8. CIVIL PROCEDURE

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Appeals

Leave to appeal

8.1 In *Ong Wah Chuan v Seow Hwa Chuan* [2011] 3 SLR 1150 ("*Ong Wah Chuan*"), the trial was bifurcated and liability and quantum were considered separately. The High Court held (*Ong Wah Chuan* at [31]), that since s 21(1)(*a*) of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) ("SCJA") specifically sets out a monetary threshold above which leave to appeal is not required, the threshold criterion is inapplicable and leave to appeal is not required where damages are "truly at large". However, this is qualified by the requirement that the maximum possible amount in damages on the facts is not clearly below S$50,000.

8.2 The High Court further held (*Ong Wah Chuan* at [34]–[36]), that, although damages in this case were not yet assessed, they were not "truly at large" as the value of the damages could be estimated. First, the parties and court had to ascertain, to the best of their abilities, the amount in dispute. Quentin Loh J opined that, firstly, in a case where there has been a bifurcation of damages, counsel should still state what the envisaged damages are. Secondly, the value of the damages could be estimated from the material before the trial judge such as the pleadings, medical reports and O 18 r 12(1A)(*b*) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("RoC") statement of special damages. Thirdly, where counsel for both parties "responsibly" agree and accept that the claim exceeds the threshold, that should be sufficient for the court.

8.3 The court also noted that with the amendments to the SCJA pursuant to the Supreme Court of Judicature (Amendment) Act 2010 (Act 30 of 2010), the relevant "amount in dispute" to determine if leave to appeal is required would be the amount in dispute at the hearing before the lower court. This would apply to both appeals from the

Subordinate Courts to the High Court and appeals from the High Court to the Court of Appeal: *Ong Wah Chuan* at [40] and [41].

Adducing fresh evidence

8.4 *Yeo Chong Lin v Tay Ang Choo Nancy* [2011] 2 SLR 1157 ("*Yeo Chong Lin*") involved the division of matrimonial assets. On appeal, the husband sought to adduce evidence that after the decision of the trial judge, his daughters had a filed suit claiming beneficial ownership of shares the trial judge said belonged to him.

8.5 The court noted (*Yeo Chong Lin* at [12]), that the special grounds laid down in *Ladd v Marshall* [1954] 1 WLR 1489 did not apply where a party to an appeal sought to adduce fresh evidence relating to events which occurred after the decision of the trial judge. Instead, the court suggested (*Yeo Chong Lin* at [13]), a less restrictive test of whether the evidence would have a "perceptible impact on the decision such that it is in the interest of justice that it should be admitted".

8.6 On the facts, the Court of Appeal held (*Yeo Chong Lin* at [14]), that the evidence sought to be admitted by the husband went "to the heart of the decision" and could alter the basis on which it was made. Accordingly, it granted the application.

Raising a new point

8.7 *Chai Cher Watt (trading as Chuang Aik Engineering Works) v SDL Technologies Pte Ltd* [2012] 1 SLR 152 ("*Chai Cher Watt*") concerned the sale and purchase of a drilling machine. On appeal, counsel for the respondent seller argued that since s 13 of the Sale of Goods Act (Cap 393, 1999 Rev Ed) ("SGA") (which provides for an implied condition that goods will correspond with their description in the contract) was not raised by the appellant in the course of pleadings or in trial, to allow it to be raised on appeal would prejudice the respondent.

8.8 The Court of Appeal held (*Chai Cher Watt* at [17]), that even if there was no literal reference to s 13 SGA in the court below (which the court said was "taking the Respondent's case at its highest"), it was clear that the parties had proceeded on the basis that the case concerned the sale of goods by description within the meaning of s 13, since the record of appeal demonstrated that the focus in the trial centred around the specifications of the drilling machine which were described in the contract between the parties. As such, the court allowed the argument to stand.

Right to appeal review of disciplinary tribunal's decision

8.9 In *Law Society of Singapore v Top Ten Entertainment Pte Ltd* [2011] 2 SLR 1279 at [41] ("*Top Ten*"), the Court of Appeal noted that the right of appeal is "exclusively a statutory right" and held that there was no right of appeal from the decision of a judge hearing a review ("Review Judge") made under ss 95, 96 and 97 of the Legal Profession Act (Cap 161, 2001 Rev Ed) ("LPA"). First, nothing in the LPA confers such a right with regard to the decisions of the Review Judge under ss 95, 96 or 97. Instead, firstly, Part VII of the LPA provides a "self-contained disciplinary framework outside the civil proceedings framework": *Top Ten* at [41] and [44]. Secondly, the decisions of a judge under Part VII of the LPA do not fall within the appellate jurisdiction described in s 29A(1) of the SCJA: *Top Ten* at [45].

8.10 In reaching this conclusion, the Court of Appeal expressly chose not to follow the decisions of the Privy Council in *Hilborne v Law Society of Singapore* [1977–1978] SLR(R) 342 ("*Hilborne*") and the Singapore Court of Appeal in *Wong Juan Swee v Law Society of Singapore* [1994] 3 SLR(R) 619 which approved of *Hilborne*: *Top Ten* at [50] and [57].

Costs

Action brought on behalf of another party

8.11 A court will generally not make a costs order against a person who brings an action on behalf of another party, but may do so where it is of the opinion that the litigation is not properly incurred.

8.12 In *Hsu Ann Mei Amy (personal representative of the estate of Hwang Cheng Tsu Hsu deceased) v Overseas-Chinese Banking Corp Ltd* [2011] 2 SLR 178 at [41] ("*Hsu Ann Mei Amy*"), the court held that it would be unfair, in principle, to impose an order for a litigation representative to bear costs personally, even if the representative would be entitled to an indemnity from the estate. It considered that there could be situations where the estate might have insufficient funds to indemnify the litigation representative (although that was not so in this case). Further, such an order reflected on the propriety of the representative's action in continuing the proceedings.

8.13 The Court of Appeal stressed that it was not the law that a litigation representative has to bear costs personally and observed that, even if this were the law, fairness would dictate that such a costs order only be imposed if the litigation representative was advised, when appointed, of the consequences of losing the case. The representative in

this case was appointed only after the action had been commenced. In light of these findings, the court set aside the costs order: *Hsu Ann Mei Amy* at [41].

8.14 This decision may be contrasted with *Wong Meng Cheong v Ling Ai Wah* [2011] SGHC 233 ("*Wong Meng Cheong*"), where the High Court ordered the plaintiffs, who were deemed deputies appointed by the court to act jointly and make decisions on the behalf of their father under the Mental Capacity Act (Cap 177A, 2010 Rev Ed), to personally bear the costs of the suit. The court accepted the proposition in *In re Beddoe; Downes v Cottam* [1893] 1 Ch 547 that a trustee is entitled to a full indemnity out of the estate for all costs, charges and expenses "properly incurred" in an action respecting the trust estate. However, it noted that a trustee was required to satisfy the tests of (a) reasonableness; and (b) *bona fides* before the costs incurred could be considered "proper": *Wong Meng Cheong* at [193].

