7. CIVIL PROCEDURE

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Affidavits

7.1 In *Compact Metal Industries Ltd v PPG Industries (Singapore) Ltd* [2006] SGHC 242 at [3]–[6], Sundaresh Menon JC commended the following observations (*Singapore Court Practice 2006* (Jeffrey Pinsler gen ed) (LexisNexis, 2006) at para 38/2/7) "to all whose responsibility it is to prepare affidavits of evidence-in-chief for use in our courts":

> The rules of evidence are specifically preserved for the affidavit procedure (O 38 r 2(5)). The advocate should be satisfied that he has obtained all the necessary information from the witness concerning the case before he commences drafting. This information would usually be recorded in a statement signed by the witness. The statement may then be reviewed prior to drafting the affidavit to determine what evidence is relevant to the issues in the case. The advocate should only include relevant evidence, that is, evidence which concerns facts in issue and relevant facts (as provided for in ss 5-57 of the Evidence Act). All other information must be excluded from the affidavit as being outside the scope of the court's concern. Any part of the affidavit which is irrelevant may be struck out (O 41 r 6). It is important that all the evidence sought to be relied upon is included in the affidavit, as a witness may not be examined in chief on evidence which could have been included in the affidavit but which was omitted, unless the court otherwise orders (O 38 r 2(3)). At the same time, the deponent must understand that he is not obliged to disclose certain facts. These include privileged communications between his advocate and himself (ss 128 and 131 of the Evidence Act) and between his wife and himself (s 124 of the Evidence Act). The advocate must also be aware of the exclusionary rules and their exceptions which govern the admissibility of hearsay, opinion, character evidence and evidence of previous judgments and orders (ss 14–57 of the Evidence Act). In particular, there is the general rule applicable to affidavits used in non-interlocutory proceedings that the deponent is only entitled to refer to facts of which he has personal knowledge (O 41 r 5). It may be tempting for the deponent, particularly if he is a party, to state his

> conclusions on his evidence and to include arguments which express his point of view. Both courses would be improper. As a general rule, it is for the court to judge the effect of the evidence, not the witness himself, unless he is an expert who offers an opinion on his findings (s 47 of the Evidence Act). The deponent should not make assumptions as to what evidence will be given by the opposing witnesses and challenge it. As the purpose of the new process is to substitute the examination-in-chief of the witness, the affidavit should only contain matters which would ordinarily be raised at this stage. Consequently, it would not be appropriate to raise arguments on the facts and the law as these are matters which are traditionally left to the closing speech (see, for example, *Alex Laurie Factors v Morgan* The Times (18 August 1999), in which it was said that a witness statement is not intended to present a party's legal arguments). As in the case of the ordinary examination of witnesses, the affidavit must be free of insulting remarks, offensive language and other scandalous or oppressive matter. If the affidavit fails to abide by this rule, the offending part or parts will be automatically struck out by the court (O 41 r 6).

Appeals

7.2 For the reported cases in 2006 which dealt with appeals, a number of them dealt with the requirement of leave to appeal to the Court of Appeal. Two cases dealt with the admission of fresh evidence on appeal under the rule in *Ladd v Marshall* [1954] 1 WLR 1489, one dealt with a notice of appeal and one considered the principles for allowing new arguments on appeal.

Leave to appeal

7.3 In *IW v IX* [2006] 1 SLR 135, the issue was whether leave to appeal against a High Court decision which reversed the District Court's decision on a custody matter should be granted. The courts followed the guidelines laid down in *Lee Kuan Yew v Tang Liang Hong* [1997] 3 SLR 489 whereby leave may be granted only where: (a) there was a *prima facie* case of error; (b) the matter involved a question of general principles decided for the first time; and (c) the matter involved a question of importance upon which further argument and the decision of a higher tribunal would be to the public advantage.

7.4 The Court of Appeal rejected the more liberal approach in *Smith v Cosworth* [1997] 4 All ER 84, of "realistic prospect of success". The court considered this to be too low a threshold being merely an "arguable case" test which would not be difficult to satisfy.

7.5 The test in *Smith v Cosworth* was referred to by G P Selvam J in the case of *Pandian Marimuthu v Guan Leong Construction Pte Ltd* [2001] 3 SLR 400. However, the Court of Appeal in *IW v IX* noted that the judge had stated the test in a somewhat different form, namely, "whether the appeal is likely to succeed and whether, if leave is not granted, there is a likelihood of substantial injustice". This was more akin to the test of a *prima facie* case of error. Later High Court cases had consistently applied the guidelines laid down in *Lee Kuan Yew v Tang Liang Hong*.

7.6 It was held that to adopt a more liberal approach in granting leave to appeal would subvert the legislative intent behind s 28A of the Supreme Court of Judicature Act (Cap 322, 1999 Rev Ed) ("SCJA"). Section 28A was enacted to ensure that there should only be one tier of appeal as a matter of right with regard to matrimonial cases heard in the District Court.

7.7 The test of a *prima face* case of error was adopted by Woo Bih Li J in the case of *Candid Water Cooler Pte Ltd v United Overseas Bank Ltd* [2006] 3 SLR 216. He agreed with Justice Kan Ting Chiu's decision in *Essar Steel Ltd v Bayerische Landesbank* [2004] 3 SLR 25 that the ground in respect of a *prima facie* case of error need not be confined to one of law. It was held that the principles for granting leave to appeal to the Court of Appeal under s 34(2) of the SCJA were the same regardless of which sub-clause was relied on.

7.8 *IW v IX* was distinguished in another reported case in 2006 – *Ong Boon Huat Samuel v Chan Mei Lan Kristine* [2006] 4 SLR 148 – on the basis that the parties in *IW v IX* had accepted that leave to appeal must first be obtained and the issue of whether the appellant should have applied for leave to appeal to the Court of Appeal against a High Court decision was not canvassed before the courts in *IW v IX*. The distinction is really that in *IW v IX*, the issue was whether leave to appeal should be granted while in *Ong Boon Huat Samuel v Chan Mei Lan Kristine* the issue was whether leave to appeal was necessary in the first place.

7.9 The courts in *Ong Boon Huat Samuel v Chan Mei Lan Kristine* considered whether leave to appeal to the Court of Appeal is required in the context of paras 2 and 10(2) of the Supreme Court of Judicature (Transfer of Matrimonial Divorce and Guardianship of Infants Proceedings to District Court) Order 2003 (Cap 322, S 557/2003) ("the 2003 Transfer Order") and paras 1(2) and 6(2) of the Supreme Court of Judicature (Transfer of Matrimonial, Divorce and Guardianship of Infants Proceedings to District

Court) (Amendment) Order 2004 (Cap 322, S 63/2004) ("the 2004 Transfer Order").

7.10 It was held that if a divorce petition is filed before 15 December 2003, no leave to appeal to the Court of Appeal is required pursuant to para 10(2) of the 2003 Transfer Order. However, if the divorce petition is filed on or after 15 December 2003, the date of the appellate decision of the High Court becomes relevant under paras 1(2) and 6(2) of the 2004 Transfer Order. If the High Court's appellate decision was made before 1 November 2004, no leave to appeal to the Court of Appeal is required. Only where the divorce petition is filed on or after 15 December 2003 and the appellate decision of the High Court is made on or after 1 November 2004 is leave to appeal to the Court of Appeal required.

7.11 In *Ang Swee Koon v Pang Tim Fook Paul* [2006] 2 SLR 733, it was held that the courts when considering leave to appeal under s 21(1) of the SCJA should look at the amount in dispute in the appeal rather than the amount at trial.

