7. CIVIL PROCEDURE

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Accounts

7.1 Where a party renders accounts in compliance with the terms of a judgment, it is not appropriate for the opposing party (who contests the accounting period relied upon) to make an application by summons for the purpose of determining the correct accounting period. This is a matter which must be left to the determination of the registrar at the inquiry into those accounts. Such an application was made pursuant to a consent judgment in *Seiko Epson Corp v Sepoms Technology Pte Ltd* [2007] 3 SLR 225. The High Court considered O 43 r 3 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) in conjunction with O 38 r 8 and concluded that an application for an interlocutory hearing by summons was misconceived (at [14]–[15]).

Appeals

Court's discretion to waive security deposit

7.2 In *Lee Hsien Loong v Singapore Democratic Party* [2008] 1 SLR 757, the Court of Appeal held that the provision for security deposit stipulated in O 57 r 3(3) is mandatory and therefore cannot be waived by the court.

7.3 Waiving the provision for security deposit, even for a bankrupt, would effectively allow the applicant a right of appeal free from any need to compensate the plaintiffs if his appeal fails.

Decision to hear notice of appeal

7.4 In *Bank Austria Creditanstalt AG v Go Dante Yap* [2007] 4 SLR 667, the Court of Appeal said that, for practical reasons, courts are generally reluctant to entertain appeals against interlocutory orders

made in the course of the trial. Chan Sek Keong CJ said that this court retains the inherent jurisdiction to strike out appeals which are not appropriate for hearing before an appellate court.

7.5 However, the Court of Appeal held that the case was appropriate for the exercise of powers under O 57 r 13(3) of the Rules of Court to remit the matter back to the trial judge for him to reconsider the interlocutory orders. While the interlocutory orders did not finally dispose of the rights of the parties, they did dispose of an evidentiary issue which may prejudice the rights of the appellants if the decisions were not overruled.

Extension of time to file appeals

7.6 In *Lee Hsien Loong v Singapore Democratic Party* [2008] 1 SLR 757, the Court of Appeal, referring to its decision in *Lai Swee Lin Linda v AG* [2006] 2 SLR 565, held (at [18]) that the four factors to be considered in determining whether to allow an extension to file a notice of appeal are the length of the delay, the reasons for the delay, the chances of the appeal succeeding and the prejudice caused to the would-be respondent if the extension were granted.

7.7 Andrew Phang JA held that all the four factors are of equal importance and must be balanced amongst one another, having regard to all facts and circumstances of the case concerned. His Honour noted that the principles apply equally to applications for an extension of time to file a notice of appeal, as well as to applications for an extension of time to serve the notice of appeal. The Court of Appeal also said that courts will adopt a far stricter approach towards applications for extension of time for the filing and/or serving of a notice of appeal relative to other situations. This is so because of the overriding concern of finality in the context of appeals.

Introduction of new issue

7.8 In *Townsing Henry George v Jenton Overseas Investment Pte Ltd* [2007] 2 SLR 597, the Court of Appeal agreed with the respondent that it would be unfair for the appellate court to introduce the principle of reflective loss on its own initiative (at [85]–[89]).

7.9 Chan Sek Keong CJ referred to the principle stated in the English cases of *The Tasmania* (1890) 15 App Cas 223 and *Connecticut Fire Insurance Co v Kavanagh* [1982] AC 473 which has been followed by the Court of Appeal in *Panwah Steel Pte Ltd v Koh Brother Building & Civil Engineering Contractor (Pte) Ltd* [2006] 4 SLR 472.

7.10 The principle is based on two tests. First, the court must be satisfied beyond doubt that it has all the facts bearing upon the new contention as completely as would have been the case if the controversy had arisen at trial; and secondly, there must be no satisfactory explanation that can be offered by those whose conduct has been impugned if an opportunity for explanation had been afforded them when in the witness box.

7.11 In applying this principle to the case where the new issue is sought to be introduced by the court, Chan Sek Keong CJ said that the principles which inhibit the parties from raising new points on appeal, particularly where the facts have not been investigated at trial, apply equally where it is the court, rather than the parties, which seek to introduce the new legal issue.

Introduction of new evidence

7.12 In *Su Sh-Hsyu v Wee Yue Chew* [2007] 3 SLR 673, the Court of Appeal allowed the appellant, under O 57 r 13(2) of the Rules of Court, despite not satisfying the first of three conditions stated in *Ladd v Marshall* [1954] 1 WLR 1489, to admit fresh evidence uncovering fraud or deception of the other party.

7.13 The three conditions in *Ladd v Marshall* are: (a) the evidence could not have been obtained with reasonable diligence for use in the trial; (b) the evidence must be such that, if given, would probably have an important influence on the result of the case, though it need not be decisive; and (c) the evidence must be such as is presumably to be believed or apparently credible.

7.14 V K Rajah JA held (*Su Sh-Hsyu v Wee Yue Chew* [2007] 3 SLR 673 at [36]) that usually, all three conditions need to be applied strictly. However, *finis litium* could not invariably or rigidly be imposed such that it would allow a miscarriage of justice to go uncorrected. In particular, where the new evidence uncovered fraud or deception of the other party, and such fraud struck at the root of the litigation, then so long as the second and third conditions in *Ladd v Marshall* are met, the court would, in exceptional circumstances be prepared to exercise measured flexibility in relation to the application of the first condition. In order for the alleged fraud to strike at the very root of litigation, the fresh evidence has to be crucial to or determinative of the final outcome to be ultimately reached by the court.

7.15 Fresh evidence will only be allowed in light of all the facts and circumstances. Even if perturbing circumstances existed, the court would be most reluctant to allow an application when either the applicant had not acted promptly in making the application or where

the applicant was not acting in good faith, *eg*, was aware of but suppressed evidence of fraud in earlier proceedings.

Leave to appeal

7.16 In *Koh Toi Choi v Lim Geok Hong* [2007] 3 SLR 340, the High Court held that the basis that the trial judge had erred in law is one of the three guidelines for granting leave of appeal. Referring to the Court of Appeal in *IW v IX* [2006] 1 SLR 135, Belinda Ang Saw Ean J said (at [11]) that "*prima facie* error" related to errors of law, not fact. A judge is said to have erred in law if his discretion was exercised in a way that was plainly wrong.

Admissions

Notice to admit documents

7.17 In *Bank Austria Creditanstalt AG v Go Dante Yap* [2007] 4 SLR 667, the Court of Appeal had the opportunity to consider the High Court's conclusion that the authenticity of certain documents had not been deemed to be admitted pursuant to O 27 r 4. The case is considered under "Appeals".

