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THE IMPACT OF THE RULES OF COURT 2021 ON THE LAW OF EVIDENCE

The Rules of Court 2021, effective April 2022, are meant to modernise the litigation process for civil cases by enhancing the efficiency and speed of adjudication and keeping costs at reasonable levels. At the heart of this discernible shift to a less adversarial system of civil litigation is the enlargement of the court's discretionary powers *vis-à-vis* case management. This article considers, however, the potential ripple effects of the new legislation on the contiguous domain of evidence law. Three distinct but related areas of evidence law most likely to be impacted have been identified. First, would the introduction of the "interests of justice" test across various provisions of the Rules of Court 2021 have any bearing on the court's existing powers regarding the admissibility of evidence? Secondly, how would the reception of expert opinion now operate, given what seems to be a fundamental change in terms of party autonomy over the choice of expert and the threshold to be met for allowing expert opinion? Finally, can the current common law position that draws a link between confidentiality and privilege still be sustained?

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I. Context and overview

1 After several years of consultations and deliberations,[2] the new Rules of Court 2021[3] ("ROC 2021") were finally gazetted in December 2021, revoking and replacing[4] the previous set of rules[5]

1 While the author is also a Professorial Fellow of the AGC Academy and the paper benefitted from questions presented during a seminar organised by the Attorney-General's Chambers Singapore, the views expressed in this article are his own.

2 See Ministry of Law & The New Rules of Court Implementation Team, *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 4.

3 S 914/2021.

4 Rules of Court 2021 (S 914/2021) O 1 r 2.

5 Cap 322, R 5, 2014 Rev Ed.

("ROC 2014"). Order 3 r 1 of the ROC 2021 is perhaps the best encapsulation of the tenor of the new rules – civil procedure in Singapore will now be explicitly governed by five ideals: (i) fair access to justice; (ii) expeditious proceedings; (iii) cost-effective work proportionate to the matter; (iv) efficient use of court resources; and (v) fair and practical results suited to the needs of the parties.[6] The introduction of O 3 r 1 alone has been described as "fundamentally affect[ing] how the rules of civil procedure are to be interpreted and applied".[7] Order 3 r 1 foreshadows the 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.[8]

2 While there will likely be much discourse and case law developments in the foreseeable future regarding the various new rules of the ROC 2021 within the realm of civil procedure, the purpose of this article is to consider the impact of the rules on evidence law specifically. In terms of written law, notwithstanding its status as subsidiary legislation, the Rules of Court have always been one of the three contiguous components that define Singapore's legal landscape in so far as procedure and evidence are concerned – the other two being the Evidence Act 1893[9] ("EA") and the Criminal Procedure Code 2010[10] ("CPC"). Changes to one regime invariably affects the others,[11] and it is necessary to ensure that all laws therein are understood and interpreted in a way that promotes not just internal consistency, but also external consistency and coherence across the different domains.

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6 Order 3 rr 3 and 4 further state, respectively, that the court "must seek to achieve the Ideals in all its orders or directions" and "[a]ll parties have the duty to assist the Court and to conduct their cases in a manner which will help to achieve the Ideals".

7 Jeffrey Pinsler SC, "The Ideals in the Proposed Rules of Court" (2019) 31 SAcLJ 987 at para 2.

8 To be clear, the importance of case management is not something the courts have not espoused with some force before (see for instance *Lin Jianwei v Tung Yu-Lien Margaret* [2021] 2 SLR 683 at [106]: "the laws of civil procedure are intended to ensure the smoothness of proceedings and to facilitate efficient case management"). The devil is in the details – and the repercussions – of this sea change that is the Rules of Court 2021.

9 2020 Rev Ed.

10 2020 Rev Ed.

11 See for instance the interaction between s 259 of the Criminal Procedure Code 2010 (which purports to dictate the admissibility of statements) and Pt 1 of the Evidence Act 1893 (which addresses admissibility generally and universally) in cases such as *Lim Hong Liang v Public Prosecutor* [2020] 5 SLR 1015. For another example, see *Wan Lai Ting v Kea Kah Kim* [2014] 4 SLR 795, which considered the issue of admitting affidavits of witnesses without them attending trial (hence presenting an issue of hearsay).

3 It is submitted that three particular areas of evidence law – all of which are related, and of considerable importance to traditional adversarial litigation – would be impacted by the ROC 2021.[12] Coincidentally, these three areas correspond to what may be described as an overarching, general, and specific aspect of evidence law respectively, which hopefully translates to a more compelling illustration of the various points this article seeks to make. The first area pertains to the court's discretionary powers. Order 3 r 2, which sets out the general powers of the court, is but one of more than a dozen provisions in ROC 2021 that refer to the "interests of justice" as a test. The scenarios in which the court may rely on "interests of justice" vary a fair bit, ranging from whether to strike out or amend a pleading (O 9 r 16) and whether to allow a broader scope of discovery (O 11 r 1), to deciding who may be in attendance at hearings (O 15 r 1) and redacting court orders (O 17 r 4). In the context of evidence law, the notion of "interests of justice" assumed prominence in 2012 when the Evidence Act[13] was amended to provide that a court may choose not to admit evidence even if found relevant under ss 32 (hearsay) and 47 (expert opinion) of the statute if it is in the "interests of justice" to do so.[14] But up till today, there remain some unanswered questions about how this discretion, which is meant to be "in addition" to the court's inherent powers,[15] coheres with some of the evidence law jurisprudence[16] and the court's inherent powers.[17] What happens now when "interests of justice" can be applied in a greater array of situations that may not have been previously contemplated?

4 The second area of evidence law that may be impacted by the ROC 2021 pertains to expert opinion evidence. Order 12 r 2(1) sets the tone for what has fundamentally changed: "No expert evidence may be used in Court unless the Court approves." Order 12 r 3 then requires parties

12 Apart from the examples considered in this article, there are quite a number of provisions in the Rules of Court 2021 that mark a clear departure from a highly adversarial model of litigation, chief of which is O 5 r 3, which empowers the court to "order the parties to attempt to resolve the dispute by amicable resolution". What was once thought to be appropriate for family law disputes (see Family Justice Rules 2014 (S 813/2014) Pt 3) will now become mainstream for general civil litigation.

13 Cap 97, 1997 Rev Ed.

14 See generally Chin Tet Yung, "Hearsay Reforms: Simplicity in Statute, Pragmatism in Practice?" (2014) 26 SAcLJ 398.

15 "Second Reading Speech by Minister for Law, K Shanmugam, on the Evidence (Amendment) Bill" *Ministry of Law Singapore* (14 February 2012) at para 31 <https://www.mlaw.gov.sg/news/parliamentary-speeches/second-reading-speech-by-minister-for-law-k-shanmugam-on-the-evidence-amendment-bill> (accessed 14 April 2022).

16 See for instance *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [116]–[126].

17 See for instance *ANB v ANC* [2015] 5 SLR 522 at [27]–[31].

to, as far as possible, agree on one common expert, though the court may add or replace experts thereafter. Order 12 r 7 also gives the court the power, where there is more than one expert, to order that all or some of the experts testify as a panel.[18] The position pre-ROC 2021 could not be more starkly different. Not only was the ability to choose one's own expert considered an essential feature of the adversarial process,[19] the failure to appoint one's own expert was likely to be quite detrimental to the party failing to do so if the other party appointed an expert.[20] Having said that, what O 12 may principally achieve eventually, apart from reducing costs and combating client bias,[21] is minimising the difficulty often attendant with parties choosing their own expert witnesses: resolving conflicting expert testimony from opposing parties.[22] However, would O 12 co-exist comfortably with what the EA says about expert evidence?