8.15 Lai Siu Chiu J held that the plaintiffs did not act properly in commencing the litigation. First, the action was not carried out *bona fide* as the plaintiffs did not intend to protect the estate, but were pursuing their own private agenda: *Wong Meng Cheong* at [195]. Secondly, the litigation was patently unreasonable because it was commenced despite the objections of a co-deputy and the costs of commencing the action were "entirely out of proportion" to the liquid funds available to the estate: *Wong Meng Cheong* at [196] and [198].

8.16 Additionally, the learned judge also ordered the plaintiffs to pay costs on an indemnity basis, as she found that the manner in which they had conducted the litigation "left much to be desired". First, the plaintiffs did not provide their expert witnesses with the necessary information to form a reliable opinion, which ultimately resulted in wasted costs as the defendants' counsel had to deal with the opinions of four experts, "none of which were useful". Secondly, the plaintiffs and their witnesses were evasive when being cross-examined, which led to the unnecessary lengthening of proceedings. Finally, the conduct of the action amounted to "an exercise in oppressing the defendants": *Wong Meng Cheong* at [199]–[202].

Action brought by body carrying out public duty

8.17 Costs will generally not be awarded against a public body carrying out its duties in the public interest. This principle, enunciated in the English Court of Appeal case of *Baxendale-Walker v Law Society* [2008] 1 WLR 426 ("*Baxendale-Walker*"), was accepted by the Singapore courts in 2011. However, regardless of whether the *Baxendale-Walker* principle applies, it only serves as a starting point and whether a public

body will have to pay costs is ultimately determined by looking at the manner in which they conducted themselves in the proceedings.

8.18 In *Law Society of Singapore v Top Ten Entertainment Pte Ltd* [2011] 2 SLR 1279 at [24] and [27] ("*Top Ten*"), the court held that the Law Society, in opposing a complainant's request for a review of the decision of the Council of the Law Society under s 96(1) of the LPA, was acting as a regulatory body and in the public interest. Therefore, the *Baxendale-Walker* principle applied and, as a starting point, costs would not be awarded against the Law Society: *Top Ten* at [33]. Further, the court held (*Top Ten* at [34] and [38]), that O 59 r 3(2) of the RoC does not apply to disciplinary proceedings under Part VII of the LPA and so the review judge should not have proceeded on the basis that costs follow the event.

8.19 However, the Court of Appeal observed (*Top Ten* at [39]), that even if the review judge had applied the *Baxendale-Walker* principle as a starting point, she may have reached the same decision as to the issue of costs. This is because the effect of the *Baxendale-Walker* principle would merely be to shift the burden of proving that the Law Society should pay costs in the proceedings to the complainant: *Top Ten* at [36]. The court agreed with the review judge's view that the Law Society's opposition to the review was based on procedural as opposed to substantive flaws in the complaint and could thus give the complainant the impression that it was trying to shield "one of its own": *Top Ten* at [39]. This would justify ordering the Law Society to pay 50% of the costs of the complainant.

8.20 In *Public Prosecutor v Ng Teck Lee* [2011] 4 SLR 906 ("*Ng Teck Lee*"), proceedings were instituted under the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Cap 65A, 2000 Rev Ed) ("CDSA"). The court found that O 59 of the RoC and not the *Baxendale-Walker* principle would regulate the award of costs because O 89A of the RoC caters specifically for proceedings under the CDSA. In light of this, and pursuant to O 59 r 3(2) of the RoC, the starting point would be that costs follow the event: *Ng Teck Lee* at [87] and [88].

8.21 The court emphasised (*Ng Teck Lee* at [88]), that this starting point did not have to be adhered to if the circumstances justified a departure. To that end, the fact that the public prosecutor was carrying out his public duty was a relevant but not conclusive factor. The court would also consider the manner in which the public prosecutor dealt with the applications of other interested parties. It awarded costs against the public prosecutor on the basis that some of the positions taken in his conduct of the proceedings fell short of what would be considered

"reasonable", and led to the unnecessary continuation of hearings which could have been avoided if a more careful approach had been taken.

Assessing costs on an indemnity basis

8.22 In *Lin Jian Wei v Lim Eng Hock Peter* [2011] 3 SLR 1052 ("*Lin Jian Wei*"), the Court of Appeal considered the assessment of costs on an indemnity basis and raised the issue of justly compensating legal professionals while ensuring that legal costs are not excessive. It held (*Lin Jian Wei* at [65]), that in a taxation conducted on an indemnity basis, any doubt about the reasonableness of the amount of costs claimed should only be resolved in favour of the receiving party at the end of a "searching review process". This would include an assessment of reasonableness and proportionality by reference to the six considerations listed in para 1(2) of Appendix 1 to O 59 r 31(1) of the RoC ("Appendix 1 considerations").

8.23 The thrust of the decision is, that in assessing costs, the court must look beyond purely quantitative factors and adopt a qualitative approach. The Court of Appeal provided the following summary of its approach: a judge or taxing registrar should assess (a) the relative complexity of the matter; (b) the work done against what was reasonably required in the circumstances; (c) the reasonableness and proportionality of the amount claimed on an item by item basis; and (d) the proportionality of the resulting aggregate costs. In this exercise, all the Appendix 1 considerations are relevant: *Lin Jian Wei* at [78].

8.24 On the facts, the court found (*Lin Jian Wei* at [67]), that the legal and factual issues of the matter, which involved a defamation claim, were "not particularly complex". It concluded that the time spent by the appellant's counsel was "clearly over the top". The court also cautioned against placing an undue emphasis on timesheets, which would be unable to accurately capture the quality of work and effort and may encourage inefficiency and "timesheet padding" instead: *Lin Jian Wei* at [68] to [70].

8.25 The court mentioned two other considerations that led it to conclude that the sum of S$650,000 allowed by the judge in taxation was unreasonable and disproportionate. First, the court noted (*Lin Jian Wei* at [72]), that although costs were allowed for only two counsel, which was an indication that the subject matter was not complex, the respondent had claimed costs for the work of six solicitors. Secondly, the court noted (*Lin Jian Wei* at [76]), that the respondent was awarded damages in the sum of S$210,000, which was below the threshold for invoking the High Court's civil jurisdiction. The court stated that while it is not an absolute rule, proportionality requires that there ordinarily

be some correlation between the quantum of damages awarded and the costs taxed.

8.26 Given these circumstances, and after examining taxation precedents, the court reduced the amount of costs allowed from S$650,000 to S$250,000. Notably, the respondent had incurred more than S$1,115,655 in expenses in commencing and maintaining the suit: *Lin Jian Wei* at [77]. The court observed that while what clients are willing to pay their counsel is a private matter, the court would not sanction a successful party seeking to recover costs from the unsuccessful party which are wholly disproportionate to the injury caused to him: *Lin Jian Wei* at [79].

