(2017) 18 SAL Ann Rev 160
(Published on e-First 31 May 2018)

8. CIVIL PROCEDURE

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Affidavits

8.1 When initiating an appeal under O 55 of the Rules of Court[1] ("RoC"), an appellant is generally not allowed to file an affidavit in support of his originating summons except with leave of the court hearing the appeal. In *Singapore Medical Council v Ang Peng Tiam*,[2] the appellant sought leave to file an affidavit to crystallise the issues and marshal the facts for the court hearing the appeal. The Court of Three Judges rejected the application, holding that the applicant's reasons for his affidavit overlapped with the function of written submissions. An affidavit that seeks to do the job of submissions is unnecessary and a waste of costs, effort and judicial resources.

8.2 The court also observed that for the majority of appeals under O 55 of the RoC, no affidavits would be necessary. However, in light of the wide scope of O 55, which includes appeals from full trials in a court of law to appeals from purely administrative decisions devoid of any trial-like adjudicatory process, the criteria for granting leave must be flexible. In this regard, leave to file an affidavit may be granted under O 55 r 6(2) where (a) the tribunal whose decision is on appeal fails to provide a complete record of proceedings, or where either party wishes to point out inaccuracies in the record of proceedings, or (b) a party has grounds to adduce further evidence.

Amendment of pleadings

8.3 In the recent case of *Gulf Hibiscus Ltd v Rex International Holding Ltd*[3] ("*Gulf Hibiscus*"), the High Court affirmed that pleadings may be amended at the appeal stage, even if the applicant was given ample opportunity to make such amendments at an earlier stage of

1 Cap 322, R 5, 2014 Rev Ed.
2 [2017] 4 SLR 672.
3 [2017] SGHC 210.

proceedings. In that case, the plaintiff brought an action against the defendant for, *inter alia*, conspiracy and inducing breach of contract. The plaintiff's claims were founded on a contract which included an arbitration agreement. At the hearing of the defendant's application to stay the proceedings in favour of arbitration, the assistant registrar invited the plaintiff to amend its pleadings to untangle its claims from the contract. The plaintiff failed to take up the asst registrar's invitation and the stay was granted. The plaintiff subsequently applied to amend its pleadings and appealed the stay on grounds of its amended pleadings.

8.4 The court held that amendments could be made even at the appeal stage, as long as no prejudice is caused. As the plaintiff's proposed amendments involved giving up part of its initial claim (the plaintiff had to abandon its claim for inducement), there was no such prejudice. Such an amendment would not amount to giving it a second bite of the cherry. On a practical point, as there had not been a trial or evidential hearing, any changes to the pleadings would not necessitate a repeat of testimony or questioning. The court also clarified that while the plaintiff's failure to take up the asst registrar's invitation might warrant adverse cost consequences, it would not preclude the plaintiff from amending its pleadings on appeal.

8.5 The court may also allow pleadings to be amended after judgment, to the extent that the amendments are non-substantive. In *Thu Aung Zaw v Ku Swee Boon*[4] ("*Thu Aung Zaw*"), the plaintiff had mistakenly commenced an action, and obtained summary judgment, in the name of his sole proprietorship. Under O 77 r 9 of the RoC, a sole proprietor is only permitted to sue in his own name, not in the name of his proprietorship. Thus, the plaintiff applied under O 20 r 5 to amend the plaintiff's name in the summary judgment to his name. Though the High Court noted that the application would have been successful under O 20 r 11 (amendment of judgment), it found that the amendment could also be made under O 20 r 5. The court held that O 20 r 5 will be inapplicable if the court is considered *functus officio* after its delivery of judgment. However, as the doctrine of *functus officio* is only intended to ensure certainty, and is not to be invoked as a mechanical rule where minor oversights or inchoateness in expression remain to be fleshed out, the court cannot be considered *functus officio vis-à-vis* non-substantive amendments. As the plaintiff's proposed amendment was non-substantive, his application under O 20 r 5 was allowed.

4 [2017] SGHC 265.

8.6 The court also observed that it is no bar to an amendment application that the original plaintiff was not vested with a legal cause of action. Further, in response to the defendant's argument that the amendment would prejudice him, by causing him to suffer a judgment that would otherwise be a nullity, the court held that the prejudice which O 20 r 5(3) of the RoC protects against is limited to that suffered by a defendant whose preparation of his defence was prejudiced as a result of being misled as to the identity of his opponent. Thus, the defendant's argument did not amount to prejudice with which O 20 r 5(3) is concerned.

Appeals

Extension of time

8.7 An application for an extension of time to apply for leave to seek a quashing order under O 53 r 1(6) of the RoC requires the delay to be accounted for to the satisfaction of the court. A recent example of an inadequate account may be found in *Nalpon Zero Geraldo Mario v Law Society of Singapore*.[5] In that case, the applicant sought to quash a Review Committee report dismissing his complaints against the then-President of The Law Society of Singapore. However, he missed the deadline to apply for leave to quash the report. In explaining his delay, the applicant claimed that he had failed to note that the three months' timeline had started to run from the date he received the report, because he had sent a letter to the Ministry of Law after the report was issued and only received a reply close to three weeks later. The High Court held that it was unable to see how his letter to the Ministry and its subsequent reply could cause him to fail to note the three months' timeline. This finding was buttressed by the fact that the applicant had admitted to making a similar application before. The court found that the applicant's delay was not explained to the satisfaction of the court and accordingly dismissed his application for an extension of time.

8.8 In an application for an extension of time to file a notice of appeal, a court will generally consider, *inter alia*, the length of the delay and the reasons for the delay. Two recent decisions have clarified the court's approach in calculating the length of delay and in evaluating an applicant's reasons for the delay.

5 [2017] SGHC 206.

8.9 In respect of the length of delay, the recent decision of *TDL v TDK*[6] clarified that this period should be calculated from the last day for filing the notice of appeal to the date on which the *present* extension of time application is filed. This was a point of controversy in *TDL v TDK* as the applicant in that case had filed two separate applications for an extension of time. The appellant filed his first application for an extension of time on 8 August 2016, ten days after the deadline to file his notice of appeal. This application was struck out on 31 August 2016, as the appellant had failed to comply with an Unless Order. The appellant took out a second application for an extension of time on 2 November 2016, about three months from the original deadline to file his notice of appeal. The applicant argued that his delay was limited to the ten days between the original deadline and his first extension of time application. The High Court disagreed. Given that the applicant had waited almost two months to file a new application, rather than comply with the Unless Order in order to restore his first application, the second application could not be taken as a mere extension of the first. Accordingly, the length of delay was held to be a very substantial three months from the original deadline.

8.10 In respect of the applicant's reasons for the delay, the court has shown itself willing to accept some degree of failure in case management on the part of the applicant or his solicitors, as long as there is nothing to suggest deliberately dilatory conduct. In *UHA v UHB*,[7] the applicant was eight days late in filing her notice of appeal. By way of background, before filing the notice of appeal, the applicant had submitted a request for further arguments which was rejected three days prior to the deadline for her to file the notice of appeal. In explaining the delay, the applicant's solicitors claimed that (a) they thought that time ran from the date that the request for further arguments was rejected; and (b) the three days between the rejection and the actual deadline to file the notice of appeal were insufficient for the solicitors to confirm the applicant's instructions. The High Court held that the correct deadline should have been apparent to the applicant's solicitors. On that basis, the court also found that there were grounds for the respondent to submit that the applicant should have made preparations to file her notice of appeal even while her request for further arguments was pending. Nevertheless, the court allowed the extension of time. Given the short delay of eight days, there was nothing to suggest that the applicant had deliberately dragged her feet in giving instructions or transferring the security for costs moneys after her request for further arguments was rejected.

6 [2017] SGHCF 20.
7 [2017] SGHCF 27.

Notice of appeal

8.11 A respondent wishing to vary or affirm the ultimate decision of the court below may do so under O 57 r 9A(5) of the RoC, and need not file a notice of appeal. Previously, under the narrow interpretation of O 57 r 9A(5) established by the Court of Appeal in *Lim Eng Hock Peter v Lin Jian Wei*[8] ("*Lin Jian Wei*"), a respondent could not rely on O 57 r 9A(5) to affirm the ultimate outcome of his case on grounds other than those relied on by the judge below. Instead, he would have to file a cross-appeal. The rationale of the court in *Lin Jian Wei* was that the outcome of a case is not a "decision" within the meaning of O 57 r 9A(5) if it is merely a natural consequence of the judge's findings of fact or law.

8.12 In *L Capital Jones Ltd v Maniach Pte Ltd*,[9] the Court of Appeal departed from this narrow interpretation of the word "decision" under O 57 r 9A(5) of the RoC. The Court of Appeal held that the previous position was (a) inconsistent with the legislative intent behind O 57 r 9A(5), which was to eliminate procedural complexity for the respondent, and (b) practically and logically unsatisfactory.

8.13 First, O 57 r 9A(5) of the RoC was introduced to eliminate the requirement to file a respondent's notice. A by-product of *Lin Jian Wei* was the introduction of the more onerous requirement of filing a cross-appeal. This ran contrary to legislative intent. Secondly, the logical distinction between independent decisions on one hand, and mere consequences of anterior findings on the other, was also difficult to appreciate given that many decisions that the court makes on primary issues will be premised on findings on sub-issues, which themselves may be premised on decisions on further sub-issues. Further, the previous position imposed practical difficulties on the respondent. A successful respondent, whose interest in filing a cross-appeal would only arise after being served notice of the appellant's appeal, would find himself in the invidious position of being out of time to file his cross-appeal if the appellant chose to file his notice of appeal at the last minute.

8.14 A notice of appeal may be struck out as fatally defective if it fails to identify the decision challenged or the issues raised on appeal, and the respondent is therefore prejudiced by the ambiguities in the appeal. In *Sun Electric Pte Ltd v Sunseap Group Pte Ltd*[10] ("*Sun Electric*"), the plaintiff issued a notice of appeal which made bare reference to specific paragraphs of the judgment of the court below. The defendants sought to strike out the notice of appeal on grounds that it (a) failed to specify

8 [2010] 4 SLR 331.
9 [2017] 1 SLR 312.
10 [2017] SGHC 232.

the decision that the plaintiff was appealing against; (b) failed to expressly state which paragraphs of the order of court it was seeking to set aside; and (c) left the defendants in doubt over the issues being raised on appeal.

8.15 The High Court found that the judgment paragraphs referenced in the notice of appeal amounted to a decision of the judge below, and the court was willing to accept such reference as identifying the decisions which the plaintiff was appealing against. The court also held that a notice of appeal need not make express reference to a particular order of court. The court found that the issues on appeal were readily apparent when read against the judgment and the proceedings before the court below. Even if there was some ambiguity about the potential issues raised, the court found that the defendants suffered no substantial prejudice as a result. After the alleged ambiguity was clarified at the striking out hearing, the defendants maintained their original substantive arguments. This indicated to the court that the defendants fully understood the issues on appeal all along.

Leave to appeal

8.16 Generally, leave to appeal a decision of a High Court bench of three judges on grounds of there being a question of general principle decided for the first time, or a question of importance on which further argument and a decision of a higher tribunal would be to the public advantage, will not be granted save in exceptional circumstances. This was established in the recent decision of *TUC v TUD*.[11]

8.17 In that case, the father claimed that the mother had wrongfully retained their children in Singapore, and applied for an order that his children be returned to California. This matter required the court to consider, for the first time, the approach to determining "habitual residence" under Art 3 of the Hague Convention on the Civil Aspects of International Child Abduction.[12] When the father appealed the district judge's decision to the High Court, the Chief Justice appointed a bench of three judges to sit in the High Court and hear the appeal. The bench comprised the Chief Justice and two Judges of Appeal. The High Court found in favour of the father. The mother sought leave to appeal the High Court's decision on the second and third grounds for granting leave to appeal (namely, there were questions of general principle decided for the first time and questions of importance on which further

11 [2017] 4 SLR 1360.
12 Concluded 25 October 1980.

argument and a decision of a higher tribunal would be to the public advantage). The court denied her application.

8.18 The court held that, because of the number of judges and the constitution of the bench in this case, it was plain that, in effect, the Court of Appeal was sitting as a bench of the High Court. The court also clarified where an appeal was heard by a High Court bench comprising three judges, leave to appeal against that decision should not be granted on the second and third grounds save in exceptional circumstances. One exception is where the bench of three judges expressed a divergence of opinion on a point of law. Another exception is where the bench of three judges expressed disagreement with legal principles set out by the Court of Appeal but were bound to apply them, or departed from an established line of High Court authority.

8.19 The recent decision of *TMY v TMZ*[13] also clarified that leave to appeal must be obtained in order to appeal an appellate decision of the Family Division of the High Court. In that case, the husband filed his notice of appeal without first obtaining leave to appeal. He claimed that notwithstanding s 34(5) of the Supreme Court of Judicature Act[14] ("SCJA"), which provides that "except with the leave of the Court of Appeal, or of a judge of the Family Division of the High Court, no appeal shall be brought to the Court of Appeal from any decision … of the Family Division of the High Court involving the exercise of [its] appellate civil jurisdiction", s 137 of the Women's Charter[15] confers an independent right of appeal. Section 137 of the Women's Charter provides that "all judgments and orders made by the court in proceedings under this Part … may be appealed from, as if they were judgments or orders made by the court in the exercise of its original civil jurisdiction".

8.20 The Court of Appeal rejected this argument. It clarified that the clear legislative intent behind s 34(5) of the SCJA was for there to be only one tier of appeal as a matter of right for family cases. Section 137 of the Women's Charter had to be read in conjunction with s 34(5) of the SCJA. Thus, any appeal to the Court of Appeal would only be possible with leave of the Family Division.

13 [2017] 2 SLR 1063.
14 Cap 322, 2007 Rev Ed.
15 Cap 353, 2009 Rev Ed.

8.21 In *Aries Telecoms (M) Bhd v ViewQwest Pte Ltd*[16] ("*Aries Telecoms HC*"), the High Court also clarified the definition of a final order, for the purposes of para (*e*) of the Fifth Schedule of the SCJA. Under para (*e*) of the Fifth Schedule of the SCJA, an interlocutory order may not be appealed to the Court of Appeal except with leave of the court. Conversely, an appeal to the Court of Appeal from a final order is available as of right. In *Aries Telecoms HC*, the plaintiff was granted interlocutory judgment on the issue of liability, with damages to be assessed. Prior to the assessment of damages hearing, the plaintiff applied under O 14 r 12 of the RoC for the court to determine whether, *inter alia*, it was entitled to an account of profits as a matter of law. The court held otherwise. The plaintiff appealed the court's order. The defendant argued that the plaintiff required leave to bring this appeal.

8.22 The court held that an order made under O 14 r 12 of the RoC is final if it effectively disposes of a substantive claim in the main action. It does not have to dispose of the entire action. As the order effectively disposed of the plaintiff's claim for an account of profits, the appeal did not require leave. The court also noted that if the plaintiff's application was not appealable as of right, it might have been deterred from making the application. The plaintiff would then have wasted time and costs proving its account of profits claim at the assessment of damages hearing when the claim was not even maintainable at law. The defendant would also have had to produce evidence of its profits, which is sensitive information, only to find out that it need not have done so. Thus, it was logical that a decision which affects the substantive rights of the parties on an issue within the action should be appealable as of right, even if it does not dismiss of the entire action or cause judgment to be entered.

Leave to adduce further evidence

8.23 In the recent case of *TNL v TNK*,[17] the Court of Appeal held that there will be cost consequences when unmeritorious applications to adduce further evidence on appeal are made. In that case, both the wife and husband appealed the judge's ancillary matters decision. The wife sought leave to adduce bank statements of the parties' joint account from April to June 2013 as further evidence. She claimed that the bank statements show an outgoing transfer of $300,000, which allegedly buttressed her argument about what had happened to the sale proceeds of their jointly-owned apartment.

16 [2017] 4 SLR 728.
17 [2017] 1 SLR 609; see also para 8.236 below.

8.24 The court dismissed her application. First, with reasonable diligence, the bank statements could have been obtained by the wife any time during the proceedings before the judge. Second, it was already apparent from the May and July 2013 bank statements in evidence before the judge that the parties' bank balance had fallen by $300,000 in the intervening period. As the April–June 2013 bank statements did not provide helpful information about where the $300,000 had been transferred to, they did not shed further light on what had already been disclosed in evidence. As the wife's application was plainly unmeritorious, the court fixed costs of the application at $2,000. The court also noted that costs were likely to be fixed at higher levels in future cases.

Application for determination of question of law

8.25 The purpose and scope of O 14 r 12 of the RoC was delineated in the recent Court of Appeal case of *Aries Telecoms (M) Bhd v ViewQwest Pte Ltd*.[18] In that case, the plaintiff made an application for the court to determine "whether the plaintiff is entitled to an account of the profits made by the defendant". The judge found that the plaintiff was not entitled to an account of the profits as the defendant had not acted cynically or deliberately in retaining the plaintiff's goods.

8.26 The Court of Appeal found that the plaintiff's defectively phrased question guided the judge to determine a question of fact *in addition* to a question of law. This might be acceptable if the facts were already established or agreed. However, in this case, the findings of fact which were central to and dispositive of the application (that is, whether the defendant had acted cynically or deliberately in retaining the plaintiff's goods) were still hotly contested. The judge's decision was accordingly set aside. Usefully, the Court of Appeal clarified that the plaintiff's question might have been countenanced if phrased as such: "what reliefs would be available under Singapore law *provided* that cynical or deliberate wrongdoing was established at the trial for the assessment of damages"? Thus, applicants under O 14 r 12 of the RoC must take care to phrase their questions to the court in a manner that does not involve questions of fact.

8.27 In *Samsonite IP Holdings Sarl v An Sheng Trading Pte Ltd*,[19] the High Court clarified that the need for lengthy submissions on a point of law is not a bar to a determination of a question of law under O 14 r 12 of the RoC. The court was concerned with the interpretation and scope

18 [2018] 1 SLR 108.
19 [2017] SGHC 18.

of the meaning of s 29(1) of the Trade Marks Act[20] ("TMA") which the defendant sought to rely on. The court held that this question was suitable for determination without a full trial of the action as there were no discernible disputes of fact. Further, the court noted that determining this question of law would fully determine whether the defendant had a *bona fide* defence under s 29(1) of the TMA and that the O 14 r 12 procedure would result in substantial savings of time and costs for the parties. The court then went on to determine the point of law and concluded that the defence did not apply on the present facts. Given that the defendant had failed to raise any other triable issues, summary judgment was granted to the plaintiff pursuant to O 14 r 1.

Representative proceedings

8.28 The ambit of O 15 r 12(2) of the RoC was recently clarified in *Syed Nomani v Chong Yeow Peh*.[21] In that case, the plaintiff sued the defendant for over $1m, being the sum that the defendant and 11 others were liable to repay the plaintiff under their agreement to share the costs of Canadian legal proceedings. None of the 11 others was named in the suit. The claim was allowed to proceed on a pro-rated basis given that only the defendant had been personally named in the action. The claim was thus reduced to around $70,000. The plaintiff applied under O 15 r 12(2) for the court to appoint the defendant as a representative of the 11 others, so that he could claim the full sum due under the agreement. The court rejected his application.

8.29 The High Court held that it does not have the power under O 15 r 12(2) of the RoC to order an existing defendant to represent non-defendants that were never involved in the litigation. The opening words of O 15 r 12(2), which read, "at any stage of the proceedings *under this Rule*" [emphasis added], circumscribe the court's powers to appoint representatives under O 15 r 12(2) to proceedings that have already been initiated as representative actions under O 15 r 12(1). Where representative proceedings have already been commenced, O 15 r 12(2) allows the court to adjust the parties to the action (for example, if it appears that another defendant or represented person is better able to represent the others than the current representative). This interpretation is bolstered by the fact that O 15 r 12(2) only gives the court the power to appoint, as a representative, any of the defendants or persons whom the current defendant is representing.

20 Cap 332, 2005 Rev Ed.
21 [2017] 4 SLR 1064.

8.30 Further, O 15 r 12(2) of the RoC cannot be used to give the plaintiff a second bite of the cherry, by getting an existing defendant to represent non-defendants that were never involved in the litigation, and conveniently converting the proceedings to a representative one. Instead, the plaintiff should have applied for leave to amend the writ to convert the action to a representative one, or restarted proceedings as a representative action.

Summary judgments

8.31 To obtain summary judgment under O 14 r 1 of the RoC, the plaintiff must first establish a *prima facie* case for judgment. Upon doing so, the defendant has the onus of showing why judgment should not be entered. In three recent decisions, the courts found that summary judgment should be granted as the defendants had not shown a reasonable probability that they had a *bona fide* defence or raised any triable issues.

8.32 In *Neville, Guy v Andrla, Dominic*,[22] the plaintiff sued the defendant for sums owing under a loan agreement and a personal guarantee provided by the defendant under an investment agreement. In coming to its decision that summary judgment ought to be granted, the High Court rejected the defendant's argument that the original loan agreement had been superseded as the available evidence showed that the subsequent loan agreement was merely a variation of the original one. The court also rejected the defendant's argument that the plaintiff was a moneylender as it was clear on the face of the evidence that the plaintiff was not.

8.33 Similarly, in *KLW Holdings Ltd v Straitsworld Advisory Ltd*,[23] the High Court granted summary judgment as none of the defences raised by the defendants was *bona fide*. The court took into account the fact that the defendants had taken contradictory positions on important points and that the objective evidence materially contradicted certain aspects of the defendants' evidence. The court also observed that the plaintiff's failure to adduce evidence from its managing director did not warrant a trial to put it to strict proof of its claim as it had presented sufficient evidence to establish a *prima facie* case for summary judgment.

22 [2017] SGHC 295.
23 [2017] SGHC 35.

8.34 In *EFG Bank AG, Singapore Branch v Teng Wen-Chung*,[24] the High Court was concerned with the defendant's liability under an indemnity agreement to pay on demand all sums owed or payable by a third party to the plaintiff. The court rejected the defendant's primary argument that the indemnity agreement was void for illegality and granted summary judgment.

8.35 However, a plaintiff's application for summary judgment may be dismissed where the defendant succeeds in raising a cogent defence which requires a thorough investigation of the facts. In *B2C2 Ltd v Quoine Pte Ltd*,[25] the Singapore International Commercial Court ("SICC") dismissed the plaintiff's application for summary judgment as the defendant had raised a cogent defence of mistake in response to the plaintiff's claim for breach of contract. The court observed that a trial was warranted so as to place the court in a proper position to fully assess the state of the plaintiff's knowledge, which was a key element of the defence of mistake.

