

6. CIVIL PROCEDURE

Jeffrey PINSLER

*LLB (Liverpool), LLM (Cambridge), LLD (Liverpool);
Barrister (Middle Temple, UK), Advocate and Solicitor (Singapore);
Professor, Faculty of Law, National University of Singapore.*

Cavinder BULL

*MA (Oxford), LLM (Harvard);
Barrister (Gray's Inn, UK), Attorney-at-Law (New York State);
Advocate and Solicitor (Singapore).*

Appeals

6.1 There were three reported cases concerning appeals. One case dealt briefly with the requirement for leave when a party sought to argue new points which had not been raised at the trial below. The other two cases dealt with a notice of appeal, and one also considered whether leave to appeal was necessary when multiple grounds of appeal existed, and the effect of a “no-appeal” clause when parties appointed a court expert.

Leave for new arguments

6.2 In *Ng Bok Eng Holdings Pte Ltd v Wong Ser Wan* [2005] 4 SLR 561, the appellants brought up a new argument which had not been raised in the court below. The respondent objected that no leave had been obtained under O 57 r 9A(4)(b) of the Rules of Court (Cap 322, R 5, 2004 Rev Ed). The Court of Appeal held that the appellants would not be allowed to canvass the new point and agreed with the respondent’s contention that the respondent had been deprived of the opportunity to put before the trial judge all evidence relevant to the issue at the time the action had been instituted.

Notice of appeal

6.3 In *Projector SA v Marubeni International Petroleum (S) Pte Ltd (No 2)* [2005] 2 SLR 1, the appellant (“Projector”) was dissatisfied with the outcome of its application to discharge an injunction granted to the respondent (“MIP”). Projector appealed against certain parts of the judge’s orders. Subsequently, Projector applied to amend its notice of appeal to include an appeal against another part of the orders imposed. In dismissing Projector’s application, the learned judge considered all factors leading to the application for amendment (see *Projector SA v Marubeni International Petroleum (S) Pte Ltd* [2004] 4 SLR 241). The judge took the view that

Projector had made a deliberate decision with the benefit of legal advice in relation to the contents of the original notice of appeal. Projector had also displayed a lack of candour in explaining why the proposed amendment had initially been left out. Projector appealed against the judge's decision.

6.4 The Court of Appeal allowed Projector's application to set aside the order for dismissal. The court considered *Leong Mei Chuan v Chan Teck Hock David* [2001] 2 SLR 17 and the English case of *Costellow v Somerset County Council* [1993] 1 WLR 256, and stated that the correct interpretation of *Leong Mei Chuan v Chan Teck Hock David* was that a court should be inclined to grant an application for amendment unless grave prejudice or hardship (and not merely inconvenience) would be inflicted on the opposing party that could not be addressed by an order as to costs. If the prejudice could be addressed by an order as to costs, then an order for amendment should be granted unless the other circumstances of the case were exceptional.

6.5 On the present facts, if the amendment was allowed there would be a month's notice before the hearing of the appeal. MIP would have sufficient opportunity to address the substance of the amendment. The amendment also did not raise any new points. Although MIP had started participating in related South Korean proceedings in reliance on the part of the orders that Projector now sought to include in its notice of appeal, any expenditure on MIP's part could be adequately addressed by an order as to costs. Projector's lack of candour in its explanations was not serious enough to amount to an abuse of process, although it was good practice for a party seeking the court's assistance to make full disclosure of the circumstances that led to the default.

6.6 In *Riduan bin Yusof v Khng Thian Huat* [2005] 2 SLR 188, the respondents had applied to strike out the notice of appeal, *inter alia*, on the ground that the notice of appeal was irregular.

6.7 The Court of Appeal held that even if the notice of appeal did not adhere to the prescribed form, the court had the discretion to allow amendments to remedy the irregularity. In addition, unless the irregularity was so serious or fundamental that the court ought not to exercise its discretion, mere irregularities would not render the proceedings void.

6.8 In the present case, the respondents were unable to elaborate on how the alleged irregularity, if any, was so serious as to merit a striking out. The respondents' allegation was no more than a bare assertion and the application was dismissed.

Leave to appeal

6.9 In *Riduan bin Yusof v Khng Thian Huat* (*supra* para 6.6), the appellant's notice of appeal was based on two issues: (a) damages; and (b) costs. In their application to strike out the notice of appeal, the respondents tied their argument to strike out the appeal on costs to their arguments on the issue of damages. They submitted that if the appeal on damages failed, the only matter left would be an appeal on costs. Such an appeal required leave but this had not been obtained.

6.10 The Court of Appeal held that this argument was fallacious. Leave to appeal on the specific issue of costs was not required in this case precisely because the notice of appeal was not based solely on those grounds.

"No appeal" clause when appointing court expert

6.11 In *Riduan bin Yusof v Khng Thian Huat* (*supra* para 6.6), the appeal arose out of a dispute over a tenancy agreement. One issue was the respondent landlords' claim for compensation for damage to the property. It was not in dispute that the appellant tenant had caused some damage to the property. However, there was substantial disparity between the expert evidence of both parties on the degree of damage, the apportionment of fair wear and tear and the quantum of the claim. At the suggestion of the trial judge, the parties agreed to appoint a court expert on these issues. The agreed terms contained the provision that:

The Expert's decision [on the quantum of damages] shall be final and binding on both parties, and no appeal or revision shall be brought in respect of the Expert's decision.

6.12 Subsequently, the trial judge indicated that he had adopted the court expert's finding on damages in his grounds of decision. In the respondents' application to strike out the notice of appeal, they argued that the decision of the trial judge read together with the above clause precluded the appellant from bringing any appeal on damages.

6.13 The Court of Appeal held that the respondents had wrongly equated the court expert's report with the judge's order on damages. There was a distinction between the findings of the court expert and the trial judge's decision to base the quantum of damages on such findings. As long as the appellant did not seek to challenge the accuracy of the court expert's findings, the notice of appeal on the issue of damages would not constitute an abuse of process.

Costs

6.14 Nine reported decisions dealt with the issue of costs. Six illustrate when the conduct of the parties would warrant a departure from the general principle that costs should follow the event. One case involved the personal liability of a solicitor, another case considered the enforcement of an agreement for costs between a solicitor and his client, and the last reported decision concerned various miscellaneous points.

Conduct of parties

6.15 Two judicial attitudes are suggested by the six decisions in this area. First, the courts are more forgiving of conduct prior to and leading up to proceedings where parties are acting under their perceived rights. Second, behaviour during proceedings which disrupt or unnecessarily prolong the matter will be penalised.

6.16 The High Court decision in *Khng Thian Huat v Riduan bin Yusof* [2005] 1 SLR 130 and the subsequent Court of Appeal ruling in *Riduan bin Yusof v Khng Thian Huat (No 2)* [2005] 4 SLR 234 demonstrate both approaches. The appellant tenant had leased property from the respondent landlords. The parties agreed that various alterations would be made at the tenant's expense. Clause 2(I) of the tenancy agreement governed the tenant's rights to remove authorised alterations to the property in the event that it was delivered up to the landlords.

6.17 The main dispute at trial was whether the lease had been validly renewed or whether the landlords were entitled to claim double rent for the tenant's unlawful holding over. The action started in the Subordinate Courts but was later transferred to the High Court upon the landlords' application, as they anticipated that their claim for double rent would exceed the Subordinate Courts' jurisdiction.

6.18 In the High Court trial, it was found that the lease had been validly renewed and the landlords' claim for double rent was dismissed. However, there was also a claim by the landlords for damage caused to the property which was undisputed save as to quantum. The trial judge interpreted cl 2(I) as obliging the tenant to hand over the property inclusive of the authorised alterations. As the tenant had removed the authorised alterations, damages were assessed on the basis that the tenant had not been entitled to do so. A court expert was also appointed to assess the extent of damage caused.

