

8. CIVIL PROCEDURE

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Extension of validity of writs

8.1 In *The Nur Allya*,¹ the defendant had written to the plaintiffs to discuss settlement after the plaintiffs had filed two writs. In the midst of settlement discussions, the writs' expiry date came and went without any prior application by the plaintiffs to extend the validity of the writs. The plaintiffs later filed two *ex parte* applications to extend the validity of the writs for a period of 12 months each ("Extension Orders"), both of which were granted. The defendant applied to set aside the Extension Orders.

8.2 The court held that the decision to extend the validity of the writ involves an exercise of discretion by the court which is to be approached in two stages. First, the court considers whether the plaintiff has shown the existence of matters which constitute good reason for an extension to be granted, which is inextricably bound with whether the plaintiff had good reasons for failing to serve the writ during the original period of validity. Secondly, the court considers all the circumstances of the case, including the hardship or prejudice to either party, to arrive at a value judgment on whether the extension should be granted or refused. In cases where the application is made after the writ has ceased to be valid and the relevant period of limitation has expired, the plaintiff must give a satisfactory explanation for its failure to apply for extension before the writ expired.

8.3 The court held that settlement negotiations can amount to good reason for extension if a fair interpretation of the negotiations show either (a) an agreement to defer service of the writ; or (b) conduct by the defendant of such character as to lead a reasonable plaintiff to think that it is unnecessary to serve the writ and to do so would increase the costs in a manner which is unwarranted in the circumstances. In relation to (b), the court held that first, there must exist negotiations that were

1 [2018] SGHCR 12.

making progress. Second, there must also be conduct by a defendant which induced or contributed to the plaintiff's belief that service was unnecessary due to the presence of ongoing settlement negotiations. Where a defendant's conduct had a causal link with the plaintiff's withholding of service, it would arguably be unjust for a defendant to be allowed the benefit of a statutory limitation.

8.4 On the facts, the court found that there was a satisfactory explanation for the plaintiffs' failure to apply for an extension before the writs expired, that is, the history of partially successful negotiations between the parties, and the defendant's specific act of asking for time to provide the defendant's settlement position, both of which led the plaintiffs' solicitors to believe that service could be deferred and caused them to put work on the file on hold while they awaited the defendant's settlement position. Therefore, since the defendant's representatives had played a causative role in the plaintiffs' failure to apply for renewal before the writs' expiration, the court found that the plaintiffs had given a satisfactory explanation.

8.5 However, with regard to the length of the extension, the court held that an applicant who seeks a 12-month extension under O 6 r 4(2A) of the Rules of Court² ("RoC") must show that his case is out of the ordinary, and that even if reasonable steps to serve the writ are taken, it may not be possible to serve the writ within a six-month period. On the facts of the case, the court found that the 12-month extension was unwarranted and varied the Extension Orders to six months.

Post-writ events

8.6 In *DyStar Global Holdings (Singapore) Pte Ltd v Kiri Industries Ltd*,³ the Singapore International Commercial Court ("SICC") affirmed the principle that a cause of action must be established as at the date when proceedings are instituted, namely, the date of the writ. Nonetheless, the court accepted that facts occurring after the issue of the writ can be relied on in support of a cause of action existing at that date. In this regard, the court observed that O 18 r 9(1) of the RoC provides that a party "may plead any matter which has arisen at any time, whether before or since the issue of the writ".

8.7 The court held that the plaintiff's allegations of *pre-writ* minority oppression were made out, such that oppressive conduct had

2 Cap 322, R 5, 2014 Rev Ed.

3 [2018] 5 SLR 1.

existed as at the date of the writ. The court held that the *post-writ* conduct could thus be relied on as evidence of oppressive conduct continuing beyond the date of the writ, which conduct was relevant for the purpose of determining whether and (if so) what relief would be appropriate. The court, accordingly, did not consider it necessary to explore the scenario where *none* of the allegations of *pre-writ* oppressive conduct is made out.

No case to answer

8.8 In *Ho Yew Kong v Sakae Holdings Ltd*⁴ (“*Ho Yew Kong*”), the Court of Appeal made it clear that, where some (but not all) defendants make a “no case to answer” submission and elect not to adduce evidence, those defendants may still rely on the evidence adduced by the other defendants who do not make the “no case to answer” submission. The court agreed with the three reasons which the High Court judge had given, namely:

(a) The relevant case authorities indicated that the evidence adduced by defendants who do not make a “no case to answer” submission might well prove to be relevant to the liability of those defendants who make such a submission, and therefore can be considered by the court.

(b) The rationale underlying the rule prohibiting a defendant who makes a “no case to answer” submission from calling evidence – namely, the inappropriateness of making any ruling on the evidence until it has been completely presented, and to avoid the expense and inconvenience which would result from having to recall defence witnesses if the court’s decision to uphold the submission were reversed on appeal – does not extend the scope of the undertaking from one not to adduce evidence to one not to rely on evidence already or otherwise to be adduced in court.

(c) Given that the plaintiff would be able to rely on evidence adduced by a defendant who did not make a “no case to answer” submission, it would not be logical or fair to allow the plaintiff to in effect selectively determine which parts of that defendant’s evidence the court could consider in determining the issues before it. Both common sense and fairness dictate that evidence from a witness which can be used against a party can also be used by that party.

4 [2018] 2 SLR 333. See paras 8.181–8.187 and 8.227 below.

8.9 The court elaborated that, by ruling on the “no case to answer” submission only at the close of the trial rather than at the close of the plaintiff’s case, the court will not be making a decision on the submission until after it has had the opportunity to consider *all* the evidence that is going to be adduced at the trial. While the question of when the court should rule on a “no case to answer” submission is ultimately a matter of proper case management having regard to the interests of justice, the general rule remains that the proper time at which to decide the defendants’ liability is at the close of the whole case.

Service

8.10 It has been held that the general rules in the RoC relating to the service of non-originating processes are applicable in the SICC. In *BNP Paribas SA v Jacob Agam*,⁵ one of the issues before the court was whether one of the appellants, Agam, had been properly served with the documents relevant to BNP Paribas SA’s application for a declaration that the appeal be deemed to have been withdrawn. At the outset, the court observed that since there is no provision in O 110 dealing with the issue of service of court documents, save for O 110 r 6 which governs the service of originating processes, the general rules in the RoC relating to the service of non-originating processes in a non-SICC context were applicable. On the facts, the court found that Agam had been properly served on three grounds.

8.11 A plaintiff seeking leave to serve its originating process out of jurisdiction must prove, *inter alia*, that its claim comes within one of the heads of claim in O 11 r 1 of the RoC and that Singapore is the proper forum for the trial. In *Nippon Catalyst Pte Ltd v PT Trans-Pacific Petrochemical Indotama*,⁶ the plaintiff appealed against, *inter alia*, the assistant registrar’s decision to set aside an *ex parte* order granting the plaintiff leave to serve its originating process out of jurisdiction against the second defendant on the basis that Singapore is not the proper forum for the trial of the suit. The High Court applied the following requirements for service out of jurisdiction:⁷ (a) the plaintiff’s claim must come within one of the heads of claim in O 11 r 1 of the RoC; (b) it must have a sufficient degree of merit; and (c) Singapore must be the proper forum for the trial of the action.

5 [2019] 1 SLR 83. See paras 8.159–8.161 and 8.176–8.179 below.

6 [2018] SGHC 126. See also *PT Gunung Madu Plantations v Muhammad Jimmy Goh Mashun* [2018] 4 SLR 1420, where the court set aside, *inter alia*, the order for service out of jurisdiction. See paras 8.111–8.113 below.

7 See the Court of Appeal’s holding in *Zoom Communications Ltd v Broadcast Solutions Pte Ltd* [2014] 4 SLR 500 at [26].

8.12 The plaintiff argued that the *ex parte* order should not have been set aside because it fell within O 11 rr 1(f)(ii) and 1(p) of the RoC. Order 11 r 1(f)(ii) provides that service out of Singapore is permissible with leave if:

... the claim is wholly or partly founded on, or is for the recovery of damages in respect of, damage suffered in Singapore caused by a tortious act or omission where occurring.

The plaintiff argued that it fell within this rule because it is a Singapore entity with a bank account in Singapore and because all payments by the first defendant were made to its Singapore bank account. The court disagreed and held that the fact that a plaintiff has a bank account in Singapore that it uses to transact with a defendant, which then fails to make payments into that bank account, does not necessarily lead to the conclusion that the plaintiff thus suffers damage in Singapore. With regard to O 11 r 1(p), the court held that the prevailing test is to ask “where in substance did the cause of action arise”; in this case, the place of the tort was Indonesia and not Singapore. Therefore, the plaintiff did not fall within either O 11 r 1(f)(ii) or r 1(p).

8.13 The court held that even if the plaintiff had been able to bring itself within O 11 rr 1(f)(ii) and 1(p), it still failed to show that Singapore is the most convenient forum. Since the plaintiff’s claims were tortious, the starting point was to ascertain where the torts took place. In this regard, the general rule is that the place where a tort occurred is *prima facie* the natural forum for determining the claim. To determine the place of the tort, the test to be applied is the “substance of the tort” test wherein the court examines the events undergirding the elements of the tort to ascertain where, in substance, the cause of action arose. On the facts, the court found that the place of the tort with respect to all three of the plaintiff’s claims in the torts of conversion, detinue and conspiracy was Indonesia.

8.14 Separately, the plaintiff argued, *inter alia*, that the place of the tort was Singapore because the court should look at where the damage was suffered, and the damage was suffered in Singapore. The court noted that while it may well be true for some torts that the place where the consequences are felt is the place of the tort, however, the plaintiff had not referred the court to any authorities showing that this was the case for the torts of conversion, detinue and conspiracy. In any event, the court noted that the authority the plaintiff itself had relied on made clear that the place of a tort is *prima facie* where it took place.

8.15 The court disagreed with the plaintiff’s contention that the defendants had failed to adduce evidence that the Indonesian witnesses would at least arguably be relevant to its defence, and held that since both the plaintiffs were based in Indonesia, it followed logically that

their witnesses would be based in Indonesia. Further, the affidavits in support of the defendants' applications were affirmed in Indonesia by representatives based in Indonesia. The court also disagreed with the plaintiffs' argument that there were few, if any, substantial disputes of fact, observing that it was clear from the face of the parties' affidavits and arguments that there were vast disagreements over factual issues. Therefore, the court found that Indonesia was *prima facie* the most appropriate forum for the action and ordered, *inter alia*, that the claims against the second defendant be stayed given that Singapore was not the proper forum for the dispute.

8.16 Even though receivers appointed under one jurisdiction may owe duties in tort, or contract in another jurisdiction, however, where matters go to the office and performance of the functions of that office, and such office is created under foreign law, it is generally more appropriate for any dispute on the duties owed by the receivers to be made in such a forum. The court in *Lakshmi Anil Salgaocar v Hadley James Chilton*⁸ ("*Hadley James Chilton*") set aside the plaintiff's leave to serve the writ and statement of claim out of jurisdiction on a number of grounds, including (a) an absence of a good arguable case that grounds were made out under O 11; (b) there were insufficient merits; and (c) it was not shown that Singapore was the more appropriate forum.

8.17 The court held that the plaintiff's lack of *locus standi* to bring the claim undermined her ability to establish a good arguable case under any of the heads under O 11 r 1. The plaintiff lacked *locus standi* to bring the claim as the beneficiary of the estate given that the plaintiff sought to recover losses for alleged breaches of duties owed to the third defendant company, rather than to recover or protect the assets belonging to the deceased which were held on trust for the estate. The plaintiff relied on the principle of reverse piercing to argue that the third defendant was the *alter ego* of the deceased and therefore the plaintiff as the beneficiary of the deceased's estate could claim for breaches of duties owed to the third defendant. The court left the issue of whether reverse piercing was legally permissible open, and held that even if the claim was brought by the plaintiff in her capacity as administrator of the deceased's estate and, therefore, as shareholder of the third defendant, the defect in standing would not be remedied since any claim in respect of a duty was owed to the company and not to shareholders. Given the court's finding on the plaintiff's lack of *locus standi*, O 11 rr 1(f) and 1(p), which the plaintiff relied upon, were also unfulfilled.

8.18 Separately, the plaintiff also relied on O 11 r 1(b), arguing that this head of claim was fulfilled since she had sought and obtained an

8 [2018] 5 SLR 725. See paras 8.84–8.85 below.

ex parte injunction and because she had invoked causes of action against the receivers independent of the interim injunctive relief sought. The court considered that leave to serve out of jurisdiction will not be granted under O 11 r 1(b) unless the injunction forms part of the substantive relief sought by the plaintiff, that is, any injunction sought had to be part of the substantive relief claimed by the plaintiff. Since, in this case, no order to do or refrain from doing anything in Singapore was sought by the plaintiff as a substantive relief arising from the causes of action alleged, the plaintiff could not rely on O 11 r 1(b) to establish jurisdiction.