5 The third area of evidence law that may be impacted by the ROC 2021 pertains to a specific aspect of privilege.[23] Order 11 r 8(1) states that a privileged document "must not be relied on unless the party entitled to the privilege consents or the Court approves". This itself is uncontroversial.[24] It is what O 11 r 8(2) says that may prove to be more

18 While O 40A r 6 of the Rules of Court 2014 had also contemplated concurrent expert evidence via a panel of experts, nothing in the Rules of Court 2014 (or the Evidence Act (Cap 97, 1997 Rev Ed) or case law for the matter) obligated parties to agree on a common expert or to require authorisation from the court to have an expert to begin with.

19 See Jeffrey Pinsler SC, "Expert Evidence and Adversarial Compromise: A Re-Consideration of the Expert's Role and Proposals for Reform" (2015) 27 SAcLJ 55 at para 12. On the litigant's more general right to adduce evidence as he saw fit, see *Basil Anthony Herman v Premier Security Co-operative Ltd* [2010] 3 SLR 110 at [24]–[26]. On an accused's right to call a material witness, see *Muhammad Nabill bin Mohd Fuad v Public Prosecutor* [2020] 1 SLR 984 at [45].

20 See for instance *Desert Palace Inc v Poh Soon Kiat* [2009] 1 SLR(R) 71 at [107]–[112]. See also *Saeng-Un Udom v Public Prosecutor* [2001] 2 SLR(R) 1 at [26] and Chen Siyuan & Eunice Chua, "2018 Changes to the Evidence Act and Criminal Procedure Code – The Criminal Justice Reform Bill and Evidence (Amendment) Bill" (2018) 30 SAcLJ 1064 at paras 16–27.

21 See also Vinodh Coomaraswamy SC, *Report of the Law Reform Committee on Opinion Evidence* (October 2011) at pp 1–2 and Civil Justice Review Committee, *Report of the Civil Justice Review Committee* (26 October 2018) at pp 30–31.

22 For an illustration of this problem, see Michael Hor, "When Experts Disagree" [2000] *Singapore Journal of Legal Studies* 241 and Ronald J J Wong "Judging between Conflicting Expert Evidence: Understanding the Scientific Method and Its Impact on Apprehending Expert Evidence" (2014) 26 SAcLJ 169.

23 Order 11 r 8(1) uses the language of "any privilege", which would therefore include, at minimum, the traditional components of legal professional privilege, which are legal advice privilege and litigation privilege.

24 Under the Evidence Act 1893, consent of the holder of the privilege is the only express way in which privilege may be ceded: ss 128 and 128A of the Evidence Act 1893 (2020 Rev Ed). The Evidence Act 1893 says nothing about inadvertent disclosures or competing interests, and though it does refer to situations of fraud

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than a little more so: "Such a document does not lose its privilege or confidentiality even if it was disclosed or taken inadvertently or unlawfully by anyone." In a related vein, O 11 r 9(2) states that "[a] confidential document does not lose its confidentiality even if it was disclosed or taken inadvertently or unlawfully by anyone". On its face, O 11 r 8 may be difficult to square with decisions by the Court of Appeal that seem to have consistently drawn an undivorceable link between confidentiality and privilege, in that the former is both a precondition to the latter arising and condition for the latter's continued existence.[25] Moreover, previously under the ROC 2014, O 24 r 19 only went as far as saying that "[w]here a party inadvertently allows a privileged document to be inspected, the party who inspected it may use it or its contents only if the leave of the Court to do so is first obtained". What then is the best way to understand privilege now in the light of O 11 of the ROC 2021? More broadly, what is the most plausible way to rationalise the three areas of impact identified in this article? As will be seen, it may very well depend on how the relationship between evidence law and procedural law is conceptualised.

II. A closer look at the potential impact on evidence law

A. The expanded (and potentially expanding) applicability of the "interests of justice" test

6 The notion of a court having discretionary powers in the context of civil procedure was never seriously disputed or difficult to comprehend. Order 92 r 4 of the ROC 2014 provided that the court had "inherent powers … to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court". Courts and commentators alike were aligned in the view that this meant because the court was the master of its own procedure, it had the power to make certain orders or directions even if the power was not explicitly conferred by written law,[26] provided of course that such orders or directions were

and crime, these exceptions prevent privilege from attaching in the first place, rather than privilege being ceded.

25 See for instance *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd* [2007] 2 SLR(R) 367 at [32]–[35]; *Mykytowych, Pamela Jane v V I P Hotel* [2016] 4 SLR 829 at [51]–[69] and *Wee Shuo Woon v HT SRL* [2017] 2 SLR 94 at [22]–[28]. Because of this undivorceable link, a party had to rely on the court's equitable jurisdiction to prevent the use of the document, as opposed to invoke its right of privilege. See also Chen Siyuan & Soh Kian Peng, "Re-Aligning Legal Professional Privilege in Indian Evidence Jurisdictions with Modern Practice" (forthcoming, (2022) 41 *Civil Justice Quarterly*).

26 The power, however, cannot be statutorily excluded: *Chan Yun Cheong v Chan Chi Cheong* [2021] 2 SLR 67 at [37].

necessary in the (exceptional) circumstances.[27] So even though O 92 r 4 has been invoked in many different types of scenarios, be it setting aside orders or judgments,[28] granting of consent orders,[29] staying of court proceedings in favour of arbitration,[30] staying an appeal,[31] or striking out a notice of appeal,[32] it has always been quite clear that the objective of O 92 r 4 was to ensure procedural justice.[33] More precisely, the court must be empowered to protect its own process, especially from parties seeking to exploit any perceived gaps in the procedural rules.[34]

7 The notion of a court having discretionary powers in the context of evidence law, however, has been less straightforward in its conceptualisation and application – maybe even contentious.[35] Consider the following instances in which the court's discretion has been, or can be invoked, with respect to the admissibility of evidence under either the EA or the CPC:

(a) Although "the overarching principle in the EA [is] that all relevant evidence is admissible unless specifically expressed to be inadmissible",[36] evidence found relevant under ss 14 or 15 of the EA (which pertain to exceptions to the similar fact rule) can be excluded if the probative value of the evidence is

27 See for instance *Retrospect Investment (S) Pte Ltd v Lateral Solutions Pte Ltd* [2020] 1 SLR 763 at [13]. As to the differences between inherent power and inherent jurisdiction, see *Li Shengwu v Attorney-General* [2019] 1 SLR 1081. See also O 34A r 1 of the Rules of Court 2014, which provides that the court may make any order or direction as it thinks fit, for the just, expeditious, and economical disposal of the cause or matter. A similar provision is found in r 4 of the Community Disputes Resolution Tribunals Rules 2015 (S 565/2015). The broadest version of this rule finds expression in r 22 of the Family Justice Rules 2014 (S 813/2014), as the court's powers on evidence goes well beyond mere administrative case management.

28 See for instance *Harmonious Coretrades Pte Ltd v United Integrated Services Pte Ltd* [2020] 1 SLR 206. *Cf Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2017] 2 SLR 12, which refused to set aside a contractual consent order.

29 See for instance *Siva Kumar s/o Avadiar v Quek Leng Chuang* [2021] 1 SLR 451.

30 See for instance *Trinity Construction Development Pte Ltd v Sinohydro Corp Ltd (Singapore Branch)* [2021] 3 SLR 1039.

31 See for instance *Independent State of Papua New Guinea v PNG Sustainable Development Program Ltd* [2020] 1 SLR 97.

32 See for instance *Suntech Power Investment Pte Ltd v Power Solar System Co Ltd* [2019] 2 SLR 564.

33 See also *Pannir Selvam a/l Pranthaman v Attorney-General* [2020] 3 SLR 796.

34 See also *Cheong Wei Chang v Lee Hsien Loong* [2019] 3 SLR 326.

35 See for instance Chen Siyuan & Eunice Chua, "The Indian Evidence Act and Recent Formulations of the Exclusionary Discretion in Singapore: Not Quite Different Rivers into the Same Sea" (2018) 15(1) *International Commentary on Evidence* 1.