6.19 Although the tenant had succeeded on the main issue of whether double rent was payable, each party was initially ordered to bear its own costs. While recognising that the parties had spent an inordinate length of time addressing the landlords' unsuccessful claim for double rent, the trial judge decided to give particular regard to the parties' conduct both prior to and during proceedings. The trial judge felt that proceedings had been initiated because the tenant had forced the landlords' hands. The tenant had unreasonably demanded from the landlords payment for the benefit of alterations, then, motivated "purely by malice and ill will", he had wilfully damaged the property by removing the alterations in breach of cl 2(I) and despite the landlords' unequivocal requests that he should leave the alterations intact. In addition, the tenant's disruptive conduct during trial had lengthened the hearing and exacerbated the tension between the parties.

6.20 The tenant's appeal on costs was allowed by the Court of Appeal. The court thought that the trial judge's comments on the tenant's conduct were understandable when based on his own (incorrect) interpretation of cl 2(I), but too harsh when viewed from the tenant's perception of his rights under the lease (which the Court of Appeal accepted as the correct interpretation). Neither was the landlords' conduct deplorable, even though their position ultimately had been proved wrong. Both sides had simply been caught up in their own differing interpretations of their rights under cl 2(I).

6.21 However, regard should be had to the fact that the landlords had shifted their case in the course of the proceedings. The landlords should also bear the consequences of their application to transfer the case from the Subordinate Courts to the High Court, as this was done pursuant to their claim for double rent which subsequently failed. The tenant was thus awarded the costs of the appeal and 80% of the costs below, bearing in mind his disruptive conduct during trial proceedings. The court expert's fees were to be shared equally between the parties.

6.22 The second case which demonstrates that acts done pursuant to a party's perceived rights should not be penalised is *Mohamed Ismail bin Ibrahim v Mohammad Taha bin Ibrahim (No 2)* [2005] 1 SLR 58. This occurred in the specific context of an action against an administrator of a deceased's estate.

6.23 Such cases usually involve a departure from the general principle that costs should follow the event. Order 59 r 6(2) of the Rules of Court allows a losing trustee or personal representative to claim his costs from the

estate unless he has acted unreasonably or acted in substance for his own benefit.

6.24 The defendant in this case had mounted his unsuccessful defence not merely as an administrator but also as an interested party. However, the dispute was not of his making and the advice given to him before the commencement of litigation had left him with little choice but to contest the plaintiffs' claim, which was also a legitimate and valid grievance.

6.25 The court felt that an order for costs to follow the event was not appropriate. It initially ordered that each party should bear its own costs. However, a re-hearing on costs was ordered before the order could be perfected because the court was concerned that its order would be disproportionately burdensome to the defendant executor. While it warned that any cavalier litigation by executors would be checked by the appropriate forum if the situation arose, the court ordered that in this case, the costs of both parties would be paid out of the estate on a standard basis.

6.26 At the re-hearing, the court also commented on the defendant's initial submission that he should be awarded costs on an indemnity basis regardless of the outcome of the case, based on the ground that he was the executor of the estate. The court found this argument to be "palpably one-sided" (at [2]). It ignored the fact that the defendant executor had also taken part as an interested party with a vested interest in the outcome of the proceedings.

6.27 The next case indicates that the courts are not so lenient where there is no basis for a party's conduct prior to the trial.

6.28 In *Ng Sing King v PSA International Pte Ltd (No 2)* [2005] 2 SLR 56, the plaintiffs were minority shareholders who commenced proceedings against the defendant majority shareholders, alleging breaches of s 216 of the Companies Act (Cap 50, 1994 Rev Ed). The claim was found to be unsustainable as the acceptable levels of commercial fairness had not been breached in any way. However, the court recognised that the defendants' conduct, though not oppressive, had given the plaintiffs cause to be aggrieved. One of two "cryptically-worded" resolutions was procedurally irregular, while both resolutions appeared to be "thinly veiled attempts to circumvent the requirement under the [Shareholders'] Agreement" for unanimous approval of all shareholder groups (at [177]). One defendant's nominee director had breached his fiduciary duties to the company by engaging in negotiations concerning a potential competitor. Both defendants'

nominee directors had also placed themselves in positions of conflict by discussing on the defendants' behalf the formation of a competing company.

6.29 During proceedings, the defendants had also “flippantly” raised unfounded and irrelevant allegations against the plaintiffs, unnecessarily prolonging the trial.

6.30 The court held that although the majority shareholders had successfully defended themselves, in view of the circumstances, it was appropriate that the parties should bear their own costs for the originating summons.

6.31 A case where a successful defendant was penalised for raising too many unnecessary issues is *Chwee Kin Keong v Digilandmall.com Pte Ltd* [2005] 1 SLR 502.

6.32 The respondent's business involved selling IT products through the Internet by offering them on websites. An error caused the price of one product to be altered to just \$66 when the actual price was \$3,854. The appellants came to know of the extraordinarily low price and placed substantial orders for the product. When the respondent refused to honour the orders, the appellants commenced an action for breach of contract. The respondent ultimately succeeded in defending the action based on unilateral mistake.

6.33 The Court of Appeal noted that a considerable portion of the trial had been spent on the other issues raised in defence, all of which were unsuccessful, eg that there were no effective contracts and the contracts were “subject to availability”. The trial judge had even noted that the defendant had “mounted a root and branch attack on the [appellants'] claims”, leaving no stone unturned (see [2004] 2 SLR 594 at [135]).

6.34 The trial judge awarded the respondent the full costs of the trial. The Court of Appeal, while appreciating that a court's decision on costs is a matter of discretion, took a broad view of the above circumstances and ordered that the appellants would only bear two-thirds of the taxed costs of the trial.

6.35 A separate issue briefly addressed in this case was in relation to the respondent's amendment to the defence. The appellants submitted that the \$1,000 awarded to them as costs on this account was too low. The Court of

Appeal refused to find any merit in this complaint because no specific reasons had been advanced to challenge the quantum awarded.

6.36 The case of *Lim Lie Hoa v Ong Jane Rebecca (No 2)* [2005] 3 SLR 116 consisted of two appeals which arose out of an inquiry conducted by an assistant registrar (“the AR”) into the assets of the estate of the deceased. The AR had ordered the appellant, Mdm Lim, to bear the costs of the inquiry incurred by the first and second respondents and the other two appellants, subject to a number of specific exclusions. In making the order, the AR had taken into account all the relevant circumstances of the case, including the fact that the inquiry would not have been necessary if Mdm Lim had been more forthcoming in producing accurate accounts of the estate. Mdm Lim’s appeal on the issue of costs was based on O 59 r 6A of the Rules of Court, which states that:

In addition to and not in derogation of any other provision in this Order, where a party has failed to establish any claim or issue which he has raised in any proceedings, and has thereby unnecessarily or unreasonably protracted, or added to the costs or complexity of those proceedings, the Court may order that the costs of that party shall not be allowed in whole or in part ...

6.37 Mdm Lim argued that under O 59 r 6A the only factors that the court could take into account when making a costs order were those which were set out in the rule. She submitted that the other circumstances considered by the AR were improper and irrelevant.

6.38 The appeal was dismissed. The Court of Appeal held that the factors listed in O 59 r 6A were not intended to be exhaustive. Order 59 r 2(2) clearly stated that costs were entirely discretionary. The AR had considered the relevant matters in making his decision, including the fact that the first respondent’s arguments might have unnecessarily protracted the proceedings as a large number of the first respondent’s claims were unsuccessful. However, this did not disentitle the first respondent from an award of costs as she ultimately obtained judgment on a number of issues.

6.39 The inquiry had also been a continuation of the main action, where the first respondent had also been awarded costs as the successful party. As was decided in *Tham Khai Meng v Nam Wen Jet Bernadette* [1997] 2 SLR 27, the general rule in such circumstances was that the same order of costs should follow.

6.40 As for the other two appellants' costs from the inquiry, it was patent on the facts that the inquiry had been necessitated by Mdm Lim's acts. Even though it was not the function of the inquiry to determine Mdm Lim's duties as an administrator, there was sufficient justification for the AR's costs order against her.