The rule in Ladd v Marshall

7.12 The rule in *Ladd v Marshall* on the admission of further evidence on appeal was discussed in two reported cases in 2006. In *Cheng-Wong Mei Ling Theresa v Oei Hong Leong* [2006] 2 SLR 637, the Court of Appeal held that the exceptional circumstances of the case justified a relaxation of the rule in *Ladd v Marshall*.

7.13 *Ladd v Marshall* lays down three conditions that must be fulfilled before further evidence can be admitted on appeal: (a) it must be shown that the evidence could not have been obtained with reasonable diligence for use at trial; (b) the evidence must be such that, if given, it would probably have had an important influence on the result of the case, though it need not be decisive; and (c) the evidence must be apparently credible, though it need not be incontrovertible.

7.14 The plaintiff in *Cheng-Wong Mei Ling Theresa v Oei Hong Leong* had difficulty satisfying the first condition with respect to admitting certain development approvals on appeal. It could not be shown that the development approvals could not have been obtained with reasonable diligence. However, the issue of development approval was not raised by counsel or the trial judge at the hearing but appeared for the first time in the grounds of decision. The Court of Appeal held that this was a factor which

made the case exceptional and warranted not applying the strict rule in *Ladd v Marshall* too rigidly. Had the point been brought up during the hearing, the plaintiff would have been afforded the opportunity to address it and could easily have brought in new evidence to deal with the point. The rule in *Ladd v Marshall* would not have applied then.

7.15 *Sim Cheng Soon v BT Engineering Pte Ltd* [2006] 3 SLR 551 was another case that dealt with the rule in *Ladd v Marshall*. The Court of Appeal held that the conditions in *Ladd v Marshall* were cumulative, citing the Singapore Federal Court decision of *Lam Soon Cannery Co v Hooper & Co* [1965] 2 MLJ 148 and the Malaysian Court of Appeal decision of *Maxisegar Sdn Bhd v Silver Concept Sdn Bhd* [2005] 5 MLJ 1 in support.

7.16 On the facts, the court found that all three conditions in *Ladd v Marshall* were satisfied. The fresh evidence that counsel for the plaintiff was seeking to adduce on appeal took the form of negatives and photographs. Counsel for the plaintiff (who was not the original counsel at trial) contended that the missing photographs were discovered only after examining the back of the photographs that were adduced as evidence at the trial. The back of the photographs adduced at trial showed the time sequence in which they were taken and there was a break in the sequence of the photographs.

7.17 It was held that the standard of diligence required under the first condition of *Ladd v Marshall* was that of a reasonable one. The Court of Appeal took the view that the plaintiff's counsel in examining the back of the photographs to check the sequence of the numbers had exhibited extraordinary diligence. The second condition of *Ladd v Marshall* was also satisfied as the Court of Appeal considered that the timing of the taking of the photographs might be legally significant. The Court of Appeal was similarly of the view that the evidence was apparently credible.

Leave for new arguments

7.18 In the case of *Panwah Steel Pte Ltd v Koh Brothers Building & Civil Engineering Contractor (Pte) Ltd* [2006] 4 SLR 571, the appellant was permitted to raise a new point on appeal. The issue in this case centred around whether a certain agreement was "project-specific" in the sense that the appellant needed only to supply reinforcing bars for use in a specified project. At first instance, the appellant had argued that the agreement contained an implied term to that effect, which was rejected by the court. Counsel for the appellant on appeal sought to argue, instead, that a

purposive construction of the agreement should be adopted which would establish that the agreement was "project specific".

7.19 The Court of Appeal held that the argument that counsel for the appellant sought to rely upon was different as it depended on a purposive interpretation of the *express* terms of the contract which did not employ tests used for establishing implied terms in an agreement.

7.20 This new argument on appeal was allowed in this case as first, it was held that the appellate court was in just as advantageous a position as the court below to adjudicate the issue relating to a point of interpretation or construction which required no new evidence to be adduced. Secondly, no prejudice was caused to the respondent as the trial judge had already considered many of the same arguments which would be raised in respect of the purposive argument but in a different context with respect to the implied term agreement.

Notice of appeal

7.21 In *Lai Swee Lin Linda v AG* [2006] 2 SLR 565, the court was not persuaded that the appellant should be granted an extension of time for filing a notice of appeal. In considering whether an extension of time should be granted, the court considered factors such as the length of delay, the reasons for delay, the chances of the appeal succeeding if time for appealing were extended and the prejudice caused to the would-be respondent if an extension was granted.

7.22 On the facts, the delay was three months and 19 days. A delay of 49 days in *AD v AE* [2004] 2 SLR 505 had been considered "a very substantial delay". The court was also of the view that financial difficulties *per se* were insufficient to justify an extension of time. The court also stated that the chances of the appeal succeeding were "hopeless".

Application of the Rules of Court

7.23 The Rules of Court (Cap 322, R 5, 2006 Rev Ed) may apply to specific proceedings unless they are excluded by O 1 r 2(4) (see the proceedings listed in the second column of the table). However, the rules governing proceedings listed in r 2(4) may expressly apply the Rules of Court (O 1 r 2(5)). In *Chee Siok Chin v AG* [2006] 3 SLR 735, the High Court had to consider, *inter alia*, whether the Rules of Court applied to proceedings concerning the Parliamentary Elections Act (Cap 218, 2001 Rev Ed),

specifically the Parliamentary Elections (Application for Avoidance of Election) Rules ("PER") which are found in the Fourth Schedule to the Parliamentary Elections Act. Andrew Phang Boon Leong JA determined that as r 13 of the PER (which concerns the provision of security for costs within a set time-frame) was a mandatory provision, it had to be complied with strictly. Therefore, the Rules of Court could not be relied upon for the purpose of applying for an extension of time under r 13. (See [98]–[109] of the judgment for the various reasons on which this conclusion is based.)

Contempt in the face of the court

7.24 In *AG v Chee Soon Juan* [2006] 2 SLR 650, the High Court made a number of observations concerning procedural aspects of contempt in the face of the court:

(a) No distinction is drawn between proceedings in open court and chambers. Contempt may be committed in either forum (at [10]).

(b) Contempt may be committed before a judge or the Registrar (including deputy and assistant registrars) (at [12]–[14]).

(c) Conduct which is "aimed at interfering with the authority of the judiciary and proper functioning of the court, and at impairing the public's respect and confidence in the Judiciary" may constitute contempt in the face of the court (at [17]).

(d) The Attorney-General has the *locus standi* to initiate proceedings for contempt in the face of the court (at [19] and [20]).

(e) There is no requirement that the court should warn the alleged contemnor that he will be cited for contempt if he does not curb his contemptuous behaviour, although he certainly has the right to reply to the charge (at [21]).

7.25 The court also dealt with the substantive aspects of the law of contempt including its relationship with the freedom of speech (from [22]), liability for scandalising the court (from [30]) and the issue of what defences may be raised (from [44]). As to sentences for contempt, see [57] onwards of the judgment.

Discovery

"Without prejudice" communications

7.26 In *Mariwu Industrial Co (S) Pte Ltd v Dextra Asia Co Ltd* [2006] 4 SLR 807, the Court of Appeal deliberated on the scope of s 23 of the Evidence Act (Cap 97, 1997 Rev Ed) ("the Evidence Act") and the application of the common law to "without prejudice" communications. Section 23 states:

> In civil cases, no admission is relevant if it is made either upon an express condition that evidence of it is not to be given, or under circumstances from which the court can infer that the parties agreed together that evidence of it should not be given.