8.19 The court observed that the British Virgin Islands (“BVI”) was the more appropriate forum. This was primarily because the thrust of the plaintiff’s claim concerned whether or not the receivers had properly discharged their duties. Given that the receivers were appointed by the BVI court in relation to a BVI-incorporated company, the BVI was both the place giving rise to the tort and the place in which damages, if any, were incurred. The court observed that even though receivers appointed under one jurisdiction may owe duties in tort or contract in another jurisdiction, however, where matters go to the office and performance of the functions of that office, and such office is created under foreign law, particularly if that creation is by order of court, it is generally more appropriate for any dispute on the duties owed by the receivers to be made in such a forum.

8.20 Separately, the defendants argued that the plaintiff had obtained leave to serve the writ of summons out of jurisdiction without fulfilling her obligation to make full and frank disclosure of material facts to the court. In *obiter*, the court considered that in determining what must be disclosed by an applicant, the applicable test is the objective test of materiality which asks whether the facts in question are matters that the court would likely take into consideration in making its decision on the *ex parte* application. On the facts, the court did not find that any lack of disclosure of misinformation on the part of the plaintiff was so material as to warrant a setting aside of the leave to serve out of jurisdiction.

8.21 In *Shanghai Turbo Enterprises Ltd v Liu Ming*,⁹ the court set aside an *ex parte* order of court for leave to serve the writ of summons, statement of claim and the *ex parte* order of court out of jurisdiction in China. The plaintiff had brought proceedings against the defendant for alleged breaches of post-termination obligations contained in an agreement appointing the defendant as the plaintiff’s executive director (“Service Agreement”).

9 [2018] SGHC 172.

8.22 The court considered whether the claim fell within O 11 r 1 of the RoC. The plaintiff relied on the governing law clause in the Service Agreement which stated that the agreement shall be governed by the laws of “Singapore/or People’s Republic of China” and “each of the parties hereto submits to the non-exclusive jurisdiction of the Courts of Singapore/or People’s Republic of China”. The plaintiff argued at the *ex parte* stage that it fell within O 11 r 1 since the Service Agreement was governed by Singapore law (O 11 r 1(d)(iii)), the dispute related to a contract with a term conferring jurisdiction on the Singapore courts (O 11 r 1(d)(iv)) and the defendant had by an agreement submitted to the jurisdiction of the Singapore courts (O 11 r 1(r)). On the setting aside application, the plaintiff conceded that the governing law clause disclosed no valid express choice of law but contended that the objective proper law of the contract was Singapore law, and maintained that the second part of the governing law clause as regards the parties’ choice of forum was valid. The defendant argued that the governing law clause was invalid and unenforceable in its entirety, and, therefore, the Service Agreement was governed by Chinese law.

8.23 The court held that the plaintiff showed a good arguable case that the Service Agreement was governed by the law of Singapore and, therefore, the claim fell within O 11 r 1(d)(iii). In this regard, the court found that the first part of the governing law clause disclosed no valid express choice of law clause since the proper law of a contract must be ascertainable at the time the contract comes into existence and cannot float in suspense. The court proceeded directly to analysing which system of law had the closest and most real connection with the Service Agreement. On balance, the court declined to make a conclusive finding as to the governing law of the Service Agreement given that all the plaintiff needed to show was a good arguable case that it fell within O 11 r 1(d)(iii).

8.24 The court held that O 11 rr 1(d)(iv) and 1(r) were not satisfied since under both Singapore and Chinese law, the governing law clause was invalid and unenforceable in its entirety; therefore, the second half of the governing law clause concerning the parties’ submission to jurisdiction was unenforceable. In this regard, the court accepted the evidence of the defendant’s Chinese law expert that the entirety of the governing law clause was unenforceable under Chinese law.

8.25 Pursuant to stage one of the test in *Spiliada Maritime Corp v Cansulex Ltd*¹⁰ (“*Spiliada*”), the court found that the plaintiff had failed to establish that Singapore is the *forum conveniens* and that the connecting factors clearly pointed to China as the more appropriate

10 [1987] AC 460.

forum for the trial. With regard to stage two of the *Spiliada* test, it was held that the plaintiff failed to show that it would suffer substantial injustice should the matter be heard in China. In any event, the court also found that the plaintiff had not made full and frank disclosure at the *ex parte* stage, noting that this ground alone would have been sufficient for the court to set aside the order.

Defence of set-off

8.26 In *Inzign Pte Ltd v Associated Spring Asia Pte Ltd*¹¹ (“*Inzign*”), the court found that the defendant was entitled to rely on its claim against the plaintiff, both as a defence of set-off against the plaintiff’s claim as well as a counterclaim. The court held that the defendant was entitled to rely on any of the following three set-offs: legal set-off, equitable set-off and set-off by judgment. Since the amount found due to the defendant on its counterclaim exceeded the amount due to the plaintiff on its claim, it was held that the defendant was entitled to an order that the plaintiff’s claim be dismissed. The plaintiff argued that even if the defence of set-off succeeded, the plaintiff’s claim should not be dismissed because the plaintiff had succeeded in proving breach by the defendant; it urged the court to exercise its inherent jurisdiction in this regard. The court disagreed and held that its inherent jurisdiction did not allow it to disregard the consequences of a successful defence of set-off; and that in any event, there was nothing unjust in the result since the successful defence of set-off against the whole of the plaintiff’s claim necessarily meant that the plaintiff had succeeded in establishing its claim, but that that claim was extinguished by the defendant’s successful cross-claim.

Further and better particulars

8.27 In *Arovin Ltd v Hadiran Sridjaja*,¹² the SICC ordered the defendant to provide further and better particulars of what the parties to alleged oral understandings or an agreement had stated. The court applied O 18 r 7(2) of the RoC in holding that the precise words used in the making of an oral agreement need not be stated, except in so far as those words are themselves material. Since the defendant relied upon an express understanding or agreement, the defendant had to provide particulars of the gist of what had been stated, as this was material to the allegation. In this regard, the court held that the gist of what had been said contained the material facts, from which an understanding or

11 [2018] SGHC 147. See paras 8.236–8.237 below.

12 [2018] 5 SLR 117.

agreement could be inferred as a matter of law. The plaintiffs needed to know enough about the material facts on which the oral understanding or agreement was based, that is, the gist of what had been said, to be able to put forward evidence to dispute the understanding or agreement.

Discovery and interrogatories

Discovery of experimental material

8.28 The case of *Element Six Technologies Ltd v Ila Technologies Pte Ltd*¹³ is significant for its consideration of the novel law on discovery of experimental material. The plaintiff sued the defendant for infringements of its patents, and sought to establish 22 facts by way of experimental evidence, filing a notice of experiments under O 87A r 6 of the RoC. The defendant's requests for specific discovery involved the discovery of material relating to experiments. In the absence of local jurisprudence relating directly to the discovery of experiments and experimental material, the court relied on three UK Patent Court decisions in determining whether to allow discovery of the experimental material.

8.29 With regard to abandoned experiments, the court agreed with Laddie J in *Electrolux Northern Ltd v Black & Decker*¹⁴ that where abandoned experiments are concerned, it would not be in the interests of the administration of justice to force parties to disclose all the other unfruitful avenues they had pursued on the off-chance that some might be arguably supportive of their opponent's case. In particular, the court held that since there are various possible reasons for which experiments may be abandoned – for instance, the lack of clarity of the experiment or the openness of the experiment to attack, many of which may have nothing to do with adversely affecting a party's own case, or supporting another party's case – documents relating to abandoned experiments may be irrelevant for the purposes of discovery. Therefore, since the plaintiff had filed an affidavit averring that no experiment had been abandoned simply because the experiments engendered results undesirable to the plaintiff, and the defendant had not provided any compelling reason to cast doubt on this averment, the court disallowed the request for discovery of abandoned experiments.

8.30 In relation to experiments which may have been performed as part of the preliminary investigation leading to the experiment forming the subject matter of a notice of experiments, or “work-up” experiments,

13 [2018] SGHCR 13.

14 [1996] FSR 595.

the court applied the reasoning of the courts in *Mayne Pharma Pty Ltd v Debiopharm SA*¹⁵ (“*Mayne Pharma*”) and *Magnesium Elektron Ltd v Neo Chemicals and Oxides (Europe) Ltd*¹⁶ (“*Magnesium Elektron*”). In *Mayne Pharma*, the court had held that the service of the notice of experiments amounted to a waiver of privilege and that such waiver would extend to work-up experiments. The court in *Magnesium Elektron* had observed that there were two types of cases in which *Mayne Pharma* disclosure would be clearly applicable: first, “inevitable result” cases where the argument is that certain types of experiments would inevitably be selected and undertaken in a certain manner, and that those experiments would inevitably engender certain results; therefore, information ought to be provided in relation to how the experiments were selected and conducted. The second type is “completeness of data” cases where the issue is whether the experiment is repeatable or exhibits significant variation in result and, therefore, the court may not permit a party to deploy only the test runs that support its case. Beyond these two types of cases, *Magnesium Elektron* held that a more cautious and focused approach would be required in determining whether privilege was waived and whether the “work-up” experiments should be disclosed. The Singapore High Court Registrar agreed with *Magnesium Elektron* and held that the *Mayne Pharma* disclosure applied specifically in the context of work-up experiments and most clearly so in the “inevitable result” and “completeness of data” types of cases. Therefore, in this case, where the defendant had merely made sweeping statements that it would be prejudiced in its preparation for trial if its request for the “work-up” experiments was not granted, and had not demonstrated with any specificity why the documents were relevant and necessary, the court disallowed the request for documents relating to “work-up” experiments.

Interrogatories

8.31 Interrogatories may be administered in relation to documentary evidence that is subject to an authenticity challenge. In *Prudential Assurance Co Singapore Pte Ltd v Tan Shou Yi Peter*,¹⁷ the plaintiff claimed that the defendant had breached contractual non-solicitation obligations and fiduciary duties owed to the plaintiff by soliciting its agents to leave the plaintiff and join a competitor. In its list of documents, the plaintiff disclosed audio recordings capturing these alleged acts of solicitation. The defendant served a notice of non-admission of authenticity of documents in respect of the audio recordings. The plaintiff served interrogatories on the defendant in

15 [2006] FSR 37.

16 [2017] EWHC 2957.

17 [2018] SGHCR 4.

relation to, *inter alia*, the audio recordings. The defendant applied to have the interrogatories withdrawn. The court held that the fact that authenticity has been disputed is not of itself a bar to interrogatories concerning that document, particularly where the interrogatories are aimed precisely at narrowing the issues in relation to the authenticity challenge; and that interrogatories administered in this vein can in fact help to significantly reduce costs and facilitate the fair disposal of the matter.

8.32 The court also held that there is no absolute prohibition of interrogatories against all persons who would be witnesses at trial. The defendant's counsel argued that the interrogatories should be disallowed on the basis that the interrogatories sought admissions of fact from a witness who would be attending trial, relying on *Oversea-Chinese Banking Corp Ltd v Wright*¹⁸ ("OCBC"). The court held that the proposition in *OCBC* was primarily motivated by the court's concern to avoid additional costs occasioned by interrogating trial witnesses prior to the trial but ought not be interpreted as an absolute prohibition of interrogatories against all persons who would be witnesses at trial, particularly where the interrogatories would be necessary for the fair disposal of the matter or for saving costs.

8.33 In this regard, the court found that only the plaintiff's primary query as to whether the defendant was the person recorded as speaking in the audio recording ("Primary Query") was necessary for the fair disposal of the matter and for saving costs. Even though this Primary Query could be put to the defendant at trial, the court held that allowing the Primary Query then would potentially dispose of entire lines of questioning and expert inquiry, and would avoid incurring costs to prove aspects of authenticity which the defendant may not intend to dispute at all. However, the plaintiff's secondary queries concerning, *inter alia*, details as to when and where the recorded events took place ("Secondary Queries") were held to be not necessary for the fair disposal of the matter, or the saving of costs. Separately, the plaintiff also sought information in relation to the defendant's pleading that he had cautioned agency leaders against speaking with their agents about the defendant's intention to retire or be a consultant ("Final Interrogatory"). The court held that the identities of the cautioned agency leaders did not go towards any material fact in dispute and would not dispose of the matter one way or another. Therefore, the court ordered that this Final Interrogatory and the Secondary Queries be withdrawn, but declined to withdraw the Primary Query.

18 [1989] 1 SLR(R) 551.