Discovery

Discovery in derivative actions

8.27 Specific considerations apply to discovery in derivative actions. In *Lew Kiat Beng v Hiap Seng & Co Pte Ltd* [2011] SGCA 61 ("*Lew Kiat Beng*"), LCE and LCW (who were shareholders and directors of the respondent company) brought a derivative action in the name of the company against the appellants (who were also shareholders and directors of the company). LCE and LCW filed a summons to apply for access to and to inspect the company's documents that were relevant to the derivative action in order for them to fulfil the company's discovery obligations. The High Court judge made an order obliging the appellants to provide LCE and LCW with such access. Subsequently, LCE and LCW complained that the appellants had not produced all the documents within the scope of the order. The Court of Appeal pointed out (*Lew Kiat Beng* at [31]), that despite the absence of any reference in the RoC to derivative actions, there was nothing in the rules to preclude the court from taking into consideration the status of the person who has control of the conduct of the derivative action ("*de facto* plaintiff") when delineating the scope of the discovery obligations of the company ("*de jure* plaintiff").

8.28 The court stated (*Lew Kiat Beng* at [32]), that the scope of the company's discovery obligations in a derivative action should be determined by two factors. First, the litigation status of both the *de facto* plaintiff and the defendant. Secondly, any directions made by the court under s 216A(5)(*b*) of the Companies Act (Cap 50, 2006 Rev Ed) in granting leave to commence the derivative action. Reference was made (*Lew Kiat Beng* at [33]), to Canadian authorities to the effect that the courts have regard to the status of the *de facto* plaintiff and the defendant in determining the rights and obligations of the various parties during the pre-trial phase. On the facts, the Court of Appeal

considered that although the company was the *de jure* plaintiff in the derivative action and was *prima facie* "a party to a cause" under O 24 of the RoC, its discovery obligations had to reflect the fact that there were only two sets of antagonistic shareholder-directors in the company; LCE and LCW on the one hand and the appellants on the other: *Lew Kiat Beng* at [37].

8.29 The company, although it might have owned the documents, was not obliged to disclose them in the derivative action. Applying *Re Tecnion Investments Ltd* [1985] BCLC 434 ("*Re Tecnion*"), the Court of Appeal emphasised (*Lew Kiat Beng* at [38]), that "even a director with dominant control and a majority shareholding may not *per se* have power over some company documents and therefore need not disclose them in discovery in an action against him". LCE and LCW (the company's representatives) had less "power" than the *Re Tecnion* directors as they were not involved in the company's operations and were not its majority shareholders. It would have been excessive and unnecessary to compel them to disclose the documents as part of the company's discovery obligations.

Discovery in judicial review proceedings

8.30 In *Lim Mey Lee Susan v Singapore Medical Council* [2011] 4 SLR 147 ("*Lim Mey Lee Susan*"), a distinction was drawn between discovery in ordinary civil actions and in proceedings for judicial review. The traditional common law position is that as discovery can be expensive, time-consuming, unnecessary and oppressive, it must be justified. This is normally the position in ordinary civil proceedings. However, as an application for judicial review usually raises an issue of law (the facts being common ground or relevant only to show how the issue arises), disclosure of documents is not generally necessary and does not justify the above-mentioned risks. The High Court referred (*Lim Mey Lee Susan* at [7]), to the observation of Lord Carswell in *Tweed v Parades Commission for Northern Ireland* [2007] 1 AC 650 that "it would now be desirable to substitute for the rules hitherto applied a more flexible and less prescriptive principle, which judges the need for disclosure in accordance with the requirement of the particular case, taking into account the facts and circumstances".

Discovery of particular documents

8.31 A party may apply for discovery of particular documents pursuant to O 24 r 5 of the RoC ("specific discovery"). Normally such an application is made after general discovery in response to any perceived omission in the list of documents disclosed for the purpose of general discovery. Order 24 r 5(4) of the RoC states that specific

discovery is not available prior to general discovery unless the court is of the opinion that it is necessary and desirable. In *Hau Tau Khang v Sanur Indonesian Restaurant Pte Ltd* [2011] 3 SLR 1128 at [49], the High Court affirmed the principle that the court will only make an order for specific discovery prior to the filing of pleadings in "exceptional" circumstances. On the facts, the disclosure of the documents was not necessary and would not have contributed to the fair disposal of the case at that point in time.

Discovery of electronic documents

8.32 In *Sanae Achar v Sci-Gen Ltd* [2011] 3 SLR 967 ("*Sanae Achar*"), the assistant registrar had granted the defendant specific discovery of various categories of e-mail messages involving the parties. The plaintiff appealed to the judge in chambers ("Judge"), who affirmed the decision below. Having explained the rationale of electronic discovery and the purposes of the governing directions (see Supreme Court Practice Direction ("PD") 2010 Part IVA and Subordinate Courts PD 2006 Part IIIA), the Judge determined that all the categories of electronically-stored documents of which the defendant sought discovery, were either directly or indirectly relevant to the issues. Further, without saying so, the Judge applied the proportionality principle by holding that discovery of these documents would not lead to "costs disproportionate to the nature of the case, the value of the claims and the complexity of the issues in dispute, so long as certain limits were imposed on the scope of disclosure": *Sanae Achar* at [15].

8.33 Although the phrase "electronically stored documents" is not defined in the e-Discovery PD, the Judge concluded that a definition was not necessary. The phrase "should be given its natural meaning as used in our modern day context". It includes "a wide range of electronic documents, *eg*, word processor documents, spreadsheets, presentation slides, and image files". The Judge also referred to case law which has identified various types of documents as being electronically stored. These include e-mails, databases, backup copies, sound and video recordings and storage media: *Sanae Achar* at [10].

8.34 The practice directions were introduced "with the aim of providing guidance on how existing legal principles pertaining to the discovery process could be applied in respect of electronically stored documents". One of the objectives "is to promote the exchange of electronically stored documents in a text searchable electronic form (in lieu of printed copies) so that parties may capitalise on the twin benefits of digitisation, *viz*, the ability to run keyword searches on the documents in question as well as easy management of the same". The e-Discovery PD also prioritises the inspection and supply of copies of

electronic documents in their native formats "without any interference with the documents' 'metadata information'". Metadata literally means "data about data". Paragraph 43A(3) of the e-Discovery PD describes "metadata information" as "the non-visible and not readily apparent information embedded in or associated with electronically stored documents". Metadata information may sometimes be relevant at trial, for instance, when data relating to the authorship history, date of creation and modification of a particular file or document is in issue. Paragraph 43G of the e-Discovery PD prohibits the deletion, removal or alteration of metadata information internally stored in the native format of discoverable electronically stored documents without consent by the relevant parties or leave of court: *Sanae Achar* at [11].

