THE RULES OF COURT 2021: PERSPECTIVES FROM THE BAR

More than two years have passed since the Rules of Court 2021 ("ROC 2021") came into effect. The new ROC 2021 promises modernisation, enhanced speed and efficiency of adjudication, as well as procedural fairness, and has brought about significant changes in the civil litigation process. Through the lenses of efficiency, fairness to litigants, and judicial control, this article aims to provide a practitioner's perspective on select areas of the ROC 2021 through a comparative analysis with its predecessor regime, the Rules of Court (2014 Rev Ed).

KOH Swee Yen SC
LLB (First Class Honours) (National University of Singapore); Head, International Arbitration Practice and Partner, Commercial & Corporate Disputes Practice, WongPartnership LLP; Advocate and Solicitor (Singapore), Solicitor (England & Wales), Registered Practitioner (DIFC Courts).

Joel **QUEK**
LLB (First Class Honours) (University College London), LLM (Cambridge); Advocate and Solicitor (Singapore); Partner, Commercial & Corporate Disputes and International Arbitration Practices, WongPartnership LLP.

LIN Chunlong
LLB (Magna Cum Laude) (Singapore Management University); Advocate and Solicitor (Singapore); Partner, Commercial & Corporate Disputes and Commodities & International Trade Practices, WongPartnership LLP.

Samuel **LOW**
LLB (First Class Honours) (University College London); Advocate and Solicitor (Singapore); Associate, WongPartnership LLP.

I. Introduction

1 At the turn of the 20th century, the esteemed Sir Richard Collins MR once remarked that "the relation of rules of practice to the

work of justice is intended to be that of handmaid rather than mistress".[1] Jurisprudential thinking on the role of procedure before the courts has since shifted, and the notion of procedure being subservient to substantive law has been gradually replaced by an enlightened recognition of its independent importance.[2] In *Lee Chee Wei v Tan Hor Peow Victor*,[3] V K Rajah JA described procedure as the servant – not of substantive law – but of the "ultimate and overriding objective of justice".[4] In a similar vein, Andrew Phang JC emphasised in *United Overseas Bank Ltd v Ng Huat Foundations Pte Ltd*[5] that the task of the court is to integrate both procedural and substantive justice "in order that justice in its fullest orb may shine forth".[6]

2 More recently, in his Keynote Address delivered at the Law Society's Litigation Conference 2022, Sundaresh Menon CJ noted that procedure cannot be merely regarded as being part of the "machinery of the law", but must be recognised for its important roles in:[7]

(a) regulating access to the courts by controlling how claims can be brought to court and the costs of doing so;

(b) securing the legitimacy of our court process by ensuring fairness to litigants; and

(c) impacting society at large by managing the costs and benefits of litigation that accrue to even those who are not parties to proceedings.

3 It is against this backdrop that we turn to discuss the new Rules of Court 2021 ("ROC 2021") which were gazetted on 1 December 2021,

1 *In the Matter of an Arbitration between Coles and Ravenshear* [1907] 1 KB 1 at 4.

2 Lim Toh Han, "Justice in its Fullest Orb: The Evolving Relationship Between Procedure and Substantive Law (I/II)" (2019/2020) 11 *Singapore Law Review: Juris Illluminae* at pp 1–2 <https://www.singaporelawreview.com/juris-illuminae-entries/2020/justice-in-its-fullest-orb-the-evolving-relationship-between-procedure-and-substantive-law-iii> (accessed 1 December 2024).

3 [2007] 3 SLR(R) 537 at [82].

4 Lim Toh Han, "Justice in its Fullest Orb: The Evolving Relationship Between Procedure and Substantive Law (I/II)" (2019/2020) 11 *Singapore Law Review: Juris Illluminae* at pp 1–2 <https://www.singaporelawreview.com/juris-illuminae-entries/2020/justice-in-its-fullest-orb-the-evolving-relationship-between-procedure-and-substantive-law-iii> (accessed 1 December 2024).

5 [2005] 2 SLR(R) 425.

6 *United Overseas Bank Ltd v Ng Huat Foundations Pte Ltd* [2005] 2 SLR(R) 425 at [9].

7 Chief Justice Sundaresh Menon, Supreme Court of Singapore, "Procedure, Practice and the Pursuit of Justice", speech at Litigation Conference 2022 (5 May 2022) <https://www.judiciary.gov.sg/docs/default-source/news-docs/litigation-conference-2022-keynote-2022-04-26-(final).pdf?sfvrsn=420c90cc_2> (accessed 1 December 2024).

came into effect on 1 April 2022, and superseded (for the most part) the Rules of Court[8] ("ROC 2014"). The ROC 2021 has had a long gestational period which included a public consultation,[9] beginning as it did with the constitution of the Civil Justice Commission at the Opening of the Legal Year on 5 January 2014. The Civil Justice Commission was mandated with the following tasks:[10]

> (a) To transform, not merely reform, the litigation process by *modernising it*, *enhancing efficiency and speed of adjudication* and *maintaining costs at reasonable levels*.
>
> (b) To simplify rules, *avoid outdated language without discarding established legal concepts*, *eliminate time-consuming or cost-wasting procedural steps*, *ensure fairness to all litigants, make good use of advancements in information technology* and *allow greater judicial control of the entire litigation process*.

4 The Civil Justice Commission therefore had to start with a clean slate – and consider what the new rules of court for Singapore should look like, and not just emulate what other jurisdictions have done. These lofty objectives of the Civil Justice Commission are perhaps best encapsulated by the new O 3 r 1 of the ROC 2021, which decrees that civil procedure in Singapore will now be governed by five critical ideals ("Ideals"): (a) fair access to justice; (b) expeditious proceedings; (c) cost-effective work proportionate to the matter; (d) efficient use of court resources; and (e) fair and practical results suited to the needs of the parties. Indeed, it should be noted at the outset that the new civil justice reforms have been nothing short of transformative,[11] with the Ideals being described as "akin to constitutional principles by which the parties and the court are guided in conducting civil proceedings".[12] They are, by and large,

8 2014 Rev Ed.

9 Civil Justice Review Committee and Civil Justice Commission, *Public Consultation on Civil Justice Reforms: Recommendations of the Civil Justice Review Committee and Civil Justice Commission* (26 October 2018) <https://www.mlaw.gov.sg/files/news/press-releases/2018/10/Annex%20A%20Public%20consultation%20paper%20on%20civil%20justice%20reforms.pdf> (accessed 1 December 2024).

10 Civil Justice Commission, *Civil Justice Commission Report* (29 December 2017) (Chairperson: Justice Tay Yong Kwang) <https://www.mlaw.gov.sg/files/Annex_C_Civil_Justice_Commission_Report.pdf> (accessed 1 December 2024).

11 Jeffrey Pinsler SC, "The Ideals in the Proposed Rules of Court" (2019) 31 SAcLJ 987 at para 2. The learned author posits that the five Ideals alone "fundamentally affect how the rules of civil procedure are to be interpreted and applied".

12 *Singapore Rules of Court: A Practice Guide (2023 Edition)* (Chua Lee Ming editor-in-chief & Paul Quan gen ed) (Academy Publishing, 2023) ch 3, at para 03.002; see also Civil Justice Commission, *Civil Justice Commission Report* (29 December 2017) at p 6, para 4 (Chairperson: Justice Tay Yong Kwang) <https://www.mlaw.gov.sg/files/Annex_C_Civil_Justice_Commission_Report.pdf> (accessed 1 December 2024).

characterised by a concern to enhance the cost-efficiency and speed of adjudication while ensuring fairness to litigants, coupled with a "shift to a new system of civil litigation, where adversarial elements of old are diminished, and the court's discretion and powers, at least with respect to case management, are enlarged".[13]

5 More than two years have passed since the new ROC 2021 came into effect. The courts and practitioners alike have had some time to explore the practical application of the new rules, and a nascent but nonetheless vibrant body of supporting case law has emerged. Although it will still be some time before a *corpus* of case law on the ROC 2021 is built up to rival that of the ROC 2014, this article aims to take stock of developments thus far in terms of:

(a) Order 3 r 2 of the ROC 2021, which – subject to certain caveats – provides for the general power of the court to "do whatever the Court considers necessary on the facts of the case before it to ensure that justice is done or to prevent an abuse of the process of the Court";

(b) Order 11 of the ROC 2021, which sets out the new regime for the production of documents; and

(c) Order 21 r 2 of the ROC 2021, which provides for the court's power to "determine all issues relating to the costs of or incidental to all proceedings in the Supreme Court or the State Courts at any stage of the proceedings or after the conclusion of the proceedings".

6 Through the lenses of efficiency, fairness to litigants, and judicial control, this article aims to provide a practitioner's perspective on the aforementioned areas through a comparative analysis with the ROC 2014.

II. Order 3 rule 2: general power of the court

7 Order 3 r 2(2) of the ROC 2021 provides that:

> Where there is no express provision in these Rules or any other written law on any matter, the Court may do whatever the Court considers necessary on the facts of the case before it to ensure that justice is done or to prevent an abuse of the process of the Court, so long as it is not prohibited by law and is consistent with the Ideals.

13 Chen Siyuan, "The Impact of the Rules of Court 2021 on the Law of Evidence" (2022) 34 SAcLJ 328 at 329.

8 As explained in the Civil Justice Commission Report:[14]

> The CJC did not try to provide detailed rules for every conceivable scenario as this will result in a very unwieldy set of rules. Human wisdom is hardly able to contemplate every possibility but human wisdom is sufficient in most cases to resolve new situations in a commonsensical way. We prefer to establish a framework with broad but clear parameters that would take care of the vast majority of cases instead of worrying about how to deal with the occasional aberration. The framework can always be modified if aberrations proliferate into a norm.

9 Order 3 r 2(2) of the ROC 2021 therefore plays a critical role in the overall architecture of the ROC 2021. To achieve a "fresh new approach that is easy to understand and which is tailored for local litigation",[15] a conscious attempt has been made to streamline the rules and detailed provisions on niche scenarios have been eschewed. On the face of it, O 3 r 2(2) of the ROC 2021 therefore appears to confer the court with a "gap-filling power"[16] by enabling the court, when faced with the absence of a rule applicable to a particular issue, to "do whatever [it] considers necessary on the facts of the case before it to ensure that justice is done".

10 Already, a veritable body of case law has emerged showing that the courts have made robust use of O 3 r 2(2) of the ROC 2021 to ensure that justice is done. These include areas such as the production of documents, stay of proceedings, amendment of a judgment or order and the power to impose terms in the absence of statutory provisions. A selection of the case law on O 3 r 2(2) of the ROC 2021 is set out below to illustrate the courts' successful use of O 3 r 2(2) of the ROC 2021.

A. Relevant case law

(1) Production of documents

11 In *Interactive Digital Finance Ltd v Credit Suisse AG*[17] ("*Interactive Digital Finance*"), the issue was whether the court had the power under the ROC 2021 to order the production of documents referred to in

14 Civil Justice Commission, *Civil Justice Commission Report* (29 December 2017) at p 3, para 9 (Chairperson: Justice Tay Yong Kwang) <https://www.mlaw.gov.sg/files/Annex_C_Civil_Justice_Commission_Report.pdf> (accessed 1 December 2024).

15 Civil Justice Commission, *Civil Justice Commission Report* (29 December 2017) at p 1 (Chairperson: Justice Tay Yong Kwang) <https://www.mlaw.gov.sg/files/Annex_C_Civil_Justice_Commission_Report.pdf> (accessed 1 December 2024).

16 *Singapore Rules of Court: A Practice Guide (2023 Edition)* (Chua Lee Ming editor-in-chief & Paul Quan gen ed) (Academy Publishing, 2023) ch 3, at para 03.002.

17 [2023] 5 SLR 1735.

the pleadings before the single application pending trial ("SAPT"). The position was clear under the ROC 2014 because O 24 rr 10 and 11 provided for the following notice to produce ("NTP") procedure:

> (a) if a party's pleadings or affidavits referred to any documents, any other party could serve a notice to produce requiring the production of such documents; and
>
> (b) if the party served with the notice failed to produce the documents requested, the requesting party could apply to court for the production of the documents in question.