Implied undertaking

8.34 The implied undertaking not to use disclosed documents for other purposes is an obligation owed to the court before which the documents in question were first disclosed, and is an obligation that only that court can modify. In *BNX v BOE*,¹⁹ the plaintiff purchaser commenced proceedings against the defendant vendor for wrongfully failing to disclose during negotiations the use restrictions imposed by the Urban Redevelopment Authority. The plaintiff also sued the defendant's project architect for breach of its duty of care to the plaintiff as buyer of the development. In this separate suit against the architect, the plaintiff obtained through discovery documents from the architect which it claimed were wrongfully withheld by the defendant. The plaintiff sought an order for the defendant to produce, or leave for the plaintiff to disclose, and leave to adduce as further evidence these documents which it had obtained from the architect. The court held that the *Riddick*²⁰ principle applied because the architect had been compelled by a court order to disclose the documents, and found that it was disingenuous for the plaintiff to suggest that the documents, which were then included as exhibits in the defendant's affidavits, had been disclosed voluntarily by the defendant when the defendant had included those documents in order to *resist* the plaintiff's application to adduce the said documents as further evidence.

8.35 Given that the *Riddick* principle applied, the plaintiff had an implied undertaking not to use the documents for any purpose other than the determination of the separate suit against the architect. Any application for the plaintiff to be released from its undertaking had to be addressed to the court presiding over that suit because (a) the undertaking is an obligation owed to the court before which the documents in question were first disclosed, and is an obligation that only that court can modify; and (b) the party that had been compelled to make discovery should be afforded the opportunity to be heard in respect of an application by the plaintiff to be released from its implied undertaking, but that party (the architect) was not a party to the present proceedings. Therefore, the Court of Appeal dismissed the applications for leave to adduce further evidence.

Specific discovery

8.36 In *Chee Yin Meh v Sim Guan Seng*,²¹ the court considered whether a party claiming a beneficial interest in property under an

19 [2018] 2 SLR 215. See paras 8.228–8.232 below.

20 *Riddick v Thames Board Mills Ltd* [1977] QB 881.

21 [2018] SGHCR 14.

alleged common intention constructive trust should be ordered to give discovery of documents relating to her financial contributions towards that property. The property owner had been adjudged bankrupt and the property sold by trustees. The bankrupt's wife then sued the defendants, demanding that the defendants distribute half of the sale proceeds to her, the plaintiff, on the basis that the plaintiff had a beneficial interest in half of the property. The plaintiff claimed that she had shared the cost of purchasing and renovating the property. The defendants sought specific discovery of documents to ascertain the sources of the funds for accounts from which the property's mortgage and/or renovation loan had been paid. The documents sought included documents that would enable the identification of those who had deposited money into or received moneys withdrawn from the accounts in question. The plaintiff resisted the application on the basis that the documents sought were irrelevant for determining whether a common intention constructive trust arose, and were unnecessary.

8.37 The court held that while it is true that the apportionment of beneficial interest in a common intention constructive trust analysis is not based on a strict arithmetic calculus, it did not mean that the financial contributions were, therefore, irrelevant. Even where a party has claimed beneficial interest under a common intention constructive trust without claiming any interest under a resulting trust, if that party has adduced evidence of his or her financial contributions, that party should generally be made to prove the contributions made. The court held that the documents were relevant since the plaintiff in that case could not on the one hand delve extensively into her financial contributions as evidence of the alleged common intention, while on the other hand take the position that documents relating to her financial contributions are irrelevant.

8.38 Separately, given that the requirement of necessity in O 24 r 7 of the RoC permitted the court to calibrate discovery orders as necessary for the present stage of the proceedings, the court limited the scope of discovery to transactions of a more significant value, as those would have a greater bearing on the plaintiff's financial contributions to the property.

Anton Piller orders

8.39 An Anton Piller order will not be granted where the plaintiff is unable to show, *inter alia*, that there is a real possibility that the defendant would destroy the relevant documents. In *Werner Samuel*

Vuillemin v Overseas-Chinese Banking Corp Ltd,²² the plaintiff claimed an order for delivery by the defendant bank to him of contents kept in the plaintiff's safe deposit box located in a branch of the defendant bank which was later redeveloped. The plaintiff applied for an Anton Piller order for him and his representatives to enter, search and inspect the bank's premises and to deliver into the safekeeping of the plaintiff (a) a sealed bag containing the contents that were removed from the safe deposit box by the bank; and (b) a recording of the occasion when the safe deposit box was opened and the contents removed. The court held that for an Anton Piller order to be made, the following requirements as set out in *Asian Corporate Services (SEA) Pte Ltd v Eastwest Management Ltd (Singapore Branch)*²³ had to be satisfied: (a) the plaintiff has an extremely strong *prima facie* case; (b) the damage suffered by the plaintiff was very serious; (c) there is a real possibility that the defendant would destroy relevant documents; and (d) the effect of the Anton Piller order is not out of proportion to the legitimate object of the order.

8.40 The court pointed out that the bank had offered on a number of occasions to hand over the contents removed from the safe deposit box to the plaintiff (in the presence of others), without requiring him to sign release forms of the bank to waive his rights against the bank but the plaintiff had refused to accept the offer. When the bank had given the plaintiff the inventory list several months after the safe deposit box was opened, the plaintiff had not then alleged that there was a likelihood of tampering by the bank, and only filed the summons for an Anton Piller order about nine years after receiving the inventory list. The court held that the plaintiff had not adduced objective evidence to suggest that the bank was acting *mala fides* in removing the safe deposit box and contents. It held that the requirements for the grant of an Anton Piller order were not met and that the summons for Anton Piller order had been an abuse of the process of court and was rightly dismissed by the court below.

Interim payments

8.41 In *HRA Corp (SG) Pte Ltd v Cheng Mun Yip Marcus*²⁴ the court dismissed an application by the plaintiff for interim payment from the defendant on account of the defendant's admissions in respect of the plaintiff's claims in the main suit. It was held that courts approach applications for interim payment in two stages. First, the court must be satisfied that one of the grounds stated in the sub-paragraphs of O 29

22 [2018] SGHC 92.

23 [2006] 1 SLR(R) 901 at [14].

24 [2018] SGHCR 7.

rr 11 or 12 of the RoC had been established (“First Stage”). Second, the court considers whether, in all the circumstances of the case, it ought to exercise its discretion to order interim payment, and if so, the quantum of such payment (“Second Stage”).

8.42 The plaintiff proceeded under three separate and alternative grounds: (a) under O 29 r 11(1)(a) of the RoC that in an action for damages, the defendant had admitted liability for the plaintiff’s damages; (b) under O 29 r 11(1)(c) of the RoC that in an action for damages, if the action proceeded to trial, the plaintiff would obtain judgment for substantial damages against the defendant; and (c) under O 29 r 12(c) of the RoC that, in an action for relief other than damages, if the action proceeded to trial the plaintiff would obtain judgment against the defendant for a substantial sum of money apart from any damages or costs.

8.43 The court rejected the defendant’s argument that since the plaintiff’s claim had been founded on breach of trust, the plaintiff could not be considered to have brought a claim for damages under O 29 rr 11(a) or 11(c) of the RoC since there is a distinction between “equitable compensation” and “damages”, and damages is not available as a remedy for an equitable wrong. The court held that it was unnecessary to determine whether a claim for equitable compensation could be brought under O 29 r 11(1) because, *inter alia*, O 29 r 12(c) states that the provision is “without prejudice to any contentions of the parties as to the nature or character of the sum to be paid by the defendant”, which meant that the court need not trouble itself with the technical legal classification of the sum to be paid.

8.44 At the First Stage, it was held that the plaintiff must demonstrate, on the balance of probabilities, something more than a *prima facie* case that he would obtain judgment for a substantial sum. The court would also consider any defences and counterclaims which qualify as set-off. On the facts, the court considered that whether the plaintiff was entitled to the sum was in itself indeterminate because the understanding which was the source of the plaintiff’s entitlement was affected by a subsequent agreement under which the plaintiff would have to pay the defendant a sum of money. Therefore, the court held that the plaintiff had failed to establish any ground in O 29 r 11 or 12 of the RoC, and thus failed to satisfy the First Stage.

8.45 The court held that even if the requirements of the First Stage were met, it would not have exercised its discretion pursuant to the Second Stage because (a) the plaintiff did not demonstrate that the interim payment was needed to mitigate any hardship, need or prejudice; (b) liability had not been established in the present case and the defendant’s counterclaims meant that the plaintiff might not

ultimately be awarded the sum it sought; and (c) there were legal and factual issues that required resolution by trial and there was insufficient evidence before the court to establish with reasonable certainty the minimum sum that the plaintiff was likely to recover at trial. The application was thus dismissed.

Striking out

8.46 In *Grande Corp Pte Ltd v Cubix International Pte Ltd*,²⁵ the High Court took the drastic step of striking out two defendants' defences on the basis of their contumelious and inexcusable failure to provide discovery of documents. The plaintiff had applied for and obtained an order against the third and fourth defendants for specific discovery of three categories of the sixth to eighth defendants' account and financial documents. The third and fourth defendants belatedly made piecemeal discovery. The plaintiff then applied for and obtained an unless order, requiring the third and fourth defendants to explain the lateness of the partial discovery and to produce certain other documents. The plaintiff subsequently applied for the defences of the third, fourth and sixth to eighth defendants to be struck out.

8.47 The court applied O 24 r 16(1) of the RoC, which empowers the court to strike out a defence or action for failure to make discovery of documents. The court affirmed that the classic case for such striking out is where there is a real or substantial risk that a fair trial will no longer be possible as a result of the failure to provide discovery. On the facts, the court was not satisfied that there was a real risk that a fair trial was not possible, since the allegedly missing or destroyed documents were not so vital to the plaintiff's case. However, the court also recognised that "inexcusable" procedural default can justify striking out even where a fair trial is still possible. Such default does not require wilful disobedience; negligence, incompetence or sheer indolence may suffice.

8.48 The court held that the third and fourth defendants had breached the unless order in failing to explain why they had asked their

25 [2018] SGHC 13. See also *International Financial Services (S) Pte Ltd v Old Mutual International Isle of Man Ltd Singapore Branch* [2018] SGHC 127, where the High Court struck out the plaintiffs' claim for breach of confidence and unlawful means conspiracy on the basis that the claim was plainly unsustainable; *Powerdrive Pte Ltd v Loh Kin Yong Philip* [2019] 3 SLR 399, where the court struck out the plaintiff's claims against the defendants in respect of alleged breaches of restraint of trade provisions on the ground that the restraint of trade provisions were not enforceable; and *Management Corporation Strata Title Plan No 901 v Lian Tat Huat Trading Pte Ltd* [2018] SGHC 270, where the High Court struck out the plaintiff management corporation's claim against the defendant subsidiary proprietor.

bank for copies of documents only more than a year after specific discovery had been ordered, and in failing to disclose other documents without even checking whether those documents were in their possession, custody or control. The court affirmed that the burden was on the third and fourth defendants to demonstrate that their breach of the unless order was not intentional and was due to extraneous circumstances. The court was satisfied that this burden had not been discharged. The court further held that the third and fourth defendants' breaches of the unless order warranted the "draconian sanction" of striking out their defence. The court observed, *inter alia*, that they had repeatedly made false assertions on their affidavit, had not shown any positive efforts to comply with the court's orders, and had dragged out the discovery process for more than two years. The court held that the third and fourth defendants had committed inexcusable breaches of their discovery obligations, as well as of the unless order. However, the court did not strike out the defence of the sixth to eighth defendants since they had not been party to the unless order or the preceding specific discovery order. The court ordered interlocutory judgment for the plaintiff, with damages to be assessed, against the third and fourth defendants.

8.49 In *Millennium Pharmaceuticals, Inc v Drug Houses of Australia Pte Ltd*²⁶ ("Millennium Pharmaceuticals"), the High Court struck out certain passages in the statement of claim as disclosing no reasonable cause of action. The plaintiff held patents relating to certain *processes* for the manufacture of an anti-cancer drug. The defendant had registered the anti-cancer drug as a therapeutic product under the Health Products (Therapeutic Products) Regulations 2016²⁷ ("HP(TP)R"). Under those regulations, the defendant had been required at the time of its registration application to declare (to the Health Sciences Authority) any patents in respect of its product. The defendant's position was that the plaintiff's patents were not relevant to the defendant's product, as the latter did not use the patented processes. The plaintiff commenced a suit against the defendant, seeking:

- (a) a declaration that the defendant's declaration to the Health Sciences Authority had been materially false or misleading;
- (b) a declaration that the defendant's performance of the registered acts would prospectively infringe the plaintiff's patents;

26 [2018] SGHC 149. See paras 8.98–8.100 below.

27 S 329/2016.

(c) an injunction to restrain the defendant from infringing the plaintiff's patents; and

(d) a declaration that the defendant had actually infringed the plaintiff's patents.

8.50 The plaintiff subsequently applied for an interlocutory injunction against the defendant's registered use of its product. The defendant then applied under O 18 r 19(1)(a) of the RoC for the statement of claim in the underlying suit to be struck out as disclosing no reasonable cause of action.