Solicitors' personal liability

6.41 In *Tan King Hiang v United Engineers (Singapore) Pte Ltd* [2005] 3 SLR 529, the applicant was adjudicated a bankrupt. His solicitors continued proceedings in his name without obtaining the consent of the Official Assignee ("the OA"). Later, the solicitors obtained conditional consent from the OA but the condition was not met by the date the motion was heard.

6.42 A majority of the Court of Appeal ordered the application to be struck out and the solicitors to be personally liable for the other side's costs, on the basis that they had failed to conduct the trial with reasonable competence. Although under O 59 r 8(2) of the Rules of Court, a solicitor had to be given a reasonable opportunity to show cause before an order could be made against him, it was held by the majority that there were no prescribed formalities and the procedure to be applied in each case would depend on the circumstances. On the facts, it was sufficient that the solicitor had been present before the court and given an opportunity to explain himself.

6.43 Choo Han Teck J, dissenting, considered that the solicitors should not be personally responsible for the non-fulfilment of the condition which had been imposed on the applicant himself. Although the applicant's solicitors were present in court when the application for costs against them personally was made, the learned judge felt that this did not constitute sufficient notice for a show cause procedure. It only made the ambush by the other party's solicitors possible.

Agreement for costs between solicitor and client

6.44 In *Wee Soon Kim Anthony v Chor Pee & Partners* [2006] 1 SLR 518, the Court of Appeal considered whether a client could enforce against his solicitors an agreement for legal fees for contentious business. The purported agreement was evinced by various e-mails between them. It was held that s 111 of the Legal Profession Act (Cap 161, 2001 Rev Ed) had nothing to do with validity. Although s 111(2) required an agreement to be in writing signed by the client, this was only concerned with enforceability by the

solicitor and did not affect the position of a client. A client could thus enforce an oral or unsigned written agreement against his solicitor, but not the other way round.

6.45 In the present case, it was the client who was asserting the existence of an agreement on fees, so the absence of a written agreement bearing the signatures of either or both of the parties was not material. The judge below had rightly approached the question as to the existence of an agreement purely on the common law basis. On the facts, the Court of Appeal determined that there was an agreement that the solicitor would charge the appellant a lump sum for attending to a contentious matter.

Miscellaneous

6.46 In *Jumabhoy Rafiq v Scotts Investments (Singapore) Pte Ltd* [2005] 1 SLR 45, the appellant (“JR”) was a director in the respondent company (“SIS”).

6.47 The trial judge dismissed JR’s claim for remuneration, but agreed that SIS should reimburse JR for any expenses that he had incurred on behalf of the company (see *Scotts Investments (Singapore) Pte Ltd v Jumabhoy Ameerali R* [2004] SGHC 20). The trial judge ordered an inquiry to determine if any such out-of-pocket expenses had in fact been incurred. The costs of the proceedings before the trial judge were awarded to SIS.

6.48 On appeal, JR argued that as he had won on the question of reimbursement of expenses and had thus partially succeeded, the trial judge was wrong to have given the full costs of the hearing before him to SIS. The Court of Appeal disagreed. Since SIS had not disputed JR’s claim for reimbursement, the only live issue before the trial judge had been JR’s claim for remuneration. As that claim failed, the trial judge was right to award the full costs of the proceedings to SIS. The costs of the inquiry would be determined by the Registrar who would decide on the particular issue of whether JR had in fact incurred expenses on SIS’s behalf.

Declaratory relief

6.49 In *Karaha Bodas Co LLC v Pertamina Energy Trading Ltd* [2006] 1 SLR 112 (“*Karaha Bodas*”), the Court of Appeal decided not to adopt the *locus standi* test of the English Court of Appeal in *In re S (Hospital Patient: Court’s Jurisdiction)* [1996] Fam 1 (“*Re S*”), which is that declaratory relief may be granted in the absence of a vested right as long as there is “a real and

present dispute between the parties as to the existence or extent of a legal right ... and that each of [the parties] would be affected by the determination of the issue” (cited by the Court of Appeal in *Karaha Bodas*, at [22] from *Re S* at 22). The Court of Appeal in *Karaha Bodas* (at [25]) pointed to the wording of O 15 r 16 of the Rules of Court, which provides that a court may make declarations “of right” and also cited the previous ruling of the Court of Appeal in *Salijah bte Ab Lateh v Mohd Irwan Abdullah Teo* [1996] 2 SLR 201. Also, *Re S* signifies a new and more liberal approach which has been argued to be more consistent with the approach of the English Civil Procedure Rules (“CPR”) (introduced in 1999). In particular, r 40.20 of the CPR, unlike O 15 r 16 (and the former English equivalent in the Rules of the Supreme Court), does not state that a declaration has to be “of right”. (English cases before the advent of the CPR required declarations to be of right: see, for example, *Meadows Indemnity Co Ltd v The Insurance Corporation of Ireland plc* [1989] 2 Lloyd’s Rep 298.)

Default judgment

6.50 Although an application to set aside a judgment in default of appearance or defence may succeed, the court has the discretion to require the defendant to provide security for the plaintiff’s claim where this would be just (as when the defendant’s veracity is in doubt and his defence is suspect): see *TR Networks Ltd v Elixir Health Holdings Pte Ltd* [2005] SGHC 106 at [37]. This case is also authority for the proposition that a judgment in default of defence is regular even though an appearance is mistakenly entered on behalf of the defendant. The plaintiff is entitled to rely on the memorandum of appearance if it is not withdrawn and, consequently, remains on the record. In this case, the lawyers mistakenly entered an appearance for the fifth defendant for whom they did not act (they represented other defendants). The lawyers obtained leave to cease acting for the fifth defendant (apparently without making a separate application for the withdrawal of the appearance). Therefore, the fifth defendant’s name continued to be stated on the memorandum of appearance and the plaintiff was entitled to rely on the record and apply for judgment in default of appearance.

Discovery and production of documents

6.51 In *Lian Teck Construction Pte Ltd v Woh Hup (Private) Ltd* [2005] 1 SLR 266, the plaintiff successfully applied for pre-action discovery. The initial supporting affidavit had stated that the plaintiff’s intention was to go for arbitration in accordance with an arbitration clause in its contract with the defendants. The plaintiff subsequently filed a second affidavit stating that

the arbitration clause did not have universal application to all the plaintiff's claims and that it now intended to start legal proceedings.

6.52 On appeal from the order for discovery, the defendants argued that the arbitration clause was all-encompassing and that the plaintiff's claims should be referred to arbitration. It also contended that the court had no power to order pre-arbitration discovery. While the court agreed that there were some doubts as to whether the inherent jurisdiction to order pre-arbitration discovery existed, it was not necessary to decide on this issue because the plaintiff had confirmed its intent to commence a court action. The defendants' argument that any court action would be stayed by reason of the arbitration clause was premature. If and when the plaintiff commenced the suit, the defendants could take this objection at the appropriate time.

6.53 In *Beckett Pte Ltd v Deutsche Bank AG* [2005] 3 SLR 39 and the related appeal in *Beckett Pte Ltd v Deutsche Bank AG* [2005] 3 SLR 555, shares held by the appellant ("B") had been used to secure a loan granted by the respondent ("DB") to another company. DB had disposed of the pledged shares after the borrower defaulted. B obtained pre-action discovery against DB, where it emerged that the shares had been sold to PT Dianlia Setyamukti ("DSM"). B subsequently commenced an action against DB for the sale of the shares at a gross undervalue. B sought to set aside the sale to DSM or, alternatively, damages.

6.54 In the meantime, B received information that DSM intended to sell the shares it had bought from DB. B applied for leave to use the discovered documents to apply for an injunction in Indonesia to restrain the sale. The assistant registrar allowed B's application, subject to certain conditions. This was reversed in the High Court.

6.55 The Court of Appeal confirmed the High Court's decision. The court had a residual discretion to take into account the risk of foreign criminal prosecution when determining whether a party would be released from its implied undertaking of discovery. As DB had a real and *bona fide* apprehension of criminal prosecution in Indonesia, leave would not be granted to B as this would result in an injustice to DB. The risk of a sale by DSM to a *bona fide* purchaser without notice was also remote because B had since given public notice in Indonesia of its claim to the shares.