7.27 In *Lim Tjoen Kong v A-B Chew Investments Pte Ltd* [1991] SLR 188 ("*Lim Tjoen Kong*"), Chan Sek Keong J (as he then was), in delivering the judgment of the Court of Appeal, had pointed out that a literal reading of s 23 of the Evidence Act suggests that the privilege which protects "without prejudice" communications from disclosure is confined to the parties to the action (and their solicitors or agents).

7.28 His Honour referred to *Rush & Tompkins Ltd v Greater London Council* [1989] AC 1280 ("*Rush & Tompkins*"), which had established that the common law rule of privilege applied to prevent a person or entity ("a third party") from relying on "without prejudice" communications even if he or it was not a party to the negotiations. The learned judge raised the issue of whether s 23 is consistent with *Rush & Tompkins* bearing in mind the direction in s 2(2) of the Evidence Act: "All rules of evidence not contained in any written law, so far as such rules are inconsistent with any of the provisions of this Act, are repealed". The Court of Appeal in *Lim Tjoen Kong* considered that there was room for argument but did not decide the point as it had not been adequately addressed by counsel.

7.29 The Court of Appeal had the opportunity to revisit this area of law in *Mariwu Industrial Co (S) Pte Ltd v Dextra Asia Co Ltd* [2006] 4 SLR 807 ("*Mariwu Industrial*"). The case involved an application for leave to adduce new evidence. The applicant (the appellant in the case) sought the court's permission to produce correspondence between other parties concerning a patent. Chan Sek Keong CJ, who delivered the judgment of the Court of Appeal, referred to his judgment in *Lim Tjoen Kong* and reiterated the point that s 23 of the Evidence Act, literally construed, limits the application of the privilege to a situation in which a party to the negotiations claims protection

(at [27]). However, despite the inherent limitation of s 23, a third party is not entitled to rely on "without prejudice" communications as the common law applies to prevent this eventuality. His Honour stated (at [28]):

> Section 23's silence on the situation where a third party is involved does not mean that he is free to adduce "without prejudice" evidence. The situation remains governed by common law. In *Lim Tjoen Kong*, I left the question open whether *Rush & Tompkins* was or was not inconsistent with s 23 because of the lack of adequate argument on this point by counsel. Given our interpretation that the rationale of the s 23 privilege is to encourage settlements, I can see no inconsistency between that section and *Rush & Tompkins*.

7.30 The purist might argue that as s 23 is the governing provision concerning "without prejudice" communications (see s 5, which provides that admissibility is to be determined by the Evidence Act), the application of a common law rule which adds to the scope of that section is inconsistent with it. However, such a view undermines the fundamental purpose of the privilege which is to encourage the settlement of disputes. The reality is that a party who is involved in settlement negotiations is unlikely to make admissions against his interest for the purpose of resolving the dispute unless he is confident that all persons (not merely the parties involved in the negotiations) are barred from disclosing his communications at trial (should the negotiations fail to produce a settlement). Accordingly, the purposive approach of the Court of Appeal is fully justified.

7.31 The Court of Appeal in *Mariwu Industrial* considered other requirements of the privilege. The first point is that the privilege only applies if there is a dispute to be settled. This condition was not satisfied in the case (at [30]). Secondly, the privilege is intended to protect the communications of a party which constitute or involve an admission against his interest. Again, this requirement was not satisfied in the circumstances of the case (at [31]).

7.32 The Court of Appeal also indicated that the facts had raised the issue of whether there had been a waiver of privilege. However, the court did not deliberate on this point as the matter had not been put before it (at [32].)

Discovery where an order for bifurcation has been made

7.33 The court may vary an earlier order concerning discovery if the bifurcation of liability and quantum occurs. However, the variation of the discovery order must be justified. In *Beckkett Pte Ltd v Deutsche Bank AG*

[2006] SGHC 26, an order for discovery (pertaining to the value of shares) was made prior to an order that the trial proceed on the issue of liability leaving damages to be assessed subsequently. The High Court determined that variation of the discovery order was not necessary as there was nothing to indicate that the relevance of the information discovered was limited to the issue of liability or quantum. The documentation could have been relevant to both matters.

Evidence and admissibility of documents

Proof of documents

7.34 The law governing proof of documents, regarded by the Court of Appeal in *Jet Holding Ltd v Cooper Cameron (Singapore) Pte Ltd* [2006] 3 SLR 769 ("*Jet Holding*") at [47] as "an extremely important area of legal practice", was clarified in this case. The issue facing the Court of Appeal was whether the plaintiffs were entitled to rely on documents which they had tendered to prove their damages. The High Court ([2005] 4 SLR 417) had ruled that these documents (most of them had been exhibited to a supplemental affidavit of the evidence-in-chief of one of the plaintiff's witnesses) had not been properly admitted into evidence. This was because the plaintiffs had failed to: (a) adduce primary evidence of the documents or prove that the exceptions for adducing secondary evidence applied (see the Evidence Act, ss 64–67); and (b) prove the contents of these documents through admissible evidence (the court ruled that the evidence was inadmissible hearsay). As the documents were not included in an "agreed bundle", there was no agreement as to the effect of the documents (pursuant to Supreme Court Practice Directions 2006, para 60(8)(*b*)).

Status of documents exhibited by an affidavit of evidence-in-chief

7.35 In *Jet Holding*, the plaintiffs relied on the Malaysian Federal Court decision of *Palaniappa Chettiar v Tan Jan* [1965] 1 MLJ 182 to the effect that a document which is exhibited to an affidavit of evidence-in-chief "should be treated as though it were copied out in the affidavit itself" (*Jet Holding*, at [34]). The plaintiffs contended on this basis that the documents were properly tendered once the supplementary affidavit of the evidence-in-chief had been filed and tendered in court. The Court of Appeal dismissed this argument and distinguished *Palaniappa Chettiar* (at [36]):

> What *Palaniappa Chettiar* decided was that where the deponent of an AEIC signed the affidavit concerned, he or she was also deemed to have signed the documents exhibited to it as well. In other words, the *contents* of the AEIC

> would be deemed to *include* the *contents* of the documents exhibited to it as well. *However*, the crucial issue before this court was *quite different*; it concerned the issue as to whether or not *the actual documents themselves were admitted into evidence together with the affidavit itself*. If, in fact, documents such as those involved in the present appeal were *automatically* admitted *into evidence* by virtue of the fact that they were exhibited to the affidavit concerned *without more*, this would, in our view, *enable parties to circumvent the relevant rules and principles embodied within the Evidence Act (Cap 97, 1997 Rev Ed) which are intended to ensure that only the best evidence is admitted into evidence*.) Indeed, such an argument, if accepted, would, with respect, make *a mockery of* the rules and principles in the Evidence Act. In an extreme situation, *wholly bogus documents* could be admitted simply because the deponent of the affidavit had exhibited them to the affidavit itself. [emphasis in original]

7.36 Accordingly, a party may not avoid the requirements of the Evidence Act by claiming that documents exhibited to an affidavit of the evidence-in-chief have a particular status justifying automatic admission.

Agreed bundle

7.37 In *Jet Holding* (*supra* para 7.34), the Court of Appeal observed (at [44]) that while the inclusion of documents in an agreed bundle (not involved in this case) would resolve any issue concerning their authenticity, the evidence which those documents represent (the contents of the documents) would need to be proved if the opposing party does not agree to dispense with proof (*ie*, to accept the documents as already proved). (See above, under "Proof of documents".)