8.35 The Judge also considered that the volume of electronic documents to be searched was not a basis for disallowing discovery in the circumstances of the case, although the scope of disclosure would be limited to a specific period: *Sanae Achar* at [15] and [24]. As for the extent of a party's obligation to disclose such documents, he must "carry out a search to the extent stated in the order, and disclose any documents located as a result of that search. So long as [Party A] has complied with the terms of that order, as well as all the necessary requirements stated in the Rules of Court, [Party B] would have to accept that [Party A] had fulfilled [its] discovery obligations, notwithstanding the fact that there could well be e-mails not caught by the search engine employed". For this purpose, "it would be best if the parties can, prior to any search, agree on which search engine or software is to be used, the preparation of the search engine prior to conducting the searches (*eg*, updating the search index or causing a fresh search index to be made) and how searches are to be conducted". Such an approach would minimise potential disputes as to whether the parties have discharged their discovery obligations: *Sanae Achar* at [23].

8.36 For other cases concerning electronic discovery in the course of the year under review, see *Robin Duane Littau v Astrata (Asia Pacific) Pte Ltd* [2011] SGHC 61 (decided by the senior assistant registrar) and *Surface Stone Pte Ltd v Tay Seng Leon* [2011] SGHC 223 (decided by the assistant registrar).

Electronic Filing System ("EFS")

8.37 In *Ong Jane Rebecca v PricewaterhouseCoopers* [2011] 4 SLR 242, the third defendant's striking out application was filed out of time but accepted by the EFS. The High Court held that the response of the EFS is not conclusive and that it is open to the registrar to reject the application despite these circumstances.

Injunctions

8.38 In *Fong Wai Lyn Carolyn v Airtrust (Singapore) Pte Ltd* [2011] 3 SLR 980 ("*Carolyn*"), the plaintiff had sought leave to bring an action in the name and on behalf of the first defendant company against the second defendant pursuant to s 216A of the Companies Act (Cap 50, 2006 Rev Ed). The plaintiff claimed that the second defendant had breached the fiduciary duties which she owed to the first defendant as a director. The plaintiff also applied for *ex parte* mareva injunctions and search orders against both defendants, which were granted. The defendants then filed various applications to set aside the orders. The defendants successfully argued that there had been a material failure by the plaintiff to make full disclosure in her *ex parte* applications and there was no real possibility or risk that the defendants would destroy relevant evidence or dissipate assets. In the circumstances, the court set aside the freezing order: *Carolyn* at [104]–[107].

Jurisdiction

8.39 In *The Bunga Melati 5* [2011] 4 SLR 1017 at [83] ("*Bunga Melati*"), the High Court said that a plaintiff who has to prove facts to establish the admiralty jurisdiction of the court under the High Court (Admiralty Jurisdiction) Act (Cap 123, 2001 Rev Ed) ("HC(AJ)A") should be held to the normal civil standard of proof on a balance of probabilities. However, where the jurisdictional dispute concerns a question of law, then it would not be appropriate to speak in terms of a balance of probabilities "since questions of law cannot be 'proved' in any meaningful sense". Therefore, in such instances, the relevant standard is that of a "good arguable case": *Bunga Melati* at [87]. This clarified that the decision of the Court of Appeal in *The Jarguh Sawit* [1997] 3 SLR(R) 829, which had been taken as authority for the proposition that the relevant standard of proof under s 3(1) of the HC(AJ)A was that of a "good arguable case", was restricted to instances where the dispute concerned jurisdictional questions of law: *Bunga Melati* at [95].

Mandatory order, quashing order

8.40 In *UDL Marine (Singapore) Pte Ltd v Jurong Town Corp* [2011] 3 SLR 94 ("*UDL Marine*"), the plaintiff applied for a quashing order and a mandatory order against the defendant (the landlord) as a result of the latter's refusal to renew the plaintiff's lease or to grant the plaintiff a fresh lease. The application was made beyond the three-month period permitted by O 53 r 1(6) of the RoC in respect of quashing orders (the period running from the time when the right to seek relief arises): *UDL Marine* at [35]. The High Court considered (*UDL Marine* at [37]), that a

leave application for a mandatory order should similarly be made without undue delay, although the three-month period prescribed for quashing orders was not necessarily indicative of whether a leave application for a mandatory order was made without undue delay. The court found that the plaintiff had satisfactorily explained the reasons for the delay in making the application and so the failure to comply with O 53 r 1(6) of the RoC was not determinative: *UDL Marine* at [39]–[44].

8.41 As to the substantive application for leave, the court reiterated the principle that a court is only required to consider whether the material before it reveals "a *prima facie* case of reasonable suspicion" that the applicant would obtain the remedies that he has sought (applying *Chan Hiang Leng Colin v Minister for Information and the Arts* [1996] 1 SLR(R) 294 at [25] and *Public Service Commission v Lai Swee Lin Linda* [2001] 1 SLR(R) 133 at [21]–[22] ("*Lai Swee Lin Linda*")). Applying the principles formulated by the Court of Appeal in *Lai Swee Lin Linda*, the High Court pointed to the two tests which could be applied for the purpose of determining whether a decision is susceptible to judicial review. The first test required the court to consider the source of the respondent's power in making the decision that the applicant sought to impugn. If the source of that power was in a statute or subsidiary legislation, the decision would be susceptible to judicial review (source test). The second test required the court to consider whether the defendant's decision involved an exercise of public law functions. If it did, judicial review would be appropriate (nature test): *UDL Marine* at [50].

8.42 Applying both tests, the court found that the defendant's decision was not susceptible to judicial review. As the defendant had exercised its private contractual rights under the leases rather than statutory powers, the plaintiff failed on the source test: *UDL Marine* at [56]. Furthermore, as the defendant was not exercising public law functions, the plaintiff also failed to establish susceptibility to judicial review on the nature test; "[the defendant] was not doing something that a private individual would not be capable of doing": *UDL Marine* at [57]. While a public authority may take into account considerations that are public in nature (for example, the defendant took into account factors such as the "quality of jobs generated" and the "value add to the GDP [Gross Domestic Product] of Singapore"), this did not necessarily mean that it is exercising public law functions. Whether the consideration of such factors would make the public authority's decision susceptible to judicial review is ultimately a matter of degree: *UDL Marine* at [60].

8.43 In *Lim Mey Lee Susan v Singapore Medical Council* [2011] 4 SLR 156 ("*Lim Mey Lee Susan*"), a public health officer filed a

complaint against a doctor ("Applicant") with the Singapore Medical Council ("Council"). The first disciplinary committee ("DC") recused itself and a second committee was formed. The Applicant sought a quashing order against the Council's decision to appoint the second DC, an order to prohibit the Singapore Medical Council from taking steps to bring disciplinary proceedings against the Applicant on the same subject matter covered in the charges set out in the notice of inquiry issued by the first DC; and a declaration to declare certain statutory regulations as being void.