8.51 The court observed that the question whether the plaintiff's claim disclosed a reasonable cause of action (for the purpose of the defendant's striking out application) was intertwined with the question whether there was a serious question to be tried (in the context of the plaintiff's interlocutory injunction application). The court struck out all the claims apart from the claim relating to whether the defendant's declaration to the Health Sciences Authority had been materially false or misleading. As regards this claim, the plaintiff had a reasonable cause of action under reg 24(1)(a)(ii) of the HP(TP)R, which (at least apparently) entitled an affected patent holder to seek declaratory relief. The court did not expand on its reasons since this aspect of its decision was not under appeal.

8.52 As regards the allegation of prospective infringement, it was common ground that the defendant's registration application was not itself an infringing act, and no infringing act had actually been committed by the defendant as at the date of the hearing. The plaintiff expressly conceded that it was not relying on any cause of action under the Patents Act.²⁸ The court ruled that reg 24(1)(a)(i) of the HP(TP)R, relied on by the plaintiff, did not encompass *prospective* patent infringements. Nor did the pleadings disclose any need for the court to grant a declaration in exercise of its inherent powers. For the same reasons, the court struck out the claim for an injunction against prospective patent infringements. Given the plaintiff's concession that there had been no actual infringing acts by the defendant, the claim for a declaration of actual infringement was plainly unsustainable.

8.53 In *Ayaz Ahmed v Mustaq Ahmad*²⁹ ("*Ayaz Ahmed*"), the High Court declined to strike out a complaint of minority oppression brought by the beneficiaries of an intestate's estate. The plaintiffs were the beneficiaries of the estate of Mustafa s/o Majid Khan ("*Mustafa Estate*"),

²⁸ Cap 221, 2005 Rev Ed.

²⁹ [2018] SGHCR 10. See paras 8.162–8.163 below.

who had died intestate. His assets, including a 30% shareholding in Mohamed Mustafa & Samsuddin Co Pte Ltd, were vested in the first defendant as administrator of the estate. The defendants first argued that the plaintiffs did not have standing to bring their complaint, as they were merely the beneficiaries and not the personal representatives of the estate; unless they could show special circumstances entitling them to stand in the administrator's shoes and bring what is known as a beneficiaries' derivative action (under the exception laid down in *Wong Moy v Soo Ah Choy*³⁰ ("*Wong Moy*"). The defendants further contended that the *Wong Moy* exception was only applicable where the action was one to recover assets, which the plaintiffs' minority oppression action was not. The court declined to strike out the claim on this basis, as it was not "plain and obvious" that the *Wong Moy* exception only permitted the recovery of assets; the plaintiffs' case was not legally unsustainable. Moreover, on the facts, the administrator of the estate was also the majority shareholder in the Mustafa company and one of the defendant directors.

8.54 The defendants' second ground for striking out was that the plaintiffs' complaint of wrongful misappropriation was a corporate claim that could not be brought in an oppression action. However, the defendants' summons for striking out did *not* contain any prayer relating to the wrongful misappropriation complaint, and did not specify the paragraphs that ought to be struck out. The court held that this omission was fatal. The court affirmed that, if a party wishes the court to strike out any part of a pleading, it is incumbent upon that party to state, in clear and unambiguous terms, the exact words or passages or lines in the pleadings that are sought to be struck out.

8.55 Nonetheless, the court proceeded to consider whether the wrongful misappropriation complaint was essentially a corporate claim. Reading the statement of claim in its totality, the court concluded that the real injury alleged by the plaintiffs was not the losses suffered by the Mustafa company (and their reflective losses) but rather the defendants' systemic abuse of their directorships signifying their wanton disregard for the Mustafa Estate's interests as a minority shareholder. The court held that it was not "plain and obvious" that the wrongful misappropriation complaint could not be mounted in an oppression action.

8.56 Finally, the defendants argued that the plaintiffs' complaint of wrongful share allotments was both legally and factually unsustainable, and should be struck out. As regards legal unsustainability, the defendants contended that the first allotment had taken place before the

30 [1996] 3 SLR(R) 27.

formation of the Mustafa Estate. The court held that this argument was misconceived, since under s 10 of the Civil Law Act,³¹ the late Mustafa's cause of action survived his death and inured to the benefit of his estate. As regards factual unsustainability, the defendants contended that the allotments had been authorised by shareholders' resolutions in accordance with the Mustafa company's constitution. The plaintiffs raised several unpleaded arguments in response. When invited by the court to amend their pleadings to incorporate their arguments, the plaintiffs declined, submitting that no amendment was necessary. The court held that the defendants' third ground for striking out was made out, since the plaintiffs bore the burden of showing that the shareholders had not freely and knowingly consented to the allotments, but had declined to plead this. Further, in the light of the documentary evidence adduced by the defendants, parts of the statement of claim were "either factually incorrect or critically ambiguous". Moreover, the allegation that the fifth defendant (who had been only the company secretary with no executive power) had been complicit in the first share allotment was contradicted by the only evidence before the court. Notwithstanding that the third ground for striking out was made out, the court exercised its power under O 20 r 8(1) of the RoC to order an amendment of the plaintiffs' pleadings, because the plaintiffs admitted that the crux of the issue was whether the late Mustafa had freely and knowingly approved the first share allotment, but had simply not pleaded this. The court granted the plaintiffs leave to amend, without specifying the precise form the amendments should take.

8.57 *Anglo-American Corp Sdn Bhd v The London Steam-ship Owners' Mutual Insurance Association Ltd*³² arose from a collision between two ships and the interested parties' failure to settle their dispute amicably. The plaintiff shipowner asserted four claims (for breach of contract, misrepresentation under s 2 of the Misrepresentation Act,³³ unjust enrichment, and breach of good faith) against the first and second defendants, and one claim against the fourth defendant for fraudulent misrepresentation. All three defendants applied to strike out the plaintiff's claims, under O 18 r 19(1)(b) of the RoC and pursuant to the inherent powers of the court. The court struck out all the claims except for the claim against the first and second defendants for breach of contract.

8.58 In respect of the claim for breach of contract, the court was satisfied that there was basis in the e-mail correspondence between the plaintiff's solicitor and the fourth defendant (at the material time an

31 Cap 43, 1999 Rev Ed.

32 [2018] SGHC 201.

33 Cap 390, 1994 Rev Ed.

English solicitor) for the claim that a contract had been agreed between the plaintiff and the first and/or second defendant, containing two of the express terms pleaded by the plaintiff. The court held that the evidence did not support a third express term, and accordingly struck out the pleading of this express term. Nonetheless, the court found that there was an arguable case that there was an implied term to the same effect as the third pleaded express term, it being arguable that such a term was necessary for business efficacy and that the parties would have emphatically affirmed it. It was also arguable that the fourth defendant had express and apparent authority to bind the first and second defendants to the contract.

8.59 The court also struck out the plaintiff's misrepresentation claims, holding that there was no evidence that the representations in question had been untrue at the time when they were made. The court also saw no evidence which hinted at any fraudulent intent harboured by the fourth defendant when he made the representations.

8.60 Of interest is the ground on which the court struck out the claim in unjust enrichment. The plaintiff claimed that the first and second defendants had been unjustly enriched at its expense, in that they had avoided the time and costs of attending to an arrest of their insured's ship and the negotiations on providing security to the plaintiff, and had received advice from the fourth defendant who would not have been qualified to represent them in Singapore proceedings. The plaintiff claimed that it had sustained losses by giving up its right to arrest the other ship and the opportunity to resolve the case more expeditiously through court processes. The court struck out the claim on the ground that the benefits received by the first and second defendants "obviously" had not been at the plaintiff's expense. The court held that the defendant has to have received a benefit from a subtraction of the plaintiff's assets. On the intended pleadings, the benefits to the first and second defendants were only causally related to the plaintiff's forbearance to initiate legal proceedings, and could not be said to be a subtraction of the plaintiff's assets. The claim was legally unsustainable.

8.61 The court also struck out the plaintiff's argument that the fourth defendant's actions pursuant to the alleged contract (between the plaintiff and the first and/or second defendant) should be construed in the light of the fourth defendant's duty under r 7(1)(b) of the Legal Profession (Professional Conduct) Rules 2015³⁴ ("PCR") to deal with other solicitors in good faith. The court held that the plaintiff's position, that the rule governing the conduct of the parties' solicitors could be

used to construe the parties' actions under a contract, was devoid of any legal principle or authority.

8.62 In *Cheong Wei Chang v Lee Hsien Loong*³⁵ (“*Cheong Wei Chang*”), the court had struck out the plaintiff’s previous action against the defendant as disclosing no reasonable cause of action. The court had regarded the plaintiff’s claim and its factual premise as “incoherent”. A day after the order striking out the previous suit had been served on the plaintiff, the plaintiff filed a new suit, and the new statement of claim enclosed a volume of documents which was almost identical to the volume previously tendered. The plaintiff made the same allegations as in the previous suit. The court struck out the claim on all four of the grounds in O 18 r 19(1) of the RoC given that, *inter alia*, there was no pleaded factual basis nor any legal premise for the plaintiff’s claim.

8.63 Of interest is the court’s holding that cause of action estoppel applied, since the claim was essentially the same claim that had been advanced in the previous suit. The parties were identical, the plaintiff was relying on the same causes of action, and the previous suit had been before a competent court. Although the previous suit had not gone to trial, the court’s decision to strike it out was final and conclusive on the merits, for the purposes of cause of action estoppel. The new claim was, thus, an abuse of process for the purposes of O 18 r 19(1)(d) of the RoC.

8.64 In *TMT Asia Ltd v BHP Billiton Marketing AG (Singapore Branch)*,³⁶ the High Court struck out the plaintiff’s claim as an abuse of process, in the light of an open offer made by the defendants. The defendants’ lawyers had written to the plaintiff’s lawyers with an open offer. The letter noted that the defendants’ parent company had obtained a judgment in England adjudging the plaintiff to owe the defendants’ parent company an amount in excess of US\$100m, which order had been registered as a judgment in the Singapore High Court. The letter maintained that the plaintiff’s allegations in the Singapore action were baseless, but made an open offer to settle the plaintiff’s claim on terms that the defendants would pay the plaintiff’s alleged losses with interest and costs, by way of set-off against the judgment sum under the English judgment. The offer had expired without the plaintiff accepting it. The defendants had subsequently applied for the striking out of the claim on account of the open offer. Their application was dismissed by an assistant registrar and the defendants did not appeal.

8.65 Subsequently, the plaintiff applied for discovery of eight categories of documents. In turn, the defendants again applied for the

35 [2019] 3 SLR 326. See paras 8.138–8.140 below.

36 [2018] SGHC 228.

claim to be struck out under O 18 r 19 of the RoC or the inherent powers of the court, on the ground that the claim was frivolous or vexatious or an abuse of the process of the court. On the day fixed for the hearing of both applications, the High Court directed that a preliminary point or issue be decided first pursuant to O 14 r 12 and/or O 33 r 2, that is, whether the plaintiff was entitled or should be permitted to continue with the action in the light of the open offer and, if not, what the appropriate order should be.

8.66 The court held that the previous decision of the assistant registrar not to strike out the claim pursuant to O 18 r 19 and/or the court's inherent powers was not final and conclusive in relation to the preliminary point or issue before the court. This was because the assistant registrar had applied a lower threshold and simply decided that the plaintiff's claim was *arguable*. In contrast, the court was deciding as a preliminary point or issue whether there *was* an abuse of process in view of the open offer. This was, therefore, not *res judicata*.

8.67 The court held that it was an abuse of the court's process for the plaintiff to seek to continue its claim instead of accepting the open offer. The court stated that, if the matter proceeded to trial, much more time and costs would be incurred, including in relation to discovery applications. The court further stated that there was a *public* interest that the court's resources should not be used for a claim that had become academic in view of the open offer. Even if there was no collateral purpose on the plaintiff's part, it was still an abuse of the court's process for the plaintiff to continue with its claim in the face of the open offer. Accordingly, the court found it appropriate to strike out the plaintiff's claim.

8.68 In *Sunbreeze Group Investments Ltd v Sim Chye Hock Ron*³⁷ ("*Sunbreeze Group Investments*"), the Court of Appeal upheld the High Court's striking out of a third-party action on the ground that it was redundant and, therefore, disclosed no reasonable cause of action pursuant to O 18 r 19(1)(a) of the RoC. The court stated that the test for redundancy is whether there is any conceivable scenario, not so fanciful or inherently improbable that it should not be taken into account, in which the defendants might fail in their defence in the main action and yet, on the same facts, succeed in their third-party claim. The court observed that, if a third-party claim is redundant, there is no possibility of it being allowed: either the facts pleaded in support of the third-party claim will vindicate the defence such that the third-party claim does not arise, or the rejection of the defence will necessarily entail the failure of the third-party claim. It followed that a redundant third-party claim

37 [2018] 2 SLR 1242. See paras 8.188–8.189 below.

does not disclose a reasonable cause of action for the purposes of O 18 r 19(1)(a).