36 *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [126]. See also *Lee Chez Kee v Public Prosecutor* [2008] 3 SLR(R) 447 at [106]; *Public Prosecutor v Mas Swan bin Adnan* [2011] SGHC 107 at [106] and Vinodh Coomaraswamy SC, *Report of the Law Reform Committee on Opinion Evidence* (October 2011) at pp 6–10.

outweighed by its prejudicial effect.[37] Evidence found relevant under the general relevancy provisions of the EA (ss 6–11) may also be excluded if there is prejudice.[38]

(b) Evidence found relevant under s 32 of the EA (which sets out some of the key exceptions to the hearsay rule) can be denied admissibility if it is "in the interests of justice" to do so. So too evidence found relevant under s 47 of the EA (the gateway provision for admitting expert opinion). Factors that may be considered when deciding if it is in the "interests of justice" to not admit s 32 evidence include the reliability of the evidence, costs, delay in the proceedings, the distraction of the court or the parties, the misleading of the court or the parties, and prejudicial effect.[39] Case law on whether "interests of justice" in the context of s 47 comprises the same factors as s 32 is scant, but there is little reason to believe the answer is no.

(c) Although the CPC does not spell out the consequences of failing to abide by the procedural requirements stipulated in the CPC[40] when recording long or investigation or cautioned statements,[41] a court may, using its inherent power, exclude a statement if the probative value of the statement is outweighed by its prejudicial effect.[42] Factors for the court's consideration in this exercise include whether the breach is flagrant and the extent of the breach.[43]

(d) If an accused's statement is found to be made involuntarily within the meaning of s 258(3) of the CPC, the court must refuse to admit the statement.[44] However, an accused's statement, even

37 *Tan Meng Jee v Public Prosecutor* [1996] 2 SLR(R) 178 at [40–[52]; *Chandroo Subramaniam v Public Prosecutor* [2021] SGCA 110 at [58]–[59].

38 *Michael Anak Garing v Public Prosecutor* [2017] 1 SLR 748 at [7]–[12]. See also *Lee Kwang Peng v Public Prosecutor* [1997] 2 SLR(R) 569 at [34]–[54].

39 *Gimpex Ltd v Unity Holdings Business Ltd* [2015] 2 SLR 686 at [106]–[108]. See also Chen Siyuan, "'In the Interests of Justice' as the New Test to Exclude Relevant Evidence in Singapore: *ANB v ANC* [2014] SGHC 172; *Wan Lai Ting v Kea Kah Kim* [2014] SGHC 180" (2015) 19(1) *International Journal of Evidence & Proof* 67.

40 These requirements are provided for in ss 22 and 23 for long and cautioned statements respectively. They include reading the statement over to the accused and having the accused sign the statement.

41 *Cf* Explanation 2(*e*) to s 258(3) of the Criminal Procedure Code 2010: "If a statement is otherwise admissible, it will not be rendered inadmissible merely because … the recording officer or the interpreter of an accused's statement recorded under section 22 or 23 did not fully comply with that section."

42 *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205 at [140]–[147].

43 *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205 at [62]–[64].

44 The provision states that statements obtained through threats, inducements, promises, or oppression must be refused admission by the court.

if found by the court to be voluntarily made within the meaning of s 258(3),[45] may be found inadmissible by the court if the prejudicial effect of the statement outweighs its probative value.[46]

(e) A confession of a co-accused, while admissible as evidence against an accused in a joint trial by virtue of s 258(5) of the CPC, may be refused consideration by a court if the prejudicial effect of the confession on the accused outweighs the probative value of the confession.[47]

8 From the above, the factor of prejudice or prejudicial effect is the singular constant across all situations in which the court has had to consider excluding what would otherwise be relevant evidence. But the term may not necessarily have a singular meaning. For instance, whether a piece of evidence is prejudicial in the context of procedural lapses when recording statements is best understood as whether the reliability of the evidence has been materially compromised.[48] Reliability also features as the predominant factor when assessing the substantive requirements for admitting statements – that is, whether they were voluntarily made, be it through the lens of threats, inducements, promises, oppression, or otherwise[49] – and reliability is surely at the core of justifying any rejection of a co-accused's confession.[50]

9 On the other hand, prejudice in the context of similar fact may take a non-epistemic turn.[51] The prohibition against admitting propensity evidence is not merely justified by the epistemic consideration of whether the evidence is similar enough or whether there is a potential affliction of moral prejudice; the *raison d'etre* of the similar fact rule, it can be said, is more concerned with protecting the dignity of the accused and not

45 For instance, Explanation 2 to the provision clarifies that statements obtained through deception – or even when the accused is intoxicated – would not be considered involuntarily made.

46 *Sulaiman bin Jumari v Public Prosecutor* [2021] 1 SLR 557 at [44]–[46].

47 This is due to s 258(5A) of the Criminal Procedure Code 2010, which was added to the statute in 2018. Previously, the Court of Appeal in *Norasharee bin Gous v Public Prosecutor* [2017] 1 SLR 820 had endorsed the longstanding position that the main safeguard when convicting an accused solely on the confession of a co-accused was evidential weight.

48 *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205 at [56]. See also Chen Siyuan, "The Judicial Discretion to Exclude Relevant Evidence: Perspectives from an Indian Evidence Act Jurisdiction" (2012) 16(4) *International Journal of Evidence & Proof* 398.

49 *Sulaiman bin Jumari v Public Prosecutor* [2021] 1 SLR 557 at [44]–[46].

50 See generally Chin Tet Yung, "Confessional Statements by Accomplices and CPC Hearsay: An Unhealthy Mix?" [2009] *Singapore Journal of Legal Studies* 235.

51 See generally Ho Hock Lai, *A Philosophy of Evidence Law: Justice in the Search for Truth* (Oxford University Press, 2008) ch 6.

subjecting his past life to unnecessary scrutiny.[52] Consider prejudice within the framework of improperly obtained evidence. Notwithstanding the fact that whether illegally obtained evidence that is relevant under the EA can be excluded by a court continues to be an open question in Singapore,[53] if the evidence laws of other common law jurisdictions are a yardstick, prejudice in this sense would entail the rights of the accused that have been violated as a result of the impropriety[54] – this is yet another non-epistemic factor. To be clear, the concept of prejudice is hardly confined to the law of evidence. It actually finds just as much – or even greater – expression in procedural law, and therein we find yet another dimension to prejudice: procedural unfairness.

10 That prejudice primarily refers to procedural unfairness when it comes to civil procedure is made clear when we consider some of the scenarios in which prejudice has been held to be an important factor by the courts when applying the ROC 2014: (a) whether to grant an extension of time;[55] (b) whether pleadings can be amended;[56] (c) whether pleadings were sufficiently particularised;[57] (d) whether to set aside interlocutory judgments;[58] (e) whether a *Riddick* undertaking not to misuse documents obtained in discovery should be lifted;[59] (f) whether to allow non-parties to participate in appeal proceedings;[60] or (g) whether parties should be allowed to raise new arguments on appeal.[61]

11 As it were, prejudice also bears the same meaning of procedural unfairness when it comes to criminal procedure. For instance: (a) the Prosecution's failure to disclose in a timely manner evidence that would likely have changed the trial strategy of the accused was held to be

52 See generally Michael Hor, "Similar Fact Evidence in Singapore: Probative Value, Prejudice and Politics" [1999] *Singapore Journal of Legal Studies* 48.