Leave to defend

8.36 Generally, where a defendant shows that he has a fair case for a defence, or reasonable grounds for setting up a defence, or even a fair probability that he has a *bona fide* defence, he ought to have leave to defend. This was the case in *Ebony Ritz Sdn Bhd v Sumatec Resources Bhd*[26] ("*Ebony Ritz*"), where the High Court granted the defendant unconditional leave to defend in respect of the plaintiff's claim for sums due and owing under a guarantee.

8.37 However, the court will grant the defendant conditional leave to defend if it raises a defence which, though triable, is shadowy. In *Millennium Commodity Trading Ltd v BS Tech Pte Ltd*,[27] the plaintiff sought summary judgment for a dishonoured cheque drawn by the defendant company in favour of the plaintiff pursuant to a joint venture agreement between the parties. The defendant raised, *inter alia*, the defence of fraud on the basis that the plaintiff had conspired with its then directors to defraud the defendant through the parties' agreement. The High Court found that the defendant had made out the prospect of a defence of fraud but that this was shadowy as no contemporaneous evidence of any form of co-ordination between the plaintiff and the defendant's then director had been produced. Further, the evidence of fraud was not contemporaneous with the parties' agreement and fraud

24 [2017] SGHC 318.
25 [2017] SGHC(I) 11.
26 [2017] SGHC 282; see also paras 8.163–8.164 below.
27 [2018] 3 SLR 98.

on the part of the plaintiff was not a reasonable explanation for the plaintiff's conduct. Thus, the court granted conditional leave to defend to the defendant and ordered that the defendant furnish $450,000 as security for the plaintiff's claim.

Effect of counterclaim on an application for summary judgment

8.38 In *Kim Seng Orchid Pte Ltd v Lim Kah Hin*[28] ("*Kim Seng Orchid*"), the High Court shed light on the proper approach to be taken when determining whether summary judgment ought to be ordered where there is a subsisting counterclaim. After a comprehensive review of the existing case law, the court created a practical framework to be applied in such cases. The framework consists of four steps:[29]

> (a) **Step 1: whether the counterclaim is plausible** … that is, whether it is reasonably possible for the counterclaim to succeed at trial … If the counterclaim is *not* plausible, then its presence ought not to stand in the way of the plaintiff obtaining summary judgment of its whole claim, without any stay pending the determination of the counterclaim, and the court should so rule. If the court finds that the counterclaim is plausible, then **Step 2** follows.
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> (b) **Step 2: whether plausible counterclaim amounts to defence of set-off** … whether legal or equitable. If [the court finds that the plausible counterclaim does amount] to a defence of set-off, then unconditional leave to defend should be granted in respect of the whole of the claim … On the other hand, if the counterclaim does *not* amount to a defence of set-off, then the court may proceed to **Step 3** below.
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> (c) **Step 3: whether plausible counterclaim is sufficiently connected to the claim** … [The court should] consider whether there is a connection between the claim (for which summary judgment is sought) and the counterclaim which it has considered to be plausible. If that counterclaim arises out of quite a separate and distinct transaction or it is wholly foreign to the claim or there is no connection between the claim and counterclaim, the court should generally grant summary judgment of the whole claim, without a stay pending the determination of the unconnected counterclaim.
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> If the court is satisfied of the degree of connection between the claim and counterclaim, it may proceed to **Step 4** [below].
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> (d) **Step 4: whether there are grounds for stay of execution in light of connected** and **plausible counterclaim** – if the court considers that there is really no defence to the claim and that as a consequence the plaintiff would be put to needless expense in proving its claim, the court should generally grant summary judgment of the

28 [2018] 3 SLR 34.

29 *Kim Seng Orchid Pte Ltd v Lim Kah Hin* [2018] 3 SLR 34 at [98].

> whole of the claim. [The court, nonetheless, has the ultimate discretion whether or not to grant a stay, subject to the qualification that no stay of execution should apply] where the quantum of the judgment exceeds that of the quantum of the counterclaim.
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> [emphasis in original]

8.39 The dispute in *Kim Seng Orchid* concerned whether the defendant was entitled to continue occupying the plaintiff's premises after the sublease between the parties had expired. The court applied the framework to the facts and found that the counterclaim did not have the requisite degree of plausibility as the defendant had never taken any steps to renew or extend the sublease, whether under the sublease agreement or otherwise. Thus, the defendant failed to pass Step 1 of the framework and summary judgment was granted.

Mere assertions of defence are insufficient

8.40 In two recent decisions, the High Court reiterated the principle that it will not grant a defendant leave to defend if all he provides is a mere assertion of a given situation which forms the basis of his defence.

8.41 In *Wayne Burt Commodities Pte Ltd v Singapore DSS Pte Ltd*,[30] the High Court held that the defendant's argument that there were triable issues was not made out on the evidence. The dispute involved whether the defendant had repaid a sum of US$3m to the plaintiff pursuant to a loan agreement. The defendant submitted that summary judgment should be refused as there were triable issues regarding (a) whether the plaintiff's parent company was the party to the loan agreement and (b) whether the defendant had repaid the US$3m by way of payment to a third party who had actual or apparent authority to receive this sum on behalf of the plaintiff. The court rejected these arguments and granted summary judgment. The court held that there were too many holes in the defendant's account and that the evidence adduced by the defendant did not disclose anything other than mere assertions.

8.42 Similarly, in *Ma Hongjin v SCP Holdings Pte Ltd*[31] ("*Ma Hongjin*"), the High Court found that the defences raised by the defendant were speculative or supported by only bare assertions in the defendant's affidavits. The plaintiff claimed for the principal amount and the interest accruing after the repayment of the principal amount fell due pursuant to a convertible loan agreement ("CLA") between the

30 [2017] SGHC 70.
31 [2017] SGHC 319.

parties. The defendant's primary arguments were (a) the CLA was an illegal contract in that the plaintiff was seeking to launder money through the defendant, and (b) the CLA was unenforceable because the loan was prohibited by s 14 of the Moneylenders Act[32] and s 31(2) of the Business Names Registration Act.[33] However, the court found that these bold allegations were unsupported and thus granted summary judgment.

Plaintiff not precluded from applying for summary judgment in respect of the same contract

8.43 Separately, the High Court in *Ma Hongjin* also held that the plaintiff was not precluded from applying for summary judgment in the present suit even though it had failed to obtain summary judgment in an earlier suit in respect of, *inter alia*, interest that was allegedly due from the defendant to the plaintiff pursuant to the CLA. The court held that while both suits involved the same facts, similar contractual arrangements and almost the same parties (with the exception of an additional third party in the earlier suit), the claims made in each suit were different. The previous suit involved the plaintiff's claim for interest *before* the repayment of the principal fell due whereas the present suit involved the plaintiff's claim for the principal sum and the interest *after* the repayment of the principal fell due. The court also noted that the previous suit also involved the repayment of third-party loans which did not form the subject matter of the present suit and the defences pleaded in each suit were different, even though there were some overlaps.

Setting aside of summary judgment

8.44 In *Thu Aung Zaw*, the High Court considered the plaintiff's application to amend the name in the summary judgment from the plaintiff's sole proprietorship to his own name and examined the impact this had on the defendant's application for an order that the summary judgment was void or should be set aside. The court allowed the plaintiff's amendment application and found that the defendant's arguments were therefore unsustainable as they were premised on the originally named plaintiff's lack of legal capacity.

8.45 Further, the court also rejected the defendant's alternative application for leave to appeal against the summary judgment as the application was made out of time and it would have been unmeritorious

32 Cap 188, 2010 Rev Ed.
33 Act 29 of 2014.

for the defendant to obtain an extension of time to appeal given the undue delay of close to two years.

Judgments and orders

Standing to set aside ex parte *orders*

8.46 O 32 r 6 of the RoC provides that the court may set aside an order made *ex parte*. In *Chan Lung Kien v Chan Shwe Ching*[34] ("*Chan Lung Kien*"), the High Court held that non-parties to an *ex parte* order may apply to set aside the order under O 32 r 6 as it would be unjust to deny a person the right to apply to set aside an *ex parte* order that affects him just because he was not a party to the proceedings in which the *ex parte* order was made. On the facts, the court found that a creditor had the necessary *locus standi* under O 32 r 6 to make an application to set aside an *ex parte* bankruptcy order which a competing creditor had made against the debtor.

Writs of seizure and sale

8.47 In *Chan Lung Kien*, the court also made clear that a judgment for the payment of money cannot be enforced by way of a writ of seizure and sale against the judgment debtor's interest in immovable property which is held under a joint tenancy with one or more joint tenants. The court endorsed the principles in the Singapore High Court decision of *Malayan Banking Bhd v Focal Finance Ltd*[35] that:

> (a) A joint tenancy is not attachable under a writ of seizure and sale as a joint tenant has no distinct and identifiable interest in the land for as long as the joint tenancy subsists.
>
> (b) The registration of a writ of seizure and sale does not sever a joint tenancy.

8.48 The court also clarified the scope of O 47 r 5(*g*) of the RoC, which provides that the sheriff may apply to the court for directions with respect to the immovable property or any interest therein seized under a writ of seizure and sale. The court held that O 47 r 5(*g*) does not allow the court to order a sale of jointly owned property against the wishes of the other joint tenants. Instead, O 47 r 5(*g*) only comes into play where the sheriff has the power to sell the property in the first place

34 [2017] SGHC 136.
35 [1998] 3 SLR(R) 1008.

as it merely permits the sheriff to apply to court for directions *in connection with the sale* of the immovable property.

8.49 In *KLW Holdings Ltd v Straitsworld Advisory Ltd*,[36] the High Court clarified that a writ of seizure and sale cannot be issued in respect of a country club membership, as such writs are meant to be used exclusively for the seizure of tangible personal property, immovable property and securities. The judgment creditor sought to rely on s 13 of the SCJA, which expressly provides that "[a] judgment of the High Court for the payment of money to any person or into court may be enforced by a writ of seizure and sale, under which all the property, movable or immovable, of whatever description, of a judgment debtor may be seized". The court held that although this provision purports to deal only with writs of seizure and sale, this expression is used as shorthand for *all* the ways in which a judgment or order for the payment of money may be enforced by the RoC. The court then examined the legislative history of O 45 of the RoC in detail and concluded that the framers of the RoC intended for the writ of seizure and sale to be the local equivalent of the English writ of *fieri facias*, which is still limited to being used against property which is capable of physical seizure.

Writs of execution

8.50 O 46 r 2(1)(*a*) of the RoC provides that a writ of execution to enforce a judgment or order may not be issued without the leave of the court where "6 years or more have lapsed since the date of the judgment or order". In *Oversea-Chinese Banking Corp Ltd v Salim bin Said*[37] ("*OCBC v Salim*"), the High Court examined the principles governing the exercise of the court's discretion to grant leave under O 46 r 2(1)(*a*). The court held that the following factors should be considered in deciding if leave should be granted:[38]

> (a) … the adequacy of the reason(s) given for the delay[;]
>
> (b) … whether the judgment debtor will suffer any prejudice[;]
>
> (c) … the diligence displayed by the judgment creditor in recovering the judgment debt[; and]
>
> (d) … whether the judgment debtor has been obstructive …

8.51 In *OCBC v Salim*, the court dealt with three applications for leave to issue writs of possession to enforce orders that were issued more than six years ago. All three applications involved applicant banks which

36 [2017] SGHCR 11.
37 [2017] SGHCR 7.
38 *Oversea-Chinese Banking Corp Ltd v Salim bin Said* [2017] SGHCR 7 at [22].

had obtained orders for the payment of moneys against the defendants but withheld enforcement pursuant to agreements that the defendants would make regular monthly instalment payments. The court dismissed one application where there had been undue delay by the bank in demanding repayment, but allowed the other two applications where the bank had acted appropriately and expeditiously throughout.

Garnishee orders

8.52 O 49 r 5 of the RoC provides:

> Where on the further consideration of the matter the garnishee disputes liability to pay the debt due or claimed to be due from him to the judgment debtor, the court may summarily determine the question at issue or order … that any question necessary for determining the liability of the garnishee be tried in any manner in which any question or issue in an action may be tried.

In *Telecom Credit, Inc v Star Commerce Pte Ltd*,[39] the High Court upheld the asst registrar's order that the judgment creditor and the garnishee should proceed to trial to determine the issue of whether the garnishee was liable to pay the judgment creditor as it was impossible to determine from the affidavits whether the garnishee owed a pre-existing debt to the judgment debtor.

Variations to consent judgments

8.53 In *Chiang Shirley v Chiang Dong Pheng*,[40] the Court of Appeal made clear that the court does not have any "administrative" power to vary a consent judgment. The Court of Appeal held that the High Court judge did not have the jurisdiction to direct that the respondent need "only make payment to the appellant after costs had been taxed and the appellant had paid costs" after consent judgment had been entered. The court held that the jurisdiction to interfere with consent judgments is generally a very limited one, to be exercised for exceptional reasons such as grounds that would justify the setting aside of a contract and fraud. Further, the court noted that the High Court judge's orders could not be characterised as merely administrative given that they would have a substantive impact on when the appellant would receive her money.

39 [2017] SGHC 300.
40 [2017] 1 SLR 283.

Judgment on admissions of facts/failure to comply with unless order

8.54 Under O 27 r 3 of the RoC, the court may give such judgment "as it thinks just" where clear admissions of fact are made by a party in respect of the necessary ingredients of the cause of action upon which the other party is seeking immediate judgment. In *Stepaniuk, Nikolai v Wellstead Corporate Solutions Pte Ltd*,[41] the High Court entered judgment in favour of the plaintiff's claim that the second defendant held the shares registered in her name on trust for him and that she should immediately transfer these shares to the plaintiff. This case fell squarely under O 27 r 3 as the second defendant had admitted in her affidavits that she held the shares on trust for the plaintiff and that he was the sole beneficial owner of those shares.

8.55 The court also struck out the defences filed by the second and fourth defendant and entered final judgment for the plaintiff for their failure to adequately comply with an unless order which required them to, among other things, confirm the whereabouts of certain assets which had been held in the fourth defendant's bank account.

Injunctions

8.56 The principles governing an *inter partes* application to discharge an existing *ex parte* injunction may still apply where one party is absent from the *inter partes* application. In *LQS Construction Pte Ltd v Mencast Marine Pte Ltd*,[42] LQS had obtained an *ex parte* injunction to restrain Mencast from calling on a performance bond. In its *ex parte* application, LQS argued that the injunction should be granted on grounds of unconscionability. LQS alleged, *inter alia*, that Mencast had withheld payment to LQS despite LQS having faithfully completed all its work under the construction project. After Mencast applied to discharge the *ex parte* injunction, LQS's solicitor withdrew himself. Though Mencast's discharge application was once adjourned to allow LQS time to instruct a new solicitor, LQS still failed to appoint a new solicitor by the hearing of the discharge application. Thus, the discharge application was heard in LQS's absence and without a reply affidavit by LQS or any submissions.

8.57 Although LQS was unable to respond to the arguments presented by Mencast, the High Court found that LQS had had every opportunity to do so. In any event, LQS had made its position clear in its initial *ex parte* application, in which it should have already disclosed all

41 [2017] SGHC 39.
42 [2018] 3 SLR 404.

material facts. Thus, the court found it appropriate to apply the principles governing an *inter partes* application to discharge an existing *ex parte* injunction, despite LQS's absence.

8.58 The court held that it could discharge the injunction without looking into its merits if it were shown that LQS had failed to make full and frank disclosure of all material facts in its initial application. Mencast adduced evidence of LQS acknowledging that, *inter alia*, it owed Mencast various outstanding works under the construction project. As such, the court found that LQS had intentionally failed to make full disclosure to further the erroneous impression that it had faithfully completed all its work under the construction project. Though LQS's non-disclosure sufficed to dispose of the matter, the court also looked into the merits of the case. The court held that even taking LQS's case at its highest, it would amount to no more than a genuine dispute between the parties, which is insufficient to constitute unconscionability. Thus, the injunction was also unsustainable on the merits.

8.59 In the recent case of *RGA Holdings International, Inc v Loh Choon Phing Robin*,[43] the Court of Appeal also clarified the exceptions to the *American Cyanamid*[44] principles which generally govern interim injunction applications. In that case, the Court of Appeal held that an exception should be made where (a) the defendant is about to breach, or has already breached, a negative covenant in a contract and an interim prohibitory injunction is sought to restrain a prospective or further breach, or (b) an interim mandatory injunction is sought.

8.60 As regards the former situation, an interim injunction should generally be granted "as a matter of course". The court is generally not concerned with the balance of convenience, or whether damages would be an adequate remedy, because the interim injunction is simply holding a party to obligations which he had voluntarily undertaken. An interim injunction may only be refused if the defendant proves undue hardship over and above that which results from having to observe his contract. As regards the latter situation, an interim injunction will only be granted in very exceptional cases, where the court has a "high degree of assurance" that it will appear at trial to have been rightly granted.

8.61 The High Court also clarified the purpose of an *Erinford*[45] injunction in the recent case of *Sin Herh Construction Pte Ltd v Hyundai Engineering & Construction Co Ltd*.[46] In that case, the plaintiff sought an

43 [2017] 2 SLR 997.
44 *American Cyanamid Co v Ethicon Ltd* [1975] AC 396.
45 *Erinford Properties Ltd v Cheshire County Council* [1974] 1 Ch 261.
46 [2017] SGHC 3.

injunction to restrain the second defendant from calling on a performance bond. The court denied the injunction. While the parties were in dispute over the quantum owed by the plaintiff to the second defendant, this did not amount to a strong *prima facie* case of unconscionability. The plaintiff then applied for an *Erinford* injunction to restrain the second defendant from calling on the performance bond until after its appeal of the court's decision. The plaintiff claimed that if the *Erinford* injunction was not granted, it would be denied its primary remedy, and disclosure of the second defendant's call on its performance bond would prejudice its chances of securing future projects. The court rejected these reasons. First, the plaintiff would not be denied its primary remedy as any sum received pursuant to the second defendant's call would have to be paid back if the plaintiff's appeal is successful. Second, the rationale behind the *Erinford* injunction was to ensure that a successful appellant did not end up with a pyrrhic victory. It was not concerned with protecting against any perceived reputational damage.

Discovery and interrogatories

Pre-action discovery and interrogatories

8.62 Three cases concerning pre-action discovery and interrogatories came before the High Court in 2017, one of which dealt with pre-action discovery and interrogatories against non-parties.

8.63 In *Aquariva Pte Ltd v Gezel Group Pte Ltd*[47] ("*Aquariva*"), the High Court dismissed the plaintiff's application for pre-action discovery, on the basis that such discovery was not relevant or necessary for the plaintiff to put forward its claim under s 340(1) of the Companies Act.[48] Section 340(1) reads as follows:

> **340.**—(1) If, *in the course of the winding up of a company or in any proceedings against a company*, it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose, the Court, on the application of the liquidator or any creditor or contributory of the company, may, if it thinks proper to do so, declare that any person who was knowingly a party to the carrying on of the business in that manner shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the Court directs. [emphasis added by the High Court in *Aquariva*]

47 [2017] SGHCR 14.
48 Cap 50, 2006 Rev Ed.

8.64 Significantly, the High Court opined that an action under s 340(1) is "not one which an applicant can or should seek pre-action discovery in order to commence", given that the language of s 340(1) makes clear that the commencement of proceedings against the company is a *precondition* to the court granting a declaration under that section. The court clarified that an application for pre-action discovery, which is necessarily made *prior* to the commencement of proceedings, does not satisfy this precondition. To interpret "any proceedings against a company" to include an application for pre-action discovery against a company would be to subvert the intention behind the section. Further, the High Court held that pre-action discovery cannot be said to be *necessary* for the commencement of an action under s 340(1) when the action itself provides a method for the plaintiff to obtain the necessary discovery, that is, by commencing winding up or other proceedings against the defendant.

8.65 The High Court also reiterated that where a plaintiff has an accrued cause of action against an identified defendant, pre-action discovery should not be utilised as a mechanism to obtain documents with respect to *other* potential causes of action. On the facts of *Aquariva*, given that the plaintiff was already in a position either to apply to wind up or bring proceedings against the first defendant, pre-action discovery could not be said to be necessary at that stage.

8.66 In *Intas Pharmaceuticals Ltd v DealStreetAsia Pte Ltd*,[49] the defendant's financial news website carried an article which reported that a competitor of the plaintiff was in talks to acquire the plaintiff, citing several unnamed sources. The plaintiff applied for pre-action discovery and interrogatories against the defendant to seek disclosure of the communications between the defendant and its sources, as well as the identity of the sources, purportedly for the purpose of potentially bringing claims for malicious falsehood against the defendant and the sources.

8.67 The asst registrar ordered the defendant to provide pre-action discovery of certain communications, but permitted the defendant to redact any information that could lead to *identification* of the sources. On appeal, the High Court affirmed the asst registrar's order. While the High Court acknowledged that pre-action disclosure of the *nature* of the sources (that is, the position, standing, character and opportunities of knowledge of those sources) was necessary for the plaintiff to know if it had a viable cause of action against the defendant, the *actual identities* of the individual or individuals involved were not required for this purpose.

49 [2017] 4 SLR 684.

8.68 The High Court also reiterated that under O 26A r 1 and O 24 r 6 of the RoC (which govern pre-action interrogatories and pre-action discovery respectively), the controlling requirements for pre-action discovery are that discovery is *necessary*[50] and *just*.[51] In particular, the High Court helpfully outlined the following factors which a court can, in appropriate cases, have regard to in deciding whether the order sought is just:[52]

> (a) the seriousness of the injury [and/or] the loss and damage behind the complaint made;
>
> (b) the extent to which the intended cause of action that is said to underpin the complaint is supported by material facts or to the contrary is wholly speculative in nature[;]
>
> (c) the degree of relevance of the material to the issues pertaining to the cause of action;
>
> (d) the scope or width of the documents or information being sought;
>
> (e) whether there is credible evidence that the alleged wrongdoing has a nexus to Singapore[; and]
>
> (f) whether there are relevant confidentiality (or related) obligations that the defendant relies on, and if so, whether the interests of justice lie in favour of maintaining or compromising such confidentiality obligations …

8.69 With regard to (e), the court clarified that establishing credible evidence of a Singapore nexus requires a likely prospect that the intended cause of action would be brought in Singapore, but *does not* require the applicant to prove that the connecting factors in *Spiliada Maritime Corp v Cansulex Ltd*[53] ("*Spiliada*") point to Singapore as the appropriate forum. Any attempt to delicately balance the various connecting factors would be premature and speculative at a stage where the plaintiff does not even yet know if he has a viable cause of action, or who his potential defendant is.

