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8. CIVIL PROCEDURE

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I. Jurisdiction against an unknown person, proprietary injunctions on non-fungible tokens, and substituted service out of jurisdiction

8.1 In *Janesh s/o Rajkumar v Unknown Person ("CHEFPIERRE")*,[1] the claimant was the owner of a non-fungible token ("NFT") known as the "Bored Ape NFT".[2] The claimant was also a regular user on NFTfi, an NFT-collateralised cryptocurrency lending marketplace.[3] One of the loan agreements the claimant made on NFTfi was with the defendant, which used the Bored Ape NFT as collateral.[4] Subsequently, the claimant was unable to repay the loan and requested an extension of time from the defendant.[5] While the defendant initially agreed to the extension, he later changed his mind and transferred the Bored Ape NFT into his cryptocurrency wallet.[6] Notably, the exact identity of the defendant was unknown, and he was only known by a pseudonym.[7]

8.2 The claimant made an urgent application to the General Division of the High Court ("High Court (General Division)") for a proprietary injunction prohibiting the defendant from dealing with the Bored Ape NFT in any way and for substituted service out of jurisdiction.[8] The court granted the application.[9]

1 [2022] SGHC 264.
2 *Janesh s/o Rajkumar v Unknown Person ("CHEFPIERRE")* [2022] SGHC 264 at [2].
3 *Janesh s/o Rajkumar v Unknown Person ("CHEFPIERRE")* [2022] SGHC 264 at [10].
4 *Janesh s/o Rajkumar v Unknown Person ("CHEFPIERRE")* [2022] SGHC 264 at [15] and [17].
5 *Janesh s/o Rajkumar v Unknown Person ("CHEFPIERRE")* [2022] SGHC 264 at [18].
6 *Janesh s/o Rajkumar v Unknown Person ("CHEFPIERRE")* [2022] SGHC 264 at [18]–[21].
7 *Janesh s/o Rajkumar v Unknown Person ("CHEFPIERRE")* [2022] SGHC 264 at [14].
8 *Janesh s/o Rajkumar v Unknown Person ("CHEFPIERRE")* [2022] SGHC 264 at [25].
9 *Janesh s/o Rajkumar v Unknown Person ("CHEFPIERRE")* [2022] SGHC 264 at [26].

8.3 There were two preliminary issues on jurisdiction which the High Court (General Division) had to address. The first was whether the court had jurisdiction to hear the application given that the domicile, residence and present location of the defendant were unknown.[10] The High Court considered that while the decentralised nature of blockchains may pose difficulties when establishing jurisdiction, there has to be a court which had the jurisdiction to hear the dispute. The fact that the claimant was located and carried on business in Singapore was the primary connecting factor that led to the conclusion that the Singapore court had jurisdiction to hear the application.[11]

8.4 The second preliminary issue was whether the court has jurisdiction against an unknown person whose identity has not been established.[12] Since this case was subject to the Rules of Court 2021 ("ROC 2021"), an originating application must be in Form 15 if the application must be served, and Form 15 requires the claimant and defendant's name and identification number to be stated.[13]

8.5 The High Court did not consider the failure to name the defendant in the precise manner stipulated in the relevant forms to be a non-compliance with ROC 2021.[14] Interpreting ROC 2021 purposively, the High Court found that requiring strict compliance with the formality requirements of an originating application or claim may well restrict access to justice, running counter to the ideals set out in O 3 r 1.[15] The key requirement for identification of the defendant is that the description of the defendant must be sufficiently certain so as to identify both those who are included and those who are not.[16]

8.6 Applied to the facts, the description of the defendant was sufficiently certain because he was identified as the person behind the certain social media accounts and the person to whom the Bored Ape NFT had been transferred to.[17] In the alternative, the High Court was also prepared to waive the non-compliance if ROC 2021 required the defendant to be named such that failure to do so meant that there was

10 *Janesh s/o Rajkumar v Unknown Person ("CHEFPIERRE")* [2022] SGHC 264 at [27].
11 *Janesh s/o Rajkumar v Unknown Person ("CHEFPIERRE")* [2022] SGHC 264 at [30].
12 *Janesh s/o Rajkumar v Unknown Person ("CHEFPIERRE")* [2022] SGHC 264 at [31].
13 *Janesh s/o Rajkumar v Unknown Person ("CHEFPIERRE")* [2022] SGHC 264 at [33].
14 *Janesh s/o Rajkumar v Unknown Person ("CHEFPIERRE")* [2022] SGHC 264 at [37].
15 *Janesh s/o Rajkumar v Unknown Person ("CHEFPIERRE")* [2022] SGHC 264 at [38].
16 *Janesh s/o Rajkumar v Unknown Person ("CHEFPIERRE")* [2022] SGHC 264 at [39]; *CLM v CLN* [2022] 5 SLR 273 at [32].
17 *Janesh s/o Rajkumar v Unknown Person ("CHEFPIERRE")* [2022] SGHC 264 at [40]–[41].

non-compliance with the form requirements under O 6 r 5(1) and O 6 r 11(1).[18]

8.7 In deciding whether to grant the proprietary injunction against the defendant, the High Court first considered whether there was a serious question to be tried.[19] This requirement would be satisfied if the claimant had a seriously arguable case that he had a proprietary interest in the Bored Ape NFT. This in turn rested on the assumption that NFTs are capable of giving rise to proprietary rights which could be protected by a proprietary injunction.[20]

8.8 The High Court explained that NFTs, including the Bored Ape NFTs, commonly store the metadata of the image on the blockchain, including the author, file creation date and file size. Thus, all they contain is a link to the server where the *actual* image can be found. Even in cases where the image file associated with a particular NFT is stored on the blockchain itself, the NFT is essentially a string of code which includes the code for the image.[21]

8.9 However, it is not appropriate to characterise crypto assets, such as NFTs and cryptocurrencies, as information. The High Court agreed with the observations in *Ruscoe v Cryptopia Ltd*[22] that it is wrong to treat cryptocurrencies as mere information.[23] This is for three reasons. First, cryptocurrencies were created with the purpose of creating an item of tradeable value not simply to record or to impart in confidence knowledge or information. The combination of data that records their existence and affords them exclusivity is comparable to the electronics records of a bank and the private key provides a method of transferring that value, similar in operation to a personal identification number ("PIN") on an electronic bank account.[24]

8.10 Second, cryptocurrency is comparable to a contract, which is capable of being an item of property, because equity recognises the unique relationship between the parties created by the words and supplies

18 *Janesh s/o Rajkumar v Unknown Person ("CHEFPIERRE")* [2022] SGHC 264 at [41].
19 *Janesh s/o Rajkumar v Unknown Person ("CHEFPIERRE")* [2022] SGHC 264 at [43] and [45].
20 *Janesh s/o Rajkumar v Unknown Person ("CHEFPIERRE")* [2022] SGHC 264 at [45]–[46]; *CLM v CLN* [2022] 5 SLR 273 at [39].
21 *Janesh s/o Rajkumar v Unknown Person ("CHEFPIERRE")* [2022] SGHC 264 at [51] and [55].
22 [2020] 2 NZLR 809.
23 *Janesh s/o Rajkumar v Unknown Person ("CHEFPIERRE")* [2022] SGHC 264 at [58].
24 *Janesh s/o Rajkumar v Unknown Person ("CHEFPIERRE")* [2022] SGHC 264 at [57]; *Ruscoe v Cryptopia Ltd* [2020] 2 NZLR 809 at [127(a)].

a system for transferring the contractual rights. Similarly, a unique relationship and system of transfer exists with respect to the relevant data on the blockchain that makes up cryptocurrency.[25]

8.11 Third, the principle for not regarding information as property is the fact that information can be infinitely duplicated. This is not true for cryptocurrency because every public key recording the data constituting the currency is unique on the system where it is recorded, and the associated private key protects it from being transferred without concept.[26]

8.12 Applying these observations on cryptocurrencies to the case, NFTs are not mere information but data encoded in a certain manner and securely stored on the blockchain ledger. To characterise NFTs as mere information would be to ignore the unique relationship between the encoded data and the blockchain system which enables the transfer of this encoded data from one user to another in a secure and verifiable fashion. Furthermore, in the context of NFTs, the information concerned is a string of computer code that does not provide any knowledge or inform the reader. It only provides instructions to the computer under a system whereby the "owner" of the NFT has exclusive control over its transfer.[27]

8.13 The High Court held that NFTs are capable of giving rise to such rights because they satisfy the *Ainsworth* criteria for a property right, with the caveat that the view formed by the court was made in the context of an urgent *ex parte* hearing where it did not have the benefit of the defendant's submissions. Thus, the decision in the present case should be read in the proper context as a different conclusion may be reached by the court with the benefit of fuller submissions.[28] First, the right is definable because the metadata that distinguishes one NFT from another makes them capable of being isolated from other assets, whether of the same type or of other types, and thereby identified.[29] Second, NFTs are assets that have an owner capable of being recognised as such by third parties because the presumptive owner is whoever controls the wallet linked to the NFT. Excludability is achieved because one cannot deal with the NFT

25 *Janesh s/o Rajkumar v Unknown Person ("CHEFPIERRE")* [2022] SGHC 264 at [57]; *Ruscoe v Cryptopia Ltd* [2020] 2 NZLR 809 at [127(b)].
26 *Janesh s/o Rajkumar v Unknown Person ("CHEFPIERRE")* [2022] SGHC 264 at [57]; *Ruscoe v Cryptopia Ltd* [2020] 2 NZLR 809 at [127(c)].
27 *Janesh s/o Rajkumar v Unknown Person ("CHEFPIERRE")* [2022] SGHC 264 at [58].
28 *Janesh s/o Rajkumar v Unknown Person ("CHEFPIERRE")* [2022] SGHC 264 at [69]; *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175 at 1248.
29 *Janesh s/o Rajkumar v Unknown Person ("CHEFPIERRE")* [2022] SGHC 264 at [69].

without the owner's private key.[30] Third, the right is capable of assumption by third parties, in that third parties do respect the rights of NFT owners because blockchain technology gives the owner the exclusive ability to transfer the NFT to another party. NFTs are also potentially desirable since they are the subject of active trading in the markets.[31] Fourth, the right and NFTs have some degree of permanence and stability since they can be likened to money in bank accounts, which exist mainly in the form of ledger entries.[32] Accordingly, the claimant had a seriously arguable case that he had a proprietary interest in the Bored Ape NFT.[33]