7.38 The Court of Appeal pointed out (at [56]) that litigants should use the agreed bundle wherever possible in order to avoid difficulties which they might otherwise encounter in having to comply with the technical requirements of the Evidence Act:

> We would, however, strongly urge parties to have recourse – as far as is possible – to an agreed bundle of documents, leaving out only those significant documents that are the subject of dispute and ensuring that they are clearly objected to, at which time they will need to satisfy the relevant criteria laid down in the Evidence Act.

See also [66] and [76] of the judgment.

Primary and secondary evidence

7.39 The Evidence Act contains a series of provisions (ss 64–67) concerning the admission of original documents (primary evidence) and copies (secondary evidence). The rule is that documents must be proved by primary evidence (s 66) unless they are within the categories listed in s 67. In *Jet Holding* (*supra* para 7.34), the plaintiffs (who had not complied with these requirements) argued that "it was both impractical as well as unfair to expect [them] to satisfy [these provisions], especially since the number of documents was voluminous" (at [40]). The Court of Appeal responded by identifying conflicting tensions involved in the application of the statutory provisions (at [41]–[43]):

> We note, however, that our Evidence Act was promulgated in its original form over one hundred years ago. The quantity and quality of documents has, unsurprisingly, increased as well as changed in the interim. Hence, the arguments that counsel for the plaintiffs have raised in so far as practicality and fairness are concerned cannot be dismissed out of hand. They embody the classic tensions that often run through most areas of the law. One is the tension between efficiency and fairness. However, the two are not incompatible. In fact, the former is itself one conception of fairness. Further, fairness is, as we have alluded to in the preceding paragraph, a concept that ought to result to both parties.
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> Another tension is to give effect both to the original intention underlying the statutory provisions concerned as well as to the changed circumstances which were not (in the nature of things) envisaged or contemplated at the time those provisions were enacted. It is true that it is often the case that both are irreconcilable. One issue that arises is whether or not this is the situation here. If so, then this court must leave any reform to the Singapore parliament itself.
>
> Put simply in the context of the present proceedings, the tension appears to be as follows: How should the court give effect to the underlying rationale of (in particular) ss 66 and 67 of the Evidence Act on the one hand, as well as ensure, on the other hand, that by giving effect to this rationale, inefficiency and unfairness do not ensue as a result? This latter consideration – not, perhaps, present at the time the Evidence Act was *originally* introduced in the local context – should not, in our view, be ignored because to do so would be tantamount to ignoring the practical realities in a changed (and ever-changing) legal milieu.

7.40 The court pointed out that, without the benefit of full arguments, it could only make "preliminary observations" on the proper approach to these issues ("there is a need for a more considered hearing before a definitive

approach is laid down by the court" (at [47])). The principles to be applied are as follows (at [48]–[50]):

> Firstly, we must begin with the general principle that the party who wishes to introduce the documents concerned into evidence must comply with the salient provisions of the Evidence Act (and see, for example, the Indian Privy Council decision of *Krishna Kishori Chowdhrani v Kishori Lal Roy* (1887) 14 IA 71). To begin with, any other premise would ignore the clear provisions of the Act. Worse still, it would be a signal to parties to be indisciplined in so far as the introduction of documents is concerned. It would then be the thin end of the procedural wedge and might even lead to the fraudulent introduction of documents. The fact that there is another legal barrier in the form of testing the truth of the contents of documents is no excuse for lowering the barrier in relation to the authenticity of documents under the salient provisions of the Evidence Act, and which would itself constitute an important threshold safeguard.
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> Secondly, however, it is also important to ensure that – at the other extreme – parties who wish (in *good faith*) to introduce documents to support their case are not put through an unnecessary procedural treadmill. An extreme example would be a situation where a party has to rely upon thousands of documents to establish his or her case in complex litigation.
>
> There is also a broader policy reason why an overly punctilious insistence on compliance with the provisions in the Evidence Act for its own sake is undesirable. If it is the case that a party is placed with the positive burden of producing original documents or calling the maker of the documents sought to be introduced into evidence, this would entail (particularly in situations akin to that outlined in the preceding paragraph) an enormous waste of court time and resources in the event that the party seeking to introduce the documents concerned is seeking to do so in good faith.

7.41 The opposing party may object to the admission of documents. If he does not do so at the appropriate time, he would not be in a position to mount a subsequent challenge to their introduction (at [51]):

> [I]f [the] documents are in fact marked and admitted into evidence without that party in fact satisfying the requirements in the Evidence Act *and* where there has been *no objection taken by the other party at that particular point in time*, then that other party *cannot* object to the admission of the said documents later. This last-mentioned proposition applies, of course, in an *a fortiori* manner when the party who had not objected to the introduction of the documents subsequently *cross-examines* the relevant witnesses on these documents in an attempt to discredit the truth of the contents stated therein.

7.42 If the opposing party's objection is "frivolous or vexatious" (*ie*, an improper attempt to stultify the process of admitting evidence), he faces a penalty in costs (at [50] and [56]).

7.43 The court found that the defendants had objected to the admission of the documents (at [68], [71] and [73]). Therefore, the plaintiffs were obliged to satisfy the requirements imposed by the Evidence Act which they failed to do. The court confirmed the decision of the High Court that the documents could not be relied upon by the plaintiffs.

Authenticity of documents (Order 27 rule 4 of the Rules of Court)

7.44 This rule did not apply in *Jet Holding* (*supra* para 7.34) as the defendants had objected to the admission of the documents. However, the Court of Appeal made certain observations about this provision (at [73]). The view of the High Court ([2005] 4 SLR 417) was that the authenticity of the documents had not been deemed admitted pursuant to r 4(1) as the time limit stipulated in r 4(2) (to which r 4(1) is subject) had not been triggered. The Court of Appeal expressed a different interpretation:

> [Order] 27 r 4(1) expressly provides that subject to r 4(2), a party is deemed to admit the authenticity of the documents in his opponent's lists of documents. This suggests that the default position under the Rules of Court is that provided for in r 4(1), namely, that a party is deemed to admit the authenticity of a document contained in his opponent's lists. That being the case, a party is generally deemed to admit authenticity unless he can bring himself within O 27 r 4(2) by showing that he had actually issued a notice of non-admission within the requisite window of time.

Hearsay issues

7.45 Although the Court of Appeal in *Jet Holding* (*supra* para 7.34) decided that the plaintiffs could not rely on the documents because they had not complied with the provisions of the Evidence Act, it went on to consider whether (assuming that there had been compliance with those provisions or the opposing party had agreed to authenticity), the documents were admissible as evidence of their contents (*ie*, substantively admissible). It concluded that the documents constituted hearsay evidence and that none of the exceptions to the hearsay rule applied (at [74]–[81]).

Depositions

7.46 Order 39 r 2(1) read with O 39 rr 1(1) and 1(2) of the Rules of Court (which concern the deposition process) empower the court to order the examination of a person even if the person to be examined is out of the jurisdiction. The court will make such an order on such terms as it thinks fit where the court believes this to be necessary for the purposes of justice. (*Kea Meng Kwang v Merrill Lynch Investment Managers (Asia Pacific) Ltd* [2006] SGHC 161, at [21] and [37]–[39].)

Injunctions

7.47 There was only one reported case in 2006 that dealt with injunctions. In *Vestwin Trading Pte Ltd v Obegi Melissa* [2006] 3 SLR 573, a permanent injunction was granted on the basis that damages would not be an adequate remedy. The case concerned the defendants' use or disclosure of confidential information belonging to the plaintiffs. It was held that it would be exceptional for damages to adequately compensate the plaintiff for the prospect of further breaches.

