8. CIVIL PROCEDURE

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

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

Appeals

Application for a stay of appeal

8.1 In *Ong Jane Rebecca v PricewaterhouseCoopers* [2012] 3 SLR 606 ("*Ong Jane Rebecca*"), the plaintiff applied to stay an appeal that her solicitors had previously filed. Lai Siu Chiu J held that an application for a stay of an appeal to the Court of Appeal can only be made to the Court of Appeal or to a High Court judge sitting as a single judge in the Court of Appeal. As the learned judge was sitting as the trial judge, she held that she could not deal with the plaintiff's application to stay the appeal.

Proper party to the appeal

8.2 In *CDL Properties Ltd v Chief Assessor* [2012] 2 SLR 30 ("*CDL Properties*"), the Court of Appeal held that the appellant had wrongly included the Comptroller of Property Tax ("the Comptroller") as a party to the appeal. The appellant had appealed against the decision of the Chief Assessor in revaluing the annual values of units in a building it owned. The court held that the appeal, in so far as it involved the Comptroller as a respondent, should be dismissed because the Comptroller was not a proper party to the appeal. The court reasoned that the appellant took issue with the quantum of the increase in the annual values as assessed by the Chief Assessor, which had nothing to do with the power of the Comptroller to collect any additional property tax that might arise from the Chief Assessor's assessment.

8.3 Although the Comptroller did not take up the issue of its standing before the court, this omission did not confer on the court jurisdiction to hear an appeal involving the Comptroller since the proceedings did not concern the Comptroller and the High Court had

not made any order pertaining to him. This was "a basic procedural flaw which cannot be corrected": *CDL Properties* at [30].

Appeal on assessment of damages

8.4 In *Poh Huat Heng Corp Pte Ltd v Hafizul Islam Kofil Uddin* [2012] 3 SLR 1003 ("*Poh Huat Heng*"), the Court of Appeal affirmed (at [14]) the principles laid down in *Chang Ah Lek v Lim Ah Koon* [1998] 3 SLR(R) 551 governing how a High Court judge hears an appeal against an assistant registrar's decision on an assessment of damages. In such situations, the High Court judge is not limited by the rule that limits appellate interference to certain errors, but is entitled to vary the assistant registrar's award as he deems fair and just.

8.5 The appellants in this case argued that the judge below had adopted an incorrect approach to hearing their appeal on assessment of damages by taking the view that he could only intervene in the award if the assistant registrar was shown to have erred in law. The Court of Appeal rejected this argument. It found that there was in fact nothing to indicate what approach the judge below took since he did not issue any written grounds of decision. On the face of the certified transcript of the hearing notes, the judge did not indicate that the reason for his dismissal of the appeal was his belief that the assistant registrar had not erred in law. Accordingly, the court held that it was not possible to determine whether the judge's approach was incorrect: *Poh Huat Heng* at [15].

8.6 While the Court of Appeal alluded to the judicial duty to give reasons, it did not go further as the appellants did not argue that the judge's decision should be set aside on the ground that he did not provide his reasons for dismissing the appeal: *Poh Huat Heng* at [16].

Appeal on apportionment of liability

8.7 In *Goh Sin Huat Electrical Pte Ltd v Ho See Jui* [2012] 3 SLR 1038, the Court of Appeal clarified (at [49]) that the threshold of review for appeals concerning the apportionment of liability among two or more defendants is the same as that for appeals concerning findings of fact. Thus, an appellate court should only intervene when the apportionment can be said to be plainly wrong or unjustified on the totality of the evidence before the trial judge.

8.8 The court also cautioned that by reason of the discretionary nature of apportionment, an appellate court should be slow to intervene on the basis that it would have exercised the discretion in a different way. However, the court also pointed out that appellate review of apportionment of liability should not be made impossible, and observed

(at [54]–[55]) that "improvements to the record, such as verbatim transcripts that are electronically recorded, now permit closer appellate review of findings of fact by trial courts. The trial judge's notes are no longer the only reliable record of what has transpired below".

8.9 Given the discretionary nature of apportionment and the lack of any clear evidence of error, the court did not see fit to disturb the discretion exercised by the judge below in the apportionment of liability (at [58]).

Live issue

8.10 In *Foo Jong Peng v Phua Kiah Mai* [2012] 4 SLR 1267, the Court of Appeal rejected the respondents' argument that there was no longer a live issue to be decided on appeal. The judge below had granted a declaration that the Management Committee of the Singapore Hainan Hwee Kuan did not have the power to remove office bearers from their positions on the Executive Committee. On appeal, the respondents argued that since a new Management Committee had been elected and new officer bearers had also been elected, there was no longer a live issue on appeal. The court disagreed with the respondents.

8.11 The court held (at [25]) that even though the subject matter of the appeal was rendered moot, there remained potential costs ramifications which meant that the appellants retained a real interest in the outcome of the dispute. The court reasoned that if the appellants were successful in the appeal, the respondents would have been liable for costs here and below, and this would affect the positions of the parties.

Further arguments on appeal

8.12 In *Sembcorp Marine Ltd v Aurol Anthony Sabastian* [2013] 1 SLR 245 ("*Sembcorp Marine*"), the High Court granted the appellant leave to submit further arguments. The appellant was convicted of contempt of court for breaching a sealing order and applied for leave to make a further argument on a point of law.

8.13 Quentin Loh J held (at [30]) that even though the application was not in compliance with paras 71(*e*) and 71(*f*) of the Supreme Court Practice Directions, which require a party to set out the proposed further arguments briefly, citing the authorities and including copies of the authorities, leave to make the further arguments should be granted. The judge reasoned that this was a "quasi-criminal case" and non-compliance could be cured without causing prejudice to the respondent. Accordingly, he directed the appellant to file written

submissions with authorities on the further argument so as to allow the respondent to know the argument they had to meet at the next hearing.