12 However, unlike O 24 r 10 of the ROC 2014, the ROC 2021 does not specifically provide for the inspection and production of documents in pleadings or affidavits. The claimants, who sought to resist the production of documents referred to in their statement of claim ("SOC"), naturally argued that the NTP procedure was not applicable under the ROC 2021 and that in any event, an application for the production of documents had to be part of the SAPT.[18]

13 Notwithstanding the lack of a specific NTP procedure under the ROC 2021, the court held that it had the power to order the production of documents referred to in pleadings pursuant to its general power to order production of documents under O 11 r 4 of the ROC 2021,[19] and that the general rule that applications for the production of documents had to be made as part of the SAPT did not apply to documents referred to in pleadings, which warranted different treatment.[20] As reasoned by Chua Lee Ming J, it is in the interests of justice that a party should know the pleaded case against it, and it follows that a party ought to be entitled to the production of documents referred to in the SOC or defence, before it files its defence or reply.[21] The principle underlying the NTP procedure was therefore that the requesting party should be conferred the same advantage as if the documents referred to had been fully set out in the

18 See O 9 rr 9(3) and 9(4)(*k*) of the Rules of Court 2021, which, collectively, provide that the SAPT must deal with all matters that are necessary for the case to proceed expeditiously, including the production of documents. An application for the production of documents referred to in pleadings does not appear under the list of applications which may be made separately from the SAPT under O 9 r 9(7) of the Rules of Court 2021.

19 Order 11 r 4 of the Rules of Court 2021 provides that "[s]ubject to Rules 5, 8 and 9, the Court may, of its own accord and at any time, order any party or non-party to produce a copy of any document that is in the person's possession or control".

20 *Interactive Digital Finance Ltd v Credit Suisse AG* [2023] 5 SLR 1735 at [30]–[31].

21 *Interactive Digital Finance Ltd v Credit Suisse AG* [2023] 5 SLR 1735 at [33].

pleadings,[22] and this principle is sound and remained relevant under the ROC 2021.[23]

14 Notably, Chua J went further and found that apart from O 11 r 4 of the ROC 2021, the court also had the power under O 3 r 2(2) to make the order of production before the SAPT and in the absence of an application to ensure a just outcome in accordance with the Ideals, in particular those relating to expeditious proceedings (O 3 r 1(2)(*b*)) and fair and practical results suited to the needs of the parties (O 3 r 1(2)(*e*)).[24] Chua J concluded that a party seeking production of documents referred to in pleadings only needed to make a written request to the other party, who should produce such documents unless it disputed that the documents requested were not referred to in the pleadings.

(2) Stay of proceedings

15 In *HQH Capital Ltd v Chen Liping*[25] ("*HQH Capital*"), the judge issued a Tomlin order, which is a consent order where a court action is stayed on agreed upon terms that are included in a schedule to the order ("First Tomlin Order").[26] When one of the parties defaulted on the terms in the schedule to the First Tomlin Order, the judge granted another order by consent that all further proceedings against that defaulting party be stayed except for the purpose of carrying into effect the terms of the schedule to the order ("Revised Tomlin Order").[27]

16 When the claimant subsequently applied for final judgment to be entered against the defendant on the Revised Tomlin Order, the defendant opposed the application, contending that the Revised Tomlin Order was invalid because, amongst others, the judge was *functus officio* when granting the order.[28] However, this argument did not find favour with the court, who identified O 3 r 2(2) of the ROC 2021 as the source of the court's power to stay proceedings, and noted that the power of the court to grant a stay of proceedings also entailed the power of the court to lift that stay.[29] The defendant's appeal was dismissed by the Appellate

22 *Interactive Digital Finance Ltd v Credit Suisse AG* [2023] 5 SLR 1735 at [32], citing *SK Shipping Co Ltd v IOF Pte Ltd* [2012] SGHCR 14 at [16].
23 *Interactive Digital Finance Ltd v Credit Suisse AG* [2023] 5 SLR 1735 at [33].
24 *Interactive Digital Finance Ltd v Credit Suisse AG* [2023] 5 SLR 1735 at [37].
25 [2023] 4 SLR 885.
26 *HQH Capital Ltd v Chen Liping* [2023] 4 SLR 885 at [8].
27 *HQH Capital Ltd v Chen Liping* [2023] 4 SLR 885 at [9]–[10].
28 *HQH Capital Ltd v Chen Liping* [2023] 4 SLR 885 at [33].
29 *HQH Capital Ltd v Chen Liping* [2023] 4 SLR 885 at [34].

Division of the High Court, which did not render any written grounds of decision but nonetheless upheld the decision below.[30]

(3) Contractual consent orders

17 In *Blomberg, Johan Daniel v Khan Zhi Yan*[31] ("*Blomberg*"), an appeal was made to the General Division of the High Court against the decision of the district judge to set aside an order of court, made by the parties' consent, under the Protection from Harassment Act 2014[32] on the basis of its imprecise terms and wide ambit.[33]

18 One of the issues before the court was the circumstances under which a consent order may be set aside.[34] In this connection, it is relevant to note that in *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua*[35] ("*Turf Club Auto Emporium*"), a case under the ROC 2014 regime, the Court of Appeal had ruled that the court has a residual discretion not to enforce procedural consent orders, although such a discretion does not extend to contractual consent orders that relate to the substantive issues in the case and the substantive rights of the parties (let alone to setting aside such orders).[36]

19 In *Blomberg*, See Kee Oon J adopted the reasoning in *Turf Club Auto Emporium*, and further elaborated on the distinction between procedural and substantive consent orders. A procedural consent order deals with parties' procedural rights in the litigation process, and refers to an order based on procedural arrangements agreed to by the parties.[37] On the other hand, a substantive consent order deals with the substantive rights of the parties in the suit,[38] an example being a contractual consent order that encapsulates a settlement agreement covering the substantive causes of action between the parties.[39] According to See J, "a contractual consent order should only be set aside pursuant to ordinary principles of contract law, and accordingly only the existence of recognised vitiating factors in contract law can justify setting aside such contractual consent orders".[40] In line with *Turf Club Auto Emporium*, the court therefore

30 See the editorial note in this case, although O 3 r 2(2) of the Rules of Court 2021 was not expressly referred to.
31 [2024] 3 SLR 1079.
32 2020 Rev Ed.
33 *Blomberg, Johan Daniel v Khan Zhi Yan* [2024] 3 SLR 1079 at [1].
34 *Blomberg, Johan Daniel v Khan Zhi Yan* [2024] 3 SLR 1079 at [36]–[51].
35 [2017] 2 SLR 12.
36 *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2017] 2 SLR 12 at [159].
37 *Blomberg, Johan Daniel v Khan Zhi Yan* [2024] 3 SLR 1079 at [39].
38 *Blomberg, Johan Daniel v Khan Zhi Yan* [2024] 3 SLR 1079 at [39].
39 *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2017] 2 SLR 12 at [163].
40 *Blomberg, Johan Daniel v Khan Zhi Yan* [2024] 3 SLR 1079 at [40].

concluded that it did not retain a residual discretion to set aside substantive contractual consent orders in order to prevent injustice.[41]

20 Against this, the independent counsel appointed by the court (previously known as "*amicus curiae*" under the ROC 2014 regime) noted that *Turf Club Auto Emporium* was decided when the inherent powers of the court resided within O 92 r 4 of the ROC 2014, which has not been replicated in its exact terms in the ROC 2021.[42] This concern was summarily dealt with by See J, who noted that the reasoning of the Court of Appeal in *Turf Club Auto Emporium* was not predicated on O 92 r 4 of the ROC 2014.[43]

21 See J then proceeded to make some interesting observations on the juridical basis for the court's power to set aside a contractual consent order on the basis of vitiating factors. In the court's view, "O 92 r 4 of the ROC 2014 can be considered to be subsumed under O 3 r 2(2) of the ROC 2021"[44] and "[i]t [was] clearly the intent of O 3 r 2(2) of the ROC 2021 to give the court broad powers to give directions and make necessary orders according to the justice of the case".[45] Hence, the court offered the provisional suggestion that "[O 3 r 2(2) of the ROC 2021] forms the juridical basis for setting aside a contractual consent order if there are vitiating factors, subject to the Court of Appeal's views in *Turf Club Auto Emporium* (at [159], [163] and [164])".[46]

(4) Security for costs prior to commencement of proceedings

22 In *Gillingham James Ian v Fearless Legends Pte Ltd*[47] ("*Gillingham James Ian*"), the applicant brought an application for the pre-action production of documents and information pursuant to O 11 r 11(1) of the ROC 2021. This procedure, which had its predecessor in O 24 r 6 of the ROC 2014, is generally intended for an applicant who has some basis for believing that he or she has a cause of action but is unable to properly

41 *Blomberg, Johan Daniel v Khan Zhi Yan* [2024] 3 SLR 1079 at [41]–[42].
42 *Blomberg, Johan Daniel v Khan Zhi Yan* [2024] 3 SLR 1079 at [42].
43 See *Blomberg, Johan Daniel v Khan Zhi Yan* [2024] 3 SLR 1079 at [42]:
> Instead, the Court of Appeal had regard to: (a) the principle of finality; (b) the fact that parties entered into consent orders not to enable the court to exercise supervisory jurisdiction but rather to be able to enforce the judgment; (c) consistency in how the law regards consent; and (d) the demands of fairness (*Turf Club Auto Emporium* at [163]).These reasons continue to be relevant today. I therefore find that *Turf Club Auto Emporium* remains authoritative and supports my finding above.

44 *Blomberg, Johan Daniel v Khan Zhi Yan* [2024] 3 SLR 1079 at [44].
45 *Blomberg, Johan Daniel v Khan Zhi Yan* [2024] 3 SLR 1079 at [45].
46 *Blomberg, Johan Daniel v Khan Zhi Yan* [2024] 3 SLR 1079 at [45].
47 [2023] SGHCR 13.

plead the claim in question because certain documents and information are required to cover "critical gaps" in the intended claim.[48]

23 In response to this application, the respondents sought to have the pre-action production order made conditional on the applicant providing security for costs.[49] The respondents contended that they had already incurred liability for costs and fees in responding to the present application (notwithstanding that no proceedings had been commenced) and that, in all likelihood, the applicant would be unable to pay costs.[50]

24 The difficulty was that unlike O 24 r 6(6)(*a*) of the ROC 2014, there is no provision in O 11 of the ROC 2021 which expressly provides that an order for pre-action production of documents and information may be made conditional upon an applicant giving security for the respondent's costs. Notwithstanding this, the court held that "it seems clear that the court may still order security for costs in a pre-action production situation pursuant to its general powers under O 3 r 2(2) of ROC 2021 (see *Singapore Civil Practice* at para 30-158)".[51] What was less clear are the principles which inform when pre-action production of documents should be made conditional on the applicant's furnishing of security, although the parties agreed that guidance could be sought from the general rules relating to security for costs. However, the court reasoned that the respondent's concern regarding costs was better addressed by making the order for pre-action production of documents and information conditional upon the applicant's payment of the ordered costs instead of an order for security for costs. There was therefore no need for the court to decide on the applicable principles governing the exercise of this discretion.[52]

(5) Amendments of judgments and orders

25 In *TG Master Pte Ltd v Tung Kee Development (Singapore) Pte Ltd*[53] ("*TG Master*"), the issue before the court was whether the High Court had jurisdiction to hear further arguments after a trial in view of s 29B of the Supreme Court of Judicature Act 1969 ("SCJA").[54]

48 *Gillingham James Ian v Fearless Legends Pte Ltd* [2023] SGHCR 13 at [17].
49 *Gillingham James Ian v Fearless Legends Pte Ltd* [2023] SGHCR 13 at [52].
50 *Gillingham James Ian v Fearless Legends Pte Ltd* [2023] SGHCR 13 at [52].
51 *Gillingham James Ian v Fearless Legends Pte Ltd* [2023] SGHCR 13 at [53].
52 *Gillingham James Ian v Fearless Legends Pte Ltd* [2023] SGHCR 13 at [53]–[54].
53 [2023] SGHC 64.
54 2020 Rev Ed. Section 29B of the Supreme Court of Judicature Act 1969 provides for the court's power to hear further arguments before a notice of appeal is filed but is expressed to apply only to "a decision made by a Judge in the exercise of the original

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26 Goh Yihan JC discussed the High Court's jurisdiction and power to hear further arguments within the context of its broader jurisdiction and power to amend its orders. According to Goh JC, O 3 r 2(8) of the ROC 2021, which enables a court to "revoke any judgment" on any of the four grounds listed in O 3 r 2(8)(*a*) to O 3 r 2(8)(*d*) if it is "in the interests of justice", arguably includes the power of the court to make substantive amendments to its orders.[55] He then went on to make the careful distinction between the court's "jurisdiction" and "power",[56] finding that the High Court is *functus officio* after it has rendered its final decision after trial and therefore has no jurisdiction (whether statutory or inherent) to hear further arguments.[57]

27 As to non-substantive amendments, O 20 r 11 of the ROC 2014 had expressly provided that "[c]lerical mistakes in judgments or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the Court by summons without an appeal". However, no equivalent provision exists under the ROC 2021. Nevertheless, Goh JC considered it "arguable" that the court's statutory jurisdiction and power to make non-substantive amendments to orders was preserved through O 3 r 2(2) of the ROC 2021, although it also considered that "such jurisdiction or power might be more properly located within [the Courts'] inherent jurisdiction or power".[58]

28 Kwek Mean Luck J took the latter position in *VMax Marine Pte Ltd v Singapore Salvage Engineers Pte Ltd*[59] ("*Vmax Marine*"), where it was held that while "[i]t is established law that a court rendered *functus officio* has limited jurisdiction to make substantive amendments to its decision", the court "possesses the inherent jurisdiction to clarify the terms of its order and to give consequential directions, but this does not extend to correcting substantive errors or effecting substantive amendments or

or appellate civil jurisdiction of the General Division, after any hearing *other than a trial of an action*" [emphasis added].