8.14 Additionally, the balance of convenience lay in favour of granting the injunction because if the string of code that represents the Bored Ape NFT on the blockchain was transferred to third parties, the claimant might never be able to recover it, and any proprietary remedy ordered by the court would be rendered futile.[34] Thus, the High Court granted the proprietary injunction sought by the claimant.[35]

8.15 Turning to the application for substituted service out of jurisdiction, the High Court noted that O 8 r 2 of ROC 2021, which provides for the methods of service out of Singapore, does not contain an express provision allowing substituted service.[36] However, the High Court found that O 8 r 2(1) avoids the use of imperative language and does not appear to prescribe a closed list as to how service of court documents could be effected out of Singapore.[37] Instead, the intention of the drafters was to simplify things by obviating the need for a claimant to scrutinise a list of cases in which service out of Singapore was permissible.[38] Hence, the High Court granted leave for substituted service out of jurisdiction as it was the claimant's only practical manner of effecting service on the defendant.[39]

30 *Janesh s/o Rajkumar v Unknown Person ("CHEFPIERRE")* [2022] SGHC 264 at [70].
31 *Janesh s/o Rajkumar v Unknown Person ("CHEFPIERRE")* [2022] SGHC 264 at [71].
32 *Janesh s/o Rajkumar v Unknown Person ("CHEFPIERRE")* [2022] SGHC 264 at [72].
33 *Janesh s/o Rajkumar v Unknown Person ("CHEFPIERRE")* [2022] SGHC 264 at [73].
34 *Janesh s/o Rajkumar v Unknown Person ("CHEFPIERRE")* [2022] SGHC 264 at [80].
35 *Janesh s/o Rajkumar v Unknown Person ("CHEFPIERRE")* [2022] SGHC 264 at [81].
36 *Janesh s/o Rajkumar v Unknown Person ("CHEFPIERRE")* [2022] SGHC 264 at [84] and [86].
37 *Janesh s/o Rajkumar v Unknown Person ("CHEFPIERRE")* [2022] SGHC 264 at [87]–[88].
38 *Janesh s/o Rajkumar v Unknown Person ("CHEFPIERRE")* [2022] SGHC 264 at [88]–[89].
39 *Janesh s/o Rajkumar v Unknown Person ("CHEFPIERRE")* [2022] SGHC 264 at [91].

II. Leave for service of transfer applications out of jurisdiction when leave already granted for the originating process by the court below

8.16 In *Shee See Kuen v PT Trikomsel Oke Tbk*,[40] the applicants applied for leave to serve out of jurisdiction on the respondent, which was an Indonesian company. These were in respect of applications seeking the transfer of pending appeals from the Appellate Division of the High Court ("High Court (Appellate Division)") to the Court of Appeal.[41]

8.17 Preliminarily, the Court of Appeal clarified that, reading O 56A r 12(5) with O 57 r 16(1) of the old Rules of Court[42] ("ROC 2014"), transfer applications to the Court of Appeal are to be commenced by original summonses because the appeals themselves are not before the Court of Appeal until the transfer applications are granted.[43]

8.18 The Court of Appeal then had to consider the interesting question of whether leave to serve out of jurisdiction must be separately granted by the court for the transfer applications when leave for service out of jurisdiction of the originating process on the respondent had already been granted by the court below.[44] Under O 11 r 1, the starting position is that service of an originating process out of Singapore is permissible with the leave of court. However, under O 11 r 8(1), no separate leave is required to serve any summons, notice or order issued, given or made in any proceeding in which leave for service of the originating process has already been granted.[45]

8.19 Thus, the question is whether, for the purposes of transfer applications, "the originating process" in O 11 r 8(1) refers to the writs of summons for the High Court suit below and not to the transfer applications.[46] The Court of Appeal decided that "originating process" did not refer to the transfer applications as they were not in substance originating processes, but should instead be deemed to be summonses which were made in a "pending cause or matter". As such, since leave to serve the writ of summons out of jurisdiction was already granted by the court below, there was no need to obtain fresh leave to serve the transfer applications on the respondent.[47]

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40 [2022] 2 SLR 239.
41 *Shee See Kuen v PT Trikomsel Oke Tbk* [2022] 2 SLR 239 at [1]–[2].
42 2014 Rev Ed.
43 *Shee See Kuen v PT Trikomsel Oke Tbk* [2022] 2 SLR 239 at [7]–[8].
44 *Shee See Kuen v PT Trikomsel Oke Tbk* [2022] 2 SLR 239 at [1] and [9].
45 *Shee See Kuen v PT Trikomsel Oke Tbk* [2022] 2 SLR 239 at [10].
46 *Shee See Kuen v PT Trikomsel Oke Tbk* [2022] 2 SLR 239 at [11].
47 *Shee See Kuen v PT Trikomsel Oke Tbk* [2022] 2 SLR 239 at [13].

8.20 The Court of Appeal also considered that not all originating summonses are originating processes. If, after disposition of the originating summons, there is still something left to try as between the parties, then the application, whilst commenced by originating summons, is interlocutory in nature.[48] Hence, an originating summons is interlocutory in nature, and is in substance a summons if it is not intended to dispose of the merits of the parties' claims.[49] Adopting this principle would best promote the purpose of O 11 r 8(1), which is to eliminate duplicative applications for leave for service out of jurisdiction, thereby expediting court processes and increasing efficiency.[50]

8.21 Accordingly, if the originating summons is interlocutory and hence ancillary to an underlying proceeding, and leave for service out of jurisdiction has already been granted in respect of the originating process in the underlying proceeding, then Singapore's courts have already determined that it is appropriate to assume personal jurisdiction over the foreign party.[51] It would therefore be superfluous for a higher court to re-analyse the requirements for granting leave for service out of jurisdiction where the lower court has already done so.[52]

8.22 Applied to the facts, the transfer applications are interlocutory in nature because they only raise the administrative or procedural question of which court should hear the substantive appeals and will not dispose of the merits of the appeals. Since leave was already granted to serve the originating process by the High Court, there was no need for the Court of Appeal to grant fresh leave for service out of jurisdiction on the same party.[53]

8.23 Further, since "summons" is defined in O 1 r 4(1) as a summons in a "pending cause or matter", the Court of Appeal considered it necessary to decide whether the first instance suit, substantive appeals, and transfer applications are in substance the same proceedings.[54] This would allow any application in the proceedings to take the benefit of the leave for service out of jurisdiction granted to the underlying proceeding.[55] The Court of Appeal observed that the authorities on this issue are divided.[56] The answer is ultimately dependent on the legal and factual context in

48 *Shee See Kuen v PT Trikomsel Oke Tbk* [2022] 2 SLR 239 at [14].
49 *Shee See Kuen v PT Trikomsel Oke Tbk* [2022] 2 SLR 239 at [18].
50 *Shee See Kuen v PT Trikomsel Oke Tbk* [2022] 2 SLR 239 at [18] and [20].
51 *Shee See Kuen v PT Trikomsel Oke Tbk* [2022] 2 SLR 239 at [19].
52 *Shee See Kuen v PT Trikomsel Oke Tbk* [2022] 2 SLR 239 at [19]–[20].
53 *Shee See Kuen v PT Trikomsel Oke Tbk* [2022] 2 SLR 239 at [22].
54 *Shee See Kuen v PT Trikomsel Oke Tbk* [2022] 2 SLR 239 at [23] and [25].
55 *Shee See Kuen v PT Trikomsel Oke Tbk* [2022] 2 SLR 239 at [23].
56 *Shee See Kuen v PT Trikomsel Oke Tbk* [2022] 2 SLR 239 at [25].

which the question arises because the terms "proceedings", "cause" and "matter" are each capable of a variety of meanings depending on the statutory context and the object of the legislation in which they are used.[57]

8.24 The Court of Appeal held that, for the purpose of O 11 r 8(1), the first instance application, appeal and any transfer application arising from the appeal are a single set of proceedings. Accordingly, parties need only apply for service out of jurisdiction once as transfer applications are substantively summonses in a pending cause or matter.[58] To hold otherwise would result in duplicative applications that strain judicial resources and raise the spectre of inconsistent results, since multiple courts would be applying the same principles on leave for service out of jurisdiction to the same facts.[59]

III. Leave to serve a summons on a non-party out of jurisdiction

8.25 In *DMX Technologies Group Ltd v Deloitte & Touche LLP*,[60] the appellants were non-parties to the underlying suit commenced by the respondent. The appeal was against the assistant registrar's decision not to set aside the orders granting leave to the respondent to serve applications for non-party discovery out of jurisdiction on the appellants who were located in Hong Kong.[61] The underlying suit concerned breaches that allegedly occurred during the planning, preparation and conduct of the audit of the respondent and in the making of the subsequent audit report.[62]

8.26 There were two issues to be decided by the High Court (General Division): first, whether the service order against the first appellant should be set aside because the respondent failed to make full and frank disclosure of all the material facts in the leave application; and second, whether both service orders against the appellants should be set aside because the applicable legal test for leave to serve the discovery applications on non-parties out of jurisdiction had not been met.[63]

8.27 On the first issue, the High Court preliminarily considered that the non-disclosure was of a material fact because the first appellant's

57 *Shee See Kuen v PT Trikomsel Oke Tbk* [2022] 2 SLR 239 at [29].
58 *Shee See Kuen v PT Trikomsel Oke Tbk* [2022] 2 SLR 239 at [30]–[31].
59 *Shee See Kuen v PT Trikomsel Oke Tbk* [2022] 2 SLR 239 at [30].
60 [2022] SGHC 218.
61 *DMX Technologies Group Ltd v Deloitte & Touche LLP* [2022] SGHC 218 at [1] and [3].
62 *DMX Technologies Group Ltd v Deloitte & Touche LLP* [2022] SGHC 218 at [4].
63 *DMX Technologies Group Ltd v Deloitte & Touche LLP* [2022] SGHC 218 at [10].

non-involvement in the audit was a relevant fact to be considered when deciding whether to grant leave.[64] The High Court then decided to set aside the first service order for non-disclosure of a material fact[65] because (a) the duty to make full and frank disclosure is an onerous one;[66] (b) the respondent would not be prejudiced if the order was set aside;[67] and (c) the discovery applications against the appellants were duplicative.[68]