6.56 The Court of Appeal observed that it was too stringent to require that there be some overriding public interest before a party would be released from the implied undertaking of discovery. Nevertheless, two conditions

would generally have to be satisfied. First, cogent and persuasive reasons had to be furnished. Second, no injustice or prejudice should be caused to the party who had given discovery.

Enforcement

6.57 In *OCM Opportunities Fund II, LP v Burhan Uray* [2005] 3 SLR 60, the court concluded that service of a Mareva injunction had been properly effected by agreement pursuant to O 62 r 3(2) of the Rules of Court (at [24]). With regard to other orders including an order for cross-examination and a permanent injunction, the court dispensed with service. The contemnors were committed to prison for six months for acting in “clear defiance of the authority of the court” (at [37]). The court pointed out that O 45 r 7(7) entitles the court to dispense with service in respect of both mandatory and prohibitory orders. Such dispensation may be given retrospectively. This power to dispense with service is unfettered and is governed by considerations of justice.

6.58 In *Transbilt Engineering Pte Ltd v Finebuild Systems Pte Ltd* [2005] 3 SLR 550, the Court of Appeal had to consider the position of an execution creditor who had obtained an order *nisi* (now referred to as a “search order”) in garnishee proceedings which were interrupted by a debtor’s winding up. In this case, the execution debtor commenced a voluntary winding up prior to the show cause proceedings (where the order *nisi* would have been made absolute in the absence of contrary factors). Section 334(1)(c) of the Companies Act states that:

Where a creditor has issued execution against the goods or land of a company or has attached any debt due to the company and the company is subsequently wound up, he shall not be entitled to retain the benefit of the execution or attachment against the liquidator unless he has completed the execution or attachment before the date of the commencement of the winding up, but the rights conferred by this subsection on the liquidator may be set aside by the Court in favour of the creditor to such extent and subject to such terms as the Court thinks fit.

6.59 This provision confers a discretion on the court to uphold the rights of the execution creditor against those of the liquidator. The High Court exercised its discretion in this manner (see *Finebuild Systems Pte Ltd v Transbilt Engineering Pte Ltd* [2005] SGHC 17). The Court of Appeal reversed the decision of the High Court and declared (at [2]) that the discretion must be exercised in the context of the rationale of this provision, which is “intended to provide a clear path for a liquidator to perform his tasks” and

“necessary to prevent any disorganised or unfair rush by creditors to put assets of the company beyond the liquidator’s control and thus alienate them from a fair distribution to all creditors”. As the section formulates a general principle which treats all creditors equally (including creditors who have obtained a decree *nisi*), a court will only set aside the liquidator’s rights in favour of the execution creditor (who has yet to complete the execution process) in exceptional circumstances (at [5]).

Experts

6.60 In *Khoo Bee Keong v Ang Chun Hong* [2005] SGHC 128, Andrew Phang Boon Leong JC (as he then was) emphasised that an expert’s opinion must be established by the facts relied upon. As he explained (at [68]):

It is both logical and commonsensical that if the basis or starting-point is either shaky or (worse still) flawed, the conclusion arrived at will be of little or no use to the court. Indeed, if there is in fact something untoward in the starting-point, even the most impeccable reasoning process will be of no avail in so far as the quest for a fair and just result is concerned.

6.61 In this case (which involved a traffic accident), the experts based their opinions on the available affidavits of the evidence-in-chief of the witnesses, the writ of summons, the defence and the police reports by both parties. They also visited the site of the accident. Phang JC expressed concern that although the affidavits of the evidence-in-chief were “useful”, they were nevertheless “untested material” at the time they were relied upon by the experts to produce their respective reports (at [72]):

One can immediately see the difficulties that would inevitably arise, especially since such material would *further* be, of necessity, *interpreted* by the experts themselves as they formulated their respective reports. [emphasis in original]

The position was exacerbated by the fact that as the affidavits of the evidence-in-chief were very often in conflict with each other “there would not be a sufficiently ‘stable’ base from which to link the analysis of these [affidavits] with the findings and discussion by the expert himself” (at [77]).

6.62 Experts should not simply set out extracts from the affidavits of the evidence-in-chief without analysis. They must be prepared to establish the necessary linkage between their conclusions and the material relied upon (note the observations of the learned judicial commissioner at [72]–[81]). Phang JC also emphasised the expert’s duty to the court which must be his highest priority (at [82]). Although the court is entitled to direct a discussion

between experts, it is up to the parties to determine whether they should be bound by agreement (at [78]).

6.63 The fact that the parties have agreed to accept the views of a court expert on an issue does not preclude a right of appeal even if the court has endorsed those views. This is because agreement does not extend to the decision of the court which must be distinguished from the views of the court expert (*Riduan bin Yusof v Khng Thian Huat* (*supra* para 6.6), at [34]). Once the parties agree that the valuation of a mutually agreed expert “will be final”, the court will not intervene unless there is “fraud or some patent error” (*Hoban Steven Maurice Dixon v Scanlon Graeme John* [2005] 2 SLR 632 at [18]). Also see *Soon Li Heng Civil Engineering Pte Ltd v Woon Contractors Pte Ltd* [2005] SGHC 34 at [64] and [87].

Inherent jurisdiction

6.64 *Wee Soon Kim Anthony v UBS AG* [2005] SGCA 3 (in which the Court of Appeal determined that it had the inherent jurisdiction to make consequential orders pursuant to O 92 r 5 of the Rules of Court) was distinguished in *Tan Yeow Hiang Kenneth v Tan Chor Chuan* [2006] 1 SLR 557. In the latter case, the High Court concluded that it was *functus officio* and, consequently, could not make any further order (the initial order concerning costs had been perfected). As the court explained (at [8]):

An order to vary the [initial order] would not be consequential or incidental thereto or to the judgment as it does not follow as a matter of course from such order or judgment. As distinct from, for example, a subsequent order supplying an obvious omission, or clarifying what was already ordered, the variation of an earlier order goes against the intent of the earlier order.

Injunctions

Mandatory injunctions

6.65 In *Chin Bay Ching v Merchant Ventures Pte Ltd* [2005] 3 SLR 142, the Court of Appeal explained the principles governing the grant of a mandatory injunction in respect of defamation proceedings (at [37]):

[I]n relation to an application for an interlocutory injunction in a defamation action, whether mandatory or prohibitory, the jurisdiction of the court [is] not to be exercised simply on *American Cyanamid v Ethicon* [1975] AC 396 guidelines but with great caution and should generally only be granted where it [is] clear that the statement complained of was libellous

and no defence could possibly apply. Having satisfied this test, the court must further be satisfied that this is a case where special circumstances exist which warrant the issue of an exceptional relief like an interlocutory mandatory injunction.

6.66 *Choo Kok Lin v MCST Plan No 2405* [2005] 4 SLR 175 involved the issue of whether a mandatory injunction should be granted to require a party to remove the unauthorised works at certain premises and reinstate the premises to their original condition. In determining whether to grant the remedy, the court will take into account all the circumstances in deciding whether such a remedy is a “fair result”. (Also see *MCST Plan No 1378 v Chen Ee Yueh* [1994] 1 SLR 463.) In this case, the High Court concluded that it was fair to continue the mandatory injunction which had been granted by the District Court.

Mareva injunctions

6.67 Certain principles established by *Siskina v Distos Compania Naviera SA* [1979] AC 210 (“*The Siskina*”) were confirmed by the Court of Appeal in *Karaha Bodas Co LLC v Pertamina Energy Trading Ltd* (*supra* para 6.49). The first is that the Singapore court will not assume jurisdiction against a foreign defendant on the merits of a claim just because the defendant has assets in Singapore and the plaintiff has asked for a Mareva injunction against these assets. Furthermore, O 11 r 1(b) of the Rules of Court would not operate in these circumstances (at [43] read with [35]). The second is that there is no jurisdiction to grant a Mareva injunction unless and until the plaintiff has an accrued right of action (at [44] read with [35]). In *Karaha Bodas*, the application for Mareva relief failed on both grounds.