Adducing further evidence on appeal

8.14 The courts continue to apply the well-known *Ladd v Marshall* [1954] 1 WLR 1489 ("*Ladd v Marshall*") conditions for admitting further evidence on appeal in different contexts. However, the courts appear willing to exercise some flexibility in the way these conditions are being applied in very exceptional circumstances.

8.15 For example, the appellant in *Sembcorp Marine* had applied for leave to adduce further evidence, and argued (at [10]) that the *Ladd v Marshall* conditions do not apply to criminal or quasi-criminal cases. The High Court disagreed. It reiterated that the *Ladd v Marshall* conditions apply even in a criminal context, as held by the Court of Appeal in *Juma'at bin Samad v Public Prosecutor* [1993] 2 SLR(R) 327. However, the court was prepared to approach the application of the *Ladd v Marshall* conditions with some flexibility because the present case concerned contempt of court which was a serious matter where confidence in the administration of justice had to be maintained, and where there was the possibility of the serious sanction of deprivation of liberty: *Sembcorp Marine* at [11]–[12].

8.16 Nevertheless, the court held that even with a degree of flexibility, the appellant did not satisfy the three *Ladd v Marshall* conditions. Notably, the court held that the potential hostility of a witness was not an acceptable excuse for the non-fulfilment of the first *Ladd v Marshall* condition (that the evidence could not have been obtained with reasonable diligence) when the appellant had made no effort at all to contact the witness: *Sembcorp Marine* at [15].

8.17 The *Ladd v Marshall* conditions were also applied in the context of a matrimonial dispute in *Tan Hwee Lee v Tan Cheng Guan* [2012] 4 SLR 785 ("*Tan Hwee Lee*"), where the wife sought leave to adduce further evidence to show that the judge below had erroneously determined the value of a property. The Court of Appeal declined to grant the wife leave to adduce further evidence because she did not satisfy the first *Ladd v Marshall* condition – *viz*, that the evidence could not be obtained with reasonable diligence.

8.18 In her affidavit, the wife claimed that she could not have obtained the evidence sought to be adduced with reasonable diligence because she was only alerted to the evidence by her new solicitors. However, the court held that the fact that a party was represented by different solicitors was in and of itself an insufficient ground to establish that the piece of evidence could not have been obtained with reasonable

diligence. In fact, the court suggested that the fact that the wife's previous solicitors did not bring the evidence to her attention demonstrated that the wife, represented by her previous solicitors, did not act with reasonable diligence: *Tan Hwee Lee* at [23]–[24]. Therefore, the court held that the further evidence could not be adduced.

8.19 Further clarification of the first *Ladd v Marshall* condition was provided by the Court of Appeal in *Chan Ah Beng v Liang and Sons Holdings (S) Pte Ltd* [2012] 3 SLR 1088 ("*Chan Ah Beng*"), where the respondent claimed that the appellant had breached his duty under an option to purchase to use his best endeavours to obtain approval from the Housing and Development Board for the sale of a property. The judge below held that the appellant had in fact breached this duty.

8.20 On appeal, the appellant sought to adduce certain documents as further evidence to show that he had used his best endeavours to obtain approval. With regard to the first *Ladd v Marshall* condition, the appellant argued that he could not have adduced those documents with reasonable diligence because he was a litigant-in-person and even with reasonable diligence, he would not have appreciated the legal significance of those documents. The court did not accept this argument. The court agreed with the respondent that the mere fact of being unrepresented cannot satisfy the first *Ladd v Marshall* condition because it would otherwise always be open to unrepresented litigants to use this as a reason to adduce further evidence: *Chan Ah Beng* at [21].

Costs

Costs follow the event

8.21 The general principle that the successful party should be awarded costs may be overridden by other considerations such as unreasonable conduct. However, the court must justify its findings. In *Low Leong Meng v Koh Poh Seng* [2012] 1 SLR 1076, the appellant was sued for sending an allegedly defamatory e-mail. The District Court ruled that the e-mail was not defamatory and dismissed the claim. The court decided not to hear the parties on costs. It took the view that the appellant had unnecessarily taken the time of the court in proving an "irrelevant fact". On appeal, the High Court concluded that the District Court had exercised its discretion wrongly. As the appellant's conduct had been reasonable in the circumstances of the case, the general principle that costs should be awarded to the successful party (the appellant) ought to have been applied.

Proportionality of costs

8.22 The examination of the proportionality principle by the Court of Appeal in *Lin Jian Wei v Lim Eng Hock Peter* [2011] 3 SLR 1052 ("*Lin Jian Wei*") was considered in *Basil Anthony Herman v Premier Security Co-operative Ltd* [2012] 2 SLR 616, which involved an application to review the assistant registrar's order for costs. The respondents had sued the applicant for defamation in the High Court. The trial, which lasted nine days, only concerned the applicant's defence (as it had previously been ruled that the applicant's remarks were defamatory). The respondents succeeded and were awarded damages totalling $150,000. The applicant appealed. The Court of Appeal allowed the appeal, ordered a retrial in the District Court, and awarded the applicant half costs for the High Court trial. The applicant filed a bill of costs for taxation, claiming $357,500 under section 1 (which represented half of the full costs of $715,000), $4,500 under section 2, and, amongst other items, $13,790 under section 3 (which represented fees paid to a freelance billing clerk for drawing up the bill of costs). The fees of the applicant's lead counsel constituted the major portion of the bill and amounted to $650,000, calculated on the basis of 1,200 hours of work done at the rate of $562.50 per hour. The assisting counsel's fees were $40,000, calculated on the basis of 100 hours of work done at the rate of $400 an hour. Costs were taxed by an assistant registrar, who awarded, *inter alia*, $91,500 for section 1 costs (representing half of $183,000 that would have otherwise been awarded) and $800 for section 2 costs. The assistant registrar disallowed the claim of $13,790.