8.28 Turning to the second issue, the High Court preliminarily noted that the discovery applications were correctly made pursuant to O 11 r 8 of ROC 2014 as they were summonses that fell within the processes referred to in O 11 r 8(1).[69] More crucially, the second issue raised the unexplored question of what the applicable test to determine if leave should be granted to serve a summons on a non-party out of jurisdiction pursuant to O 11 r 8 is.[70] The High Court clarified that the applicable test is not based on the grounds in O 11 r 1 because those grounds concern the service of originating processes out of Singapore, whereas the discovery applications are summonses.[71]

8.29 Instead, the applicable test is the close connection test laid down in *Burgundy Global Exploration Corp v Transocean Offshore International Ventures Ltd*[72] ("*Burgundy*"). The High Court held that the close connection test in *Burgundy* is a general test to be applied in an application for leave under O 11 r 8(1) in relation to non-parties for three reasons.[73] First, the Court of Appeal in *Burgundy* was setting out a general concern about constraints that should govern the exercise of jurisdiction over a non-party overseas.[74] Second, *Burgundy* did not lay down strict or exhaustive rules in relation to the specific context of examination of judgment debtor ("EJD") orders but was setting out the close connection test as a fundamental question that is generally applicable in respect of O 11 r 8(1) applications for non-parties.[75] Third, the two tentative points in relation to how the close connection test was to be applied to EJD orders

64 *DMX Technologies Group Ltd v Deloitte & Touche LLP* [2022] SGHC 218 at [17].
65 *DMX Technologies Group Ltd v Deloitte & Touche LLP* [2022] SGHC 218 at [22].
66 *DMX Technologies Group Ltd v Deloitte & Touche LLP* [2022] SGHC 218 at [23]–[24].
67 *DMX Technologies Group Ltd v Deloitte & Touche LLP* [2022] SGHC 218 at [25].
68 *DMX Technologies Group Ltd v Deloitte & Touche LLP* [2022] SGHC 218 at [26].
69 *DMX Technologies Group Ltd v Deloitte & Touche LLP* [2022] SGHC 218 at [32].
70 *DMX Technologies Group Ltd v Deloitte & Touche LLP* [2022] SGHC 218 at [11] and [28].
71 *DMX Technologies Group Ltd v Deloitte & Touche LLP* [2022] SGHC 218 at [35]–[38].
72 [2014] 3 SLR 381. *DMX Technologies Group Ltd v Deloitte & Touche LLP* [2022] SGHC 218 at [39].
73 *DMX Technologies Group Ltd v Deloitte & Touche LLP* [2022] SGHC 218 at [44] and [48].
74 *DMX Technologies Group Ltd v Deloitte & Touche LLP* [2022] SGHC 218 at [45].
75 *DMX Technologies Group Ltd v Deloitte & Touche LLP* [2022] SGHC 218 at [46].

were contextualising the general close connection test to the specific situation rather than restricting it to such orders only.[76] Furthermore, the High Court also found that the close connection test is consistent with the approaches taken in other jurisdictions.[77]

8.30 Accordingly, the specific formulation of the applicable test to apply for the court to determine if leave should be granted to serve a summons on a non-party out of jurisdiction is whether the person on which service is sought is so closely connected to the substantive claim that the Singapore court is justified in taking jurisdiction over him. The application of this close connection test is context specific, which means that the extent of the close connection required in each case will depend on the nature of the summons served on the non-party. Above all, the overarching concern addressed by the close connection test is to avoid the over-extension of the Singapore courts' extraterritorial jurisdiction on a non-party.[78] The High Court further suggested that the close connection test remains relevant under O 8 r 1(4) of the new Rules of Court 2021 where the court's approval for service of the originating process out of Singapore has not been granted.[79]

8.31 In applying the close connection test, the High Court considered that, compared to the EJD order in *Burgundy*, the application for non-party discovery is not as intrusive and does not require the person against whom the application is made to attend court personally. Thus, while the exercise of extraterritorial jurisdiction is not a matter to be taken lightly and a close connection must still be shown on the facts, the discretion to grant such leave need not be exercised quite as sparingly.[80]

8.32 On the facts, the High Court held that the close connection test was not satisfied in relation to the first appellant because he was not involved in the relevant audit.[81] However, after considering the relatively non-draconian nature of a discovery application, the High Court held that the close connection test was satisfied in relation to the second appellant because she was involved in the audit for one of the financial years concerned.[82] Consequently, the High Court allowed the appeal to set aside the service order against the first appellant but not the second appellant.[83]

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76 *DMX Technologies Group Ltd v Deloitte & Touche LLP* [2022] SGHC 218 at [47].
77 *DMX Technologies Group Ltd v Deloitte & Touche LLP* [2022] SGHC 218 at [50]–[56].
78 *DMX Technologies Group Ltd v Deloitte & Touche LLP* [2022] SGHC 218 at [48].
79 *DMX Technologies Group Ltd v Deloitte & Touche LLP* [2022] SGHC 218 at [49].
80 *DMX Technologies Group Ltd v Deloitte & Touche LLP* [2022] SGHC 218 at [57]–[58].
81 *DMX Technologies Group Ltd v Deloitte & Touche LLP* [2022] SGHC 218 at [59].
82 *DMX Technologies Group Ltd v Deloitte & Touche LLP* [2022] SGHC 218 at [60].
83 *DMX Technologies Group Ltd v Deloitte & Touche LLP* [2022] SGHC 218 at [61].

IV. Striking out of minority oppression claims for abuse of process

8.33 In *Leong Quee Ching Karen v Lim Soon Huat*,[84] the appellants appealed against the assistant registrar's decision to dismiss their striking-out applications against the respondent's minority oppression claim.[85] The applications were made pursuant to O 9 r 16 of ROC 2021. The appellants had previously offered to buy out the respondent's shares in the relevant companies, but the respondent refused the offer because it did not give her what she truly wanted, which was a special audit of the companies in satisfaction of her legitimate expectation to access information.[86]

8.34 The High Court (General Division) dismissed the appeals and found that the respondent's claim was not an abuse of process.[87] In arriving at this conclusion, the High Court had to determine the appropriate test for striking out a minority oppression claim for abuse of process where a buyout offer has been made under ROC 2021.[88]

8.35 Even though the striking-out applications were brought under ROC 2021, the High Court noted that it could still refer to authorities predating ROC 2021 to interpret O 9 r 16(1).[89] Thus, the framework laid down in *Kroll, Daniel v Cyberdyne Tech Exchange Pte Ltd*[90] ("*Kroll*"), which applied to O 18 r 19 of ROC 2014, remains applicable for assessing striking-out applications in the context of a buyout offer under O 9 r 16 of ROC 2021.[91]

8.36 The *Kroll* framework as laid down in *Kroll* has two stages. The first stage considers whether the offer presented was a "reasonable offer", taking into account the guidelines in *O'Neill v Phillips*.[92] If the offer was reasonable, the second stage considers whether the claimant was justified in rejecting that offer and choosing to seek relief by bringing a minority oppression claim. A key consideration of the second stage is whether the offer encompasses all the reliefs sought in the claim by paying attention to whether the buyout offer contains all the reliefs which the claimant can reasonably expect to obtain at trial. Another consideration is whether

84 [2022] SGHC 309.
85 *Leong Quee Ching Karen v Lim Soon Huat* [2022] SGHC 309 at [2] and [14].
86 *Leong Quee Ching Karen v Lim Soon Huat* [2022] SGHC 309 at [1]–[2].
87 *Leong Quee Ching Karen v Lim Soon Huat* [2022] SGHC 309 at [3].
88 *Leong Quee Ching Karen v Lim Soon Huat* [2022] SGHC 309 at [15(a)] and [19].
89 *Leong Quee Ching Karen v Lim Soon Huat* [2022] SGHC 309 at [23].
90 [2022] SGHC 231 at [135].
91 *Leong Quee Ching Karen v Lim Soon Huat* [2022] SGHC 309 at [15(a)] and [29]–[30].
92 [1991] 1 WLR 1092.

there are any disputed issues which are more appropriately determined by the court.[93]

8.37 Two issues were raised in relation to the application of the *Kroll* framework. The first issue concerned whether the applicable standard for striking out is that of "reasonable expectation" or the traditional "plain and obvious" test.[94] The "reasonable expectation" standard only requires the defendant to show that the buyout offer proposed included all the reliefs which a claimant could *reasonably expect* to obtain at trial, whereas the "plain and obvious" standard requires the defendant to show that it is *impossible* for the relief sought to be granted.[95]

8.38 The High Court found that the applicable standard in the *Kroll* framework remains the "plain and obvious" test for three reasons.[96] First, the High Court in *Kroll* did not intend to overturn established law on striking out by using the expression "reasonably expect".[97] Second, the High Court in *Kroll* had applied the traditional "plain and obvious" test in other parts of the decision and did not consider whether the claimant in that case could "reasonably expect" to have obtained the reliefs sought.[98] Third, none of the cases reviewed in *Kroll* suggested that the traditional "plain and obvious" standard for striking out has changed to that of "reasonable expectation".[99]

8.39 Accordingly, the relevant portion of the second stage of the *Kroll* framework was reframed as whether the claimant is justified in rejecting the offer after considering whether the offer encompasses all the reliefs sought in the claimant's claim. The onus is on the defendant to show that it is *impossible* (and not just improbable or not reasonably expected) for the plaintiff to obtain the reliefs sought at the end of trial (apart from those already part of the buyout offer). It is only when the defendant can show this that the situation would be a *plain and obvious* case for striking out the claim entirely, on the basis that the continued prosecution of the action serves no useful purpose and is an abuse of process.[100]

8.40 There are four further points to note about the reframed second stage of the *Kroll* framework. First, this reframing does not disturb any

93 *Leong Quee Ching Karen v Lim Soon Huat* [2022] SGHC 309 at [30]; *Kroll, Daniel v Cyberdyne Tech Exchange Pte Ltd* [2022] SGHC 231 at [135].
94 *Leong Quee Ching Karen v Lim Soon Huat* [2022] SGHC 309 at [34]–[35].
95 *Leong Quee Ching Karen v Lim Soon Huat* [2022] SGHC 309 at [35].
96 *Leong Quee Ching Karen v Lim Soon Huat* [2022] SGHC 309 at [37]–[38].
97 *Leong Quee Ching Karen v Lim Soon Huat* [2022] SGHC 309 at [39].
98 *Leong Quee Ching Karen v Lim Soon Huat* [2022] SGHC 309 at [40].
99 *Leong Quee Ching Karen v Lim Soon Huat* [2022] SGHC 309 at [41]–[54].
100 *Leong Quee Ching Karen v Lim Soon Huat* [2022] SGHC 309 at [54].