8.70 *Goh Seng Heng v Liberty Sky Investments Ltd*[54] ("*Goh Seng Heng*") concerned an appeal on the applicable test for discovery of information relating to a party's bank account where the purpose of such discovery was to ascertain if the sale proceeds from a share sale and purchase agreement remained in that bank account or had been transferred to any third parties. If the sale proceeds had been transferred

50 See O 24 r 7 and O 26A r 2 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed).
51 See O 26 r 6(5) and O 26A r 1(5) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed).
52 *Intas Pharmaceuticals Ltd v DealStreetAsia Pte Ltd* [2017] 4 SLR 684 at [35].
53 [1987] AC 460.
54 [2017] 2 SLR 1113.

to third parties, the plaintiff could then seek recovery by asserting a proprietary claim to those proceeds.

8.71 In *Liberty Sky Investments Ltd v Oversea-Chinese Banking Corp Ltd*,[55] the plaintiff sought to rely on the court's inherent jurisdiction to grant orders of discovery against non-parties as well as O 24 r 6(5) of the RoC, which provides that an order for discovery by a person who is not a party to the proceedings may be made "for the purpose of or with a view to identifying possible parties to any proceedings". The plaintiff drew support from the following:

> (a) decision of the House of Lords in *Norwich Pharmacal Co v Customs and Excise Commissioners*[56] ("*Norwich Pharmacal*") to make orders allowing the applicant to seek information from third parties for the purpose of identifying the person or persons who may be liable to him; and
>
> (b) decision of the English Court of Appeal in *Bankers Trust Co v Shapira*[57] ("*Bankers Trust*"), where Lord Denning emphasised the importance of discovery in allowing funds to be traced, and referred to *Norwich Pharmacal*, which his Lordship said exemplified the court's powers in ordering discovery.

8.72 The High Court did not make a decision on whether the jurisdictions in *Norwich Pharmacal* and *Bankers Trust* are distinct or overlapping, as it opined that the present case fell within the ambit of O 24 r 6(5) of the RoC, *Norwich Pharmacal* and *Bankers Trust*. Accordingly, the applicable test for the grant of the discovery order was the one laid down by the Court of Appeal in *Dorsey James Michael v World Sport Group Pte Ltd*[58] as follows:

> (a) First, the person from whom discovery is sought must have had been involved in the wrongdoing, though the involvement may have been completely innocent.
>
> (b) Second, the applicant must be able to show a reasonable *prima facie* case of wrongdoing against the person whose information or identity is sought of.
>
> (c) Third, the applicant must show that the disclosure sought is necessary to enable him to take action, or at least that it is just and convenient in the interests of justice to make the order sought. Two significant considerations in the last factor are whether there exists an alternative and more appropriate

55 [2017] SGHC 20.
56 [1974] AC 133.
57 [1980] 1 WLR 1274.
58 [2014] 2 SLR 208 at [39], [44] and [45].

method to obtain the information and whether the order is proportionate in the circumstances.

8.73 On the facts, the court found that all three elements were satisfied and allowed the plaintiff's application. On appeal, the Court of Appeal did not need to give a decisive opinion on whether a *Norwich Pharmacal* order and a *Bankers Trust* order ought to be characterised differently and/or subject to different tests. The court found that the plaintiff had not even demonstrated a reasonable *prima facie* case of fraud, and set aside the discovery order. Accordingly, the question of whether a plaintiff needs only to show a reasonable *prima facie* case of fraud, or has to show a strong *prima facie* case of fraud (that is, compelling evidence of fraud) remains open, though the court was of the tentative view that it may well be too fine a line to attempt to define different degrees of a *prima facie* case. It remains to be seen if subsequent cases will adopt different tests based on the purpose for which pre-action discovery is sought.

Requirements of relevance and necessity

8.74 In *Comptroller of Income Tax v ARW*[59] ("*ARW (HC 1)*"), the High Court reiterated that whether or not a request for discovery amounts to a "fishing expedition" is *not* an independent criterion to be weighed by the court, and such a determination should be made with regard to the requirements of relevance and necessity as laid down in O 24 rr 5 and 7 of the RoC. In other words, casting about for something useful is not objectionable in itself and should *not* be a bar to discovery if the requirements of relevance and necessity are otherwise made out.

Specific discovery

8.75 *EQ Capital Investments Ltd v Sunbreeze Group Investments Ltd*[60] ("*EQ Capital*") involved two issues of law relating to specific discovery: (a) the jurisdictional preconditions for the grant of an order of specific discovery; and (b) the question of who bears the burden of proving the element of "necessity".

8.76 On the first issue, the defendant sought to argue that, following the English position in *Berkeley Administration, Inc v McClelland*,[61] before a court has *jurisdiction* to make an order for specific discovery, it must *additionally* be shown that there are requested documents which

59 [2017] SGHC 16.
60 [2017] SGHCR 15.
61 [1990] FSR 381.

have not yet been disclosed in general discovery. The High Court rejected this argument, and made clear that the position in Singapore based on O 24 rr 1 and 5 of the RoC is different. Pertinently, the tests of relevance under general and specific discovery diverge under Singapore law – *indirectly relevant* documents are *not* discoverable under general discovery and can only be obtained in an application for specific discovery. Therefore, it cannot be the case that the court's jurisdiction to order specific discovery is only engaged where there is evidence that there are documents which are being suppressed or withheld (or have otherwise not been disclosed).

8.77 Turning to the requirement of "necessity" in discovery, while the test for "necessity" remains the same for both specific discovery applications and applications for production for inspection, the court re-affirmed that there is a distinction in relation to *who bears the burden of proof* when proving this element, as laid down in case law. In essence:

> (a) "Where the application is one for specific discovery, the burden rests on the party resisting discovery (that is, the *requested party*) to show that disclosure is *not necessary*" [emphasis in original].[62]
>
> (b) "Where the application is one for production for inspection, the burden rests on the *applicant* to show that it is *necessary* that the requested documents be produced" [emphasis in original].[63]

Privilege

Legal professional privilege

8.78 In *ARW (HC 1)*, the first defendant sought discovery of various documents relating to an investigatory audit conducted by the plaintiff public authority against the first defendant and a related company. The plaintiff resisted the application, on the basis that the documents were protected by litigation privilege and legal advice privilege.

8.79 The High Court affirmed the principle that a change in the nature or basis of the litigation contemplated would not disqualify reliance on litigation privilege. However, as the High Court found that the elements of litigation privilege were not made out on the facts of the

62 *EQ Capital Investments Ltd v Sunbreeze Group Investments Ltd* [2017] SGHCR 15 at [53].

63 *EQ Capital Investments Ltd v Sunbreeze Group Investments Ltd* [2017] SGHCR 15 at [53].

case, it left open the interesting question of *how* litigation privilege should apply to a regulatory agency or public authority, given that such an organisation may not have an interest in confidentiality of the same nature as a private citizen or a corporation preparing for trial.

8.80 To qualify for legal advice privilege, the advice given by a lawyer "must be given in a legal context". In this regard, the High Court clarified that what matters is whether the *transaction as a whole* required the participation of the lawyer. The High Court further held that the mere fact that certain documents exist and may possibly be considered and reviewed from a legal perspective is *insufficient* to render them privileged – there must be evidence that such documents went to, or were intended to be sent to, the lawyers.

8.81 Notably, the High Court observed that the plaintiff's real claim appeared to be a form of privilege protecting the fruits of the audit, review and related internal discussions conducted by law enforcement agencies, but that the plaintiff had not invoked either s 125 or 126 of the Evidence Act,[64] and that in any event, neither would seem to have been made out. The plaintiff subsequently sought leave to (a) request for further arguments out of time, and (b) adduce further affidavits as evidence in support of those further arguments. Both applications were dealt with in *Comptroller of Income Tax v ARW*[65] ("*ARW (HC 2)*").

8.82 In *Wee Shuo Woon v HT SRL*,[66] the respondent's computer systems were hacked and privileged e-mails containing confidential legal advice relating to the suit were uploaded onto the Internet. The appellant accessed these e-mails and in seeking to strike out the respondent's claim, relied on these e-mails in a supporting affidavit. The respondent then filed an application to expunge all references to the e-mails in the appellant's affidavit on the ground that they were privileged. The Court of Appeal found that prior to their uploading onto the Internet, the e-mails attracted legal professional privilege and the respondent had not waived such privilege. The Court of Appeal reiterated the general rule in *Seet Melvin v Law Society of Singapore*[67] that until and unless privilege has been waived, a document once privileged is always privileged. Although the privileged e-mails in this case had become publicly accessible, they contained confidential information. Accordingly, the Court of Appeal relied on its equitable injunction to intervene and prevent their unauthorised use as evidence in the court proceedings.

64 Cap 97, 1997 Rev Ed.
65 [2017] SGHC 180; see also paras 8.183–8.195 below.
66 [2017] 2 SLR 94.
67 [1995] 2 SLR(R) 186.

Privilege in context of multiparty litigation

8.83 Several novel arguments concerning litigation privilege in the context of a multi-party litigation were raised in the decisions of *United Overseas Bank Ltd v Lippo Marina Collection Pte Ltd*[68] ("*Lippo (HCR)*") and *United Overseas Bank Ltd v Lippo Marina Collection Pte Ltd*[69] ("*Lippo (HC)*").

8.84 In *Lippo (HCR)*, the plaintiff commenced suit against eight parties. Following negotiations, it settled its claims against the second and third defendants. Pursuant to the terms of the settlement agreement, the second defendant affirmed an affidavit in which he detailed the first defendant's involvement in the alleged wrongdoing committed against the plaintiff and extended a copy to the plaintiff. The first defendant then applied for specific discovery of the affidavit from the plaintiff, who resisted production on the ground that the affidavit was privileged. The first defendant argued that the plaintiff had no standing to invoke litigation privilege because it was not the creator of the document. The asst registrar upheld the plaintiff's claim to privilege, and the defendant appealed.

8.85 On appeal, the High Court in *Lippo (HC)* was faced with two interesting issues:

> (a) Does the failure to file an affidavit claiming privilege over a document preclude a claim of litigation privilege over that document?
>
> (b) "In the context of a *multi-party litigation*, does the disclosure of privileged material to an *opponent* result, without more, in a waiver of privilege for all intents and purposes, *notwithstanding that* the disclosing party may have sought to keep the privileged material confidential as against the other parties to the litigation" [emphasis in original]?[70]

8.86 The High Court affirmed the asst registrar's decision and found as follows:

> (a) First, litigation privilege is *not* excluded simply because a supporting affidavit has not been filed. The essential question is whether the claim of privilege is expressed clearly in some form, so that the matter can be readily determined by the court.

68 [2017] SGHCR 1.
69 [2017] SGHC 140.
70 *United Overseas Bank Ltd v Lippo Marina Collection Pte Ltd* [2017] SGHC 140 at [21].

(b) Second, litigation privilege *subsists* in unserved but finalised affidavits intended to be used at trial. Until such affidavits are actually served or filed, they should be protected by litigation privilege until such time where confidentially is unequivocally waived or required to be waived, to enable the parties to rework their affidavits and to prepare adequately for their case.

(c) Third, in the context of a multi-party litigation:[71]

> [Selective] disclosure of a document to some but not all of the parties does not necessarily constitute waiver of the litigation privilege as against all the parties; much would depend on the *context of that disclosure and its effect on the confidentiality of the document concerned*. In this regard, it is *not* determinative that the party to whom disclosure was made stood in an adversarial position *vis-à-vis* the party who made the disclosure, or that the document concerned was intended to be used at trial or otherwise. [emphasis added]

Marital communications privilege

8.87 The proper ambit of marital communications privilege under s 124 of the Evidence Act, a matter of first impression in Singapore, was made clear in *EQ Capital*.[72] In this case, the defendants were married and were directors of a company. A key issue was whether the communications passing between the defendants in relation to the affairs of their company were protected by marital communications privilege. In holding that these were indeed privileged, the High Court emphasised that the scope of protection offered under s 124 is a broad and expansive one, extending to *all* communications which pass between the spouses during the marriage, and not just those which are expressed to be confidential. This would necessarily include matters relating to the ordinary business affairs of the spouses. Such an interpretation would align with the purpose of the privilege, which is to secure complete privacy in conjugal communications and to preserve the *relationship of confidence* that exists between spouses, not to protect *particular confidences*. It would also circumvent the difficulty inherent in determining whether something is of a confidential nature, as well as the "endless embarrassment and distrust" that would tend to arise from an inquiry into the matter.

71 *United Overseas Bank Ltd v Lippo Marina Collection Pte Ltd* [2017] SGHC 140 at [69].

72 See para 8.90 below.

Privilege in copies

8.88 The interesting issue of privilege in copies was resolved by the High Court in *Lippo (HC)* and *EQ Capital*. The court clarified that simply extending a copy of a privileged document to another party does *not* in itself have the effect of waiving privilege. Both decisions are to be welcomed as a step in the right direction given the pace of technological progress in the world today and the ease of making copies of documents via photocopiers, scanners, e-mails and mobile devices.

8.89 In *Lippo (HC)*,[73] the defendant sought discovery of a copy of a privileged affidavit, which was in the possession of the plaintiff. The issue before the High Court was whether the plaintiff's copy of the affidavit remained privileged and whether the plaintiff had standing to assert this privilege. The High Court articulated the general rule that the mere making of copies does not destroy or waive the privilege that otherwise subsists in the original document; without more, the copies themselves are also similarly privileged. Accordingly, the plaintiff (while only a recipient of a copy of the affidavit and not its creator) still had standing to assert litigation privilege over the document, in so far as the privilege in the original affidavit subsisted and had not been waived by the second and third defendants. The High Court made the following three important points in its decision:

> (a) There was a distinction between the voluntary disclosure of a document (which might implicate the doctrine of waiver) and the making of a copy, which did *not* have the effect of removing the privilege which subsisted therein.[74]
>
> (b) Even if the plaintiff was not, on orthodox principles, entitled to assert privilege over the draft affidavit, *the law should develop to allow this to be done*. Such a development would be congruent with the reality of litigation privilege in a multi-party context, where a plaintiff might lawfully elect to settle his case with one or more of the defendants in order to focus his energies on those who remained.
>
> (c) It would "make a mockery" of litigation privilege if the first defendant were to be able to get from the plaintiff what he would not be able to obtain from the first and second defendants, merely by virtue of the fact that copies of the privileged document exist.[75]

73 See paras 8.83–8.86 above.

74 *United Overseas Bank Ltd v Lippo Marina Collection Pte Ltd* [2017] SGHC 140 at [92].

75 *United Overseas Bank Ltd v Lippo Marina Collection Pte Ltd* [2017] SGHC 140 at [92].

8.90 In *EQ Capital*,[76] the defendants were married and a key issue was whether the communications passing between them in relation to the affairs of their company were protected by marital communications privilege. Apart from finding that these communications were indeed privileged, the High Court also held that the *company* was entitled, as the holder of copies of at least some of these privileged communications, to withhold them from disclosure. It affirmed the common law principle on privilege in copies that was recently endorsed in *Lippo (HC)*[77] – that simply extending a copy of a privileged document to another party does *not* have the effect of waiving privilege, and the second party may himself assert that privilege. On the facts, the putatively privileged documents in the company's hands were not originals, but *copies* which were automatically generated each time an e-mail was sent. Echoing the reasoning in *Lippo (HC)*, the High Court in *EQ Capital* observed that in such a situation, a third party ought to be able to stand in the shoes of the privilege-holder to refuse disclosure. If it were otherwise, parties would be able to obtain copies of privileged correspondence by seeking discovery from the operators of e-mail servers and all forms of privilege would be emptied of content. Accordingly, even if there were no rule which currently permitted the company to refuse disclosure, the law should develop to meet the demands of the modern age.

Further and better particulars

8.91 The High Court decision of *Element Six Technologies Ltd v IIa Technologies Pte Ltd*[78] involved two applications for further and better particulars of pleadings in patent proceedings, and focused on three specific categories of requests for which there appears to be a paucity of local case authority, namely:

> (a) requests for particulars of the combinations of prior art relied on to invalidate the patents in question ("the Combination Requests");
>
> (b) requests for particulars of specific passages of certain prior art relied on to invalidate the patents in question ("the Passage Requests"); and
>
> (c) requests for particulars of the alleged commercial success of one of the patents in question ("the Commercial Success Requests").

76 See para 8.87 above.
77 See para 8.89 above.
78 [2017] SGHCR 16.

8.92 In relation to the Combination Requests, the defendant had raised separate lists of prior art to challenge each of the asserted claims in the patents. The issue before the court was whether the defendant should be ordered to particularise the combinations of prior art. The High Court found that this was a context-specific inquiry and was dependent on factors such as the number and nature of prior art cited, as well as the complexity of the subject matter in question. In particular, if there are numerous pieces of prior art and a large number of possible combinations, there will be a greater need for a defendant to particularise the combinations relied on. Otherwise, the plaintiff may be saddled with massive and unnecessary costs, and the court would be unnecessarily occupied in dealing with a large number of issues which have no real bearing on the substantive issues at hand.

8.93 The High Court also noted that while particularisation of the combinations relied on may require the involvement of an expert, this would *not* itself render such requests a matter of expert evidence (which is to be reserved for expert reports or for trial). Instead, a careful perusal of precisely what particulars are sought by the requests is required to determine whether these are requests for material facts (which is permitted) or for expert evidence (which is not). On the facts, the High Court found that the Combination Requests were requests for material facts. Further, given the large number of prior art cited, without the particulars sought, the plaintiff would not know the case it had to meet on each of the claims that the defendant sought to invalidate and would necessarily be put through immense expense in responding to the numerous possible combinations. Accordingly, the Combination Requests were allowed.

8.94 Turning to the Passage Requests, the High Court summarised the principles from various English decisions as follows: "[a] defendant may be ordered to particularise the specific passages of prior art that he wishes to rely on. However, whether such particulars will be ordered and the extent of specificity required depends on the nature (*eg* type, length, complexity, *etc*) of the prior art in question". Consistent with the purpose of particularisation, the lengthier and more complex the prior art, the more likely a defendant will be required to provide greater specificity. In the present case, the court found that it was *insufficient* for the defendant to merely list the lengthy pieces of prior art (eight pieces of prior art, each of which exceeded 22 pages in length), without further specificity on the parts relied on, and hence granted the Passage Requests.

8.95 Finally, the High Court examined whether the Commercial Success Requests sought by the defendant ought to be ordered under O 87A r 3(5) of the RoC, which requires a party who wishes to rely on the commercial success of the patent to state in his pleadings the

grounds upon which he so relies. Notably, the High Court considered for the first time the ambit of these "grounds" in O 87A r 3(5), subsequent to the introduction of the O 87A r 5 discovery regime. Under the O 87A r 5 discovery regime, documents relating to commercial success are exempted from the usual discovery process and only have to be stated in the O 87A r 5(3) schedule. The High Court was of the opinion that as a matter of logic and statutory interpretation, the "grounds" in O 87A r 3(5) should *not* be interpreted to require information that is identical to the information required in the O 87A r 5(3) schedule. Instead, they should be interpreted to relate to *other* important matters that ought to be pleaded in relation to a commercial success claim, such as particulars relating to defects in prior art and long-felt want. On the facts, the court disallowed the Commercial Success Requests as they were targeted entirely at material properly reserved for discovery pursuant to O 87A r 3(5).

Locus standi

8.96 In 2017, there were three decisions that concerned the issue of *locus standi*. Two of these were issued in the context of striking out applications.

8.97 The High Court made certain observations on the issue of *locus standi* in *Fong Wai Lyn Carolyn v Kao Chai-Chau Linda*.[79] The plaintiff, a beneficiary of her father's estate, sought a declaration that certain shares were held on trust by the first defendant for the estate, and that the first defendant was obliged to comply with any direction from the estate's executors as regards the exercise of the voting rights attached to the trust shares and the disposal of the trust shares. The first defendant raised a threshold objection that the application, in the absence of special circumstances, should have been brought by the executor of the estate. The executor supported the plaintiff's application.

8.98 The High Court made clear that ordinarily, the proper party to obtain a remedy on behalf of and for the benefit of the estate was the *executor*, so as to avoid multiplicity of suits and to control unilateral actions by beneficiaries. Nonetheless, in special circumstances, the court would permit an action to be brought by a beneficiary on behalf of the estate. Whether such special circumstances exist was a fact-specific inquiry, to be evaluated in the light of all the circumstances of the case. To this end, the courts have adopted a flexible approach, taking cognisance of factors such as the executor's unwillingness or inability to sue, the merits of the case, and the potential loss to the beneficiaries. On

79 [2017] 4 SLR 1018.

the facts, the High Court found that special circumstances existed to justify the plaintiff in making the application as beneficiary instead of the executor:

> (a) A significant factor was that the executor consented to the plaintiff's application, such that the predominant mischief behind the *locus standi* requirement was no longer in play.[80]
>
> (b) There was urgency at the time of the application, yet the executor was not sufficiently acquainted with all the facts to have brought the action at that time and was unwilling to take further steps to secure the estate's interest.[81]
>
> (c) Further, the plaintiff's case had merits and should be allowed to proceed.[82]
>
> (d) Finally, it would have been prejudicial to the estate to deny the plaintiff *locus standi* as the same substantive arguments would be raised if the executor were to start a fresh application, incurring further costs.[83]

8.99 The High Court in *Lakshmi Anil Salgaocar v Vivek Sudarshan Khabya*[84] had the occasion to address the following question: where an intestate deceased was the sole shareholder of a company in his lifetime, does a beneficiary of that deceased who has not yet obtained the grant of letters of administration have *locus standi* to bring an action to recover, preserve or protect property which belongs to that company or its subsidiaries? The plaintiff was the widow of the late Anil Vassudeva Salgaocar ("AVS"), who died intestate. The plaintiff and her four children were the beneficiaries of the estate. At the time of the proceedings, the plaintiff had applied for, but had not obtained, the grant of letters of administration.

