to make full and frank disclosure of all material facts in his possession at the time of application, even if they are prejudicial to his claim. This includes defences which are likely to be raised.
>
> (c) The duty is to disclose all material facts. Materiality is to be decided by the court and not by the applicant or their advisers.
>
> (d) "Material facts" cover both factual and legal matters, and it extends to facts which the applicant has knowledge of and facts which he ought to know or could have discovered had he made proper inquiries. Whether or not a fact is a material fact depends on the facts and circumstances of each case and also on the particular relief sought.

(e) Even if the plaintiff has made a disclosure of material facts, mere disclosure without more or devoid of the proper context is in itself insufficient to constitute full and frank disclosure. The manner of disclosure must also meet the threshold of the disclosure, namely, that the plaintiff has identified the crucial points for and against the application, and not relied on general statements and the mere exhibiting of numerous documents.

(f) Conversely, where the court finds that the plaintiff has not made a full and frank disclosure, it does not necessarily follow that the court must discharge the Mareva injunction. There is discretion in the matter and the court may continue the injunction notwithstanding non-disclosure.

(g) Whether the court would exercise its discretion depends on factors such as the particular relief sought, how serious the material non-disclosure is, and the overall merits of the plaintiff's case.

(h) Where the information suppressed is sufficiently material, the court would then have to consider whether the material non-disclosure was inadvertent or innocent, or whether it was deliberate and intended to mislead the court into granting the injunction.

(i) As a general rule of thumb, courts tend to take a stricter view of any material non-disclosure in respect of Mareva injunctions as compared with other orders because the grant of the Mareva injunction will confer on the applicant an advantage over the party restrained.

(j) The court is less likely to exercise its discretion to set aside the Mareva injunction where the plaintiff did not have any deliberate intention to suppress those material facts from the court. However, this is not to say that all innocent non-disclosures are excused.

(k) However, where the plaintiff did intend to suppress material facts from the court, whether or not the court would exercise its discretion to discharge the Mareva injunction would depend on the facts of each case. The court would have to balance the degree of the plaintiff's culpability and the burden of the injunction against the defendants should the injunction be upheld against the adverse impact on the plaintiff should the injunction be discharged.

(l) Where there has been culpable non-disclosure, the court would be more inclined towards exercising its discretion to discharge the injunction for abuse of process, unless there are

very extenuating circumstances for which the court would be prepared to excuse the plaintiff.

8.68 Ultimately, in discharging a Mareva injunction because of a material non-disclosure, the question is whether it would be "just and convenient" in the circumstances to lift the injunction. The court must determine whether the "punishment" imposed by way of the discharge would outweigh the "culpability" of the material non-disclosure and distortion (*Bahtera Offshore (M) Sdh Bhd v Sim Kok Beng* [2009] 4 SLR(R) 365 at [44]).

8.69 On the facts of the case, Chan Seng Onn J held that the plaintiff had intentionally and deliberately set out to mislead the court on the material facts, and its honesty, probity and integrity were even called into question (*Bahtera Offshore (M) Sdh Bhd v Sim Kok Beng* [2009] 4 SLR(R) 365 at [45]). The court exercised its discretion to discharge the Mareva injunction for two reasons: first, the evidence did not disclose a good arguable case against the defendants; and, secondly, there was no real risk of dissipation because the plaintiff had already obtained a worldwide Mareva injunction in Malaysia against the second defendant (at [46]).

Interest on judgments

8.70 As O 42 r 12 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) merely provides for the rate of interest to be applied and omits any mention of the manner of computing that interest (whether on a simple or compound basis), it does not prohibit the granting of compound post-judgment interest *per se*. (See *The Oriental Insurance Co Ltd v Reliance National Asia Re Pte Ltd* [2009] 2 SLR(R) 385 at [181].)

Interim payments

8.71 If the court determines that one of the grounds in O 29 r 12 (or r 11) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) is satisfied, it must go on to the next stage of considering whether it is just to make the order for an interim payment, and how much should be paid, in the circumstances of the case "after taking into account any set-off, cross claim or counterclaim on which the defendant may be entitled to rely". In *American International Assurance Co Ltd v Wong Cherng Yaw* [2009] SGHC 89, the question arose as to whether the court should consider any set-off or counterclaim during the first stage of its deliberation. The High Court concluded that the court may consider any defences and counterclaims which qualify as set-offs (because these directly affect the claim), but not other counterclaims.