53 *ANB v ANC* [2015] 5 SLR 522 at [27]–[31]. But now see O 3 r 2(8) of the ROC 2021: "The Court may, on its own accord or upon application, if it is in the interests of justice, revoke any judgment or order obtained or set aside anything which was done … contrary to any written law." Could this be a basis for the court to do more than just deny admissibility of the evidence if it is illegally obtained, but to revoke any judgment altogether?

54 See for instance s 30 of New Zealand's Evidence Act 2006 (No 69 of 2006) or s 138 of Australia's Evidence Act 1995 (No 2 of 1995).

55 *Koh Kim Teck v Shook Lin & Bok LLP* [2021] 1 SLR 596 at [50]–[51].

56 *Ivanishvili, Bidzina v Credit Suisse Trust Ltd* [2020] 2 SLR 638 at [43]–[48].

57 *JTrust Asia Pte Ltd v Group Lease Holdings Pte Ltd* [2020] 2 SLR 1256 at [131]–[135].

58 *U Myo Nyunt (alias Michael Nyunt) v First Property Holdings Pte Ltd* [2021] 2 SLR 816 at [89]–[104].

59 *Ong Jane Rebecca v Lim Lie Hoa* [2021] 2 SLR 584 at [163]–[165].

60 *Golden Hill Capital Pte Ltd v Yihua Lifestyle Technology Co, Ltd* [2021] 2 SLR 1113 at [53]–[56].

61 *Charles Lim Teng Siang v Hong Choon Hau* [2021] 2 SLR 153 at [28].

prejudicial to the accused;[62] (b) whether an accused should be charged and tried separately for different offences depends on whether the court thinks the accused would be prejudiced;[63] (c) if a court alters a charge or frames a new charge, it will only proceed immediately with the trial if it is unlikely that the accused will be prejudiced;[64] or (d) whether a court permits an accused to be charged with one offence but convicted of another[65] would depend on whether there is any prejudice to the accused, in that a conviction of an unframed charge must not affect the presentation of the evidence in connection with the defence of the accused had the unframed charged been framed in the first place.[66]

12 How then does "interests of justice" fit in all of this? In a nutshell, there are some signs pointing to "interests of justice" eventually substituting prejudice or prejudicial effect as the new constant whenever the court is asked to exercise its discretion, whether on matters of procedure or evidence. That in civil procedure it now can (and has to) is clear by dint of the aforementioned O 3 r 2; paragraph (1) states that "all requirements in these Rules are subject to the Court's discretion to order otherwise in the interests of justice", while paragraph (2) states that "[w]here there is no express provision in these Rules … 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". Moreover, as mentioned, "interests of justice" now features in more than a dozen provisions in the ROC 2021.[67] As it is an observable phenomenon that when presented with discrete procedural or evidential rules and broadly worded mandates, common law courts may gravitate towards using the latter in lieu of the former,[68] the question is whether "interests of justice" would – and should – be embraced as a universal test for all the three contiguous domains of civil procedure, evidence law, and criminal procedure whenever the court is asked to make a discretionary decision.

62 *Public Prosecutor v Wee Teong Boo* [2020] 2 SLR 533 at [131]–[132]. See also Benny Tan, "The Role of Prosecutors as Ministers of Justice" *Law Gazette* (February 2021) <https://lawgazette.com.sg/feature/the-role-of-prosecutors-as-ministers-of-justice/#:~:text=At%20a%20general%20philosophical%20level,its%20determination%20of%20the%20truth.> (accessed 14 April 2022).

63 Criminal Procedure Code 2010 (2020 Rev Ed) s 146.

64 Rules of Court 2021 (S 914/2021) O 1 r 2.

65 Criminal Procedure Code 2010 (2020 Rev Ed) s 129.

66 *Public Prosecutor v Muhammad Shafiq bin Shariff* [2021] 5 SLR 1317 at [210].

67 For completeness, apart from the Evidence Act 1893, the phrase also appears in other written law, such as the Small Claims Tribunals Rules (Cap 308, R 1, 1998 Rev Ed).

68 New Zealand Law Commission, *The Second Review of the Evidence Act 2006* (E31 (142), 20 February 2017) at pp 72–74.

13 Putting aside the vagueness and potential overbreadth of the test,[69] the main reason why our courts should be slow to expand the applicability of "interests of justice" is that ultimately, it serves a different function from the prejudice or prejudicial effect inquiry, and also protects different interests. It has just been demonstrated that prejudice – whether in the sense of reliability of the evidence, rights of the parties, or procedural fairness – is about the parties to the proceedings. In other words, the focus is on what effect a discretionary decision made by the court has on the parties. "Interests of justice", in contrast, arguably places a heavier emphasis on the court's perspective and priorities when deciding on what orders and directions to make.[70] Indeed, O 92 r 4 of the ROC 2014 had bifurcated the justification of the court's inherent power into prevention of injustice (which focuses on the parties) and abuse of process (which focuses on the court protecting the institution), without more.[71] What about the ROC 2021, since the five ideals in O 3 r 1 comprise a mix of managing the smoothness of proceedings and ensuring fairness to parties? The problem, it is submitted, is figuring out what happens when smoothness of proceedings conflicts with fairness.[72] We see an example of that in what the ROC 2021 has to say about expert

69 See Jeffrey Pinsler SC, "Admissibility and the Discretion to Exclude Evidence: In Search of a Systematic Approach" (2013) 25 SAcLJ 215 at paras 30–37.

70 Notably, "interests of justice" will also be a guide when deciding on matters of disclosure – or what was previously known as discovery. Originally, it was envisioned (at least by the Civil Justice Review Committee) that the Rules of Court 2021 should adopt an arbitration-style model of discovery, whereby one feature is that parties would not be obligated to disclose what might be adverse to their own case. However, there was pushback against this, and the rules on discovery that were eventually adopted (see O 11 r 1) did not completely remove the previous requirement of disclosing adverse materials. As stated by the Court of Appeal in *Teo Wai Cheong v Crédit Industriel et Commercial* [2013] 3 SLR 573 in the context of s 33 of the Evidence Act (Cap 97, 1997 Rev Ed), litigation is meant to be conducted with cards face up on the table. The new O 11 r 1 aligns more with that idea than arbitration-style disclosure and serves as another example of how procedure and evidence are distinct.

71 *Cf* Rules of Court 2021 (2020 Rev Ed) O 3 r 2(2), which though very much a replication of O 92 r 4, is nonetheless subordinate to "interests of justice" as O 3 r 2 can only be exercised if it is "not prohibited by law and is consistent with the Ideals". Further, the Table of Derivations of the Rules of Court 2021 does not list O 3 r 2 as being derived from O 92 r 4, but as a new provision.

72 This very situation was contemplated during the public consultation exercise: Ministry of Law & The New Rules of Court Implementation Team, *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 7. The response was that "all of the Ideals may not be achieved in every case. For example, enabling 'fair access to justice' in a certain case may sometimes be at odds with ensuring that proceedings are conducted expeditiously. Hence, the Ideals would apply, conjunctively, as dictated by the circumstances of each case. to have an overarching objective or ideal may elevate one ideal above others or may result in the courts being restricted in the way the Ideals are applied." While this may seem

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opinion – a subject no doubt of great interest to the domain of evidence law – to which we now turn.