8.69 On the facts, the court agreed with the High Court that there was no reasonably conceivable situation in which the appellants might fail in their defence *and yet* have a viable basis for seeking relief against the third party. The appellants contended that there were four non-redundant bases on which they could recover an indemnity or contribution from the third party, namely: (a) the doctrine of abuse of process; (b) the doctrine of unjust enrichment; (c) the principles said to have been articulated in *Raffles Town Club Pte Ltd v Lim Eng Hock Peter*;³⁸ and (d) ss 15 and 16 of the Civil Law Act.

8.70 The court rejected all four bases. First, the court held that abuse of process could not render the third party liable to the appellants; in this regard, the court referred to its previous decision not to recognise abuse of process as a tort in Singapore.³⁹ The separate legal personality of the plaintiff company did not prevent the third-party claim from being redundant: either the third party was not the plaintiff's controlling mind and will, and there was no abuse of process; or he was the controlling mind and will, and the claim against the appellants would fail and they would not need a contribution or indemnity. Secondly, the court held that the appellants had failed to plead unjust enrichment as a cause of action; rather, the words "unjustly enrich" were included only to support the allegation of abuse of process.

8.71 Thirdly, the court clarified that, where the directors of a company act unconscionably and/or in bad faith in causing the company to commence an action for the purposes of unjustly enriching themselves, this is not in itself a basis to order an indemnity or contribution against the directors as third parties. Fourthly, the court held that s 15 of the Civil Law Act does not remove the need to identify some legal basis or cause of action in respect of which both the defendant and the third party are liable to the same person for the same damage. The court, accordingly, held that the third-party claim was redundant, and upheld the striking out by the High Court.

8.72 In *BUN v BUP*,⁴⁰ the High Court declined to strike out an action under O 18 r 19(1)(a) of the RoC. A father and his son from a previous marriage were suing the father's wife as joint plaintiffs, seeking declarations in relation to two properties held by father and son as joint

38 [2013] 1 SLR 374.

39 *Lee Tat Development Pte Ltd v Management Corporation Strata Title Plan No 301* [2018] 2 SLR 866.

40 [2018] SGHCR 17.

tenants at law. Divorce proceedings between the father and his wife had been stayed pending the determination of the proprietary interests in the two properties. The defendant wife applied to strike out the action on the basis that there was no reasonable cause of action and no relief claimed against her. The defendant contended that the declarations could only be sought against legal owners of the properties, which the wife was not.

8.73 The court declined to strike out the action in view of O 15 r 16 of the RoC. The court held that the effect of O 15 r 16 is that a claim will not be struck out simply on the ground that the plaintiff is seeking “merely declaratory judgment or order”, whether or not there are claims for “any consequential relief”. The court affirmed that, while every claim must be founded on a reasonable cause of action, O 15 r 16 of the RoC provides an exception where the plaintiff seeks only a declaration of right. The reason for this exception is that declaratory relief is generally superfluous where a plaintiff has a subsisting cause of action.

8.74 The court applied the requirements for a court to grant declaratory relief found in *Karaha Bodas Co LLC v Pertamina Energy Trading Ltd*⁴¹ and *Tan Eng Hong v Attorney-General*⁴² and held that there was no indication, at the interlocutory stage, that the statement of claim failed to meet the requirements for the grant of declaratory relief. The joint plaintiffs, as legal and allegedly beneficial owners of the properties, had a real interest in bringing the action. The declarations sought directly or indirectly affected the defendant’s beneficial interests, and would impact the quantification of matrimonial assets in the pending matrimonial proceedings. For the latter reason, there would have been a “real controversy” even if the defendant had not asserted any beneficial interest in the properties.

Stay of proceedings

8.75 When a plaintiff is claiming that several defendants had conspired to cause him harm, and the court has granted one of the defendants a stay in favour of arbitration, the plaintiff is entitled to pursue his claim in court against the remaining defendants. In *Epoch Minerals Pte Ltd v Raffles Asset Management (S) Pte Ltd*,⁴³ the court refused the second, third and fourth defendants’ applications for a stay of proceedings in favour of arbitration even though the first defendant’s

41 [2006] 1 SLR(R) 112 at [14].

42 [2012] 4 SLR 476 at [115].

43 [2018] SGHC 223. See also *Re the Attorney-General* [2018] SGHC 49, where the court dismissed an application for a stay of the hearing of a committal application.

application had been allowed previously. The first and third defendants had earlier applied for and were granted a stay of proceedings in favour of arbitration only in respect of the action against the first defendant with whom the plaintiff had signed an agreement containing an arbitration clause. On appeal, the issue was whether a stay should be granted against the three defendants who were not bound by the arbitration clause, given that a stay had been granted to the first defendant. The court rejected the second to fourth defendants' argument that a stay should be granted as a matter of effective case management as it would be inconvenient to have the arbitration proceedings against the first defendant proceeding in parallel to the court proceedings against the other defendants. The court held that "case management" is just a descriptive term for the court's administrative function and is not intended to affect the court's judicial discretion which must be based on, *inter alia*, legal principles. The court held that when a plaintiff is claiming that the four defendants had conspired to cause him harm, he is entitled to pursue his claim in court against them even when the court had granted one of them a stay in favour of arbitration. While potential conflict in the findings of fact may arise between the court and the arbitrator, that alone is not a reason to stymie the plaintiff against the three defendants who are not concerned in the arbitration.

8.76 Where a court grants a beneficiary of an estate leave to intervene pursuant to O 15 r 6(2)(b)(ii) of the RoC, the court may lift a prior order to stay the action. In *Sia Chin Sun v Yong Wai Poh*⁴⁴ ("*Sia Chin Sun*"), the court lifted the stay order in order to grant leave for the estate's beneficiary to intervene. The court held that a court is empowered to lift a stay it made where the premise of the stay no longer holds. In this case, where the stay order had been granted so that the question of who the rightful executor of the estate should be would be litigated in the probate proceedings, and it had become necessary for the beneficiary of the estate to take steps to protect the estate in the action, the court was empowered to lift the stay order for limited purposes.

8.77 In *FT Plumbing Construction Pte Ltd v Authentic Builder Pte Ltd*,⁴⁵ the defendant had succeeded in an adjudication against the plaintiff and sought to enforce the adjudication determination as a judgment debt. The plaintiff had applied for a stay of the enforcement proceedings ("Main Stay Application") and had commenced a suit against the defendant, seeking a final determination of the dispute between the parties ("the Plaintiff's Suit"). The applications before the court concerned the defendant's application for a stay of the suit, and the

44 [2018] SGHC 142. See paras 8.126–8.128 and paras 8.148–8.150 below.

45 [2018] SGHCR 3.

plaintiff's application for an interim stay on the enforcement proceedings pending the hearing of the Main Stay Application.

8.78 In applying for a stay of the Plaintiff's Suit, the defendant alleged that the Plaintiff's Suit amounted to an abuse of process of the court given that the plaintiff had not made payment of the adjudicated amount to the defendant. The plaintiff argued that it was genuinely unable to pay the adjudicated amount due to its financial circumstances, and it believed that the defendant was itself impecunious such that any amounts paid to the defendant pending the determination of the underlying dispute might prove irrecoverable if the plaintiff eventually succeeded in the Plaintiff's Suit.

8.79 The defendant relied on *Lim Poh Yeoh v TS Ong Construction Pte Ltd*⁴⁶ ("*Lim Poh Yeoh*") for the proposition that it is an abuse of process of the court for an unsuccessful respondent to an adjudication determination to commence a claim against the claimant on the same contract without first paying the sum awarded under the determination. The court held that it is necessary to have regard to the unsuccessful respondent's reason for the non-payment; observing that in *Lim Poh Yeoh*, the plaintiff had the ability to pay, but had deliberately chosen not to do so before commencing proceedings against the defendant. The court held that where a plaintiff has not made payment of the adjudicated amount because it is genuinely unable to do so as a result of its financial situation, its commencement of proceedings to obtain a final determination of the underlying dispute cannot, without more, be considered an abuse of process such that proceedings should be stayed. However, on the evidence, the court rejected the plaintiff's claim that it was genuinely unable to make payment of the adjudicated amount.

8.80 As to the plaintiff's second argument that it had not paid the adjudicated amount because of its belief that the defendant was impecunious, the court held that the plaintiff's belief must be tested and proven on the evidence. Since the defendant's impecuniosity was the subject of decision in the plaintiff's Main Stay Application, the court ordered that proceedings in the Plaintiff's Suit should be stayed, subject to any decision in the Main Stay Application that the defendant was indeed in such dire financial circumstances that it was appropriate to grant a stay of enforcement pending disposal of proceedings in the Plaintiff's Suit. The court also granted the plaintiff an interim stay of enforcement proceedings pending the decision in the Main Stay Application.

46 [2017] 4 SLR 789.

8.81 In *SCK Serijadi Sdn Bhd v Artison Interior Pte Ltd*,⁴⁷ the court dismissed the plaintiff's application to lift the stay of proceedings against the defendant which was placed under a creditors' voluntary winding up. The plaintiff was a judgment creditor that had, *inter alia*, commenced two garnishee proceedings and obtained garnishee orders *nisi*. Before the garnishee show cause proceedings could be heard, the defendant was placed under creditors' voluntary winding up and the garnishee show cause proceedings were adjourned. In this application, the plaintiff sought to lift the stay of proceedings against the defendant (which operates automatically upon the commencement of the defendant's winding up) in relation to, *inter alia*, the garnishee proceedings.

8.82 The court followed the Court of Appeal's decision in *Transbilt Engineering Pte Ltd v Finebuild Systems Pte Ltd*⁴⁸ ("*Transbilt*"). In *Transbilt*, the respondent had obtained a garnishee order *nisi* against the appellant but before the show cause hearing could take place, the appellant commenced a creditors' voluntary winding up. The High Court had granted the respondent's application under s 334(1)(c) of the Companies Act⁴⁹ to set aside the liquidator's rights so that the attachment of the garnishee order could be completed. The Court of Appeal allowed the appeal and restored the stay, holding that s 334(1) was intended to provide a clear path for a liquidator to perform his tasks and therefore the section expressly provided that any inchoate execution and attachment would be nullified, such that the executing creditor would not be able to reap the benefit of the execution or attachment. The Court of Appeal held that the judgment creditor would need to show inequitable behaviour on the part of the company in order to obtain relief from the court under s 334(1)(c). On the facts of the present case, the court held that there was no inequitable behaviour on the part of the defendant and, therefore, applying *Transbilt*, there was no reason to grant the plaintiff's application.

8.83 Separately, the court also rejected the plaintiff's argument that the service of the garnishee order *nisi* made it a secured creditor and took it outside the regime in the Companies Act, holding that although the plaintiff had obtained an equitable charge when it served the garnishee order *nisi*, the equitable charge did not give the plaintiff all the rights of a secured creditor. The court further noted that in *Transbilt*, the judgment creditor had also argued that it was a secured creditor, but the Court of Appeal had held that at the onset of liquidation, all creditors are placed on the same footing and the creditor who has not completed

47 [2018] SGHC 8.

48 [2005] 3 SLR(R) 550.

49 Cap 50, 2006 Rev Ed.

his execution or attachment will be part of the rule in s 334(1). In any event, the court also observed that Parliament had intended for the relevant provisions of the Companies Act to apply to both secured and unsecured creditors.

Submission to jurisdiction

8.84 Failure to mount a jurisdictional challenge in a prior suit which has been discontinued does not mean that the party has submitted to jurisdiction in a separate fresh suit, notwithstanding that there may be overlap in parties and the subject matter of both suits. In *Hadley James Chilton*,⁵⁰ the plaintiff was the administratrix of the estate of a deceased who had been the sole shareholder and sole director of the third defendant. The first and second defendants were foreign joint receivers of the third defendant. The plaintiff first commenced a suit against the first and second defendants seeking various declarations but did not include a claim for damages. The plaintiff later commenced the present suit with a reformulated claim and discontinued the second suit.

8.85 The plaintiff argued that the defendants had submitted to jurisdiction because (a) the defendants had failed to mount a jurisdictional challenge in the first suit; (b) the defendants had made an application seeking recognition of the appointment of foreign receivers; and (c) the receivers had entered appearance on behalf of the third defendant. On the first point, the court held that the defendants' submission to jurisdiction in the first suit did not constitute submission to jurisdiction in the present suit. The court held that where a defendant took a step in a previous suit which has since been discontinued, it would not be appropriate to infer that he has submitted to the jurisdiction of the Singapore courts in a separate fresh suit, notwithstanding that there may be some overlap in the parties and the subject matter of both suits. On the second point, the court held that an application for recognition of foreign receivership did not constitute a step taken in submission to jurisdiction. On the third point, the court held that it is clear that a defendant may enter an appearance and dispute the existence of the court's jurisdiction in any of the manners set out under O 12 r 7(1) of the RoC.