Interim payment and stay of proceedings

7.48 The rule established in *Samsung Corp v Chinese Chamber Realty Pte Ltd* [2004] 1 SLR 382 ("*Samsung*") that an application for summary judgment may only be made after the defendant's application for a stay of proceedings is heard applies to an application for an interim payment. In *Lian Teck Construction Pte Ltd v Woh Hup (Pte) Ltd* [2006] 4 SLR 1, the respondents applied for the proceedings in the action to be stayed in favour of arbitration pursuant to s 6 of the Arbitration Act (Cap 10, 2002 Rev Ed). In response, the appellant filed a cross-application for interim payment pursuant to O 29 r 10 of the Rules of Court. Andrew Ang J stated (at [19]) as follows:

> ... I came to the view that it was not sensible to distinguish between an O 14 r 1 application and one under O 29 r 10 in the context of a stay application. My reasons are as follows:
>
> > (a) An application for interim payment is an application on the merits and akin to an application for summary judgment. This is because before granting an order for interim payment, the court has to be satisfied that the plaintiff would obtain judgment for a substantial amount at trial (see O 29 rr 11 and 12). It was held by Browne-Wilkinson VC in *British and Commonwealth Holdings Plc v Quadrex Holdings Inc* [1989] QB 842 at 866 that when

considering whether to grant an order for interim payment, it was not sufficient for the court to be of the view that the claim was likely to succeed; the court had to be satisfied that it would succeed.

(b) If the defendant were to file affidavit(s) opposing the application for interim payment, such affidavit(s) would necessarily have to dwell on the merits of the claim. In so doing, the defendant would be taking a step inconsistent with its contention that the court had no jurisdiction by reason of the agreement to arbitrate.

(c) More importantly, so to do would constitute the taking of a step in the proceedings prohibited by s 6(1) of the Arbitration Act which provides as follows:

> Where any party to an arbitration agreement institutes any proceedings in any court against any other party to the agreement in respect of any matter which is the subject of the agreement, any party to the agreement may, at any time after appearance and *before delivering any pleading or taking any other step in the proceedings*, apply to that court to stay the proceedings so far as the proceedings relate to that matter. [emphasis added]

[emphasis in original]

7.49 As the case concerned arbitration proceedings, the question of whether the rule in *Samsung* applies to an application for an interim payment in the face of a stay application which does not involve arbitration proceedings remains open.

Judgments and orders

Review of perfected judgments

7.50 The principle that the High Court is not entitled to review its previously perfected judgment or order had been emphasised by the English Court of Appeal in *In re Barrell Enterprises* [1973] 1 WLR 19, a case which was endorsed by the Singapore Court of Appeal in *Neo Corp Pte Ltd v Neocorp Innovations Pte Ltd* [2006] 2 SLR 717. (Note O 20 r 11 of the Rules of Court in relation to the amendment of judgments and orders and O 92 r 5 concerning the judge's power to give further orders or directions incidental or consequential to his judgment.)

Clarification and variation of judgment

7.51 The principle that a court may not vary a judgment which has been perfected was reiterated in *Hin Hup Bus Service v Tay Chwee Hiang* [2006] 4 SLR 723. It is also an established rule that the court may clarify its judgment if it is appropriate to do so (*Tan Yeow Hiang Kenneth v Tan Chor Chuan* [2006] 1 SLR 557 at [8]).

Ex parte *orders*

7.52 The discretion to set aside an *ex parte* order pursuant to O 32 r 6 of the Rules of Court is intended to be broad. Accordingly, it is not appropriate "to impose limitations upon the exercise of such a discretion simply by importing rules and principles articulated in a different context" (*Karaha Bodas Co LLC v Perusahaan Pertambangan Minyak dan Gas Bumi Negara* [2006] 4 SLR 345 ("*Karaha Bodas*") at [45]). In *Karaha Bodas*, the High Court declined to apply the principles applicable to O 21 r 3 (which concerns discontinuance with the leave of the court) in construing the scope of its discretion pursuant to O 32 r 6.

Enforcement

7.53 Order 45 r 5(1)(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, Tay Yong Kwang J determined that this provision "does not apply to a solicitor or a firm of solicitors in its professional capacity" (at [28]). He said at [29]:

> [It does apply] to any case where committal is involved even if the applicant … expressly asks the court to impose only a fine instead of incarceration. This is a logical conclusion because while committal proceedings are generally commenced by a party to the proceedings, the ultimate sanction is left to the court.

His Honour also confirmed that the standard of proof applicable to an allegation of contempt of court pursuant to O 52 is the same as that which applies in criminal proceedings (beyond a reasonable doubt) (at [22]). The application was dismissed as the requisite standard of proof had not been attained.

Offer to settle

7.54 It was held in the case of *S & E Tech Pte Ltd v Western Electric Pacific Ltd* [2006] 2 SLR 7 that the court had no power under O 22A r 3(2) to allow the withdrawal of an offer to settle before the expiry of the minimum period (14 days), whether or not the offer to settle expressed a time limit for acceptance.

7.55 The defendant in this case had served on the plaintiff an offer to settle all the actions on the basis of payment by the plaintiff of a certain sum expressed in Singapore currency. In the evening of the day after the offer to settle was served on the plaintiff, the defendant realised that the offer to settle contained an error as the sum stated should have been expressed in US currency instead. Upon realising the mistake, the defendant's solicitors informed the plaintiff's solicitors, on the same day, by fax, and post as well as orally over the telephone about the mistake and that they would be applying to withdraw the offer to settle. However, the plaintiff's solicitors sent an Acceptance of Offer to the defendant's solicitors the next day. It was argued by the plaintiff's solicitors at the Registrar's Appeal that the court had no power to order the withdrawal of the offer to settle under O22A r 3 of the Rules of Court.

7.56 While Woo Bih Li J was similarly of the view that O 22A r 3 does not envisage the withdrawal of an offer to settle within the minimum period (14 days) and that the court has no power to order such a withdrawal, he held that the doctrine of mistake operated and there was therefore no valid settlement arising from the plaintiff's acceptance of the offer to settle. He pointed out that the draftsman of O 22A r 3(1) and 3(2) may not have envisaged the situation that had arisen in the present case and ventured that an application to amend an offer to settle could possibly be made.

Parties

7.57 In *Cheng-Wong Mei Ling Theresa v Oei Hong Leong* (noted above at paras 7.12 and 7.14), the respondent contended that the appellant did not have *locus standi* to seek a declaration that a property enjoyed an implied easement of way through the adjoining property because she had not completed the purchase of the property. This argument was rejected by the Court of Appeal who held that the appellant acquired an equitable interest in the property when the agreement was signed, as specific performance was available to the appellant pursuant to the signing of the agreement. While it was a condition in the contract that the declaration be obtained, the

condition was for the exclusive benefit of the appellant and it was within her right to waive that benefit, though unlikely on the facts.

7.58 *Tan Yow Kon v Tan Swat Ping* [2006] 3 SLR 881 dealt with the scope of the court's discretion to remove improper or unnecessary parties to an action under O 15 r 6(2)(*a*) of the Rules of Court. Sundaresh Menon JC considered that O 15 r 6 was designed to ensure that the right parties were before the court so as to minimise the delay, inconvenience and expense of multiple actions. Accordingly, he was of the view that the court was vested with a wide discretion in order to secure these objectives.

7.59 It was held that the court should not feel constrained to override the plaintiff's selection of defendants having regard to factors such as:

(a) how the respective interests of the party whose presence was sought and of the party resisting it stood to be affected;

(b) ensuring that interested parties had the opportunity to be heard and that the subject matter of the action could be disposed of without the delay and expense of multiple actions; and

(c) how other provisions of the Rules of Court bore on the particular concerns of the parties.