8.23 The applicant applied for review of the assistant registrar's award, arguing, *inter alia*, that the assistant registrar had misapplied the proportionality principle as expressed in *Lin Jian Wei*. Furthermore, the applicant contended that the bill was not disproportionate when compared to the taxed costs of $650,000 awarded at first instance in *Lin Jian Wei* (as the present case was much longer and had more issues than in *Lin Jian Wei*). The applicant did not submit his claim on the basis of time costs because he was of the view that the court in *Lin Jian Wei* held that time sheets were immaterial. The applicant also argued that just because the Court of Appeal ordered a retrial in the District Court, the assistant registrar assumed that the applicant's claim for costs of $357,000 under section 1 (being 50% of the original amount of $715,000 claimed) were not proportional to the District Court's jurisdictional pecuniary limit of $250,000. According to the applicant, these circumstances misled the assistant registrar with the effect that he did not consider the amount and value of the work that had been done. In the view of the High Court, the costs had been properly assessed. The proportionality principle had not been breached. Accordingly, the application was dismissed.

Non-party's liability for costs

8.24 The principles formulated by the Court of Appeal in *DB Trustees (Hong Kong) Ltd v Consult Asia Pte Ltd* [2010] 3 SLR 542 ("*DB Trustees*") in respect of a non-party's liability to pay costs were considered by the High Court in *South East Enterprises (Singapore) Pte Ltd v Hean Nerng Holdings Pte Ltd* [2012] 3 SLR 864 ("*South East Enterprises*"). The first principle is that there must be a *close connection* between the non-party and the proceedings. As was said in *DB Trustees* (at [26]), "[w]here … the non-party not merely funds the proceedings but substantially also controls or at any rate is to benefit from them, justice will ordinarily require that, if the proceedings fail, he will pay the successful party's costs". The funding and control need not be conjunctive: "It is sufficient that the non-party either funds or controls legal proceedings with the intention of ultimately deriving a benefit from them": *DB Trustees* at [35]. The second principle is that the non-party must have caused the incurring of costs: "This is a matter of causation which has often been glossed over in case law. Ordinarily, it would not be just to order a non-party, as opposed to a litigant, to pay costs if the litigant would have incurred the legal costs regardless of the non-party's role": *DB Trustees* at [35]. In *South East Enterprises*, the non-party was the managing director of the plaintiff company. Although his role in the litigation may have satisfied the first principle, it was not clear that he had personally caused the costs to be incurred. Furthermore, an order of costs against him personally appeared inappropriate considering that the plaintiff had already provided a considerable sum as security for the defendants' costs pursuant to an order of court. In the circumstances, it was not just to order the non-party to bear any costs personally.

8.25 The principles in *DB Trustees* were also considered in *Nanyang Law LLC v Alphomega Research Group Ltd* [2012] 4 SLR 1153. The High Court appeared to put a gloss on the Court of Appeal's pronouncement by stating (at [5]), "There is also another equally important general principle to bear in mind, namely that by ordering costs against a non-party who is a shareholder and director of an impecunious litigant company, the court pierces the corporate veil". Pointing out that this is "not an order the court would be quick to make", it concluded that a non-party's substantial connection to the case is only one of the many factors the court would take into account. Furthermore, "[i]t is also not a principle of law that where a litigant company is unable to pay costs the successful party can look to the person with a close connection to it and the litigation for costs" (at [5]). On the facts of the case, it would not have been just to make an order against the non-party.

Prosecutor's liability to pay costs in respect of proceedings under the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act

8.26 The case of *Centillion Environment & Recycling Ltd v Public Prosecutor* [2013] 1 SLR 444 ("*Centillion*") involved an application by the Prosecution for the confiscation of the benefits derived by a person from criminal conduct and the realisation of property to satisfy the confiscation order. At the end of the proceedings in the High Court, the judge awarded costs against the Prosecution in respect of successful and partially successful applications by other parties. This order was made pursuant to O 59 r 3(2) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("RoC") on the principle that costs follow the event. The fact that the Prosecution was performing a public function in the proceedings did not, in the view of the judge, qualify this general principle as the Prosecution had acted unreasonably: see *Public Prosecutor v Ng Teck Lee (Centillion Environment & Recycling Ltd)* [2011] 4 SLR 906 at [88].

8.27 On appeal, the Court of Appeal did not agree with the High Court's approach. First, the High Court had inappropriately relied on *R (Perinpanathan) v City of Westminster Magistrates' Court* [2010] 1 WLR 1508 by failing to properly construe the Court of Appeal's position and distinguish the facts in that case. The Court of Appeal in *Centillion* ruled that although confiscation proceedings under the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Cap 65A, 2000 Rev Ed) ("CDSA") are civil proceedings, they are different from ordinary civil proceedings because they are initiated in the public interest to prevent defendants and their associates from enjoying the benefits of their criminal conduct. Moreover, the Prosecution has to expend considerable resources for the purpose of investigation, collection and seizure of assets. Therefore, the ordinary rule that costs follow the event does not apply to proceedings under the CDSA. The proper rule on costs in such circumstances should either be that the costs of all claimants and the Public Prosecutor should come out of the pool of realisable properties, or alternatively, that each party should pay his own costs.