55 *TG Master Pte Ltd v Tung Kee Development (Singapore) Pte Ltd* [2023] SGHC 64 at [7].

56 As observed by the Court of Appeal in *Re Nalpon Zero Geraldo Mario* [2013] 3 SLR 258 at [13], the jurisdiction of a court is "its authority, however derived, to hear and determine a dispute that is brought before it", whereas the powers of a court constitute its "its capacity to give effect to its determination by making or granting the orders or reliefs sought by the successful party to the dispute".

57 *TG Master Pte Ltd v Tung Kee Development (Singapore) Pte Ltd* [2023] SGHC 64 at [21]–[50].

58 *TG Master Pte Ltd v Tung Kee Development (Singapore) Pte Ltd* [2023] SGHC 64 at [9].

59 [2024] SGHC 208.

variations to orders that have been perfected".[60] However, it was not clear if the applicability of O 3 r 2(2) of the ROC 2021 was raised for the court's consideration in that case, which concerned whether an appellate court has jurisdiction to receive and consider a party's appeal on a costs order at first instance when the appeal had already been disposed of.

(6) Abuse of process and striking out

29 In *Iskandar bin Rahmat v Attorney-General*[61] ("*Iskandar bin Rahmat*"), one of the matters before the Court of Appeal was an oral application made by the second appellant seeking a stay of his execution pending the disposal of a civil claim he had filed against his assigned counsel.[62] In this civil claim, the second appellant alleged, amongst others, that his assigned counsel had failed to call a critical witness to give evidence.

30 The Court of Appeal was of the view that the civil claim which formed the basis for the second appellant's application for a stay of execution was an abuse of process for several reasons, including that it was baseless, an afterthought, an impermissible collateral attack on earlier decisions in the criminal proceedings, and had been brought too late in the day.[63]

31 In the premises, the Court of Appeal invoked the power under O 3 r 2(2) of the ROC 2021 to dismiss the application and strike out the civil claim on the basis that "it [was] appropriate and necessary to do so to prevent the frustration of the administration of justice".[64]

(7) Notice of intention to contest or not contest in absence of originating claim

32 In *COSCO Shipping Specialized Carriers Co, Ltd v PT OKI Pulp & Paper Mills*[65] ("*COSCO Shipping*"), a vessel collided with a trestle bridge connecting a paper mill to an offshore jetty at a port in Palembang, Indonesia. The owner of the vessel commenced a limitation action to limit

60 *VMax Marine Pte Ltd v Singapore Salvage Engineers Pte Ltd* [2024] SGHC 208 at [12], citing *Godfrey Gerald QC v UBS AG* [2004] 4 SLR(R) 411 at [18]–[19]; *Retrospect Investment (S) Pte Ltd v Lateral Solutions Pte Ltd* [2020] 1 SLR 763 at [12]; and *Thu Aung Zaw v Ku Swee Boon* [2018] 4 SLR 1260 at [23].

61 [2022] 2 SLR 1018.

62 *Iskandar bin Rahmat v Attorney-General* [2022] 2 SLR 1018 at [2].

63 *Iskandar bin Rahmat v Attorney-General* [2022] 2 SLR 1018 at [57], [59] and [67].

64 *Iskandar bin Rahmat v Attorney-General* [2022] 2 SLR 1018 at [67]–[68].

65 [2024] SGHC 92.

its liability arising out of the incident, pursuant to Pt 8 of the Merchant Shipping Act 1995.[66]

33 In this limitation action, the owner of the trestle bridge and the head charterer of the vessel were named as the first and second defendants respectively.[67] However, in accordance with the procedural rules for a limitation action as contained in O 33 r 36 of the ROC 2021, service of the originating claim was only effected on the second defendant.[68] Dissatisfied with this, the first defendant filed a notice of intention to contest and applied for, amongst other things, a declaration that the Singapore courts had no jurisdiction to hear the limitation action.[69]

34 In subsequent proceedings for an anti-suit injunction (following the commencement of Indonesian proceedings by the first defendant), the owner of the vessel argued that the conduct of the first defendant had been procedurally abusive.[70] However, the court held that the first defendant was entitled to file its notice of intention to contest despite not having been served with the originating claim. Whilst recognising that "[t]he ROC 2021 does not expressly provide for such a procedure", the court regarded this as "a gap that had to be filled in the interests of justice by an exercise of [its] discretion under O 3 r 2(2) of the ROC 2021".[71] This is perhaps an unsurprising decision considering that the ROC 2014 envisaged a defendant entering an appearance in an action where the originating process is not served on the defendant,[72] and the application of O 3 r 2(2) of the ROC 2021 in such a manner does nothing more than to allow for something that was allowed under the previous procedural regime.

(8) Imposition of terms in absence of statutory provisions

35 *Re Gabriel Silas Tang Rafferty*[73] ("*Gabriel Silas Tang*") concerned the dismissal of an application for admission as an advocate and solicitor

66 2020 Rev Ed. *COSCO Shipping Specialized Carriers Co, Ltd v PT OKI Pulp & Paper Mills* [2024] SGHC 92 at [1].
67 *COSCO Shipping Specialized Carriers Co, Ltd v PT OKI Pulp & Paper Mills* [2024] 3 SLR 807 at [1].
68 *COSCO Shipping Specialized Carriers Co, Ltd v PT OKI Pulp & Paper Mills* [2024] 3 SLR 807 at [1].
69 *COSCO Shipping Specialized Carriers Co, Ltd v PT OKI Pulp & Paper Mills* [2024] 3 SLR 807 at [1].
70 *COSCO Shipping Specialized Carriers Co, Ltd v PT OKI Pulp & Paper Mills* [2024] SGHC 92 at [169].
71 *COSCO Shipping Specialized Carriers Co, Ltd v PT OKI Pulp & Paper Mills* [2024] SGHC 92 at [169(a)].
72 See Rules of Court (2014 Rev Ed) O 10 r 1(3) and O 12 r 8.
73 [2024] 4 SLR 401.

of the Supreme Court of Singapore. The concern was raised by the Attorney-General that should an unsuccessful applicant continue to desire admission to the Bar, it may be undesirable for him to be left without any indication as to when a fresh application for admission might be considered.[74]

36 At the time the matter was heard, the Legal Profession Act 1966[75] did not expressly set out the court's power to make the appropriate orders in that regard.[76] Nevertheless, Menon CJ took the view that the Attorney-General's concern could be adequately addressed by the imposition of appropriate terms on the dismissal of the application, and imposed the condition that the applicant was not to bring a fresh application for a minimum period of five years from the date of the court's decision.[77] In making this order, Menon CJ noted that it "has the inherent power to regulate its own processes to serve the ends of justice. This is implicitly acknowledged in O 3 r 2(2) …".[78]

(9) Amendment of pleadings

37 In *Housing and Development Board v Cenobia Majella Chettiar*[79] ("*Cenobia Majella Chettiar*"), the applicant took out an originating claim against the respondent for sums arising under a guarantee.[80] The applicant then filed an application for summary judgment. This application was heard before a deputy registrar, who held that the respondent had adduced some evidence to establish a *bona fide* defence, and that even if he were mistaken on this point, there was evidence that the respondent could rely on the "prevention principle" as a defence.[81] Accordingly, the deputy registrar allowed the respondent to amend her defence to include the "prevention principle".[82]

38 Dissatisfied, the applicant filed an unsuccessful registrar's appeal which was heard by the principal district judge, and thereafter filed an application in the General Division of the High Court to seek permission

74 *Re Gabriel Silas Tang Rafferty* [2024] 4 SLR 401 at [54].
75 2020 Rev Ed.
76 *Re Gabriel Silas Tang Rafferty* [2024] 4 SLR 401 at [56].
77 *Re Gabriel Silas Tang Rafferty* [2024] 4 SLR 401 at [59].
78 *Re Gabriel Silas Tang Rafferty* [2024] 4 SLR 401 at [55].
79 [2023] 5 SLR 1514.
80 *Housing and Development Board v Cenobia Majella Chettiar* [2023] 5 SLR 1514 at [4].
81 *Housing and Development Board v Cenobia Majella Chettiar* [2023] 5 SLR 1514 at [5]–[6].
82 *Housing and Development Board v Cenobia Majella Chettiar* [2023] 5 SLR 1514 at [6].

for a further appeal.[83] Amongst others, the applicant alleged that it could establish a *prima facie* case of error as the principal district judge had relied on the amended defence in reaching his decision.[84] According to the applicant, the amended defence was filed by the respondent only after the conclusion of application for summary judgment, it would not have been before the deputy registrar and the principal district judge was therefore precluded from considering the same because O 18 r 16(4) of the ROC 2021 provided that "[t]he appeal must proceed before the District Judge by way of a rehearing on the documents filed by the parties before the Registrar".[85]

39 This application for permission to appeal was dismissed by Goh JC, who held that O 18 r 6(4) of the ROC 2021 did not constrain the District Court's broad powers to consider other documents.[86] In any event, the court was not convinced that there would be a likelihood of substantial injustice to the applicant if permission to appeal were not granted.[87] By this point, the applicant would have had fair notice of the defences in the amended defences, which in Goh JC's view were not implausible defences for which there are no triable issues.[88] Thus, even if there had been some procedural irregularity and the General Division could not consider the amended defence without a formal amendment application, the result of the appeal would be the same as that in the application for summary judgment. This is because the General Division would, in all likelihood, following *Olivine Capital Pte Ltd v Chia Chin Yan*[89] and O 3 r 2(2) of the ROC 2021, have formally allowed the defendant to amend her defence to include the "prevention principle".[90]

B. Comments

40 It transpires from the above that the courts have actively resorted to O 3 r 2(2) of the ROC 2021 to meet the myriad situations which arise

83 *Housing and Development Board v Cenobia Majella Chettiar* [2023] 5 SLR 1514 at [7].
84 *Housing and Development Board v Cenobia Majella Chettiar* [2023] 5 SLR 1514 at [8].
85 *Housing and Development Board v Cenobia Majella Chettiar* [2023] 5 SLR 1514 at [8].
86 *Housing and Development Board v Cenobia Majella Chettiar* [2023] 5 SLR 1514 at [25].
87 *Housing and Development Board v Cenobia Majella Chettiar* [2023] 5 SLR 1514 at [30].
88 *Housing and Development Board v Cenobia Majella Chettiar* [2023] 5 SLR 1514 at [30].
89 [2014] 2 SLR 1371.
90 *Housing and Development Board v Cenobia Majella Chettiar* [2023] 5 SLR 1514 at [30].

in practice. This comes as no surprise given the gap-filling function of O 3 r 2(2). Now, in the absence of a statutory rule which restricts the power of the court in a particular situation, it is no longer open to litigants to argue that the court lacks the power and/or discretion to make the appropriate orders in the interests of justice. This is fitting, given the Civil Justice Commission's expressed hope that "no one will be denied justice … due to the perceived lack of a procedure for dealing with a particular problem that has arisen before the courts".[91]

41 This general power has been used to bridge gaps resulting from the removal of provisions dealing with niche situations under the ROC 2014, a drafting decision which was no doubt brought about by a concern to simplify the rules and avoid cumbersome provisions.

42 The cases also show that the courts have not generally interpreted the removal of such provisions to mean that there was a conscious decision to deprive the court of these powers. On the contrary, O 3 r 2(2) of the ROC 2021 has been regarded as a basis for the preservation of these unexpressed powers. It seems then that O 3 r 2(2) of the ROC 2021 would be a litigant's first port of call where powers which were expressly provided for under the ROC 2014 have apparently been removed under the ROC 2021.