8.44 The High Court declared that the law relating to judicial review of administrative decisions is expressed in two overarching core common law principles. First, no legal power is beyond the reach of the supervisory jurisdiction of the court if it is exercised beyond its legal limits (*ie*, illegality/*ultra vires* the enabling law, bad faith or if the exercise of the power is *Wednesbury* irrational (the court cited *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223)). Second, the procedural fairness/natural justice rule which comprises: (a) the *nemo iudex in sua causa* rule/the rule that no one shall be a judge in his own cause, which is the rule against bias; and (b) the *audi alteram partem* rule/the "hear the other side" rule, which is the fair hearing rule (the court cited *Yong Vui Kong v Attorney-General* [2011] 2 SLR 1189 at [88]). Referring to *Lloyd v McMahon* [1987] AC 625 at 702–703, the High Court stated that administrative decisions are susceptible to judicial review for legality and for fairness, whether or not they involve a discretion.

8.45 With regard to fairness, the content of the duty to act fairly will vary depending on the nature and statutory context of the relevant decision. Where the relevant statute prescribes a hearing, the duty to act fairly will encompass the whole gamut of natural justice prescriptions. Where the relevant statute prescribes a narrow decision to be made, the duty to act fairly carries a narrower scope: *Lim Mey Lee Susan* at [25]. In the circumstances of the case, the applications were dismissed. By way of general observation, the court pointed out that whilst Singapore law on judicial review has English common law foundations, the more recent English cases and treatises are of little relevance where they embody or have been shaped by European Union treaty and legislative obligations which have no application to Singapore.

Originating processes

8.46 A statutory requirement that an application to court must be made by originating summons does not mean that the originating summons may not be converted to a writ pursuant to O 28 r 8 of the RoC. In *Woon Brothers Investments Pte Ltd v Management Corporation*

Strata Title Plan No 461 [2011] 4 SLR 777 ("*Woon Brothers Investments*"), a subsidiary proprietor of a building ("Appellant") filed an originating summons against the building's management corporation and some of its members ("Respondents"). The second to fifth Respondents applied to convert the originating summons into a writ. The Appellant resisted the application on the basis of s 124(1) of the Building Maintenance and Strata Management Act (Cap 30C, 2008 Rev Ed) ("BMSMA"), which requires applications under the BMSMA to be made by originating summons. The Appellant contended that where a party wished to make an application pursuant to s 124(1) of the BMSMA, the court had no discretion to convert it into a writ. Alternatively, that even if the court had such discretion, it had been wrongly exercised. The Court of Appeal held that s 124(1) of the BMSMA should not be read as preventing an originating summons from being converted into a writ and that the discretion had not been wrongly exercised.

8.47 Apart from O 28 r 8(3) of the RoC, which states that an originating summons may be converted into a writ notwithstanding that the action could not have been initiated by the latter process, the Court of Appeal pointed out that s 124(1) of the BMSMA was not intended to interfere with the court's jurisdiction to determine procedural issues relating to the action, including the appropriateness of converting the proceedings in accordance with the RoC. Matters relating to the administration of court proceedings are "within the exclusive domain of the courts": *Woon Brothers Investments* at [20]–[22]. The court also noted (*Woon Brothers Investments* at [24]–[25]), that s 41A(2)(*b*) of the Interpretation Act (Cap 1, 2002 Rev Ed) empowers the court to give necessary directions "for the purpose of facilitating the progress of the application", while s 41A(2)(*c*) of the Interpretation Act confers a primary status on the RoC with regard to practice and procedure even to the extent of overriding any inconsistency with other legislation.

8.48 As to the issue of whether the High Court had properly exercised its discretion to convert the originating summons to a writ, it was clear that "a substantial dispute of fact is likely to arise". The respondents were not required to show that it had arisen or would actually arise: *Woon Brothers Investments* at [27]. The court observed that although it is able to give directions pursuant to O 28 r 4(4) of the RoC concerning evidence and the attendance of deponents for cross-examination in proceedings begun by originating summons, such an approach is only suitable if the disputes of fact are limited. In this case, the broad range of factual issues, the variety of parties involved and the extensive need for cross-examination justified the conversion of the proceedings. The fact that allegations of fraud were made against the Respondents and that the Appellant relied on a significant amount of

hearsay evidence added to the respondents' case for conversion: *Woon Brothers Investment* at [29]–[31].

Pleadings

Amendment of pleadings

8.49 In *Ng Chee Weng v Lim Jit Ming Bryan* [2011] SGCA 62 ("*Ng Chee Weng*"), the appellant sought to amend his statement of claim, reversing the order of his causes of action. The court said that it would "lean favourably towards allowing the amendment" if no injustice was caused apart from some inconvenience that can be compensated by costs, and the amendment is "in order". It elaborated that an amendment is "in order" if it complies with the established rules of pleading which were to be found in the RoC and under the common law: *Ng Chee Weng* at [29] and [30].

8.50 The court observed (*Ng Chee Weng* at [31]), that under O 18 r 7 of the RoC, only facts and not evidence are to be pleaded. It noted that since the RoC were silent as to whether inconsistent alternatives can be pleaded, the common law rules on alternative pleadings were applicable. These rules require that the facts relied on in each cause of action are set out separately (*Ng Chee Weng* at [34]), and the alternative cause of action cannot offend common sense: *Ng Chee Weng* at [36].

8.51 On the facts, the Court of Appeal held (*Ng Chee Weng* at [39]–[41]), that the appellant's inconsistent causes of action were properly pleaded in the alternative. In the primary cause of action, he set out the facts giving rise to the settlement and then set out the relief sought under those facts. This was also done for the alternative cause of action for the dividends. Therefore, the court allowed the amendment of the statement of claim.

Making finding in absence of plea

8.52 In *Chong Sze Pak v Chong Ser Yoong* [2011] 3 SLR 80 ("*Chong Sze Pak*"), the plaintiff submitted that since the defendant did not plead illegality, it was not entitled to rely on ss 51(4) and 51(5) of the Housing and Development Act (Cap 129, Rev Ed 2004) ("HDA") which voided trusts created over HDB flats without the prior written approval of the board. However, the court noted (*Chong Sze Pak* at [54]), that the plaintiff's opening statement acknowledged the statutory prohibition against a trust, and so asserted a right to claim the sale proceeds of the property in equity instead.

8.53 Additionally, the plaintiff's lawyer did not object when the plaintiff was cross-examined as to whether he or his son was eligible to acquire the property: *Chong Sze Pak* at [55]. The High Court held (*Chong Sze Pak* at [56] and [58]), that given the circumstances, the defendant was not precluded from relying on the relevant provisions of the HDA and declared the express trust in favour of the plaintiff and his son null and void.