Costs and public law issues

8.28 The issue of liability of costs recently arose in judicial review proceedings. In *Attorney-General v Vellama d/o Marie Muthu* [2013] 1 SLR 439, the respondent applied for and was granted leave to judicial review proceedings for a mandatory order to compel the Prime Minister to advise the President to issue a writ of election mandating by-elections in the single member constituency of Hougang and declarations that the Prime Minister does not have unfettered discretion in deciding whether and when to announce by-elections. Subsequently, the appellant filed a

notice of appeal against the order granting leave as well as a summons for the hearing of the appeal to be expedited. The respondent then filed a summons to strike out the notice of appeal on the basis that no leave had been obtained for this purpose. Subsequently, the President issued the writ of election for the Constituency of Hougang. The appellant then applied to withdraw the appeal on the basis that the writ of election had been issued. The appellant contended that each party should bear his or her own costs and the respondent contended that she be paid for costs thrown away.

8.29 The Court of Appeal considered the power to order costs pursuant to s 29 of the Government Proceedings Act (Cap 121, 1985 Rev Ed), which empowers the court to order costs for or against the government or the public officer in the same manner and upon the same principles as in proceedings between private persons. The general rule in O 59 r 3(2) that costs follow the event applies as a matter of discretion. The circumstances of the case did not justify a costs order as the appellant had earlier notified the respondent and the court of its intention to withdraw the appeal. In the circumstances, no costs would have been incurred by the respondent with respect to any preparation for this hearing. As for the respondent's application to strike out the notice of appeal, this was unnecessary considering the respondent's opportunity to object (as a preliminary point) at an earlier hearing. Furthermore, the Court of Appeal was not satisfied that the respondent would have succeeded in her application to strike out the notice of appeal (see also *OpenNet Pte Ltd v Info-communications Development Authority of Singapore* [2012] 4 SLR 1076). For general observations on the incidence of costs in proceedings involving public law issues, see *Vellama d/o Marie Muthu v Attorney-General* [2013] 1 SLR 797.

Discovery

Pre-action discovery

8.30 The strict preconditions for pre-action discovery were re-emphasised in *Ching Mun Fong v Standard Chartered Bank* [2012] 4 SLR 185 ("*Ching Mun Fong*"), which concerned a dispute arising out of an investment arrangement between the appellant and the respondent bank. The appellant sought documents relating to the investment arrangement. The respondent refused to provide certain documents and the appellant applied for discovery pursuant to O 24 r 6 of the RoC and s 47 of the Banking Act (Cap 19, 2008 Rev Ed). The application was dismissed by the assistant registrar and subsequently by the High Court judge. The Court of Appeal took the opportunity to review the law governing pre-action discovery in Singapore and to distinguish it from the practice in England. According to O 24 rr 6(3)

and 7, the applicant must satisfy the requirements of relevance and necessity respectively. The court observed (at [18]) that there is "a degree of tension in the way these two rules are formulated. Rule 6(3)(*a*) requires that an applicant possess grounds for making the application as well as the material facts pertaining to an intended claim. Rule 6(3)(*b*) presupposes that an applicant knows the issues which are likely to arise out of the possible claim in requiring that the relevance of the documents sought to be disclosed be shown. … [Rule 7] appears to suggest that there is some gap in the knowledge of the applicant which must be filled". As far as the material facts are concerned, these have been interpreted to mean facts which are sufficient to explain why discovery before action is necessary: at [22], citing *Kuah Kok Kim v Ernst & Young* [1996] 3 SLR(R) 485 at [34]–[35].

8.31 Putting these rules together, the purpose of pre-action discovery is "to accommodate the situation where a potential plaintiff does not have sufficient facts to commence proceedings": *Ching Mun Fong* at [23]. If the plaintiff is able to commence proceedings without the information he seeks, pre-action discovery would not be necessary within the meaning of O 24 r 7 of the RoC. This is broader than the English position which includes access to documents for the purpose of assessing the strength of the claim: see *Dunning v Board of Governors of the United Liverpool Hospitals* [1973] 1 WLR 586 at 593, which is considered in *Ching Mun Fong* at [31]. The Court of Appeal in *Ching Mun Fong* considered that English cases which were decided at a time when pre-action discovery only applied to personal injury or death cases "must be viewed with circumspection". Furthermore, as legally aided cases decided in England involve considerations which may not apply in Singapore, they "should be considered with some care": *Ching Mun Fong* at [34]. It is also significant that the English Civil Procedure Rules do not have a provision which corresponds to O 24 r 7 which applies the element of necessity: *Ching Mun Fong* at [35]. The nature of the documentation sought is also significant in that the court will not permit pre-action discovery of evidence as opposed to material facts necessary to plead the case. In *Ching Mun Fong*, the appellant applied for the disclosure of voice logs which were evidence of the communications between her and the respondent. As these voice logs did not reveal material facts of which she was already aware from her own personal knowledge, they were not discoverable prior to the commencement of proceedings: *Ching Mun Fong* at [39]–[41]. A related but no less significant point was that the appellant was already aware of the content of these communications. The Court of Appeal distinguished between this scenario and the situation in which an applicant is not aware of the information contained in the documents sought. Although it did not lay down a strict rule, it observed that an applicant in the position of the appellant was not entitled "to raid the cupboards of the respondent for the purposes of finding fault,

ie, a fishing expedition, which is not an object of discovery": *Ching Mun Fong* at [41]–[43]. With regard to the appellant's application for disclosure pursuant to s 47(2) of the Banking Act, the Court of Appeal interpreted this as a permissive provision which did not oblige the respondent to produce the requested documents: *Ching Mun Fong* at [46].