other propositions of law relating to other considerations laid down in *Kroll*.[101] Second, the key concern of the inquiry is whether a claim for a specific *relief* for minority oppression will be impossible, not whether the claim for minority oppression *itself* will be impossible. Third, the operative question within the application of the *Kroll* framework is whether the buyout offer has addressed all the claimant's concerns that prompted the minority oppression action.[102] Fourth, the fact that it is unrealistic to expect the claimant to fully make out their case at the interlocutory stage explains the high threshold to be met for striking out and the need for such a draconian power to be exercised judiciously.[103]

8.41 Additionally, the High Court held that a third stage – framed as whether the court is able to utilise its tools and procedures to resolve any impediment to the petitioner's acceptance of the offer to avoid wasted time, costs and judicial resources by a full trial – should not be added to the *Kroll* framework, even in light of ROC 2021.[104]

8.42 Turning to the facts, since there was no dispute that the appellant's offer was a reasonable offer under the first stage of the *Kroll* framework, there were only two issues that required determination under the second stage.[105] On the first issue of whether the appellant's offer dealt with the respondent's desire for a special audit, the High Court found that the offer did not do so. This was because the offered exercise to value the shares did not address the respondent's legitimate expectation that the company had been properly managed and her concomitant right to access the relevant information.[106]

8.43 On the second issue of whether it was a plain and obvious case that the relief sought was impossible to obtain,[107] the High Court found that the pursuit of the special audit was not an impossible exercise.[108] This was because (a) a special audit is a possible relief under s 216 of the Companies Act 1967;[109] (b) the courts' supposed desire to bring an end to matters by encouraging the ultimate resolution of the dispute did not preclude an order for a special audit;[110] and (c) the respondent's

101 *Leong Quee Ching Karen v Lim Soon Huat* [2022] SGHC 309 at [55].
102 *Leong Quee Ching Karen v Lim Soon Huat* [2022] SGHC 309 at [56].
103 *Leong Quee Ching Karen v Lim Soon Huat* [2022] SGHC 309 at [57].
104 *Leong Quee Ching Karen v Lim Soon Huat* [2022] SGHC 309 at [58] and [61].
105 *Leong Quee Ching Karen v Lim Soon Huat* [2022] SGHC 309 at [15(b)] and [20].
106 *Leong Quee Ching Karen v Lim Soon Huat* [2022] SGHC 309 at [67]–[68].
107 *Leong Quee Ching Karen v Lim Soon Huat* [2022] SGHC 309 at [70].
108 *Leong Quee Ching Karen v Lim Soon Huat* [2022] SGHC 309 at [78].
109 2020 Rev Ed. See *Leong Quee Ching Karen v Lim Soon Huat* [2022] SGHC 309 at [79]–[80].
110 *Leong Quee Ching Karen v Lim Soon Huat* [2022] SGHC 309 at [81]–[83].

further allegations of misfeasance or misappropriation were made out. Furthermore, a special audit did not offend the reflective loss principle,[111] and the respondent's inaction prior to the suit was at best a neutral factor.[112] Accordingly, the High Court dismissed the appeals and upheld the assistant registrar's decision not to strike out the respondent's claim.[113]

V. Bifurcation orders in personal injury cases

8.44 In *Dai Yi Ting v Chuang Fu Yuan*,[114] the defendant applied to bifurcate the trial for a personal injury claim. There were also two third parties in the suit.[115]

8.45 Preliminarily, the power to order bifurcation is provided under O 33 r 2 of ROC 2014.[116] The High Court (General Division) considered that, when read together with O 33 r 3(2), the primary purpose behind the power to order bifurcation is to ensure the efficient conduct of a trial by avoiding the trial of unnecessary issues or questions. This leads to a corresponding elimination or reduction of delay and expense in both the preparation for and attendance of the trial.[117]

8.46 Separately, the High Court suggested in *dicta* that the key distinction between the provisions providing for the power to order bifurcation in ROC 2014 and ROC 2021 is the presence of O 3 r 1 in ROC 2021, which provides for the attainment of certain ideals in civil procedure. As such, the power to order bifurcation provided for by O 9 r 25(2) of ROC 2021 must be applied with those ideals in mind.[118] These ideals relate to promotion of expeditious and cost-effective proceedings that are achieved by the efficient use of court resources, and are all ultimately tailored towards the achievement of fair and practical results, thereby ensuring fair access to justice.[119]

8.47 After surveying the key precedents,[120] the High Court surmised that the principle that emerged from those decisions was that the court should order bifurcation where it is just and convenient in the

111 *Leong Quee Ching Karen v Lim Soon Huat* [2022] SGHC 309 at [86]–[92].
112 *Leong Quee Ching Karen v Lim Soon Huat* [2022] SGHC 309 at [93].
113 *Leong Quee Ching Karen v Lim Soon Huat* [2022] SGHC 309 at [94].
114 [2022] SGHC 253.
115 *Dai Yi Ting v Chuang Fu Yuan* [2022] SGHC 253 at [1].
116 *Dai Yi Ting v Chuang Fu Yuan* [2022] SGHC 253 at [9].
117 *Dai Yi Ting v Chuang Fu Yuan* [2022] SGHC 253 at [11].
118 *Dai Yi Ting v Chuang Fu Yuan* [2022] SGHC 253 at [13].
119 *Dai Yi Ting v Chuang Fu Yuan* [2022] SGHC 253 at [14].
120 *Dai Yi Ting v Chuang Fu Yuan* [2022] SGHC 253 at [16]–[19].

circumstances of the case to do so.[121] Further, the policy and primary purpose behind the power to order bifurcation is to achieve the expeditious and cost-effective conduct of proceedings.[122] However, this purpose must ultimately yield to the attainment of justice as between the parties and the just and convenient test must be applied taking all the circumstances of the case into account.[123] Further, the High Court explained that in construing this purpose, it had deliberately used words found in the ideals contained in O 3 r 1(2) of ROC 2021 because cases governed by ROC 2021 should apply the just and convenient test with the ideals in mind.[124]

8.48 The High Court established four general factors to consider when applying the just and convenient test in an application for bifurcation:[125]

(a) the degree of demarcation between the issues of liability and damages;[126]

(b) the complexity of issues of liability and damages;[127]

(c) the prevailing policies on case management;[128] and

(d) as an overarching consideration, the effect of bifurcation on the party opposing it, focusing on whether bifurcation will impose substantial injustice on the opposing party which goes beyond mere inconvenience and amounts to an infringement on the other party's fair access to justice.[129]

8.49 Additionally, the burden is on the party applying for bifurcation to convince the court that it is just and convenient to make the order.[130]

8.50 Personal injury cases often entail certain unique characteristics such as uncertainty as to the plaintiff's future, the lack of a firm prognosis of the plaintiff's condition until some years after the accidence, and the lack of documentary records. These characteristics give rise to the concern that the claimant may not be able present a complete and sympathetic picture of its case at trial. Thus, the High Court held that additional

121 *Dai Yi Ting v Chuang Fu Yuan* [2022] SGHC 253 at [20].
122 *Dai Yi Ting v Chuang Fu Yuan* [2022] SGHC 253 at [25]–[26].
123 *Dai Yi Ting v Chuang Fu Yuan* [2022] SGHC 253 at [27].
124 *Dai Yi Ting v Chuang Fu Yuan* [2022] SGHC 253 at [26].
125 *Dai Yi Ting v Chuang Fu Yuan* [2022] SGHC 253 at [29].
126 *Dai Yi Ting v Chuang Fu Yuan* [2022] SGHC 253 at [30].
127 *Dai Yi Ting v Chuang Fu Yuan* [2022] SGHC 253 at [31].
128 *Dai Yi Ting v Chuang Fu Yuan* [2022] SGHC 253 at [32]–[33].
129 *Dai Yi Ting v Chuang Fu Yuan* [2022] SGHC 253 at [34].
130 *Dai Yi Ting v Chuang Fu Yuan* [2022] SGHC 253 at [29].

factors specific to personal injury cases should also be considered in deciding whether to order bifurcation.[131]

8.51 Two general considerations are applicable to personal injury cases. First, there is no general concern or presumption against bifurcation in personal injury cases.[132] Second, the tactical advantage that might accrue to a plaintiff by not ordering bifurcation should not be a relevant consideration as the paramount duty of the court is to look at the interests of *all* parties in determining whether to order bifurcation.[133]

8.52 Next, the High Court established four factors and explained how they may affect the order for bifurcation in personal injury cases:[134]

> (a) **Uncertainty in the plaintiff's future.** The more uncertain the plaintiff's future, the more likely bifurcation would be ordered.[135]
>
> (b) **Point at which a firm prognosis of the plaintiff can be made.** The later a firm prognosis of the plaintiff can be made, the more likely bifurcation would be ordered.[136]
>
> (c) **Complexity of the facts and availability of evidence.** Factual circumstances and evidential issues may determine whether it is better for the trial on liability to take place before damages, especially if an earlier determination on liability would be easier because the facts are fresher in the witnesses' memory.[137]
>
> (d) **Possibility for consolidation of several actions.** The possibility of an order for consolidation of several actions arising out of the same accident up to the determination of liability, with liberty for each claimant to assess their respective damages separately, would be considered in deciding whether to order bifurcation.[138]

8.53 Applied to the facts, the High Court found that this was an apt case for bifurcation because there was a clear demarcation between the issues of liability and damages that could result in substantial cost savings if the issues of liability were decided before damages.[139] There were also

131 *Dai Yi Ting v Chuang Fu Yuan* [2022] SGHC 253 at [42].
132 *Dai Yi Ting v Chuang Fu Yuan* [2022] SGHC 253 at [43].
133 *Dai Yi Ting v Chuang Fu Yuan* [2022] SGHC 253 at [44]–[45].
134 *Dai Yi Ting v Chuang Fu Yuan* [2022] SGHC 253 at [47].
135 *Dai Yi Ting v Chuang Fu Yuan* [2022] SGHC 253 at [48].
136 *Dai Yi Ting v Chuang Fu Yuan* [2022] SGHC 253 at [49].
137 *Dai Yi Ting v Chuang Fu Yuan* [2022] SGHC 253 at [50].
138 *Dai Yi Ting v Chuang Fu Yuan* [2022] SGHC 253 at [51].
139 *Dai Yi Ting v Chuang Fu Yuan* [2022] SGHC 253 at [52]–[53] and [57].

potentially difficult issues arising from the multiplicity of parties. In particular, since the issues of damages could be inherently complex and require a rather involved process, it would be more efficient and in the interest of justice for issues of liability to be decided first.[140]

8.54 Additionally, the plaintiff's difficulties in having to attend the trial twice over were personal in nature and were not strictly relevant to the determination of bifurcation.[141] Furthermore, the fact that third parties had been seeking a quantification of the plaintiff's claims to take instructions on mediation should not stop the plaintiff from providing such information because the quantification would necessarily be tentative prior to the final judicial disposition of the matter.[142] Accordingly, the High Court granted the application and ordered that the trial be bifurcated.[143]

VI. Validity of Tomlin Orders

8.55 In *HQH Capital Ltd v Chen Liping*,[144] the claimant was a company that provided a short-term loan to the defendant pursuant to two initial agreements.[145] The underlying dispute arose between the parties when the defendant allegedly failed to deliver shares to the claimant after it exercised a call option pursuant to the initial agreements.[146] Afterwards, on the parties' application, an order by consent was granted to the effect that all further proceedings between the parties be stayed except for the purpose of carrying into effect the terms set forth in the schedule to the order. This was the first Tomlin Order.[147]

8.56 However, the defendant defaulted on the terms in the schedule to the first Tomlin Order.[148] After further negotiations, another order by consent that all further proceedings against the defendant be stayed except for the purpose of carrying into effect the terms in the schedule was granted.[149] This was the revised Tomlin Order.

