

INTRODUCTION

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1 This Special Issue of the *Singapore Academy of Law Journal* contains articles dealing with topics that are relevant to civil and criminal litigation.

2 The Rules of Court 2021 (the “ROC 2021”) made bold and innovative changes to, and transformed, the entire civil litigation process in Singapore. It is timely to take stock of the implementation of the ROC 2021. The first three articles provide perspectives from the Bench and the Bar on the changes brought about by the ROC 2021.

3 The first article, by Justice Kannan Ramesh, provides perspectives from the Appellate Division of the High Court. The author highlights the common procedural missteps that have been observed in cases heard by the appellate courts, with a view to helping readers navigate the rules effectively and avoid undesirable outcomes. The author focuses on six different areas, with references to relevant cases. First, the author looks at the different tracks for filing appeals and sets out the consequences of choosing the wrong track as well as the appellate court’s power to remedy any such missteps. Second, the author discusses when permission to appeal is required and what parties can do if they are unsure of whether permission is required. Third, the author provides useful guidance on dealing with some of the difficulties with computing timelines and other requirements for bringing an appeal or an application for permission to appeal. Fourth, the author examines the question of when time for bringing appeals or applications for permission to appeal starts to run, including the interpretation of when a lower court “has heard and determined all matters in the trial, including costs” (which starts time running). Fifth, the author provides guidance on when a cross-appeal is necessary as well as when exceptions apply to allow parties to challenge the decision of the lower court despite not having filed a cross-appeal. Finally, the author clarifies when further arguments can be made.

4 The second article, by Justice Chua Lee Ming, provides perspectives from the General Division of the High Court. The author first analyses several cases to demonstrate how purposive interpretation and the Ideals, as provided in the ROC 2021, have guided the courts’ interpretation of a spectrum of provisions, including the term “special

case” (in the context of when reply affidavits may be permitted). The author also observes that the application of relevant cases decided under the Rules of Court¹ (the “ROC 2014”) would still be subject to the Ideals. Next, the author discusses the flexibility given to the courts, including the broad discretion and power under O 3 r 2 and the power to waive non-compliance. Reference is made to cases to illustrate the courts’ willingness to exercise their powers in the interests of justice. The author goes on to discuss three areas where the ROC 2021 has introduced significant changes – production of documents, filing of affidavits of evidence-in-chief before production of documents (“AB4D”) and expert evidence. Finally, the author sets out several cases in which the courts have continued to apply the relevant principles that were applicable under the ROC 2014.

5 The third article, by Koh Swee Yen SC, Joel Quek, Lin Chunlong and Samuel Low, provides useful perspectives from the Bar. The authors take stock of developments in the case law since the implementation of the ROC 2021 in three broad areas. First, the authors note that case law shows that the courts have made robust use of their “gap-filling power” under O 3 r 2(2) of the ROC 2021 to ensure that justice is done. The authors demonstrate this point using cases dealing with a wide range of matters – production of documents, stay of proceedings, contractual consent orders, security for costs prior to commencement of proceedings, amendment of judgments and orders, striking out on the ground of abuse of process, filing of notice of intention to contest despite not having been served with the originating claim, imposition of terms in the absence of statutory provisions and amendment of pleadings. Second, the authors discuss the stricter regime for production of documents under the ROC 2021, and comments on case law dealing with the test of materiality under O 11 r 3(1) of the ROC 2021. The authors also discuss exclusions to the production of documents, in particular the important exclusion relating to private or internal correspondence. Third, the authors discuss the costs regime under the ROC 2021 and the increased arsenal of specific powers to deal with non-complying litigants.