8.72 The Singapore Court of Appeal (*American International Assurance Co Ltd v Wong Cherng Yaw* [2009] 3 SLR(R) 1117) did not think it was necessary for the High Court to disagree with the position taken in *Shanning International Ltd v George Wimpey International Ltd* [1989] 1 WLR 981 ("*Shanning*"). The Court of Appeal considered a different interpretation of *Shanning* to the effect that the court is only to consider set-offs and defences at the first stage but not counterclaims which arise from other transactions (at [17] and [18]). The Court of Appeal also referred to *Smallman Construction Ltd v Redpath Dorman Long Ltd* (1988) 47 BLR 15, which indicates that the court is to consider even independent counterclaims at the first stage. It was not necessary to resolve this issue as the result of the application would have been the same regardless of the approach adopted (the order for the interim payment was upheld, although the amount was reduced) (at [19] and [30]). The Court of Appeal also pointed out that if the court makes a mistake in the amount awarded as an interim payment, it may make the appropriate adjustment under O 29 r 17 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed). Furthermore, the court "must take into account the applicant's ability to repay should a mistake in the amount awarded occur" (at [24]).

Jurisdiction

8.73 The Court of Appeal distinguished between applications under O 12 r 7(1) and r 7(2) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed): whether a litigant has submitted to the jurisdiction of the court is relevant only to an application for a stay under O 12 r 7(1) (because the litigant is taking the position that the court has no jurisdiction to hear the case). In contrast, where the litigant applies for a stay under O 12 r 7(2) on the ground of *forum non conveniens*, he in fact accepts the court's jurisdiction and is merely applying for a stay. Therefore, any steps he takes in the proceedings will not compromise his application. Compare *Wing Hak Man v Bio-Treat Technology Ltd* [2009] 1 SLR(R) 446 at [59]–[65], in which the High Court considered whether a holding defence constituted waiver of the defendant's right to ask the court not to exercise its jurisdiction (in the circumstances it did not). The High Court seemed to assume that waiver could operate in the context of O 12 r 7(2). If so, this is no longer the position after *Chan Chin Cheung v Chan Fatt Cheung* [2009] SGCA 62.

8.74 Order 12 r 7(2) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) requires the application to the court not to assume jurisdiction to be made "… within the time limited for serving a defence". In *Wing Hak Man v Bio-Treat Technology Ltd* [2009] 1 SLR(R) 446, the High Court, by permitting the defendant to file his application out of time, confirmed that the time limit in O 12 r 7(2) (and r 7(1)) is subject to the

court's power to extend time (at [57]). (This position was subsequently confirmed by the Court of Appeal in *Chan Chin Cheung v Chan Fatt Cheung* [2009] SGCA 62.)

8.75 The High Court in *Wing Hak Man v Bio-Treat Technology Ltd* [2009] 1 SLR(R) 446 also concluded that the 48-hour notice to the opposing advocate and solicitor (pursuant to r 70 of the Legal Profession (Professional Conduct) Rules (Cap 161, R 1, 2009 Rev Ed) to file and serve the defence was inappropriate and unjustified in the circumstances of the pending stay application. The court referred to *Carona Holdings Pte Ltd v Go Go Delicacy Pte Ltd* [2008] 4 SLR(R) 460 at [33] and [34], which endorsed the observations of Woo Bih Li JC (as he then was) in *Yeoh Poh San v Won Siok Wan* [2002] 2 SLR(R) 233 at [27] to the effect that ordinarily a defendant should not be asked or compelled to file his defence in the course of a pending stay application, so that the defendant is not compelled to adopt two contrary courses of action simultaneously.

Locus standi for judicial review

8.76 The Court of Appeal has ruled that the elements of *locus standi* for an application under O 53 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) (concerning judicial review) are no different to the elements of *locus standi* pertaining to an application for a declaration under O 15 r 16. (See *Eng Foong Ho v Attorney-General* [2009] 2 SLR(R) 542 at [18].)

Parties

8.77 An order of court generally only binds the parties to an action, and even then only after they have been properly notified of the proceedings and given an opportunity to be heard. This principle was re-propounded in *Chua Choon Cheng v Allgreen Properties Ltd* [2009] 3 SLR(R) 724, in which the court decided against making an order against certain non-parties who did not have the opportunity to appear before the court to present their cases.