8.100 In his lifetime, AVS was the sole director and shareholder of Million Dragon Wealth Ltd ("MDWL"), which in turn was the sole shareholder in 22 subsidiaries. The defendant was appointed by AVS as the chief executive officer ("CEO") of MDWL, and continued to act as its CEO in various ways after AVS's passing. The plaintiff brought claims against the defendant for conspiracy, conversion, breach of fiduciary duty and breach of trust.

80 *Fong Wai Lyn Carolyn v Kao Chai-Chau Linda* [2017] 4 SLR 1018 at [35(a)].
81 *Fong Wai Lyn Carolyn v Kao Chai-Chau Linda* [2017] 4 SLR 1018 at [29].
82 *Fong Wai Lyn Carolyn v Kao Chai-Chau Linda* [2017] 4 SLR 1018 at [35(b)].
83 *Fong Wai Lyn Carolyn v Kao Chai-Chau Linda* [2017] 4 SLR 1018 at [35(c)].
84 [2017] 4 SLR 1124.

8.101 The defendant applied to strike out the plaintiff's statement of claim under O 18 r 19(1) of the RoC, alleging that the plaintiff lacked capacity to act for the estate because she had not yet been duly appointed as administrator. The asst registrar allowed the defendant's application and struck out the statement of claim. On appeal by the plaintiff, the High Court sought to determine two issues:[85]

> (a) whether the plaintiff had *locus standi* to sue *qua* beneficiary and for the benefit of the Estate under the [line of authorities cited by the plaintiff, including *Wong Moy v Soo Ah Choy*,[86] *Omar Ali bin Mohd v Syed Jafaralsadeg bin Abdulkadir Alhadad*[87] and *Ching Chew Weng Paul v Ching Pui Sim*[88] (collectively, "the *Wong Moy* line of authorities")]; and
>
> (b) whether the plaintiff had *locus standi* to sue the defendant in respect of the claim for breach of trust.

8.102 In relation to the first issue, the plaintiff sought to rely on the *Wong Moy* line of authorities for the proposition that a beneficiary is entitled to bring a claim to protect the assets of an estate pending administration, even before extracting the grant of the letters of administration. However, the High Court found that the *Wong Moy* line of authorities were inapplicable to the present case as none of those cases involved a beneficiary seeking to assert an interest in income or assets which belongs *to a company*. On the facts, the assets and income in question had not vested in the estate simply by virtue of AVS's passing – only the *shares* in MDWL were assets of the estate. Accordingly, the High Court affirmed the asst registrar's decision to strike out the writ and the statement of claim under O 18 r 19(1)(*b*) and/or O 18 r 19(1)(*d*) of the RoC.

8.103 With regards to the second issue, the High Court found that under s 10(1) of the Civil Law Act,[89] read with s 37(1) of the Probate and Administration Act,[90] the claim for breach of trust had vested in the Public Trustee, and no other person would be entitled to pursue the claim until the grant of letters of administration. It was thus found that the plaintiff's claim for breach of trust was unsustainable and also liable to be struck out under O 18 r 19(1)(*b*) of the RoC.

85 *Lakshmi Anil Salgaocar v Vivek Sudarshan Khabya* [2017] 4 SLR 1124 at [36].
86 [1996] 3 SLR(R) 27.
87 [1995] 2 SLR(R) 407.
88 [2010] 2 SLR 76.
89 Cap 43, 1999 Rev Ed.
90 Cap 251, 2000 Rev Ed.

8.104 In *MCH International Pte Ltd v YG Group Pte Ltd*,[91] the first defendant, YGG, was a joint venture company incorporated by the first plaintiff and second defendant. The plaintiffs sought, *inter alia*, declarations that the third to fifth defendants (the directors of YGG) had breached their fiduciary duties and an order that the defendants account for the loss and damage suffered by the plaintiffs as a result of such breaches. YGG applied for the relevant paragraphs and reliefs in the statement of claim to be struck out, arguing that the plaintiffs had no legal capacity or right to bring this action as the proper plaintiff in such claims was YGG itself. Further, while the plaintiffs had brought the claim for and on behalf of YGG by a statutory derivative action under s 216A of the Companies Act, the plaintiffs had not served notice on the board of YGG as required nor had they obtained the requisite leave prior to the commencement of the action.

8.105 As the plaintiffs had not obtained leave, the High Court held that they did not have *locus standi* to bring the action and the relevant paragraphs and reliefs were struck out on the basis that there was no reasonable cause of action under O 18 r 19(1)(*a*) of the RoC.

8.106 The plaintiffs submitted that even if they did not have leave to commence a *statutory* derivative action, they were still entitled to maintain a *common law* derivative action. On the facts, however, the court found that the plaintiffs had not satisfied the necessary procedural and substantive requirements to maintain such an action. As such, the High Court struck out the paragraphs and reliefs on the basis that they were frivolous, vexatious and an abuse of process under O 18 r 19(1)(*b*) and O 18 r 19(1)(*d*) of the RoC.

Offer to settle

8.107 Two significant judgments relating to offers to settle were issued by the High Court in 2017. The court made certain observations relating to the cost consequences where multiple offers to settle are made, as well as the validity of offers to settle.

8.108 In *Goel Adesh Kumar v Resorts World at Sentosa Pte Ltd*[92] ("*Goel Adesh Kumar*"), the plaintiff sued the defendant's casino for certain tortious acts committed against him. Approximately a year before the trial, the defendant and third party made a joint offer to settle the plaintiff's claim at $62,000. The plaintiff rejected this offer. Before judgment was delivered, the defendant and third party made a second

91 [2017] SGHCR 8.
92 [2017] SGHC 43; see also para 8.218 below.

offer to settle for $100,000 which was again rejected by the plaintiff. The High Court subsequently found in favour of the plaintiff but apportioned liability against the defendant up to 80% only, because some of the tortious acts were committed by security officers of the third party. The plaintiff was accordingly awarded $36,732.59.

8.109 In dealing with the question of costs, the High Court reiterated that the cost consequences resulting from an offer to settle under O 22A of the RoC would apply in this case, and that the court may not only refuse the plaintiff's costs but also order costs against him. Significantly, the High Court dealt with the issue of whether the *first* offer could be relied upon by the defendant to mark the date from which the plaintiff had to pay costs. The court clarified that the defendant was *not* obliged to stand by its second offer to settle (which may be higher or lower than the first) and could rely on its first offer to benefit from its cost consequences. That offer remained; otherwise, there would be no incentive for parties to improve their offers to facilitate a settlement. Therefore, the plaintiff was found responsible for costs incurred from the date of the first offer to settle, on an indemnity basis.

8.110 The plaintiff also submitted that the offers to settle were invalid because there was no procedure for the defendant and the third party to have made a joint offer. The High Court rejected this argument and held that while the third party was not a defendant, it was still a party from whom the defendant was seeking a contribution, and had an interest in a speedy and inexpensive end to the litigation.

8.111 *Poh Fu Tek v Lee Shung Guan*[93] ("*Poh Fu Tek*") concerned an offer to settle that was served by the plaintiffs on the defendants just four days before trial commenced. This offer did not expire, was not withdrawn and was not accepted by the defendants. The plaintiffs subsequently beat their offer at trial, and sought standard costs up to the date of their offer and indemnity costs thereafter. The defendants submitted that the High Court should disregard the plaintiffs' offer to settle because it was made shortly before the trial. The court rejected this argument and held that there was "no basis – whether as a matter of principle or authority – to argue that an offer to settle is not a genuine attempt to compromise simply because it is served shortly before the trial and regardless of the content of the offer". Accordingly, the High Court held that the plaintiffs' offer to settle was a genuine offer to compromise.

93 [2017] SGHC 212; see also para 8.219 below.

Stay of execution

8.112 In *United Overseas Bank Ltd v Pereira, Dennis John Sunny*,[94] the defendants mortgaged their properties to the plaintiff bank as security for moneys due and owing to the plaintiff pursuant to (a) loans granted by the plaintiff to the defendants, as well as (b) guarantees furnished by the first defendant in respect of two loan facilities extended by the plaintiff to his company. The defendants and the company failed to pay the monthly instalments due to the plaintiff. Pursuant to an order for possession, the plaintiff sought to execute a writ of possession in respect of the defendant's property.

8.113 The defendant brought an application for a stay of execution pursuant to O 45 r 11 of the RoC, which provides that the court may grant a stay of execution of an order on the ground of matters which have occurred since the date of the order, and on such terms as it thinks fit. At the outset, the High Court reiterated that where a party relies on O 45 r 11, that party must show "that the matters referred to are matters which would or might have prevented the order being made or would or might have led to a stay of execution if they had already occurred at the date of the order", as espoused in *SAL Leasing (Pte) Ltd v Hendmaylex Pte Ltd*.[95]

8.114 The first defendant sought to argue that there was a reasonable prospect of the company being able to satisfy its debt in full as there had been new offers made to acquire the company. The High Court rejected this argument and held that a creditor is fully entitled to proceed against a guarantor *regardless* of the principal debtor's ability to pay its debts, as established in the Court of Appeal decision of *Chan Siew Lee Jannie v Australia and New Zealand Banking Group Ltd*.[96] Otherwise, the commercial value of a guarantee would be defeated. Accordingly, the plaintiff was *not* required to enforce its principal debt against the company before seeking remedies against the first defendant as the guarantor. In any event, even if the court had the discretion to grant a stay of execution, the "new circumstances" raised by the defendant did not demonstrate that there was a reasonable prospect that the company would be able to satisfy its debt owed to the plaintiff. On the facts, there had not yet been any firm offer made and the acquisition of the company's shares remained nothing more than a mere possibility. Accordingly, the High Court declined to grant a stay of execution of the order for possession.

94 [2017] SGHC 66.
95 [1987] SLR(R) 303.
96 [2016] 3 SLR 239.

Stay of proceedings

8.115 Several judgments were issued regarding applications for a stay of proceedings. As illustrated in the following cases, the two-stage test enunciated in *Spiliada* continues to be applied to many situations.

Relevance of foreign proceedings

8.116 In *Best Soar Ltd v Praxis Energy Agents Pte Ltd*,[97] the defendant contracted to supply bunker fuel to the plaintiff's vessel. The plaintiff disputed liability for certain invoiced sums, following which the defendant arrested the vessel in Lebanon. Proceedings were commenced in Lebanon in relation to the dispute. The plaintiff subsequently commenced proceedings in Singapore seeking, *inter alia*, a declaration that it was not liable to the defendant under the contract and/or that the defendant had wrongfully arrested the vessel in Lebanon ("the Wrongful Arrest Claim"). On application by the defendant, the asst registrar granted a stay of the proceedings in Singapore on the ground of *forum non conveniens*. The plaintiff appealed.

8.117 On appeal, the High Court dealt with the question of whether the Singapore proceedings ought to be stayed, either on the ground of *forum non conveniens*, or alternatively on the ground of case management pending the outcome of the proceedings ongoing in Lebanon. In relation to *forum non conveniens*, the High Court applied the first stage of the *Spiliada* test and examined the various connecting factors as a whole. It found that the defendant had succeeded in showing that Lebanon was *prima facie* a more appropriate forum than Singapore, because:

> (a) "[The] Wrongful Arrest Claim was to be resolved under Lebanese law and depended in part on the interpretation of the Merchant Shipping Code of Lebanon".[98]
>
> (b) The Wrongful Arrest Claim was a "claim in tort, and as a general principle, the place where a tort was committed is *prima facie* the natural forum for that tortious claim"[99] (as espoused in *JIO Minerals FZC v Mineral Enterprises Ltd*[100] ("*JIO Minerals*")).

97 [2018] 3 SLR 423.
98 *Best Soar Ltd v Praxis Energy Agents Pte Ltd* [2018] 3 SLR 423 at [21].
99 *Best Soar Ltd v Praxis Energy Agents Pte Ltd* [2018] 3 SLR 423 at [20].
100 [2011] 1 SLR 391.

(c) The proceedings in Lebanon were multiple proceedings and gave rise to concerns over the duplication of resources and the risk of conflicting judgments. The court held that it was sufficient that there are *parallel* proceedings, even if these proceedings do not meet the stricter requirements of a *lis alibi pendens*.[101]

(d) Most significantly, considerations of international comity favoured Lebanon as the more appropriate forum for the Wrongful Arrest Claim, as the Lebanon court was the court making the arrest order.[102]

8.118 Applying the second stage of the *Spiliada* test, the legal burden was on the plaintiff to show why the Singapore proceedings should not be stayed even though Lebanon had been shown to be the *prima facie* more appropriate forum for the dispute. The court found that the differences between the common law system in Singapore and the civil law system in Lebanon did *not* amount to a denial of substantial justice, and hence affirmed the asst registrar's decision that the Singapore proceedings should be stayed on the ground of *forum non conveniens*.

8.119 Finally, the High Court also considered its power to grant a limited stay under s 18(2) of the SCJA read with para 9 of the First Schedule, alternatively under the court's inherent jurisdiction. The judge stated that had he not decided that a stay should be granted on *forum non conveniens* grounds, he would have granted a limited stay of the Singapore proceedings pending the outcome of the proceedings in Lebanon, given that the Lebanon proceedings were at a more advanced stage. Accordingly, a limited stay would ensure an efficient and fair resolution of the dispute, avoid the possibility of conflicting decisions (especially on the Wrongful Arrest Claim) and promote international comity.

8.120 In *Borneo Ventures Pte Ltd v Ong Han Nam*,[103] the High Court reiterated the following guidelines for a limited stay of proceedings, as laid down in the SICC decision of *BNP Paribas Wealth Management v Jacob Agam*:[104]

(a) The grant of a limited stay of proceedings is a discretionary exercise of the court's case management powers. This discretion is triggered when there is a multiplicity of proceedings. In exercising these powers, the court is entitled to

101 *Best Soar Ltd v Praxis Energy Agents Pte Ltd* [2018] 3 SLR 423 at [23]–[26].
102 *Best Soar Ltd v Praxis Energy Agents Pte Ltd* [2018] 3 SLR 423 at [28].
103 [2017] SGHC 320.
104 [2017] 3 SLR 27 at [36] and [46].

consider all the circumstances of the case. The underlying concern is the need to ensure the efficient and fair resolution of the dispute as a whole. Also, a consideration of private international law factors such as the principles of *forum non conveniens* and international comity is germane, although the former doctrine does not strictly need to be applied due to the temporary nature of the stay which preserves the plaintiff's right to prosecute his claim in Singapore.

(b) The risk of conflicting judgments is not *by itself* a sufficient reason for the grant of a limited stay of proceedings and the court.

8.121 In sum, the relevant considerations gleaned from case law were (a) the need for proper case management, (b) the avoidance of multiplicity in different jurisdictions, and (c) whether there would be conflicting judgments on the same issues being litigated in different jurisdictions.

Relevance of dispute resolution clauses and internal appeal processes

8.122 *Gulf Hibiscus* concerned an appeal from the decision of an asst registrar who granted a stay of court proceedings, on the basis that the matters raised by the plaintiff in the court proceedings were covered by an arbitration clause. In that case, the plaintiff had entered into a shareholders' agreement with three other companies – RME, Schroder and Lime PLC – and this agreement provided for a dispute resolution procedure with an arbitration mechanism. The asst registrar found that the legal and factual disputes in the plaintiff's claims against the defendants, who were the ultimate and intermediate holding companies of RME, overlapped and were intertwined with those concerning breaches of that shareholders' agreement. Given the significant overlap, the close relationship between the parties in the two proceedings, the duplication of witnesses, the risk of inconsistent findings, and there being no bar to the claims being pursued in arbitration in accordance with the shareholders' agreement, the asst registrar ordered a stay.

8.123 The plaintiff made certain amendments to its pleadings and argued on appeal that the amendments removed all reliance on breaches of the shareholders' agreement, such that that there would no longer be any basis to order a stay. The defendants maintained that even with the amended pleadings, the allegations raised touched on matters covered by the shareholders' agreement, which would properly be the subject of arbitration between the plaintiff and the other shareholders.

8.124 In dealing with this issue, the High Court first affirmed the principle in *Tomolugen Holdings Ltd v Silica Investors Ltd*[105] ("*Tomolugen*") that the court has the inherent power to stay court proceedings in the interests of case management pending the resolution of a related arbitration, even if the applicant is *not* directly party to the arbitration agreement. Therefore, while the defendants were the parent companies of RME and hence not directly party to the shareholders' agreement, they could still seek a stay of proceedings on the basis of case management if it was necessary to "serve the ends of justice". The exercise of the court's inherent jurisdiction turns on the balance to be struck between three higher-order concerns as identified in *Tomolugen*:[106]

> [First,] a plaintiff's right to choose whom he wants to sue and where; second, the court's desire to prevent a plaintiff from circumventing the operation of an arbitration clause; and third, the court's inherent power to manage its processes to prevent an abuse of process and ensure the efficient and fair resolution of disputes …

8.125 In determining whether the shareholders' agreement was engaged, the High Court followed the approach laid down in *Tomolugen* – the first step was to ascertain the nature of the claims pursued (or the "substance of the controversy") and then consider if they fell within the ambit of the arbitration agreement. On the facts, while the plaintiff's amended claims did not directly engage the shareholders' agreement, an examination of the "substance" of the court proceedings showed that the plaintiff's claims pertained to alleged improper actions taken at the Lime PLC level. Further, based on a contextual reading, the court found that the arbitration agreement did not only cover disputes concerning the specific parties to the shareholders' agreement but also disputes in relation to Lime PLC's subsidiaries. The plaintiff's claims were thus disputes arising out of the shareholders' agreement.

8.126 Accordingly, the High Court held that the court proceedings should be stayed but on certain conditions including, *inter alia*, a condition that if the tiered dispute resolution under the shareholders' agreement was not triggered within three months from the date of the judgment or an arbitration was not commenced within five months from the date of the judgment, the plaintiff would be free to apply to court to reinstate the proceedings against the defendants. The court was of the view that through this option of a conditional stay pending the resolution of a related arbitration, the plaintiff's right to sue would not be unduly prejudiced or restrained.

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105 [2016] 1 SLR 373.

106 *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 at [188].

8.127 In *Tan Wee Tin v Singapore Swimming Club*,[107] the plaintiffs, who were formerly members of the defendant swimming club's management committee, had been subject to certain disciplinary proceedings and were subsequently expelled from the committee. The plaintiffs commenced proceedings against the defendant seeking, *inter alia*, an injunction to restrain the defendant from enforcing the expulsion decision, and a restraining order to stop the defendant from re-initiating fresh disciplinary actions against the plaintiffs. The defendant applied to stay these proceedings on the basis that the plaintiffs had failed to (a) exhaust the internal appellate processes mandated by the Club's Rules, and (b) comply with the dispute resolution clause stipulated under those rules.

8.128 The asst registrar first considered whether a stay should be granted in favour of the stipulated internal appellate process, which required that an appeal be brought to a meeting of general members. While there did not appear to be any local case that directly dealt with this issue, the asst registrar observed that in judicial review applications, the Singapore courts have taken the position that an applicant must first exhaust the remedies available before bringing the matter to court. Ultimately, the High Court ordered that the present proceedings be stayed in favour of the stipulated internal appellate process, as it held that members of a club are generally bound to follow the procedures found in the Club's Rules, including exhausting internal appellate processes provided under those rules. There may, however, be exceptional cases, such as where the appeal process in question was inapplicable to the case at hand (for example, in the case of *Chiu Teng @ Kallang Pte Ltd v Singapore Land Authority*,[108] where the stipulated appeal process did not provide the applicant with any alternative remedy).

8.129 The asst registrar also found that the proceedings should be further stayed in favour of the stipulated dispute resolution process, which required parties to first endeavour to resolve the dispute by way of mediation, before proceeding to court. The High Court affirmed that the courts will generally uphold multi-tiered dispute resolution clauses and stay proceedings in order for these to be adhered to. On the facts, the rule setting out the dispute resolution clause was sufficiently clear, and this was validated by the fact that the High Court had previously granted a stay of a separate set of proceedings (which also involved the defendant) on the basis of this rule.

107 [2017] SGHCR 21.
108 [2014] 1 SLR 1047.

Stay of proceedings for non-payment of costs and judgment debt

8.130 In *Lim Poh Yeoh v TS Ong Construction Pte Ltd*,[109] the plaintiff employed the defendant to construct a pair of semi-detached houses. Disputes arose between the parties and spawned a number of proceedings. Significantly, pursuant to an adjudication determination, the plaintiff was ordered to pay a certain sum, with interest and costs, to the defendant ("the Judgment Debt"). In the present suit, the plaintiff claimed damages for uncompleted and defective works, while the defendant filed a counterclaim for an unpaid sum owed to it for completed works. As a result of not having various costs orders and the Judgment Debt satisfied, the defendant sought a stay of the present suit pending the plaintiff's payment of all sums owed in respect of the orders made in the previous proceedings. The asst registrar granted the stay, and the plaintiff appealed.

8.131 The High Court first clarified that ultimately, whether a stay for the *non-payment of costs* should be ordered would depend on the justice of the case. This would necessarily include considerations such as whether there had been an abuse of process, although this would be balanced against the right of the defaulting party to be heard. On the facts, it was found that the plaintiff had the capacity and means to pay the outstanding costs ordered but was simply *refusing* to do so, as a tactical method to avoid contradicting or weakening the legal position she was adopting. The court found that in this situation, a stay of proceedings would not cause the plaintiff "prejudice" in the usual way that the concept was understood, since the plaintiff simply needed to pay up the outstanding costs to re-activate the present proceedings.

8.132 Similarly, with regard to the non-payment of a *judgment debt*, one of the grounds on which the court would exercise its inherent power to stay proceedings was where the proceedings were likely to cause an abuse of process of court. Because the plaintiff was ultimately able but unwilling to pay the Judgment Debt, the High Court found that there was therefore no issue of depriving her of the right of access to the court to have her case heard in the current suit, since it was entirely within her control to pay the Judgment Debt and have the matter revived.

8.133 Finally, the High Court held that quite apart from the defendant having taken all reasonable steps to enforce the costs orders and the Judgment Debt against the plaintiff, the availability of possible enforcement measures which the defendant could concurrently pursue should *not* be a fetter on the court's power to stay the proceedings. This was especially so in a case where a party was abusing the court process.

109 [2017] 4 SLR 789.