7.60 Citing the case of *Lee Kuan Yew v Tang Liang Hong* [1997] 2 SLR 819 in support, it was held at [58] that "the court's power under O 15 r 6(2) to bring and keep the appropriate parties before it is broad indeed and may be exercised even where no cause of action is asserted against a particular defendant".

7.61 *Lee Kuan Yew v Tang Liang Hong* was a case whereby the plaintiff's application to add the first defendant's wife was successful even though there was no cause of action brought against her. She was ordered to be joined on the basis of a property registered in her name which the first defendant was thought to have an interest in.

7.62 It was also held by Menon JC that O 15 r 6(2)(*a*) should be construed in the light of r 6(2)(*b*) which dealt with the court's power to add a party. Thus, a party who could be joined under r 6(2)(*b*) should be considered a "necessary" or "proper" party to the action and not liable to an order of cessation under r 6(2)(*a*). Otherwise, one could encounter a situation of an unwilling party being joined under r 6(2)(*b*) and then applying to be released under r 6(2)(*a*).

7.63 On the facts, the court found that the plaintiff's interest in keeping the second to fifth defendants in the action related directly to his desire to be able to establish his rights against them and to proceed with enforcement against each of them if he should succeed, without the need to commence fresh proceedings. This, opposed to the defendants' considerations of convenience and desire not to be troubled by the stress and expense of a law suit, led the court to hold that the second to fifth defendants were necessary or proper parties to the suit. The fact that the first defendant had offered to bear liability for all the defendants was not, in the court's view, a relevant consideration.

7.64 In *Chee Siok Chin v Minister for Home Affairs* [2006] 1 SLR 582, the applicants had named as respondents the Minister for Home Affairs and the Commissioner of Police in their official capacity. The proper respondent in that case should have been the Attorney-General pursuant to s 19(3) of the Government Proceedings Act (Cap 121, 1985 Rev Ed). It was held that the misjoinder of the Minister for Home Affairs and the Commissioner of Police was a curable procedural irregularity. V K Rajah J (as he then was) was of the view that the irregularity in question arose principally as a consequence of the peculiarities relating to proceedings against government organs, office holders or departments which is quite unlike the primary situations contemplated by O 15 r 6, where a named or joined party might be completely unrelated to the proceedings.

Pleadings

Striking out

7.65 The second to fifth defendants in *Tan Yow Kon v Tan Swat Ping* (noted above at paras 7.58–7.63) had also applied for the claim against them to be struck out under O 18 r 19 of the Rules of Court, contending that no allegation was levelled against them in the claim and only passing references were made to the second defendant. As to the others, beyond reciting the circumstances in which they had become partners, they were not mentioned again save in the context of the reliefs sought.

7.66 It was held at [24] that:

> A reasonable cause of action connoted a cause of action which had some chance of success when only the allegations in the pleadings were considered. As long as the statement of claim disclosed some cause of action, or raised some question fit to be decided at the trial, the mere fact that the

case was weak and was not likely to succeed was no ground for striking it out.

7.67 On the present facts, the pleadings revealed a sufficient nexus between the status of the second to fifth defendants as siblings and as partners of the partnership, and the reliefs sought against them.

Amendment

7.68 In *Sin Leng Industries Pte Ltd v Ong Chai Teck* [2006] 2 SLR 235, the High Court emphasised that an amendment (the application to amend was made during the second week of trial) will not be permitted merely because no prejudice results from it and the other party can be effectively compensated in costs. The interest of the administration of justice is a paramount consideration "if legal business should be conducted efficiently in the interests of the whole community, there is no reason why the trial dates should be vacated" (at [42]). The court may be more disposed to granting an amendment at a late stage of the proceedings in the interest of a comprehensive disposal of the issues between the parties (and so to avoid the risk of multiplicity of proceedings), if this is particularly appropriate in the circumstances (such as when there is a specific relationship between the parties) and injustice does not result from the amendment (as when the amendment does not take the opposing party by surprise). See *Rabiah Bee bte Ibrahim v Salem Ibrahim* [2006] 2 SLR 173, in which the plaintiff's application to re-amend her statement of claim in the course of trial was granted in part. The court also agreed with the observation of Waller LJ in *Worldwide Corporation Ltd v GPT Ltd* [1998] EWCA Civ 1894 that it cannot be argued that a party should always be entitled to amend his pleading, however late in the proceedings, as long as the applicable limitation period has not expired (at [16]).

7.69 In *Emjay Enterprises Pte Ltd v Skylift Consolidator (Pte) Ltd* [2006] 2 SLR 268, the High Court did not permit a defence to be amended for the purpose of the assessment of damages (interlocutory judgment had already been given) because of the prejudice which would otherwise have resulted.

Case not pleaded

7.70 In *Chua Kwee Chen, Lim Kah Nee and Lim Chah In v Koh Choon Chin* [2006] 3 SLR 469, the plaintiffs brought a claim against the defendant for breach of fiduciary duty and/or breach of trust based on various alleged acts of fraud and/or dishonesty. As the hearing proceeded, the plaintiffs

shifted their ground and sought to seek an account from the defendant instead. Andrew Phang Boon Leong J (as he then was) held at [76]:

> [W]here there appear to be ostensibly "neutral" claims for an account, these have to be read in the *context* of the pleadings as a whole. It is clear that it was *not* the plaintiff's *pleaded* case that there be an alternative claim for an account… It is clear that this court cannot consider a case that has not in fact been pleaded. Although I acknowledge that one cannot sacrifice justice and fairness at the altar of technicality, it is equally clear that one cannot ignore the clear rules as to pleadings where to do so would in fact result in the sacrifice of justice and fairness. Indeed, to allow the plaintiffs to "slip in" an unpleaded case literally at the eleventh hour would be to cause irreparable damage to the defendant's case. All that the rules as to pleadings seek to achieve (including defining with clarity the precise issues at hand, avoiding the element of surprise and of prejudice to the other party and, above all, achieving justice and fairness) would go by the board in this case if I were to hold otherwise.

7.71 In *Emjay Enterprises Pte Ltd v Skylift Consolidator (Pte) Ltd* [2006] 2 SLR 268, the defendant at the stage of assessment of damages sought to adduce new evidence in order to rely on a defence based on a limitation of liability clause. The plaintiff resisted this and argued that the limitation of liability clause had not been pleaded and since it went to the issue of liability it ought to have been pleaded and canvassed at the stage when liability was assessed. The defendant's contention was that issues as to the assessment of damages need to be pleaded pursuant to O 18 r 3(4) of the Rules of Court. Order 18 r 3(4) provides that:

> Any allegation that a party has suffered damage and any allegation as to the amount of damages is deemed to be traversed unless specifically admitted.

7.72 It was held that this merely permitted the defendant concerned to argue that any allegation as to, *inter alia*, the amount of damages put forward by the plaintiff was deemed to have been traversed. The onus remained on the defendant to specifically plead a particular argument, such as that proffered in the instant case. Further, the court was also of the view that it would be substantively prejudicial to allow the defendant to amend its pleadings at this late stage when interlocutory judgment had already been entered on behalf of the plaintiff. To allow the defendant to introduce a limitation of liability clause at this late stage could, if the clause was found applicable, be to the irreparable prejudice of the plaintiff. The requirements of both procedural and substantive justice and fairness demanded that the plaintiff not be taken by surprise.