Pleadings

8.78 In *Ong Kai Hian v Tan Hong Suan Cecilia* [2009] 3 SLR(R) 385, the High Court denied an application to amend the statement of claim (in order to incorporate a new cause of action and relief) and reply (to deny the applicability of s 6 of the Civil Law Act (Cap 43, 1999 Rev Ed)). The proposed amendments did not enable "the real issue between the parties to be tried" and would have caused "injustice or injury" to the

opposing party which could not have been compensated by costs. An allegation that a party has not acted in good faith must be pleaded. In *Tat Seng Machine Movers Pte Ltd v Orix Leasing Singapore Ltd* [2009] 4 SLR(R) 1101 at [76], the Court of Appeal determined that the failure to plead such an allegation prevents reliance on it at trial: "It is trite pleading practice that all material facts (including that relating to a party's lack of good faith) should be expressly pleaded and particularised. Such material facts are not limited only to those which establish a cause of action or defence."

8.79 As an allegation that a party has not acted in good faith is a serious allegation, "due process requires that adequate notice of such an allegation be given [to the concerned party]" (*Tat Seng Machine Movers Pte Ltd v Orix Leasing Singapore Ltd* [2009] 4 SLR(R) 1101 at [76]). In *PT Panasonic Gobel Indonesia v Stratech Systems Ltd* [2009] 1 SLR(R) 470, a party had claimed damages to be assessed rather than a refund of payments made on the basis of a total failure of consideration. Accordingly, it could not rely on the latter ground (*PT Panasonic Gobel Indonesia v Stratech Systems Ltd* [2009] 1 SLR(R) 470 at [87]). In *Metalform Asia Pte Ltd v Ser Kim Koi* [2009] 1 SLR(R) 131, the plaintiff's claim for specific damages was struck out because the underlying facts were omitted from the statement of claim.

Privilege

8.80 In *Tentat Singapore Pte Ltd v Multiple Granite Pte Ltd* [2009] 1 SLR(R) 42, the plaintiff applied for a declaration that a certain e-mail communication was privileged, and for the defendant to be restrained from using it in separate proceedings for summary judgment brought by a holding company related to the plaintiff against the same defendant. The e-mail communication was attached to the affidavit of a former officer of the holding company ("*X*"), who was also a shareholder and director of the defendant. *X* had made the affidavit for the defendant and the e-mail he referred to was a privileged communication between the plaintiff and its lawyers (a copy of which he had obtained in his capacity as a former officer of the holding company).

8.81 The High Court adopted May LJ's pronouncement in *Goddard v Nationwide Building Society* [1987] 1 QB 670 at 683 that a third party in possession of a copy of a privileged document is entitled to adduce it in evidence subject to the right of the person claiming privilege to apply to restrain its use prior to its presentation in court as evidence and its introduction to the public domain (*Tentat Singapore Pte Ltd v Multiple Granite Pte Ltd* [2009] 1 SLR(R) 42 at [34] and [39] ("*Tentat*")). Therefore, although the e-mail communication in *Tentat* had been

referred to in *X*'s affidavit, it had yet to be presented in evidence at the hearing of the application for summary judgment. Accordingly, the plaintiff was in a position to obtain the relief it sought (at [40]–[42]). The High Court also acknowledged the common law principle that a party may impliedly waive his privilege if the facts clearly establish this intention. The court further stated (at [21]) that "privilege could be waived by express waiver or an implied waiver". Waiver was not established in the circumstances of the case.

Service

8.82 The High Court in *Consistel Pte Ltd v Farooq Nasir* [2009] 3 SLR(R) 665 examined the relationship between substituted service under O 62 r 5 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) and service out of jurisdiction under O 11 of the Rules of Court. Significantly, Andrew Ang J held that where a defendant had left Singapore before a writ of summons was issued against him, the plaintiff had to seek leave of court to serve the writ out of jurisdiction before resorting to substituted service (at [30]).

8.83 This was because O 62 r 5 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) established a hierarchy of service which must be adhered to. Substituted service can only be employed when personal service is impracticable. The mere fact that the defendant is out of jurisdiction does not constitute such impracticability (*Consistel Pte Ltd v Farooq Nasir* [2009] 3 SLR(R) 665 at [31]).

8.84 Andrew Ang J also highlighted that when a plaintiff applies under O 11 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) for service out of jurisdiction, he must show that the interests of justice are best served by proceedings in Singapore. The plaintiff should not be allowed to bypass the requirements of O 11 simply by applying for substituted service within jurisdiction as this would render O 11 otiose (*Consistel Pte Ltd v Farooq Nasir* [2009] 3 SLR(R) 665 at [34] and [42]).

8.85 However, there were two exceptions to the application of this general principle: first, where the defendant had left the country in anticipation that legal proceedings would be initiated against him; and, secondly, where the defendant is constantly moving from country to country such that it is impossible to serve the writ personally on him. The court noted that while these exceptions are non-exhaustive, these exceptions should not detract from the force of the general principle that applying for personal service out of jurisdiction should be the first port of call for plaintiffs who have to serve a writ on defendants who are outside Singapore (*Consistel Pte Ltd v Farooq Nasir* [2009] 3 SLR(R) 665 at [35]).