Relevance of features of foreign legal system

8.134 In *Rotary Engineering Ltd v Kioumji & Eslim Law Firm*,[110] the Court of Appeal overturned the High Court's decision not to grant a stay and found that, on balance, Saudi Arabia was the more appropriate forum to hear the parties' dispute. Applying the first stage of the *Spiliada* test, the dispute between the parties was found to be more closely connected to Saudi Arabia than Singapore, because the contracts in issue as well as the plaintiffs' claim in conspiracy were all governed by Saudi law.

8.135 At the second stage of the *Spiliada* test, the plaintiffs submitted that there would be a risk of injustice if the proceedings were prosecuted in Saudi Arabia, because Saudi Arabia's rules of evidence accord less weight to the evidence of non-Muslim witnesses in relation to Muslim witnesses, and of female witnesses in relation to male witnesses. The Court of Appeal acknowledged that it was *possible* in principle to establish a sufficient risk of injustice by reason of such considerations as the generally applicable rules of evidence, even if these were features of the foreign legal system as a whole. However, it remained necessary to establish that there was a risk of injustice *on the particular facts of the case*, and in this case, it was not clear that the evidence of the witnesses in question that might be adversely affected by the Saudi law of evidence was sufficiently critical to the case.

8.136 The plaintiffs also submitted that the first plaintiff might face difficulties pursuing his claim in Saudi Arabia, due to the risk of arrest arising from a false allegation of forgery against him. In this regard, the Court of Appeal addressed the important questions of (a) whether the effect of a stay on the ground of *forum non conveniens* was suspensory only, and (b) whether parties could return to the court which had granted the stay to seek a lifting of the stay. It answered these questions in the affirmative and clarified that a stay was indeed suspensory only – it would thus be open to the plaintiffs to return to the court to seek the lifting of the stay *in the exceptional circumstance where a premise on which the stay was granted turned out to have been mistaken*. However, the Court of Appeal clarified that this was not to be misconstrued as a standing invitation to litigants to re-agitate settled issues in the event that they later encounter mere setbacks or inconveniences in prosecuting their claims. On the facts, the court saw no need for concern as it found that many of the complaints against the first plaintiff had been withdrawn, and that there was no clear evidence that investigations were still ongoing in Saudi Arabia. In the event that the first plaintiff did indeed face such dangers in Saudi Arabia, then it

110 [2017] 1 SLR 907.

would be open to the plaintiffs to return to the court to seek the lifting of the stay.

8.137 In *Sinco Technologies Pte Ltd v Singapore Chi Cheng Pte Ltd*,[111] the High Court granted the defendants' applications for a stay as it was clear that based on the two-stage test in *Spiliada*, the plaintiff's claim should more appropriately be heard by the Chinese courts in Zhuhai. Under the first stage of *Spiliada*, the High Court found, based on the three-pronged approach to determine a contract's governing law as laid out by the Court of Appeal in *JIO Minerals*, that People's Republic of China ("PRC") law was the applicable law by implication as almost all the connecting factors took place in China. While the plaintiff listed 12 factors in support of its argument that Singapore was the more appropriate forum, the court emphasised that it is the *quality* and not the quantity of the connecting factors that is crucial in this analysis.

8.138 On the second stage of *Spiliada*, the court was not satisfied that justice required that a stay should nonetheless not be granted. Although the plaintiff had argued that a stay would deprive it of juridical advantages available in Singapore proceedings due to the lack of common law discovery under PRC law, expert evidence suggested that the plaintiff's claims were actionable under PRC law and that witness testimony was receivable by the Chinese courts. Further, the court observed that the fact that a plaintiff would have a "legitimate juridical advantage" if it was allowed to proceed in Singapore was *not* a decisive factor.

Relevance of public policy/relevance of exclusive jurisdiction clause

8.139 In *Trisuryo Garuda Nusa Pte Ltd v SKP Pradiksi (North) Sdn Bhd*,[112] there was an agreement for shares in two Indonesian companies ("Indonesian shares") to be transferred to a Singapore special purpose vehicle, Trisuryo Garuda Nusa Pte Ltd ("TGN"). When the parties' relationship broke down, two Malaysian investment holding companies ("the SKP Companies") commenced an action (Suit 252 of 2016 ("S 252")) against TGN, claiming that TGN had failed to transfer the Indonesian shares back to them, in breach of an agreement for TGN to hold those shares on trust for them. Subsequently, Southern Realty, a Malaysian company that had an indirect equity stake in the SKP Companies, commenced a separate action (Suit 349 of 2016 ("S 349")) against the shareholders of TGN, claiming that they held TGN's shares on trust for Southern Realty pursuant to an alleged oral trust agreement.

111 [2017] SGHC 234.
112 [2017] 2 SLR 814.

8.140 TGN sought a stay of proceedings in S 252 on the basis that (a) S 252 was commenced in breach of exclusive jurisdiction clauses, and (b) Indonesia, rather than Singapore, was the proper forum. The stay application was dismissed by the High Court. Likewise, the shareholders of TGN sought a stay in S 349, on the sole basis that Indonesia rather than Singapore was the proper forum. This stay application was granted, as the High Court found that TGN's holding of Indonesian shares was a particularly weighty factor, amongst others. Both TGN and Southern Realty appealed against the respective decisions. The Court of Appeal dismissed TGN's appeal and allowed Southern Realty's appeal, thereby allowing both S 252 and S 349 to proceed.

8.141 The Court of Appeal first addressed Southern Realty's appeal (in relation to S 349). Because Southern Realty was seeking to argue that it was the beneficial owner of TGN's shares and would therefore, indirectly, be the beneficiary of the Indonesian shares, the Court of Appeal found that the critical connection in the S 349 stay application was *the law that governed the plaintiff's claims*. In particular, if Indonesian law, rather than Singapore law, applied to the dispute and Indonesian law did *not* recognise causes of action in equity, then regardless of which court heard the matter, the plaintiff's claims were likely to fail. On the facts, the court found that the nature of the alleged trust agreement in S 349 and the surrounding circumstances pointed to an implied choice of Singapore law, especially since the parties had chosen Singapore as the place of incorporation of the special purpose vehicle (that is, TGN). The Court of Appeal stated that the judge who granted the stay in S 349 ought not to have focused on the fact that TGN's sole purpose of incorporation was to hold the Indonesian shares, in effect ignoring the structure that the parties had chosen to govern their arrangements.

8.142 In granting a stay application in favour of the Indonesian courts as the proper forum, another factor the High Court judge considered was that the claim in that suit raised issues of Indonesian public policy, since the defendant's position was that Indonesian public policy prohibited the holding of shares in a foreign company on trust. However, the Court of Appeal held that the implication of issues of foreign public policy in a dispute would not necessarily be dispositive of a stay application. In this regard, the court observed the following:

> (a) First, every law, local or foreign, was based on a policy of some sort, and whether a particular rule arose to the level of public policy had to be amply demonstrated by way of evidence. The relevance of foreign public policy in determining whether proceedings should be stayed would depend on the facts and

> circumstances of the case, including the nature of the foreign public policy.[113]
>
> (b) Second, the determination of whether a particular forum was clearly or distinctly more appropriate was a fact-sensitive exercise requiring the court to consider all the circumstances of the case. The relevance of foreign public policy in a stay application was only one out of a host of potentially relevant factors. The weight to be placed on it was matter for careful judgment, having regard to the interests of the parties, the ends of justice, and the demands of international comity.[114]

8.143 The court distinguished the decision of *Peh Teck Quee v Bayerische Landesbank Girozentrale*,[115] which the High Court relied on to find that Singapore's public policy and desire for international comity required the court to respect foreign public policy even if Singapore law applied to the dispute, as that was a case in which illegality in the place of performance was raised as a *substantive defence* to the claim, and not as a justification for a *stay of proceedings*. Generally, foreign illegality should be considered only when determining the substantive merits of the action, and not during the hearing of a stay application.

8.144 Finally, the High Court judge hearing the S 349 stay application was also influenced by the fact that TGN had commenced litigation against the SKP Companies in Indonesia involving what was essentially the same underlying factual inquiry. However, the Court of Appeal was not convinced by this argument – not only because those Indonesian proceedings were commenced *after* the Singapore actions, but also because the defendants to the Singapore actions *themselves* had commenced those proceedings (therefore doing nothing more than to manufacture a set of concurrent proceedings).

8.145 Turning to the stay application in S 252, the Court of Appeal considered the application of exclusive jurisdiction agreements in favour of a District Court in Jakarta, and found that the SKP Companies' claims fell within the scope of the jurisdiction clauses. These exclusive jurisdiction clauses were found in certain deeds, which concerned the transfer of legal ownership of the Indonesian shares to TGN. While the SKP Companies sought to argue that their claims were based on an oral agreement to hold the shares on trust, which was separate and distinct from the deeds, the court observed that it would be unlikely that the

113 *Trisuryo Garuda Nusa Pte Ltd v SKP Pradiksi (North) Sdn Bhd* [2017] 2 SLR 814 at [55].

114 *Trisuryo Garuda Nusa Pte Ltd v SKP Pradiksi (North) Sdn Bhd* [2017] 2 SLR 814 at [54]–[56].

115 [1999] 3 SLR(R) 842.

parties intended to have courts in two different jurisdictions hear such closely related disputes, absent of any evidence that this was their intention. It made reference to the approach in *Fiona Trust & Holding Corp v Yur Privalov*[116] that the construction of an arbitration clause should start from the assumption that rational businessmen are likely to have intended for any dispute arising out of their relationship to be decided by the same tribunal. Significantly, the Court of Appeal observed that this approach ought also to be adopted in construing the scope of *jurisdiction agreements* entered into by businessmen who are presumed to be acting as rational commercial parties.

8.146 While the SKP Companies' claims fell within the scope of the agreement, the Court of Appeal went on to consider whether the SKP Companies were nevertheless able to show that there were exceptional circumstances amounting to strong cause as to why the proceedings should not be stayed. In this regard, the Court of Appeal opined that the list of relevant matters set out in *Amerco Timbers Pte Ltd v Chatsworth Timber Corp Pte Ltd*[117] was *not* a closed list, and in particular, did not contain an exhaustive list of factors that would result in prejudice to the plaintiff who seeks to resist a stay of proceedings despite the exclusive jurisdiction agreement. It ultimately agreed with the High Court judge that there was strong cause against a stay of proceedings, since the concept of trusts was not recognised in Indonesia and the SKP Companies would accordingly be clearly prejudiced as they would simply not have been able to obtain any remedy in Indonesia by virtue of the nature of their claim. In addition, Singapore law governed the SKP Companies' claim for breach of trust and Singapore was the more appropriate forum, as evidenced by the parties' choice of corporate structure.

Singapore International Commercial Court

8.147 There were three decisions issued by SICC in 2017. Two of these dealt with applications for a stay of execution and made clear that the fact there are parties from foreign jurisdictions before the court is *not* in itself a sufficient ground for a stay of execution pending appeal, particularly so for matters before SICC (where there are *necessarily* parties from foreign jurisdictions).

8.148 In *Telemedia Pacific Group Ltd v Yuanta Asset Management International Ltd*,[118] after the plaintiffs successfully obtained judgment,

116 [2007] Bus LR 686.
117 [1977–1978] SLR(R) 112.
118 [2017] 4 SLR 26.

the defendants filed an appeal and applied for a stay of execution of the judgment pending appeal. SICC had the opportunity to address the question of whether the fact that a plaintiff (a) was not ordinarily resident in Singapore but in Hong Kong, and (b) was implicated in past questionable transactions and in previous litigation, weighed in favour of a stay. At the outset, SICC reiterated the general principle that a stay of execution would be granted if evidence could be adduced to show that if the judgment moneys were paid, there would be *no reasonable probability* of getting them back if the appeal subsequently succeeded, thus rendering the appeal nugatory. The applicant would have to show that there are special circumstances warranting the granting of a stay.

8.149 In this case, the court found that the fact that the plaintiffs were ordinarily resident outside Singapore, which could cause inconvenience and expense in seeking recovery outside the jurisdiction, without more, was *not* a special circumstance warranting a stay. While the court acknowledged that the combination of non-residence and the *absence* of any reciprocal enforcement regime *may* amount to special circumstances warranting the grant of a stay, in this case there was a reciprocal enforcement regime between Singapore and Hong Kong. SICC also observed that if parties embraced the jurisdiction of an international court to determine their dispute, there should be little force in a claim that sought to rely upon the international status of one or the other of the parties to claim that the court orders should not be enforced.

8.150 Similarly, the fact that the plaintiff was involved in previous litigation over the years was also held to be *insufficient* to justify a stay of execution, short of any evidence to show that there had been some form of commercial recalcitrance that took place in those cases. The court was equally unconvinced that the fact that the plaintiff was implicated in questionable transactions could qualify as a special circumstance warranting a stay. While the defendants had sought to establish that the plaintiffs could not be trusted to comply with such an order or to have the funds available to so comply, SICC drew a distinction between being *trustworthy enough* to comply with a court order and *actually having the funds available* to comply with one. On the facts, the defendants had not called evidence to show that the plaintiffs were impecunious or would not be in a position to repay the moneys if ordered to do so. Ultimately, the court found that there was only *suspicion* that the plaintiffs might not comply with a court order, and that this suspicion was possibly tempered by the plaintiffs' willingness to consent to a conditional stay pursuant to which the moneys would be paid into court pending the determination of the appeal.

8.151 In *CPIT Investments Ltd v Qilin World Capital Ltd*,[119] SICC dealt with the applicable principles in an application to stay execution of a judgment pending an appeal. It reiterated that the court would grant a stay only if the applicant could show by affidavit that, if the damages and costs are paid, there was no reasonable probability of it getting back if the appeal succeeded. The court found that the merits of the appeal alone did not amount to a special circumstance warranting a stay, neither did the fact that there were parties from foreign jurisdictions in itself – this had to be so for matters in SICC, where there were necessarily parties from foreign jurisdictions.

8.152 The applicant in this case also made an oral application for a *partial* stay of execution pending its application to the Court of Appeal for a full stay. The court found that when an application was made for a stay in proceedings, and where the evidence before the court clearly showed that a stay should *not* be granted, it was generally not for a first instance judge to decide not to give effect to the dismissal of the stay by granting a partial stay pending any application to the Court of Appeal.

8.153 In *BNP Paribas Wealth Management v Jacob Agam*,[120] the plaintiff had executed a merger with BNP Paribas SA ("BNPSA") under French law, where BNPSA succeeded to the plaintiff's assets and liabilities. The issue before SICC was whether BNPSA could be substituted as plaintiff in the suit under O 15 r 7(2) of the RoC, consequent upon the merger. The defendants argued that based on specific articles in the merger agreement which made reference to BNPSA being "subrogated" in the rights and obligations of the plaintiff, the parties had chosen to carry out the transfer of assets and liabilities by the particular mechanism of subrogation. Because an entity subrogated to the rights of another entity could only sue in the name of that entity, they argued that BNPSA could only sue in the name of the plaintiff; but because the plaintiff no longer existed as an entity, there was no entity in whose name BNPSA could sue. SICC rejected this argument and held that the subrogation referred to in the merger agreement was not the same as the common law concept of subrogation. The merger agreement could not have required that the plaintiff continue to exist in order for BNPSA to maintain the right to sue in relation to the assets and liabilities transferred to it.

8.154 The defendants' second argument was that the transfer of the plaintiff's business in Singapore to BNPSA should not be given effect because, in breach of s 55B of the Banking Act,[121] court approval for the

119 [2017] 5 SLR 148.
120 [2017] 4 SLR 14.
121 Cap 19, 2008 Rev Ed.

transfer had not been obtained. SICC disagreed and found that it was not necessary that such approval be obtained for the transfer executed under French law to be effective in Singapore. In particular, based on the wording of s 55B(2) of the Banking Act, which states that the mechanism of transfer requiring court approval under s 55B(1) is without prejudice to the right of a bank to transfer the whole or any part of its business under any law, the court found that the words "any law" in s 55B(2) amply extends beyond a Singapore statute and to a foreign law which would be recognised in Singapore as giving the right to transfer. Accordingly, on the facts, the French Commercial Code was a law for the purposes of s 55B(2) and the transfer thereunder would be recognised by the court out of international comity.

Striking out

8.155 In *Antariksa Logistics Pte Ltd v Nurdian Cuaca*,[122] the High Court dealt with the novel question whether a case management decision to litigate incrementally constituted an abuse of process under the doctrine of *res judicata*, and laid down some general principles for future cases in Singapore relating to this specific question.

8.156 The first to fifth defendants applied to strike out the claims against them, under O 18 r 19 of the RoC, alleging, *inter alia*, that the present suit constituted an abuse of process under the extended doctrine of *res judicata*. The asst registrar declined to strike out any of the plaintiffs' claims, and the defendants appealed. On appeal, the High Court relied on three English authorities that were on point to set out some general principles for Singapore law:

> (a) The inquiry as to whether a case management decision to litigate incrementally constitutes an abuse of the court process requires a broad, merits-based approach, coupled with an intense focus on the facts of the case.[123]
>
> (b) A reasonable and *bona fide* case management decision by a plaintiff to bring his claims incrementally does *not* amount to an abuse of the process of the court, in line with the public policy consideration of access to justice.
>
> (i) However, the failure to bring the later claims in an earlier set of proceedings should not be the result of negligence or inadvertence.

122 [2018] 3 SLR 117.

123 *Antariksa Logistics Pte Ltd v Nurdian Cuaca* [2018] 3 SLR 117 at [100].

> (ii) As a general rule, this decision should be deliberate, reasoned and sensible (both from a commercial and practical perspective). These reasons should be sufficient to override the competing public interest consideration of economy of litigation, and may include but are not limited to (a) the discovery of new evidence after the first set of proceedings have concluded, (b) the urgency of the situation which militates against commencing a complicated set of proceedings, or (c) the lack of funds to proceed with the other claims in the first instance.[124]
>
> (c) "[The] incremental litigation pursued must not undermine another aim of the extended doctrine of *res judicata*, which is to avoid bringing the justice system into disrepute. The two sets of proceedings must not … require the duplicative determination of the same underlying issues of fact, as this would give rise to the possibility of inconsistent judgments between different courts examining the same matter".[125]

8.157 With regard to whether there was a requirement to give notice of further proceedings to the defendant or to the court, the fact that a plaintiff was keeping a second claim up his sleeve while prosecuting the first would at the most be *one factor* in the court's consideration of whether the second action was an abuse of process. The High Court held that it should *not* automatically be treated as a "special factor" that holds particular or enhanced significance. Instead, the overall circumstances must be considered, including (but not limited to) factors such as:[126]

> (a) [whether] the plaintiff is, at the time of the first set of proceedings, already able to make a reasonable decision as to whether a further cause of action is available[;]
>
> (b) [how] closely connected the further causes of action are to the original proceedings in terms of the required supporting facts[;]
>
> (c) [whether] the further cause of action is against the same defendant, either on his own or together with other parties[; and]
>
> (d) [whether] the parties are in negotiation over a possible settlement and, if so, whether this was intended to be an omnibus settlement of all present and potential future suits …

124 *Antariksa Logistics Pte Ltd v Nurdian Cuaca* [2018] 3 SLR 117 at [100]–[102].
125 *Antariksa Logistics Pte Ltd v Nurdian Cuaca* [2018] 3 SLR 117 at [104].
126 *Antariksa Logistics Pte Ltd v Nurdian Cuaca* [2018] 3 SLR 117 at [112].

8.158 The High Court made several clarifications on the doctrine of *res judicata* in *BNX v BOE*.[127] The plaintiff initiated arbitration proceedings against the defendant claiming that the defendant was guilty of fraudulent misrepresentation and breach of warranty in relation to a sale and purchase agreement ("SPA") that they were party to. The arbitral tribunal dismissed the plaintiff's claim in its entirety. The plaintiff applied under s 48 of the Arbitration Act[128] to set aside the award, and while the setting-aside application was pending, commenced an action against the defendant in the High Court on a lease that the parties entered into pursuant to the SPA. The defendant then cross-applied to strike out the plaintiff's action under O 18 r 19 of the RoC, on the basis that the plaintiff's action was unsustainable on its merits,[129] alternatively that it amounted to an abuse of process.[130] For both grounds, the defendant based its submissions on the doctrine of *res judicata*.

8.159 The High Court dismissed the plaintiff's setting aside application and allowed the defendant's striking out application. Specifically on the striking out application, the High Court first discussed the applicable law in relation to the doctrine of *res judicata*. It clarified the three principles in the term "*res judicata*":

> (a) "cause of action estoppel[, which] operates to prevent a party from asserting or denying against another party the existence of a cause of action, when its existence or non-existence has previously been decided in proceedings between the same parties by a court of competent jurisdiction";[131]
>
> (b) "issue estoppel[, which] precludes a party from [relitigating] an issue rather than a cause of action [and] applies when a litigant raises a question of fact or law which has already been determined by a court of competent jurisdiction";[132] and
>
> (c) "the abuse of process doctrine [or the "extended" doctrine of *res judicata*,] which operates to bar a litigant from litigating matters even though those matters *have not* before been determined by a court of competent jurisdiction" [emphasis in original].[133]

127 [2017] SGHC 289.
128 Cap 10, 2002 Rev Ed.
129 See O 18 r 19(1)(*b*) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed).
130 See O 18 r 19(1)(*d*) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed).
131 *BNX v BOE* [2017] SGHC 289 at [124].
132 *BNX v BOE* [2017] SGHC 289 at [125].
133 *BNX v BOE* [2017] SGHC 289 at [127].

8.160 Given that cause of action estoppel and issue estoppel find application in significantly different situations from the abuse of process doctrine, the High Court reiterated the analytical approach to be applied when a defendant argues that the doctrine of *res judicata* prevents a plaintiff from bringing a claim (as articulated in *The Royal Bank of Scotland NV v TT International Ltd (nTan Corporate Advisory Pte Ltd)*:[134]

> (a) First, the court must determine whether the matter has been previously decided by a competent court in proceedings between the same parties. If so, then action estoppel and/or issue estoppel would be triggered.
>
> (b) Second, if not, the question is whether the matter could reasonably have been raised in the earlier proceedings. If it could have been, then the abuse of process doctrine operates to prevent the plaintiff from raising it in the fresh proceedings.