B. The court's enlarged role in regulating expert opinion

14 As mentioned, O 12 of the ROC 2021, by placing the control over expert witnesses firmly in the hands of the court, unequivocally represents a fundamental shift from the previous expert opinion regime under the ROC 2014. Under the old regime, the practice was to allow parties to appoint their own experts (though the court could limit the number of experts).[73] Jointly appointed experts,[74] court appointed experts,[75] and placing the experts in a panel[76] were all theoretically possible and contemplated by the ROC 2014, but seldom availed of in practice. Crucially, the court was not directed by the rules to compel parties or to limit their autonomy. This was consistent with the idea that, in an adversarial litigation system, party autonomy regarding trial strategy is important – and to be respected as much as possible. The ROC 2014, after all, had a number of safeguards to ensure the relevance and reliability of the expert evidence, which from epistemic standpoints, are the key considerations when letting in any kind of evidence.[77] Order 40A r 2 stipulated that the expert's duty to assist the court overrode any obligation owed to the client. Order 40A r 3 mandated that reports prepared by experts had to detail the expert's qualifications, detail the material the expert had relied on, show that the expert had considered a range of opinion on the matters dealt with in the report, and contain a statement of belief of correctness of the opinion, to name a few. The ROC 2014 also had provisions that attempted to streamline the adducing of expert opinion, principally by way of O 40A r 5, which allowed the court to direct the experts to identify what issues were in dispute and what facts were common ground.

15 O 12 of the ROC 2021 preserves these safeguards,[78] but effectively changes everything else related to the old regime. As mentioned, the starting point is that expert opinion can only be used in court if the court

assuring, as will be seen, O 12 is almost completely focused on efficiency rather than rights.

73 Rules of Court (Cap 322, R 5, 2014 Rev Ed) O 40A r 1.

74 Rules of Court (Cap 322, R 5, 2014 Rev Ed) O 40 r 1.

75 Rules of Court (Cap 322, R 5, 2014 Rev Ed) O 40 r 1.

76 As mentioned above, O 40A r 6 of the Rules of Court 2014 provided for this.

77 See generally Chen Siyuan, "Redefining Relevancy and Exclusionary Discretion in Sir James Fitzjames Stephen's Indian Evidence Act of 1872: The Singapore Experiment and Lessons for Other Indian Evidence Act Jurisdictions" (2014) 10(1) *International Commentary on Evidence* 1.

78 Rules of Court 2021 (S 914/2021) O 12 rr 1(2)–1(3), 2(4), 4 and 5.

approves of its use.[79] In deciding whether to approve, the court will be guided by first, whether the expert evidence will "contribute materially to the determination of any issue in the case", and secondly, whether the parties have attempted to resolve the matter "by an agreed statement of facts or by submissions on mutually agreed materials".[80] However, even after approval is given, the parties, "as far as possible, must agree on one common expert".[81] And even after this is done, the court may, in "a special case … appoint a court expert in addition to or in place of the parties' common expert".[82] The method of questioning in court and the remuneration of the expert(s) is also to be directed by the court.[83] Where there is more than one expert, the court "may order that all or some of the experts testify as a panel".[84]

16 The composite picture that emerges from the above is that, as far as the procedural side of things is concerned, judicial discretion over case management, rather than party autonomy over trial strategy, is front and centre. What about the evidential side of things? Do the two domains see convergence or conflict? Under the EA, there are three main conditions for admitting expert opinion:[85] (i) there is a likelihood that the court will derive assistance from an opinion upon a point of scientific, technical, or other specialised knowledge;[86] (ii) the expert in question has such scientific, technical, or other specialised knowledge based on training, study, or experience;[87] and, as mentioned, (iii) the court is not of the view that it would not be in the "interests of justice" to treat the expert opinion as relevant.[88] This is not the entire picture of how the admissibility of expert opinion is regulated, however. There exist several other rules that may have some bearing on how to appraise the impact of O 12 of the ROC 2021:

(a) The opinion of an expert is not irrelevant merely because of the common knowledge rule.[89] This abolition of the traditional common law rule was effected in the 2012 amendments to the

79 Rules of Court 2021 (S 914/2021) O 12 r 2(1).
80 Rules of Court 2021 (S 914/2021) O 12 rr 2(2)–(3).
81 Rules of Court 2021 (S 914/2021) O 12 r 3(1). Order 12 r (5) provides the exception: "[paragraph 1 does] not apply to any proceedings before a Magistrate's Court or District Court where any question requiring the evidence of an expert witness arises in a case which the Court has directed to be set down for a simplified trial".
82 Rules of Court 2021 (S 914/2021) O 12 r 3(3).
83 Rules of Court 2021 (S 914/2021) O 12 rr 3(4) and 6.
84 Rules of Court 2021 (S 914/2021) O 12 r 7(1).
85 For non-experts, see Evidence Act 1893 (2020 Rev Ed) ss 32B and 49–52.
86 Evidence Act 1893 (2020 Rev Ed) s 47(1). Section 53 also states that an expert may give the grounds of his opinion if they are relevant.
87 Evidence Act 1893 (2020 Rev Ed) s 47(2).
88 Evidence Act 1893 (2020 Rev Ed) s 47(4).
89 Evidence Act 1893 (2020 Rev Ed) s 47(3).

Evidence Act as one of the means to broaden the admissibility gateway for expert opinion.[90] The changing of the primary admissibility criterion constituted the other means: whereas the pre-2012 s 47 pitched the test at the court needing to form an opinion, the current s 47 pitches it at likelihood of assistance to the court; whereas the pre-2012 s 47 limited assistance to fixed categories of science or art, the current s 47 permits assistance as long as it is a form of specialised knowledge. Notably, the need for an expert was never pitched, either before or during the 2012 amendments, at the level of necessity or material contribution.

(b) The ultimate issue rule still needs to be applied to some degree, in that while an expert is not prohibited from expressing an opinion on the ultimate issue, the court cannot simply adopt the expert's opinion on that issue – the court must sift, weigh, and evaluate the objective facts within their circumstantial matrix and context to arrive at a final finding of fact.[91] There is no requirement that the court must demonstrate awareness of the danger of allowing an expert to testify on the ultimate issue.

(c) Whether the basis rule needs to be strictly applied depends on what is being relied upon by the experts. While experts in practice often rely on evidence from authoritative publications or other extrinsic material customarily employed in their line of work,[92] the basis rule should only be relaxed when the expert's opinion is based on general hearsay (such as prior research) and not specific hearsay pertaining to a particular inquiry, fact, examination, or experiment.[93] Thus, where an expert is asked to testify about the condition of a witness, personal examination is imperative.[94]

(d) *Per* s 48 of the EA, facts not otherwise relevant can be admitted if they support or are inconsistent with the opinions of experts. Section 48 can be considered the specific relevancy-equivalent of s 11 of the EA, which provides that facts not otherwise relevant are relevant if they are inconsistent with any fact in issue or relevant fact, or if by themselves or in connection

90 "Second Reading Speech by Minister for Law, K Shanmugam, on the Evidence (Amendment) Bill" *Ministry of Law Singapore* (14 February 2012) <https://www.mlaw.gov.sg/news/parliamentary-speeches/second-reading-speech-by-minister-for-law-k-shanmugam-on-the-evidence-amendment-bill> (accessed 14 April 2022) at para 38.

91 *Anita Damu v Public Prosecutor* [2020] 3 SLR 825 at [35]–[36].

92 See also Evidence Act 1893 (2020 Rev Ed) s 62(2).

93 *Anita Damu v Public Prosecutor* [2020] 3 SLR 825 at [31]. See also *Creative Technology Ltd v Huawei International Pte Ltd* [2017] SGHC 201 at [219].

94 See for instance *Ong Pang Siew v Public Prosecutor* [2011] 1 SLR 606 at [43]–[73].

> with other facts they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable. It serves a rebuttal function, dispensing with the need for the relevance of the evidence to be established independently.