140 *Dai Yi Ting v Chuang Fu Yuan* [2022] SGHC 253 at [54].
141 *Dai Yi Ting v Chuang Fu Yuan* [2022] SGHC 253 at [56].
142 *Dai Yi Ting v Chuang Fu Yuan* [2022] SGHC 253 at [58].
143 *Dai Yi Ting v Chuang Fu Yuan* [2022] SGHC 253 at [2] and [59].
144 [2022] SGHC 215.
145 *HQH Capital Ltd v Chen Liping* [2022] SGHC 215 at [4].
146 *HQH Capital Ltd v Chen Liping* [2022] SGHC 215 at [5]–[6].
147 *HQH Capital Ltd v Chen Liping* [2022] SGHC 215 at [8].
148 *HQH Capital Ltd v Chen Liping* [2022] SGHC 215 at [9].
149 *HQH Capital Ltd v Chen Liping* [2022] SGHC 215 at [10].

8.57 The parties then agreed to an extension of time for the defendant to make payments to the claimant by way of a deed of agreement.[150] This deed of agreement was accompanied by an addendum, which clarified its provisions.[151] Subsequently, the claimant filed a summons to enter judgment and applied for orders enforcing the terms of the revised Tomlin Order.[152]

8.58 Preliminarily, the High Court (General Division) held that the arguments relating to the initial agreements were not relevant because they concerned issues relating to the main underlying dispute.[153] Thus, the rule in *Henderson v Henderson*,[154] or the extended doctrine of *res judicata*, operated to preclude the defendant from raising points not previously decided because they were not raised in earlier proceedings, even though they could and should have. Given that the defendant had opted to settle the dispute, it was not for her to reopen those matters before the court in an application for final judgment on the revised Tomlin Order.[155]

8.59 After considering various authorities on the nature and effect of Tomlin Orders,[156] the High Court explained that Tomlin Orders are consent orders which have three key elements characterising them: the furnishing of agreed-upon terms in a schedule to the order; the imposition of a stay of proceedings so that parties may carry out the settlement; and the preservation of the power of the court to make orders for the purpose of compliance with the terms in the schedule.[157] However, the Tomlin Order does not mandate the performance of any term in the schedule and operates merely as a record of the terms of the parties' contractual agreement. Thus, it is only when the parties are deadlocked on the performance of the terms in the schedule that the court may, upon application of any party and in exercise of the powers reserved to the court, make orders to enforce compliance of those terms.[158]

8.60 Turning to the first issue on validity of the revised Tomlin Order,[159] the High Court clarified that while Tomlin Orders operate to place a stay of proceedings, they do not curtail the court's powers to lift the stay as the court's power to impose and lift a stay are derived from

150 *HQH Capital Ltd v Chen Liping* [2022] SGHC 215 at [12].
151 *HQH Capital Ltd v Chen Liping* [2022] SGHC 215 at [13].
152 *HQH Capital Ltd v Chen Liping* [2022] SGHC 215 at [15].
153 *HQH Capital Ltd v Chen Liping* [2022] SGHC 215 at [21].
154 (1843) 3 Hare 100.
155 *HQH Capital Ltd v Chen Liping* [2022] SGHC 215 at [22]–[23].
156 *HQH Capital Ltd v Chen Liping* [2022] SGHC 215 at [25]–[31].
157 *HQH Capital Ltd v Chen Liping* [2022] SGHC 215 at [24]–[25] and [32].
158 *HQH Capital Ltd v Chen Liping* [2022] SGHC 215 at [32].
159 *HQH Capital Ltd v Chen Liping* [2022] SGHC 215 at [20].

O 3 r 2(2) of ROC 2021.[160] Additionally, nothing in the first Tomlin Order stated or necessarily implied that the court had no power to lift the stay.[161] The High Court then found that if it were necessary to lift the stay imposed by the first Tomlin Order to make the revised Tomlin Order, the judge would have done so. There was also no requirement for an express order lifting the stay imposed by the first Tomlin Order in circumstances where the parties came before the judge, in full agreement, requesting the grant of the revised Tomlin Order.[162] Thus, the revised Tomlin Order was validly granted as the judge was not *functus officio* when granting it.[163]

8.61 The second issue was whether the subsequent agreements, specifically the deed of agreement and the accompanying addendum, had modified the revised Tomlin Order in any binding way.[164] After scrutinising the relevant terms of these documents,[165] the High Court held that because the defendant had not fulfilled her requisite obligations triggering the operation of the relevant term of the agreement and did not take the position that the addendum was valid, the subsequent agreements had not modified the revised Tomlin Order.[166]

8.62 Finally, the High Court considered the third issue on whether the terms recorded in the revised Tomlin Order should be set aside.[167] The starting point for this inquiry was that the schedule to a Tomlin Order can be set aside on the basis upon which any ordinary contract can be set aside because it is not an order of court but instead a contract between the parties.[168] However, the evidence did not show any reason to suggest that the defendant had entered into the settlement agreement under illegitimate pressure. In fact, the High Court considered that the pressures faced by the defendant, which included being subject to a Mareva injunction, were the ordinary pressures of a lawsuit faced by litigants when compelled to comply with interlocutory orders in the lead-up to trial. Furthermore, since the defendant was also legally represented when agreeing to the two Tomlin Orders, the High Court did not find that the contractual agreement recorded in the schedule to the revised Tomlin Order was void for duress.[169] Hence, since the revised Tomlin Order was

160 *HQH Capital Ltd v Chen Liping* [2022] SGHC 215 at [34].
161 *HQH Capital Ltd v Chen Liping* [2022] SGHC 215 at [34].
162 *HQH Capital Ltd v Chen Liping* [2022] SGHC 215 at [39].
163 *HQH Capital Ltd v Chen Liping* [2022] SGHC 215 at [40].
164 *HQH Capital Ltd v Chen Liping* [2022] SGHC 215 at [20], [42] and [45].
165 *HQH Capital Ltd v Chen Liping* [2022] SGHC 215 at [46]–[48].
166 *HQH Capital Ltd v Chen Liping* [2022] SGHC 215 at [49].
167 *HQH Capital Ltd v Chen Liping* [2022] SGHC 215 at [20].
168 *HQH Capital Ltd v Chen Liping* [2022] SGHC 215 at [51].
169 *HQH Capital Ltd v Chen Liping* [2022] SGHC 215 at [51].

validly granted, the High Court granted the application to carry out the terms of the schedule.[170]

VII. Raising a new point on appeal

8.63 In *Wei Ho-Hung v Lyu Jun*,[171] the parties were an unmarried couple, and the dispute arose over putative gifts made by the respondent to the appellant during the time of their relatively short relationship.[172] The appellant had initially argued at trial in the High Court below that she was entitled to the gifts wholly, and not only to a share of the assets and sums of money, because they were gifts of love.[173] However, on appeal to the High Court (Appellate Division), the appellant abandoned the assertion that the assets were transferred to her as gifts wholly for her benefit but instead submitted that the judge erred in determining that the respondent lacked any and all intention to benefit her, even to a lesser degree.[174]

8.64 The appellant thus sought leave under O 56A r 9(5)(*b*) of ROC 2014 to raise a new point on appeal.[175] Order 56A r 9(5)(*b*) states that "[i]f a party intends to apply in the course of the hearing for leave to introduce a new point not taken in the Court below, this should be stated clearly in the Case".[176] However, the appellant's case had only expressly sought leave under O 56A r 9(5)(*b*) in respect of only one of the claims, even though similar arguments were made for some of the other claims.[177]

8.65 The High Court (Appellate Division) found that the word "should" in O 56 r 9(5)(*b*) need not be interpreted as a condition precedent for leave to be sought, since even if the court permits the party to apply for leave, it does not follow that such leave would be granted. Nonetheless, given that the adequacy of notice is a relevant factor, the failure to indicate even one's basic intention to seek leave under O 56A r 9(5)(*b*) will in most cases be fatal to the application for leave.[178]

8.66 Additionally, the High Court (Appellate Division) clarified that there is a difference between omitting to indicate one's intention to seek

170 *HQH Capital Ltd v Chen Liping* [2022] SGHC 215 at [54]–[55].
171 [2022] 2 SLR 1066.
172 *Wei Ho-Hung v Lyu Jun* [2022] 2 SLR 1066 at [1] and [4].
173 *Wei Ho-Hung v Lyu Jun* [2022] 2 SLR 1066 at [6].
174 *Wei Ho-Hung v Lyu Jun* [2022] 2 SLR 1066 at [12].
175 *Wei Ho-Hung v Lyu Jun* [2022] 2 SLR 1066 at [13].
176 *Wei Ho-Hung v Lyu Jun* [2022] 2 SLR 1066 at [16].
177 *Wei Ho-Hung v Lyu Jun* [2022] 2 SLR 1066 at [14].
178 *Wei Ho-Hung v Lyu Jun* [2022] 2 SLR 1066 at [16].

leave under O 56A r 9(5)(*b*) and failing entirely to seek the court's leave to raise a new point whether in writing or orally. The former counts against the application for leave (which may still be made); but the latter may result in the dismissal of the new point without anything further.[179]