8.161 In its application, the plaintiff argued that the SPA and the lease were wholly independent agreements, hence the rights and obligations under the lease would be outside the scope of the doctrine of *res judicata*. The court rejected this, and found that based on the plain wording of the SPA and the substance of the transaction, the SPA was the express contractual cause of the lease. Considering the "true and subordinate relationship which the lease bears to the SPA", the High Court held that the plaintiff's action operated as a collateral attack on the award or an abuse of process. Its claims were essentially the same as the claims placed before the tribunal, hence it was prevented by the doctrine of *res judicata* from litigating them again. In any event, the claims were legally unsustainable. Accordingly, the action was struck out entirely under O 18 r 19 of the RoC.

8.162 In *Chan Boon Siang v Jasmin Nisban*,[135] a letter referring to the resignation of a female staff was circulated among members of the Singapore Chess Federation ("SCF"). It stated that her resignation involved sexual misconduct and that there were "two Council members implicated", including the plaintiff. The plaintiff, who was a member of the SCF's executive committee, sued 39 members of the SCF for libel in the letter. The defendants applied to strike out the plaintiff's claim on the basis of O 18 r 19(1)(*a*) and O 18 r 19(*d*) of the RoC, arguing that the action was an abuse of process of the court as it did not amount to a "real and substantive tort". The High Court rejected this argument and found that the letter was *prima facie* defamatory, and could not be regarded as an abuse of process.

134 [2015] 5 SLR 1104 at [105].
135 [2018] 3 SLR 498.

8.163 In *Ebony Ritz*,[136] the plaintiff commenced the underlying suit for sums due and owing under two separate contracts – an Option and Financial Representation Agreement ("OFRA") and a guarantee ("the Guarantee"). The defendant's defence was that the plaintiff had compromised its claims and/or was estopped from bringing these claims. The plaintiff sought to strike out the defendant's defence under all four limbs of O 18 r 19(1) of the RoC, and in the alternative, sought for summary judgment to be entered against the defendant under O 14. The defendant then applied to make substantial amendments to its defence. In his decision, the asst registrar allowed most of these amendments, and granted the defendant conditional leave to defend the claim under the OFRA and unconditional leave to defend the claim under the Guarantee. The parties brought the present set of appeals and cross-appeals against the asst registrar's decision.

8.164 In relation to the claim under the OFRA, the High Court found that the defendant had no basis to resist summary judgment under O 14 of the RoC, as it had failed to demonstrate a reasonable probability that it had any *bona fide* defences at all. The defences were struck out as disclosing no reasonable defence or as being "frivolous or vexatious", under O 18 r 19(1)(*a*) or O 18 r 19(1)(*b*) of the RoC respectively. Following the proposition in *Jeyaretnam Joshua Benjamin v Lee Kuan Yew*,[137] the High Court also declined to allow the defendant's proposed amendments relating to this claim, as these amendments were themselves liable to be struck out pursuant to O 18 r 19(1). However, the High Court affirmed the asst registrar's decision in so far as he allowed the defendant to make amendments to its defence in relation to the claim under the Guarantee and to have unconditional leave to defend it.

8.165 In *EQ Capital Investments Ltd v Sunbreeze Group Investments Ltd*,[138] the plaintiff had commenced an action against the first to third defendants ("defendants 1 to 3") for minority oppression in relation to the affairs of the fourth defendant. Defendants 1 to 3 in turn commenced third-party proceedings against one Ron Sim for an indemnity or contribution. The High Court granted Ron Sim's application to strike out the third-party claim against him on the basis that (a) it was redundant, and (b) the third-party statement of claim did not disclose a reasonable cause of action against him, pursuant to O 18 r 19(1)(*a*) of the RoC.

8.166 On the redundancy ground, the High Court first affirmed the general rule that a third-party claim will be struck out if it is redundant,

136 See para 8.36 above.
137 [1990] 1 SLR(R) 337 at [4].
138 [2017] SGHC 271.

that is, if it is based on allegations which if proved, would defeat the plaintiff's claim (in which event there would be no need for the third-party claim), and if not proved, would mean that the third-party claim fails anyway. On the facts, it was found that the substance of the defence and third-party claim was the same, that is, that the matters complained of by the plaintiffs were not caused by defendants 1 to 3 but by OSIM/Ron Sim (OSIM's CEO). It was clear that if defendants 1 to 3 succeeded in proving that those matters were caused by OSIM/Ron Sim, the plaintiff would have failed to prove its case (with respect to these matters) against them and the question of a third-party claim would not arise. Conversely, if defendants 1 to 3 failed to prove that the matters were caused or brought about by OSIM/Ron Sim, they would also have failed to prove their case in their third-party claim. Accordingly, the inescapable conclusion was that the third-party claim (with respect to those matters) was redundant.

8.167 The next question was whether the third-party statement of claim disclosed any basis for the claim for indemnity or contribution against Ron Sim. The High Court found that it did not. In relation to the claim for indemnity, the third-party statement of claim did not plead any express or implied contract or any statute pursuant to which Ron Sim was liable to indemnify defendants 1 to 3; neither did it plead that such liability arose by implication of law. In relation to the claim for contribution, defendants 1 to 3 submitted that as Ron Sim's actions had caused the damage which formed the subject matter of the plaintiff's claim, if they were found liable to the plaintiff for the same damage, Ron Sim would *also* be liable to the plaintiff. However, the High Court rejected this submission – since defendants 1 to 3's case was that the matters complained of by the plaintiff were caused by OSIM/Ron Sim and not by them, then on their own case, Ron Sim could not possibly be also liable to the plaintiff for the very same damage that they were liable for to the plaintiff.

8.168 In *Ezion Holdings Ltd v Credit Suisse AG*,[139] the defendant published an analyst report setting out the details of a lawsuit commenced by another company, AMS, against the plaintiff. It also sent out an e-mail referring to this report. The plaintiff brought a defamation action against the defendant in respect of the report and the e-mail (collectively, "the publications"). It was pleaded in the defence that, *inter alia*, the publications were made on an occasion of qualified privilege. To defeat this defence, the plaintiff pleaded in its reply that the publications "were published with actual malice as [the defendant] … did not have an honest belief in the allegations complained of and/or published the allegations with a dominant improper motive". The

139 [2018] 3 SLR 356.

defendant filed an application to strike out the plea of malice, on the grounds that it was factually unsustainable and therefore "frivolous and vexatious" under O 18 r 19(1)(*b*) of the RoC, and that it may "embarrass or delay the fair trial of the action" under O 18 r 19(1)(*c*). The asst registrar granted this application, and the plaintiff appealed.

8.169 On appeal, the plaintiff contested the striking out of the plea of malice on the basis that the defendant did not have an honest belief in the truth of the publications. In upholding the asst registrar's decision, the High Court found that the plea of malice founded on the defendant's lack of honest belief was factually unsustainable and met the "frivolous or vexatious" threshold under O 18 r 19(1)(*b*) of the RoC. There was no substance to the allegation that the defendant had acted in reckless indifference to the truth of the statements made in the publications – the defendant had taken care to convey that it was reporting on allegations made in the AMS suit, and to include the plaintiff's position *vis-à-vis* those allegations. On top of this, the plaintiff's plea of malice was also found to be woefully lacking in particulars: the facts pleaded by the plaintiff did not provide a sufficient basis to support its plea of malice, and significantly, the individuals within the defendant company alleged to have malicious intent were not particularised. Hence, the unsupported plea of malice could also be said to "embarrass or delay the fair trial of the action" under O 18 r 19(1)(*c*) for failing to comply with the rules of pleading.

8.170 In *Invest-Ho Properties Pte Ltd v Karuppiah Tanapalan*,[140] the plaintiff was the intended purchaser of a piece of property owned by the defendants. A solicitor, Ms Leong, acted for all the parties in the conveyancing transaction. Subsequently, the defendants alleged that the transaction was a loan rather than a genuine sale and purchase of property, and sought to unravel the transaction. The plaintiff commenced a suit in the High Court, seeking an order against the defendants for specific performance of the transaction. Disciplinary proceedings were commenced against Ms Leong, and the Court of Three Judges eventually held in the decision of *Law Society of Singapore v Leong Pek Gan*[141] ("*Leong Pek Gan*") that the charges against her were made out. In particular, the court found that the transaction was to advance an illegal purpose, and that Ms Leong should have been aware of this in light of the highly unusual circumstances surrounding the transaction.

8.171 Subsequently, the defendants brought an application to strike out the plaintiff's suit, on the grounds that it was scandalous, frivolous

140 [2017] SGHCR 20.
141 [2016] 5 SLR 1091.

or vexatious under O 18 r 19(1)(*b*) of the RoC, or alternatively, an abuse of the process of the court under O 18 r 19(1)(*d*). In relation to the ground of abuse of process, both parties focused on whether the suit was *res judicata* on the basis of issue estoppel, since the decision of the Court of Three Judges in the disciplinary proceedings touched on the issues that were raised in the suit. The High Court clarified that abuse of process involves *more* than simply the doctrine of *res judicata* and its constituent or related doctrines. For instance, a proceeding can be struck out on the basis of abuse of process if it is manifestly groundless, or without foundation, or serves no useful purpose, as demonstrated in case law. On the facts, the High Court found that:

> (a) Issue estoppel did *not* apply in the present case, because the parties in the disciplinary proceedings were not identical to the parties in the suit, and because the Court of Three Judges falls outside the normal court system of Singapore.[142]
>
> (b) Nonetheless, the findings of the Court of Three Judges in *Leong Pek Gan* would be of immense persuasive value, given the judges were investigating the very same factual and legal issues that were the subject matter of the suit, with the benefit of evidence from the parties on the very same transaction, and determining the issues on a higher standard of proof. Allowing the matter to proceed to trial on the same issues would not serve any useful purpose and therefore the statement of claim should be struck out under O 18 r 19(1)(*d*) of the RoC.[143]

8.172 The High Court also found that the decision of *Leong Pek Gan* would render the statement of claim frivolous and vexatious, and liable to be struck out under O 18 r 19(1)(*b*) of the RoC. This was because it was both *legally* as well as *factually* unsustainable, based on the definitions in *The Bunga Melati 5*:[144]

> (a) [The present suit was legally] unsustainable because even if the Plaintiff were to succeed in proving all the facts pleaded in the Statement of Claim, one can say to a high level of certainty that – based on the findings in *Leong Pek Gan*, which were made on a higher standard of proof – the defence of illegality would be successfully made out in the present suit.
>
> (b) [The present suit was also factually] unsustainable, as it [was] essentially the Plaintiff's attempt to prove factual matters that [were already] found in *Leong Pek Gan* to be entirely without substance.

142 *Invest-Ho Properties Pte Ltd v Karuppiah Tanapalan* [2017] SGHCR 20 at [27].
143 *Invest-Ho Properties Pte Ltd v Karuppiah Tanapalan* [2017] SGHCR 20 at [30].
144 [2012] 4 SLR 546; *Invest-Ho Properties Pte Ltd v Karuppiah Tanapalan* [2017] SGHCR 20 at [36].

8.173 In *Liew Soon Fook Michael v Yi Kai Development Pte Ltd*,[145] the plaintiffs commenced an action relating to a "cluster house" which they purchased from the defendant developer. They claimed that:

(a) Through a brochure that was provided to them, the defendant had misrepresented that the "cluster house" would have a roof garden, whereas when constructed, it only had a sloping roof structure which was generally inaccessible and unusable ("the misrepresentation claim").

(b) In breach of the sale and purchase agreement, there was a substantial shortfall in the *floor area* of the "cluster house" ("the breach of contract claim").[146]

8.174 In hearing the appeal, the High Court upheld the asst registrar's decision and held as follows:

(a) The misrepresentation claim was *time-barred* and thus liable to be struck out under O 18 r 19(1)(*b*) of the RoC for being "frivolous or vexatious", or under O 18 r 19(1)(*d*) for otherwise being "an abuse of the process of the court". The court observed that a claim is necessarily *legally unsustainable* if the relevant limitation period has elapsed, and that the judicial process may *not* be used to enforce a claim which is time-barred by statute.[147]

(b) Even if it were not time-barred, the misrepresentation claim was plainly and obviously unsustainable as:

(i) From the brochure, it was neither clear nor unambiguous that the "cluster house" would have a roof garden.[148]

(ii) The plaintiffs could not have relied on any of the representations in the brochure to enter into the sale and purchase agreement, given that the documents sent to the plaintiff's conveyancing lawyers prior to the conclusion of the agreement would have corrected any misrepresentation made.[149]

(c) In relation to the breach of contract claim, the sale and purchase transaction was based on strata area, and not the floor area of the "cluster house". Further, there was no term in the sale and purchase agreement providing that the "cluster house"

145 [2017] SGHC 88.
146 *Liew Soon Fook Michael v Yi Kai Development Pte Ltd* [2017] SGHC 88 at [1].
147 *Liew Soon Fook Michael v Yi Kai Development Pte Ltd* [2017] SGHC 88 at [18].
148 *Liew Soon Fook Michael v Yi Kai Development Pte Ltd* [2017] SGHC 88 at [37].
149 *Liew Soon Fook Michael v Yi Kai Development Pte Ltd* [2017] SGHC 88 at [38].

> would have a roof garden. It would hence be appropriate to strike out the breach of contract claim under O 18 r 19(1)(*b*) for being plainly and obviously unsustainable.[150]

8.175 In *Sun Electric*, the substantive and novel question before the High Court was whether it possessed the jurisdiction to hear revocation proceedings or to grant an order for revocation by counterclaim. After an extensive review of the relevant statutory provisions, the current practice in Singapore, parliamentary intention, as well as other similar statutory regimes, the High Court found that it had no such jurisdiction. Accordingly, the prayer for revocation in the defendants' pleadings was amenable to be struck out under any of the four limbs of O 18 r 19(1) of the RoC.

8.176 The main issue before the High Court in *Tommy Choo Mark Go & Partners v Kuntjoro Wibawa*[151] was whether it had the necessary jurisdiction to hear and determine the Originating Summons 430 of 2017 ("OS 430") filed by the plaintiff, given that OS 430 concerned offers to settle relating to various appeals that had been fixed for hearing by the Court of Appeal later in the year. The defendant sought to argue that only the *Court of Appeal* had this jurisdiction, hence OS 430 should be struck out under both O 18 r 19(1)(*b*) and O 18 r 19(1)(*d*) of the RoC. The High Court rejected this argument and held that the High Court retained original jurisdiction to hear OS 430, pursuant to s 16 of the SCJA, which provides that "the High Court has jurisdiction to hear and try an action where, *inter alia*, the defendant is served with an originating process in the manner prescribed by the Rules of Court". Accordingly, the defendant's striking out application was dismissed.

Third-party proceedings

8.177 *Sakae Holdings Ltd v Gryphon Real Estate Investment Corp Pte Ltd*[152] ("*Sakae Holdings*") involved consolidated actions that arose from a dispute between parties regarding a joint venture company ("the Company") which the plaintiff company had invested in. One of these actions was commenced against, *inter alia*, the third to fifth defendants ("defendants 3 to 5") for conducting the Company's affairs in such a way as to amount to oppression and unfair prejudice to the plaintiff as a shareholder of the Company.

150 *Liew Soon Fook Michael v Yi Kai Development Pte Ltd* [2017] SGHC 88 at [50].
151 [2017] SGHCR 9.
152 [2017] SGHC 100; see also paras 8.220–8.222 below.

8.178 The defendants denied liability to the plaintiff in the consolidated actions, and proceeded to commence third-party proceedings against one Mr Foo, who was a director and chairman of the plaintiff as well as a director of the Company. They alleged that Mr Foo was in breach of his fiduciary duties owed to the Company and that these breaches contributed to the wrongful transactions that the plaintiff had complained of. Accordingly, they asserted that if they were found liable to the plaintiff, Mr Foo would in turn be liable to contribute to any liability they may have to the plaintiff. Defendants 3 to 5 were ultimately found liable and were ordered to pay various amounts to the Company or the plaintiff.

8.179 In this case, the issue before the High Court was whether Mr Foo bore any liability to defendants 3 to 5 under ss 15 and 16 of the Civil Law Act. The relevant portions of these sections are as follows:

> **15.**—(1) Subject to subsections (2) to (5), any person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage (whether jointly with him or otherwise).
>
> …
>
> **16.**—(1) Subject to subsection (3), in any proceedings for contribution under section 15, the amount of the contribution recoverable from any person shall be such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage in question.
>
> (2) Subject to subsection (3), the court shall have power in any such proceedings to exempt any person from liability to make contribution, or to direct that the contribution to be recovered from any person shall amount to a complete indemnity.

8.180 The High Court emphasised two points in this regard:

> (a) "First, for a claimant to succeed under s 15(1) of the Civil Law Act, it is essential that both the person from whom contribution is sought and the person who is claiming the contribution be liable in respect of '*the same damage*'" [emphasis in original].
>
> (b) "Second, s 16(2) gives the court power to exempt any person from contribution to liability[, and this] power is not circumscribed in any way".[153]

153 *Sakae Holdings Ltd v Gryphon Real Estate Investment Corp Pte Ltd* [2017] SGHC 100 at [10].

8.181 In deciding the issue of whether the liability was in respect of "the same damage" for the purposes of s 15 of the Civil Law Act, the High Court affirmed the applicability of the three-step test set out by the Court of Appeal in *Tan Juay Pah v Kimly Construction Pte Ltd*.[154] Adapted to the circumstances of this case, the three-step test was stated as follows:[155]

> (a) What damage was suffered by [the plaintiff] as a result of the actions of [defendants 3 to 5]?
>
> (b) Are [defendants 3 to 5] liable to [the plaintiff] in respect of that damage?
>
> (c) Is Mr Foo also liable to [the plaintiff] in respect of that very 'same damage' or some of it?

8.182 The court went on to apply the three-step test to the facts. It held that defendants 3 to 5's claim was not well-founded because they could not meet the third requirement for establishing liability. While the whole rationale of the plaintiff's claim against defendants 3 to 5 was for oppression and unfair prejudice in their management of the Company's affairs, Mr Foo had no such liability to the plaintiff for oppression. Mr Foo would accordingly not be liable to the plaintiff for the "very same damage" that the defendants caused it, since the damage represented by the claims in the main action were *not* directly the plaintiff's damage and those sums were ordered to be repaid to the Company. The third-party claims were therefore dismissed.

Further arguments

8.183 The High Court in *ARW (HC 2)*[156] had the opportunity to clarify the law on the applicable tests for applications to extend time and to adduce new evidence in the context of further arguments. In this case, following an earlier decision[157] granting the first defendant's application for discovery against the plaintiff of various categories of documents, the plaintiff sought leave to (a) put in further arguments out of time under s 28B of the SCJA, and (b) adduce further affidavits as evidence in support of those further arguments.

8.184 The High Court first considered certain principles governing the exercise of the court's power to extend time in the context of further arguments. In particular, it identified two different approaches in two

154 [2012] 2 SLR 549.

155 *Sakae Holdings Ltd v Gryphon Real Estate Investment Corp Pte Ltd* [2017] SGHC 100 at [11].

156 See paras 8.188–8.210 below.

157 See paras 8.78–8.81 above.

Court of Appeal decisions that may be applied with respect to extensions of time: the more stringent approach espoused in the case of *Denko-HLB Sdn Bhd v Fagerdala Singapore Pte Ltd*[158] ("*Denko*") (which concerned an application for an extension of time to file a notice of appeal), and the less stringent approach in *The Tokai Maru*[159] (which concerned an application for an extension of time to file an affidavit). The court ultimately found that the stricter approach in *Denko* should govern the court's approach to deciding whether to grant extensions of time to request for further arguments, as the application was more analogous to an extension of time to file a notice of appeal. The less stringent alternative in *The Tokai Maru*, while entirely appropriate for interlocutory matters generally, was less so in respect of such cases where the principle of finality may be disturbed. Accordingly, in relation to a request for further arguments, the relevant factors to determine whether an extension of time should be granted were:

(a) length of the delay;

(b) reasons for the delay;

(c) merits of the further arguments (adapted from "merits of the appeal" in *Denko*); and

(d) degree of prejudice to the other party.[160]

8.185 In respect of the issue of allowing further *evidence* to be admitted in support of the plaintiff's further arguments, the High Court emphasised the importance of the finality of a decision, even if it were interlocutory, and held that the principled position would be "to allow further evidence in support of new arguments if sufficient reason exists, but to disallow the admission of further evidence to support or strengthen previously raised arguments". It is significant that this position in relation to further evidence (which distinguishes between further evidence in support of new arguments and that in support of old arguments) would accordingly be distinguished from the position as to further arguments (which permits old and new arguments alike to be raised).

158 [2002] 2 SLR(R) 336.

159 [1998] 2 SLR(R) 646.

160 *Comptroller of Income Tax v ARW* [2017] SGHC 180 at [100]; see also *Denko-HLB Sdn Bhd v Fagerdala Singapore Pte Ltd* [2002] 2 SLR(R) 336 at [11].

8.186 Finally, the High Court stated that in determining whether sufficient reasons have been canvassed to justify the admission of further evidence in support of new arguments, the factors set out in *Ladd v Marshall*[161] would likely be a useful starting point:[162]

> (a) whether the new evidence could have been obtained at the time of the original hearing, with reasonable diligence, by the party seeking to introduce it;
>
> (b) whether the new evidence is such that it would probably have an important influence on the result of the case, even though it need not be decisive; and
>
> (c) whether the evidence is such as is presumably to be believed.

8.187 On top of these factors, other relevant factors would include the likelihood of further delay to the proceedings that would be caused as a result of such admission, and the degree of prejudice that may be caused to the other party.

Joinder

8.188 *ARW (HC 2)*[163] arose out of an earlier decision[164] of the High Court granting the first defendant's application for discovery against the plaintiff of various categories of documents. Following that decision, the plaintiff sought leave to make further arguments out of time. Because some of these further arguments related to the issue of public interest privilege under s 126 of the Evidence Act, the Attorney-General subsequently sought leave to intervene in the proceedings, either under the court's inherent jurisdiction[165] or under the O 15 r 6 joinder provisions in the RoC. It was held that intervention could be allowed under both provisions.

8.189 Given the unique context of this case, the High Court was willing to take on a *slightly broader and more generous* approach in dealing with the relevant joinder provisions. It affirmed that the Attorney-General had standing to intervene in order to give effect to its duty as a guardian of the public interest, and found that joinder of the Attorney-General could be effected under either O 15 r 6(2)(*b*)(i) or O 15 r 6(2)(*b*)(ii) of the RoC. The material portions of O 15 r 6(2) provide as follows:

161 [1954] 1 WLR 1489.
162 *Comptroller of Income Tax v ARW* [2017] SGHC 180 at [114].
163 See paras 8.183–8.187 above.
164 See paras 8.78–8.81 above.
165 See O 92 r 4 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed).