43 Taking a step back, however, one may question whether O 3 r 2(2) of the ROC 2021 simply solves a problem created by an oversimplification of the rules – were these powers expressly provided for, one would not need to resort to a somewhat amorphous provision that enables the court to "do whatever the Court considers necessary", and procedural certainty would be assured.

44 Three points may be made in response to this criticism. First, the promulgation of voluminous rules to deal with every conceivable scenario is not the only way of achieving procedural certainty (even assuming, *arguendo*, the practicability and desirability of such a course of action). As mentioned in the Civil Justice Commission Report, one of the key objectives of the civil justice reform was to simplify rules and avoid outdated language without discarding established legal concepts.[92] It appears that the courts have heeded this sentiment well: notwithstanding the difference in wording and structure between ROC 2021 provisions and

91 Civil Justice Commission, *Civil Justice Commission Report* (29 December 2017) at p 1 (Chairperson: Justice Tay Yong Kwang) <https://www.mlaw.gov.sg/files/Annex_C_Civil_Justice_Commission_Report.pdf> (accessed 1 December 2024).

92 Civil Justice Commission, *Civil Justice Commission Report* (29 December 2017) at Preamble (Chairperson: Justice Tay Yong Kwang) <https://www.mlaw.gov.sg/files/Annex_C_Civil_Justice_Commission_Report.pdf> (accessed 1 December 2024).

ROC 2014 provisions, the courts routinely consider case law interpreting equivalent ROC 2014 provisions where appropriate;[93] old ROC 2014 provisions have served as a source of inspiration for the invocation of specific powers under O 3 r 2(2);[94] and previously established legal principles have even been used to justify the invocation of O 3 r 2(2).[95]

45 For example, in *Interactive Digital Finance*, the court observed that the principle underlying the NTP procedure under the ROC 2014 was that the requesting party should be conferred the same advantage as if the documents referred to had been fully set out in the pleadings. This principle in turn has its genesis in the fact that it is in the interests of justice that a party should know the pleaded case against it. As this principle remained relevant under ROC 2021, the court held that it was likewise empowered to order the production of documents referred to in pleadings.[96]

46 In this way, established legal principles and procedures under the previous regime have been preserved, and litigants are not left completely adrift with no guidance as to what the court may order in the face of eventualities which have not been expressly provided for under the ROC 2021. In other words, while concerns about procedural certainty are not invalid, they should not be overstated, especially given the ever-growing body of case law surrounding the interpretation of the ROC 2021.

47 Second, the above criticism involves an overly narrow view of the potential scope of application of O 3 r 2(2). Order 3 r 2(2) has not merely been used to remedy the removal of provisions which previously existed under the ROC 2014 but has also been used to deal with situations which were not explicitly contemplated under either regime. For example, the powers of the court to (a) lift a stay of proceedings following the grant of a Tomlin Order;[97] (b) set aside a contractual consent order in the presence of vitiating factors;[98] and (c) impose terms in an order dismissing an application for admission to the Bar,[99] have all been situated within O 3 r 2(2). These are all powers which were not expressly provided for under the ROC 2014.

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93 *Indian Trading Pte Ltd v De Tian (AMK 529) Pte Ltd* [2023] SGHCR 3 at [26].
94 See paras 40–43 above.
95 See, *eg*, *Interactive Digital Finance v Credit Suisse AG* [2023] 5 SLR 1735 and *Blomberg, Johan Daniel v Khan Zhi Yan* [2024] 3 SLR 1079 discussed at paras 11–14 and 17–21 above.
96 *Interactive Digital Finance Ltd v Credit Suisse AG* [2023] 5 SLR 1735 at [33].
97 See *HQH Capital Ltd v Chen Liping* [2023] 4 SLR 885.
98 See *Blomberg, Johan Daniel v Khan Zhi Yan* [2024] 3 SLR 1079.
99 See *Re Gabriel Silas Tang Rafferty* [2024] 4 SLR 401.

48 Even the briefest of forays into civil litigation tends to impart one with a keen awareness that the situations one encounters are multifarious. No two cases are quite the same, procedurally or substantively. It is perhaps a fool's errand to attempt to provide for all procedural eventualities, and the ROC 2021 strikes a sensible balance by enumerating the key procedural rules while leaving it to O 3 r 2(2) to do the rest.

49 Third, and as alluded to above, the open textured phraseology of O 3 r 2(2) may in fact be a more desirable alternative to express provisions governing specific situations. This flexibility enables O 3 r 2(2) to temper the operation of what might otherwise be overly-rigid rules. For instance, pursuant to O 9 rr 9(3) and 9(4)(*k*) of the ROC 2021 read with O 7(7) of the same, an application for the production of documents is to be made as part of the SAPT. Notwithstanding this, it was held in *Interactive Digital Finance* that the court had the power under O 3 r 2(2) to make an order of production before the SAPT to ensure a just outcome in accordance with the Ideals.[100] In this way, the *prima facie* rigidity of the SAPT regime was tempered by the court's approach to O 3 r 2(2) in order to achieve a just and eminently sensible outcome.

50 Another example of this is *COSCO Shipping*. There, the issue before the court was whether it was procedurally abusive of the first defendant to have filed a notice of intention to contest despite not having been served with the originating claim. By way of explanation, *COSCO Shipping* involved a limitation action in respect of damage done by a vessel. Such actions are governed by special procedures under the ROC 2021. In particular, O 33 r 36(3) of the ROC 2021 requires that only one defendant be expressly named in the originating claim, while all others may be described generally. As to service, O 33 r 36(4) of the ROC 2021 further provides that the originating claim only needs to be served on one named defendant and need not be served on any others. These rules – which may on a first impression seem peculiar – have been formulated in recognition of the practical reality that it may not be possible for a shipowner seeking to limit his liability to know the identities of all the parties with potential claims against it, let alone be able to name and serve the limitation proceedings on all of them.[101] By allowing the first defendant to file its notice of intention to contest pursuant to O 3 r 2(2), the apparent inflexibility of procedural rules is once again attenuated, paving the way for substantive justice to be done: shipowners are not denied substantive rights simply because they are

100 *Interactive Digital Finance Ltd v Credit Suisse AG* [2023] 5 SLR 1735 at [37].

101 *COSCO Shipping Specialized Carriers Co, Ltd v PT OKI Pulp & Paper Mills* [2024] SGHC 92 at [6].

unable to serve originating process on all potential defendants, and those defendants that are not served are not denied an opportunity to be heard.

51 These examples illustrate the clear benefit of a general power for the court to "do whatever the Court considers necessary on the facts of the case before it", which power is guided by the Ideals, along with the imperative to ensure that justice is done and that the court's processes are not abused.

52 Notwithstanding the above, it is unlikely that O 3 r 2(2) of the ROC 2021 was intended to be a cure-all to be mindlessly invoked, or to be construed as conferring a plenary power on the court that is unfettered by any restrictions.

53 In the first place, the general power under O 3 r 2(2) is subject to the proviso that it only applies "[w]here there is no express provision in these rules or any other written law on any matter". In *Presscrete Engineering Pte Ltd v SsangYong-Wai Fong Joint Venture*[102] ("*Presscrete Engineering*"), the defendant sought a stay of court proceedings pursuant to s 6 of the Arbitration Act 2001[103] ("Arbitration Act"), and further or alternatively, also sought a stay of proceedings pursuant to the court's general powers under O 3 r 2(2) of the ROC 2021.[104] As the court ordered a stay under s 6 of the Arbitration Act, it was unnecessary for the court to consider O 3 r 2(2), which did not form part of its decision.[105] Thus, O 3 r 2(2) finds no application where there is a statutory provision or rule which specifically addresses and governs the determination of the issue at hand. It goes without saying that one would not countenance O 3 r 2(2) being invoked to overcome the provisions of written statutes (even where such statutes deal with procedural rights). It may also be the case, with reference to the jurisprudence on O 92 r 4 of the ROC 2014 (as discussed below), that O 3 r 2(2) cannot be used to provide the court with powers which were deliberately excluded from its remit by the Legislature.[106]

54 Furthermore, although O 3 r 2(2) is framed extremely broadly and is not subject to the express proviso that it only governs matters of procedure, it is plain – from its surrounding context and the limited way it has been used and invoked in the cases – that O 3 r 2(2) is ultimately only a procedural rule that does not empower the court to modify the

102 [2023] SGHC 8.
103 2020 Rev Ed.
104 *Presscrete Engineering Pte Ltd v SsangYong-Wai Fong Joint Venture* [2023] SGHC 8 at [5].
105 *Presscrete Engineering Pte Ltd v SsangYong-Wai Fong Joint Venture* [2023] SGHC 8 at [88].
106 *Tan Poh Beng v Choo Lee Mei* [2014] 4 SLR 462 at [24] and [26].

substantive rights of the parties before it. Thus, in *Blomberg*, the court put forward the provisional suggestion that O 3 r 2(2) provided the juridical basis for the court's power to set aside consent orders, but – following *Turf Club Auto Emporium* – held that it did not retain a residual discretion to not enforce (let alone set aside) contractual consent orders that relate to the substantive issues in the case, even if it was in the interests of justice to do so.[107]

55 Finally, any discussion of O 3 r 2(2) of the ROC 2021 would be incomplete without some mention of its predecessor (for want of a better term), O 92 r 4 of the ROC 2014.

56 By way of context, O 92 r 4 provided as follows:

> For the avoidance of doubt it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

57 Order 92 r 4 provides statutory recognition to what is known across the Commonwealth as the doctrine of inherent power.[108] The inherent power of the court has in turn been defined as "the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them".[109]

58 Under the ROC 2014 regime, the court has invoked its inherent powers for, amongst others, the following purposes:

> (a) to refuse to entertain an appeal where there is no "live" issue to be decided, even where that was not a stated instance where "[n]o appeal shall be brought to the Court of Appeal" under s 34 of the SCJA;[110]

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107 *Blomberg, Johan Daniel v Khan Zhi Yan* [2024] 3 SLR 1079 at [41]–[42].

108 I H Jacob, "The Inherent Jurisdiction of the Court" (1970) 23(1) *Current Legal Problems* 23; Jeffrey C Dobbins, "The Inherent and Supervisory Power" (2020) 54 Ga L Rev 411 at 432; see also *Re Nalpon Zero Geraldo Mario* [2013] 3 SLR 258 at [33]–[41], in which the Court of Appeal expressed the view that the term "inherent jurisdiction" is a misnomer and that "the so-called inherent jurisdiction of the court is in fact no more than the exercise by the court of its fund of powers conferred on it by virtue of its institutional role to dispense justice".

109 I H Jacob, "The Inherent Jurisdiction of the Court" (1970) 23(1) *Current Legal Problems* 23 at 51 (as endorsed by the Court of Appeal in *Wee Soon Kim Anthony v Law Society of Singapore* [2001] 2 SLR(R) 821 at [27]).

110 *Attorney-General v Joo Yee Construction Pte Ltd* [1992] 2 SLR(R) 165 at [11].

(b) to allow trustees to carry out an act or transaction which is expedient in the interests of a trust, but not if it is contrary to the terms of the trust;[111]

(c) to try a case and give judgment on the merits where the defendants have not made an appearance;[112]

(d) to stay proceedings in favour of arbitration in cases not covered by statutory provisions,[113] such as where court proceedings are stayed in the interest of case management pending the resolution of related arbitration involving other parties;[114] and

(e) to not enforce a consent unless order or other procedural consent orders.[115]

59 The cases explored above suggest that the doctrine of inherent power is now situated within O 3 r 2(2) of the ROC 2021. In *Blomberg*, See J's provisional view was that the doctrine of inherent power should be considered to be "subsumed" under O 3 r 2(2) of the ROC 2021.[116] Furthermore, in *Gabriel Silas Tang*, it was stated that the court's inherent power to regulate its own processes to serve the ends of justice was "implicitly acknowledged" by O 3 r 2(2) of the ROC 2021.[117] Indeed, clear similarities can be seen between the nature of the powers which have been invoked under the banner of the inherent power of the court, as well as those which have been invoked pursuant to O 3 r 2(2) of the ROC 2021. For instance, similar to how O 92 r 4 was invoked as the source of the court's power to *not enforce* a procedural consent order in *Turf Club Auto Emporium*, O 3 r 2(2) was subsequently said to furnish the juridical basis for the court's power to *set aside* a procedural consent order. The decision of *Interactive Digital Finance* is in turn reminiscent of *UCMI Ltd v Tokio Marine & Fire Insurance Co (Singapore) Pte Ltd*[118] ("*Tokio Marine*"), in which the court relied on its inherent power to justify making an order for the production of documents even in circumstances where the court was not empowered to do so by the ROC 2014.[119]

111 *Rajabali Jumabhoy v Ameerali R Jumabhoy* [1998] 2 SLR(R) 434 at [75]–[76].
112 *Indian Overseas Bank v Svil Agro Pte Ltd* [2014] 3 SLR 892 at [25]–[35].
113 *Star-Trans Far East Pte Ltd v Norske-Tech Ltd* [1996] 2 SLR(R) 196 at [47].
114 *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 at [138].
115 See *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2017] 2 SLR 12.
116 *Blomberg, Johan Daniel v Khan Zhi Yan* [2024] 3 SLR 1079 at [44].
117 *Re Gabriel Silas Tang Rafferty* [2024] 4 SLR 401 at [55].
118 [2006] 4 SLR(R) 95.
119 *UCMI Ltd v Tokio Marine & Fire Insurance Co (Singapore) Pte Ltd* [2006] 4 SLR(R) 95 at [96].