17 In light of this fairly comprehensive (evidential) framework on how the admissibility of expert opinion is regulated, it was of little surprise that in the public consultation regarding the ROC 2021, the "majority of respondents were … of the view that the current rules pertaining to the adducing of expert evidence are robust enough to achieve the desired outcomes and do not need to be revised".[95] More critically, however, the EA's treatment of expert opinion is markedly different from O 12 of the ROC 2021. First, on a fundamental level, the EA does not distinguish between relevance and admissibility; hence, something that fulfils the criteria of a relevancy provision (such as s 47) is admissible, unless expressly provided for[96] (such as in s 47(4)). As subsidiary legislation, the ROC 2021 cannot overwrite the EA.[97]

18 Secondly, whereas s 47(1) of the EA uses the language of likelihood of assistance to determine admissibility, O 12 r 2 uses the language of material contribution to the issues to determine if the court would allow expert evidence. The only way to avert the same problem about how the ROC cannot overwrite the EA is to frame O 12 r 2 as a case management discretion, rather than an admissibility discretion, but it cannot be overlooked that the EA errs on the side of allowing parties to admit expert opinion – that was the legislative intent when s 47 was amended in 2012, and that is also why s 47(4) was introduced as a check. In comparison, O 12 is about keeping things streamlined and efficient, which, in fairness, can be characterised as a facet of fairness as well (in that everyone might save time and money). One might even argue that O 12 is consistent with what the courts have held regarding the meaning of "interests of justice" in the context of s 32 of the EA. As mentioned above, efficiency of proceedings is (already) part of the calculus, and there is no reason to believe why "interests of justice" under s 47 should

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95 Ministry of Law & The New Rules of Court Implementation Team, *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 28.

96 *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [126]. See also *Lee Chez Kee v Public Prosecutor* [2008] 3 SLR(R) 447 at [106]; *Public Prosecutor v Mas Swan bin Adnan* [2011] SGHC 107 at [106] and Vinodh Coomaraswamy SC, *Report of the Law Reform Committee on Opinion Evidence* (October 2011) at pp 6–10. See also Evidence Act 1893 (2020 Rev Ed) s 138.

97 As mentioned below, O 3 r 2(1) has this reminder as well: the court's discretionary powers under the ROC 2021 is "subject to any other written law".

be interpreted too differently. And to the extent that (in matters of admissibility) "interests of justice" has not yet been applied by the courts outside the confines of ss 32 and 47,[98] any fear that "interests of justice" will supersede the consideration of prejudice caused to a party across all inquiries of admissibility of evidence – and concomitantly, render the relevancy criteria of all the EA's relevancy provisions redundant – is premature.

19 One way to ensure things remain coherent is to focus instead on what overlaps between – and maybe binds – s 47 and O 12. Although O 12 does not itself refer to the "interests of justice" like s 47 does, O 3 r 2(1) does state that "[u]nless the context otherwise requires … all requirements in these Rules are subject to the Court's discretion to order otherwise in the interests of justice". The difficulty with this approach is twofold. If the "interests of justice" has the same meaning in the context of s 47 and in the context of O 12, it presumes that there is no meaningful difference between evidence and procedure generally and the court's discretion regarding admissibility and the court's discretion regarding case management specifically. However, for reasons mentioned, the domains of evidence and procedure prioritise values differently and attempts to weld them into a monolithic entity warrant closer scrutiny, not least because as a statute passed by Parliament, one must be careful not to inadvertently overwrite the EA. The other difficulty is that "interests of justice" in the context of the EA is meant to reverse course on what is found relevant, not to make something that is irrelevant into something that is relevant. It is a discretion to ensure fairness to parties. The objection to the thrust of O 12 is not that it is overly permissive of allowing expert opinion, but that it may curtail party autonomy over litigant strategy too much. To invoke "interests of justice" in an attempt to restore party autonomy for the purposes of O 12 would be to turn how the doctrine has hitherto been applied on its head.

20 Perhaps another way to resolve this conundrum is to confront the logically prior question of whether parties in litigation have a right – or at least a right to be given an opportunity – to adduce expert opinion to begin with.[99] If there is, it must be borne in mind that rights can

98 See Chen Siyuan, "Improperly Obtained Evidence in Criminal Proceedings: An Updated Framework" [2022] SAL Prac 5.

99 Using the language of rights poses a big challenge. In the context of the rules of natural justice for instance, one could hardly make the case that a party has rights over how evidence is presented or challenged. The Evidence Act 1893 is also silent on whether a litigant has any rights – at best, they have to be implied. At the same time, the reason why O 12 r 3(1) included the phrase "as far as possible" as regards party agreement on one common expert is because of fraternity pushback: Ministry of Law & The New Rules of Court Implementation Team, *Response to Feedback from*

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often stand in the way of convenience, expediency, or even efficacy.[100] A party may have a constitutional right to counsel in criminal cases,[101] yet if the party should so choose an abjectly incompetent counsel, that is the party's decision and that is all there is to it – this is a function of an adversarial system. This does not mean rights are necessarily absolute of course, especially if the exercise of a right negatively affects other parties. But this is also where the prerogative to adduce expert opinion is rather unique as compared to other rights: it seems that in many lawsuits, despite the increase in costs and time that often accompanies the use of experts, both plaintiffs and defendants still prefer to go ahead to appoint their own experts, presumably because they believe that having a choice better protects their interests. Nor is this simply about parties being difficult for the sake of it. As stated in the public consultation regarding the ROC 2021, respondents also raised concerns (with respect to the prospect of a jointly appointed expert) about "increase in costs to parties arising from parties having to appoint the joint expert on top of their own experts to assist them with navigating the issues requiring expert opinion" and parties being "limited to cross-examining the single expert on his evidence as opposed to putting forward a positive case".[102] It is highlighted that all of this is without first mentioning that, since O 12 operates before the trial but provides for a higher bar of permissibility of expert opinion, s 47(1) is rendered completely redundant – and one must always be slow to interpret any given written law that would lead to such an outcome. At any rate, the ability to choose one's own expert witness is not the only potential right of a litigant that the ROC 2021 engages. Privilege is analysed next, and depending on how the existing authorities are interpreted, the ROC 2021 has either clarified one important aspect of the law – or modified it substantially.

Public Consultation on the Civil Justice Reforms: Recommendations of the Civil Justice Commission and the Civil Justice Review Committee (11 June 2021) at p 29. This suggests that there is still a recognition that parties should generally be allowed to adduce evidence as they see fit.

100 *Cf* Ministry of Law & The New Rules of Court Implementation Team, *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 28: "The intent [of proposing a jointly appointed expert] was to improve the quality and materiality of expert evidence put before the court. Almost invariably, party-appointed experts give opinions from different ends of the spectrum. Sometimes, this is not because they disagree with each other but because the manner of engagement and the instructions given to the experts differ … a single joint expert would suffice in the majority of cases which are straightforward … This will enhance the efficiency and speed of adjudication."

101 Constitution of the Republic of Singapore (2020 Rev Ed) Art 9(3).

102 Ministry of Law & The New Rules of Court Implementation Team, *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 28.

C. Revisiting, removing, or restoring the link between confidentiality and privilege?

21 The law on how to treat inadvertently disclosed evidence that would have been protected by privilege, spanning decades of conflicting case law and attracting much academic commentary, has been described as "not easy to reconcile".[103] Would such evidence still be privileged? Can the holder of the privilege still exercise the right? After surveying the relevant English and local cases, this is what the Court of Appeal in its 2016 decision of *Mykytowych, Pamela Jane v V I P Hotel* ("*Mykytowych*") concluded:[104]

> *Privilege* allows a party to withhold the disclosure of information which would otherwise be compulsory to disclose. *Admissibility*, on the other hand, relates to the question of whether a particular piece of evidence may be received by the court, and is governed by whether that piece of evidence is relevant to the matters in issue … Where the document in respect of which privilege is being asserted … is already in the possession of the other party, the issue is no longer one of withholding disclosure, and the question becomes one of admissibility rather than privilege. [emphasis in original]

The Court of Appeal would then add in the subsequent decision of *Wee Shuo Woon v HT SRL*, that:[105]

> Equity may, however, through the grant of injunctions, intervene to prevent the unauthorised use in court proceedings of information contained in privileged material. Such information would, in most instances, be of a confidential nature … The court's equitable jurisdiction to restrain breaches of confidence is invoked in these instances.