6.68 There is also a third principle raised by *The Siskina*: A court has no jurisdiction to grant a Mareva injunction to freeze assets in its jurisdiction in order to provide the plaintiff with security in respect of his action in a foreign jurisdiction. This principle did not apply to the circumstances of *Karaha Bodas*. However, the Court of Appeal observed (at [45]) that:

There has been considerable debate on the extent to which this principle is still in force.

Fortification of undertaking

6.69 The court may fortify an undertaking with regard to damages payable to the defendants for possible loss that has allegedly resulted, and/or might result, from the grant of an injunction. For example, the court might

order the plaintiff to fortify his undertaking by paying certain sums representing the risk of loss. The governing principles and relevant cases were considered in *CHS CPO GmbH v Vikas Goel* [2005] 3 SLR 202. The applicant must be able to demonstrate “a sufficient risk of loss” should the undertaking not be fortified. This is a threshold consideration and failure in this respect would defeat the application (at [38]–[39]).

6.70 This issue of whether there is a risk is governed, *inter alia*, by the contractual principles relating to causation, remoteness of damage and mitigation, *ie*, to what extent is the loss attributable to the grant or implementation of the injunction? (at [51]). Is the loss too remote in the contractual sense? (at [52] and [54]). Could the plaintiff have reduced or minimised any part of the loss? (at [53]). The court will also consider whether there are sufficient assets either within or outside the jurisdiction that would be readily available to satisfy any liability under the undertaking (at [89], sub-para (e)). The detailed legal analysis of these issues is set out at [20]–[87] of the judgment and summarised in [89].

6.71 The fundamental basis of fortification is that it is “intended to do justice to the applicant without resulting in the hanging of an albatross around the neck of the other party” (at [123]). The court will not permit fortification where the application for this relief is merely an attempt to put undue pressure on the plaintiff (at [3]). In determining whether there is a “sufficient risk of loss”, the court will consider the merits of the case; it will not enter into the more profound assessment of merits which characterises the hearing of the main action (at [26]–[27]).

Search order (formerly “Anton Piller order”)

6.72 A recent review of the legitimacy of a search order was conducted by the learned V K Rajah J in *Asian Corporate Services (SEA) Pte Ltd v Impact Pacific Consultants Pte Ltd* [2005] 4 SLR 61 (“*Asian Corporate Services*”). Rajah J considered the draconian effect of this remedy (at [1]):

Search orders in civil proceedings, commonly known as Anton Piller orders, must be sought only after much deliberation and with the exercise of great circumspection. They will normally only be granted in extreme cases where a grave danger of property being smuggled away or an imminent risk of vital evidence being destroyed prevails: see Lord Denning MR in *Anton Piller KG v Manufacturing Processes Ltd* [1976] Ch 55 at 61.

6.73 The legal criteria for this order are formulated in *Asian Corporate Services* (at [19]) as follows:

...

The overriding principle upon which the grant of these orders ought ... to be based is that of necessity. No such order ought to be made unless it is necessary in the interests of justice. No order ought to be made in wider terms than is necessary to achieve the legitimate object of the order.

...

...

- (1) There must be “an extremely strong *prima facie* case”;
- (2) The damage, “potential or actual”, must be “very serious” for the applicant;
- (3) There must be “clear evidence” that the defendants have in their possession “incriminating documents or things” (which was the subject matter sought to be preserved in that case) and that there is a “real possibility” that the defendants may destroy such material before any application *inter partes* can be made.

... “The harm likely to be caused by the execution of the Anton Piller order to the respondent and his business affairs must not be excessive or out of proportion to the legitimate object of the order.”

[emphasis in original]

6.74 The Court of Appeal allowed the appeal against the High Court’s decision to discharge the order because it concluded that (a) the plaintiff showed that he had “an extremely strong *prima facie* case”; (b) the potential damage would be “very serious”; (c) there was “a real possibility that the defendants would destroy relevant documents”; and (d) the effect of the order on the respondent would not be “out of proportion to the legitimate object of the order” (*Asian Corporate Services (SEA) Pte Ltd v Eastwest Management Ltd (Singapore Branch)* [2006] 1 SLR 901 at [14]). The court made important observations on the third and fourth requirements. With regard to destruction of evidence, there may be circumstances in which direct evidence is or is not necessary. For example, where it is shown that the respondent has a propensity to destroy evidence (*ie*, he has already destroyed some evidence), inferential evidence may be sufficient. The Court of Appeal cited (at [34]) the following passage of Oliver LJ in *Dunlop Holdings Ltd and Dunlop Ltd v Staravia Ltd* [1982] Com LR 3 at 3 to this effect:

[I]t has certainly become customary to infer the probability of disappearance or destruction of evidence where it is clearly established on the evidence before the court that the defendant is engaged in a nefarious activity which renders it likely that he is an untrustworthy person. It is seldom that one can get cogent or actual evidence of a threat to destroy material or documents, so it is necessary for it to be inferred from the evidence which is before the court.

6.75 Where, however, there is nothing to indicate that the respondent has destroyed evidence, the court will look for specific evidence showing a real possibility of destruction. Thus, Hoffmann J stated in *Lock International Plc v Beswick* [1989] 1 WLR 1268 at 1281:

People whose commercial morality allows them to take a list of the customers with whom they were in contact while employed will not necessarily disobey an order of the court requiring them to deliver it up. Not everyone who is misusing confidential information will destroy documents in the face of an order of court requiring him to preserve them.

6.76 With regard to the fourth requirement – that the effect of the order on the respondent would not be out of proportion to the legitimate object of the order – the Court of Appeal endorsed (at [35] and [36]) the following comments in the *Staughton Committee Report* (1992) on “the practical operation of Anton Piller orders” published by the Lord Chancellor’s Department:

The harm likely to be caused by the execution of the Anton Piller Order to the respondent and his business affairs must not be excessive or out of proportion to the legitimate object of the order ... the court will still have to weigh in the balance the plaintiff’s need for the order against the injustice to the respondent in making the order *ex parte* without any opportunity for the respondent to be heard. The judge who hears the application for the order should keep in mind that, in as much as *audi alteram partem* is a requirement of natural justice, the making of an *ex parte* mandatory order always risks injustice to the absent and unheard respondent.

6.77 The scope of the search order is a crucial consideration with regard to the proportionality requirement. The Court of Appeal observed that the order made in *Asian Corporate Services* “would not have stifled the business of the respondent” (at [37]).

Irregularity

6.78 The fact that a court determines that a particular procedure is wrong but permits argument on the substantive issue does not justify the use of the same erroneous procedure in a future case involving similar circumstances: see *Cigar Affair v Pacific Cigar Company* [2005] 3 SLR 633, in which an application was initiated by motion instead of petition. In a previous case, *Heng Lee Handbags Co Pte Ltd v PP* [1994] 2 SLR 760, the court had pointed to this error and then heard the arguments. For a case in which a court converted proceedings improperly commenced by originating motion (a former originating process) to proceedings deemed to have been commenced by originating summons (pursuant to O 2 r 1(3) of the Rules of Court, see *Chee Siok Chin v Minister for Home Affairs* [2006] 1 SLR 582 (further considered at para 6.83 below under “Joinder of actions and parties”). For a case in which lawyers applied for leave to cease acting for a defendant but who did not, apparently, apply for leave to withdraw an appearance mistakenly entered on behalf of that defendant, see *TR Networks Ltd v Elixir Health Holdings Pte Ltd* (*supra* para 6.50).

6.79 The Court of Appeal in *Wee Soon Kim Anthony v UBS AG* (*supra* para 6.64, at [29]) held that the discretion of the court to cure irregularities in procedure pursuant to O 2 of the Rules of Court could not be exercised in contravention of the specific provisions to extend time provided by O 3 rr 4(3) and 4(5). Therefore, O 2 must be read subject to O 3 rr 4(3) and 4(5).

Joinder of actions and parties

6.80 In *Chong Hon Kuan Ivan v Levy Maurice* [2005] SGHC 14, the High Court ordered that four overlapping actions be heard successively; that evidence adduced in the trial of an earlier action be admitted as evidence in the trials of subsequent actions; that these directions were without prejudice to the discretion of the trial judge (or a registrar at a pre-trial conference) to vary the sequence or order of the trials if necessary, or to make other orders or directions as the court deems fit; and that the parties be at liberty to apply for the sequence of the hearing of the actions to be altered.