Electronic discovery

8.32 Important observations were made on the developing process of electronic discovery in *Breezeway Overseas Ltd v UBS AG* [2012] 4 SLR 1035 ("*Breezeway Overseas*"). The case involved an appeal against part of the decision of the senior assistant registrar ("the registrar") regarding certain disputed keyword search terms in the electronic discovery process. The registrar had ordered some banks to conduct reasonable keyword searches on the categories of documents in question and allow discovery of the search results. The parties agreed on certain keywords but disagreed on 23 keywords. The registrar subsequently ordered that ten of the disputed keywords were to be used in the keyword searches. The appeal concerned nine of the ten keywords that the registrar had allowed. Apart from his decision on the facts, the learned judge observed that keyword searches are potentially both over-inclusive and under-inclusive (*Breezeway Overseas* at [24]):

> … As any user of search engines would realise, false positives and false negatives are an inevitable result of attempting to identify relevant material through keyword searches. This should be contrasted with ocular review, which could theoretically ensure zero gaps in the identification of relevant material. However, when a large number of documents have to be reviewed, discrepancies inevitably arise due to fatigue and variances in each reviewer's subjective appreciation of the issues in dispute and threshold for relevance. When the documents to be reviewed exceed a certain volume, accurate ocular review becomes prohibitively costly and impracticable.

8.33 The judge added that although they are imperfect, "keyword searches present a practical trade-off between achieving a theoretically complete set of relevant material and keeping costs proportionate to the value of the claim". For the purpose of identifying relevant material, keyword searches "provide a pragmatic solution where the costs of ocular review would be way out of proportion to the stakes in the case": *Breezeway Overseas* at [25]. The judge proposed that it would be helpful to conceptualise the process of identifying relevant material through keyword searches as an "iterative sieving process". Under this iterative sieving process, the court and the parties endeavour to select the best possible keywords that would avoid sieving out relevant material whilst simultaneously ensuring a practical and workable manner of processing the material at hand. Parties would thereafter clarify and/or narrow

search terms as necessary with a collaborative spirit and in good faith, resorting to applications to court only when parties require an arbiter to break the impasse. The court will eventually sanction a final set of search criteria for the purposes of e-discovery ("court-sanctioned search"): *Breezeway Overseas* at [26].

8.34 The judge also emphasised that the practice directions governing electronic discovery are not intended to prevent the party giving discovery from undertaking a post court-sanctioned search review to remove documents that are irrelevant to the issues in dispute. However, any such further review would be outside the ambit of the Supreme Court Practice Direction No 3 of 2009 ("the e-discovery PD") and the decision to remove any document on the ground of irrelevance must be carried out by way of ocular review. This means that every document a party removes in a post court-sanctioned search review on the basis that it is irrelevant must be processed in the traditional manner, *ie*, manually examined and subsequently considered irrelevant by a solicitor familiar with the issues in dispute (or the party, in the case of a litigant in person). As this process is usually an expense unreasonably incurred, the party concerned will not generally be entitled to recover the costs of the post court-sanctioned search review in the event that costs are eventually awarded in his favour: *Breezeway Overseas* at [33]. A post court-sanctioned search review may be conducted for relevance (as just indicated) and for the identification of privileged or confidential material. The same conditions apply as in a post court-sanctioned search review for relevance. This means that documents may only be withheld from discovery on the ground of privilege and/or confidentiality pursuant to ocular review. The costs for this additional procedure will not generally be allowed: *Breezeway Overseas* at [34].

Further arguments in Subordinate Court proceedings

8.35 The issue of when the time for an appeal begins to run – the date when the District Court makes the order or the date when the District Judge refuses to hear further arguments – was the sole issue before the High Court in *Lim Kok Boon (Lin Guowen) v Lee Poh King Melissa* [2012] 2 SLR 1082 ("*Lim Kok Boon*"). In this case, the District Judge made his order on ancillary matters relating to the proceeds of sale of a matrimonial flat ("the order") on 18 October 2011. The judge certified on 27 October 2011 that he required no further arguments in respect of a decision relating to the proceeds of sale of a matrimonial flat. The appellant filed his notice of appeal on 8 November 2011. If the time for filing the notice of appeal began to run from the time of the date of the order, the period for filing the notice of appeal would have expired on 1 November 2011 (in which event the appellant's notice of

appeal would have been out of time by seven days). If time only began to run from the time the Judge certified that he would not hear further arguments, the notice of appeal would have been filed in time (as the period would have expired on 10 November 2011). The respondent applied to strike out the appellant's notice of appeal on the basis that it had been filed out of time. The district judge granted the application on the basis that the procedure for extending time to appeal pending a request for further arguments applied in the High Court but not the subordinate courts (compare O 55C with O 56 (RoC) and s 28B of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed)). The appeal to the High Court was dismissed. The difficulties faced by the appellant in *Lim Kok Boon* have been resolved by the introduction of O 55C rr 1(6) and 1(7) (RoC), which set out a time-scheme where an application for further arguments has been made.

Garnishee proceedings

8.36 A court ought not to summarily determine an application for a garnishee order where there are outstanding issues between the parties which need to be fully resolved. In *Teleoptik-Ziroskopi v Westacre Investments Inc* [2012] 2 SLR 177, a party ("the judgment creditor") sought a garnishee order against funds held by the local branch of an international bank in order to satisfy his English judgment. The judgment creditor claimed that the funds belonged to the judgment debtor. This was contested by three other parties who claimed ownership of the money. The High Court decided to summarily determine the matter and concluded that the money belonged wholly and exclusively to the judgment debtor. The respondents appealed and the Court of Appeal reversed the decision. It observed that there are two ways in which a defence may be shown to be hopeless. The first is if it is unsustainable on a cursory examination of the facts. The second is, assuming it is arguable on the facts, it nonetheless has no basis in law. The High Court wrongly omitted to make a finding of fact before reaching a conclusion on the applicable law. As the governing law depended on a proper assessment of the facts and the effect of critical documents, it was necessary for there to be a trial. Despite the fact that the judgment debtor might have used the other parties in the case to delay the proceedings (although there was no clear evidence of this), it was nevertheless proper to provide them with the opportunity to show why they were entitled to the funds.