8.67 Leave was not granted for the appellant to raise its new point on appeal because the High Court (Appellate Division) found that the application under O 56A r 9(5)(*b*) was mischaracterised as raising a new "point" when what was actually sought was to advance a new case which had not been put before the judge below.[180] Two factors led to this conclusion. First, the appellant's case on appeal was fundamentally at odds with the case advanced in the trial below.[181] Given that the appellant's case on appeal asserted a particular state of mind, the parties and the judge below should have had the opportunity to explore the issue fully at trial by calling for evidence to be adduced and tested through cross-examination. Mere reliance on the record of appeal was inappropriate as it would have been prejudicial to the respondent for the court to consider the evidence without allowing the respondent the opportunity to explain the evidence adduced in the context of the case advanced on appeal.[182]

8.68 Second, the appellant could not explain or prove the assertion that the respondent had specifically intended for the appellant to receive the benefit of at least 50% of the moneys he had transferred, as it was not an issue that would have crossed the minds of the parties and the judge during the trial in the court below. There was thus inadequate evidence that could prove the specific proportion of the share the respondent had allegedly intended the appellant to have; consequently, the appellant's case on appeal could not be determined.[183]

8.69 While new points may be allowed on appeal in suitable cases, appellate courts adopt a cautious approach and are guarded against parties who seek to raise such points inappropriately. This is because the efficiency and authority of appellate courts are increased and strengthened by the opinions of learned judges who have considered the same issues in the courts below.[184] Given the cautious approach towards new points, there is no room for entirely new cases to be raised on appeal.[185] Accordingly, the High Court (Appellate Division) dismissed the appellant's appeal and

179 *Wei Ho-Hung v Lyu Jun* [2022] 2 SLR 1066 at [18].
180 *Wei Ho-Hung v Lyu Jun* [2022] 2 SLR 1066 at [24]–[25].
181 *Wei Ho-Hung v Lyu Jun* [2022] 2 SLR 1066 at [26].
182 *Wei Ho-Hung v Lyu Jun* [2022] 2 SLR 1066 at [26]–[27].
183 *Wei Ho-Hung v Lyu Jun* [2022] 2 SLR 1066 at [28].
184 *Wei Ho-Hung v Lyu Jun* [2022] 2 SLR 1066 at [31]–[33].
185 *Wei Ho-Hung v Lyu Jun* [2022] 2 SLR 1066 at [33].

emphasised that attempting to advance new cases on appeal amounts to an abuse of the appeal process.[186]

VIII. Returned of garnished sums when substratum of order is reversed on appeal

8.70 In *ST Group Co Ltd v Sanum Investments Ltd*,[187] the respondent sought and obtained leave to enforce an arbitral award against the appellants.[188] The respondent then proceeded to obtain judgment for the relief stated in the arbitral award and, on that basis, obtained three garnishee orders against the appellant.[189] The appellant subsequently succeeded in setting aside the order granting leave to seek enforcement.[190] Consequently, the appellant made this application to the Court of Appeal seeking, amongst others, the return of the sums garnished under the garnishee orders, with interest.[191] Alongside these proceedings, there was an ongoing Macau-seated arbitration commenced by the respondent, which granted an interim measure to the effect that if and when a Singapore court ordered the garnished sums to be returned, the moneys would be placed in an escrow account pending a final award in the arbitration.[192]

8.71 The Court of Appeal affirmed that the touchstone for the invocation of the inherent power to set aside a garnishee order is one of "need".[193] In this case, there was a clear need, in the interests of justice, to set aside the judgment and the garnishee orders because their entire substratum had ceased to exist after the setting aside of the leave order. Conversely, not setting aside the orders would allow entirely invalid court orders remaining formally operative, which would be unjust and bring the legal system into disrepute.[194]

8.72 In any event, even if some balancing exercise needed to be undertaken, it was unclear how the respondent's arguments on the appellant's dilatory conduct and the merits of the underlying claim currently being litigated in a separate arbitration were relevant to the question of whether court orders which have lost their substratum should

186 *Wei Ho-Hung v Lyu Jun* [2022] 2 SLR 1066 at [29] and [33].
187 [2022] 1 SLR 1280.
188 *ST Group Co Ltd v Sanum Investments Ltd* [2022] 1 SLR 1280 at [4].
189 *ST Group Co Ltd v Sanum Investments Ltd* [2022] 1 SLR 1280 at [6]–[7].
190 *ST Group Co Ltd v Sanum Investments Ltd* [2022] 1 SLR 1280 at [14]–[16].
191 *ST Group Co Ltd v Sanum Investments Ltd* [2022] 1 SLR 1280 at [16]–[17].
192 *ST Group Co Ltd v Sanum Investments Ltd* [2022] 1 SLR 1280 at [28]–[29].
193 *ST Group Co Ltd v Sanum Investments Ltd* [2022] 1 SLR 1280 at [44].
194 *ST Group Co Ltd v Sanum Investments Ltd* [2022] 1 SLR 1280 at [47].

be set aside.[195] Crucially, those arguments did not outweigh the inherent need to maintain consistency in court orders and to set aside judgments and orders that should never have been made.[196]

8.73 Next, the Court of Appeal confirmed that the appellate court has the inherent power to order a return of sums paid under a judgment or order that has been reversed on appeal.[197] Precedent cases adopted a restitutionary analysis for the return of such sums, which was based on the policy of unravelling the orders made by the court below in order to give effect to the appeal.[198]

8.74 On the issue of whether the court should order the return of the garnished sums, the Court of Appeal held that the starting point is that garnished sums should be returned as a matter of justice, since a party should not be deprived of moneys due to a court order that was found to be wrong on appeal.[199] Arguments that relate to considerations collateral to the fundamental purpose of unravelling the effect of a prior court order which has lost all validity are not relevant in deciding whether to depart from the starting point.[200] In any event, on the facts, the Court of Appeal found that any allegation of injustice to the respondent was adequately addressed by the escrow arrangement ordered under the interim measure by the Macau-seated arbitration.[201]

8.75 Additionally, the return of sums paid out pursuant to a judgment or court order should generally be with interest.[202] The Court of Appeal found that the basis for the payment of such interest is to give effect to the underlying policy of unravelling the effect of court orders that have been found to be incorrect or set aside and is part of the court's equitable jurisdiction. However, the payment of interest is not an absolute rule but a general one, and the ultimate consideration is to do justice as between the parties.[203]

8.76 The present case was distinguished from precedent cases where interest was paid out because there were no pending proceedings and matters were essentially concluded in those cases. In the present case, the dispute was still pending resolution before the Macau-seated

195 *ST Group Co Ltd v Sanum Investments Ltd* [2022] 1 SLR 1280 at [48]–[49].
196 *ST Group Co Ltd v Sanum Investments Ltd* [2022] 1 SLR 1280 at [49].
197 *ST Group Co Ltd v Sanum Investments Ltd* [2022] 1 SLR 1280 at [52].
198 *ST Group Co Ltd v Sanum Investments Ltd* [2022] 1 SLR 1280 at [52]–[58].
199 *ST Group Co Ltd v Sanum Investments Ltd* [2022] 1 SLR 1280 at [61].
200 *ST Group Co Ltd v Sanum Investments Ltd* [2022] 1 SLR 1280 at [66].
201 *ST Group Co Ltd v Sanum Investments Ltd* [2022] 1 SLR 1280 at [67]–[69].
202 *ST Group Co Ltd v Sanum Investments Ltd* [2022] 1 SLR 1280 at [71].
203 *ST Group Co Ltd v Sanum Investments Ltd* [2022] 1 SLR 1280 at [72].

arbitration.[204] Given this, while the respondent should generally have to return the sums with interest, in the circumstances, it was the Macau-seated arbitration tribunal that was best placed to decide whether any interest should be paid and at what rate.[205] However, this did not mean that the appellants were not entitled to interest on the garnished sums at all.[206] Accordingly, the Court of Appeal did not make any order as to interest without prejudice to the Macau-seated arbitral tribunal's own determination on the matter.[207]

8.77 Lastly, the Court of Appeal decided that it should not order a stay on its order pending determination of the Macau-seated arbitral tribunal, since that tribunal had already determined that the interim measures should be put in place pending its own determination and the respondent's reasons justifying a stay were essentially the same as its allegations of prejudice, which were already dismissed.[208] However, as a matter of practicality and to ensure the orders would be executed in a manner consistent with the interim measures, an allowance for time was granted to allow the parties to seek further directions from the Macau-seated arbitral tribunal.[209]

8.78 Accordingly, the Court of Appeal ordered the judgment and garnishee orders to be set aside, the return of the garnished sums to the appellant, and no order as to payment of interest. Parties were also directed to seek further directions from the Macau-seated arbitral tribunal on effecting the return in light of the interim measures and on the issue of interest.[210]

IX. *Noble-Owens* orders and the appropriate course of action in light of an allegation that the judgment below was obtained by fraud

8.79 In *Yee Heng Khay (alias Roger) v Angliss Singapore Pte Ltd*,[211] the appellant was a former employee of the respondent who was found to have breached his duties of confidence, loyalty and fidelity.[212] After adducing further evidence on appeal, the appellant's main contention was

204 *ST Group Co Ltd v Sanum Investments Ltd* [2022] 1 SLR 1280 at [73].
205 *ST Group Co Ltd v Sanum Investments Ltd* [2022] 1 SLR 1280 at [74]–[75].
206 *ST Group Co Ltd v Sanum Investments Ltd* [2022] 1 SLR 1280 at [75].
207 *ST Group Co Ltd v Sanum Investments Ltd* [2022] 1 SLR 1280 at [76].
208 *ST Group Co Ltd v Sanum Investments Ltd* [2022] 1 SLR 1280 at [77].
209 *ST Group Co Ltd v Sanum Investments Ltd* [2022] 1 SLR 1280 at [78].
210 *ST Group Co Ltd v Sanum Investments Ltd* [2022] 1 SLR 1280 at [79].
211 [2022] 2 SLR 521.
212 *Yee Heng Khay (alias Roger) v Angliss Singapore Pte Ltd* [2022] 2 SLR 521 at [5].

initially that the judgment below had to be set aside as it was obtained by fraud,[213] but subsequently abandoned this argument and sought retrial on the basis that there was miscarriage of justice instead.[214] In response to new points made by the appellant, the respondent sought leave to adduce further evidence on appeal.[215]