50 See para 8.16 above.

Pleadings

8.86 In *Royal Melbourne Institute of Technology v Stansfield College Pte Ltd*,⁵¹ the High Court held that the law permits departure from the general rule that parties are bound by their pleadings in limited circumstances, where no prejudice is caused to the other party in the trial or where it would be clearly unjust for the court not to do so. The court may permit an unpleaded point to be raised if no injustice or irreparable prejudice will be occasioned to the other party, and evidence given at trial can (where appropriate) overcome defects in the pleadings provided that the other party is not taken by surprise or irreparably prejudiced.

8.87 The court found that the first defendant's failure to plead the doctrine of waiver and the material facts required to establish waiver was fatal to this aspect of its defence. The court held that this failure was irreparably prejudicial to the plaintiff given that (a) a waiver is fact-dependent and pleading the material facts is an indispensable foundation upon which a plea of waiver rests; and (b) since waiver was not pleaded in the defence and counterclaim, the plaintiff's reply and defence to counterclaim likewise did not address this issue; nor did the affidavits of evidence-in-chief address waiver. Further, in the court's view, counsel for the plaintiff might have approached his re-examination and cross-examination differently had waiver been pleaded.

8.88 In any event, the court considered that the defence of waiver *by election* would have failed on the merits, since the plaintiff had not sought to reverse or undo a choice it had previously made; the gravamen of the first defendant's complaint was waiver *by estoppel*, but the first defendant had neither pleaded nor submitted on this. In any event, there had been no unequivocal representation on the plaintiff's part, as required for both forms of waiver.

8.89 In *PT Surya Citra Multimedia v Brightpoint Singapore Pte Ltd*,⁵² the High Court apparently accepted that a defendant is required to set out in its pleadings all material facts on which it relies for its defence, especially where a positive assertion is being taken. The court also appeared to accept as a corollary of the foregoing rule that, if the defence is a bare denial, the defendant would not be permitted to lead evidence or cross-examine the opponent's witnesses on the point omitted from the pleadings.⁵³

51 [2018] SGHC 232.

52 [2018] 3 SLR 461.

53 *Multi-Pak Singapore Pte Ltd v Intraco Ltd* [1992] 2 SLR(R) 382 at [24(b)].

8.90 During cross-examination of one of the plaintiff's witnesses in regard to whether the plaintiff had mitigated its loss by selling to third parties the very same mobile phones that the defendant had refused to pick up, counsel for the defendant had raised a point about the mobile phones' unique identification numbers. Counsel for the plaintiff had objected to this line of questioning on the basis that the defendant had not pleaded the point and the point had not been raised in any affidavits of evidence-in-chief. The court took the defendant's point during the trial as simply being that the plaintiff had not adduced sufficient evidence to prove its case, including that the mobile phones sold to third parties had been allocated to the defendant. The court held that the defendant had not produced a shred of evidence that would weaken the plaintiff's case that the mobile phones sold to third parties had been allocated to the defendant. In any event, the court held that the prices at which the mobile phones had been sold to third parties reflected the market value of the phones which the defendant had failed to accept, since (despite their unique identification numbers) the units of a single model were perfect substitutes for each other. Indeed, one of the defendant's witnesses had testified that the prices were the prevailing market price.

Amendment of pleadings

8.91 In *Macquarie Bank Ltd v Graceland Industry Pte Ltd*,⁵⁴ the SICC granted the defendant's application for leave to amend its defence and counterclaim, even though the court criticised the defendant's "egregious" conduct in applying to amend very late in the day. The court also held that the defendant had had plenty of opportunities previously to seek the necessary amendments but had failed or refused to do so. The court recognised that, in certain circumstances, such egregious conduct might of itself justify the refusal of any application for leave to amend. However, the court held that it was also necessary to consider the prejudice that might be suffered by the plaintiff if the amendments were allowed, and whether such prejudice could be adequately compensated by an appropriate order as to costs.

8.92 Given the proximity to trial, the court would have refused three of the major amendments sought by the defendant, after the original

54 [2018] 4 SLR 19. See also *Wang Weidong v SPM Global Services Pte Ltd* [2018] SGHCR 6, where the High Court disallowed an amendment of the statement of claim to introduce a new cause of action against the second defendant in tort for inducing the first defendant to breach its contract with the plaintiff; and *Tan Chin Lay Evelyn v Cheng Soo May Stacy* [2018] SGHC 240, where the High Court affirmed the assistant registrar's decision to grant the defendant leave to amend her defence and counterclaim.

hearing of the application. However, the defendant's counsel subsequently sent a letter to the registry attaching a new draft amended defence and counterclaim with additional proposed amendments. The court decided to have a further oral hearing, and to give the defendant's counsel a further opportunity to serve a yet further draft amended defence and counterclaim to remove uncertainty and ambiguity. This resulted in a yet further oral hearing. The further drafts of the amended defence and counterclaim met the plaintiff's objections to two of the major proposed amendments, and avoided prejudice to the plaintiff that could not be compensated by costs. The other major proposed amendment was saved by the defendant's counsel's written confirmation to the registry that the defendant had no further relevant documents to disclose, in relation to the new issue.

8.93 In view of the lateness of the application, the fact that the application had failed in part and the defendant's egregious conduct, the court ordered the defendant to pay the costs of the application and of the three hearings which its conduct had necessitated. This was in addition to the usual order for the defendant to bear the costs relating to the other parties' consequential amendments to their pleadings.

Order of medical examination

8.94 Where an injured plaintiff produces a more serious subsequent diagnosis even though the earlier diagnosis did not indicate future complications, the opposing party must be given an opportunity to test that subsequent diagnosis, and the court may grant the opposing party's request for a medical examination. *Xie Weiwei v Long Hui Construction Pte Ltd*⁵⁵ concerned two cases wherein the appellants had both sued their employers for damages for injuries arising in the course of their employment. In both cases, the appellants had adduced subsequent medical reports that increased the amount of damages recoverable, and the respondents had succeeded in applying for court orders compelling the appellants to undergo medical examinations proposed by the respondents. The appellants appealed against the court orders compelling the medical examination.

8.95 In the first appeal, although the appellant's earlier medical reports had stated that there was nothing to suggest the onset of Complex Regional Pain Syndrome ("CRPS"), the appellant later produced a medical report where his medical expert concluded that the appellant had CRPS, increasing the amount of damages recoverable. Similarly, in the second appeal, the appellant had suffered a fracture in

55 [2018] SGHC 185.

his hand but after a follow-up examination the doctor had certified that the injury was recovering well and the appellant's range of movement was improving. Two years later, the appellant's doctor's medical report stated that the appellant now had residual disability and may require future surgery. The appellants in both cases rejected the respondents' requests for the appellants to be examined by their doctor. The respondents thereafter successfully applied for the court to compel the appellants to undergo medical examinations.

8.96 On appeal, the High Court held that once the circumstances changed, the respondents were obliged to investigate further, and their requests to have the appellants subject themselves to a medical examination were fair and reasonable. In particular, the court noted that CRPS appears to be a diagnosis of last resort when there is no other medical explanation for a patient's constant and continuing complaint of pain; and that the court must be satisfied that it is indeed a genuine case and "not a new melody of an old malingerer's tune". Similarly, where the initial injury was changed from "improving" to "may require future surgery", as in the second appellant's case, the court held that the respondent is entitled to test that claim as to why the injury was worse than when the appellant was first examined. Therefore, the court dismissed the appeals against the orders for the appellants to undergo medical examinations.

Injunctions

8.97 Several judgments were issued in 2018 regarding applications for injunctions. As illustrated in the following cases, the *American Cyanamid*⁵⁶ principles which involve two main considerations, namely, whether there is a serious question to be tried and whether the balance of convenience lies in favour of the injunction being granted, still continue to govern interim injunction applications.

8.98 In *Millennium Pharmaceuticals*,⁵⁷ the plaintiff brought an action against the defendant seeking, *inter alia*, an injunction to restrain the defendant from infringing the plaintiff's patents. It also applied for an interlocutory injunction to restrain the defendant from performing any of the acts for which the defendant had obtained registration of its product.

56 *American Cyanamid Co v Ethicon Ltd* [1975] AC 396.

57 See paras 8.49–8.52 above.

8.99 The High Court found that the plaintiff had failed to satisfy either limb of the *American Cyanamid*⁵⁸ test and dismissed the application for an interlocutory injunction. On the first limb, the court held that the “serious question to be tried” must relate to the right for which the plaintiff was seeking protection from injury, and not just *any* right asserted in the statement of claim. Accordingly, the “serious question to be tried” had to relate to the plaintiff’s alleged right to protection from prospective infringement of its patents. However, as the plaintiff conceded that there had been no actual infringement of its patents by the defendant, the court found that it had no reasonable cause of action for prospective infringement of its patents.

8.100 On the second limb, the High Court found that damages would have been an adequate remedy even if the plaintiff were to succeed at trial after being denied an interlocutory injunction. The court held that there was no general proposition of law that in every pharmaceutical case where a patentee is pitted against a generic, the damage suffered by the patentee if denied an injunction pending trial will inevitably and automatically be “incalculable”. Accordingly, it rejected the plaintiff’s allegations that it would suffer incalculable damage and incalculable repercussions on its global patent management if denied an interlocutory injunction, and agreed with the defendant that the plaintiff’s damage if it succeeded at trial was limited to a reasonable royalty.

8.101 In *Harsha Rajkumar Mirpuri v Shanti Shewakram Samtani Mrs Shanti Haresh Chugani*⁵⁹ (“*Harsha Rajkumar*”), the plaintiff sought an injunction to restrain the law firm representing the defendant from continuing to act for the defendant. The plaintiff contended that the law firm was in possession of confidential information pertaining to the action that the plaintiff had conveyed to them when she was considering instructing them to act for her. The High Court found that the plaintiff had no case both under the law on breach of confidence and under the court’s supervisory jurisdiction, and declined to grant the injunction.

8.102 After reviewing the relevant Commonwealth case law on breach of confidence, the High Court found that the applicable rule where a former *prospective* client (as opposed to a former client) seeks to restrain a law firm from acting on the grounds of protecting his confidentiality was a *modified* version of the test in *Prince Jefri Bolkiah v KPMG*⁶⁰ – he must establish that (a) the law firm is in possession of information

58 See also *Goldilocks Investment Co Ltd v Noble Group Ltd* [2018] 5 SLR 425 for its application of the *American Cyanamid* test.

59 [2018] 5 SLR 894. See paras 8.135–8.137 below.

60 [1999] 2 AC 222.

which is confidential to him and the disclosure of which he has not consented to; (b) the information is or may be relevant to the new matter in which the interest of the other client is or may be adverse to his own; and (c) there is a risk that the information will come into the possession of those now acting for the new client. The court also held that a former prospective client who was able to satisfy this test would not automatically be entitled to an injunction that restrained the law firm from acting.

8.103 On the facts, the High Court found that the law firm should not be restrained from acting for the defendant, because the information in question was either not in the firm's possession or not confidential or relevant to the plaintiff's pending action. The law firm's undertakings to continue maintaining its information barrier were sufficient. Having rejected the allegation that the information in question was in the firm's possession and might be used to the plaintiff's prejudice in the pending action, the High Court found that there was no basis for any actual or reasonably perceived risk that the proper administration of justice would be prejudiced unless the law firm were removed.

8.104 Finally, the High Court noted that the plaintiff had brought the present application by taking out a summons pursuant to her pending action against the defendant, despite the fact that it was the law firm (and not the defendant) that she was seeking to restrain from committing a breach of confidence. The High Court reiterated the general principle that in order to obtain an interlocutory injunction, the applicant must have a cause of action in law entitling him to substantive relief. Accordingly, it was necessary for a party seeking such an injunction to do so by recourse to an *originating process* against the law firm in question. Significantly, if an originating process had been used, the jurisdictional basis for the injunction would have been clearer.

Anti-suit injunctions

8.105 In *Lakshmi Anil Salgaocar v Jhaveri Darsan Jitendra*⁶¹ (“*Jhaveri Darsan Jitendra*”), the first defendant instituted proceedings against the estate of one Salgaocar and the second defendant in the British Virgin Islands (“BVI”) (“the BVI proceedings”). The plaintiff, the administratrix of Salgaocar's estate, applied, *inter alia*, for an anti-suit injunction to restrain the first defendant from continuing the BVI proceedings. The High Court dismissed the application.

61 [2018] SGHC 90. See paras 8.190–8.193 below.

8.106 At the outset, the High Court reiterated the general principles governing the grant of anti-suit injunctions. It noted that an anti-suit injunction may be granted to protect (a) substantive rights under a jurisdiction or arbitration agreement; or (b) procedural rights from an abuse of process, or vexatious or oppressive conduct. The underlying broad principle was that it would be granted when the ends of justice required it, and in a category (a) case, an anti-suit injunction would generally be granted unless there were “strong reasons” not to do so.