22 The upshot of these two decisions is that if privileged material is inadvertently disclosed, be it through negligence or theft – which means confidentiality of that material is lost, by definition – the appropriate route for the holder of privilege to still "protect" the material from being used against him is to seek equitable relief from the courts on the basis of restraining a breach of confidence, rather than attempt to invoke privilege. But it is submitted that this challenges any notion that the privilege can truly be classified as a right that is not so easy to derogate from – a matter that is no longer of any debate in jurisdictions such as the UK.[106] This is because while rights may be waived (and privilege can

103 *Mykytowych, Pamela Jane v V I P Hotel* [2016] 4 SLR 829 at [67].

104 [2016] 4 SLR 829 at [58].

105 [2017] 2 SLR 94 at [24].

106 *The Law of Privilege* (Bankim Thani ed) (Oxford University Press, 3rd Ed, 2018) at para 1.06. For the position in Singapore, although the High Court in *Public Prosecutor v Soh Chee Wen* [2020] 3 SLR 1435 at [11] described privilege as a right, it also held that it is a right subject to various exceptions such as the necessity

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be under the EA, via s 128(1)), it is another thing to say that they can be lost as a matter of course through inadvertence, as opposed to, say, implied waiver or partial waiver[107] by the holder of the privilege (for which the holder has exercised a choice in waiving). Moreover, not only is the injunctive solution that is open to the holder of disclosed privileged material grantable only at the discretion of the court (since it is equitable relief being sought), but its successful invocation also requires proof of a breach of confidence,[108] which locates a burden on the holder (when he is meant to be the invoker of a right) rather than the opposing party.

23 A counterpoint can also be made to the proposition that "[w]hile a privileged communication that is inadvertently disclosed may continue to be privileged, the privilege is merely a status that does not itself provide the means to bar the admissibility of the evidence".[109] This presupposes that questions of admissibility – of evidence, and not in any broader sense – can be resolved by means outside the EA or written law, when the EA conceptualises admissibility to be resolved by its relevancy provisions (ss 6 to 47). But as alluded to earlier, the EA "was drafted on [the] idiosyncratic view that there should be no distinction between the concepts of relevance and admissibility. Therefore the [EA] attempts to define relevance as an intrinsic, ever-present connection between two facts rather than accepting that it is a process leading to a conclusion".[110] Furthermore, the EA states that "[a]ll rules of evidence not contained in any written law, so far as such rules are inconsistent with any of the provisions of this Act, are repealed". This would undoubtedly include rules of admissibility of evidence. Framing the court's granting of injunctive relief *vis-à-vis* a breach of confidence as an admissibility question therefore produces an intractable problem: equity and evidence (in the sense of whether something is logically probative enough) are simply on different planes altogether.[111] In the circumstances, would it

exception. This would suggest that it is not as robust a right as compared to how it is treated in, say, the UK.

107 See also *ARX v Comptroller of Income Tax* [2016] 5 SLR 590.

108 See also *Mykytowych, Pamela Jane v V I P Hotel* [2016] 4 SLR 829 at [62].

109 Jeffrey Pinsler SC, "Status of Privileged Communications Inadvertently Disclosed in Civil or Criminal Proceedings" (2021) 33 SAcLJ 959 at 983.

110 Vinodh Coomaraswamy SC, *Report of the Law Reform Committee on Opinion Evidence* (October 2011) at p 7.

111 Hence, even using the suggestion in *Mah Kiat Seng v Attorney-General* [2021] SGHC 202 on how to avoid infringing s 2(2) of the Evidence Act, might not work. The court stated at [63] that "a common law rule of evidence is not inconsistent with the provisions of the EA if it is conceptually in keeping with the rationale and spirit of provisions within the EA". In this connection, more than ten years ago, Professor Chin lamented that the Evidence Act suffered from a lack of values: see Chin Tet Yung, "Remaking the Evidence Code: Search for Values" (2009) 21 SAcLJ 52. In the light of what we have seen so far, perhaps it is now the time for

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not be easier, and also more consonant with the EA, to frame matters relating to privilege as just matters of privilege without resort to an alien realm? It is not as though the EA does not have provisions relating to privilege. And like the case law that came after it, it considers privilege a matter of production.[112] By confining any privilege inquiry to the EA – and case law that is consistent with it – it could negate the uncertainty that accompanies requiring a holder of privilege to seek injunctive relief in time.[113]

24 Having said that, the current state of the law is arguably not that clear as to whether the loss of confidentiality of privileged material inexorably and necessarily leads to a loss of privilege. The EA[114] is for the most part silent[115] on whether confidentiality is either a precondition to privilege attaching to the evidence in question, or a condition of the evidence being continued to be protected. As to the Court of Appeal's position in the two cases cited above, perhaps it is better understood as: to the extent that the purpose of privilege is to withhold disclosure of otherwise compulsory evidence, it is meaningless to still talk about whether evidence that has been disclosed can still be disclosed at trial, since the cat is already out of the bag (whether privilege can still be invoked

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the antiquated legislation to take the cue from the ROC 2021 and have an express set of values to guide its interpretation too.

112 The fact that s 23 of the Evidence Act 1893 – which frames without prejudice communications evidence as inadmissible evidence, rather than privilege – is further food for thought as to how production of documents is not completely distinct from admissibility within the meaning of Pt 1 of the Evidence Act 1893.

113 Arguably, there remains the issue of whether s 2(1) of the Evidence Act 1893 complicates matters, since the Evidence Act's provisions on relevance and privilege only "apply to all judicial proceedings in or before any court, but not to affidavits presented to any court or officer".

114 This is what the relevant provision, s 128(1), states: "No advocate or solicitor is at any time permitted, unless with his or her client's express consent, to disclose any communication made to him or her in the course and for the purpose of his or her employment as such advocate or solicitor by or on behalf of his or her client, or to state the contents or condition of any document with which he or she has become acquainted in the course and for the purpose of his or her professional employment, or to disclose any advice given by him or her to his or her client in the course and for the purpose of such employment." Subsection (2) then clarifies: "Nothing in this section protects from disclosure — (*a*) any such communication made in furtherance of any illegal purpose; (*b*) any fact observed by any advocate or solicitor in the course of his or her employment as such showing that any crime or fraud has been committed since the commencement of his or her employment."

115 The provision that is not silent is s 131(1): "No one may be compelled to disclose to the court any confidential communication which has taken place between him or her and his or her legal professional adviser unless he or she offers himself or herself as a witness, in which case he or she may be compelled to disclose any such communications as may appear to the court necessary to be known in order to explain any evidence which he or she has given, but no others."

over the disclosed documents in other proceedings remains unanswered for now, though this will probably have some bearing on whether privilege has been "lost" as a right or simply become a token right). This does not mean, however, that the material has lost its privileged status as a result of the disclosure.[116] In this regard, it bears mentioning that the Court of Appeal's concluding remarks in *Mykytowych* on the interplay between privilege and confidence were that "it is not entirely satisfactory that the question of whether privileged documents will be admitted as evidence should depend on when, in the course of litigation, applications are brought and steps are taken to restrain their use".[117] The court, perhaps, was hinting that something was still missing or unresolved.