8.80 There were three main issues before the High Court (Appellate Division). First, the High Court (Appellate Division) considered whether the respondent's application to adduce further evidence on appeal should be allowed.[216] The respondent was allowed to adduce further evidence as the High Court (Appellate Division) considered that the *Ladd v Marshall*[217] criteria were not applicable when the evidence was adduced in response to the new points and evidence raised by the appellant. In context, finality was less of a concern, and it would be just to allow the respondent the opportunity to respond.[218]

8.81 Second, the appropriate course of action in light of an allegation that the judgment below was obtained by fraud was considered.[219] As a starting point, the court must first establish its jurisdiction before it can consider what powers it possesses and may exercise.[220] Thus, in its appellate jurisdiction under the Supreme Court of Judicature Act 1969,[221] the High Court (Appellate Division) has the power to order a new trial in exercise of its civil jurisdiction pursuant to s 43(1) and may also order a new trial on limited questions without affecting other parts of the judgment pursuant to s 43(4).[222]

8.82 Given this, there are two alternative procedures a party seeking to set aside a judgment by adducing fresh evidence to show that the earlier court was fraudulently deceived can adopt. The party can either bring a new action for fraud, or appeal while seeking to adduce fresh evidence of the fraud.[223] Between these options, the High Court (Appellate Division) affirmed that the preferred practice, both locally and in Commonwealth jurisdictions such as England, Australia and Malaysia,[224] is to bring a new

213 *Yee Heng Khay (alias Roger) v Angliss Singapore Pte Ltd* [2022] 2 SLR 521 at [6]–[7].
214 *Yee Heng Khay (alias Roger) v Angliss Singapore Pte Ltd* [2022] 2 SLR 521 at [37] and [41].
215 *Yee Heng Khay (alias Roger) v Angliss Singapore Pte Ltd* [2022] 2 SLR 521 at [8].
216 *Yee Heng Khay (alias Roger) v Angliss Singapore Pte Ltd* [2022] 2 SLR 521 at [9].
217 [1954] 1 WLR 1489.
218 *Yee Heng Khay (alias Roger) v Angliss Singapore Pte Ltd* [2022] 2 SLR 521 at [13]–[15].
219 *Yee Heng Khay (alias Roger) v Angliss Singapore Pte Ltd* [2022] 2 SLR 521 at [9].
220 *Yee Heng Khay (alias Roger) v Angliss Singapore Pte Ltd* [2022] 2 SLR 521 at [16].
221 2020 Rev Ed.
222 *Yee Heng Khay (alias Roger) v Angliss Singapore Pte Ltd* [2022] 2 SLR 521 at [17].
223 *Yee Heng Khay (alias Roger) v Angliss Singapore Pte Ltd* [2022] 2 SLR 521 at [18].
224 *Yee Heng Khay (alias Roger) v Angliss Singapore Pte Ltd* [2022] 2 SLR 521 at [19]–[20].

action to set aside the judgment because fraud is a serious allegation that requires a high threshold for proof. Accordingly, the court must consider all the particulars of the fraud, examine all the affidavits and apply the strict rules of evidence.[225]

8.83 Within the appeal route, there are two identifiable scenarios that lead to different scenarios.[226] The first scenario is where the appellate court can determine the issue of fraud since fraud is admitted or there is incontrovertible evidence that the respondent deliberately misled the court at trial and procured the judgment by fraud. Where the appeal is allowed, the extent to which the judgment is set aside would depend on the relief sought by parties and whether it is possible for the appellate court to adjudicate on the merits of the appeal within the appeal proceedings given all the evidence placed before it. Orders may be made on the judgment only if the evidence can be clearly and objectively established before the appellate court, thereby enabling it to be in as good a position as the court of first instance to take a fresh view of the facts. If this is not the case, a retrial is required because cross-examination of the relevant witnesses will be necessary for the court to properly evaluate the new evidence and its effect on the relevance and weight of the rest of the evidence.[227]

8.84 The second scenario is where evidence on the issue of fraud does raise questions but does not lead to the incontrovertible conclusion that the respondent deliberately misled the court at trial and procured the judgment by fraud. In this scenario, the appellate court will consider the matter based on the evidence before it but will not set aside the judgment until fraud is established. There are two consequent approaches available to the appellate court. First, the appeal may be dismissed without consideration of the merits, and a new action for fraud is required.[228] Second, a *Noble-Owens* order from the English case of *Noble v Owens*[229] could be made, which provides directions for the issue of fraud to be determined within the appeal proceedings. As compared to commencing a fresh action for fraud, a *Noble-Owens* order is likely to save time and costs while enabling the issue of fraud to be determined by the most appropriate judge, whether that is the trial judge or otherwise.[230] If fraud is established, the appeal would be allowed and the judge would be at

225 *Yee Heng Khay (alias Roger) v Angliss Singapore Pte Ltd* [2022] 2 SLR 521 at [19].
226 *Yee Heng Khay (alias Roger) v Angliss Singapore Pte Ltd* [2022] 2 SLR 521 at [23].
227 *Yee Heng Khay (alias Roger) v Angliss Singapore Pte Ltd* [2022] 2 SLR 521 at [24].
228 *Yee Heng Khay (alias Roger) v Angliss Singapore Pte Ltd* [2022] 2 SLR 521 at [25].
229 [2010] 1 WLR 2491; [2010] 3 All ER 830.
230 *Yee Heng Khay (alias Roger) v Angliss Singapore Pte Ltd* [2022] 2 SLR 521 at [25] and [27].

liberty to proceed to hear a retrial of the issues that have given rise to the appeal. Otherwise, the appeal would be dismissed.[231]

8.85 On the facts, the appellant had sought to proceed with an appeal to set aside the judgment below and for the adjudication of the merits considering the new evidence adduced.[232] The appellant was thus essentially seeking a reversal of the judgment below on evidence that was not presented or tested by cross-examination in the court below. This approach was at odds with the High Court (Appellate Division)'s appellate jurisdiction as it would be placed in the position of a court of first instance.[233] In any case, a retrial would also not have been ordered because there already was a full trial before the judge below, the issue of fraud was contested, and the evidence of fraud was not incontrovertible.[234]

8.86 Thus, the High Court (Appellate Division) observed that the appellant would traditionally have needed to commence a fresh action to prove fraud to set aside the judgment, but also recognised the advantages of the *Noble-Owens* order. However, as the allegations of fraud were no longer pursued by the appellants, the High Court (Appellate Division) did not decide on the applicability of *Noble v Owens* in Singapore and its appropriateness in the present case.[235]

8.87 The third issue to be determined was whether there was a miscarriage of justice that justified a retrial.[236] The High Court (Appellate Division) did not find that there was any miscarriage of justice justifying a retrial because the appellant did not identify exactly how and where any miscarriage had occurred. Additionally, the appellant did not show that the decision of judge below would be so different if she had the further evidence before her.[237] Accordingly, the appeal was dismissed, and no retrial was ordered.[238]

X. Costs in the Singapore International Commercial Court

8.88 In *Senda International Capital Ltd v Kiri Industries Ltd*,[239] the Court of Appeal authoritatively laid out the manner in which costs are to

231 *Yee Heng Khay (alias Roger) v Angliss Singapore Pte Ltd* [2022] 2 SLR 521 at [27].
232 *Yee Heng Khay (alias Roger) v Angliss Singapore Pte Ltd* [2022] 2 SLR 521 at [29].
233 *Yee Heng Khay (alias Roger) v Angliss Singapore Pte Ltd* [2022] 2 SLR 521 at [32].
234 *Yee Heng Khay (alias Roger) v Angliss Singapore Pte Ltd* [2022] 2 SLR 521 at [33]–[34].
235 *Yee Heng Khay (alias Roger) v Angliss Singapore Pte Ltd* [2022] 2 SLR 521 at [36].
236 *Yee Heng Khay (alias Roger) v Angliss Singapore Pte Ltd* [2022] 2 SLR 521 at [9].
237 *Yee Heng Khay (alias Roger) v Angliss Singapore Pte Ltd* [2022] 2 SLR 521 at [44].
238 *Yee Heng Khay (alias Roger) v Angliss Singapore Pte Ltd* [2022] 2 SLR 521 at [45]–[46].
239 [2023] 1 SLR 96.

be assessed for proceedings in the Singapore International Commercial Court ("SICC") and the principles by which such costs are to be assessed.[240] The appellant appealed against the SICC's decision on costs, seeking an order for costs to be reassessed.[241]

8.89 The first issue was what the proper interpretation of "reasonable costs" under O 110 r 46 of ROC 2014 is.[242] Resolution of this question turned on the distinction between the respective approaches to costs in O 59, which governs costs in the High Court, and O 110 r 46, which governs costs in the SICC.[243]

8.90 Upon reviewing the decision of the SICC below, the Court of Appeal found that the SICC had erred in its understanding and explication of reasonable costs under O 110 r 46.[244] The Court of Appeal had three main points of reservation over the court's reasoning. First, the SICC's reasoning was premised on the notion that the costs regimes under O 59 and O 110 r 46 were comparable with and likely related to one another.[245] This view is incorrect, and the Court of Appeal clarified that the approaches to costs under the two provisions are fundamentally distinct.[246]

8.91 Second, a broad inquiry under O 110 r 46 into whether claimed costs were "reasonable costs" could not ignore the question of whether such costs are reasonable in quantum in overall terms. Thus, it is incorrect to hold that the inquiry under O 110 r 46 should only be about whether the claimed costs were reasonably incurred while excluding the question of whether they are reasonable in amount.[247]

8.92 Third, the SICC's reasoning suggested that there would be a discernible relationship between costs awarded under O 59 and O 110 r 46 respectively, explained by a single rather than double attenuation for reasonableness in the latter case. However, the Court of Appeal clarified that there is no discernible relationship between costs awarded under either provision. The test of reasonableness is an objective yardstick that is context-specific and thus cannot constitute the same thing in both

240 *Senda International Capital Ltd v Kiri Industries Ltd* [2023] 1 SLR 96 at [1].
241 *Senda International Capital Ltd v Kiri Industries Ltd* [2023] 1 SLR 96 at [27].
242 *Senda International Capital Ltd v Kiri Industries Ltd* [2023] 1 SLR 96 at [31].
243 *Senda International Capital Ltd v Kiri Industries Ltd* [2023] 1 SLR 96 at [32]–[33].
244 *Senda International Capital Ltd v Kiri Industries Ltd* [2023] 1 SLR 96 at [36] and [42].
245 *Senda International Capital Ltd v Kiri Industries Ltd* [2023] 1 SLR 96 at [37].
246 *Senda International Capital Ltd v Kiri Industries Ltd* [2023] 1 SLR 96 at [38].
247 *Senda International Capital Ltd v Kiri Industries Ltd* [2023] 1 SLR 96 at [39].