Particularisation of the counterclaim

7.73 In *Silberline Asia Pacific Inc v Lim Yong Wah Allan* [2006] SGHC 27, it was held that a counterclaim for wrongful termination of a sole distribution agreement was a basis for staying the plaintiff's judgment in respect of the latter's claim for the price of its products. The High Court concluded that the defendant's counterclaim justified a stay of execution of part of the judgment sum obtained by the plaintiff (pursuant to his successful application for summary judgment) for the price of its products. The stay was granted in respect of part of the judgment sum because the defendant had not comprehensively quantified its counterclaim. It was for the defendant alleging the counterclaim to "particularise the amount of his set-off or counterclaim or to specify or indicate how it is made up or calculated" (at [11]).

Close of pleadings in action involving multiple parties

7.74 The defendants in *Vestwin Trading Pte Ltd v Obegi Melissa* (*supra* para 7.47) contended that the plaintiff's application for summary judgment was out of time as against each of the defendants. This argument could succeed only if O 18 r 20 of the Rules of Court was construed as providing that in a single action with multiple parties, pleadings would close as against each defendant on a different date. It was held that such a construction could not have been intended. First, it is contradicted by the words of O 18 r 20 which contemplate only one close of pleadings in any given action and of O 25 r 1 which contemplate only one summons for directions in any given action. Secondly, such a construction contended by the defendants does not advance the underlying purpose of O 14 r 14. Andrew Ang J stated at [14] and [15]:

> That amendment to the rules was added to ensure that resort to the summary judgment procedure is had at an early stage of the proceedings where the savings in costs would be most marked. Where some defendants have filed a defence and others have not filed a defence, it cannot be said that the proceedings are at an advanced stage. Indeed, it cannot be said that the matters in issue in the action have been properly crystallised until the *last* defendant has filed its defence. To require that the plaintiffs take out separate applications for summary judgment against the respective defendants would lead to multiplicity of actions and wastage of costs.

Res judicata *and issue estoppel*

7.75 It was held in the case of *Alliance Entertainment Singapore Pte Ltd v Sim Kay Teck* [2006] 3 SLR 712 that for *res judicata* to be established, there had to be, *inter alia*, a decision that was final and on the merits, and in respect of an issue raised in the later litigation. For issue estoppel to apply, there had to be, *inter alia*, identity of subject matter in the two proceedings being compared, where the decision on that subject matter was a "necessary step" to reaching the outcome of the first set of proceedings.

7.76 On the present facts, the defendants had successfully applied for the plaintiff's claim to be struck out on the ground that the pleadings in the plaintiff's claim failed to show a chain of title from the owner of the copyright to the plaintiff ("the earlier action"). The plaintiff subsequently commenced fresh proceedings which the defendants sought to strike out on the basis of *res judicata* or issue estoppel. It was held that *res judicata* was not established as there had been no judicial determination on the merits of the cause of action in the earlier action. Issue estoppel did not apply as well, the court found, as there was no identity of subject matter in the two proceedings. The earlier action was struck out on the narrower ground of failure to show requisite chain of title and not whether the plaintiff had the requisite exclusive license to make a claim against the defendants.

Security for costs

7.77 For a review of the principles governing the court's discretion to grant security for costs, see *Meyer Erwin v Lerner Brian* [2006] SGHC 163. With regard to the principles governing the court's discretion to order security for costs when there is an overlap between the defence and the counterclaim by the same defendant, see *PT Muliakeramik Indahraya TBK v Nam Huat Tiling & Panelling Co Pte Ltd* [2006] SGHC 154.

Stay of proceedings

Impact of video link on court's discretion to stay proceedings

7.78 In *Peters Roger May v Pinder Lillian Gek Lian* [2006] 2 SLR 381 at [26], V K Rajah J (as he then was) pointed out:

> Geographical proximity and physical convenience are no longer compelling factors nudging a decision on *forum non conveniens* towards the most "witness convenient" jurisdiction from the viewpoint of physical access.

This is primarily because "the availability and accessibility of video links coupled with its relative affordability have diminished the significance of the 'physical convenience' of witnesses as a yardstick" (at [26]). See also the observations of the learned judge in *Cheong Ghim Fah v Murugian s/o Rangasamy* [2004] 1 SLR 628 at [39] and that of Lord Nicholls of Birkenhead in *Polanski v Conde Nast Publications Ltd* [2005] 1 WLR 637 at [14] to the same effect.

Striking out

7.79 In *Chee Siok Chin v Minister for Home Affairs* (*supra* para 7.64), the applicants commenced proceedings by way of an originating motion seeking declarations that the Minister for Home Affairs and the Commissioner of Police had acted in an unlawful or unconstitutional manner by ordering the applicants to disperse and in seizing the items such as their t-shirts and placards when they held a "peaceful protest" outside the Central Provident Fund Building. The Attorney-General on behalf of the respondents sought an order that the proceedings be struck out on the basis that they were vexatious, frivolous and/or an abuse of process of court. In illustrating what is meant by vexatious, frivolous and/or an abuse of process of court, the court stated (at [33]–[34]) as follows:

> Proceedings are frivolous when they are deemed to waste the court's time, and are determined to be incapable of legally sustainable and reasoned argument. Proceedings are vexatious when they are shown to be *without foundation* and/or where they *cannot possibly succeed* and/or where an action is brought only for annoyance or to gain some fanciful advantage.
>
> The instances of abuse of process can therefore be systematically classified into four categories, *viz*:
>
> (a) proceedings which involve a deception on the court, or are fictitious or constitute a mere sham;
>
> (b) proceedings where the process of the court is not being fairly or honestly used but is employed for some ulterior or improper purpose or in an improper way;
>
> (c) proceedings which are *manifestly groundless or without foundation* or which serve no useful purpose;
>
> (d) multiple or successive proceedings which cause or are likely to cause improper vexation or oppression.
>
> [emphasis in original]

7.80 The court held that it is only in "plain and obvious" cases that the power to strike out should be exercised. In this context, the learned judge stated at [36] that:

> A *bona fide* litigant will not be prevented from pursuing a remedy unless the substance of the claim is plainly and unquestionably unsustainable. This summary procedure is not meant to be used as a ploy to avoid embarrassing proceedings and/or to evade debatable facts and/or legal arguments. The court must be convinced that the proceedings are bound to fail when it grants such a radical peremptory remedy.

7.81 On the facts of the case, the court ordered that the claim be struck out on the basis that it disclosed no legitimate legal grievance whatsoever against the respondents and/or any other authority. The claim was inescapably flawed by its own legal and factual inadequacies and fallacies which the applicants could neither redeem nor repair. The court was of the view that the only pivotal and only apparent complaint that the applicants had was the purported arbitrary exercise of police power, the substance of which was wholly misconceived and legally unsustainable.

Submission of "no case to answer"

7.82 In *Lim Swee Khiang v Borden Co (Pte) Ltd* [2006] 4 SLR 745, the Court of Appeal reiterated (at [5] and [6]) the point that a defendant takes a perilous step where he submits that the plaintiff has no case for the defendant to answer and elects not to adduce evidence:

> It is a trite principle that under our adversarial system of justice, each party has the right to conduct his action or his defence, as the case may be, in a way that benefits him most. It is also an accepted principle that he who asserts must prove and therefore a defendant is entitled to put the plaintiff to strict proof of everything he is alleging, without having to respond in any way to the allegations. However, it is also accepted that where a defendant calls no evidence to rebut the evidence of the plaintiff, a submission of no case in those circumstances is a very high-risk strategy. This is particularly so as the appellants are alleging a series of oppressive and prejudicial acts and omissions of the respondents. …
>
> ... In the light of this principle, the respondents would have to be supremely confident of the absence of any merits in the appellants' claims of oppression, either on the facts or on the law, to resort to a submission of no case to answer.