8.86 Finally, the court also explained that the Court of Appeal probably allowed substituted service in the case of *Ng Swee Hong v Singmarine Shipyard Pte Ltd* [1991] 1 SLR(R) 980 because no process server could keep up with the defendant in that case and that substituted service had a very good chance of bringing the writ to the defendant's attention (*Consistel Pte Ltd v Farooq Nasir* [2009] 3 SLR(R) 665 at [45]).

Stay of proceedings

Effect of filing holding defence

8.87 In *Wing Hak Man v Bio-Treat Technology Ltd* [2009] 1 SLR(R) 446, the plaintiffs had commenced an action against four defendants. The first defendant successfully applied for a stay of the proceedings on the basis of *forum non conveniens*. However, on the same day, the plaintiffs called upon the second defendant to file his defence within 48 hours, failing which default judgment would be obtained. Pursuant to this, the second defendant filed a holding defence. The second and fourth defendants then applied for a stay of proceedings as well as an extension of time to file their respective defences.

8.88 Belinda Ang J identified the issues as whether the terms of the reservation incorporated in the defence were proper and valid, and whether the filing of the holding defence exhibited an unequivocal, clear and consistent intention to have the dispute determined by the Singapore courts (*Wing Hak Man v Bio-Treat Technology Ltd* [2009] 1 SLR(R) 446 at [62] and [63]).

8.89 The defence which the second defendant had filed was all of three paragraphs and not substantive on the merits of the plaintiff's pleadings. Paragraph 1 of the defence stated that it was filed without prejudice to the application to stay all proceedings. Paragraph 2 was a bare denial of the allegation in the statement of claim. Paragraph 3 was a general traverse denying every allegation in the statement of claim.

8.90 Belinda Ang J held that paragraph 1 of the defence was a properly worded reservation, and that there was no election to abandon the pending stay application in favour of allowing the action to proceed in Singapore. Accordingly, the filing of the defence did not compromise the second defendant's stay application (*Wing Hak Man v Bio-Treat Technology Ltd* [2009] 1 SLR(R) 446 at [62] and [63]).

Dispute as to jurisdiction

8.91 In *Wing Hak Man v Bio-Treat Technology Ltd* [2009] 1 SLR(R) 446, Belinda Ang J also held that the time limit set in O 12 r 7(2) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) is not absolute. This rule provides that a defendant who wishes to raise the issue of *forum non conveniens* must apply to stay the proceedings within the time limited for serving a defence. Instead, the court granted an extension of time under O 3 r 4 of the Rules of Court because the second defendant had a reason for the late filing – he and his lawyers were mistaken that the plaintiffs had given them an extra week to file their defence. Further, the court held that no prejudice had been caused to the plaintiff (at [54]–[57]).

8.92 The decision above was cited with approval by the Court of Appeal in the case of *Chan Chin Cheung v Chan Fatt Cheung* [2009] SGCA 62 at [16], which similarly held that there was nothing in O 12 r 7(2) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) which suggested that the timeline laid down therein should be rigidly adhered to, whatever may be the circumstances (at [21]). The High Court had decided to extend the time for allowing the respondents to file the stay application because the respondents had waited until the Malaysian courts had refused to stay the Malaysian proceedings before applying to stay the Singapore proceedings. The Court of Appeal upheld this decision, and emphasised that no prejudice to the appellant had been shown (at [23]–[26]).

Inherent jurisdiction

8.93 In *Relfo Ltd v Bhimji Velji Jadva Varsani* [2009] 4 SLR(R) 351 at [36], the High Court applied the Court of Appeal's holding in *Roberto Building Material Pte Ltd v Oversea-Chinese Banking Corp Ltd* [2003] 2 SLR(R) 353, that the inherent jurisdiction of the courts to stay proceedings pending payment of legal costs should only be invoked in exceptional circumstances where there was a clear need for it and the justice of the case so demanded.

8.94 The defendant had argued that the circumstances were exceptional because the plaintiff was insolvent and the costs owed to the defendant were not recoverable under the normal enforcement process. However, Andrew Ang J was not persuaded that these circumstances were exceptional enough to warrant a stay. In addition, Andrew Ang J pointed out that the defendant was still holding on to money which properly belonged to the plaintiff (*Relfo Ltd v Bhimji Velji Jadva Varsani* [2009] 4 SLR(R) 351 at [38] and [39]).