Search orders

8.54 Another critical issue which arose in *Fong Wai Lyn Carolyn v Airtrust (Singapore) Pte Ltd* [2011] 3 SLR 980 ("*Carolyn*"), concerned the manner in which the search order was executed. The first defendant's employees were subject to materially similar interrogatory techniques employed by a team of forensic experts, including harsh questioning and threats of criminal proceedings: *Carolyn* at [96]. According to the court (*Carolyn* at [97]), "the forensics team misguidedly perceived themselves to be investigation officers who possessed authority to interrogate [the first defendant's] staff". However, the search order did not authorise the forensics team to interrogate the individuals present during its execution. Rather, it only compelled the people there to provide information to aid the search and examination of the items listed in the search order and did not allow questions concerning the purpose or object of the documents found pursuant to the order. The fact that there was no real attempt to explain the terms of the search orders to the employees in a manner that could be readily understood aggravated the "already deplorable conduct". Further, the employees were unaware that they were entitled to be questioned only if the defendants' lawyers were present and that they were not obliged to answer questions that fell outside the scope of the order. In the circumstances, the court concluded that "an unjustifiably oppressive environment existed during the execution of the search order".

8.55 Further, there was a conflict of interest as the person who supervised the execution of the search order had also filed an affidavit in its support. The court considered that an arrangement should have been made for an independent person to supervise the search to ensure the fairness of the procedure. This impropriety of the search was itself a ground for setting aside the search order: *Carolyn* at [99].

Security for costs

8.56 *Tjong Very Sumito v Chan Sing En* [2011] 4 SLR 580 ("*Tjong Very Sumito*") concerned the question of whether security for costs under O 23 of the RoC can be awarded against a plaintiff who is

ordinarily resident both in Singapore and another jurisdiction (in this case, one of the Indonesian plaintiffs was ordinarily resident in Indonesia and Singapore). Having explained that "ordinary residence" is determined by physical presence with some degree of continuity and the person's intention to treat the jurisdiction as his place of residence (*Tjong Very Sumito* at [22]), the Court of Appeal affirmed the decision of the High Court that a person could be ordinarily resident in more than one jurisdiction and that the court retains a discretion to grant security for costs in such circumstances: *Tjong Very Sumito* at [33] and [43].

8.57 The appellants (the plaintiffs in the High Court) argued that security should not be granted where a plaintiff is amenable to the court's enforcement jurisdiction. The Court of Appeal considered (*Tjong Very Sumito* at [37]), that while amenability to process was a factor to be taken into account, it "could not be the main rationale" for ordering security for costs. Having pointed to the separate elements of jurisdiction under O 23 r 1(1)(*a*)–(*d*) of the RoC and the discretion based on justice pursuant to the final part of O 23 r 1(1) of the RoC, it drew a distinction between "factors or grounds which relate to jurisdiction and … those which are relevant to the exercise of the court's discretion as to whether security for costs should be ordered". Some arguments made in relation to the court's discretion may not be relevant to the issue of whether jurisdiction to order security for costs is established under O 23 r 1 of the RoC.

8.58 The Court of Appeal added that while the inconvenience of enforcing costs against a plaintiff ordinarily resident out of Singapore is "one rationale for the jurisdiction provided under O 23 r 1(1)(*a*), inconvenience of enforcement in general is neither a necessary nor a sufficient ground of jurisdiction. Recourse must always be had first and foremost to the wording of the four grounds of jurisdiction under O 23 r 1(1)": *Tjong Very Sumito* at [41]. As for the court's jurisdiction, "the fact that a plaintiff ordinarily resident out of Singapore is *also* ordinarily resident *in* Singapore is a factor which the court should take into account": *Tjong Very Sumito* at [46]. The Court of Appeal considered it to be "a well-founded principle" that where a plaintiff is ordinarily resident in the jurisdiction, this is a strong factor in favour of the court refusing to exercise its discretion to order security for costs: *Tjong Very Sumito* at [51]. It ruled that the High Court had been correct to grant security for costs primarily on the ground that the appellants did not have fixed assets in Singapore suitable for satisfying a possible order of costs against them.

Service

8.59 In *ITC Global Holdings Pte Ltd (in liquidation) v ITC Limited* [2011] SGHC 150 ("*ITC Global Holdings*"), the High Court concluded that service on the second and third defendants in India did not comply with the requirements of Indian law, but cured the irregularities and validated the service. When considering whether to cure an irregularity in an attempt at service out of jurisdiction, a highly significant factor is whether the defendant was apprised of the proceedings. If the defendant was in fact apprised of and took steps to contest the proceedings, he would have suffered no prejudice. Another factor is whether the plaintiff had properly done all that he could to effect service. Both factors favoured ITC Global in the circumstances, especially since it had even received a copy of an endorsement from the process server indicating that the writ had been served on the three defendants: *ITC Global Holdings* at [49].

8.60 The court went on to state (*ITC Global Holdings* at [50]), that even if the two factors had not been determinative, the call on the exercise of the court's discretion to cure the irregularities in service was compelling. Although the plaintiff and the defendants had been involved in the litigation for almost a decade, the substantive action was immobile as a result of "myriad procedural obstacles". The High Court (at [50]), thought that "in the light of the several assiduous attempts at service and the defendants' knowledge of such attempts and of the proceedings, the procedural defects are illusory". It concluded that the exercise of discretion to cure the irregularities would avoid undue prejudice to the plaintiff.

Setting aside judgment after trial

8.61 In *Ching Chew Weng Paul deceased v Ching Pui Sim* [2011] 3 SLR 869 ("*Ching Chew Weng Paul*"), the plaintiff brought proceedings against the defendants to recover assets which he claimed entitlement to under his father's estate. After the defence was filed, the second defendant passed away and the plaintiff applied for the fifth to ninth defendants to be substituted as parties to continue the action against the second defendant's estate. The fifth to ninth defendants elected not to participate in the proceedings at all. At the end of trial, the first, second and fourth defendants were directed under the judgment to transfer various assets including shares in several companies back to the father's estate under which the plaintiff was the sole beneficiary. The fifth to ninth defendants, representing the estate of the second defendant, filed a notice of appeal and applied for a stay of execution. The stay application was dismissed upon an undertaking from the father's estate not to transfer the assets pending the outcome of the appeal. The appeal then

lapsed as the fifth to ninth defendants failed to file the necessary documents. In the meantime, the plaintiff passed away. The fifth to ninth defendants applied under O 35 r 2 of the RoC to set aside the judgment on the ground that it was procured by fraud primarily through the evidence of the first defendant.

8.62 The High Court (*Ching Chew Weng Paul* at [11]), applied the factors pronounced by the Court of Appeal in *Su Sh-Hsyu v Wee Yue Chew* [2007] 3 SLR(R) 673 in determining whether a judgment given at trial should be set aside under O 35 r 2 of the RoC: (a) the reasons for the defendant's absence at the trial; (b) whether the successful party will be prejudiced; (c) the length of the applicant's delay; (d) whether a complete trial is required; (e) the prospects of success; and (f) the considerations of public interest. In the circumstances, the applicants failed to persuade the court to exercise its discretion in their favour. In particular, they were not able to satisfy the predominant requirement that they provide cogent reasons to explain their absence. Furthermore, they could not justify the delay in applying to set aside the judgment. As for the applicants' allegation of fraud, there was insufficient evidence to establish this allegation. The court cited (*Ching Chew Weng Paul* at [40]), the principles (summarised by Kirby P in *Wentworth v Rogers (No 5)* (1986) 6 NSWLR 534 at 538–539) governing the court's discretion to set aside a judgment on the basis of fraud.