Notice to admit facts: costs

7.18 The costs of proving facts not admitted in a notice to admit facts are normally assessed on a standard basis. See *Colliers International (S) Pte Ltd v Senkee Logistics Pte Ltd* [2007] 2 SLR 230 at [127].

Assessment of damages

Position when percentage of liability agreed upon

7.19 When a party's liability has been fixed at a certain percentage (by agreement or by the court), and damages are ordered to be assessed, the percentage applies to the amount of the damages assessed and not the pecuniary limit of the court involved. In *Ng Chan Teng v Keppel Singmarine Dockyard Pte Ltd* [2007] 4 SLR 633, the plaintiff, who had brought his action in the District Court, obtained interlocutory judgment based on 70% liability on the part of the defendant with damages to be assessed. The District Judge had ruled that the percentage applied to the District Court pecuniary limit of $250,000 so that the plaintiff was entitled to $175,000. The High Court disagreed. Choo Han Teck J pointed out that when a defendant consents to interlocutory

judgment at 70% liability with damages to be assessed, "he is taken to have accepted responsibility and [becomes] bound to pay 70% of the damages that he would have to pay had he been found entirely liable. It is only after damages have been assessed that the court needs to know whether there are any other rules that prevent the plaintiff from fully recovering the amount assessed" (at [3]). For example, if the plaintiff's damages are assessed at $250,000, he would be entitled to $175,000. If they are assessed at $400,000, he would *prima facie* be entitled to $280,000. However, in this latter scenario, he would only be awarded $250,000 because this is the pecuniary limit of the District Court (see s 20 of the Subordinate Courts Act (Cap 321, 2007 Rev Ed)).

New evidence

7.20 In *Tan Sia Boo v Ong Chiang Kwong* [2007] 4 SLR 298, the High Court considered whether it had the discretion to admit new evidence of the plaintiff's physical condition which contradicted the evidence given by the plaintiff in the course of the hearing of the assessment of damages. After the hearing, the defendant employed a private investigator to keep surveillance on the plaintiff. The defendant also changed solicitors. The plaintiff appealed against the award of damages and the defendant cross-appealed. The defendant applied to introduce new evidence consisting of video recordings of the plaintiff by the investigator and the affidavits of the defendant's medical experts concerning the new video evidence. Choo Han Teck J applied the principle established in *Lassiter Ann Masters v To Keng Lam* [2004] 2 SLR 392 that an application to introduce new evidence on an appeal to a judge against the registrar's assessment of damages is governed by the *Ladd v Marshall* conditions subject to the modification of the first condition. It is not necessary to show that the new evidence could not have been obtained with reasonable diligence for the purpose of the assessment. The judge has a broader discretion than this: "Sufficiently strong reasons must be shown why the new evidence was not adduced at the assessment before the registrar" (*Lassiter Ann Masters v To Keng Lam* at [24]).

7.21 A court may order an assessment of damages even if the plaintiff has pleaded the words "damages in lieu of specific performance" without specifying that they are "to be assessed". In *Lee Chee Wei v Tan Hor Peow Victor* [2007] 3 SLR 537 (at [62]), the Court of Appeal considered the reference to assessment of damages in a pleading "superfluous given that any claim for damages must necessarily be assessed (unless otherwise agreed)".

Default judgment

Imposition of condition on setting aside default judgment

7.22 In *Awyong Shi Peng v Lim Siu Lay* [2007] 2 SLR 225, the High Court allowed an application to set aside a default judgment under O 19 r 9 of the Rules of Court despite the non-fulfilment of the condition to furnish security. In general, the court may permit the judgment to be set aside subject to compliance with reasonable conditions. However, the court would avoid imposing terms which cannot possibly be complied with as this would deprive the applicant of his right to have the judgment set aside. The discretionary power of the court to set aside a default judgment that has been entered into regularly is unconditional. The overriding principle in the exercise of the court's discretionary power is to avoid the injustice that may result if judgment follows automatically on default.

Setting aside irregular default judgment

7.23 In *Canberra Development Pte Ltd v Mercurine Pte Ltd* [2008] 1 SLR 316, the High Court held at [24] that different standards are applied in the decision-making process on an application to set aside a default judgment, depending on whether the judgment had been regularly obtained or not. For irregular default judgments, it may be set aside as a matter of right. This "right", however, is not an absolute one even though the judgment may be irregular. First, it is subject to the power of the court to correct an irregularity and second, it is subject to the duty of the defendant to make his application to set aside within a reasonable time. For an application to set aside an irregularly obtained judgment, a defendant must show his defence has some merit and is not bound to fail. The O 14 test is the appropriate standard to apply when deciding whether a particular defence is "bound to fail".

Costs

Security of costs

7.24 The provision of security for costs pursuant to s 388 of the Companies Act (Cap 50, 2006 Rev Ed) was ordered in *Fibresteel Industries Pte Ltd v Radovic Dragoslav* [2007] 4 SLR 719. The fact that the defendant had not filed his defence by the time of the application was not a crucial factor in assessing the merits of the plaintiff's claim which did not have a reasonable prospect of success (at [26]).

Judicial review

7.25 For a case involving costs arising out of proceedings for judicial review seeking to quash the findings of a disciplinary committee (against an advocate and solicitor), see *Re Shankar Alan s/o Anant Kulkarni* [2007] 2 SLR 95.

When two or more counsel are involved

7.26 A request that the defendant be awarded a certificate for three rather than two counsel was rejected by the High Court in *Colliers International (S) Pte Ltd v Senkee Logistics Pte Ltd* [2007] 2 SLR 230 at [125]–[126]. In the circumstances of the case, the defendant did not need the assistance of more than one counsel.

Discovery

7.27 In *Alliance Management SA v Pendleton Lane P* [2007] 4 SLR 343, the High Court dealt with the principles relating to electronic discovery, an area of law which previously had not had the benefit of detailed consideration by our local courts. Belinda Ang J made observations on the scope of the definition of electronic documents, the admission of their authenticity and the appropriate safeguards for access to and inspection of such documents.

7.28 Belinda Ang J, holding that the concept of a "document" under O 24 of the Rules of Court embraced both the material stored in the hard drive of a computer and the hard drive itself, referred to the US case of *Playboy Enterprises, Inc v Terri Welles* 60 F Supp 2d 1050 (1999) and endorsed the principle that so long as an application for specific discovery and inspection was for documents which might be on the hard drive of a computer, it was not necessary to mention the hard drive itself in the application (*Alliance Management SA v Pendleton Lane P* [2007] 4 SLR 343 at [17]).