When stay of proceedings will not be granted

8.95 In *Tjong Very Sumito v Antig Investments Pte Ltd* [2009] 4 SLR(R) 732 at [52], the Court of Appeal briefly considered the circumstances in which a stay of court proceedings should be refused in the context of an arbitration agreement. A stay should be refused, for example, where the court concludes that one of the parties named in the legal proceedings was not a party to the arbitration agreement, where the alleged dispute did not come within the terms of the arbitration agreement, or where the application for the stay was out of time. In addition, the Court of Appeal highlighted that where the party applying for a stay had waived or was estopped from insisting on arbitration, for example, when the parties had subsequently agreed that disputes could be resolved by litigation, the arbitration agreement would be "inoperative" and a stay in favour of arbitration would be refused (at [52] and [53]).

8.96 This last ground of estoppel was applied to refuse a stay application in *Yokogawa Engineering Asia Pte Ltd v Transtel Engineering Pte Ltd* [2009] 2 SLR(R) 532. The plaintiff had only provided the defendant with one copy of its General Conditions, which provided for arbitration in Singapore. The plaintiff did not furnish the defendant with the newer version of its General Conditions, which provided for arbitration in Thailand. Nor did the plaintiff indicate to the defendant that its version of the General Conditions were outdated or no longer valid. The defendant was not even aware that there was a different version of the General Conditions. The plaintiff had a continuing duty to correct the defendant's erroneous view as to the applicable dispute resolution mechanism but failed to do so for more than four years (at [9] and [12]).

8.97 On these facts, Judith Prakash J found that all three elements of the defence of estoppel by representation, namely, estoppel, reliance and detriment, were present. Accordingly, the plaintiff was estopped from asserting that the proper dispute resolution procedure was not arbitration in Singapore and its application to stay the Singapore arbitration proceedings was dismissed with costs (*Yokogawa Engineering Asia Pte Ltd v Transtel Engineering Pte Ltd* [2009] 2 SLR(R) 532 at [20]).

Striking out

8.98 Significant developments in the law on striking out were made in 2009. In particular, there were three decisions in which the High Court struck out the plaintiffs' actions, each on distinct grounds.

8.99 The first was the decision in *K Solutions Pte Ltd v National University of Singapore* [2009] 4 SLR(R) 254, in which the plaintiff's statement of claim and its defence to counterclaim were struck out on the ground that the plaintiff had suppressed discovery and destroyed relevant documents. This was the first time which the High Court considered pre-action destruction of documents and only the second time where post-action destruction of documents was considered.

8.100 The plaintiff had brought a claim against the defendant alleging that the defendant had wrongfully terminated a contract for the plaintiff to develop an integrated technology information system for the defendant. In the course of discovery, it emerged that the plaintiff had suppressed discovery of various categories of documents. The plaintiff claimed to have no backups of its internal e-mail, and one of the plaintiff's key staff also claimed to have a policy of deleting his e-mail once every six months. In total, the plaintiff had filed more than 20 affidavits to explain its failure to comply with its discovery obligations and to further explain its initial explanations.

8.101 The High Court noted the numerous contradictions in the plaintiff's affidavits and held that the plaintiff's suppression of documents was deliberate. The evidence demonstrated that the plaintiff was preserving and/or collating evidence in anticipation of litigation, and in this light, it was unbelievable that all of the plaintiff's internal e-mail had been deleted without backup. In short, the court was of the opinion that the plaintiff had deliberately sought to destroy and suppress documents and recordings adverse to it (*K Solutions Pte Ltd v National University of Singapore* [2009] 4 SLR(R) 254 at [134]–[138]).

8.102 Woo Bih Li J held that even though there is no specific provision in the Rules of Court (Cap 322, R 5, 2006 Rev Ed) prohibiting any party from destroying relevant documents in his possession, custody or power, it is implicit in the scheme of discovery that he should not do so, especially if he knows that they are relevant to the issues in the litigation (*K Solutions Pte Ltd v National University of Singapore* [2009] 4 SLR(R) 254 at [106]).

8.103 Woo Bih Li J clarified that if a litigant destroys documents and does not disclose that he once had those documents, if the destruction was deliberate and if it had occurred after the action was commenced, the litigant would still be in breach of his discovery obligations under para 3 of Form 37 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed). Thus, his conduct would come under O 24 r 16 of the Rules of Court even though such conduct did not fall under the express words of O 24 r 16. Alternatively, the court's inherent jurisdiction would enable the court to impose the appropriate sanction (*K Solutions Pte Ltd v National University of Singapore* [2009] 4 SLR(R) 254 at [107] and [108]).