Stay of proceedings

8.63 The Court of Appeal in *Sun Jin Engineering Pte Ltd v Hwang Jae Woo* [2011] 2 SLR 196 ("*Sun Jin Engineering*") reiterated its position in *Chan Chin Cheung v Chan Fatt Cheung* [2010] 1 SLR 1192 that a party who takes a step in the proceedings (for example, the service of a defence) may be regarded as having submitted to the jurisdiction of the court, in which case his application to challenge the jurisdiction pursuant to O 12 r 7(1) of the RoC would be compromised. The court distinguished this from an application for stay under O 12 r 7(2) of the RoC on the basis that the defendant in such circumstances is merely asking the court not to exercise its jurisdiction, which the defendant accepts, but does not regard as the proper forum for the adjudication of the dispute: *Sun Jin Engineering* at [16]. The court went on to point out, that while a court has the discretion under O 3 r 4 of the RoC to extend time for making an application pursuant to O 12 r 7 of the RoC, it is possible that significant delay may justify a finding by the court that the defendant has waived his right to make an application: *Sun Jin Engineering* at [46]. On the facts, the period of delay was seven weeks. However, the court did not deliberate further on this issue as the principle had not been raised in argument.

Striking out

8.64 The courts have been notably circumspect in exercising their discretion to strike out pleadings, emphasising their draconian nature and tending to err on the side of caution. One exception to this trend seems to be where claims seeking declaratory relief are concerned.

Amendments to pleadings

8.65 In *Ng Chee Weng v Lim Jit Ming Bryan* [2011] SGCA 62 ("*Ng Chee Weng*"), the plaintiff initially claimed for dividends from shares he alleged the defendant held on trust for him. He then proposed to add a secondary claim seeking to enforce an alleged settlement agreement ("First Proposed Amendment"). This was struck out on the basis that it was legally embarrassing, since a court would not be able to determine the secondary cause of action once it ruled on the first.

8.66 However, the Court of Appeal held (*Ng Chee Weng* at [116]), that the embarrassment was cured when the plaintiff reversed the order of the claims and pleaded the First Proposed Amendment as the primary cause of action and the dividend claim in the alternative instead ("Second Proposed Amendment"). Therefore, O 18 r 19(1)(*c*) of the RoC was inapplicable.

8.67 The court further held that the Second Proposed Amendment did not implicate O 18 r 19(1)(*d*) of the RoC. First, the plaintiff did not merely reverse the order of the claims, but pleaded the two causes of action in the alternative, "with the relevant facts in support of these causes of action being pleaded separately". Secondly, the fact that the plaintiff took inconsistent positions at different points during the negotiations was not *per se* an abuse of the process of court: *Ng Chee Weng* at [118]–[120].

8.68 In light of these findings, the Court of Appeal reversed the High Court's decision to strike out the Second Proposed Amendment.

Whether claim is "plain and obvious"

8.69 In *Her Majesty's Revenue & Customs v Hashu Dhalomal Shahdadpuri* [2011] 3 SLR 1186 ("*Her Majesty's Revenue*"), the court had to decide whether to strike out the appellant's claim for offending the rule that the courts will not collect the taxes of foreign states for their benefit ("Revenue Rule").

8.70 The court considered (*Her Majesty's Revenue* at [29]), that the appellant's claim could be interpreted as a claim for recovery of tax

which the appellant had been deceived into reimbursing and such a claim arguably did not contravene the Revenue Rule. It noted (*Her Majesty's Revenue* at [35]), that the issue of how to characterise such a claim was novel and complex, and whether such a claim was contrary to the Revenue Rule was a matter to be decided at trial and not at the interlocutory striking-out stage. Therefore, the Court of Appeal held that it was not "plain and obvious" that the claim was one that offended the Revenue Rule nor that it should be struck out.

Failure to draw a causal nexus between the breach and the losses

8.71 The defendant in *TTJ Design and Engineering Pte Ltd v Chip Eng Seng Contractors (1988) Pte Ltd* [2011] 2 SLR 877 ("*TTJ Design*") sought to strike out 33 of 223 paragraphs of a statement of claim under O 18 r 19(1)(*a*) and O18 r 19(1)(*c*) of the RoC.

8.72 The High Court held (*TTJ Design* at [13]), that the O 18 r 19(1)(*a*) application was "clearly misconceived" because where there is only one pleaded cause of action, it is "wholly inappropriate" to strike out only some paragraphs since that impliedly recognises that the other 190 paragraphs do disclose a reasonable cause of action.

8.73 The defendant also alleged that the 33 paragraphs were embarrassing because they failed to draw a causal nexus between the breach and the alleged damage. However, the court distinguished the cases the defendant cited to support this alleged requirement of a causal nexus (*TTJ Design* at [23]), and held (*TTJ Design* at [24]), that even if such a requirement existed, the plaintiff had done so in setting out the nature of its claim and particularising the losses that arose as a result of the additional works.

8.74 Ultimately, what seemed to matter to the court was the fact that the statement of claim contained sufficient particulars for the defendant to understand the nature of the plaintiff's claim and plead a defence. The learned judge also noted that the proper course of action was for the defendant to apply for further and better particulars and not to apply for a striking out: *TTJ Design* at [2] and [16].

Striking out and setting aside in admiralty cases

8.75 In *The Bunga Melati 5* [2011] 4 SLR 1017 at [30] ("*Bunga Melati*"), the High Court drew a distinction between two methods a defendant could use to challenge a plaintiff's claim before a matter went to trial. First, it could apply under O 12 r 7 of the RoC to set aside the writ, on the basis that the jurisdiction of the court had been wrongly invoked. This would be the correct procedure to use when the inquiry

was limited to purely jurisdictional matters of fact or law. Secondly, it could apply under O 18 r 19 of the RoC to strike out the action, and this would be the proper procedure where the court had to delve into non-jurisdictional matters of fact or law.

8.76 Applying these principles, the court found that the defendant's main argument (that there was no contractual relationship between itself and the plaintiff) required a determination of the merits of the dispute and should be dealt with under O 18 r 19 of the RoC. On the evidence, it held (*Bunga Melati* at [63]), that the plaintiff's claim of a contractual relationship with the defendant was "plainly unsustainable" and struck out the action.