7.29 The learned judge noted that in the absence of an agreement envisaged by s 35(1)(*a*) of the Evidence Act (Cap 97, 1997 Rev Ed), a party would have to satisfy the requirements of s 35(1)(*c*) of the Evidence Act before being able to make use of any computer output at a trial to prove authenticity of the electronically generated documents. Belinda Ang J pointed out (at [27]) that given the regime in the Evidence Act on computer output, more attention and consideration should be given to the value of a notice of non-admission and the operation of O 27 r 4 of the Rules of Court.

7.30 Belinda Ang J examined the court's discretion to order production for the purposes of inspection and found that the words "produce to the Court" in O 24 r 12(1) had the purpose of carrying into effect the provisions of O 24 rr 1 and 5, enabling the court to incorporate safeguards for the inspection of documents. In this case, the learned judge found that the appropriate safeguards for the production of the hard drive of a computer by the defendants for inspection by the plaintiff were (at [36]):

> (a) the appointment of a computer expert by the plaintiff to make an exact copy of the hard drive under the supervision of parties;
>
> (b) liberty to the defendants to object to the choice of appointment of the computer expert nominated by the plaintiff;
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> (c) an undertaking of confidentiality by the computer expert to the court;
>
> (d) the creation of an electronic copy from the cloned copy of the hard drive by the computer expert which was to be first made available to the defendants for review for the purpose of claiming privilege, if any, before release to the plaintiff for inspection. The defendants were to list the documents to which privilege was claimed; and
>
> (e) liberty to apply.

7.31 Given that the Rules of Court and the Practice Directions are silent on the appropriate safeguards for electronic discovery, the safeguards imposed by Belinda Ang J would serve as a useful model for future cases. Belinda Ang J's decision was affirmed by the Court of Appeal.

7.32 In *Banque Cantonale Vaudoise v Fujitrans (Singapore) Pte Ltd* [2007] 1 SLR 570, the High Court found that it was unnecessary to consider whether issue estoppel applied where the categories of documents sought in a discovery application mirrored or were wider than those unsuccessfully sought in a prior discovery application. Tan Lee Meng J pointed out that the party seeking discovery should have an opportunity to explain how circumstances have changed since the prior discovery application to warrant discovery of the documents previously denied to him. His Honour also reiterated the point that O 24 r 5 of the Rules of Court is not intended to cover what is essentially a "fishing expedition" by an applicant (at [10]).

7.33 In *Pertamina Energy Trading Ltd v Karaha Bodas Co LLC* [2007] 2 SLR 518, the Court of Appeal reiterated (at [93]) the principle established in *Riddick v Thames Board Mills Ltd* [1977] QB 881, which is that a party seeking discovery of documents is under an implied

undertaking that he will make use of them only for the purposes of that action, and no other purpose. The Court of Appeal held that such an implied undertaking is owed to the court and a breach of the implied undertaking would amount to a contempt of court.

Enforcement of judgments

Absence of time-limit for act to be performed

7.34 Although O 45 r 5(1) contemplates a judgment or order which specifies a period of time in which a person is required to perform an act, the absence of such a period does not bar contempt proceedings. The rule that a judgment or order which requires a person to do an act must specify the time in which it is to be done (O 42 r 6(1)) does not apply to orders requiring the payment of money, giving possession of immovable property or delivery of movable property (O 42 r 6(2)). In these circumstances, the person must perform the act within a reasonable time even though the judgment or order does not stipulate the period for this purpose. Support for this approach may also be found in s 52 of the Interpretation Act (Cap 1, 2002 Rev Ed) which provides, in relation to the construction of legislation that where no period is fixed for the performance of an act, that the act must be performed "with all convenient speed". However, to avoid uncertainty, a party who has obtained an order which does not specify the period for the performance of an act may apply to the court (pursuant to O 45 r 6(2)) for a period to be specified: see *QU v QV* [2007] 4 SLR 588 (at [24]).)

Companies

7.35 Order 45 r 5(1)(*b*)(ii) of the Rules of Court provides that enforcement of an order against a body corporate may, with the leave of the court, be effected by "an order of committal against any director or other officer of the body". In *Karaha Bodas Co LLC v Pertamina Energy Trading Ltd* [2006] 3 SLR 721, the High Court decided that a lawyer acting in his professional capacity on behalf of a corporation (his client) is not an "officer" of that corporation for the purpose of r 5(1)(*b*)(ii) (at [28]). The court also pointed out that r 5(1)(*b*)(ii) could apply to an officer of the corporation even though the applicant has expressly asked the court to impose only a fine (rather than incarceration) (at [29]). This must be right as it is not for the applicant to limit the determination of the court. Although the High Court's decision that the first and second respondents had not acted in contempt of the terms of the Mareva injunction was reversed by the Court of Appeal (the judgment of the Court of Appeal in *Pertamina Energy Trading Ltd v*

Karaha Bodas Co LLC [2007] 2 SLR 518 is considered in paras 7.33, 7.37 and 7.38), the above points were left alone.

Obtaining leave to execute

7.36 In *AmBank (M) Bhd v Raymond Yong Kim Yoong* [2008] 1 SLR 441, a Malaysian bank applied for a bankruptcy order against the appellant almost 18 years after judgment had been obtained against the latter in Malaysia and almost 12 years after that judgment was registered in Singapore. The High Court ruled that the respondent was not entitled to apply for the appellant to be made a bankrupt as it had not obtained leave pursuant to O 46 r 2(1)(*a*). Tan Lee Meng J stated (at [25]): "In my view, for debts incurred outside Singapore, the petitioning creditor must have in his hands a judgment that is enforceable by execution and if leave is required before it can be executed, it must be obtained before a bankruptcy application founded on a failure to pay the judgment debt in question can be presented." (See also *Westacre Investments Inc v Yugoimport-SDPR* [2007] 1 SLR 501.)

Rationale of doctrine of contempt

7.37 In *Pertamina Energy Trading Ltd v Karaha Bodas Co* LLC [2007] 2 SLR 518, the facts of which are considered below (at para 7.38 below), the Court of Appeal said of the doctrine of contempt that it "is not intended, in any manner or fashion whatsoever, to protect the dignity of the judges as such; its purpose is more objective and is (more importantly) rooted in the public interest" (at [22]). The court referred, *inter alia*, to the observation of Lord Morris in *Attorney-General v Times Newspapers Ltd* [1974] AC 273 at 302:

> In an ordered community courts are established for the pacific settlement of disputes and for the maintenance of law and order. In the general interests of the community it is imperative that the authority of the courts should not be imperilled and that recourse to them should not be subject to unjustifiable interference. When such unjustifiable interference is suppressed it is not because those charged with the responsibilities of administering justice are concerned for their own dignity: it is because the very structure of ordered life is at risk if the recognised courts of the land are so flouted and their authority wanes and is supplanted.