6.81 Order 4 r 1 of the Rules of Court does not apply to appeals. The word “pending” in r 4(1) concerns matters which have yet to be tried. Furthermore, the terms “causes” and “matters” (also in this rule) contemplate trials, not appeals. This construction is supported by the terminology of Form 1 (to which O 4 r 1(2) refers) which refers to a plaintiff and defendant

rather than an appellant and respondent: see *Lai Swee Lin Linda v AG* [2005] SGCA 58 at [19].

6.82 In *Tan Chin Seng v Raffles Town Club Pte Ltd (No 2)* [2005] 2 SLR 302, a representative action was considered to be sustainable in respect of an assessment of damages as the expectation of each of the represented plaintiffs was the same (at [61]).

6.83 In *Chee Siok Chin v Minister for Home Affairs* [2006] 1 SLR 582, the applicants sought declarations to vindicate their alleged constitutional rights of assembly and freedom of speech against the Minister for Home Affairs and the Commissioner of Police. These were not the correct parties because s 19(3) of the Government Proceedings Act (Cap 121, 1985 Rev Ed) states that proceedings against the Government must be instituted against the appropriate government department, and, where this is not possible, against the Attorney-General. As no list of government departments had been published in the *Government Gazette* pursuant to s 19(1) of that Act, the applicants should have named the Attorney-General as respondent. The High Court considered this to be a curable irregularity and ordered the substitution of the Attorney-General for the original respondents. Such a discretion is clearly implicit in O 15 r 6(1) of the Rules of Court which provides that misjoinder or non-joinder should not *per se* vitiate the proceedings. Furthermore, s 19 of the Government Proceedings Act, which is essentially facilitative in nature (as pointed out by the court), may be construed to permit the substitution of a party when this is justified by the circumstances and such an order would be in the interest of justice.

Pleadings

Close of pleadings

6.84 The pleading process may simply culminate in the defence, in which case the pleadings are deemed to be closed “at the expiration of 14 days after service of the defence” (O 18 r 20(1)(b) of the Rules of Court. If the plaintiff utilises a reply, then the closure occurs “at the expiration of 14 days after service of the reply” (O 18 r 20(1)(a)). If he serves a defence to counterclaim, but no reply, then the former is the last pleading and the pleadings would be closed 14 days after the defence to counterclaim has been served (O 18 r 20(1)(a)). If the plaintiff does not serve a reply or a defence to counterclaim, then the pleadings are deemed to be closed 14 days after the service of the defence (O 18 r 20(1)(b)). However, no provision is made for the situation in which leave is granted in exceptional circumstances for the

service of a pleading subsequent to a reply or a defence to counterclaim (see O 18 r 4)). Whenever the time for service of a reply or defence to counterclaim has been extended by the court or by consent of the opposing party (pursuant to O 3 r 4(3)), the deemed closure of pleadings is delayed until the expiry of the period so extended (see *Sumikin Bussan Corp v Hiew Teck Seng* [2005] 2 SLR 773 at [15]).

Specific elements of a cause of action such as relationship between entity and individual

6.85 An important pleading issue arises where a company employee is alleged to have acted in a manner to cause the company to commit a wrong such as conspiracy and interference with a third party's contractual rights. This is because of the principle that a company can only act by its officers, servants or agents. Accordingly, if the individual acts *bona fide* within the scope of his employment on behalf of the company, he is not liable in his individual capacity (rather the company is acting through him in these circumstances) and an action against him in this capacity is liable to be struck out: see *Chong Hon Kuan Ivan v Levy Maurice (No 2)* [2004] 4 SLR 801 and *Said v Butt* [1920] 3 KB 497.

6.86 Both the above cases were considered in *Otech Pakistan Pvt Ltd v Clough Engineering Ltd* [2005] SGHC 98, in which it was held that an action could be pursued against an individual (the second defendant) in respect of the alleged wrongs that he was alleged to have caused a company (the first defendant) to commit. This was because the statement of claim did not indicate that he was a director or the holder of any other office in the company (at [29]). Accordingly, the court did not strike out the claim against the second defendant. The court observed that it is open to a defendant, who wishes to refute an allegation that he acted in his individual capacity, to contend that he was acting in good faith and within the scope of his authority as an officer of the company at the material time (at [31]). *Chong Hon Kuan Ivan v Levy Maurice (No 2)* (in which the claims were struck out) was distinguished.

Cross-examination and pleadings

6.87 In *Lin Tsang Kit v Chng Thiam Kwee* [2005] SGHC 10 (at [28]), the defendant was precluded from making submissions regarding his pleaded defence as he had not put this to the plaintiff during the latter's cross-examination. See also *ABC Supermarket Pte Ltd v Kosma Holdings Pte Ltd*

[2005] SGHC 44 at [22]–[25] and *Chan Emily v Kang Hock Chai Joachim* [2005] 2 SLR 236 at [15].

Procedural justice

6.88 The following observations of Andrew Phang Boon Leong JC (as he then was) in *United Overseas Bank Ltd v Ng Huat Foundations Pte Ltd* [2005] 2 SLR 425 at [4]–[9] encapsulate the fundamental relationship between procedure and substantive law:

It is axiomatic that every party ought to have its day in court. This is the very embodiment of *procedural* justice. The appellation “procedural” is important. Procedural justice is just one aspect of the holistic ideal and concept of justice itself. In the final analysis, the achievement of a substantively just result or decision is the desideratum. It is more than that, however. It is not merely an ideal. It must be a practical outcome – at least as far as the court can aid in its attainment.

However, the court must be extremely wary of falling into the flawed approach to the effect that “the ends justify the means”. This ought never to be the case. The obsession with achieving a substantively fair and just outcome does not justify the utilisation of any and every means to achieve that objective. There must be fairness in the *procedure or manner* in which the final outcome is achieved.

Indeed, if the procedure is unjust, that will itself taint the outcome.

On the other hand, a just and fair procedure does *not*, in and of itself, ensure a just outcome. In other words, procedural fairness is a necessary but not sufficient condition for a fair and just result.

The quest for justice, therefore, entails a continuous need to balance the procedural with the substantive. More than that, it is a continuous attempt to ensure that both are *integrated*, as far as that is humanly possible. Both *interact* with each other. One cannot survive without the other. There must, therefore, be – as far as is possible – a fair and just procedure that leads to a fair and just result. This is not merely abstract theorising. It is the *very basis* of what the courts do – and ought to do. When in doubt, the courts would do well to keep these bedrock principles in mind. This is especially significant because, in many ways, this is how, I believe, laypersons perceive the administration of justice to be. The legitimacy of the law in their eyes must never be compromised. On the contrary, it should, as far as is possible, be enhanced.

It is true, however, that in the sphere of practical reality, there is often a *tension* between the need for procedural justice on the one hand and substantive justice on the other. The task of the court is to attempt, as I have

pointed out in the preceding paragraph, to *resolve* this tension. There is a *further* task: it is to actually attempt, simultaneously, to *integrate* these two conceptions of justice in order that justice in its fullest orb may shine forth.

[emphasis in original]

Proof of documents

6.89 The distinction between proving authenticity and admissibility was considered in *Jet Holding Ltd v Cooper Cameron (Singapore) Pte Ltd* [2005] 4 SLR 417 (“*Jet Holding Ltd*”). The first point concerns O 27 rr 4(1) and 4(2) of the Rules of Court. In summary, the effect of these provisions is that a party who is served with a list of documents is deemed to admit to their authenticity (r 4(1)) unless he serves a notice within the prescribed time (before the expiration of 14 days after inspection of the documents specified in a list of documents or after the time limited for inspection of those documents expires, whichever is the later) stating that he does not admit to their authenticity (r 4(2)). In this case, as the inspection never occurred in relation to the second and third supplemental lists of documents, the deeming provision in r 4(1) (which is expressly stated to be subject to r 4(2)) never came into effect in relation to those documents (at [17] and [145]). There would have been no dispute as to authenticity if the documents had been agreed and put into an agreed bundle (so that formal proof would not be necessary).