8.104 As for pre-action destruction of documents, the court is empowered under its inherent jurisdiction to respond with the appropriate sanction to such a deliberate destruction (*K Solutions Pte Ltd v National University of Singapore* [2009] 4 SLR(R) 254 at [109]). The court saw no reason in principle to distinguish between pre-action and post-action destruction where it had been established that the destruction was deliberate (at [125]).

8.105 Ultimately, all the circumstances have to be considered in determining whether a striking out should be ordered. The intention behind the destruction is crucial, but even a deliberate destruction will not necessarily lead to a striking out. The test is not whether a fair trial is possible; the court may order a striking out even if a fair trial is still possible. However, where there is both deliberate destruction and a fair trial is no longer possible, then a striking out would appear to be the appropriate sanction (*K Solutions Pte Ltd v National University of Singapore* [2009] 4 SLR(R) 254 at [126] and [127]).

8.106 The second case, *Recordtv Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2009] 4 SLR(R) 43, concerned an application to strike out certain paragraphs of the plaintiff's statement of claim which pertained to an alleged conspiracy on the part of the defendants. Tan Lee Meng J affirmed the principle reiterated by Belinda Ang J in *OCM Opportunities Fund II, LP v Burhan Uray* [2004] SGHC 115, namely, that a cause of action pleaded without the support of material facts is defective and should be struck out as disclosing no reasonable cause of action, or as being frivolous and vexatious or an abuse of the court's process (*Recordtv Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2009] 4 SLR(R) 43 at [18] and [19]).

8.107 However, in this case, the only evidence of a conspiracy presented by the defendants were the first and second cease and desist letters, in which the defendants asserted that the plaintiff was in breach of their copyright. Counsel for the plaintiff even stated that it was hoped that evidence of a conspiracy would be uncovered during cross-examination of the defendants' witnesses. The High Court held that this "[smacked] of a most blatant fishing expedition" (*Recordtv Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2009] 4 SLR(R) 43 at [20]).

8.108 Even though at an interlocutory stage, a party is not required to lay down all the evidence on which he will rely at the trial to support his claim, it cannot be overlooked that material facts must be pleaded. Tan Lee Meng J held that the first and second cease and desist letters did not prove a conspiracy of any kind and there was no evidence of the alleged conspiracy in the affidavits that had been exchanged (*Recordtv Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2009] 4 SLR(R) 43 at [24]). Given that the trial was just a few weeks away, the plaintiff's conspiracy claim was

hopelessly doomed to fail and to allow the case to go further for trial would be to compel the defendants to expend time and money in defending a case which obviously had no merit whatsoever. Consequently, the plaintiff's conspiracy claim was struck out because it was scandalous, frivolous and vexatious or an abuse of the process of the court (at [26] and [27]).

8.109 In the third case, *Ho Kiang Fah v Toh Buan* [2009] 3 SLR(R) 398, the parties were in the midst of matrimonial proceedings in which interim judgment had been granted and the next stage was to deal with ancillary matters such as the division of the matrimonial assets of the parties. Against this backdrop, the husband commenced this action in the High Court for, *inter alia*, a declaration that the husband and wife owned a certain property in equal shares, and an order that the property be sold in the open market, with the sale proceeds to be divided equally between the parties.

8.110 The High Court held in no uncertain terms that the proceedings were a blatant abuse of the judicial process. It was clear that the husband had brought the action for the collateral purpose of unilaterally removing the property from the ancillary proceedings. For example, the pleadings did not disclose a realistic debt against the wife and no cause of action in contract was pleaded against the wife in relation to the property. Indeed, it was evident from the husband's line of argument that the division of the property in a just and equitable manner under s 112 of the Women's Charter (Cap 353, 1997 Rev Ed) was not what the husband wanted. In the circumstances, this was not a *bona fide* invocation of the court's jurisdiction and the Family Court was the proper forum to decide on the parties' share of the property. Thus, the husband's action was struck out as an abuse of the process of the court (*Ho Kiang Fah v Toh Buan* [2009] 3 SLR(R) 398 at [22]–[24]).

Striking out affidavits

8.111 In *Lee Hsien Loong v Singapore Democratic Party* [2009] 1 SLR(R) 642, the plaintiffs successfully applied to strike out three affidavits filed by the defendants in the assessment of damages proceedings on three grounds.