60 However, O 3 r 2(2) of the ROC 2021 goes further than O 92 r 4 of the ROC 2014 by expressly giving the doctrine of inherent power statutory form, whereas O 92 r 4 merely made clear that nothing in the ROC 2014 would limit or affect the "judicially developed *inherent* power to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court"[120] [emphasis added]. Such express codification should inspire greater confidence in litigants and the courts alike, who are in turn more likely to rely on and invoke O 3 r 2(2) to bridge any gaps in the rules.

61 Furthermore, under ROC 2014, the exercise of inherent powers by the court was subject to the important qualification that it must not be inconsistent with the written rules of court.[121] Thus, in *Samsung Corp v Chinese Chamber Realty Pte Ltd*[122] ("*Samsung Corp*"), the Court of Appeal stated that:[123]

> We endorse the views of the judge that generally where the Rules of Court have expressly provided what can or cannot be done in a certain circumstance, it is not for the court to override the clear provision in exercise of its inherent powers. No court should arrogate unto itself a power to act contrary to the Rules. The rule making powers are conferred upon the Rules Committee. The court should not usurp the powers and functions of the Rules Committee: See *The Siskina* [1979] AC 210. If, in its opinion, what is clearly provided in a particular rule is undesirable or unjust, the course which the court should take would be to offer its views on it for the consideration of the Rules Committee but not to amend it, or bend it, to reflect what it thinks is just or more desirable.

62 Consistent with the views of the Court of Appeal in *Samsung Corp*, there appears to be no reported case where a Singapore court has exercised its inherent power pursuant to O 92 r 4 of the ROC 2014 (or previous versions of the Rules of Court) to override a mandatory rule of court.[124]

63 By contrast, O 3 r 2(1) of the ROC 2021 expressly provides that "[u]nless the context otherwise requires and subject to any other written law, all requirements in these Rules are subject to the court's discretion to order otherwise in the interests of justice, even if they are expressed using imperative words such as 'must', 'is to' or 'shall'." This provision

120 See Jeffrey Pinsler SC, "Order 3 Rule 2(2): Recent Cases on the Court's General Power" (2024) CLU 3 at p 5.

121 *Singapore Civil Procedure 2021* vol 1 (Cavinder Bull gen ed) (Sweet & Maxwell, 11th Ed, 2021) at para 92/4/3.

122 [2004] 1 SLR(R) 382.

123 *Samsung Corp v Chinese Chamber Realty Pte Ltd* [2004] 1 SLR(R) 382 at [12].

124 Jeffrey Pinsler SC, "Order 3 Rule 2(2): Recent Cases on the Court's General Power" (2024) CLU 3 at p 6.

operates to attenuate the proviso appended to O 3 r 2(2), which states that it only applies "[w]here there is no express provision in these rules or any other written law on any matter". For instance, in *Management Corporation Strata Title Plan No 4572 v Kingsford Development Pte Ltd*[125] ("*Kingsford Development*"), the court held that even if the application to set aside a default judgment had been filed out of time,[126] it would have granted an extension of time to the applicant pursuant to O 3 r 2(1).[127] In a similar vein, the court in *Horizon Capital Fund v Ollech David*[128] ("*Horizon Capital Fund*") expressed the view that even where there might be technical adherence to the conditions listed in O 9 r 11,[129] the court may nevertheless have the power to find that the conditions enlivening the court's discretion under O 9 r 11 are not satisfied if doing so would facilitate an abuse of process or some other injustice.[130] It can therefore be argued that the combined effect of O 3 rr 2(1) and 2(2) of the ROC 2021 is that the court is now expressly empowered – in the exercise of its general power to ensure that justice is done or to prevent an abuse of the process – to override even mandatory rules of court.

64 Given the *obiter* pronouncements of the High Court in both *Blomberg* and *Gabriel Silas Tang* that the doctrine of inherent power recognised under O 92 r 4 of the ROC 2014 has now been subsumed under or acknowledged by O 3 r 2(2) of the ROC 2021, it is perhaps time for the courts to definitively pronounce that the doctrine of inherent power is encompassed within O 3 r 2(2), should the appropriate occasion arise. This would promote certainty by precluding – once and for all – reliance on arguments to the effect that O 92 r 4 of the ROC 2014 has not been replicated in its exact terms in the ROC 2021 (see, *eg*, the concerns raised by independent counsel in *Blomberg*), and it would make clear that the rich body of case law which has built up surrounding the doctrine of

125 [2023] SGHCR 8.

126 Bearing in mind that O 3 r 2(10) provides that: "An application under paragraph (8) *must* be taken out within 14 days after the date the applicant knows or should have known that any of the grounds in that paragraph exists." [emphasis added]

127 *Management Corporation Strata Title Plan No 4572 v Kingsford Development Pte Ltd* [2023] SGHCR 8 at [55].

128 [2023] SGHC 164.

129 Order 9 r 11 of the Rules of Court 2021 provides that:

> The Court may order 2 or more actions to be consolidated, or order them to be tried together or one immediately after another, or order any of them to be stayed pending the determination of the other action or actions, if the Court is of the opinion that —
>
> (*a*) there is some common question of law in the actions;
>
> (*b*) the reliefs claimed in the actions concern or arise out of the same factual situation; or
>
> (*c*) it is appropriate to do so.

130 *Horizon Capital Fund v Ollech David* [2023] SGHC 164 at [41].

inherent power under the ROC 2014 would also be applicable to cases involving the application of O 3 r 2(2) of the ROC 2021. The latter would be entirely in keeping with the desiderata of preserving established legal principles, as articulated by the Civil Justice Commission. Furthermore, given (a) the wide language used in O 3 r 2(2); (b) the similarities in the nature of the powers invoked under O 92 r 4 and O 3 r 2(2); as well as (c) the truism that the source of the inherent power of the court is the fact that the High Court and the Court of Appeal are by their very nature superior courts of law,[131] providing this clarification would involve only the smallest of incremental steps.

III. Order 11: production of documents

65 What was formerly known as "discovery" under the ROC 2014 has now been granted a new lease on life as "production of documents" under O 11 of the ROC 2021. Simply put, the rules on production of documents under the ROC 2021 seek to narrow the scope of production of documents and reduce the time and costs expended in the process. In relation to the principles which have shaped the new regime under O 11, the Civil Justice Commission had this to say:[132]

> The Rules impose a new regime which works on the principle that a claimant is to sue and proceed on the strength of his case and not on the weakness of the defendant's case. It aims to prevent parties from engaging in unnecessary requests and applications with the hope of uncovering a 'smoking gun'. While some cases may justify the current full discovery, the Rules seek to make them rare exceptions rather than the norm. Discovery is very expensive and time consuming. It is also labour intensive in some cases where documents are still stored in printed copy. It is also highly intrusive into privacy and confidentiality (even if the browsing of a party's documents is done by that party's solicitors and their assistants). In today's context, it is even more so since discovery can encompass all the documents and the messages stored in a person's mobile phone and other electronic devices.

66 To this end, O 11 lays down a stricter regime for production of documents. Echoing the Civil Justice Commission Report, O 11 r 1(2) now provides that when exercising its power under O 11, the court must bear in mind – in addition to the Ideals – the principles that (a) "a claimant is to sue and proceed on the strength of the claimant's case and not on the weakness of the defendant's case"; and (b) "a party who sues or is sued in court does not thereby give up the party's right to privacy and

131 *Re Nalpon Zero Geraldo Mario* [2013] 3 SLR 258 at [33].

132 Civil Justice Commission, *Civil Justice Commission Report* (29 December 2017) at p 19 (Chairperson: Justice Tay Yong Kwang) <https://www.mlaw.gov.sg/files/Annex_C_Civil_Justice_Commission_Report.pdf> (accessed 1 December 2024).

confidentiality in the party's documents and communications".[133] As stated in *Singapore Civil Procedure 2024*, "[t]he new rules significantly further the pre-existing position, in the context of specific discovery under the old O.24, r.5, that the courts will not allow the discovery process to be used to 'fish' for a cause of action".[134]

67 Briefly, assuming affidavits of evidence-in-chief ("AEICs") are not ordered before any exchange of documents, the production of documents under O 11 of the ROC 2021 proceeds as follows:[135]

(a) *General production*: After an order for general production is made by the court, the parties are to exchange a list of, and a copy of, all documents in their possession or control, on which they rely on for their respective cases as well as "known adverse documents".[136] In addition, a broader scope of discovery can take place if agreed between the parties or if ordered by the court.[137]

(b) *Specific production*: Thereafter, the parties may seek production of requested documents if they can properly identify these documents and show that such documents are material to the issues in the case.[138]

(c) *Exclusions*: Subject to any written law, the court must not order the production of any document which is subject to any privilege or where its production would be contrary to the public interest.[139] The court will not order production of any document that merely leads a party on a train of inquiry to other documents, except in a special case.[140] Further, the court will not order the production of any document that is part of a party's private or internal correspondence, unless it is a special case or such correspondence are known adverse documents.[141]

A. General production

68 It was thought that under the old regime, discovery led to situations where the time and costs spent thereon were disproportionate

133 Rules of Court 2021 O 11 r 1(2).
134 *Singapore Civil Procedure 2024* vol 1 (Cavinder Bull gen ed) (Sweet & Maxwell, 13th Ed, 2024) at para 11/1/4.
135 *Eng's Wantan Noodle Pte Ltd v Eng's Char Siew Wantan Mee Pte Ltd* [2023] SGHCR 17 at [45].
136 Rules of Court 2021 O 11 r 2(1)(*a*)–2(1)(*b*).
137 Rules of Court 2021 O 11 r 2(1)(*c*).
138 Rules of Court 2021 O 11 r 3(1).
139 Rules of Court 2021 O 11 r 5(3).
140 Rules of Court 2021 O 11 r 5(1).
141 Rules of Court 2021 O 11 r 5(2).

to the complexity and value of the claim. Thus, in 2018, the Civil Justice Commission and Civil Justice Review Committee initially recommended that an arbitration-style disclosure of documents ought to be adopted by default.[142] Under this regime, which sought to significantly narrow the scope of discovery, parties would first produce documents on which they relied for their respective cases.[143]

69 However, the feedback gathered from the public consultation was unequivocal in indicating that the initial obligation to disclose documents ought to include the disclosure of adverse documents, otherwise:[144]

(a) parties would be incentivised to hide or destroy adverse documents;

(b) there would be an increase in the number of requests or applications for further documents; and

(c) the proposed regime would operate unfairly in cases where there is information asymmetry between the parties.

70 This feedback was taken in, resulting in the current iteration of O 11 r 2 described above. This formulation addresses the abovementioned concerns, especially with the new inclusion of O 11 r 2(2) which defines "known adverse documents" to be disclosed as including "documents which a party ought reasonably to know are adverse to the party's case". Nevertheless, the scope of discovery is still somewhat narrowed because unlike O 24 r 1(2)(*b*) of the ROC 2014, O 11 r 2(2) requires that the document in question be actually adverse as opposed to potentially adverse.

142 Civil Justice Review Committee and Civil Justice Commission, *Public Consultation on Civil Justice Reforms: Recommendations of the Civil Justice Review Committee and Civil Justice Commission* (26 October 2018) at p 17 <https://www.mlaw.gov.sg/files/news/press-releases/2018/10/Annex%20A%20Public%20consultation%20paper%20on%20civil%20justice%20reforms.pdf> (accessed 1 December 2024).