Non-compliance with terms of a Mareva injunction

7.38 For a case in which contempt proceedings were successfully brought against the party who obtained a Mareva injunction and his solicitor, see *Pertamina Energy Trading Ltd v Karaha Bodas Co LLC* [2007] 2 SLR 518. The Court of Appeal made the following observations

on the seriousness of obstructing the operation of a Mareva injunction (at [97]):

> Before concluding, it is eminently appropriate to note that what is most alarming, in our view, is that what transpired in the present proceedings might, if left unchecked, well be replicated not only in Singapore but in other jurisdictions as well – with the precedent in these proceedings being cited and used in the process. Such a possibility is to be assiduously avoided. The Mareva injunction is an important remedy, whose terms cannot – and ought not to – be thwarted. It would be easily set at naught if conduct such as that which occurred in the present proceedings were permitted. More importantly, such conduct would, as alluded to above, also herald the commencement of possible legal anarchy across jurisdictions. Respect for court orders in any and every jurisdiction is a given. Any contravention of such orders cannot be excused on the ground that it was effected in aid of possibly legitimate legal proceedings elsewhere. Indeed, such contravention could *not*, in our view, be excused even on the ground that it was effected in *clearly* legitimate legal proceedings elsewhere. How the courts in other jurisdictions decide on legal proceedings as well as issues brought before them is wholly within their purview. What is within *this* court's purview, however, is the need to ensure that *its* orders are *not* contravened or thwarted. We cannot overemphasise the importance of this fundamental proposition, and trust that nothing akin to the conduct in the present proceedings will ever come before this court again. If, in the unfortunate event it does, more stringent sanctions will be meted out accordingly.

Experts

Veracity of expert

7.39 In *Asia Hotel Investments Ltd v Starwood Asia Pacific Management Pte Ltd* [2007] SGHC 50 ("*Asia Hotel*") (at [206]) the High Court, citing *Kaufman, Gregory Laurence v Datacraft Asia Ltd* [2005] SGHC 174, stated that the court must "scrutinise [the expert's] evidence with care" before coming to a conclusion on his veracity. The court added that "an allegation of independence does not warrant an expert's evidence to be inadmissible … but it may affect the weight of his evidence" (*Asia Hotel* at [207]). The learned judge also endorsed *Macro v Thompson (No 3)* [1997] 2 BCLC 36 to the effect that "it is actual partiality, rather than the appearance of partiality, that is the crucial test in deciding whether the evidence of an expert witness should be discounted." It is submitted that there may be circumstances in which the appearance of partiality is so tangible that the expert's evidence should be dismissed outright. The ability of the expert witness to cleverly mask his actual partiality must not be permitted to work to the advantage of the party who calls him and to the disadvantage of the administration of justice. While Lord Wilberforce's observation in

Whitehouse v Jordan [1981] 1 WLR 246 that an expert witness "should be seen to be" independent may go too far (in that even a hint of partiality would disqualify the witness), expert testimony should not be accepted where it is clearly tainted by circumstances (even if they are unrelated to the issues in the case) which show that the expert is not a person to be believed.

Effect of agreed expert's opinion

7.40 If the parties agree to accept the opinion or decision of an expert (for example, a valuation), they remain bound by the decision of the expert if it was made honestly, in good faith and in accordance with the terms of his appointment. An error on the part of the expert does not vitiate his decision as long as he acted within the scope of the parties' agreement. Fraud or partiality would vitiate the decision. The court may correct errors which appear on the face of the award or report. However, the underlying evidence is not reviewable: see *Geowin Construction Pte Ltd v MCST No 1256* [2007] 1 SLR 1004 at [7].

Foreign judgments

7.41 For the three reported cases in 2007 which dealt with foreign judgments, two cases, namely, *Perwira Affin Bank v Lee Hai Pey* [2007] 3 SLR 218 and *Westacre Investments Inc v Yugoimport-SDPR* [2007] 1 SLR 501, dealt with whether it was "just and convenient" under s 3(1) of the Reciprocal Enforcement of Commonwealth Judgments Act (Cap 264, 1985 Rev Ed) ("RECJA") to enforce a foreign judgment where there had been a delay in seeking its enforcement. The third case, *Murakami Takako v Wiryadi Louise Maria* [2007] 4 SLR 565, discussed issues relating to foreign judgments *in rem* and foreign judgments *in personam*.

7.42 The effect of s 3(1) of the RECJA is that where the RECJA applies, a judgment creditor may apply at any time within 12 months after the date of the judgment, or such longer period as may be allowed by the court, to have the judgment registered in the court. On any such application, the court may, if in all the circumstances of the case it thinks it is just and convenient that the judgment should be enforced in Singapore, order the judgment to be registered accordingly.

7.43 In *Perwira Affin Bank Bhd v Lee Hai Pey* [2007] 3 SLR 218, the High Court considered whether it was "just and convenient" under s 3(1) of the RECJA to enforce a Malaysian judgment issued nearly 20 years before in Singapore. Judith Prakash J noted that the delay had resulted from the exhaustion of the Malaysian appeal process and a previous stay order preventing the enforcement of the Malaysian

judgment in Singapore pending the outcome of the appeal in Malaysia. Since the party seeking the enforcement of the judgment in Singapore had not been dilatory and there was no longer any uncertainty, the learned judge found that it was just and convenient that the judgment be enforced in Singapore.

7.44 In *Westacre Investments Inc v Yugoimport-SDPR* [2007] 1 SLR 501, the High Court noted that Singapore law governed the registration of judgments under s 3 of the RECJA. Kan Ting Chiu J pointed out that while the Limitation Act (Cap 163, 1996 Rev Ed) imposes a six-year time bar when a party seeks to sue on a foreign money judgment in Singapore, it does not set a time limit on applications to register foreign judgments.

7.45 The learned judge held that the onus was on the judgment creditor to establish that it was "just and convenient" under s 3(1) of the RECJA that the judgment be registered despite being issued more than 12 months before. The court would look at all relevant factors in deciding whether to allow an application to register a judgment. The reason for the delay and the prejudice that the judgment debtor would suffer formed a proper basis for a decision whether it was just and convenient to allow registration. Kan Ting Chiu J noted that certain inevitable forms of prejudice against judgment debtors resulting from the registration of foreign judgments should not be strong factors against registration.

7.46 His Honour also found that the rules established in English decisions for leave to issue a writ of execution out of time were relevant and applicable to late applications for registration. The learned judge was of the view that if a judgment deserved to be registered, it should be registered with full effect. Conversely, if the judgment did not deserve to be registered because registration would result in prejudice to the judgment debtor, it should not be registered in a restricted form.