8.112 First, the defendants' pleadings were defective in that they lacked material particulars. If a defendant intends to raise mitigation or reduction of damages as part of his defence as to damages, this point, together with the relevant supporting particulars, must be pleaded and proved like any other fact (*Lee Hsien Loong v Singapore Democratic Party* [2009] 1 SLR(R) 642 at [14]). The defendants intended to rely on the plaintiffs' general bad reputation in mitigation of damages. However, the defendants did not specify in their pleadings what the plaintiffs'

alleged general bad reputation was or in what way the plaintiffs' general reputation was allegedly bad. In the case of the first defendant, it did not even file a defence. Accordingly, the defendants' affidavits related to matters which were not put in issue before the court and were therefore irrelevant to the quantification issue and inadmissible in evidence. The defendants' affidavits were therefore struck out under O 41 r 6 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) or, alternatively, under the inherent jurisdiction of the court (at [17]).

8.113 Secondly, the evidence in the defendants' affidavits was inadmissible as evidence of the plaintiffs' alleged general bad reputation because, *inter alia*, the procedural requirements under O 78 r 7 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) were not met. Under O 78 r 7, if the defendant does not plead justification, the defendant is precluded from giving evidence of O 78 r 7 particulars for the purposes of mitigation of damages unless leave of court is given; neither is the defendant allowed to elicit such evidence in cross-examination. The second and third defendants' bald plea of justification was held to be no different from a case involving a defendant who did not plead justification at all in his defence or who did not file any defence (*Lee Hsien Loong v Singapore Democratic Party* [2009] 1 SLR(R) 642 at [23]). Belinda Ang J was also not persuaded that particulars under O 78 r 7 could be furnished by way of an affidavit of evidence-in-chief, nor that that would constitute proper notice pursuant to O 78 r 7. In any event, the affidavit did not state or go into matters relating to the plaintiffs' alleged general bad reputation (at [29]).

8.114 Finally, the principle in *Burstein v Times Newspapers Ltd* [2001] 1 WLR 579 ("*Burstein*") is applicable in Singapore. The *Burstein* principle renders admissible in some limited circumstances, evidence of specific facts which were permitted to be adduced only where there is a plea of justification (*Lee Hsien Loong v Singapore Democratic Party* [2009] 1 SLR(R) 642 at [39]). However, Belinda Ang J held that there was no scope for the application of the *Burstein* principle because the alleged "contextual background" was unconnected with the real sting of the libel, and the defendants were in fact seeking to introduce evidence aimed at proving the truth of the libel under the guise of "background context" (at [43]–[46]).

8.115 The striking out application did not succeed in the final case, *Cytec Industries Pte Ltd v APP Chemicals International (Mau) Ltd* [2009] 4 SLR(R) 769. The plaintiff had applied for summary judgment by relying on certain correspondence with the defendant which was marked "without prejudice". The defendant then applied to strike out the portions of the plaintiff's affidavit which referred to and exhibited such correspondence on the basis that they were privileged.

8.116 The defendant's striking out application was dismissed by the assistant registrar, and its appeal was dismissed by Andrew Ang J. Andrew Ang J held that even though a "without prejudice" label had been attached to the document, that label was not consistent with the contents of the correspondence or the surrounding circumstances in which they were written. Instead, the correspondence contained an implied admission as to the existence of the debt in dispute and liability for it. However, the existence of a dispute and an attempt to compromise was at the heart of the "without prejudice" privilege (*Cytec Industries Pte Ltd v APP Chemicals International (Mau) Ltd* [2009] 4 SLR(R) 769 at [17]). Since there was no ongoing dispute that would attract the application of the "without prejudice" privilege, the striking out application was dismissed (at [25] and [26]).

Summary judgment

8.117 A combined application for summary judgment and an application to strike out parts of a defence or its entirety may be justified on the basis of alternative remedies. A combined application would not be appropriate where the intention is to challenge the entirety of the defence (as opposed to specific defences). If the defence includes several parts, one or more of which may be struck out, the court may find it more appropriate to strike out a part or parts rather than awarding summary judgment. See *Lee Hsien Loong v Review Publishing Co Ltd* [2009] 1 SLR(R) 177 at [5]–[16], in which the High Court determined that a combination of both applications was proper in the circumstances.

8.118 In an application for summary judgment, the plaintiff must first show that he has "a *prima facie* case for judgment". If he achieves this, the defendant must establish that "there is a fair or reasonable probability that he has a real or *bona fide* defence". Triable issues of *law* are not normally a basis for leave to defend. (See *Associated Development Pte Ltd v Loong Sie Kiong Gerald* [2009] 4 SLR(R) 389 at [22].) In *Lee Hsien Loong v Review Publishing Co Ltd* [2009] 1 SLR(R) 177, the court also applied the principle that an application may be made pursuant to O 14 r 12 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) to determine the meaning of the words complained of in a defamation action (at [26]). In the context of equitable set-off, the High Court ruled in *Gao Bin v OCBC Securities Pte Ltd* [2009] 1 SLR(R) 500 that there was insufficient connection between the claim and counterclaims for the purpose of this remedy. An interesting aspect of this case is the involvement of a clause which precluded set-off. The court expressed the view that in the absence of exceptional circumstances (including, for example, "a very strong *prima facie* case of fraud"), the clause posed "an insuperable obstacle to any request for a stay" (at [17]).