143 Civil Justice Review Committee and Civil Justice Commission, *Public Consultation on Civil Justice Reforms: Recommendations of the Civil Justice Review Committee and Civil Justice Commission* (2 October 2018) at p 17 <https://www.mlaw.gov.sg/files/news/press-releases/2018/10/Annex%20A%20Public%20consultation%20paper%20on%20civil%20justice%20reforms.pdf> (accessed 1 December 2024).

144 Civil Justice Review Committee and Civil Justice Commission, *Response to Feedback from Public Consultation on the Civil Justice Reforms: Recommendations of the Civil Justice Commission and the Civil Justice Review Committee* (11 June 2021) at p 25 <https://www.mlaw.gov.sg/files/news/public-consultations/2021/Consolidated_Response_to_Civil_Justice_Public_Consultation_Feedback.pdf> (accessed 1 December 2024).

B. Specific production

71 One major difference between the ROC 2014 and ROC 2021 regimes lies in the threshold test to be applied before an order of specific production can be made. Under the ROC 2014 regime, it was trite that an order for specific discovery would only be made if the requested documents were relevant and necessary.[145] The relevance of a document was determined by reference to the parties' pleaded cases and in this regard, a document could either be directly or indirectly relevant.[146] A document would fall into the latter category where it may lead the applicant to a "train of inquiry resulting in his obtaining information which may" adversely affect his or another party's case, or which may support another party's case.[147] If the requested documents were relevant, it had to then be shown that the documents were necessary either for disposing fairly of the cause or matter or for saving costs.[148] Notably, the burden rested on the party resisting discovery to show that disclosure was not necessary.[149]

72 Under the ROC 2021, the specific production of documents is no longer circumscribed by the twin principles of relevance and necessity. Instead, pursuant to O 11 r 3(1), the requesting party must show that the requested documents are material to the issues in the case. The term "material" is not defined in the ROC 2021, but it connotes a higher level of importance to the case at hand.[150] This is stricter than the relevance-necessity test under O 24 of the ROC 2014. For one, whereas O 24 r 5(3)(*c*) of the ROC 2014 provided for specific discovery of indirectly relevant or "train of inquiry" documents, O 11 r 5 of the ROC 2021 expressly provides that such documents are – as a general rule – not subject to orders for production.

73 To date, there have been four reported decisions dealing with the test of materiality under O 11 r 3(1) of the ROC 2021:

145 See Rules of Court (2014 Rev Ed) O 24 rr 5 and 7.

146 *EQ Capital Investments Ltd v Sunbreeze Group Investments Ltd* [2017] SGHCR 15 at [46(c)].

147 *EQ Capital Investments Ltd v Sunbreeze Group Investments Ltd* [2017] SGHCR 15 at [46(c)].

148 Rules of Court 2021 O 24 r 7.

149 *UCMI Ltd v Tokio Marine & Fire Insurance Co (Singapore) Pte Ltd* [2006] 4 SLR(R) 95 at [79].

150 *Singapore Rules of Court: A Practice Guide (2023 Edition)* (Chua Lee Ming editor-in-chief & Paul Quan gen ed) (Academy Publishing, 2023) ch 11, at para 11.012; *Singapore Civil Procedure 2024* vol 1 (Cavinder Bull gen ed) (Sweet & Maxwell, 13th Ed, 2024) at para 11/3/6.

(a) In *Gillingham James Ian* (discussed above at paras 22–24 in relation to O 3 r 2(2)), the court dealt with an application for pre-action production of documents and information under O 11 r 11 of the ROC 2021 but also made some observations on O 11 r 3(1). In particular, the court observed that the touchstone of "material[ity]" differs from that of "necessity" because the former connotes a higher degree of importance to the case at hand.[151] Furthermore, the court noted that there was a temporal element to the assessment of "material[ity]" – thus, a court may dismiss an application for production of a specific document or piece of information at the time of the application, while leaving it open to the applicant to make another application at a subsequent stage where the requested document or information has become material.[152]

(b) In *Eng's Wantan Noodle Pte Ltd v Eng's Char Siew Wantan Mee Pte Ltd*[153] ("*Eng's Wantan Noodle*"), the court observed that "[t]he academic commentaries are aligned that the test of materiality … mandates a higher or stricter threshold than the relevance-necessity test under O 24 of the ROC 2014", and held – in view of the impetus for the new disclosure regime in the ROC 2021 and the Ideals – that "the threshold of materiality requires the requested documents to have a significant bearing on an issue in case, such that it could potentially affect the court's ultimate decision".[154]

(c) In *DFD v DFE*[155] ("*DFD*"), the court built upon *Eng's Wantan Noodle* and held that documents requested under O 11 r 3 must be "material" to the "issues in the case", in that they must (i) bear a demonstrable nexus with at least one of those issues, which is determined by reference to the parties' pleaded cases; and (ii) have a significant bearing on that issue, such that it could potentially affect the court's ultimate decision.[156]

(d) In *Cachet Multi Strategy Fund SPC v Feng Shi*[157] ("*Cachet*"), the court expressed the view that the "scope of specific production is narrower than that under the ROC 2014 in one obvious way, which is the rule in O 11 r 5(1) that prohibits the

151 *Gillingham James Ian v Fearless Legends Pte Ltd* [2023] SGHCR 13 at [16].
152 *Gillingham James Ian v Fearless Legends Pte Ltd* [2023] SGHCR 13 at [19].
153 [2023] SGHCR 17.
154 *Eng's Wantan Noodle Pte Ltd v Eng's Char Siew Wantan Mee Pte Ltd* [2023] SGHCR 17 at [49(a)]–[49(b)].
155 [2024] SGHCR 4.
156 *DFD v DFE* [2024] SGHCR 4 at [22(b)].
157 [2024] SGHCR 8.

> court from ordering, except in a special case, production of any document that 'merely leads a party on a train of inquiry to other documents' – in other words, indirectly relevant documents". Further, the term "materiality" entailed a greater analytical focus on the likely impact of the requested document on the court's decision on the disputed issue. Consequently, "[i]f a requested document has some affiliation to the pleaded issue but is unlikely to have any real bearing on the way the court determines that issue, it is not the proper subject of an order for production".[158]

74 Formulating the test of materiality this way gives the court considerable discretion on the scope of document production, while refocusing the inquiry on the significance of the requested documents to the adjudicative outcome and making it clear that a narrower scope of document production is intended than under the previous versions of the Rules of Court. Given this change, an interesting thought experiment might be to apply the test of materiality to cases decided under the preceding ROC 2014 regime to observe whether those cases would have been decided differently.

75 In fact, a potential example of the differences between the operation of the two regimes may be found in *DFD*. In *DFD*, which concerned an application to set aside an order to enforce an arbitral award, one of the issues before the court was whether the arbitration had been a sham ("Sham Issue").[159] The second respondent applied for the claimant to produce eight categories of documents which it claimed were material to the determination of the application, including post-award communications between the claimant and the second respondent and/or the second respondent's purported representatives in relation to the award.[160] However, the court was not convinced that the test of materiality was satisfied and this request was refused. According to the court, whether the arbitration had been a sham turned on what had taken place before and during the arbitration, and not the events that took place after the arbitration – therefore, it could not be said that these documents would have a significant bearing on the Sham Issue.[161] This application of the materiality test is interesting because it is conceivable that the second respondent's application for specific production might have satisfied the relevance-necessity test under the old discovery regime. After all, the existence and contents of post-award communications could shed light on whether the parties had commenced the arbitration with a genuine

158 *Cachet Multi Strategy Fund SPC v Feng Shi* [2024] SGHCR 8 at [33].
159 *DFD v DFE* [2024] SGHCR 4 at [38].
160 *DFD v DFE* [2024] SGHCR 4 at [1]–[2].
161 *DFD v DFE* [2024] SGHCR 4 at [52].

intention to have their rights adjudicated,[162] and "may reasonably be expected to assist in proving or disproving the fact in issue".[163] Indeed, the court itself acknowledged that:[164]

> The fact that there exist no post-Award communications of the nature described in Category 8 might well reinforce the Liquidator's case that the Arbitration had been commenced for the sole purpose of enabling the claimant to obtain the Award and consequently a judgment giving it priority over the Remaining Shares ahead of the second respondent's other creditors.

C. Exclusions

76 Subject to any written law, the court must not order the production of any document which is subject to any privilege or where its production would be contrary to the public interest (O 11 r 5(3) of the ROC 2021). As mentioned above, the court will also not order the production of any document that merely leads a party on a train of inquiry to other documents, except in a special case (O 11 r 5(1) of the ROC 2021).

77 Furthermore, under O 11 r 5(2) of the ROC 2021, the court will not order the production of any document that is part of a party's private or internal correspondence, unless it is a special case or such correspondence are known adverse documents. As explained in the Civil Justice Commission Report, discovery is "highly intrusive into privacy and confidentiality", and in "today's context, it is even more so since discovery can encompass all the documents and the messages stored in a person's mobile phone and other electronic devices". The exclusion of private and internal correspondence from the scope of document production represents a significant departure from the previous regime, under which such correspondence was frequently adduced.[165]

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162 *DFD v DFE* [2024] SGHCR 4 at [53].

163 *Management Corporation Strata Title Plan No 2297 v Seasons Park Ltd* [2004] SGHC 142 at [14]–[15]:

> Relevant evidence simply means such evidence as bears directly upon the point or fact in issue … Order 24 r 1(2) employs the auxiliary verb 'could' before the words 'adversely affect another party's case' … In my opinion, the use of the word 'could' connotes that the court, in arriving at a decision whether a particular document is relevant or not, need not at this stage of the trial process enter upon an in-depth analysis as to the exact degree of relevance apropos the documents. What is required of the court at this stage of the trial is only to form an informed view as to whether the documents in question may reasonably be expected to assist in proving or disproving the fact in issue.

164 *DFD v DFE* [2024] SGHCR 4 at [53].

165 *Cachet Multi Strategy Fund SPC v Feng Shi* [2024] SGHCR 8 at [3].

78 In the first (and, thus far, the only) reported judgment on O 11 r 5(2), useful guidance was provided on the operation of this exclusion. *Cachet* (discussed above at paras 64–65 in relation to O 11 r 3(1)) concerned a claim by a Cayman Islands-incorporated hedge fund for alleged fraudulent misrepresentation and conspiracy in relation to a subscription agreement entered with a Singapore-incorporated company. The hedge fund filed an application for the production of 14 categories of documents pursuant to O 11 r 3 of the ROC 2021, and the second defendant – who was the respondent in the application – objected to the majority of the requests on the basis that they related to internal correspondence.[166]

79 Although the term "private or internal correspondence" is not defined in the ROC 2021, the court accepted the following general definitions, leaving the precise contours of the exclusion to be defined in future cases:[167]

> (a) Private correspondence refers to communications which are intended to be private as between the persons who corresponded with each other.[168]
>
> (b) Internal correspondence refers to correspondence that is internal to the party from which the document is requested, such as e-mails between individuals and/or departments in the organisation, and not intended to be received by persons outside the party.[169]

80 While these broad definitions provide a useful starting point, there remains a degree of ambiguity as to the boundaries of private or internal correspondence. For instance, one wonders whether the private or internal nature of correspondence pertains to just the *manner and mode* of the communications or whether it also requires a consideration of the *nature and contents* of the communications. For example, in the context of a dispute within a family-run company, would communications exchanged between two directors on a family WhatsApp chat group regarding the affairs of the company be considered private correspondence? What about communications pertaining to an individual's private affairs disseminated by way of a company e-mail address to an external recipient? One possible view is that in both scenarios, the relevant communications should *prima facie* be excluded from the scope of orders for production on the basis that what constitutes "private or internal correspondence" should take

166 *Cachet Multi Strategy Fund SPC v Feng Shi* [2024] SGHCR 8 at [2].
167 *Cachet Multi Strategy Fund SPC v Feng Shi* [2024] SGHCR 8 at [55].
168 *Cachet Multi Strategy Fund SPC v Feng Shi* [2024] SGHCR 8 at [55(a)].
169 *Cachet Multi Strategy Fund SPC v Feng Shi* [2024] SGHCR 8 at [55(b)].

into account both the *mode and contents* of the relevant communication. Such a position is arguably supported by the definitions of private and internal correspondence endorsed in *Cachet*, both of which refer to the intention behind the communication.[170]

81 Lest this appears to some to an overly restrictive outcome, it must not be forgotten that O 11 r 5(2) is already subject to the all-important proviso that it does not preclude an order of production in respect of "known adverse documents" (the definition of which is extended by the objective test under O 11 r 2(2)). This should eliminate concerns that parties would lose access to documents that reveal the true state of affairs. Such an approach would also be in keeping with the intentions behind O 11 r 5(2), which are to: (a) prevent parties from inundating each other with lengthy correspondence that would have little or no bearing on the issues in dispute in the case;[171] and (b) give effect to the principle that a party who sues or is sued in court does not thereby give up the party's right to privacy and confidentiality in the party's documents and communication.[172] In connection with the latter, it is apposite to note that the law on breach of confidence has regard to both the nature of the information in question and the circumstances under which it was imparted.[173]

82 It should also be noted that the court may allow discovery of private or internal correspondence in a "*special case*". In *Cachet*, the court issued the following guidance:

> (a) The term "special case" must be interpreted restrictively so that the exception does not swallow the rule.[174]
>
> (b) "Special case" in the context of O 11 r 5(2)(*a*) must mean more than that the requested document is material to the case, since – in the first place – no order for specific production can be made if the requested documents are not shown to be material.[175]

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170 *Cachet Multi Strategy Fund SPC v Feng Shi* [2024] SGHCR 8 at [55]. Presumably, both the mode and contents of a communication would shed light on the relevant intention behind the communication.