8.107 As set out in *John Reginald Stott Kirkham v Trane US Inc*,⁶² the High Court affirmed that the following elements should be considered in deciding whether to grant an anti-suit injunction:

- (a) whether the defendants are amenable to the jurisdiction of the Singapore court;
- (b) the natural forum for resolution of the dispute between the parties;
- (c) the alleged vexation or oppression to the plaintiffs if the foreign proceedings are to continue;
- (d) the alleged injustice to the defendants as an injunction would deprive the defendants of the advantages sought in the foreign proceedings; and
- (e) whether the foreign proceedings were commenced in breach of an agreement between the parties (only applicable to category (a) cases).⁶³

8.108 On the first element, the High Court found that the first defendant was amenable to the jurisdiction of the Singapore court as he had been properly served with the papers for the originating summons. However, the second defendant was not as it had neither submitted to the court’s jurisdiction nor been served with the relevant papers; hence, an anti-suit injunction could not be granted against it.

8.109 On the natural forum element, the High Court held that the plaintiff did not establish that Singapore was clearly the more appropriate forum for the BVI proceedings. Considering the connecting factors set out in *Spiliada*, the court found the following:

- (a) The ongoing actions in Singapore⁶⁴ were not significant connecting factors between the BVI proceedings and Singapore,

62 [2009] 4 SLR(R) 428.

63 *Lakshmi Anil Salgaocar v Jhaveri Darsan Jitendra* [2018] SGHC 90 at [17].

64 Suit 821, Originating Summons No 727 of 2015 and Originating Summons No 945 of 2015.

as Suit 821 had not proceeded beyond the pleadings stage and the central issues in the various parallel proceedings did not overlap.⁶⁵

(b) There was no strong connection between the parties who might be involved in the BVI proceedings and Singapore.⁶⁶

(c) The fact that potential witnesses were in Singapore was not material as BVI law allowed for witnesses to be examined by way of video link and, in any event, it was not immediately apparent whether the evidence of these potential witnesses would be relevant to the BVI proceedings.⁶⁷

(d) The subject matter of the BVI proceedings, the single share in the second defendant company, pointed to the BVI as the natural forum given that the share was in a BVI-incorporated company and ownership of the share would be reflected on that company's register of members.⁶⁸

(e) As control over the second defendant's subsidiaries and the units that these subsidiaries owned in a condominium development were consequential upon the resolution of the dispute in the BVI proceedings, the fact that these units were located in Singapore and that the rental income they generated was collected in Singapore were indirect and irrelevant connections between the BVI proceedings and Singapore.⁶⁹

8.110 On the third element, the High Court rejected the plaintiff's arguments that the BVI proceedings were frivolous and vexatious, commenced in bad faith, or doomed to fail. The mere fact that the BVI and Singapore courts might make inconsistent findings on the factual issues that overlapped in the BVI proceedings and Suit 821 was insufficient basis to grant an anti-suit injunction. The court also did not agree that it would be unduly onerous for the plaintiff to defend the BVI proceedings just because she would have to apply for letters of administration in the BVI. The fourth element was a non-issue since it would be considered only after a *prima facie* case of vexation or oppression had been made out.

65 *Lakshmi Anil Salgaocar v Jhaveri Darsan Jitendra* [2018] SGHC 90 at [47]–[51].

66 *Lakshmi Anil Salgaocar v Jhaveri Darsan Jitendra* [2018] SGHC 90 at [52].

67 *Lakshmi Anil Salgaocar v Jhaveri Darsan Jitendra* [2018] SGHC 90 at [53].

68 *Lakshmi Anil Salgaocar v Jhaveri Darsan Jitendra* [2018] SGHC 90 at [55].

69 *Lakshmi Anil Salgaocar v Jhaveri Darsan Jitendra* [2018] SGHC 90 at [54].

Mareva injunctions

8.111 In *PT Gunung Madu Plantations v Muhammad Jimmy Goh Mashun*,⁷⁰ the High Court was faced with the question of whether it had jurisdiction to grant a Mareva injunction against a foreign defendant in aid of foreign proceedings. The court reiterated that under the present regime, pursuant to s 16(1) of the Supreme Court of Judicature Act⁷¹ (“SCJA”), the defendant had to be validly served with an originating process before the High Court’s *in personam* jurisdiction over him could be established. It rejected the plaintiff’s argument that s 4(10) of the Civil Law Act read with s 16(2) of the SCJA gave the court *in personam* jurisdiction over a foreign defendant who had not been validly served with an originating process. The court clarified that s 4(10) of the Civil Law Act only conferred a power on the High Court to grant a Mareva injunction once *in personam* jurisdiction was established. On the facts, the plaintiff could not meet the requirement of *forum conveniens* for service of the originating process out of jurisdiction, and accordingly, the High Court had no *in personam* jurisdiction.

8.112 The High Court went on to consider whether it had jurisdiction to grant a Mareva injunction against a defendant before the originating process had been served on him. While it was not necessary for the court to reach a definite conclusion on the point, it was inclined to the view that the court did have such a jurisdiction, and that granting a Mareva injunction in such a situation would be on the assumption that (a) in the context of a *local* defendant, it is likely that the plaintiff will eventually effect service of the writ on the defendant; and (b) in the context of a *foreign* defendant, it is likely that the plaintiff would eventually obtain leave to serve out of jurisdiction and eventually effect service. However, this assumption had to be supported by the known facts; otherwise, the court had to decline to grant the Mareva injunction.

8.113 As the High Court found that it did not have *in personam* jurisdiction over the defendant, the issue as to whether it had power to grant a Mareva injunction against the defendant in aid of foreign court proceedings had become academic. Nonetheless, the High Court made certain noteworthy observations:

- (a) Applications for a Mareva injunction are often made on an urgent *ex parte* basis and before service of the originating process on a defendant. Accordingly, it would be important for a judge hearing an application for a Mareva injunction against a foreign defendant to bear in mind the *forum conveniens*

70 [2018] 4 SLR 1420.

71 Cap 322, 2014 Rev Ed.

requirement for an application for leave to serve an originating process out of jurisdiction on a foreign defendant (on top of the requirements for obtaining a Mareva injunction), whether or not the application for such a Mareva injunction is combined with an application for leave to serve out of jurisdiction.⁷²

(b) If a plaintiff was unlikely to satisfy the requirement of *forum conveniens* and leave to serve out of jurisdiction is unlikely to be granted, then a Mareva injunction should not be granted against a foreign defendant, even on an *ex parte* basis.⁷³

8.114 In *JTrust Asia Pte Ltd v Group Lease Holdings Pte Ltd*⁷⁴ (“*JTrust Asia*”), the appellant commenced an action against the respondents, alleging that they had conspired to defraud the appellant of its investment in a Thai company, Group Lease Thailand. The appellant obtained domestic Mareva injunctions against the respondents and later applied for the injunctions to be given worldwide effect, while the respondents applied for the injunctions to be set aside. The High Court discharged the injunctions, principally because Group Lease Thailand had not been named a defendant in the appellant’s action even though it was the counterparty to the investment agreements whose validity appeared to be the main issue in dispute, and the court thought that this undermined the appellant’s attempt to advance a good arguable case on its action. Further, the High Court noted that the appellant had already obtained a worldwide Mareva injunction against the second respondent in the BVI, and doubted the need for the appellant to obtain a similar order here.

8.115 The appellants appealed, arguing that the High Court below failed to appreciate the evidence for a good arguable case and had placed excessive weight on the omission of Group Lease Thailand as a defendant in the action. The respondents contended that the proceedings were an abuse of process because they were conceived only to oppress the respondents’ group of companies in order to force a proposed merger that the appellant had failed to disclose when applying *ex parte* for the injunctions.

8.116 The Court of Appeal allowed the appeal. First, it found that the appellant had shown a good arguable case on its action. There was objective evidence that the respondents had conspired to create a round-tripping scheme to defraud the appellant. The omission of Group Lease

72 *PT Gunung Madu Plantations v Muhammad Jimmy Goh Mashun* [2018] 4 SLR 1420 at [60]–[63].

73 *PT Gunung Madu Plantations v Muhammad Jimmy Goh Mashun* [2018] 4 SLR 1420 at [63].

74 [2018] 2 SLR 159. See para 8.233 below.

Thailand as a defendant was not significant because it was not the mere validity of the investment agreements that was in dispute but the purpose for which they had been entered into, and because the alleged mastermind behind the conspiracy (that is, the second respondent) had already been named as a defendant in the appellant's action. Secondly, the Court of Appeal was satisfied that there was a real risk of dissipation of assets. It held that whether there was a real risk of dissipation depended ultimately on whether the defendant had any characteristics which suggested that he could and would do so. Here, various factors contributed to such a risk:

- (a) There was evidence that the second respondent had engaged in dishonest conduct in the mismanagement of large sums of money and in concealing that mismanagement (which had a material bearing on that risk).⁷⁵
- (b) The first and third respondents were tainted by his dishonesty due to their connections with him.⁷⁶
- (c) Most of the respondents' assets were held in bank accounts and were capable of being easily dissipated.⁷⁷
- (d) The second respondent did not appear to be based in Singapore.⁷⁸
- (e) The first and third respondents were owned by foreign companies.⁷⁹

8.117 The Court of Appeal reiterated that a plaintiff applying *ex parte* for Mareva relief had to make full and fair disclosure of all material facts within his knowledge, even if prejudicial to his claim. Whether an undisclosed fact was of sufficient materiality to require discharge of an injunction depended on the importance of the fact to the issues to be decided in the application. Here, the fact that the appellant and Group Lease Thailand had been in talks to merge their respective parent companies was material and should have been disclosed. However, this did not disqualify the appellant from obtaining Mareva relief, mainly because that fact was not ultimately inconsistent with the appellant's allegations of fraud, which were made in reliance on its own genuine investigations that were made after merger negotiations had broken down.

75 *JTrust Asia Pte Ltd v Group Lease Holdings Pte Ltd* [2018] 2 SLR 159 at [69].

76 *JTrust Asia Pte Ltd v Group Lease Holdings Pte Ltd* [2018] 2 SLR 159 at [74].

77 *JTrust Asia Pte Ltd v Group Lease Holdings Pte Ltd* [2018] 2 SLR 159 at [78].

78 *JTrust Asia Pte Ltd v Group Lease Holdings Pte Ltd* [2018] 2 SLR 159 at [80].

79 *JTrust Asia Pte Ltd v Group Lease Holdings Pte Ltd* [2018] 2 SLR 159 at [81].

8.118 The court also considered two issues of principle:

(a) Would the mere fact that a plaintiff was seeking Mareva relief for a collateral purpose be sufficient to deny him such relief, even if he has established a good arguable case and a real risk of dissipation?

(b) Under what circumstances would a plaintiff be granted Mareva relief where he has already obtained a worldwide Mareva injunction against the same defendant in another jurisdiction, and when, if ever, should this subsequent Mareva injunction be given worldwide effect?

8.119 On the first issue, the Court of Appeal found that the presence of a collateral purpose was sufficient to deny a plaintiff such relief. However, close attention to the circumstantial evidence would often be necessary to determine whether the plaintiff truly had no genuine interest in obtaining a legal remedy through the underlying action; the fact that the injunction would have an inevitable financial impact on the defendant did not necessarily mean that the plaintiff had a predominant collateral purpose to cause that impact. In the present case, the Court of Appeal found that there was insufficient evidence that the appellant's action was brought for the sole purpose of crippling the respondent's group of companies in order to compel them to agree to a merger.

8.120 On the second issue, the Court of Appeal clarified that a third party outside the jurisdiction in which a worldwide Mareva injunction was granted was generally not bound by the injunction unless and until a court in its jurisdiction declared the injunction enforceable against it and the defendant. The appellant was in substance seeking such a declaration by applying here for a fresh Mareva injunction against the second respondent pursuant to a substantively similar claim. As the principal requirements of Mareva relief had been satisfied in relation to the second respondent, the Court of Appeal held that the domestic Mareva injunction that was previously granted against him should be reinstated. However, there was no reason for that injunction to be given worldwide effect, given that the appellant already had a worldwide Mareva injunction against the second respondent. In relation to the first and third respondents, the Court of Appeal held that worldwide Mareva injunctions against them were justified, given that their assets in Singapore fell far short of the value of the appellant's claim, and neither of them had been made the subject of any Mareva injunction elsewhere in the world.