Inherent power to preserve the interests of the administration of justice and due process

8.37 Although ethical compliance with the processes of litigation is critical to the interests of the administration of justice and due process,

it is not common for a case to address such an issue in particular detail. The case of *Then Khek Khoon v Arjun Permanand Samtani* [2012] 2 SLR 451 ("*Then Khek Khoon*") provided an exception to this trend. The second defendant sought an injunction to restrain the plaintiffs' solicitors ("PS") from acting as solicitors for the plaintiffs and/or giving legal advice in all court matters arising out of a particular suit ("the suit"). The plaintiffs were part of a group of subsidiary proprietors who had opposed the collective sale of Horizon Towers, succeeding in setting aside the order of the Horizon Board at the Court of Appeal in 2009 ("the 2009 Judgment"). The plaintiffs were consistently represented by the PS before the Strata Titles Board ("STB"), the High Court in relation to orders made by the STB and in the judicial review application in the High Court ("STB matters"). The PS did not represent the plaintiffs before the Court of Appeal. Subsequent to the 2009 Judgment, in the suit, the plaintiffs founded their claim against the defendants for breach of fiduciary duties which the Court of Appeal had found to be owed by the defendants to the plaintiffs in the 2009 Judgment, due to a possible conflict of interest which the defendants should have disclosed to the plaintiffs.

8.38 The plaintiffs pleaded that they had suffered loss and damage as a result of the defendant's breaches in the form of the solicitor and client costs incurred by the STB matters. In his defence, the second defendant challenged the quantum of loss and damage suffered by the plaintiffs. Therefore, the reasonableness of the PS' invoices to the plaintiffs (which were paid by the plaintiffs), in connection with the STB matters, was identified by the second defendant as a material fact in issue in the suit. In the present application, the second defendant argued that the PS should be restrained from representing the plaintiffs due to their alleged breach of r 25(*a*) (*ie*, conflicts of interest between the advocate and solicitor and client) and r 64 (*ie*, rule preventing the acting advocate and solicitor from testifying on a material question of fact) of the Legal Profession (Professional Conduct) Rules (Cap 161, R 1, 2010 Rev Ed) ("LPPCR"). The second defendant argued that rr 25(*a*) and 64 of the LPPCR were breached because the reasonableness of the impugned invoices was a material fact in issue which created a conflict of interest between the PS and their clients, the plaintiffs, and also would require the PS to testify as witnesses.

8.39 The court observed that it is generally for the Law Society to investigate and determine breaches of the LPPCR which do not trigger any concurrent breach of legal obligations owed by the counsel to the court or the client at common law. However, the court may intervene (on its own initiative or the application of a party) to restrain the breach of an ethical rule if this is necessary to preserve the interests of the administration of justice, due process and the wider public interest: *Then Khek Khoon* at [22]. The mechanism by which it would do

this is its inherent power. With regard to r 25(*a*) of the LPPCR, there was no conflict of interest on the evidence before the court which required intervention at this stage: *Then Khek Khoon* at [30]–[36]. As for r 64, there was no breach on the facts: *Then Khek Khoon* at [48] and [50]. Therefore, it was not necessary for the court to exercise its inherent power.

Offer to settle

8.40 In *Chia Kim Huay v Saw Shu Mawa Min Min* [2012] 4 SLR 1096 ("*Chia Kim Huay*"), the High Court clarified the differences between the statutory mechanism of offers to settle provided for in O 22A of the RoC and the common law principles of contract law.

8.41 The defendant made two offers to settle under O 22A of the RoC. The plaintiff's counsel posted an acceptance to the defendant's second offer, which the defendant's counsel received four days later. Meanwhile, during those four days, the plaintiff passed away. The court held that the defendant's second offer was validly accepted at the time the letter of acceptance was received by the defendant's counsel.

8.42 The plaintiff relied on the postal acceptance rule under the common law and argued that the offer had been validly accepted when the letter of acceptance was posted. However, Chan Seng Onn J held that the common law postal acceptance rule does not apply to the statutory mechanism of offers to settle because O 22A r 6(1) requires an offer to settle to be accepted by "serving" an acceptance of offer, which goes beyond the common law rule of communicating the acceptance to the offeror: *Chia Kim Huay* at [44]. Thus, the court held that the defendant's second offer was not accepted at the time it was posted by the defendant's counsel, before the plaintiff's death: *Chia Kim Huay* at [47]. This was significant because the issue then arose as to whether the defendant's second offer could be accepted after the plaintiff's death.

8.43 Counsel for the defendant argued that the plaintiff's death had determined the defendant's second offer. However, the court held that the statutory regime in this regard was not intended to be different from the common law. Under the common law, an offer to settle would be determined by the offeree's death if the offer was personal in nature. Since s 10(1) of the Civil Law Act (Cap 43, 1999 Rev Ed) provides that all causes of action vested in the deceased shall survive for the benefit of his estate, the court held that the defendant's offer to settle was not personal in nature. Accordingly, the defendant's second offer was still valid for acceptance at the time the letter of acceptance was received by the defendant's counsel: *Chia Kim Huay* at [55] and [60].