25 This is where O 11 of the ROC 2021 enters the equation. Order 11 r 8 is unambiguous in its expression, though in the light of what is known so far, the consequence is not as clear: a document "which was at any time subject to any privilege … does not lose its privilege or confidentiality even if it was disclosed or taken inadvertently or unlawfully by anyone". One should again be entitled to assume with some confidence that new legislative provisions are never introduced in vain. If so, O 11 r 8 should not be seen as being put in place simply to make the symbolic point that a disclosed privileged document can still remain privileged, but practically speaking, it is just a status with no value as the privilege cannot be invoked or enforced in any meaningful way. Rather, O 11 r 8 should be viewed as clarifying that there is indeed no undivorceable link between confidentiality and privilege. As mentioned, the EA does not demand it and with good reason: communications between a client and the lawyer, even if not conveyed in circumstances of confidentiality, can be deemed confidential because of the purpose of privilege (either to protect the solicitor–client relationship or to shield others from being privy to the client's trial strategy)[118] as well as the status of the lawyer (as a fiduciary) – provided of course the communications were for seeking legal advice, the baseline requirement for either legal advice or litigation privilege to attach.[119]

26 Put another way, communications between a client and the lawyer do not become privileged because they were confidential, but it is their privileged nature that render them confidential. Extrapolating from this, if a privileged piece of evidence loses its confidentiality other than in situations of waiver, it should not have any bearing on whether privilege

116 See also *Mykytowych, Pamela Jane v V I P Hotel* [2016] 4 SLR 829 at [61].
117 See also *Mykytowych, Pamela Jane v V I P Hotel* [2016] 4 SLR 829 at [67].
118 See also *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd* [2007] 2 SLR(R) 367 at [43]–[46].
119 *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd* [2007] 2 SLR(R) 367 at [43]–[74].

can still be invoked – and enforced. This way, no burden is located on either the holder of the privilege to seek injunctive relief in time or the opposing party to not admit relevant material: privilege operates as before, protecting the holder and restraining the opposing party – and not simply entitling the holder to resist disclosure. This position better aligns with classifying privilege as a right,[120] and further obviates the problem of framing the seeking of the court's equitable relief to injunct on the basis of breach of confidence as an admissibility question (it even comports with the ideals of the ROC 2021 in this sense because there will be no need for a separate hearing to determine if the injunction is to be granted – a hearing that requires a balancing of various types of factors).[121] This position also coheres with what O 11 r 8(1) stipulates, in that if a person in possession of a privileged document can only rely on it if the court or holder of the privilege approves, this not only shows that privilege still exists, but that it can also still be enforced.

27 However, what should one make of O 11 r 9, which states that a confidential document "does not lose its confidentiality even if it was disclosed or taken inadvertently or unlawfully by anyone"? Taken literally, it is as though the ROC 2021 is able to declaratively restore a no-longer-confidential document to a confidential document, which, if analysed through the law of confidence, may seem at odds with that doctrine. On this (declarative) view, O 11 r 8 is similarly restoring a no-longer-privileged document to a privileged document, and supports the notion that a loss of confidentiality leads to a loss of privilege. If this is the case, then O 11 is another instance of the ROC 2021 being able to modify rights – just as how it may have done the same with respect to adducing expert opinion.

28 Yet, unlike the expert opinion scenario which may on some level be rationalised on the basis of case management, it is less clear how O 11 is a function of case management. A clue resides in the Civil Justice Commission Report. As regards the precursor to O 11 r 9, the Commission wrote that the rule was meant to codify the common law rule that "the mere fact that confidential information had been made technically available to the public at large does not destroy its confidential character".[122] This dispels any prospect that either O 11 r 8 or O 11 r 9 is

120 See also Rules of Court 2021 O 11 r 2(b): "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 communications". Is this another indication of the blurring of lines between procedure and other domains?

121 Jeffrey Pinsler SC, "Status of Privileged Communications Inadvertently Disclosed in Civil or Criminal Proceedings" (2021) 33 SAcLJ 959 at para 48.

122 Civil Justice Commission, *Civil Justice Commission Report* (29 December 2017) (Chairman: Justice Tay Yong Kwang) at p 20.

contemplating a scenario in which a privileged or confidential document has merely been disclosed within the four walls of the proceedings but has not been released in the public domain. So, although there appears to be no preparatory material on the purpose of O 11 r 8, it seems that both O 11 r 8 and O 11 r 9 are meant to be a step in the opposite direction of having to invoke the court's equitable jurisdiction whenever privileged and confidential documents respectively have been inadvertently or even unlawfully disclosed. But for reasons mentioned above, it is anticipated that both rules would receive jurisprudential elucidation sooner rather than later.

III. Concluding remarks

29 The ROC 2021 are still fresh out of the oven, so there may yet be other implications on evidence law not explored in this article. In any event, to the extent that the ROC 2021 are meant to enhance court procedure by vesting more discretionary powers in the court, the EA may feature as a stumbling block, even if that would probably not have been the intended consequence. The EA is one of the oldest statute books around, and its approach to admissibility of evidence, the court's discretion, and privilege can be seen as technical, idiosyncratic, or even downright outdated. Before the introduction of the ROC 2021, this may have been something that could be managed somewhat. With the introduction of the ROC 2021, this article has sought to identify no less than three main areas that may require harmonisation to minimise any fragmentation of the law down the road.

30 The proliferation of "interests of justice" as a guide for the court's discretion in the context of civil procedure will invariably shape the meaning of the same test in the context of evidence law. The challenge is that the two domains do not serve the same functions and do not necessarily prioritise the same values.[123] Then there is the question of how

123 This is notwithstanding the fact that courts have described evidence law as being a subset of procedural law: see for instance *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193 and *Ritzland Investment Pte Ltd v Grace Management & Consultancy Services Pte Ltd* [2014] 2 SLR 1342. Consider too the remarks in *United Overseas Bank Ltd v Ng Huat Foundations Pte Ltd* [2005] 2 SLR(R) 425 at [9], which were perhaps the harbinger of what was to come 16 years later: "It is true, however, that in the sphere of practical reality, there is often a *tension* between the need for procedural justice on the one hand and substantive justice on the other. The task of the court is to attempt, as I have pointed out in the preceding paragraph, to *resolve* this tension. There is a *further* task: it is to actually attempt, simultaneously, to *integrate* these two conceptions of justice in order that justice in its fullest orb may shine forth." [emphasis in original]. If procedural law and substantive law were to be melded, why not procedural law and evidence law? Moreover, when it comes to

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this test interacts with the probative value-prejudice balancing test, so often invoked in evidence law and criminal procedure, but often given the limited meaning of comparing probative value and sufficiency in reliability. On the issue of expert opinion, amidst a series of potential points of divergence, the main potential tension lies in the fact that while the EA has set a low bar for admissibility, the ROC 2021 is decidedly about ensuring efficiency and maybe even efficacy. Here, again, there is that conflict in functions and values. Finally, there appears to be diametrically opposing ways to interpret the ROC 2021's take on how confidentiality impacts privilege (and relatedly, the law of confidence). The potential obviation of recourse to the court's equitable jurisdiction to address what remains a matter of privilege, while welcome, might require a revisiting of the jurisprudence for firm disambiguation. The view that has been advanced here is that privilege, if properly considered a right, should not be limited to just being able to resist disclosure, but precluding the opposing party from using the evidence on the basis of privilege itself, and not equity. This view also has the benefit of avoiding the characterisation of O 11 as modifying rights in the form of legal professional privilege, be it under the EA or under the common law.

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international tribunals, they do not always see a firm distinction between procedure and evidence: see for instance Chen Siyuan, "Re-Assessing the Evidentiary Regime of the International Court of Justice" (2016) 13(1) *International Commentary on Evidence* 1.