6 The use of affidavits of evidence-in-chief (“AEICs”) in place of oral evidence-in-chief has led to more efficient court hearings and better preparation for trials. However, the use of AEICs has also given rise to several issues. In “Drafting Affidavits of Evidence-in-Chief”, Justice Andre Maniam examines these issues from the perspective of the Bench. The author covers several important topics. First, the author provides guidance on the role of the lawyer and his duty of candour when drafting AEICs. Second, the author discusses when oral evidence-in-chief and

1 2014 Rev Ed.

supplementary oral evidence-in-chief (by a witness who has filed an AEIC) may be allowed. Third, the author examines how the principle that the witness's evidence should be his own affects the drafting of AEICs. Useful practical guidance is given with respect to how a lawyer should approach the drafting of AEICs, including on the use of words and choice of language. Fourth, the author discusses the use of joint or corroborative AEICs, in the light of observations made by the court in some cases. Fifth, the author deals with organisation, length and the contents (from the evidential perspective) of AEICs. Sixth, the author discusses the AB4D procedure and its effect on the drafting of AEICs.

7 Advocacy skills are essential for litigation lawyers, especially under our adversarial system. In “Advocacy in Court: Musings and Observations”, Justice Chua Lee Ming shares his observations as a trial judge on practices adopted by members of the Bar, with the aim of providing some guidance to litigation lawyers, especially the younger members of the Bar. The author starts with five general topics that apply to trial and applications advocacy: (a) the role that counsel's duty to the court plays in advocacy; (b) the persuasive power of concise submissions; (c) practical points to remember with respect to documents that are filed in court; (d) a reminder to be attentive to the judge in both physical and virtual hearings; and (e) the importance of responding to questions from the judge directly and honestly. The author then moves on to cover proceedings headed for and at trial. The discussion covers pleadings and closing submissions, with emphasis on the importance of preparing an outline of closing submissions before the trial begins so that counsel is clear about what his client is fighting for, and counsel can be guided as to the questions that he should or should not ask in cross-examination. The author also provides observations and suggestions regarding several aspects of cross-examination, with examples and illustrations to demonstrate the points made.

8 The Singapore International Commercial Court (the “SICC”) has also introduced a new set of rules, the Singapore International Commercial Court Rules 2021 (the “SICC Rules 2021”). Both the SICC Rules 2021 and the ROC 2021 made significant changes to the procedure relating to factual witness evidence. The SICC Rules 2021 introduced the use of witness statements in lieu of affidavits in actions commenced in the SICC. The ROC 2021 introduced the AB4D procedure. The next article, “Factual Witness Evidence in Modern Civil Litigation”, addresses key topics relating to the use of witness evidence in modern civil litigation, with a focus on civil trials. Toby Landau KC and Colin Seow first analyse the use of witness statements under the SICC Rules 2021 and the distinguishing features between witness statements and affidavits. The authors suggest that the distinguishing features of witness statements underscore an overall tighter regime regulating the use of witness

statements in SICC proceedings as compared to affidavits in general. The authors query whether the standards for regulating each of the two forms of witness evidence will differ significantly. The authors next analyse the procedure for AB4D under the ROC 2021. The authors discuss, in-depth, specific issues concerning the use of witness evidence, namely content (differences between witness statements and affidavits), veracity (issues concerning human memory and legal representation), timing (the AB4D procedure) and control (parties' selection of witnesses and whether courts should play a more proactive role), with comparisons between the SICC Rules 2021 and the ROC 2021 where appropriate.

9 The civil litigation segment of this Special Issue would be incomplete without some observations from the Bench on litigation in the appellate courts. The final article of this segment, "Litigation in Appellate Courts: Some Personal Reflections and Observations" draws on the author's experience as an appellate judge over the course of almost 17 years. Taking a practical approach, Senior Judge Andrew Phang sets out several suggestions for counsel in relation to appellate litigation. The author explains the importance of diligence, clarity of one's case and arguments and focusing on one's major arguments whilst having the flexibility to adapt and shape one's arguments in response to questions from the Bench. The author also explains why questions from the Bench are not necessarily a bad thing and why litigation lawyers should be sensitive to the court's concerns and address these concerns. The author includes a caution regarding appealing against findings of fact and highlights the importance of ensuring that all relevant documents and authorities are brought to the attention of the court. The author also suggests that litigation lawyers should consider possible uses of comparative material and encourages litigation lawyers to remain positive and to develop a positive reputation.