Transfer of proceedings

8.119 There has been a spate of recent cases on transfer between the courts. Most recently, in *Ng Chan Teng v Keppel Singamarine Dockyard* [2009] 2 SLR(R) 647, the High Court considered and applied the observations of the Court of Appeal in *Keppel Singmarine Dockyard Pte Ltd v Ng Chan Teng* [2008] 2 SLR(R) 839. The Court of Appeal had concluded that the entry of an interlocutory judgment does not affirm a subordinate court's jurisdiction over the plaintiff's claim so as to prevent a transfer to the High Court (hence reversing the previous position it took in *Ricky Charles s/o Gabriel Thanabalan v Chua Boon Yeow* [2003] 1 SLR(R) 511).

8.120 Such an affirmation of jurisdiction would fail to address the changing dynamics in the course of litigation (during which the parties' claims and/or defences may be developed and modified). Furthermore, the defendant cannot complain of prejudice (in the context of potentially higher damages being awarded against him as a result of the transfer), as the plaintiff is legally entitled to have his claim assessed to its full extent in the proper court. In the view of the Court of Appeal, as a matter of principle, there is no difference between a transfer of proceedings before or after the judgment is entered. Where, however, "liability has actually been settled on the basis of an express agreement that the matter is to be tried and dealt with in its entirety in the [subordinate court], the position might be quite different". If real prejudice can be shown in these circumstances, the transfer may not be permitted (*Keppel Singmarine Dockyard Pte Ltd v Ng Chan Teng* [2008] 2 SLR(R) 839 at [32] and [39]).

8.121 Although the Court of Appeal in *Keppel Singmarine Dockyard Pte Ltd v Ng Chan Teng* [2008] 2 SLR(R) 839 was directly concerned with the issue of how damages for contributory negligence should be deducted in the context of the pecuniary jurisdiction of the District Court, so that its views on s 54B Subordinate Courts Act (Cap 321, 2007 Rev Ed) are arguably *obiter*, the clear intention is to establish a broader approach to transfer of proceedings. As for the meaning of "sufficient reason" in s 54B, the Court of Appeal endorsed the observations of the High Court in *Cheong Ghim Fah v Murugian s/o Rangasamy (No 2)* [2004] 3 SLR(R) 193 at [10] and the Court of Appeal in *Ricky Charles s/o Gabriel Thanabalan v Chua Boon Yeow* [2003] 1 SLR(R) 511 at [15] that these words are to be construed broadly and include the possibility that the plaintiff's claim may exceed the subordinate court limit.

Vacation of hearing dates

8.122 In *Singapore Investments (Pte) Ltd v Golden Asia International (Singapore) Pte Ltd* [2009] 4 SLR(R) 291, the High Court reiterated that the courts adopt a strict approach towards the vacation of hearing dates. This was an appeal from the decision of the assistant registrar, who considered the defence to be a sham. The assistant registrar granted summary judgment to enforce a lease. The appeal by the defendant had been specially fixed for a half-day hearing. Subsequently, the defendant's lawyer asked for an adjournment of the hearing in order to file a new affidavit. He conceded that there were "no new facts", and that "the true reason was that he was simply not ready with his legal arguments". The court informed the lawyer that his conduct "bordered on dishonesty and amounted to conduct unbecoming of counsel". The lawyer then apologised to the court. In deciding not to grant an adjournment, the court took into account considerations including the previous vacation of a hearing and the fact that the defendant should have been prepared to make his legal submissions. The appeal was dismissed with costs and disbursements fixed at $7,000 to be paid personally by the defendant's lawyer. The court admonished (at [3(d)]) as follows:

> The administration of justice would be impaired if counsel were to be allowed to coerce the court into granting an adjournment by simply stating that he is unable to argue the matter or proceed with the hearing as a result of his utter failure to be ready for the hearing. Such irresponsible conduct should not be countenanced by the court and it could well invite personal cost orders against the counsel concerned, as it did in this case.

8.123 The court also referred to *Su Sh-Hsyu v Wee Yue Chew* [2007] 3 SLR(R) 673 at [39] for the observations of the Court of Appeal on the judicial policy concerning the vacation of hearing dates.