8.77 Belinda Ang Saw Ean J raised a further point (*Bunga Melati* at [79] and [82]), that where a court's admiralty jurisdiction is challenged pursuant to s 4(4) of the High Court (Admiralty Jurisdiction) Act (Cap 123, 2001 Rev Ed) ("HC(AJ)A"), this would be a jurisdictional dispute and therefore the challenge should be made pursuant to O 12 r 7 of the RoC.

8.78 However, the exception to this is when the defendant challenges the identity of "the person who would be liable on the claim in an action *in personam*" under s 4(4)(*b*) of the HC(AJ)A. The court observed that it would not deal with this as a jurisdictional matter, but as a dispute pertaining to the defendant's liability on the merits of the claim, and so any challenge should be made pursuant to O 18 r 19 of the RoC: *Bunga Melati* at [139].

8.79 It should be noted that the court's decision to strike out was reversed by the Court of Appeal in *The Bunga Melati 5* [2012] SGCA 11 ("*Bunga Melati (CA)*"). While the full grounds of that decision have not been released as of the date of this article, the court indicated in its brief reasons (*Bunga Melati (CA)* at [42]), that the plaintiff's claim was "not so factually or legally unsustainable that it should be barred from proceeding to trial".

Application for granting of declaratory relief

8.80 In *Tan Eng Hong v Attorney-General* [2011] 3 SLR 320 ("*Tan Eng Hong*"), the applicant was initially charged for an offence under s 377A of the Penal Code (Cap 224, 2008 Rev Ed) although he eventually pleaded guilty to an amended charge under s 294(*a*) of the Penal Code. He then sought to challenge the constitutionality of s 377A.

8.81 The High Court said (*Tan Eng Hong* at [6]), that if it could not grant the applicant declaratory relief, then "it is arguable that the case

is frivolous and vexatious, since it would have no practical value". Therefore, it had to consider whether the applicant fulfilled the requirements for the granting of declaratory relief. While the court found that the applicant had *locus standi*, it held that there was no real controversy since the s 377A charges against the applicant were dropped and he had pleaded guilty to another charge. Lai Siu Chiu J decided to uphold the striking-out order on this ground of no real controversy: *Tan Eng Hong* at [24].

8.82 The court made this decision notwithstanding its view (*Tan Eng Hong* at [30]), that the case "raised many novel issues that deserved more detailed treatment". The Court of Appeal has reserved judgment in this case and it remains to be seen how it will rule in light of its statement in *Bunga Melati (CA)* at [27] that the judge in *Bunga Melati* should not have struck out the claim if she only had "some doubt" about whether an alleged representation (that may establish agency by estoppel and thus a contractual relationship between the parties) had been made. This is relevant because Lai Siu Chiu J said (*Tan Eng Hong* at [27]), that "it *may be argued* that Tan's claim has no practical value and should therefore be struck out" [emphasis added]. This statement might be seen as sufficiently equivocal to fall short of the "obviously unsustainable" standard.

8.83 In *Huang Meizhe v Attorney-General* [2011] 2 SLR 1149 ("*Huang Meizhe*"), the court also struck out a claim for declaratory relief. The applicants, the widow and mother of a deceased victim, sought a declaration that the Attorney-General, in his capacity as public prosecutor, acted illegally and/or irrationally and/or with procedural impropriety in failing to appeal against a sentence the applicants believed was too lenient. The court recognised the wide discretion the public prosecutor had when conducting a case and held (*Huang Meizhe* at [27]), that since the applicants did not allege breach of the Constitution or bad faith, their application was bound to fail.

8.84 The High Court also considered whether the applicants had legal rights "that can be the subject matter of the declaration sought". It held that since the right to appeal in criminal cases was only conferred on the accused and the public prosecutor, the applicants' legal rights were unaffected by the public prosecutor's decision and they lacked the *locus standi* to apply for the declaration: *Huang Meizhe* at [28].

Summary judgment

Raising defence that is not pleaded

8.85 In *Rankine Bernadette Adeline v Chenet Finance Ltd* [2011] 3 SLR 756 ("*Rankine Bernadette*"), the High Court was faced with two conflicting lines of authority on whether a defendant to an application for summary judgment could raise a defence that was not previously pleaded. On the one hand, the Malaysian case of *Lin Securities (Pte) v Noone & Co Sdn Bhd* [1989] 1 MLJ 321 ("*Lin Securities*") and the Court of Appeal decision in *Poh Soon Kiat v Desert Palace Inc* [2010] 1 SLR 1129 ("*Poh Soon Kiat*") said that a defendant in a summary judgment proceeding may raise defences even if they are not referred to in the pleaded defence. The contrary position was taken in *Lim Leong Huat v Chip Hup Hup Kee Construction Pte Ltd* [2008] 2 SLR(R) 786 ("*Lim Leong Huat*") and *United States Trading Co Pte Ltd v Ting Boon Aun* [2008] 2 SLR(R) 981 ("*United States Trading*"), where Woo Bih Li J and Judith Prakash J respectively, departed from the decision in *Lin Securities* on the basis that the RoC had been amended to allow for an application for summary judgment to be made only after the defence had been filed.

8.86 Kan Ting Chiu J noted (*Rankine Bernadette* at [24]), that counsel for the plaintiff was prepared to deal with the unpleaded defence and did not exclude it, following *Poh Soon Kiat*. However, he observed that the court in *Poh Soon Kiat* did not have its attention drawn to the decisions of *Lim Leong Huat* and *United States Trading*, and added that it may have decided differently had this been done: *Rankine Bernadette* at [23].

8.87 Similarly, the High Court in *PMA Credit Opportunities Fund v Tantono Tiny (representative of the estate of Lim Susanto deceased)* [2011] SGHC 89 ("*PMA Credit*") followed *Poh Soon Kiat* as it was binding but emphasised (*PMA Credit* at [74]), that if it were not so bound, it would not have allowed the defendant in a summary judgment application to raise an allegation that it did not plead.

Establishing a triable issue

8.88 During summary judgment proceedings, the defendant in *PMA Credit* alleged that the deceased, Susanto, was mistaken as to the nature of his obligation to the plaintiffs ("First Allegation"), and that the terms of the personal guarantee were not explained to the defendant (Susanto's widow), which was a requirement of Indonesian law ("Second Allegation").

8.89 The High Court found (*PMA Credit* at [75]), that the defendant's failure to raise Susanto's unawareness of his primary obligation in the pleadings suggested that the First Allegation was a sham. It also found the Second Allegation to be a sham, and one of the reasons was that it "was raised so late in the day": *PMA Credit* at [84]. Given these conclusions, the court held that there was no triable issue and affirmed the decision of the assistant registrar to grant summary judgment in favour of the plaintiffs: *PMA Credit* at [85].

8.90 Therefore, while the current position in Singapore is that the failure to plead a defence raised in summary judgment proceedings does not render the defence inadmissible, the decision in *PMA Credit* suggests that the court will, nevertheless, take such a failure into account when determining whether there is a triable issue.