171 Civil Justice Review Committee and Civil Justice Commission, *Response to Feedback from Public Consultation on the Civil Justice Reforms: Recommendations of the Civil Justice Commission and the Civil Justice Review Committee* (11 June 2021) at p 26 <https://www.mlaw.gov.sg/files/news/public-consultations/2021/Consolidated_Response_to_Civil_Justice_Public_Consultation_Feedback.pdf> (accessed 1 December 2024).

172 Rules of Court 2021 O 11 r 1(2)(*b*); *Cachet Multi Strategy Fund SPC v Feng Shi* [2024] SGHCR 8 at [53]–[54].

173 *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 1 SLR 1130 at [43] and [63].

174 *Cachet Multi Strategy Fund SPC v Feng Shi* [2024] SGHCR 8 at [59].

175 *Cachet Multi Strategy Fund SPC v Feng Shi* [2024] SGHCR 8 at [60].

> (c) To avail itself of the "special case" exception, the requesting party may invoke the Ideals. However, the rule against the production of private or internal correspondence is itself underpinned by Ideals (such as those of cost-efficiency, proportionality and the efficient use of court resources) as well as the principles under O 11 r 1(2). Therefore, "[t]he requesting party would have to show that the relevant Ideals and the probative value of the requested document are sufficient to outweigh the standing policy of the law on the occasion in question".[176]

83 *Cachet* itself offers a pertinent illustration of the strictures of the "special case" exception. Five of the document requests by the claimant hedge fund pertained to internal discussions on the various alleged decisions or actions of the defendants on which the hedge fund had based its claim.[177] The hedge fund argued, amongst others, that the "special case" exception was applicable because this was a typical conspiracy case in which there was information asymmetry between the victim and the conspirators, and the documents would have a material bearing on the issues to be decided.[178] These arguments were given short shrift by the court, which considered that the hedge fund's plea of information asymmetry fell squarely afoul of the principle in O 11 r 1(2)(*a*) that a claimant is to sue and proceed on the strength of the claimant's case and not on the weakness of the defendant's case. The court also noted that in any event, this was not a case where the applicant was "lacking in information and documents".[179]

84 All things considered, the contours of the "special case" exception continue to be somewhat amorphous, albeit by design.[180] It remains to be seen how the courts will strike the appropriate balance in determining whether production of private or internal correspondence is warranted under the ROC 2021's disclosure regime.

D. Further observations

85 The need to strike the right balance between justice and efficiency when it comes to the production of documents has become increasingly

176 *Cachet Multi Strategy Fund SPC v Feng Shi* [2024] SGHCR 8 at [61].
177 *Cachet Multi Strategy Fund SPC v Feng Shi* [2024] SGHCR 8 at [74].
178 *Cachet Multi Strategy Fund SPC v Feng Shi* [2024] SGHCR 8 at [75].
179 *Cachet Multi Strategy Fund SPC v Feng Shi* [2024] SGHCR 8 at [76].
180 According to the Civil Justice Commission, *Civil Justice Commission Report* (29 December 2017) at p 20 (Chairperson: Justice Tay Yong Kwang) <https://www.mlaw.gov.sg/files/Annex_C_Civil_Justice_Commission_Report.pdf> (accessed 1 December 2024), "'[s]pecial case' is deliberately left undefined to allow for flexibility and good sense should a rare case emerge".

pressing in light of technological advancements and the proliferation of data. As Menon CJ explained in his extra-judicial address at the Goff Lecture in 2021:[181]

> … In 1999, the world generated as much as 1.5 billion gigabytes of data in a year; today, that same amount of data is produced about every 18 hours; and, by 2025, it is estimated that that quantity of data will be created approximately every 5 minutes. The popularity of email and instant messaging have resulted in the creation and archival of an almost exhaustive documentary record of written communication. Even video and audio calls can be recorded and saved. Added to this is the data that is constantly generated by all manner of 'smart' gadgets connected to the 'Internet of Things'. There is also the data about the data – or metadata – such as information as to the size of an electronic file, or when it was created. Today, nearly everything is recorded, almost nothing is deleted, and anything can be shared with anyone with a click or two.
>
> The ease with which data can be electronically generated, stored and shared has meant that the volume of potential evidence available now is far beyond anything that existed in the 20th century, when records were predominantly created and stored on paper. …
>
> [This] has led to an unprecedented expansion in the scope of the available evidence that could be considered. Evidence may now be found everywhere, whether in the form of message logs, call logs, GPS location data, connections to wireless networks, and the like, so long as one knows where to look and is inclined to look hard enough.

86 In this regard, the new O 11 sets up a promising framework for a discovery regime that is better suited to the rigours of the 21st century, although some uncertainties remain about its practical operation. Order 11 r 2 streamlines the process by removing documents which are merely potentially adverse from the scope of general production. To prevent an abuse of this rule, the obligation to produce documents is not limited to the production of adverse documents that a party is actually aware of, but includes the production of adverse documents that the party could have knowledge about through reasonable checks and searches.[182] Furthermore, the court now has the power to order AEICs before any exchange of documents,[183] and in such cases, the production

181 Chief Justice Sundaresh Menon, Supreme Court of Singapore, "The Complexification of Disputes in the Digital Age", speech at the Goff Lecture 2021 (9 November 2021) at paras 17–19 <https://www.judiciary.gov.sg/docs/default-source/news-docs/goff-lecture-2021.pdf> (accessed 1 December 2024).

182 Civil Justice Review Committee and Civil Justice Commission, *Response to Feedback from Public Consultation on the Civil Justice Reforms: Recommendations of the Civil Justice Commission and the Civil Justice Review Committee* (11 June 2021) at p 26 <https://www.mlaw.gov.sg/files/news/public-consultations/2021/Consolidated_Response_to_Civil_Justice_Public_Consultation_Feedback.pdf> (accessed 1 December 2024).

183 Rules of Court 2021 O 9 r 8(1).

of documents will be severely curtailed as this may obviate the need for an order for the general production of documents.[184]

87 As for the specific production of documents, a stricter threshold test now applies and this is likely to dissuade parties from engaging in unnecessary requests and applications in the hopes of uncovering a "smoking gun".[185] This position is bolstered by the decision in *Lutfi Salim bin Talib v British and Malayan Trustees*, which strengthens the conclusiveness of affidavits relating to discovery under the ROC 2021 regime.[186]

88 Finally, the scope of exclusions has been expanded such that private and internal correspondence are not, as a general rule, subject to discovery. It remains to be seen, however, how the courts will delineate such correspondence to give effect to the precepts of O 11.

IV. Order 21 rule 2: costs

89 With the coming into force of the ROC 2021, and in keeping with the theme of enhanced judicial control, the court now has access to an increased arsenal of specific powers to deal with non-complying litigants. Although the courts have robustly used some of their new powers (as discussed above in relation to O 3 r 2(2)), it is arguable that the courts could be more proactive when it comes to exercising certain other powers under the ROC 2021.

90 One example of this is O 21 r 2(6) of the ROC 2021. By way of context, O 21 r 2(1) of the ROC 2021 provides for the court's general power to determine issues of costs and states that:

184 Civil Justice Commission, *Civil Justice Commission Report* (29 December 2017) (Chairperson: Justice Tay Yong Kwang) at p 2 <https://www.mlaw.gov.sg/files/Annex_C_Civil_Justice_Commission_Report.pdf> (accessed 1 December 2024).

185 *Lutfi Salim bin Talib v British and Malayan Trustees* [2024] 5 SLR 86 at [34].

186 Under the previous versions of the Rules of Court, there was authority that an affidavit in respect of discovery of documents was not conclusive if there was a mere "reasonable suspicion" that further discoverable documents existed. In *Lutfi Salim bin Talib v British and Malayan Trustees* [2024] 5 SLR 86 it was held that this "reasonable suspicion" test has no place under O 11 r 3 of the Rules of Court 2021. Instead, for the purposes of deciding an application under O 11 r 3(1), a respondent's opposing affidavit and any subsequent affidavits filed in response to a previous order under O 11 rr 3(1) or 3(2) of the Rules of Court 2021 are conclusive and the court should not go behind the affidavits unless it is plain and obvious from the documents that have been produced, the respondent's affidavits or pleadings, or some other objective evidence before the court, that the requested documents (a) must exist or have existed; (b) must be or have been in the respondent's possession or control; or (c) are not protected from production (at [32]).

> Subject to any written law, costs are in the discretion of the court and the court has the power to determine all issues relating to the costs of or incidental to all proceedings in the Supreme Court or the State Courts at any stage of the proceedings or after the conclusion of the proceedings."

91 Interestingly, O 21 r 2(6) of the ROC 2021 additionally provides that:

> The Court may stay or dismiss any application, action or appeal or make any other order as the Court deems fit if a party refuses or neglects to pay any costs ordered within the specified time, whether the costs were ordered in the present proceedings or in some related proceedings.

92 A few observations may be made. Notably, the old ROC 2014 did not contain such a provision. Instead, under the old regime, it was recognised that the court had an inherent jurisdiction to order a dismissal and/or stay of the appeal if the costs order below remained outstanding. As this previously entailed the exercise of the court's inherent jurisdiction, this was invoked in "exceptional circumstances where there is a clear need for it and the justice of the case so demands".[187]

93 It is arguable that the enactment of O 21 r 2(6) of the ROC 2021 means that there is no longer a requirement for an applicant to show "exceptional circumstances" before the appellate court may exercise its discretion to stay or dismiss an appeal where a party refuses or neglects to pay costs of the proceedings below.

94 As opined in *Singapore Rules of Court: A Practice Guide*, O 21 r 2(6) of the ROC 2021 "is new to incentivise parties to pay costs in a timely manner during the course of the proceedings".[188]

95 In addition, there is a clear emphasis in the ROC 2021 on ensuring that litigants comply with the court's orders or directions (including costs orders) by expressly providing that non-compliance by parties could lead to a dismissal of any proceedings pursuant to the court's general powers under O 3 r 2(4):

> Where there is non-compliance with these Rules, any other written law, the Court's orders or directions or any practice directions, the Court may exercise all or any of the following powers:
>
> > (*a*) subject to paragraph (5), waive the non-compliance of the Rule, written law, the Court's order or direction or practice direction;

187 *Roberto Building Material Pte Ltd v Oversea-Chinese Banking Corp Ltd* [2003] 2 SLR(R) 353 at [17].

188 *Singapore Rules of Court: A Practice Guide (2023 Edition)* (Chua Lee Ming editor-in-chief & Paul Quan gen ed) (Academy Publishing, 2023) ch 21, at para 21.006.

> (*b*) disallow or reject the filing or use of any document;
>
> (*c*) refuse to hear any matter or dismiss it without a hearing;
>
> (*d*) dismiss, stay or set aside any proceedings and give the appropriate judgment or order even though the non-compliance could be compensated by costs, if the non-compliance is inconsistent with any of the Ideals in a material way;
>
> (*e*) impose a late filing fee of $50 for each day that a document remains unfiled after the expiry of the period within which the document is required to be filed, excluding non-court days;
>
> (*f*) make costs orders or any other orders that are appropriate.