7.47 In *Murakami Takako v Wiryadi Louise Maria* [2007] 4 SLR 565, the Court of Appeal held that whether a foreign judgment was a judgment *in personam* or *in rem* depended on the nature of the judicial proceedings that led to it and the intention of the foreign court as to the effect of the order on the parties. In this connection, what is relevant is the substance of the foreign judgment and its effect or intended effect on the parties thereto, not whether the foreign law recognises the concept of a judgment *in rem* and a judgment *in personam*.

7.48 The Court of Appeal noted that a Singapore court would recognise a foreign judgment *in personam* made in matrimonial proceedings as binding on the parties in relation to movable properties situated outside the foreign jurisdiction. The Court of Appeal also stated

that a foreign court exercising testamentary jurisdiction would have jurisdiction to grant a judgment *in rem* on movable properties outside its jurisdiction and that such a judgment would be enforced by a Singapore court.

Injunctions

7.49 See *NCC International AB v Alliance Concrete Singapore Pte Ltd* [2007] SGHC 64, in which an application for interlocutory mandatory injunction was dismissed as the principles established in *Chuan Hong Petrol Station Pte Ltd v Shell Singapore (Pte) Ltd* [1992] 2 SLR 729 and *Films Rover International Ltd v Cannon Film Sales Ltd* [1986] 3 All ER 772 were not satisfied.

Interrogatories

Stage of interrogatories

7.50 The interrogatory process is essentially interlocutory in nature, its purpose being to enable a party to become aware of the position taken by his opponent in relation to specific facts so as to promote proper preparation at trial. This is achieved by obtaining admissions and information from the other party in relation to those facts. The primary condition is that interrogatories relate to the issues and will dispose fairly of the cause or matter or save costs. Although the Rules of Court do not expressly prohibit the use of interrogatories at trial, this restriction is implied by the nature of the process. As pointed out by Choo Han Teck J in *Trek Technology (Singapore) Pte Ltd v Ritronics Components (S'pore) Pte Ltd* [2007] 1 SLR 846 ("*Trek Technology*") (at [4]):

> Once the trial has started, expediency and fairness would have to be decided by the judge according to the rules of procedure at trial. Any question that could previously have been asked by way of interrogatory will have to be asked by way of cross-examination or by applying for leave for further cross-examination as the case may be. I do not think that interrogatories continue to be a viable means of saving of costs and achieving fairness once the trial has started. It would be anachronistic to use interlocutory procedures at the trial because interlocutory proceedings end when the trial begins.

7.51 However, the learned judge indicated that this rule may be qualified when the interrogatories "have a direct bearing on the issues and when they will ease the subsequent passage of cross-examination by delineating the precise matters in contention" (*Trek Technology* at [6]). His Honour thought that interrogatories should not be limited to the situation in which a party would be "irremediably prejudiced" if the

questions are asked in the course of cross-examination at trial (the position taken by Colman J in *Det Danske edeselskabet v KDM International PLC* [1924] 2 Lloyd's Rep 534). Nor did the learned judge regard the saving of expenditure as a good enough reason for permitting interrogatories when the questions can be properly put in the course of cross-examination: see *Attorney-General v Gaskill* (1882) 20 Ch D 519. In *Trek Technology*, the plaintiff failed in his application for interrogatories in the course of proceedings for the assessment of damages as the interrogatories involved questions which could properly be put in the course of cross-examination (at [9]).

Interrogatories against a non-party

7.52 Leave was granted to the plaintiffs to serve interrogatories on a non-party in *Tullet Prebon (S) Ltd v Spring Mark Geoffrey* [2007] 3 SLR 187 (which concerned information that had been passed from an unnamed source to a journalist). Although the rule under which this order was made is not mentioned in the judgment, it is very likely to have been O 26A r 1(2). The High Court pointed out that although the plaintiffs might possibly have obtained information elsewhere, it was unrealistic and unreasonable to have expected them to do so in the circumstances (such an effort would have been "akin to searching for a needle in the haystack" (at [19])). The court also considered the need to be "even-handed" as the defendants had been permitted to serve interrogatories on journalists (in relation to the same matter).

Judgments and orders

Setting aside judgment due to absence at trial

7.53 The High Court in *Wee Yue Chew v Su Sh-Hsyu* [2007] 1 SLR 1092 held that the reason given for non-attendance was a predominant consideration in deciding whether to set aside the judgment obtained in the absence of the party at trial under O 35 r 2(1) of the Rules of Court. It is not possible to list the circumstances justifying absence as much would depend on the circumstances of the case. The validity of the reason proffered would be judged in the context of the factual matrix presented in each particular case. Instances of genuine mistake or accidental omissions have been accepted as valid excuses as each fell short of being deliberate in intent.

7.54 After being satisfied with the explanation for absence at trial, the court would continue to hear and balance the competing factors. Besides considering the interests of the parties such as the prejudice suffered by either party when the judgment is or is not set aside, and the interests of justice, the court would also have regard to the objectives set

out in O 34A of the Rules of Court, which is the just, expeditious and economical disposal of proceedings, and the public interest element of finality in litigation.

7.55 On finding that the applicant's decision not to attend trial was deliberate, Belinda Ang J dismissed the application to set aside the judgment.

7.56 The Court of Appeal in *Su Sh-Hsyu v Wee Yue Chew* [2007] 3 SLR 673 echoed the views of the High Court but stated that in addition to the dominant consideration of the reason for the party's absence, other considerations are also relevant. Referring to the Leggatt LJ's judgment in *Shocked v Goldschmidt* [1998] 1 All ER 372, the other relevant factors are (*Su Sh-Hsyu v Wee Yue Chew* at [44]):

> (a) whether the successful party would be irremediably prejudiced by the judgment being set aside;
>
> (b) whether there has been any undue delay by the absent party in applying to set aside the judgment;
>
> (c) whether the setting aside of the judgment would entail a complete retrial on matters of fact which have already been investigated by the court;
>
> (d) whether the applicant enjoy a real prospect of success;
>
> (e) whether the public interest in finality in litigation would be compromised; and
>
> (f) whether there is a likelihood that a real miscarriage of justice had occurred.

7.57 The reasons for an applicant's non-attendance would be most severely viewed in instances where the applicant's omission is deliberate and contumelious. In such cases, the court would be most reluctant to set aside the judgment and any countervailing factors necessarily had to be very compelling to tilt the balance in favour of setting aside the judgment.

7.58 V K Rajah JA affirmed the High Court's finding that the absence of the applicant was deliberate. However, a retrial was allowed based on the exceptional circumstances of the case, that being the real possibility that the judgment had been attained through fraud.