> (2) Subject to the provisions of this Rule, at any stage of the proceedings in any cause or matter, the Court may, on such terms as it thinks just and either of its own motion or on application —
>
> …
>
> (*b*) order any of the following persons to be added as a party, namely:
>
> (i) any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in the cause or matter may be effectually and completely determined and adjudicated upon; [or]
>
> (ii) any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the Court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter.

8.190 At the outset, the High Court stated that in ordinary cases involving private parties, the recognised and traditionally cited object of the joinder provisions under O 15 r 6(2)(*b*) of the RoC was to prevent multiplicity of action. However, the court recognised that there was *unlikely* to be a multiplicity of action in this case, even if the Attorney-General's application was dismissed. Nonetheless, it still found that joinder of the Attorney-General could be effected under these provisions, so as to give effect to the *broader purpose* of allowing important issues pertaining to public interest to be raised, ventilated, and fully considered, as well as to promote uniformity both in the decision of such questions and in the formulation of the grounds on which the objections are taken.

8.191 Taking O 15 r 6(*b*)(i) of the RoC first, the court observed that joinder is generally permitted where the non-party would be directly affected either *legally or financially* by any order which may be made in the action. However, it acknowledged that it would be perhaps *artificial* to search for a private legal or financial interest of the Attorney-General that would be directly affected by the outcome of the court's determination. Nonetheless, it held that once its standing has been established, the Attorney-General should generally be allowed to be joined at least in relation to arguments on public interest privilege under either limb of s 126 of the Evidence Act. In any event, following the general approach to O 15 r 6(2)(*b*)(i) taken in *Pegang Mining Co Ltd v*

Choong Sam,[166] any order made would affect the "rights or liabilities of the intervener" as the Attorney-General's performance of his duties and obligations would be affected by the outcome of the application.

8.192 The defendant sought to argue that intervention should not be allowed since the plaintiff represented the same interests as the Attorney-General, and/or the Attorney-General controlled or directed the litigation conducted by the plaintiff. However, the court found that although the positions of the Attorney-General and the plaintiff on s 126 of the Evidence Act overlapped, their interests and reasons were not exactly the same. In particular, the position of the Attorney-General reflected that of the Government as a whole and of the public more generally, and its participation as the guardian of the public interest was on a non-partisan basis.

8.193 In dealing with O 15 r 6(*b*)(ii) of the RoC, the High Court reiterated that once the Attorney-General was found to have sufficient standing to intervene in private litigation to make submissions on s 126 of the Evidence Act, he should generally be joined at least in so far as the arguments on public interest privilege were concerned. In any case, the High Court found that this limb was fulfilled as the issue sought to be raised by the Attorney-General (on public interest privilege) was "sufficiently linked" to the discovery orders sought by the defendants, and it would be "just and convenient" for intervention to be allowed.

8.194 While the issue of public interest privilege was not raised by the plaintiff at first instance and had not yet arisen before the court (because the application to make further arguments had not yet been allowed), the court held that the Attorney-General was entitled to intervene whether the issue of public interest privilege is raised, not raised, belatedly raised, or inappropriately raised by the parties. Otherwise, that would leave the public interest concerns underlying s 126 of the Evidence Act vulnerable to the vagaries of litigation and contingent on the conduct of the parties.

8.195 With respect to the court's inherent jurisdiction under O 92 r 4 of the RoC, the High Court reiterated that this jurisdiction "should only be invoked in exceptional circumstances where there is a clear need for it and the justice of the case so demands". The touchstone of the court's inherent jurisdiction to permit intervention or joinder is the "strict criterion" of necessity – the absence of prejudice would not itself suffice, but due consideration will be given to the concerns of due process and fairness as between the parties. On the facts, the High Court found that the standing of the Attorney-General in respect of matters concerning

166 [1969] 2 MLJ 52.

s 126 of the Evidence Act invested the Attorney-General with sufficient interest to justify the court allowing intervention under its inherent jurisdiction as well.

8.196 *Syed Ahmad Jamal Alsagoff v Harun bin Syed Hussain Aljunied*[167] concerned the question of whether the court should allow intervention into concluded proceedings under its inherent jurisdiction. In 1992, there was a court order ("the Original Order") granted to appoint the fourth to seventh respondents as trustees of an estate. In 1998, a subsequent court order allowed the substitution of those trustees with new trustees. In 2015, the applicants, who purported to hold leasehold interests in the estate, filed an application seeking leave under O 15 r 6(2)(*b*)(ii) of the RoC and/or the court's inherent jurisdiction to intervene in the 1992 proceedings in order to set aside the Original Order (which they alleged was defective), and to make consequential amendments to the Registry of Deeds. The first and second respondents, who stood as the new co-trustees of the estate, objected.

8.197 In relation to intervention under the joinder provisions, the High Court found that the phrase "at any stage of the proceedings" in O 15 r 6(2)(*b*)(ii) of the RoC implied a certain time period for intervention, that is, that leave to intervene will generally be granted only if it is filed during the pendency of the cause or matter in which intervention is sought. Accordingly, as the original proceedings had been concluded in 1992 with nothing remaining to be done, the High Court held that the present case did not fall within the jurisdictional scope of O 15 r 6(2).

8.198 In any event, the court found that O 15 r 6(2) of the RoC could not assist the applicants as it was not "just and convenient" in the circumstances of the case to allow the intervention, given the considerable lapse of time since the Original Order was made, the complications over the relevance of the Original Order, and the fact that the applicants' real dispute was against non-parties to the original proceedings. The court observed that to allow intervention by the applicants in this case would in effect be to countenance a curious situation where two sides litigate in the name of a proceeding to which neither party had been privy nor party. There was in these circumstances a real risk that the first and second respondents would be embarrassed in the conduct of their substantive case against setting aside.

8.199 The High Court accepted that even if O 15 r 6(2) of the RoC did not apply, it had an inherent jurisdiction to allow an application for

167 [2017] 5 SLR 299.

intervention or joinder if such order would be in the interests of justice. Nonetheless, it reiterated that the touchstone of the court's inherent jurisdiction to permit intervention or joinder is the "strict criterion" of necessity, and that, ultimately, this jurisdiction "should only be invoked in exceptional circumstances where there is a clear need for it and the justice of the case so demands". *A fortiori*, if there was an existing rule already covering the situation at hand, such as O 15 r 6(2) in the present case, the party urging the court to invoke its inherent jurisdiction or power to circumvent the rule had to show that it was in the interests of justice to disregard the rule. On the facts, the court was not satisfied that it would be in the interests of justice to allow intervention, given the considerable lapse of time since the Original Order was made, the complications over the relevance of the Original Order, and the fact that the applicants' real dispute was against non-parties to the original proceedings. Critically, the High Court was also not convinced of the necessity of the applicants' undertaking. In particular, it held that their fear that the first and second respondents would interfere with their leasehold interests was too remote, given that they had already previously obtained declarations that their leasehold interest had not been extinguished or merged with the respondents' reversionary interest.

Rejoinder

8.200 In *Champion Management Pte Ltd v Kee Onn Engineering Pte Ltd*,[168] the defendant applied for leave to file a rejoinder to respond to the plaintiff's reply, submitting that the proposed rejoinder would bring clarity to the salient issues at trial. The plaintiff argued that leave should not be granted as the proposed rejoinder contained paragraphs that were either already in the defence, and/or brought up issues of evidence. The High Court noted at the outset that pursuant to O 18 r 4 of the RoC, leave should have been sought to *serve*, as opposed to file, the proposed rejoinder. It also affirmed the principle that leave to serve a rejoinder should only be granted under *exceptional* circumstances, if it was "really required to raise matters which must be specifically pleaded". The corollary of this proposition was that a rejoinder must not be a mere repetition of what had already been pleaded.

8.201 On the facts, it was found that the proposed rejoinder was unnecessary as it added nothing of substance to the defence. The proposed rejoinder also raised matters of evidence in contravention of O 18 r 7(1) of the RoC, which states that pleadings must only contain facts and "not the evidence by which those facts are to be proved".

168 [2017] SGHC 116.

Further, the court found that the defendant was not prejudiced or precluded from proving the facts in the proposed rejoinder even in the absence of a rejoinder, given that there was an implied joinder of issue under O 18 r 14(2)(*a*).

Service

8.202 In *BGC Partners (Singapore) Ltd v Tan Wee Hiong Kevin*,[169] the plaintiff company had terminated the defendant's employment and claimed for recovery of loan moneys in Singapore. The employment contract between the plaintiff and the defendant was governed by Singapore law and contained a non-exclusive jurisdiction clause in favour of Singapore. The defendant subsequently counterclaimed against the plaintiff and a limited partnership, BGC Holdings, for wrongful forfeiture of his partnership units under a partnership agreement. This partnership agreement was between BGC Holdings and the defendant, was governed by Delaware law and had an exclusive jurisdiction clause in favour of the Delaware courts. Because BGC Holdings was formed under Delaware law, the defendant sought leave for service out of jurisdiction on BGC Holdings for his counterclaim. The issue in the appeal was whether the defendant had shown Singapore to be the proper forum for his counterclaim against BGC Holdings, in light of the exclusive jurisdiction clause in the partnership agreement.

8.203 The High Court found that there was strong cause in this case to allow a breach of the exclusive jurisdiction clause and that Singapore was the proper forum for the defendant's counterclaim. This was because the plaintiff's claim arose out of the defendant's termination as a partner, which was governed by the partnership agreement. Since the defendant's termination as a partner of BGC Holdings followed upon his dismissal as an employee of the plaintiff company, the main issues in dispute would necessarily involve the circumstances under which the defendant was terminated as an employee. These issues would be best resolved in Singapore, where he was employed and carried out his duties. Indeed, the plaintiff itself must have thought that Singapore would be a better place to have these issues heard, given that it commenced its suit in Singapore even though its claim was inherently linked to the termination of the defendant's status as a partner.

8.204 In addition, while the remedies sought in the defendant's counterclaims were different, the three claims were intimately connected and could not be meaningfully separated. Given that the findings of fact

169 [2017] SGHC 214.

and law in relation to the defendant's dismissal were crucial to all three claims, there would be a risk of inconsistent findings between the Delaware court and Singapore court should there be parallel proceedings. Accordingly, in the interests of justice, leave to serve out of jurisdiction was granted.

8.205 In *Josias Van Zyl v Kingdom of Lesotho*,[170] the plaintiffs obtained a court order giving them leave to enforce the final award on costs in Singapore ("the leave order"). They applied to serve the leave order on the defendant, the Kingdom of Lesotho, through substituted means – either by posting it at the local address of Lesotho's Singapore solicitors, by e-mailing a copy of the enforcement order to Lesotho's Singapore solicitors, or both. Because Lesotho was a State to which the State Immunity Act ("SIA") applied, the question before the High Court was whether the leave order was a "writ or other document required to be served for instituting proceedings against a State" within the terms of s 14(1) of the SIA. If so, then s 14(1) of the SIA, which sets out the procedure for service of such documents, requires service to be made through diplomatic channels; substituted service on Lesotho's Singapore solicitors would not be permissible.

8.206 The High Court answered this question in the affirmative and dismissed the application for substituted service. It found that:

> (a) The phrase, "writ or other document", was broad enough to include documents other than originating processes and was not limited to proceedings seeking judgment.[171]
>
> (b) Service of an enforcement order has the effect of "instituting proceedings" in relation to the enforcement of the award against the party served, and there can be no substantive basis for distinguishing between "adjudicative" and "enforcement" proceedings for the purposes of s 14(1) of the SIA.[172]
>
> (c) A leave order would often be the first hint that the respondent State had of the impending enforcement proceedings, and s 14 would provide the State adequate time and opportunity to respond to proceedings brought against it.[173]

170 [2017] 4 SLR 849.
171 *Josias Van Zyl v Kingdom of Lesotho* [2017] 4 SLR 849 at [14].
172 *Josias Van Zyl v Kingdom of Lesotho* [2017] 4 SLR 849 at [15]–[17].
173 *Josias Van Zyl v Kingdom of Lesotho* [2017] 4 SLR 849 at [19].

Security for costs

8.207 In *Siva Industries and Holdings Ltd v Foreguard Shipping I Singapore Pte Ltd*,[174] the defendant made an application for the plaintiff to provide security for costs pursuant to O 23 r 1(1)(*a*) of the RoC and s 388 of the Companies Act. The High Court affirmed the relevant principles as set out in *Creative Elegance (M) Sdn Bhd v Puay Kim Seng*.[175] Essentially, in considering whether the court should order security to be provided by the plaintiff, the court had to determine:[176]

> (a) first, whether the court's [jurisdiction] to order security for costs under O 23 r 1(1)(*a*) of the [RoC] and s 388 of the Companies Act [had] been invoked; and
>
> (b) second, whether it [was] just to order security for costs having regard to all the relevant circumstances.

8.208 With regard to the first issue, the High Court held that its jurisdiction to order security under O 23 r 1(1)(*a*) of the RoC had been invoked as the plaintiff was ordinarily outside the jurisdiction. Further, based on the evidence before the court, there was good reason to believe that the plaintiff company would be unable to pay the defendant's costs in the event that the defendant was successful in his defence, thus satisfying the threshold jurisdictional requirement under s 388 of the Companies Act.

8.209 The High Court then considered if its discretion should be exercised to order security for costs. On one hand, the plaintiff was impecunious, but on the other hand, the defendant's defence was found to overlap substantially with its counterclaim. The court was hence faced with two competing considerations:

> (a) It has been expressly recognised that impecunious companies do not have an unfettered freedom to commence legal actions against defendants who cannot be compensated in costs if they win.
>
> (b) Case authority has established that it is often inappropriate to award security for costs when there is a substantial overlap between the defence and counterclaim, since it may result in:
>
> > (i) the plaintiff incurring all the costs required to prosecute its main claim in defending the counterclaim

174 [2017] SGHCR 5.

175 [1999] 1 SLR(R) 112.

176 *Siva Industries and Holdings Ltd v Foreguard Shipping I Singapore Pte Ltd* [2017] SGHCR 5 at [4].

> and still not being able to enter judgment on its main claim; and
>
> (ii) the defendant being indirectly aided to pursue its counterclaim, since the costs incurred in defending the action could be regarded as costs necessary to prosecute the counterclaim and there would be no additional costs to be considered.[177]

8.210 Ultimately, the asst registrar held that since the defendant was willing to give an undertaking to discontinue its counterclaim if the plaintiff's claim was struck out for failure to provide security of costs, the prejudice to the plaintiff arising from the second consideration would be *offset* by the possibility that there may be no continuing litigation at all. In his view, this was a reasonable solution to the tension between the two considerations. Further, he observed that where a plaintiff is impecunious, the legislative intent and public policy articulated under s 388 of the Companies Act may weigh more in favour of ordering security for costs *even though* there may be a risk that this could amount to indirectly aiding a defendant in pursuing its counterclaim.

8.211 Finally, the fact that the plaintiff was ordinarily resident in and only had assets in India was a factor in favour of ordering security for costs, *notwithstanding* that there was a reciprocal agreement between India and Singapore for the enforcement of orders. The court's focus was on the fact that the defendant would be put to cost in trying to enforce cost orders awarded in Singapore in India, through an enforcement process that may well outstrip the value of the costs orders. The defendant's order for security for costs was thus granted.

Discontinuance

8.212 *Chua Peng Ho v Saravanan a/l Subramaniam*[178] arose out of a road traffic accident which led to the commencement of a suit in 2013. By consent, interlocutory judgment was entered on 4 February 2015, although it was only extracted some time later on 28 August 2015. In a subsequent summons, the issue before the Court of Appeal was whether the suit was deemed discontinued pursuant to O 21 r 2(6) of the RoC, which reads as follows:

177 *Siva Industries and Holdings Ltd v Foreguard Shipping I Singapore Pte Ltd* [2017] SGHCR 5 at [24]–[25].

178 [2017] 2 SLR 409.

> (6) Subject to paragraph (6A), if no party to an action or a cause or matter has, for more than one year (or such extended period as the Court may allow under paragraph (6B)), taken any step or proceeding in the action, cause or matter that appears from records maintained by the Court, the action, cause or matter is deemed to have been discontinued.

8.213 This required determining whether the extraction of the interlocutory judgment amounted to a "step or proceeding" for the purposes of O 21 r 2(6) of the RoC. In particular, the Court of Appeal had to consider two sub-issues:[179]

> (a) whether a 'step or proceeding' for the purposes of O 21 r 2(6) [had] to be one that [moved] the action forward towards resolution; and
>
> (b) if a 'step or proceeding' for the purposes of O 21 r 2(6) [had] to be one that [moved] the action forward towards resolution, whether the extraction of the interlocutory judgment in the [present case] moved the action forward towards resolution.

8.214 With regard to the first sub-issue, the Court of Appeal found that a "step or proceeding" for the purposes of O 21 r 2(6) of the RoC did *not* have to be one that moved the action forward towards resolution. Instead, what O 21 r 2(6) proscribed was total inaction or inactivity and/or an act that was not part of the "records maintained by the Court". Accordingly, in the context of the present case, the extraction of the interlocutory judgment *amounted to* a "step or proceeding" for the purposes of O 21 r 2(6). While the court did not strictly need to consider the second sub-issue, it went on to endorse the District Court judge's finding that the extraction of the interlocutory judgment *was*, in any event, a "step" which moved the case forward towards resolution.

8.215 In *Zeleenah Begum v KK Women's & Children's Hospital Pte Ltd*,[180] the defence to the plaintiff's statement of claim was filed on 19 January 2015. The plaintiff filed the summons for directions on 3 March 2016. Because more than 12 months had elapsed between the filing of the defence and the summons for directions, the proceedings were deemed to be discontinued by virtue of O 21 r 2(6) of the RoC. The plaintiff took another six months to file an application for leave to restore the action. This application was dismissed by the deputy registrar, and the plaintiff's subsequent appeal to the district judge was also dismissed. The plaintiff then filed an appeal before the Court of Appeal, and also sought an adjournment of the appeal in order to retrieve a medical report from one Dr Lim Beng Hai. The Court of Appeal dismissed both

179 *Chua Peng Ho v Saravanan a/l Subramaniam* [2017] 2 SLR 409 at [3].
180 [2017] SGHC 126.

the application for adjournment and the appeal itself. It found that there was no good reason why the medical report could not have been sought from Dr Lim much earlier, and that reinstating the plaintiff's claim would prejudice the other party by putting it through the judicial process when proceedings had already ended long ago. Further, the court was of the view that the chances of the plaintiff succeeding in her claim against the defendant was palpably weak and would likely remain so, in which case she would incur only the hardship of paying legal costs at the end of a full trial.

Costs

Offer to settle

8.216 In *Main-line Corporate Holdings Ltd v United Overseas Bank Ltd*,[181] three offers to settle were served on the plaintiff. The parties made submissions regarding the appropriate interest and costs orders on these offers to settle. In relation to interest, the plaintiff submitted that the date of commencement of pre-judgment interest ought to be the date of accrual of loss, while the defendants took the position that a party is not liable to pay interest *until it receives notice of the claim that it has to meet* (that is, on the date when they received notice of the plaintiff's election for an account of profits). The High Court accepted the defendant's position regarding the date of commencement of pre-judgment interest. In this case, due to the bifurcation of the action, the issue of liability and the issue of remedies were dealt with at different stages. The High Court found that until the date when the defendants received the plaintiff's notice of election of remedy, it was unclear to the defendants how they were to work out the amount that would be payable to the plaintiff.

8.217 In relation to the issue of costs, the High Court applied O 22A r 9(3) of the RoC and held that indemnity costs should be ordered against the plaintiff. This was because it had failed to accept two offers to settle that were more favourable than the judgment amount, namely, (a) the first defendant's offer to settle, which did not stipulate a time for acceptance and was not withdrawn, and (b) the joint offer to settle, which was withdrawn just before the assessment hearing. Although the joint offer to settle was eventually withdrawn, the plaintiff had five months to consider it and this was found to be sufficiently long in the circumstances of the case.

181 [2017] 5 SLR 175.

8.218 In *Goel Adesh Kumar*,[182] the plaintiff sued the defendant's casino for certain tortious acts that were committed against him. The High Court in an earlier decision found in favour of the plaintiff but apportioned liability against the defendant up to 80% only, because some of the tortious acts were committed by security officers of the third party. The plaintiff was accordingly awarded $36,732.59. In relation to the question of costs for the third-party proceedings, the High Court held that the third party was entitled to costs because the plaintiff succeeded against the defendant for up to 80% of his claim. It also observed that it would take exceptional circumstances before a *plaintiff* is made responsible for costs of third-party proceedings, especially when the plaintiff's claim has substantially succeeded. Unless the defendant is clearly the wrong party, the plaintiff is not responsible for the defendant's decision to join third parties to the suit.

8.219 In *Poh Fu Tek*,[183] the High Court departed from the general principle that costs should follow the event because it found that the plaintiffs' preparation and presentation of their cases on the first defendants' alleged breaches of fiduciary duty and fraud – and the late withdrawal of those aspects of its case – put the defendants to unnecessary expense for an unnecessarily long period of time. Therefore, the court exercised its discretion to award the plaintiffs standard costs for the entire action, *despite* the fact that they had made an offer to settle.

Indemnity costs

8.220 In *Sakae Holdings*,[184] the High Court found the defendants liable in respect of the plaintiff's claims. The High Court also held that the defendants had failed in their third-party claims against one Mr Foo (the director of the plaintiff company), and had to bear his costs in those actions. In this regard, Mr Foo submitted that he should be awarded costs on the indemnity basis. The High Court made reference to O 59 r 5 of the RoC, which sets out factors which the court may take into account in deciding whether costs should be ordered on the indemnity basis. These include the conduct of all the parties, including conduct before and during the proceedings. The court also noted Vinodh Coomaraswamy J's observations in *Tan Chin Yew Joseph v Saxo Capital Markets Pte Ltd*[185] that:

182 See paras 8.108–8.110 above.
183 See para 8.111 above.
184 See paras 8.177–8.182 above.
185 [2013] SGHC 274.

(a) The factors mentioned by Millett J in *Macmillan, Inc v Bishopsgate Investment Trust plc*[186] could also be relied on in determining whether indemnity costs should be awarded. In that case, indemnity costs were granted where litigants had conducted their cases in *bad faith* or *caused costs to be incurred irrationally*.[187]

(b) When the conduct of the unsuccessful claimant was relied on as a ground for ordering indemnity costs, the test was that of *unreasonableness*.[188]

8.221 In considering what would amount to "unreasonable conduct" in the third-party proceedings, the High Court reiterated that:

(a) It is not unreasonable conduct *per se* to bring a case that is weak or to give some evidence which is not credible.