Summary judgment

Conditional leave to defend

7.83 The following observations were made by Choo Han Teck J in *Oversea-Chinese Banking Corp Ltd v Ang Thian Soo* [2006] 4 SLR 156 at [8]:

> Ordinarily, where a court has determined that there is an issue that ought to be tried, but that the defence is a shadowy one, as I find to be the case here, it means that the court has strong doubts as to the likelihood of a successful defence. However, that is a circular proposition in that until the defence has been tested at trial, the court cannot make a final determination of the merits of that defence. Nonetheless, if the overall circumstances in law and the available evidence in such a case indicate that the likelihood of the defence succeeding is very small, the court would require the defendant to pay the money claimed into court or provide a banker's guarantee for the amount claimed. That would be a usual condition to secure the opportunity of proving that his defence was a valid one after all. In addition to that, the court may also require him to provide security for costs.

7.84 Regarding the conditions which a court may impose when giving conditional leave to defend, see *Chin Tyng Lei v Lim Yoon Ngok* [2006] SGHC 104.

Time for filing application

7.85 Where the plaintiff has applied for summary judgment against two or more defendants and the application is made within 28 days of the close of pleadings (pursuant to O 14 r 14 of the Rules of Court) with regard to the last defence filed, the application is regarded as having been filed in time against all the defendants. This is so even though the application is filed more than 28 days after the deemed closure of pleadings in respect of the earlier defences. In *Vestwin Trading Pte Ltd v Obegi Melissa* (*supra* para 7.47), the eighth defendant was the last to file his defence. The plaintiffs filed their application for summary judgment 12 days after the eighth defendant filed his defence. Andrew Ang J stated (at [12]–[15]) as follows:

> All the defendants, save the eighth, argued that the application for summary judgment was out of time as against each of them. That argument could succeed only if O 18 r 20 could be read as providing that in a *single action* with multiple parties, pleadings would close as against each defendant on a different date.

That cannot be the case. Otherwise, the consequences would be that in a case such as this, where there are multiple parties in foreign jurisdictions and with the attendant delay in effecting service:

(a) close of pleadings will occur for each defendant on a different date;

(b) the time stipulated for taking out the summons for directions will expire as against each defendant on a different date;

(c) the plaintiff must therefore take out as many summonses for directions as there are defendants or risk being out of time;

(d) the court must give separate directions at separate hearings as regards how the plaintiff is to progress the action to trial as against each defendant; and

(e) in a personal injuries matter, different sets of automatic directions would take effect automatically, with different sets of deadlines running as against each defendant under O 25 r 8.

Such outcome cannot have been intended. It is contradicted by the words of O 18 r 20 which contemplate only *one* close of pleadings in any given action and of O 25 r 1 which contemplate only *one* summons for directions in any given action. Likewise, O 14 r 14 refers to an "action" in the singular form.

Further, the interpretation contended for by the defendants does not advance the underlying purpose of O 14 r 14. That amendment to the rules was added to ensure that resort to the summary judgment procedure is had at an early stage of the proceedings where the savings in costs would be most marked. Where some defendants have filed a defence and others have not filed a defence, it cannot be said that the proceedings are at an advanced stage. Indeed, it cannot be said that the matters in issue in the action have been properly crystallised until the *last* defendant has filed its defence.

To require that the plaintiffs take out separate applications for summary judgment against the respective defendants would lead to multiplicity of actions and wastage of costs. All the reasons in favour of a single trial also point to why there should be a single O 14 application. I conclude therefore that the plaintiffs' application is within time not only as against the eighth defendant but as against all the defendants. Even if I were wrong, this would seem to me a paradigm case where the court should allow an extension of time to prevent injustice.

Unless orders made by consent

7.86 In *Wellmix Organics (International) Pte Ltd v Lau Yu Man* [2006] 2 SLR 117, Andrew Phang Boon Leong J (as he then was), after pointing out

certain doctrinal difficulties in relation to the residuary discretion to interfere with the enforcement of an unless order made by consent ("consent unless order") (at [86]–[88]), thought it "desirable" for the court to have such a role (at [90]–[91]):

> It must be borne in mind that a consent unless order, whilst technically a contract between the parties, is one that allows one party to wholly deprive the other of its legal rights in the context of litigation. Even though such an order has been agreed upon between the parties, there may, in my view, arise certain special circumstances where it would nevertheless be unjust for the party in whose favour the consent order operates to insist on its enforcement in the absence of a high degree of intentionally contumacious or contumelious conduct.
>
> Such a discretion is, in the final analysis, merely an aspect of the court's power to have ultimate control over its own procedure. This is not at all unreasonable, in my view, and does, on balance, conduce to justice and fairness. The focus is still on procedure, rather than substance. It might be argued that the substantive rights of the plaintiff would be adversely affected. This is arguably the case but it must never be forgotten that an unless order is part of the procedural armoury and is not based on the substantive merits of the case as such. Thus, an unless order (whether by consent or otherwise) deals, in the final analysis, with the *litigation process and, on this score, the courts ought to have the final say.*
>
> [emphasis in original]

7.87 The court pointed out that such a residuary discretion is consistent with the court's inherent power to act in the interest of justice (see O 92 r 4 of the Rules of Court, which was closely examined by the learned judge in the context of consent unless orders (from [80] onwards)).

7.88 His Honour also observed that as a consent unless order is an order of court generated by the agreement of the parties, the question of whether there is such an agreement must be objectively ascertained in accordance with contractual principles (at [9]). As his Honour stated more specifically (at [14]):

> One has to adopt an *objective* approach towards ascertaining *the parties' intentions* at the initial hearing before the assistant registrar and, indeed, before he made the order concerned. In this regard, close attention had to be paid not only to the parties' own actions *in the context of the relevant surrounding circumstances* but also to the *language and terms of the actual order made by the assistant registrar himself.* [emphasis in original]

7.89 His Honour found that the assistant registrar's order was not an unless order by the consent of the parties but merely an unless order (at [50], [104] and [106]). (For the court's assessment of the circumstances which led to this conclusion, see [12]–[50] of the judgment.)

7.90 As to whether a consent unless order may be vitiated by the doctrine of mutual or unilateral mistake, his Honour found that even if the unless order could have been classified as an unless order by consent, it would have been vitiated by mutual mistake (because there was no agreement between the parties: see [58]) or unilateral mistake (because of one party's knowledge that the other party was labouring under a mistake: see [59]). (For a very useful analysis of recent developments in the law governing mistake, see [55]–[75] of the judgment.)

Writ and withdrawal of appearance

7.91 In *The Global 1* [2006] SGHC 30, the assistant registrar permitted the plaintiff to alter a writ *in rem* to a writ *in personam* because proceedings *in rem* were not maintainable and the action "was in substance an *in personam* action" (at [31]). The defendant had entered an appearance to the *in rem* action. It then applied for leave to withdraw the appearance on the basis that ownership of the subject vessel had changed prior to the issue of that writ. The court dismissed the defendant's application and exercised its discretion pursuant to O 2 r 1(2) of the Rules of Court to permit the plaintiff to change its writ *in rem* to a writ *in personam* (including the change of name of the defendant). The defendant was awarded costs because the litigation had resulted from the plaintiff's initial error of having issued an improper writ (the *in rem* action not having been maintainable).