7.59 A party seeking to set aside a judgment based on fraud could choose either to commence a fresh action or apply for a retrial. Referring to the case of *Hamilton v Al Fayed (No 2)* [2001] EMLR 15, a fresh action is necessary where fresh evidence, introduced to impugn the judgment, was "hotly contested". By "hotly contested", the fresh

evidence proving fraud must be questionable and cannot clearly establish fraud. Since the new evidence was unchallenged, the Court of Appeal held that a fresh action was unnecessary and a retrial would suffice (*Su Sh-Hsyu v Wee Yue Chew* at [73]).

Interpretation of court order

7.60 The Court of Appeal, in *Hoban Steven Maurice Dixon v Scanlon Graeme John* [2007] 2 SLR 770, held that where a court order was intended to substantially give effect to the parties' intentions, it would be relevant to consider these intentions even when giving consideration to the express wording of the order.

7.61 Chan Sek Keong CJ referred to his earlier judgment in *Sujatha v Prabhakaran Nair* [1988] SLR 648 at 652:

> Where an order of court is capable of being construed to have effect in accordance with or contrary to established principles of law or practice, the proper approach, in the absence of manifest intention, is not to attribute to the judge an intention or a desire to act contrary to such principles or practice but rather in conformity with them.

When court order becomes inoperative

7.62 The Court of Appeal in *Hoban Steven Maurice Dixon v Scanlon Graeme John* [2007] 2 SLR 770 held that the court order is inoperative because the subject matter had been valued at nil value and there is no legal basis to interfere with that valuation by the trial judge. The court order cannot be implemented and is thus inoperative.

7.63 This is not an unusual occurrence even with respect to court orders that need to be worked out or are in the nature of Tomlin orders. Such orders normally provide a mechanism to implement the order. If the mechanism, for some reason or other, cannot be used by reason of a supervening event, then the order cannot be implemented.

Jurisdiction

7.64 In *Westacre Investments Inc v Yugoimport-SDPR* [2007] 1 SLR 501, the High Court held that it does not have jurisdiction to direct that a foreign judgment should only be enforced by a certain method. Kan Ting Chiu J found at [70] that the court may not have recourse to its inherent jurisdiction under O 92 rr 4 and 5 of the Rules of Court to impose such a restriction.

7.65 In *OK Property Pte Ltd v Heng Siew Ang* [2007] 3 SLR 740, the High Court applied s 38(1A) of the Small Claims Tribunals Act

(Cap 308, 1998 Rev Ed) and held at [5] that an order made by the Small Claims Tribunal may not be set aside by the High Court without leave from the District Court to appeal to the High Court against the order.

Pleadings

Material facts

7.66 The courts have reiterated that it is crucial for the parties to plead material facts on which they seek to rely. In *Orient Centre Investments Ltd v Societe Generale* [2007] 3 SLR 566, at [45], the Court of Appeal confirmed the principle that the material facts which establish a legal outcome must be pleaded. The court held that a party who wishes to rely on a clause in a contract which is capable of giving rise to an estoppel only needs to plead the material facts (*ie*, the existence of the clause) which gives rise to the estoppel. The rules of pleading do not require the name of the defence to be pleaded. In *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd* [2007] SGCA 39 at [51]–[52]), the Court of Appeal ruled that the defence of *force majeure* must be specifically pleaded. In *Main-Line Corporate Holdings Ltd v United Overseas Bank Ltd* [2007] 1 SLR 1021 at [75], the High Court ruled that the defence of innocent infringement must normally be pleaded. However, as the plea was alluded to in the evidence and the facts were already before the court, no injustice would result from its consideration by the court.

Damages

7.67 In *Lee Chee Wei v Tan Hor Peow Victor* [2007] 3 SLR 537 at [61], the Court of Appeal endorsed (by way of observation) *Perestrello E Companhia Limitada v United Paint Co Ltd* [1969] 1 WLR 570 to the effect that while the plaintiff need not plead general damage, he must plead damage "which is not the necessary and immediate consequence of the wrongful act" so as to give necessary notice to the defendants. The Court of Appeal (at [63]) also affirmed (by way of observation) *Lim Eng Kay v Jaafar bin Mohamed Said* [1982] 2 MLJ 156, in which the court awarded special damages notwithstanding that they had been incorrectly pleaded as general damages. A court may order an assessment of damages even if the plaintiff has pleaded the words "damages in lieu of specific performance" without specifying that they are "to be assessed". In *Lee Chee Wei v Tan Hor Peow Victor* [2007] 3 SLR 537 at [62], the Court of Appeal considered the reference to assessment of damages in a pleading "superfluous given that any claim for damages must necessarily be assessed (unless otherwise agreed)".

Bare denials

7.68 In *Nagase Singapore Pte Ltd v Ching Kai Huat* [2007] 3 SLR 265, the High Court stressed that a bare denial of the plaintiff's allegation would only constitute a "negative pregnant" if it makes it obvious to the plaintiff what the defence is (as opposed to putting the plaintiff to strict proof of his own claim) (at [172]). Furthermore, the phrase "and the plaintiff is put to strict proof thereof" combined with a denial without further particulars "suggests, though not conclusively, that the defendant is intending to [plead] a bare denial rather than a negative pregnant" (at [173]). In *Nagase Singapore Pte Ltd v Ching Kai Huat* [2007] 3 SLR 265, one of the defendants argued that his bare denial of the plaintiff's allegations implied an affirmative defence which entitled him to adduce evidence at trial to prove his case (at [166] and [169]). The plaintiff objected to the bare denial for the first time in his closing submissions. The court pointed out that the plaintiff, having failed to raise any objections earlier on to the bare denial point in its objections to the contents of the affidavits of the evidence in chief, could not now make this objection (at [176]–[177]).

Striking out

7.69 In *Orient Centre Investments Ltd v Societe Generale* [2007] 3 SLR 566, the Court of Appeal affirmed the High Court's order to strike out the appellant's claim. The application to strike out was made almost 19 months after the filing of the claim, However, on the facts, the application was not too late because "the generality and vagueness" of the claim required the respondent to make seven interlocutory applications for discovery and further and better particulars in order to decide whether the appellant had a *prima facie* case. The appellant's case against the respondent had no basis (at [62]–[64]). The Court of Appeal cited the principles in *Tapematic SpA v Wirana Pte Ltd* [2002] 4 SLR 953 concerning the time of application; *Gabriel Peter & Partners v Wee Chong Jin* [1998] 1 SLR 374 concerning the merits of the application; and *Chok Boon Hock v Great Eastern Life Assurance* [1999] 1 SLR 344 concerning the merits of the application. See also *Alliance Entertainment Singapore Pte Ltd v Sim Kay Teck* [2007] 2 SLR 869 (the action was struck out as the plaintiff had no title to sue).