96 As explained in *Singapore Rules of Court: A Practice Guide* in relation to O 3 r 2 of the ROC 2021 (making reference to the Civil Justice Commission Report[189]):[190]

> … In response to parties who do not comply with the rules, rules 2(4)(*b*) and 2(4)(*c*) give the court the power to make orders against such in relation to their hearings or documents. Rule 2(4)(*b*) modifies the precept that non-compliance is always curable so long as it can be compensated by costs. That precept tends to favour parties with deep pockets. The price of non-compliance will no longer be measured in purely monetary terms. Instead, the test is whether the non-compliance is inconsistent with any of the Ideals in a material way.

97 In this connection, the Ideals under O 3 r 1 of the ROC 2021 include "fair access to justice", "efficient use of court resources" as well as "fair and practical results suited to the needs of the parties", and "[t]he Court must seek to achieve the Ideals in all its orders or directions". In particular, Prof Jeffrey Pinsler SC has explained that the expression "fair access to justice" seeks to ensure that "litigants have a straightforward and timely access to appropriate and justified reliefs and solutions without having to incur prohibitive costs".[191]

98 The inclusion of O 21 r 2(6) of the ROC 2021, which expressly allows the appellate court to stay or dismiss an appeal where a party refuses to pay costs ordered "in some related proceedings" can perhaps also be understood to signal a departure from the observations by the Court of Appeal in *Roberto Building Material Pte Ltd v Oversea-Chinese Banking*

189 Civil Justice Commission, *Civil Justice Commission Report* (29 December 2017) at p 6, para 5 (Chairperson: Justice Tay Yong Kwang) <https://www.mlaw.gov.sg/files/Annex_C_Civil_Justice_Commission_Report.pdf> (accessed 1 December 2024).

190 *Singapore Rules of Court: A Practice Guide (2023 Edition)* (Chua Lee Ming editor-in-chief & Paul Quan gen ed) (Academy Publishing, 2023) ch 3, at para 03.005.

191 Jeffrey Pinsler SC, "The Ideals in the Proposed Rules of Court" (2019) 31 SAcLJ 987 at para 22.

Corp Ltd[192] ("*Roberto*") (and more recently affirmed in *Independent State of Papua New Guinea v PNG Sustainable Development Program Ltd*[193] ("*PNG*")) that "costs due to the successful party in the court below … are a debt which is recoverable under the normal enforcement process" which "would have nothing to do with the appeal which is pending", and that "a right of appeal should not be curtailed by considerations which are extraneous to the appeal".[194]

99 It is thus arguable that the availability of enforcement processes and a party's general right of appeal must be situated in a wider and more holistic context – parties who come before the courts and wish to use the court's resources have an overriding obligation and duty to abide by orders made by the court and not act in blatant disregard of the same (which is an abuse of the court's process), especially where this causes prejudice to other litigants.

100 Yet, it is somewhat surprising that since the inception of ROC 2021, there is only one recently reported case (which we will discuss below) where O 21 r 2(6) was invoked in response to a party's failure to pay costs. Previous to that, in at least one reported case where O 21 r 2(6) was potentially of relevance, the provision appeared to not have been dealt with at all. In *Lee Wee Ching v Wang Piao*[195] ("*Lee Wee Ching*"), which concerned a dispute over a loan agreement, the defendant against whom summary judgment had been granted by an assistant registrar (whose decision was then upheld by the General Division of the High Court) mounted a further appeal to the Appellate Division of the High Court. The claimant applied to strike out the notice of appeal as an abuse of process. One of the factors which the claimant relied on in support of his case was the defendant's failure to pay him the costs awarded in his favour in the proceedings below. However, the court opined that:[196]

> It seemed to us that this was in and of itself not a relevant factor. The remedy for such failure lay elsewhere instead of a striking-out application. In *Independent State of Papua New Guinea v PNG Sustainable Development Program Ltd* [2020] 1 SLR 97, the Court of Appeal held at [22]–[24] that while it had the jurisdiction, pursuant to what is now s 58(1) of the SCJA (see s 40(1) for the equivalent provision for the Appellate Division) and the court's inherent jurisdiction, to stay an appeal pending payment by the appellant to the respondent of the costs of the action below, the jurisdiction should be exercised only in special or exceptional circumstances where there is a clear need for it and the justice of

192 [2003] 2 SLR(R) 353.
193 [2020] 1 SLR 97.
194 *Roberto Building Material Pte Ltd v Oversea-Chinese Banking Corp Ltd* [2003] 2 SLR(R) 353 at [17].
195 [2024] 1 SLR 350.
196 *Lee Wee Ching v Wang Piao* [2024] 1 SLR 350 at [33].

> the case so demanded. We were therefore not persuaded that the failure to pay costs below is *per se* a relevant factor in striking out an appeal on the basis that it was an abuse of process.

101 The court's statement to the effect that the failure to pay costs in proceedings below was not relevant to the application to strike out an appeal is curious given that O 21 r 1(6) expressly provides that "[t]he Court may stay or dismiss any application, action or appeal or make any other order as the Court deems fit if a party refuses or neglects to pay any costs ordered within the specified time, whether the costs were ordered in the present proceedings or in some related proceedings". If this provision is to mean anything at all, it must mean that the failure to pay costs is at least a relevant consideration for the court when exercising its power to stay or dismiss an application, action or appeal. However, it is possible that O 21 r 2(6) was not cited to the court in *Lee Wee Ching* and so the issue did not arise for proper consideration.

102 *Lee Wee Ching* may be contrasted with the more recent case of *Huttons Asia Pte Ltd v Chen Qiming*[197] ("*Huttons*") where – in the first reported decision of its kind – the Appellate Division of the High Court considered the application of O 21 r 2(6) and ordered an appeal to be stayed pending the appellant's compliance with a costs order issued in the proceedings below.

103 *Huttons* concerned an appeal against a judgment of the General Division of the High Court dismissing the appellant's claims against the respondents arising from their role as his agents in a property transaction. In the proceedings below, the parties had reached an agreement on costs that was subsequently embodied in the terms of a consent order ("Costs Order"). However, when the respondents attempted to enforce the said order, the appellant's solicitors stated without elaboration that they did not have instructions to accept service of an order for examination of judgment debtor against the appellant. As the appellant persisted in not complying with the Costs Order, the respondents filed an application to stay the appeal pending the payment of costs.

104 In considering the application before it, the court provided some much-needed guidance on the principles applicable to O 21 r 2(6):

> (a) First, the court confirmed the proposition (set out above at para 93) that there is no longer a requirement for an applicant to show "exceptional circumstances" before the appellate court may exercise its discretion to stay an appeal where a party refuses or

197 *Huttons Asia Pte Ltd v Chen Qiming* [2024] 2 SLR 401.

neglects to pay costs of the proceedings below. In particular, the express power provided contained in O 21 r 2(6) of the ROC 2021 "obviates the need to rely on the court's inherent powers, wherein the touchstones of prevention of injustice or abuse of process under O 92 r 4 of the ROC 2014 meant that the powers could be exercised only in special or exceptional circumstances".[198]

(b) Second, drawing inspiration from (amongst others) the approach of the Court of Appeal in *The Republic of India v Deutsche Telekom AG*,[199] the court observed that a "more robust approach" now prevails in response to an appellant's non-payment of the costs below. Such an approach is also more consistent with the Ideals set out in O 3 r 1(2) of the ROC 2021, which include fair and practical results suited to the needs of the parties.[200]

(c) Third, the court indicated that less weight should be placed on pre-ROC 2021 cases such as *Roberto* and *PNG*, where the threshold for staying an appeal pending the payment of costs ordered below was pegged at "special or exceptional circumstances".[201] For instance, it was suggested in *PNG* that "special or exceptional circumstances" would not be shown by the mere fact that (i) the appellant has the ability to pay the costs below but has not done so;[202] or (ii) enforcement proceedings would have to be commenced overseas against a judgment debtor.[203] By contrast, under the ROC 2021 regime, the court may exercise its discretion to stay an appeal pending payment of the costs below even in these circumstances, provided that the party has refused or neglected to pay the ordered costs.[204]

105 Having considered the applicable principles, the court then allowed the application for a stay because (a) the facts suggested that the appellant was evading payment;[205] (b) no evidence had been put forward in support of the appellant's explanation that he had failed to comply with the Costs Order because his finances had not been stable;[206] and (c) it

198 *Huttons Asia Pte Ltd v Chen Qiming* [2024] 2 SLR 401 at [28].
199 *The Republic of India v Deutsche Telekom AG* [2024] 1 SLR 56.
200 *Huttons Asia Pte Ltd v Chen Qiming* [2024] 2 SLR 401 at [27].
201 *Huttons Asia Pte Ltd v Chen Qiming* [2024] 2 SLR 401 at [29].
202 *Independent State of Papua New Guinea v PNG Sustainable Development Program Ltd* [2020] 1 SLR 97 at [37].
203 *Independent State of Papua New Guinea v PNG Sustainable Development Program Ltd* [2020] 1 SLR 97 at [51].
204 *Huttons Asia Pte Ltd v Chen Qiming* [2024] 2 SLR 401 at [29].
205 *Huttons Asia Pte Ltd v Chen Qiming* [2024] 2 SLR 401 at [31]–[33].
206 *Huttons Asia Pte Ltd v Chen Qiming* [2024] 2 SLR 401 at [34]–[35].

appeared that the respondents might have to enforce the Costs Order overseas and would face difficulty doing so.[207]

106 *Huttons* is an important decision which sets out, at a high level of generality, the differences in the approach to staying an appeal pending the payment of costs under the ROC 2021 and ROC 2014 regimes. The decision is also laudable for giving express recognition to the prevalence of a less tolerant attitude towards the deliberate non-payment of costs, and is perhaps an augur of increased judicial willingness to invoke the power under O 21 r 2(6).

107 However, some critical questions remain unanswered. For instance, although it is clear that the court may now exercise its discretion to stay an appeal pending the payment of costs in a broader range of circumstances than under the ROC 2014 regime, the principles governing the exercise of this discretion remain unsettled. One may of course refer to the facts of *Huttons* itself, or the court's helpful remark that "the situations mentioned in *PNG* may remain useful in being relevant circumstances that the court can take into account in deciding whether to exercise this discretion",[208] but the precise contours of this discretionary power remain unclear. Furthermore, since *Huttons* only concerned an application for a stay of an appeal, other facets of the court's power under O 21 r 2(6) – such as its power to dismiss an appeal (see *Lee Wee Ching* discussed above) and when such power will be exercised – have yet to receive judicial consideration.

108 Further decisions by the courts on these outstanding issues would therefore be a welcome addition to the jurisprudence on the point and provide certainty to parties on the scope of application of O 21 r 2(6) against parties who blatantly refuse to satisfy costs orders.

V. Conclusion

109 Overall, the ROC 2021 has had a positive impact on civil litigation practice. The new rules are characterised by a newfound simplicity that is undergirded by enhanced judicial control and a concern for efficiency that has been carefully balanced against fairness to litigants. That being said, there remain areas which would benefit from further clarification by the courts, and it remains to be seen whether the new powers granted to the courts under the ROC 2021 will be utilised to their fullest potential.

207 *Huttons Asia Pte Ltd v Chen Qiming* [2024] 2 SLR 401 at [36].
208 *Huttons Asia Pte Ltd v Chen Qiming* [2024] 2 SLR 401 at [29].

110 As is apparent from the discussion above, there is a close relationship between procedural rules and substantive justice, and practitioners should expect that the courts will build upon the well-meaning framework established by the ROC 2021. Indeed, one can put it no better than the High Court in *Cenobia Majella Chettiar*, in response to the ill-fated argument that O 18 r 6(4) of the ROC 2021 acted as a fetter upon the District Court's power on appeal to consider documents not before the Registrar:[209]

> … the ROC 2021 should not be construed in so restrictive a manner: it has to be remembered that procedural rules, while important, should be interpreted and applied in a manner that furthers the interest of substantive justice whenever possible. Indeed, this is in keeping with the ROC 2021's aim of 'giv[ing] judges sufficient flexibility to respond to the particular facts of each case, and manage individual cases in the most efficient manner possible' (see Ministry of Law, *Report of the Civil Justice Review Committee* (2018) (Chairperson: Indranee Rajah SC) at para 36). As such, in the final analysis, the interpretation and application of the ROC 2021 must be viewed through the lens of the ultimate ideal of having 'a fair and just procedure that leads to a fair and just result'. This is 'the *very* basis of what the courts do – and ought to do' [emphasis in original] (see the High Court decision of *United Overseas Bank Ltd v Ng Huat Foundations Pte Ltd* [2005] 2 SLR(R) 425 at [8]).

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209 *Housing and Development Board v Cenobia Majella Chettiar* [2023] 5 SLR 1514 at [27].