Originating processes

8.44 In *Rainforest Trading Ltd v State Bank of India Singapore* [2012] 2 SLR 713 ("*Rainforest Trading*"), the Court of Appeal held that the judge below was correct to hold that the originating summons in that case should not be converted into a writ action. The first appellant had pledged certain shares to the respondent bank in order to obtain a loan facility. The bank then sought to enforce its security over these shares by commencing an originating summons. The appellants argued that the respondent should have commenced the action by a writ instead given that the appellants had made various allegations of fraud against the respondent.

8.45 The court agreed with the judge below that the appellants' allegations of fraud had no merit. It observed that a mere allegation of fraud is insufficient to warrant the conversion of an originating summons into a writ action, and clarified that the case of *Woon Brothers Investments Pte Ltd v Management Corporation Strata Title Plan No 461* [2011] 4 SLR 777 did not stand for the proposition that an originating summons must be converted the moment there are allegations of substantial disputes of fact, allegations of fraud or both.

8.46 Further, the court stated that "alleged disputes of facts as well as allegations of fraud must be accompanied by the existence of at least a credible matrix of facts and must be relevant to the dispute at hand, which was not the case here". Accordingly, the court held that the action could be commenced by an originating summons and need not be converted into a writ action: *Rainforest Trading* at [41]–[42].

Pleadings

Amendment of pleadings

8.47 In *Als Memasa v UBS AG* [2012] 4 SLR 992 ("*Als Memasa*"), the Court of Appeal granted leave to the appellants to amend their pleadings. The appellants brought an action against the respondent bank, alleging that all of the transactions made from the appellants' account were performed without their authorisation. The appellants then applied to specifically plead their claim *vis-à-vis* a particular transaction involving the purchase of Russian bonds, but this was denied by the judge below. The judge reasoned that even if the Russian bonds transaction was not performed with the appellants' instructions initially, the appellants had subsequently affirmed it.

8.48 The Court of Appeal held (at [20]–[23]) that whether the appellants had in fact affirmed the Russian bonds transaction was a

factual issue that could only be determined after a full trial. This was because the appellants alleged in their proposed amended pleadings that the respondent had misrepresented the nature and risks inherent in the Russian bonds which induced them to affirm the transaction, casting doubt over whether the affirmation was valid.

8.49 The court held (at [30]) that the appellants should not be barred from "pursuing a claim on which there [was] *prima facie* some evidence to support it". Leave was thus granted to the appellants to amend their pleadings.

Order on an issue that was not pleaded

8.50 In *OMG Holdings Pte Ltd v Pos Ad Sdn Bhd* [2012] 4 SLR 231, the Court of Appeal held that the judge below was not entitled to make an order on an issue that was not pleaded or canvassed at the trial. The appellant brought an action against the respondent for, *inter alia*, arrears of outstanding royalty payments under a sub-licensing agreement. The judge had ordered the appellant to refund the royalties that the respondent had paid during a particular period ("the interim period") because the appellant could not collect royalties from the respondent during this period.

8.51 On appeal, the court found (at [27]) that the facts as pleaded by the parties did not cover and could not be viewed as having in contemplation the issue of a refund of the royalties. It could not have reasonably occurred to the appellant that the respondent would be asking for a refund of the royalties. This was supported by the fact that if the respondent had so pleaded, it would not have been difficult for the appellant to plead an implied contract or a contract by conduct obliging the respondent to make payment during the interim period. Thus, the judge's order could not be described as a "variation, modification or development" of what was averred in the pleadings and at the trial itself.

8.52 The court also found (at [28]) that there was obvious prejudice occasioned to the appellant because it had to return the royalties paid during the interim period when that was not part of the respondent's counterclaim and this took the appellant "completely by surprise".

8.53 Accordingly, the Court of Appeal held (at [49]) that the judge was not entitled to order the appellant to return the royalties paid by the respondent during the interim period.

Striking out

8.54 The courts have been judicious in exercising their discretion to strike out pleadings, preferring to allow the matter to be heard in full except in clear and obvious situations.

Application for granting of declaratory relief

8.55 In *Tan Eng Hong v Attorney-General* [2012] 4 SLR 476, the Court of Appeal held that the applicant's claim should not have been struck out by the judge below. The applicant had sought a declaration that s 377A of the Penal Code (Cap 224, 2008 Rev Ed) is unconstitutional. The judge below struck out the applicant's claim on the basis that there was no real controversy to be adjudicated upon since the applicant had already pleaded guilty to a different charge and the s 377A charge had been dropped.

8.56 The Court of Appeal disagreed with the judge below and held (at [133]) that there was in fact a real controversy to be determined. This was because a *lis* had been constituted in two ways: first, by the applicant's "arrest, investigation, detention and charge under s 377A"; second, by the "real and credible threat of prosecution under s 377A".

8.57 On appeal, the Attorney-General raised a new issue that was not before the judge below and argued that the applicant's claim should be struck out for disclosing no reasonable cause of action because s 377A was enacted (in the form of s 377A of the 1936 Penal Code) prior to the commencement of the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) ("Constitution"), and so Art 4 of the Constitution could not be relied on to invalidate s 377A. The Court of Appeal rejected this argument. It held (at [59]) that the court's power to void laws for inconsistency with the Constitution under Art 4 is not limited to laws which come after the enactment of the Constitution.

8.58 The court held (at [125]–[127]) that the applicant's claim was not certain to fail on the basis that the applicant had no *locus standi*, finding that the applicant did have *locus standi* to bring the claim. It also found (at [185]–[186]) that there was an arguable case on the constitutionality of s 377A that ought to be heard in court.

8.59 More generally, the Court of Appeal observed (at [20]–[21]) that the "threshold for striking out is a high one" and that "for the purposes of a striking out application, even if the statement of claim is inadequately drawn up, an opportunity to amend will be given, unless the court is satisfied that the defect cannot be cured by an amendment". These statements reveal the court's reluctance to pre-determine a matter at the striking out stage.