Rules of Court

7.70 Order 32 r 5 of the Rules of Court enables the court to proceed in a party's absence where he fails to attend on the first or any resumed hearing of a summons that he is a party to. In *Lee Hsien Loong v Singapore Democratic Party* [2007] 1 SLR 675, the High Court held (at [9]) that in the absence of medical evidence that a party is medically

unfit to conduct the case, his absence from the hearing *per se* was not a ground for an adjournment. In this case, Belinda Ang J found that there was no valid reason for granting an adjournment of the hearing in the third defendant's absence and as such, proceeded with the hearing under O 32 r 5.

7.71 In *The Vasiliy Golovnin* [2007] 4 SLR 277, the High Court held that the court would not exercise its discretion to strike out a writ or pleading under O 18 r 19 of the Rules of Court or under its inherent jurisdiction unless the case was wholly and clearly unarguable. Tan Lee Meng J referred to *Tan Eng Khiam v Ultra Realty Pte Ltd* [1991] SLR 798 where G P Selvam JC (as he then was) stated that this is anchored on the judicial policy to afford a litigant the right to institute a *bona fide* claim before the courts and to prosecute it in the usual way.

Service out of the jurisdiction

7.72 The manner in which an originating process is served out of the jurisdiction must comply with the laws of the country of service. This principle was reiterated in *ITC Global Holdings Pte Ltd v ITC Ltd* [2007] SGHC 127, in which the assistant registrar set aside the service of two writs of summons (which had been served on two of the defendants) in India.

7.73 The party serving the originating process out of the jurisdiction is required to establish that all conditions for this purpose are satisfied. Therefore, when an application is made to set aside service of the writ on the basis of irregularity, it is not for the applicant to prove that the method of service was improper, but for the respondent to show that it was proper. (See *Lee Hsien Loong v Review Publishing Co Ltd* [2007] 2 SLR 453 at [19]–[21] in which the *dicta* of the majority opinion of the High Court of Australia in *Voth v Manildra Four Mills Pty Ltd* (1990) 171 CLR 538 was regarded as "persuasive".)

7.74 The plaintiff must establish a sufficient nexus between the claim and Singapore. In *Lee Hsien Loong v Review Publishing Co Ltd* [2007] 2 SLR 453 (which involved O 11 r 1(*b*), (*f*) and (*p*)), the defendants in a defamation suit (who were served with the writs in Hong Kong) argued that the statements of claim "lacked any specification as to the place of publication and location of the readers in whose eyes [their] reputations are alleged to have suffered" (at [24]). Sundaresh Menon JC considered various authorities (at [25]–[29]) and concluded that the question to be asked is as follows: "[Is] the plaintiff seeking to bring the foreign defendant into the home jurisdiction to pursue a claim for injury arising within the jurisdiction or is he, in reality, seeking in this jurisdiction to vindicate the alleged damage to his reputation in other jurisdictions?"

As the latter situation is beyond the scope of O 11 r 1(*b*), (*f*) and (*p*) (and, therefore involves an abuse of process), the court requires that the plaintiff frames his claim in a manner which brings it within one or more of these paragraphs (*ie*, the claim must have a sufficient nexus with Singapore as contemplated by these paragraphs): "If the claim is not sufficiently circumscribed or if there is ambiguity, leave [to serve the writ out of the jurisdiction] may be refused or the statement of claim may have to be amended or an undertaking may be insisted upon to the effect that the plaintiff will not pursue any claim for injury suffered elsewhere" (at [30]).

Striking out

7.75 The High Court in *Alliance Entertainment Singapore v Sim Kay Teck* [2007] 2 SLR 869 held that an action commenced by the non-exclusive licensee of copyright for alleged infringement of copyright should be struck out and the pleadings cannot be amended so as to add the copyright owners as plaintiffs in order for the non-exclusive licensee to remain as party to the action.

7.76 A non-exclusive licensee of copyright, within the meaning of the Copyright Act (Cap 63, 2006 Rev Ed), has no title to sue at all and the joinder of the owners of copyright does nothing to remedy that. If it were to be a copyright infringement against the defendants, the copyright owners could well be the proper plaintiffs, but the case would have to be pleaded on that basis.

7.77 This was a situation distinct from a case where there is doubt as to the plaintiff's title to sue for a particular cause of action and the plaintiff then sought to add another party as co-plaintiff in order to better his position. The plaintiff simply had no title to sue.

Summary judgment

7.78 In *Lee Hsien Loong v Singapore Democratic Party* [2007] 1 SLR 675, the High Court pointed out that the existence of complex issues in a case is not an answer to a claim for summary judgment if the claim is otherwise well founded. Belinda Ang J also noted that the question of whether words bear a defamatory meaning is a question of law which may be determined summarily.

7.79 In *Abdul Salam Asanaru Pillai v Nomanbhoy & Sons Pte Ltd* [2007] 2 SLR 856, the High Court made an order for summary judgment to be entered for one of the plaintiff's claims. While Sundaresh Menon JC (as he then was) was satisfied that there was no defence to the claim, the learned judicial commissioner found that the

defendant had some plausible counterclaims for an amount possibly in excess of the plaintiff's claim. In these circumstances, his Honour considered it appropriate to stay execution on the judgment until the trial of the counterclaim or further order.

7.80 Sundaresh Menon JC pointed out that it would be wrong for the court to shy away from evaluating rival contentions simply because papers may be voluminous, facts may be many and arguments may be vigorous. The learned judicial commissioner also noted that the proper course is not for the court to assume that every sworn averment is to be accepted as true. While proceedings at the summary judgment stage are not to be conducted as a trial on affidavits, everything set out in the affidavits is not to be accepted without rational consideration to determine if there is a fair or reasonable probability of a real defence.

7.81 His Honour endorsed the holding in *Habibullah Mohamed Yousuff v Indian Bank* [1999] 3 SLR 650 where Karthigesu JA stated that the court would only give summary judgment where there is no reasonable doubt that a plaintiff is entitled to judgment, and where it is inexpedient to allow a defendant to defend for mere purposes of delay.

7.82 The learned judicial commissioner also made these observations concerning the imposition of a condition when leave to defend is granted. Firstly, a condition is appropriate when although it cannot be said that there is no defence, some demonstration of commitment on the part of the defendant to the claimed defence is called for. Secondly, the condition must not be one which the defendant would find impossible to meet. Thirdly, once the condition is met, the defendant is taken to have demonstrated his commitment and the matter should then proceed to trial with no predisposition towards any view of the strength of the defence.