(b) It is not unreasonable to choose to sue one person rather than another.

(c) It is not unreasonable for someone ("A") to bring a case against someone else ("B") and rely only on B's evidence to make out the case against him, however risky a strategy that may be.

(d) It is, however, unreasonable for A to bring a case against B for the sole purpose of making B testify and subject to cross-examination by A so that A can support his own defence in a different, though connected, action.[189]

8.222 On the facts, the defendants were not found to have engaged in any of the above forms of unreasonable conduct. However, the transactions that the plaintiff complained of in the main action were *orchestrated* by the defendants, and they had taken full advantage of the trust that Mr Foo reposed in them to carry out activities that the plaintiff would object to. In the circumstances, for them to bring third-party claims against Mr Foo and make the latter incur the costs and stresses of defending himself was, in the judge's view, a plain instance of suing in *bad faith*. The defendants were accordingly ordered to bear Mr Foo's costs on the indemnity basis.

186 10 December 1993, unreported.
187 *Tan Chin Yew Joseph v Saxo Capital Markets Pte Ltd* [2013] SGHC 274 at [98].
188 *Tan Chin Yew Joseph v Saxo Capital Markets Pte Ltd* [2013] SGHC 274 at [99].
189 *Sakae Holdings Ltd v Gryphon Real Estate Investment Corp Pte Ltd* [2017] SGHC 100 at [50].

8.223 In *Tan Yok Koon v Tan Choo Suan*,[190] one of the issues on appeal was whether the paying party's conduct in proceedings conduct was relevant to whether the three groups of co-plaintiffs were entitled to separate sets of costs, as opposed to only one-third of each of their sets of costs, as the trial judge had originally ordered. The Court of Appeal held that whether a paying party acted dishonestly and unreasonably was relevant *not* to whether each receiving party should be entitled to a full set of costs, but to whether costs should be taxed on an indemnity or standard basis.

8.224 As set out in *Ng Eng Ghee v Mamata Kapildev Dave*,[191] the relevant factors in the determination of whether to award more than one set of costs would include (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 the proceedings. On the facts, while the size of the sum and importance of the interests were indisputably large, the Court of Appeal found that the co-plaintiffs' positions on the issues in dispute were common, and that the overlap in their pre-hearing preparations and conduct of proceedings was substantial. Accordingly, it was not reasonable for the plaintiffs to have sought separate representation, and the Court of Appeal was not minded to order a separate set of costs for each of the plaintiffs.

8.225 The Court of Appeal also affirmed the trial judge's finding in relation to the paying party's conduct, and found that in the circumstances, indemnity costs should be awarded against her. This was because she had pursued the core of her claim dishonestly and unreasonably by, *inter alia*:

> (a) refusing to assist the court with material evidence which would have put one of the issues to rest, but instead capitalising on the lack of evidence to construct a case for her own ends;
>
> (b) tending to take inconsistent positions which suited her ends and to divert the court's attention away from the true nature of the transactions which had taken place; and
>
> (c) being motivated by personal financial gain and/or a personal vendetta against the co-plaintiffs.[192]

190 [2017] 1 SLR 654.
191 [2009] 4 SLR(R) 155.
192 *Tan Yok Koon v Tan Choo Suan* [2017] 1 SLR 654 at [238].

8.226 In *Parakou Shipping Pte Ltd v Liu Cheng Chan*,[193] the High Court, in deciding on the appropriate costs orders, considered:

(a) whether the plaintiff was entitled to full costs;[194]

(b) whether the plaintiff was entitled to costs for three solicitors;[195] and

(c) whether the plaintiff was entitled to indemnity costs.[196]

8.227 On the first issue, the High Court found that because the plaintiff did not succeed in *all* of its claims against each of the six defendants, it would be wrong and unfair to the defendants to make them pay costs for those claims that were dismissed. On the facts, this was not a case where the plaintiff had *substantially* succeeded in a claim but failed in one or more issues that were argued in respect of that claim. Even in that scenario, the court clarified that depending on the issues that succeeded or failed, the plaintiff *may not* be awarded full costs.

8.228 On the second issue, the High Court reiterated that a certificate for costs for three solicitors is awarded only in "exceptional circumstances", that is, in cases which "involve a high degree of complexity of facts and/or law, or where there are many issues of both fact and law and trial is lengthy". However, while this case was complex and involved a multitude of claims in respect of several impugned transactions against six defendants, there was a fair amount of overlap, both on the law and the facts. Further, the trial was not particularly lengthy – it took about 14.5 days, including a half-day for interlocutory matters and another half-day for oral submissions. Accordingly, the High Court was of the view that the case was not of such a high degree of complexity as to warrant a certificate for costs for three solicitors.

8.229 Finally, in determining whether the plaintiff was entitled to indemnity costs, the court emphasised that pursuant to O 59 r 5(*b*) of the RoC, the conduct of *all* the parties, including conduct before and during the proceedings, is a matter to be taken into account by the court in exercising its discretion as to costs. Thus, while there were grounds that could have justified the making of an indemnity costs order based on the *defendants*' conduct, the conduct of the *plaintiff* was also a relevant factor. In particular, the court found that the plaintiff had asserted a whole gamut of claims against each defendant quite indiscriminately, instead of being more discerning about the claims that

193 [2017] SGHC 91.
194 See *Parakou Shipping Pte Ltd v Liu Cheng Chan* [2017] SGHC 91 at [6]–[13].
195 See *Parakou Shipping Pte Ltd v Liu Cheng Chan* [2017] SGHC 91 at [14]–[15].
196 See *Parakou Shipping Pte Ltd v Liu Cheng Chan* [2017] SGHC 91 at [16]–[19].

could reasonably be brought against each defendant. As such, it was not minded to award costs to the plaintiff on an indemnity basis.

8.230 In *Long Kim Wing v LTX-Credence Singapore Pte Ltd*,[197] the High Court had in an earlier decision granted the plaintiff judgment against the defendant for $5,512.98 and $12,928.26 and dismissed the rest of the plaintiff's claims. The court had also granted the defendant judgment against the plaintiff for $30,000 on the defendant's remaining counterclaim. The defendant sought indemnity costs of the action from the date of its offer to settle, which the court had held was not validly accepted by the plaintiff. The court found that the offer to settle was not a genuine offer to settle all the claims and counterclaims, and consequently, the defendant was not entitled to rely on it to claim any indemnity costs.

8.231 In the alternative, the defendant sought indemnity costs in the light of the plaintiff's conduct in the litigation. While the court agreed that the plaintiff's conduct was egregious in one aspect, that is, where he did not establish the relevance or fact of an allegation he made, this did not mean that his conduct was egregious throughout the trial. Furthermore, the plaintiff *did* succeed in obtaining a judgment in his favour, albeit for small sums. One of these sums was due to the defendant's failure to conduct due inquiry, which took some time at the trial. In addition, the defendant withdrew three out of four counterclaims, although the getting-up for the three counterclaims would not have involved much work. There was also considerable overlap between defendant's remaining counterclaim and the plaintiff's claims. All things considered, the High Court was of the view that it would be just if the defendant was granted 80% of the costs on the plaintiff's claims and the defendant's remaining counterclaim on a standard basis.

Relevance of successful party obtaining only nominal damages

8.232 In *Bamian Investments Pte Ltd v Lo Haw*,[198] the first defendant submitted that although the plaintiff had succeeded in its claim at trial, the costs of the trial should, nonetheless, be reserved to after the assessment of damages had taken place, as it could well be that the plaintiff may only obtain nominal damages. He cited the cases of *Anglo-Cyprian Trade Agencies Ltd v Paphos Wine Industries Ltd*[199] and *AllTrans Express Ltd v CVA Holdings Ltd*[200] for the principle that a plaintiff who

197 [2017] SGHC 312.
198 [2017] SGHC 166.
199 [1951] 1 All ER 873.
200 [1984] 1 WLR 394.

gets only nominal damages should not be regarded as successful at trial and the court should in such cases award costs to the defendant as if the defendant had succeeded in his defence. This principle was adopted locally in the case of *Mahtani v Kiaw Aik Hang Land Pte Ltd*,[201] where the court explained that the policy behind the principle was to discourage frivolous litigation, since not every breach of contract would actually cause loss to the innocent party.

8.233 The High Court found that this principle was *inapplicable* on the facts of this case, and distinguished the three cases cited. In those cases, the relief sought by the plaintiffs were *monetary* damages, thus, having only been awarded nominal or trivial damages, the plaintiffs could not be said to have really succeeded in their claim. In contrast, in the present proceedings, the plaintiff had informed the first defendant since the start of the trial that it might not proceed to the next phase on assessment of damages, as its main claim was for a *declaration* that the first defendant was in breach of his duty as its director. The claim was nevertheless defended vigorously by the first defendant. The court was of the view that the plaintiff had *not* brought the litigation frivolously nor conducted the litigation improperly or unreasonably. This was also not a case in which the plaintiff had little chance of success on its claim for a declaratory relief. Accordingly, the High Court held that costs should follow the event since the plaintiff had succeeded in its claim.

Costs in matrimonial proceedings

8.234 In *TYU v TYV*,[202] the High Court made orders for division of matrimonial assets and costs, after interim judgment for divorce had been granted. The main component of the matrimonial asset pool was the value of the husband's 50% interest in a certain group of companies. Both parties submitted valuation reports prepared by their respective appointed companies, with RHL Appraisal Ltd ("RHL") appointed by the husband, and BDO Advisory Pte Ltd ("BDO") appointed by the wife. However, the husband failed to provide a proper and reliable valuation report, because of his instruction to RHL to value only one of the companies instead of taking into consideration the entire group of companies. Subsequently, when he sought leave to prepare a second valuation, the deputy registrar ordered a joint expert, PriceWaterhouseCoopers ("PWC"), to prepare an independent report.

201 [1994] 2 SLR(R) 996.
202 [2017] SGHCF 8.

8.235 One of the questions addressed by the High Court was which party ought to bear the additional cost of the PWC Report. While it acknowledged that in general, costs are not ordered in matrimonial cases, it reiterated that the court can nevertheless exercise its discretion to do so in appropriate cases. In the judge's view, costs still played a crucial role in regulating the process of litigation and incentivising good litigation conduct. In the circumstances, the High Court found that it was fair for the additional cost of the PWC Report to be borne by the husband, because:

> (a) Though it was ordered only because the husband applied for an additional valuation report, the PWC Report ultimately showed that the BDO Report was largely reliable.
>
> (b) The husband was the fee earner whose conduct occasioned the PWC Report. The wife, on the other hand, was a homemaker whose source of funds was the interim maintenance order. Her litigation expenses, then, would necessarily come out of her share of the assets being divided.[203]

8.236 In *TNL v TNK*,[204] the Court of Appeal laid down some general guidelines for cost orders in matrimonial appeals. It stated that there was a clear interest in encouraging parties to move on to face the future instead of re-fighting old battles. Therefore, appeals would generally not be sympathetically received where the result was a potential adjustment of the sums awarded below that worked out to less than 10% thereof. Even where such appeals were allowed because there was an error of principle, costs might be awarded against the successful party if the court was satisfied that the appeal was a *disproportionate imposition* on the unsuccessful party. On the facts, the net amounts gained by the wife and lost by the husband as a result of both appeals were both less than $100,000. This was less than 2% of the original asset pool as calculated by the trial judge and hardly justified the amount of time, effort and anxiety that went into the mounting and hearing of these appeals. Ultimately, as this was a cross-appeal situation in which *both* parties had been *partially* successful, the Court of Appeal made no order as to costs. The court cautioned that unsuccessful appellants in matrimonial appeals in the future should expect to have costs awarded against them, subject to the overall justice of the case. Additionally, costs might be awarded on an issues basis against a nitpicking appellant who raises unmeritorious issues on appeal.

203 *TYU v TYV* [2017] SGHCF 8 at [46]–[47].
204 See paras 8.23–8.24 above.

Costs in favour of non-parties

8.237 In *Centre for Laser and Aesthetic Medicine Pte Ltd v GPK Clinic (Orchard) Pte Ltd*,[205] the defendants argued that the High Court judge erred in ordering that the party-and-party costs awarded to the plaintiff be used to satisfy the plaintiff's outstanding obligations for its solicitor and client costs, and that any balance thereafter be used to reimburse one Dr Kelvin Goh (who had caused the plaintiff company to commence the suit) for any legal fees that he had paid on behalf of the plaintiff. One of their submissions was that Dr Kelvin Goh had no legal entitlement to be reimbursed for expenses incurred by him on behalf of the plaintiff. The Court of Appeal found this submission to be without merit as it was within the court's discretion to award costs to Dr Kelvin Goh, *even if* he had no independent legal entitlement to such costs, in keeping with the established principle that the court's discretion on costs extends to the award of costs in favour of non-parties.

Whether Attorney-General was entitled to costs when intervening in private judicial review proceedings

8.238 In *Deepak Sharma v Law Society of Singapore*,[206] the appellant sent a letter of complaint to the respondent, the Law Society of Singapore, alleging that two lawyers were guilty of professional misconduct in filing certain bills of costs against his wife. The complaint was in large part dismissed by a review committee. The appellant then filed an application for judicial review against the review committee's decision. The Attorney-General subsequently intervened in the proceedings. While the High Court rejected the Attorney-General's submission that the appellant did not have *locus standi* to make a complaint, it ultimately dismissed the appellant's application on the merits.

8.239 Dissatisfied with the outcome, the appellant appealed against the judge's decision. The Attorney-General continued to participate in the proceedings, advancing both oral and written submissions in the appeal. The Court of Appeal dismissed the appeal, and the Attorney-General then sought costs against the appellant. The Attorney-General submitted that he was entitled to costs because he had participated in the proceedings as the "guardian of the public interest" and the court had agreed with his position that the appellant's application should be dismissed. The appellant denied that he was liable to pay costs to the Attorney-General, arguing that the principle that costs followed the

205 [2018] 1 SLR 180.
206 [2017] 2 SLR 672.

event did not apply to the Attorney-General who was merely an intervener and thus could not be considered a "winning party". The central question in the dispute thus concerned the circumstances in which the Attorney-General was entitled to costs when he intervened in an application for judicial review that did not involve the Government and/or did not seek to challenge any government action or decision (referred to hereafter as "private judicial review"). In particular, the *principle* and *rationale* for the award of such costs was an issue that had not been raised directly for decision in any cases before.

8.240 Considering the issue from first principles, the Court of Appeal held that when the Attorney-General intervened in private judicial review proceedings, he did so in his role as the "guardian of the public interest", and discharged his public function by drawing the court's attention to issues of public interest and making submissions on them. His intervention in private judicial proceedings was purely on a non-partisan basis and his role in the litigation did *not* extend to the deliberate enablement of a specific outcome for one of the parties. Accordingly, he ought not to be regarded either as a "winner" or "loser" in the litigation, regardless of whether the Attorney-General's submissions were accepted or rejected by the court.

8.241 The Court of Appeal found that, on one hand, the compensatory principle and the policy of enhancing access to justice underpinning an award of party-and-party costs were *not* engaged where the Attorney-General intervened in private judicial review proceedings. Nonetheless, the Attorney-General's statutorily-envisaged role *required* him to intervene in private judicial review proceedings to make submissions on issues of public interest where he considers it necessary and appropriate to do so – he would be in dereliction of his public duty if he failed to do so. Accordingly, given the Attorney-General's unique role in such proceedings, the Court of Appeal observed that a balance would need to be struck when approaching this issue.

8.242 The Court of Appeal went on to refer to the relevant principle that ought to guide the court in its determination on whether costs ought to be awarded to the Attorney-General when he participated in private judicial review proceedings, as embodied s 29(1)(*a*) of the Government Proceedings Act.[207] Section 29(1)(*a*) provides as follows:

> [In] the case of proceedings to which by reason of any written law or otherwise the Attorney-General or any officer of the Government as such is authorised or required to be made a party, *the court shall have regard to the nature of the proceedings and the circumstances in which the Attorney-General or such officer appears and may in the exercise of*

207 Cap 121, 1985 Rev Ed.

> *its discretion order any other party to the proceedings to pay the costs of the Attorney-General or such officer whatever may be the result of the proceedings* … [emphasis added by the Court of Appeal in *Deepak Sharma v Law Society of Singapore*]

8.243 The Court of Appeal then set out three guidelines to be borne in mind when deciding whether it was appropriate to award the Attorney-General costs where he intervened in private judicial review proceedings. Taken together, these guidelines would provide a *calibrated* approach between the imperatives of supporting the Attorney-General's participation in private judicial review proceedings in the public interest and ensuring that the parties are treated fairly in relation to their liability to pay costs:

> (a) First, as a threshold requirement, the issues pursued by the Attorney-General had to, objectively speaking, *concern the public interest*. If the court took the view that the issues raised by the Attorney-General did not pertain to the public interest, it would be open to the court to refuse to order costs in favour of the Attorney-General even if the Attorney-General considered that his intervention was warranted in the public interest.[208]
>
> (b) Second, the issue of public interest raised by the Attorney-General had to be *relevant to, and go towards, the determination of the actual dispute* before the court. It would not be fair to the parties in terms of their time and costs expended if the Attorney-General were in a position to make a claim for costs even though his submissions were untethered to the resolution of the dispute.[209]
>
> (c) Third, the Attorney-General had to have *succeeded in his submissions on the issues raised*. His success or failure for the purposes of awarding costs should be considered in the context of his submissions on the issues of public interest raised, and *not* on the basis of his being an overall "winner" or "loser" in the litigation. This argument or issue-based assessment reflected the fact that the arguments advanced and the issues raised by the Attorney-General were based purely on what, in his view, the public interest demanded and the fact that he conducted himself purely on a non-partisan basis.[210]

8.244 Nonetheless, in relation to the third guideline, there may be circumstances in which it would be proper for the Attorney-General to be awarded costs *even though* his submissions were unsuccessful. In

208 *Deepak Sharma v Law Society of Singapore* [2017] 2 SLR 672 at [56]–[58].
209 *Deepak Sharma v Law Society of Singapore* [2017] 2 SLR 672 at [59]–[60].
210 *Deepak Sharma v Law Society of Singapore* [2017] 2 SLR 672 at [61]–[70].

particular, the Court of Appeal was of the view that there might be good grounds to make a costs order in favour of the Attorney-General if (a) the issue of public interest raised by the Attorney-General was one of *obvious and considerable public importance*, (b) the grounds relied on by the Attorney-General in support of his arguments were *sound and possessed some degree of merit*, and (c) the Attorney-General's submissions were, in the final analysis, of *substantial assistance to the court* in reaching its decision even though it ultimately did not agree with the Attorney-General's position. The court should also take into account the *novelty or complexity* of the issue in deciding if it was appropriate to award the Attorney-General some costs despite his unsuccessful arguments. In any event, even if the Attorney-General was unsuccessful in relation to the issue raised, he should *not* generally be ordered to pay costs given that his role in the dispute is non-partisan in nature, and given that he has participated in the proceedings only to the extent that it was necessary for him to do so in the public interest.

8.245 With regards to the quantification of costs, the Court of Appeal held that costs awarded to the Attorney-General ought generally to be on a lower scale than those awarded to the winning party in the proceedings, in order to reflect the non-partisan nature and limited scope of the Attorney-General's involvement in the litigation, as well as to control the quantum of costs to be paid by the party who loses on the issues raised by the Attorney-General.

8.246 On the facts, the Court of Appeal held that since the Attorney-General's submissions on the *locus standi* of the appellant were rejected by the High Court and not pursued on appeal, it would be appropriate to make *no order as to costs* in relation to that issue. Nevertheless, it was appropriate to accord proper recognition to the Attorney-General's contributions in respect of his submissions on the nature and scope of the professional and ethical duties owed by lawyers in making claims for party-and-party costs, which the court found was an issue of undeniable public importance. The costs to be awarded to the Attorney-General for his success on this issue were, however, reduced to reflect the fact that the parties broadly agreed on the correct legal position. The court also observed that in future cases involving similar complaints, where the respondent was a party to the proceedings and was ostensibly in a position to make the necessary submissions on the issues at hand, the Attorney-General might wish to take a more conservative view of whether his participation was required.

Damages

8.247 In *Ong Teck Soon v Ong Teck Seng*,[211] the plaintiff was one of the executors of the estate of his deceased father ("the Testator"). One of his siblings, the first defendant, was found liable in conversion for issuing two unauthorised cheques with resulted in the withdrawals of moneys from the Testator's OCBC bank account. One of the issues before the High Court was whether the rate of pre-judgment interest applicable from the date of the withdrawal of those sums to the date of the writ was calculable according to:[212]

> (a) the default interest rate of 5.33% per annum;
>
> (b) the interest at the actual rates earned on the fixed and/or time deposits in which the sums under the two cheques were placed [after their withdrawal]; or
>
> (c) the interest rate on the OCBC account at the time of withdrawal.

8.248 On the facts, the court was of the view that an award of the default rate of interest would overcompensate the estate for the loss of time value of the moneys. The plaintiff had not shown that the estate would have invested the money or that it had to borrow money at a commercial rate, but instead, the evidence suggested that the plaintiff, after confronting the first defendant about the withdrawals in May 2011, was under the impression that the funds had been deposited into his mother's account and was evidently quite content for the funds to remain in her account. Therefore, in the exercise of its discretion under s 12 of the Civil Law Act, the High Court awarded the plaintiff interest at the actual rates earned on the various fixed and/or time deposits in which the sums under the two cheques were placed after their withdrawal from the Testator's OCBC account, which were significantly lower than the default rate. The court also noted that there was no evidence that the rate of interest which the funds would have continued to earn in the OCBC account but for the withdrawals was different from the actual rates earned on the fixed and/or time deposits.

211 [2017] 4 SLR 819.
212 *Ong Teck Soon v Ong Teck Seng* [2017] 4 SLR 819 at [80].