6.90 Where the authenticity of a document is in issue (because O 27 r 4(1) does not apply and there is no agreement to dispense with proof of authenticity), the party seeking to prove the document must adduce primary evidence of the documents (*ie*, normally the originals: see s 66 of the Evidence Act (Cap 97, 1997 Rev Ed)). An exception to the primary evidence rule (*ie*, circumstances in which copies may be adduced: see the instances set out by s 67 of the Evidence Act) operates. However, even the production of the original document is not normally sufficient to establish its authenticity. In *Jet Holding Ltd*, Belinda Ang Saw Ean J referred to *Deutz Far East (Pte) Ltd v Pacific Navigation Co Pte Ltd* [1989] SLR 926 (“*Deutz*”) for this proposition. In *Deutz*, the original log book was tendered to court for identification. The court held that the log book was inadmissible as the person responsible for the log book (the master of the vessel) was not called as a witness to establish that the log book was the vessel’s log, that the signatures in the log were his and that he kept the log according to the statutory regulations.

6.91 The authenticity of a document has to be proved before the court will consider its admissibility (*Jet Holding Ltd*, at [150]). If authenticity is established, the content of the document may be proved through a witness who has personal knowledge of the evidentiary facts (the facts on which the party relies upon in establishing his case) or by hearsay evidence of those evidentiary facts (when admissible). Ang J reminded the profession that counsel has a duty to ensure that documentary evidence is properly tendered in court and proved (at [152], citing *Chong Khee Sang v Pang Ah Chee* [1984] 1 MLJ 377 at 381).

6.92 A party should not assume that the authenticity of the photographs (or any other evidence) he intends to present can be established without the oral testimony of a witness or other confirmatory evidence. In *Sim Cheng Soon v BT Engineering Pte Ltd* [2006] 1 SLR 697, the authenticity of photographs was challenged on the basis that the photographer was absent (he had left the jurisdiction). The court accepted the validity of the photographs on the basis of other evidence in the case. See also *Ensure Engineering Pte Ltd v Invista (S) Pte Ltd* [2005] SGHC 237, in which the court stated that it was “regrettable” that photographic evidence of certain items in issue was not produced until late in the proceedings and that the photographer was not called as a witness to explain the photographs.

Doctrine of *res judicata*

6.93 In *Lee Tat Development Pte Ltd v Management Corporation of Grange Heights Strata Title No 301 (No 2)* [2004] 4 SLR 828 (HC), [2005] 3 SLR 157 (CA), there were initially three dominant tenement lots with a right of way over the servient tenement. Grange Heights condominium was built on the amalgamation of one dominant lot with an adjoining non-dominant lot and its residents used the right of way. In 1989, there was litigation between the appellant (“LT”), which owned the other two dominant tenements, and the respondent (“the MCST”). The MCST was granted a mandatory injunction compelling LT to remove an iron gate and a fence that LT had erected on the servient tenement.

6.94 LT subsequently purchased the servient tenement. In 2004, LT applied to the High Court for an order restricting the use of the right of way by the residents of Grange Heights. This was dismissed on the basis of issue estoppel.

6.95 The High Court decision was affirmed by a majority in the Court of Appeal. Firstly, it was not disputed that there had been a final and conclusive

judgment on the merits by a court of competent jurisdiction in the earlier proceedings. Secondly, the effective parties were the same in both actions. The distinction of LT as being owner of the servient tenement in the present proceedings made no difference to the rights of the MCST over the servient tenement, which had been addressed in the earlier proceedings. Finally, there was an identity of subject matter in both proceedings, namely, whether the residents of Grange Heights could use the right of way on the servient tenement for the benefit of the dominant land the condominium was built on as well as the adjoining non-dominant land. Although the earlier decision was contrary to the general principle in *Harris v Flower and Sons* (1904) 91 LT 816, for issue estoppel the correctness of the judgment relied on was completely irrelevant.

6.96 Chao Hick Tin JA (as he then was), dissenting, said that the issue in the present proceedings was whether the MCST could unilaterally extend the right of way beyond the terms of the original grant to the dominant tenement. The earlier judgment had only decided the question of whether LT could obstruct the right of way which the owner of the dominant tenement (although it had become part of the larger Grange Heights lot) was entitled to. Chao JA said that it was unthinkable that the court in the earlier proceedings had decided on the present issue because it had not discussed *Harris v Flower and Sons* or the related cases, or offered any reasons why the general principle should be departed from. Even if it had decided the present issue, the decision would have been unnecessary in relation to the question in those earlier proceedings. Accordingly, issue estoppel did not arise against LT in the present proceedings.

6.97 In *Nike International Ltd v Campomar SL* [2005] 4 SLR 76, the first appellant (“NI”) had commenced opposition proceedings against the application of the respondent (“CSL”) to register an application mark (“the first opposition”). The opposition was refused by the Assistant Registrar of Trade Marks (“the AR”) on the condition that certain amendments were made to CSL’s application. NI unsuccessfully sought leave in the High Court to appeal out of time against the decision. At that hearing, CSL’s written submissions stated that NI could commence opposition proceedings again. The judge asked if CSL was waiving the issue of *res judicata* in the next opposition proceedings, but counsel for CSL replied that this right was reserved.

6.98 There was a subsequent opposition to CSL’s amended application where Nike Singapore (“NS”) joined NI as a party (“the second opposition”). This was dismissed by the Principal Assistant Registrar of Trade Marks on the

grounds that the issues had already been decided in the first opposition and the doctrine of *res judicata* applied.

6.99 NI and NS appealed in the High Court against the decision in the second opposition. The court held that there had been a ruling on the final rights of the parties in the first opposition. The negative phraseology used by the AR – “failing which the application shall be refused” – still meant that CSL’s application had been accepted. Also, the concept of finality for the purposes of *res judicata* related to whether a decision was under appeal or review, as distinct from the sense of a final or interlocutory decision used in s 34(1)(c) of the Supreme Court of Judicature Act (Cap 322, 1999 Rev Ed). Where a right of appeal lay against a decision but was not invoked by the party entitled to that right, a decision could still be final for the purposes of *res judicata*. Whether a decision could be re-heard on the same points was also different from whether it could be reviewed on grounds that it had been obtained improperly, for instance, by fraud. The latter could still apply to a decision that was final for the purposes of *res judicata*.

6.100 It was also held that the parties were identical for the purposes of both opposition proceedings notwithstanding the joinder of NS as a party in the second proceedings, because NI’s and NS’s interests were inextricably linked. The issues in both opposition proceedings were in essence the same although the arguments had been packaged differently. The doctrine of *res judicata* therefore applied. CSL’s conduct did not prevent it from relying on the doctrine because its counsel had reserved its rights.

Settlement

Offer to settle: Clarity and comprehensiveness of offer

6.101 Although O 22A of the Rules of Court does not require an offer to settle the plaintiff’s claim to include a counterclaim, an offer which embraces all claims is conducive to settlement. This was the pronouncement of the High Court in *SBS Transit Ltd v Teo Chye Seng Douglas* [2005] SGHC 15 at [22]. In this case, Woo Bih Li J also emphasised the importance of clarity in this respect (at [31]):

I also add that quite often, offers to settle omit to mention a counterclaim. I encourage every person who is drafting such an offer to go through the pleadings carefully to ensure that the offer clearly specifies all claims, including counterclaims, that are meant to be included. For example, if a counterclaim is to be discontinued as part of an offer to settle made in respect of all claims by a plaintiff, this should be stated clearly and not left

to implication. If the offer to settle is made in respect of various claims, the offer must make it clear whether it may be accepted in part or not. Issues of interest and costs should also be stated clearly in the offer to settle although O 22A r 9(2) of the Rules of Court does make provision for the situation where an offer to settle does not provide for costs.