Plainly or obviously unsustainable action

8.60 In *The Bunga Melati 5* [2012] 4 SLR 546, the Court of Appeal adopted Lord Hope's formulation in *Three Rivers District Council v Governor and Company of the Bank of England* [2001] UKHL 16 of when an action can be said to be plainly or obviously unsustainable so as to warrant a striking out. It held (at [39]) that a plainly or obviously unsustainable action is one which is either legally or factually unsustainable. An action is said to be legally unsustainable if "it may be clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove he will not be entitled to the remedy that he seeks". An action is said to be factually unsustainable if it is "possible to say with confidence before trial that the factual basis for the claim is fanciful because it is entirely without substance".

8.61 The appellant commenced an action *in rem* on the basis that the respondent was liable in contract and in unjust enrichment. The respondent sought to strike out the appellant's action on, *inter alia*, the basis that the appellant's claim was plainly unsustainable as the respondent had not been in a contractual relationship with the appellant.

8.62 Applying the formulation of what is plainly unsustainable as laid down by Lord Hope, the court held (at [47]) that the appellant's claim was not plainly unsustainable. The appellant's claim was not so factually unsustainable that it ought to be struck out because there were certain facts that suggested that the appellant had at least an arguable case.

8.63 As for legal sustainability, the court held that the appellant's claim was not so legally unsustainable because there was insufficient evidence to determine if the legal elements relied on by the appellant to prove its case of estoppel by agency could be satisfied or not. The court cautioned (at [75]) that "[t]he court at an interlocutory stage should not speculate on the evidence that might or might not surface during trial where the parties would have had the benefit of the discovery, interrogatory and cross-examination processes".

Re-litigation of the same claims

8.64 Notwithstanding the court's general reluctance to strike out claims, the High Court in *Chia Kok Kee v Tan Wah* [2012] 2 SLR 352 dismissed the plaintiff's appeal against an order by the judge below to strike out the plaintiff's claims.

8.65 The plaintiff alleged fraud against the first defendant in omitting to record the plaintiff's investment contribution in the books

of a company set up by the plaintiff and the first defendant. The High Court held that the plaintiff's claims of fraud were correctly struck out under O 18 r 19 of the RoC.

8.66 The court reasoned that the plaintiff was merely repackaging and re-litigating his previous claims which constituted a clear abuse of process of court, a ground for striking out under O 18 r 19(1)(*a*) of the RoC. The plaintiff had earlier commenced a suit and an originating summons which were dismissed. The court found (at [39]) that the plaintiff's claims in this case contained essentially the same allegations made in the previous suit and originating summons. As a result, the first defendant was being made to answer to similar allegations on various occasions even though the original dispute had already been adjudicated upon.

Summary judgment

8.67 The principles governing the determination of an application for summary judgment were reiterated in *Republic Airconditioning (S) Pte Ltd v Shinsung Eng Co Ltd (Singapore Branch)* [2012] 2 SLR 601 ("*Republic Airconditioning*"). The High Court endorsed the proposition (at [9]): "The primary concern of the courts in determining whether summary judgment ought to be granted is whether the plaintiff is truly entitled to this relief at this stage and, by the same token, whether it is just to deprive the defendant of the opportunity to challenge the plaintiff's claim at trial". It affirmed the principle in *Associated Development Pte Ltd v Loong Sie Kiong Gerald* [2009] 4 SLR(R) 389 at [22] "that in order to obtain judgment, a plaintiff has first to show that he has a *prima facie* case for judgment. Once he has done that, the burden shifts to the defendant who, in order to obtain leave to defend, must establish that there is a fair or reasonable probability that he has a real or *bona fide* defence". Furthermore, leave to defend will not be granted based upon "mere assertions" by defendants; instead, the court will look at the whole situation critically to examine whether the defence is credible: citing *Goh Chok Tong v Chee Soon Juan* [2003] 3 SLR(R) 32. The court must be "wary of defendants who seek to evade summary liability by throwing out spurious allegations, assertions and afterthoughts as convenient smoke screens, which they neatly label as *bona fide* defences raising triable issues. In seeking to delay the inevitable, as it were, such defendants end up not only wasting precious court resources, but more importantly, could potentially cause serious hardship and irreparable loss to the plaintiff seeking vindication of his/her claim, for some of whom time is of the essence": *Republic Airconditioning* at [11]. (Also see *Hua Khian Ceramics Tiles Supplies v Torie Construction* [1991] 2 SLR(R) 901 at [21]; *MP-Bilt Pte Ltd v Oey Widarto* [1999] 1 SLR(R) 908 at [13], which were cited in the case.)

Trial

8.68 *Ong Jane Rebecca* (above, para 8.1) dealt with an unusual situation where the plaintiff chose not to continue with the trial while the trial was underway. The plaintiff commenced a suit against three defendants for professional negligence. Upon receiving the second defendant's order of witnesses, the plaintiff indicated to the court that she could not continue with the trial because she was not aware that the second defendant's witness would be called first instead of the first defendant's witnesses.

8.69 The court held that in the light of the history of the proceedings, it appeared that the plaintiff was merely looking for an excuse not to continue with the trial. Accordingly, it dismissed the plaintiff's claims and awarded judgment to the first and third defendants on their respective counterclaims.

8.70 The plaintiff then applied to set aside the judgments, relying on O 35 r 2 of the RoC. However, the court held (at [65]) that the plaintiff's reliance on O 35 r 2 was misplaced because O 35 r 2 refers to a situation where the plaintiff does not turn up for trial at all, whereas in this case, the plaintiff had turned up, but chose not to continue with the trial while the trial was underway. Thus, the court dismissed the plaintiff's application.