provisions, especially where different considerations inform the costs assessments under each provision.[248]

8.93 Accordingly, the Court of Appeal considered the issue as a matter of first principle.[249] The starting point of the analysis is the indemnity principle which dictates that a successful litigant is to be indemnified by the unsuccessful party for the legal costs it has incurred.[250] However, the entitlement of a party to costs recovery is not a substantive right but an incident of the legal system's scheme for costs recovery, which is driven by social policy.[251]

8.94 Next, the costs regime under O 59, which applies to proceedings in the High Court, is underpinned by the policy of enhancing access to justice for *all*. However, an uncompromising pursuit of a policy based on full indemnification may mean that the level of costs which a successful party will be awarded comes to be dependent on the resources expended by the litigant in securing the best possible assistance in prosecuting its claim or maintaining its defence.[252]

8.95 Accordingly, costs under O 59 are assessed at a level that would enable a litigant with reasonable merits to pursue justice. This requires the application of an objective standard to determine the level of recoverable costs in each case, shaped by the normative question of what ought to be the quantum of costs a successful party can recover for the particular work done in the context of the dispute in question, irrespective of the level of costs the successful party may have actually incurred in the legal proceedings.[253]

8.96 This objective standard manifests in two ways: in the use of costs precedents; and Appendix G of the Supreme Court Practice Directions 2013 in the assessment of costs by the High Court. These reflect the generally accepted level of costs for a particular type of work done in a particular type of case and also represent the notional level of costs necessary to enable a meritorious litigant pursue justice.[254] Thus, under O 59, whether costs are "reasonably incurred" entails a consideration of whether the costs were incurred in such a way that it corresponds to the level of effort that is generally accepted as being likely for the particular work in question. On the other hand, whether costs are "reasonable in

248 *Senda International Capital Ltd v Kiri Industries Ltd* [2023] 1 SLR 96 at [40]–[41].
249 *Senda International Capital Ltd v Kiri Industries Ltd* [2023] 1 SLR 96 at [42].
250 *Senda International Capital Ltd v Kiri Industries Ltd* [2023] 1 SLR 96 at [43].
251 *Senda International Capital Ltd v Kiri Industries Ltd* [2023] 1 SLR 96 at [45].
252 *Senda International Capital Ltd v Kiri Industries Ltd* [2023] 1 SLR 96 at [46].
253 *Senda International Capital Ltd v Kiri Industries Ltd* [2023] 1 SLR 96 at [47].
254 *Senda International Capital Ltd v Kiri Industries Ltd* [2023] 1 SLR 96 at [47]–[50].

amount" entails a consideration of whether the overall quantum of costs corresponds to the level of costs that is generally accepted as likely to be incurred for a particular type of dispute.[255]

8.97 Moving to the SICC costs regime under O 110 r 46, the Court of Appeal considered that the international and commercial nature of disputes that are litigated in the SICC means that parties before the SICC would generally be better resourced and more willing to incur greater expense on litigation. The policy of enhancing access to justice is hence less relevant in the SICC. Instead, the principal underlying consideration is a commercial one of ensuring that a successful litigant is not unfairly put out of pocket for sensibly prosecuting its claim or defence.[256]

8.98 Given these commercial considerations, costs awarded under O 110 r 46 are generally intended to restore or compensate the other party for the expense it had incurred in the legal proceedings as long as it has been incurred in sensibly mounting his claim or defence. Thus, the starting point for determination of recoverable costs is a subjective inquiry into what costs were incurred by the successful party in the particular case. However, even in the context of O 110 r 46, the indemnity principle is not unlimited as the successful party is only entitled to recover reasonable costs from the unsuccessful party, and not whatever costs it had incurred. Still, this test of reasonableness would be directed at the costs actually incurred and not what an appropriate level of costs to be incurred might be in a generic sense for a similar type of case.[257]

8.99 In determining whether the claimed costs are reasonable costs, the court will look both at whether the costs were reasonably incurred and whether the overall quantum of costs is reasonable. The list of factors which the court may consider, as set out in para 152(3) of the SICC Practice Directions 2021[258] ("SICC PD 2021"), also supports this position.[259] These factors taken together involve a holistic inquiry into whether the overall expense incurred by the litigant is reasonable in all the circumstances.[260]

8.100 Separately, in relation to solicitor-and-client costs, the Court of Appeal clarified that, in the context of O 59, the distinction between solicitor-and-client and party-and-party costs exists because the objective basis on which recoverable costs are assessed would mean that

255 *Senda International Capital Ltd v Kiri Industries Ltd* [2023] 1 SLR 96 at [50].
256 *Senda International Capital Ltd v Kiri Industries Ltd* [2023] 1 SLR 96 at [51].
257 *Senda International Capital Ltd v Kiri Industries Ltd* [2023] 1 SLR 96 at [52].
258 Effective 2 June 2021.
259 *Senda International Capital Ltd v Kiri Industries Ltd* [2023] 1 SLR 96 at [54].
260 *Senda International Capital Ltd v Kiri Industries Ltd* [2023] 1 SLR 96 at [55].

recoverable costs would often fall short of and therefore be distinct from solicitor-and-client costs. Given that the bases for assessing costs in O 59 and O 110 r 46 are not related, it must follow that there is no basis for importing the concept of solicitor-and-client costs into O 110 r 46.[261]

8.101 The second issue was how reasonable costs under O 110 r 46 are to be assessed.[262] Preliminarily, the Court of Appeal interpreted the words "taxed if not agreed" in the SICC's decision to mean that costs are to be taxed in the absence of an agreement on costs between the parties, but it does not oblige parties to come to an agreement on matters of costs.[263] However, it is generally desirable for parties to try to come to such an agreement or at least communicate with each other on their respective positions on costs.

8.102 The Court of Appeal held that the factors the trial court should consider when exercising its discretion as to how to determine questions of costs include the complexity of the issues in the substantive proceeding; the amount of costs claimed by the successful party; and the nature and extent of the differences in the respective positions on costs taken by the parties. This discretion should be guided by the need to maintain a measure of proportionality between, on the one hand, the nature of the inquiry into "reasonable costs", the corresponding level of detail involved in such an inquiry, and the expense associated with such an inquiry, and on the other, the amount of costs claimed by the successful party.[264]

8.103 The legal burden of proving that the claimed costs are reasonable costs falls on the successful party and is accompanied by the evidential burden of adducing evidence that is required to prove this.[265] This evidential burden may be discharged if the successful party adduces evidence of information on its incurred costs and includes sufficient breakdown of such costs. Such evidence would typically include a breakdown of the claimed costs in terms of the number of hours claimed; information identifying by whom those hours were incurred, their levels of seniority and corresponding hourly rates; and some explanation as to the types of work those hours were incurred for.[266]

8.104 Once the successful party has adduced the requisite level of information, the evidential burden shifts to the unsuccessful party to adduce evidence to show that the claimed costs are not reasonable costs.

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261 *Senda International Capital Ltd v Kiri Industries Ltd* [2023] 1 SLR 96 at [59].
262 *Senda International Capital Ltd v Kiri Industries Ltd* [2023] 1 SLR 96 at [31] and [60].
263 *Senda International Capital Ltd v Kiri Industries Ltd* [2023] 1 SLR 96 at [63]–[65].
264 *Senda International Capital Ltd v Kiri Industries Ltd* [2023] 1 SLR 96 at [70].
265 *Senda International Capital Ltd v Kiri Industries Ltd* [2023] 1 SLR 96 at [72].
266 *Senda International Capital Ltd v Kiri Industries Ltd* [2023] 1 SLR 96 at [73] and [100].

Since the inquiry into reasonable costs under O 110 r 46 is a subjective one that is particularised to the specific case, the best evidence an unsuccessful party can adduce to discharge this evidential burden will often be information as to its own costs incurred, which may be a sound proxy by which the trial court can determine what the appropriate level of costs is.[267]

8.105 Additionally, the Court of Appeal accepted that previous SICC costs awards may be relevant in the assessment of reasonable costs under O 110 r 46 where the cases share common features. However, this does not mean a tariff-based approach like under O 59 is used because the determination of reasonable costs under O 110 r 46 is ultimately subjectively assessed, considering the level of incurred costs in each specific case. Thus, any reliance placed on previous costs awards is not to determine the level of costs that should be awarded but to provide a check on whether the claimed costs are reasonable.[268]

8.106 On the facts, the appellant specifically disputed the SICC's award of post-transfer costs and expert fees to the respondent. However, as these costs orders were made in exercise of the SICC's discretion, the Court of Appeal found that it could only interfere with the decision if:[269]

> (a) the SICC was misguided with regard to the principles under which its discretion was to be exercised;
>
> (b) the SICC considered matters which it ought not to or failed to consider matters which it ought to have; or
>
> (c) the SICC's decision was plainly wrong.

8.107 In relation to the post-transfer costs, the Court of Appeal rejected the appellant's arguments and found that the respondent's cost schedule was not defective because the information provided was sufficient to enable the appellant to compare the claimed costs against the costs it had incurred for the corresponding stage of the proceeding, thereby allowing the appellant to assess whether the claimed costs were questionable.[270]

8.108 In relation to the expert fees, the Court of Appeal found that the level of information provided by the appellant was deficient and inadequate.[271] However, given that the amount of expert fees recoverable by the appellant was within an appropriate range when assessed against

267 *Senda International Capital Ltd v Kiri Industries Ltd* [2023] 1 SLR 96 at [75].
268 *Senda International Capital Ltd v Kiri Industries Ltd* [2023] 1 SLR 96 at [79].
269 *Senda International Capital Ltd v Kiri Industries Ltd* [2023] 1 SLR 96 at [84].
270 *Senda International Capital Ltd v Kiri Industries Ltd* [2023] 1 SLR 96 at [88]–[89].
271 *Senda International Capital Ltd v Kiri Industries Ltd* [2023] 1 SLR 96 at [94].

the respondent's own expert fees, the Court of Appeal decided not to interfere with the SICC's discretion in its award on costs for expert fees.[272] Thus, the appeal was dismissed by the Court of Appeal.[273]

272 *Senda International Capital Ltd v Kiri Industries Ltd* [2023] 1 SLR 96 at [97]–[98].
273 *Senda International Capital Ltd v Kiri Industries Ltd* [2023] 1 SLR 96 at [99].