Liability and quantum

6.102 It is quite possible for the parties to agree to liability but not quantum: see *Tomlin v Standard Telephones and Cables Ltd* [1969] 1 WLR 1378 (“*Tomlin*”) to this effect. Whether an agreement has this effect must depend on the circumstances of the case. In *Yip Jenn Yeuan v Ng Ah Chen* [2005] SGHC 21, the High Court determined that, as in the case of *Tomlin*, the parties had decided to settle the issue of liability prior to any determination of the quantum. Choo Han Teck J observed (at [15]) that:

The context in which an agreement is made is relevant in helping one understand what that agreement really was. In this case, we are examining the effect of the negotiations between solicitors in a personal accident claim. It is, of course, a claim in tort. I will accept that the court can take judicial notice of the practice, especially in this country, where solicitors often begin by engaging in a cautious exchange of proposals. The early stage of negotiations is important because it might there be established whether the parties had decided to negotiate on a global basis, that is to say, that they will carry on until both issues, namely liability and quantum, are agreed. Alternatively, they might have decided to complete the negotiations in two stages, that is to say, they might have wished to determine liability before proceeding to negotiating on quantum. In this case, the plaintiff’s solicitors’ letter ... stated that they wished to “resolve the issue of liability first before considering any reduction in quantum”. The onus thus shifted to the defendant’s solicitors to correct that path if they so wished, but they did not. ... I am of the opinion that liability had, in fact, been settled.

Striking out

6.103 In *Changhe International Investments Pte Ltd v Dexia BIL Asia Singapore Ltd* [2005] 1 SLR 598 (HC), [2005] 3 SLR 344 (CA), the first plaintiff’s (“CH”) first suit against the first defendant (“DX”) was dismissed for CH’s breach of an “unless” order. Three years later, CH brought a second suit against DX but failed to file, on time, an affidavit explaining the breach in the first suit. DX successfully applied to strike out the statement of claim on the grounds that it was an abuse of the process of the court. CH appealed.

6.104 On appeal, the Court of Appeal held that it was established law that where a previous action had been struck out for failure to comply with a peremptory order and a second action was brought on the same cause of action, the second action might be struck out as an abuse of process unless the litigant could show that the earlier breach was not contumelious. The litigant also had to show that no further disobedience of court orders would occur. Even where the contumelious conduct was that of the litigant's solicitor rather than that of the litigant himself, the litigant had to bear the consequences of such contumely.

6.105 In the present case, it was not enough to blame the solicitors because CH had failed to have somebody on the ground to follow up on the progress of its action with the solicitors. Although it was unusual that the court in the second action had ordered discovery before the filing of the summons for directions, this was not an anomaly which the courts would consider as a factor to determine if the second action would be struck out. The size of CH's claim was also immaterial. The court's main concern was why the peremptory order had not been complied with. CH had not shown that what happened was not its fault, and up to the time that the first action was struck out, CH already had a history of procedural defaults. CH's appeal was therefore dismissed.

6.106 In *Tung Hui Mannequin Industries v Tenet Insurance Co Ltd* [2005] 3 SLR 184, the plaintiff ("THMI") was a partnership which had been awarded damages and costs in a previous suit against the defendants. When THMI's solicitors wrote to the defendants on behalf of THMI to recover the sums awarded, the defendants' solicitors asserted that THMI was no longer on the Registry of Companies and Businesses and asked for THMI's solicitors' warrant to act. THMI's solicitors did not reply and THMI started an action against the defendants. The defendants eventually applied to strike out the action, based on THMI's solicitors' lack of authority to act for THMI. Before the application was heard, the former partners of THMI made a joint affidavit explaining that THMI had been dissolved and that they had authorised THMI's solicitors to commence the present action. The assistant registrar hearing the application granted leave to the defendants to withdraw their prayer to strike out the action and also awarded costs to them. The plaintiff appealed.

6.107 The High Court held that O 64 r 7 of the Rules of Court necessarily implied that counsel were entitled to request opposing counsel to produce their warrants to act. When an opposing party challenged a solicitor's authority to act, the onus of proving authority lay with the solicitor and his

client. Even an ulterior motive on the part of the lawyer making the request was not a just excuse to withhold disclosure. Any privileged material could be expunged before disclosing the warrant or a further brief warrant could be obtained from the client for disclosure.

6.108 On the facts, the defendants were entitled to the costs of the applications which were necessitated by the plaintiffs' and their solicitors' unreasonable refusal to produce any evidence of authority.

Summary judgment

6.109 Where the time for service of a pleading has been extended by a court order or with the consent of the opposing party (pursuant to O 3 r 4(3) of the Rules of Court), an application for summary judgment may be made beyond the periods of time prescribed by the rules for the service of pleadings. This is because the deemed closure of pleadings is correspondingly extended, *ie*, O 14 r 14 is not offended in these circumstances as long as the application for summary judgment is made within 14 days of the end of the extended period for service of the pleading. This was the conclusion of the High Court in *Sumikin Bussan Corp v Hiew Teck Seng* (*supra* para 6.84). Judith Prakash J made certain observations regarding the approach that the defendant might take in these circumstances (at [16]–[17]):

Defendants who think that pleadings are deemed to have been closed because no reply has yet been filed and who are then faced with either a request to consent to an extension of time or with an application for an extension of time have the ability to refuse to give such consent unless the plaintiff agrees not to file an application for summary judgment after filing his reply. Alternatively, if the matter goes to court, such defendants may ask the court to make it a condition of the grant of the extension that no application for O 14 be made. The protection given to the defendant is, therefore, that no plaintiff can unilaterally extend the time prescribed for the filing of any pleading.

... The defendant can safeguard his position by refusing to consent to a late filing of the reply and then, if the plaintiff makes a court application for an extension, objecting to it being granted except on terms. It would then be up to the plaintiff to persuade the court that after filing the reply and despite his failure to observe the stipulated time frame for filing of pleadings he should not be prevented from making an application for summary judgment. The court would then be able to weigh all relevant circumstances and determine whether it would be right to deprive the plaintiff of access to the advantages of an expedition of proceedings and costs-saving afforded by the O 14 procedure.

Trials and hearings

Appearance of parties

6.110 In *Lin Tsang Kit v Chng Thiam Kwee* (*supra* para 6.87) at [30], the High Court dismissed the claim of the second plaintiff as he failed to appear. The second plaintiff's application to give evidence through video-conferencing (because of advanced age and ill health) had been previously denied. The defendant also failed to appear because of medical reasons. The court pointed out that although it could have given judgment to the first plaintiff pursuant to O 35 r 1(2) (at [40]), it decided to examine the merits of the case.

Proceedings in camera

6.111 In *JD Ltd v Comptroller of Income Tax* [2006] 1 SLR 484 (proceedings concerning a tax appeal), the Court of Appeal granted the request of a litigant that proceedings be held *in camera*. The court construed ss 83(1) and 81(5) of the Income Tax Act (Cap 134, 2004 Rev Ed) to the effect that appeals before the Court of Appeal will only be held *in camera* if the High Court had heard the case in the exercise of its original civil jurisdiction. The court pointed out that the Act "remains silent as to the case where the taxpayer appeals against the decision of the High Court exercising its appellate jurisdiction". This was the situation in the present appeal as the case had been first heard by the Board of Review. The court concluded that the spirit of the Act required secrecy at all hearings before the Court of Appeal (irrespective of their point of origin) so as "to preserve the secrecy of a taxpayer's taxation matters" (at [62], [64]–[65]). Furthermore, quite apart from the Act, a court always has the discretion to order proceedings to be heard *in camera* pursuant to s 8(2) of the Supreme Court of Judicature Act if it is "expedient in the interests of justice, public safety, public security or propriety, or for other sufficient reason to do so" (at [66]).

Without prejudice communications

6.112 Where the question before the court is whether the negotiations resulted in an agreed settlement, the communications will be admitted so that a decision can be made: see *Tomlin* (*supra* para 6.102), cited by Lord Griffiths in *Rush & Tompkins Ltd v Greater London Council* [1989] AC 1280 at 1300. See also *Yip Jenn Yeuan v Ng Ah Chen* (*supra* para 6.102) at [18] where the court held, "An open letter ends the 'without prejudice' correspondence."