10 There have also been important developments in criminal law and procedure which significantly impact criminal practice in general and criminal litigation in particular.

11 No aspect of criminal jurisprudence has arguably been the subject of more discussion, and undergone more reform, in the last few years than the criminal disclosure regime. In "From Adversarial to Collaborative Truth Seeking: The Past, Present and Future of Criminal Disclosure in Singapore", Senthilkumaran Sabapathy and Ng Jun Chong, both Legal Service Officers, provide a comprehensive review of the criminal disclosure regime, the rationale for the reforms and a window to possible future developments. The authors make the trenchant observation that the changes to the law reflect a significant mindset shift in the prosecution of criminal cases, from an adversarial approach to a more collaborative one. As the authors explain, while the reforms undoubtedly result in a

levelling of the playing field between the Prosecution and the Defence, the weightier and more consequential goal is to assist the court in its search for the truth.

12 The need for finality is an indispensable feature of litigation and any credible legal system. In recent times, that issue has been severely tested, particularly in capital cases, which has led to authoritative pronouncements by the Court of Criminal Appeal and extensive legislative reforms. Nicholas Wuan and Chin Jincheng were both personally involved in these efforts in their roles as Deputy Public Prosecutors. In “Reopening Concluded Cases in Criminal Matter”, the authors review the laws governing post-appeal review applications in criminal matters and the changes introduced by the Post-Appeal Applications in Capital Cases Act 2022. The authors focus on the difficult but important balance that must be struck to preserve access to justice while ensuring the proper utilisation of judicial resources and preserving the integrity of the judicial process.

13 Colin Liew, Ben Tan and DR Teo Guan Siew’s joint article, “Privilege: Contemporary Issues”, provides unique and interesting insights on the important and complex issues of litigation and marital privilege, combining the perspectives of a private practitioner, Deputy Public Prosecutor and Supreme Court Deputy Registrar. The authors discuss the current gaps in the law, and even challenge settled issues such as whether privilege is even necessary, when it should apply and whether exceptions should be introduced or expanded.

14 It has been said that it is increasingly difficult to attract young lawyers to criminal defence work. There are several reasons for this, but high on that list would surely be the emotional stress of defending accused persons and the ethical issues criminal lawyers must regularly navigate in discharging their duties to the court and their clients. The next two articles from highly experienced criminal practitioners discuss these matters. Shashi Nathan, Ramesh Tiwari, Tania Chin and Sadhana Rai, in “‘The Sword of Justice Has No Scabbard’: Perspectives from the Criminal Bar”, recount their involvement in several high-profile criminal cases, and how these shaped their perspectives and careers. In “Ethics in Criminal Defence Practice”, Anand Nalachandran and Thrumurgan s/o Ramapiram identify and share their perspectives on common ethical issues faced by defence counsel in criminal practice and related court proceedings and provide useful guidance on how to deal with the same. These articles underscore the importance to society of maintaining an effective and responsible Defence Bar.

15 Last and certainly not least, the Public Defender’s Office (“PDO”) was established in December 2022, marking a significant milestone in the

provision of legal aid, and a departure from a policy of more than 50 years of not funding and providing criminal defence aid to accused persons. The details and inner workings of the PDO however remain relatively unknown. In “The Public Defender’s Office: Singapore’s Publicly Funded Criminal Defence Aid”, Muhammad Taufiq bin Suraidi and Ryan David Nonis from the PDO discuss the scope of publicly funded criminal defence aid, the structure of the PDO, the power, independence and accountability of the Chief Public Defender and examples of the work done by the PDO thus far. The article provides helpful information on the PDO and will enable lawyers and the public to better understand how it discharges its important mission.

16 We are most grateful to all the authors for their contributions, insightful comments and valuable suggestions. We hope that litigation lawyers will find the guidance in the articles to be useful, and that non-litigation lawyers will gain some insight into the litigation process.