Trials and chamber hearings

Absence of defendant at trial

7.83 In determining whether the appeal was "hopeless", the Court of Appeal in *Lee Hsien Loong v Singapore Democratic Party* [2008] 1 SLR 757 took into account, *inter alia*, the applicant's decision to walk out of the proceedings (before the judge in chambers) prior to their conclusion (the applicant's counsel was absent on that occasion so only the applicant could have attended). The judge in chambers raised the issue of whether O 32 r 5 applies to a party who attends proceedings and then walks out (in contrast to the situation where the party never attends), and concluded that it does. The Court of Appeal did not express any difficulty about this finding (at [81]–[85]).

Chamber hearings

7.84 Hearings in chambers, unlike proceedings in open court, are private in nature. Members of the public are not entitled to attend proceedings in chambers. However, the court has a discretion to permit persons other than counsel if it would be just to do so. In *Lee Hsien Loong v Review Publishing Co Ltd* [2007] 2 SLR 453, the appellants requested the court to permit their Australian legal adviser to attend in chambers. The court determined that the legal adviser of a party is "within the class of persons in whose favour [it] could conceivably have exercised [its discretion]" (at [8]). In exercising its discretion in such a matter, the court should take into account: "the interest [of the person who seeks to attend] in the litigation; the interests of the litigants themselves; the reasons for which such permission is sought; and the court's interest in preserving and upholding its authority and dignity" (at [13]). The court denied the request as the legal adviser had openly made disrespectful remarks about the Singapore judiciary and continued to stand by them despite asking for the court's indulgence (at [15]). It was not for the court to satisfy the legal adviser of the fairness of the administration of justice by permitting him to attend in chambers (at [14]). The court also took into account the issue of whether the presence of the legal adviser would assist in the conduct of the appellants' case. As counsel for the appellants responded that he did not need the assistance of the legal adviser, the court determined that the appellants would not be prejudiced by the legal adviser's absence (at [16]–[17]). Accordingly, the application for the legal adviser to attend in chambers was dismissed.

Bifurcation

7.85 An application for the bifurcation of the hearing on liability and damages pursuant to O 33 r 2 will "inevitably succeed if the circumstances render it just and convenient to so order" (*Lee Chee Wei v Tan Hor Peow Victor* [2007] 3 SLR 537 at [64], citing *Polskie Towarzystwo Handlu Zagranicznego Dla Elektrotech niki "Electrim" Spolka Z Ograniczona Odpowiadziolnoscia v Electric Furnace Co Ltd* [1956] 1 WLR 562).

Vacation of trial dates

7.86 There was only one reported case in 2007 that dealt with vacation of trial dates. The Court of Appeal in *Su Sh-Hsyu v Wee Yue Chew* [2007] 3 SLR 673 held that the present judicial policy in relation to the religious and punctilious observance of hearing dates and minimal tolerance for unmeritorious adjournments has not and will not be modified. Following *Chan Kern Miang v Kea Resources Pte Ltd* [1999]

1 SLR 145, strong compelling grounds must prevail before the court would consider the exercise of its discretion to vacate trial dates.

7.87 The Singapore standard of "strong compelling grounds" is a higher threshold than the English standard in that it requires demonstrably convincing reasons to move a court to exercise its discretion.

Witnesses

Evidence through live video or live television links

7.88 If a material witness cannot attend a hearing because he is in another jurisdiction, reasonable efforts should be made to arrange for him to testify by video-link if such facility is available in the foreign jurisdiction. In *Asia Hotel Investments Ltd v Starwood Asia Pacific Management Pte Ltd* [2007] SGHC 50 at [73], the High Court stated: "Given the present state and prevalence of video conference technology and the state-of-the-art facilities in the Supreme Court, the practice of foreign witnesses providing testimony by way of video-link has become fairly commonplace in the Singapore High Court." The court warned that if a proposed witness fails to make himself available for cross-examination, his affidavit of the evidence-in-chief would be disregarded pursuant to O 38 r 2(1) (at [74]).

Availability of witness for cross-examination

7.89 In *Asia Hotel Investments Ltd v Starwood Asia Pacific Management Pte Ltd* [2007] SGHC 50 at [74], the High Court emphasised the effect of O 38 r 2 concerning the absence of a witness at the hearing. The case is considered above in the context of evidence given by live video-link.

Depositions

7.90 In *Credit Suisse v Lim Soon Fang Bryan* [2007] 3 SLR 414 at [12], Belinda Ang J rejected counsel's argument that there is a general rule prohibiting the use of depositions where limitations are placed on cross-examination in the foreign jurisdiction: "the overarching question is whether the order is necessary for the purposes of justice". The fact that cross-examination in the foreign jurisdiction takes the form of written questions (*ie*, cross-interrogatories) is not a basis on which to refuse a deposition. As pointed out by the High Court in *Credit Suisse*, "cross-examination" in s 33(*b*) of the Evidence Act (Cap 97, 1997 Rev Ed) includes oral cross-examination and cross-interrogatories. Cross-

interrogatories are contemplated by O 39 r 3: "Cross-interrogatories being a form of cross-examination, can serve to test the evidence and consequently answer the test of admissibility" (at [36]).

7.91 The court also concluded that O 38 r 9 and s 33 of the Evidence Act are reconcilable. Order 38 r 9 provides that a deposition may only be "received in evidence" if certain conditions are satisfied including compliance with O 39 r 1 (see O 38 r 9(1)(*a*)), proof of unavailability of the deponent (see O 38 r 9(1)(*b*)), and the procedural requirements of O 38 r 9(2) and (3), which concern notice and signature respectively. Regarding s 33(*b*) of the Evidence Act ("the adverse party in the first proceeding had the right and opportunity to cross-examine"), the word "right" means "a right conferred by a statutory provision such as that contained in s 140 of the Evidence Act and not a right accruing from mere permission granted by the court" (*Credit Suisse v Lim Soon Fang Bryan* [2007] 3 SLR 414 at [30]). Section 140 of the Evidence Act, *inter alia*, addresses "cross-examination". If there is no right to cross-examine, or the opposing party was not provided with a proper opportunity to cross-examine, in the foreign jurisdiction, s 33(*b*) would not be satisfied and, accordingly, the deposition would not be admitted. There may be circumstances in which there is both a right and opportunity to cross-examine but the process of cross-examination is limited or different to that which applies in Singapore. In these circumstances, the court must determine whether the deposition would serve the purposes of justice pursuant to O 39 r 1. It will take into account all the circumstances of the case. If the deponent decides not to use the deposition at trial, the opposing party is entitled to rely on it (at [28]).