8.121 *China Medical Technologies, Inc v Wu Xiaodong*⁸⁰ considered the question of whether s 4(10) of the Civil Law Act conferred on the Singapore court power to grant interim relief in aid of foreign court proceedings, particularly where the court has *in personam* jurisdiction over the defendant and the plaintiff has a reasonable accrued cause of action recognisable by the court. Having reviewed local case law, the legislative history of s 4(10) of the Civil Law Act, and the position in foreign jurisdictions, the High Court affirmed the position as set out in *Multi-Code Electronics Industries (M) Bhd v Toh Chun Toh Gordon*⁸¹ and held that the ambit of s 4(10) (including in its predecessor form) allows the court to grant a Mareva injunction even in aid of foreign court proceedings, so long as it appears to the court to be “just or convenient” that such an order should be made. This power would arise if the following prerequisites were met:

- (a) The plaintiff must have a reasonable accrued cause of action against the defendant that is recognised or justiciable in a Singapore court.
- (b) The defendant must be subject to the *in personam* jurisdiction of the Singapore court.
- (c) There must be assets within the territorial jurisdiction of Singapore which could be the subject of a Mareva injunction.
- (d) Substantive proceedings must be brought in Singapore against the defendant, although those proceedings might be stayed by the Singapore court in favour of proceedings elsewhere.⁸²

8.122 The High Court added that a factor to be taken into consideration was whether the foreign court proceedings were capable of giving a judgment which would be enforceable in Singapore. If the foreign judgment would not be enforceable, it is likely that the interim Mareva relief granted by the Singapore court would not be able to facilitate the process of enforcement or execution (against the assets frozen) in satisfaction of the foreign court judgment.

8.123 On the facts of that case, the court held that the relevant prerequisites were met, and that a domestic Mareva injunction should be granted against the second defendant to prohibit the disposal of the

80 [2018] SGHC 178.

81 [2009] 1 SLR(R) 1000.

82 *Multi-Code Electronics Industries (M) Bhd v Toh Chun Toh Gordon* [2009] 1 SLR(R) 1000 at [116].

assets in Singapore. Following the decision in *JTrust Asia*,⁸³ the court found that the fact that the Hong Kong High Court had previously granted a worldwide Mareva injunction against the second defendant did not prevent the court from granting a domestic injunction against her in relation to the same Singapore assets, so long as the principal requirements for a Mareva injunction had been made out.

8.124 The application in *Sea Trucks Offshore Ltd v Roomans, Jacobus Johannes*⁸⁴ pertained to the circumstances under which a party subject to a Mareva injunction and its ancillary disclosure obligations can apply to the court to limit the said disclosure obligations to the sums restrained by the Mareva injunction. In that case, the first and second defendants filed joint affidavits of disclosure disclosing the details of some of their assets, pursuant to a Mareva injunction obtained by the plaintiff against them. They then applied to the court for, *inter alia*, an order that their disclosure obligations under the Mareva injunction be varied on the basis that the assets that they had disclosed were sufficient to meet the sums restrained by the Mareva injunction, and thus further disclosure would serve no purpose but would be an intrusion upon their privacy.

8.125 The High Court disallowed the application. It held that in a situation where the defendant has disclosed assets sufficient to meet the sums restrained by the Mareva injunction, there is still utility in requiring the defendant to disclose information pertaining to the defendant's other assets, as the disclosure affidavit is a "rough and ready" estimate of the value of the assets which may not truly reflect their true value. Further, Mareva injunctions often contain exceptions which allow the defendant to use some of the restrained sums of money towards ordinary expenses and legal fees. Hence, if the defendant only disclosed assets that are equal in value or slightly above that restrained by the Mareva injunction, then the use of moneys for such purposes could reduce the value of the assets disclosed to a value below that which had been restrained, further reducing its efficacy. The High Court concluded that while there may well be circumstances which call for a variation of disclosure obligations (for instance, if it can be shown that the plaintiff is using the disclosure order for an extraneous purpose such as to obtain information to support the plaintiff's other claims against the defendant), such circumstances did not arise in the present case.

83 *JTrust Asia Pte Ltd v Group Lease Holdings Pte Ltd* [2018] 2 SLR 159 at [114] and [116]. See paras 8.114–8.120 above.

84 [2018] SGHC 248.

Proprietary injunctions

8.126 *Sia Chin Sun*⁸⁵ concerned an action commenced in 2015 by the late plaintiff against the defendant, involving assets which the plaintiff claimed were transferred to the defendant under undue influence. Less than a year after the action was commenced, the plaintiff passed away. Pending the resolution of the probate proceedings to determine the rightful executor of the estate, the plaintiff's daughter, Sia (a beneficiary of the estate), sought to intervene to take the necessary steps in the action to protect the estate's assets. To that end, she concurrently applied for an injunction prohibiting the defendant from disposing of his assets in Singapore up to the value of \$1,255,184.

8.127 In her application, Sia sought an interim injunction similar to the one granted in *Wong Moy*.⁸⁶ The High Court granted the application to intervene and also granted the interim injunction. The court found that the interim injunction in *Wong Moy* was actually proprietary in nature, and was not a Mareva injunction (as characterised by Sia's counsel). The High Court clarified the distinction between both types of injunctive relief, as set out in the Court of Appeal decision of *Bouvier, Yves Charles Edgar v Accent Delight International Ltd.*⁸⁷ a proprietary injunction is a relief that "fastens on the specific asset" in which the plaintiff asserts a proprietary interest, and prevents the defendant from dealing with that asset and its traceable proceeds. In contrast, a Mareva injunction is granted in support of a claim for personal relief, which does not latch on to any specific asset of the defendant but prevents the defendant from disposing of his assets beyond a certain value to defeat a possible judgment that may be rendered against him.

8.128 Given the finding that the interim injunction in *Wong Moy* was proprietary in nature, the *American Cyanamid* principles applied. On the facts, the High Court held that Sia had established that there was a seriously arguable case of undue influence such that the estate had a proprietary claim in the assets (namely, the money and the share in the property). In considering the balance of convenience, the court was of the view that there was a real risk that the defendant would dissipate his assets in Singapore, which would frustrate the estate's recovery of such assets, and as such a proprietary injunction should be granted.

85 See para 8.76 above and paras 8.148–8.150 below.

86 See para 8.53 above.

87 [2015] 5 SLR 558 at [143]–[144].

Further arguments and further evidence

8.129 The Court of Appeal in *ARW v Comptroller of Income Tax*⁸⁸ (“ARW”) clarified the law on the applicable tests for applications to extend time and to adduce new evidence in the context of further arguments. Following an earlier decision granting the Comptroller’s application for discovery against the appellant for various categories of documents, the appellant sought leave to (a) put in further arguments out of time under s 28B(1) of the SCJA (“EOT Application”); and (b) adduce two further affidavits as evidence in support of those further arguments (“Further Evidence Application”). The High Court allowed the EOT Application as well as the Further Evidence Application (in so far as the affidavits related to new arguments).⁸⁹

8.130 On appeal, the Court of Appeal considered (a) whether the High Court judge erred in granting the Comptroller an extension of time to request for further arguments; and (b) whether the judge erred in admitting the two affidavits into evidence having regard to the following sub-issues: (i) whether new evidence can be admitted in support of further arguments; and, if so, (ii) whether the test to govern the admission of new evidence in such a situation was satisfied.

8.131 On the first issue, the Court of Appeal confirmed that the High Court retains the inherent jurisdiction to hear further arguments at any time before the order has been extracted. It also affirmed the High Court’s application of the more stringent test espoused in the case of *Denko-HLB Sdn Bhd v Fagerdala Singapore Pte Ltd*⁹⁰ (which concerned applications for an extension of time to appeal) in an application under s 28B of the SCJA. This was because under s 28B(3)(b) of the SCJA, a request for further arguments had the effect of restarting the clock on the timelines for filing a notice of appeal. Accordingly, if the test for an extension of time to request further arguments was any less strict than that for filing a notice of appeal, it would become possible to circumvent the stricter test for filing an appeal by applying for an extension of time to file further arguments.

8.132 The relevant factors to determine whether an extension of time to request further arguments should be granted were (a) the length of the delay; (b) the reasons for the delay; (c) the merits of the further arguments; and (d) the degree of prejudice to the other party. On the facts, the Court of Appeal declined to disturb the discretion exercised by the High Court judge in granting the EOT Application.

88 [2019] 1 SLR 499. See paras 8.151–8.152 and 8.157–8.158 below.

89 *Comptroller of Income Tax v ARW* [2017] SGHC 180.

90 [2002] 2 SLR(R) 336.

8.133 On the second issue, the Court of Appeal affirmed the High Court's approach that while further evidence should not be allowed where the evidence is sought to support or strengthen previously raised arguments, it may, in appropriate circumstances, be allowed in support of new arguments. If the judge is satisfied that the further evidence is being adduced to support or strengthen new arguments that may make a difference to his decision, he may allow the further evidence, and any inconvenience caused to the opposing party by such an untimely move could be addressed by way of costs.

8.134 The Court of Appeal did not think it was necessary to express a conclusive view on the applicable test to be met for the admission of further evidence in this case, because even taking the appellant's case at its highest that the test for admitting further evidence ought to be the same as that in an interlocutory appeal, the two affidavits would have met the test for admission. Accordingly, it held that there was no basis to disturb the High Court's exercise of discretion to admit the two affidavits into evidence. Nonetheless, the court made the following observations:

(a) Contrary to the Comptroller's submissions, the test to admit evidence cannot be that which applies in the case of a *de novo* rehearing. The court is also not obliged to employ the conditions of the *Ladd v Marshall*⁹¹ test in its determination, as that test only strictly applies in an appeal from a judgment after trial or a hearing upon the merits.

(b) The reasonable diligence factor in *Ladd v Marshall* (that is, whether the new evidence could have been obtained at the time of the original hearing, with reasonable diligence, by the party seeking to introduce it) was not a relevant consideration in admitting further evidence in further arguments, as the right to request for further arguments cannot be precluded solely on the basis that the further arguments ought reasonably to have been made earlier.

(c) The other four factors identified by the High Court judge (namely, whether the new evidence is such that it would probably have an important influence on the result of the case, even though it need not be decisive; whether the evidence is such as is presumably to be believed; the likelihood of further delay to the proceedings that would be caused as a result of such admission; and the degree of prejudice that may be caused to the other party) ought to guide the court's exercise of discretion in admitting further evidence in further arguments. However,

91 [1954] 1 WLR 1489.

none of these factors were to be applied strictly and the final analysis must depend on the justice of the case.

Inherent jurisdiction/powers

8.135 *Harsha Rajkumar*⁹² raised fundamental issues of principle regarding the court's jurisdiction to restrain a law firm or a lawyer from acting against a former client or a former prospective client for the purpose of protecting confidential information belonging to that client, including the basis for that jurisdiction, its relationship with the court's inherent jurisdiction to supervise the conduct of its officers, and the relationship between the applicable common law principles and the ethical rules contained in the PCR.

8.136 The High Court opined that the court's supervisory jurisdiction to regulate the conduct of its officers was *distinct* from its jurisdiction arising from the law on breach of confidence; each jurisdiction had a different overall scope and purpose. The purpose of the court's supervisory jurisdiction is to ensure that its officers adhere to a minimum standard of propriety in conduct, while the purpose of the court's jurisdiction in the substantive law on breach of confidence is to ensure that confidential information is not unjustifiably disclosed. Further, while the court's jurisdiction to protect confidence will often be invoked to prevent entire law firms from acting in consideration of the risk of disclosure of confidential information within the firm, the court's supervisory jurisdiction may often be more appropriately exercised against individual lawyers.

8.137 On the applicable principles governing this supervisory jurisdiction, the High Court held as follows:⁹³

(a) The test for invoking the court's supervisory jurisdiction was whether, in the eyes of a fair-minded observer, there was an actual or reasonably perceived risk that the proper administration of justice would be prejudiced unless the lawyer in question was removed.

(b) In determining whether the court's supervisory jurisdiction ought to be invoked, whether the lawyer in question appears to be in breach of a given rule in the PCR must be of some relevance. However, the court ought not to express any

92 See paras 8.101–8.104 above.

93 *Harsha Rajkumar Mirpuri v Shanti Shewakram Samtani Mrs Shanti Haresh Chugani* [2018] 5 SLR 894 at [81]–[83].

final opinion on whether any particular rule has been breached, as the proper forum for such a determination is the Law Society.

(c) Great care must be taken not to adopt an expansive view of this supervisory jurisdiction, and that there must be a compelling reason for depriving both the client and the solicitor of their free election before the court will act to restrain a lawyer from acting under its supervisory jurisdiction.

8.138 The High Court in *Cheong Wei Chang*⁹⁴ considered whether the court had an inherent power to regulate and restrain proceedings by vexatious litigants, in addition to the statutory power conferred by s 74 of the SCJA, especially in cases where the Attorney-General was the applicant. In that case, the Attorney-General, acting for the defendant, had requested for the court to exercise its inherent powers to make an order preventing a litigant from commencing future legal proceedings (“extended civil restraint order”).

8.139 The High Court held that Singapore courts generally have inherent powers over procedural matters, but (a) there must be no statutory exclusion of the inherent power; and (b) there must be exceptional circumstances where there is need for the court to use its inherent powers in order for justice to be done or injustice to be averted. In this case, despite the existence of s 74 of the SCJA, there did not appear to be any legislative intention to exclude the court’s inherent power to grant an extended civil restraint order.

8.140 On the issue of need, the High Court distinguished an order under s 74 of the SCJA and an extended civil restraint order,⁹⁵ and concluded that the need for exercise of the court’s inherent powers arose in this case as (a) the litigant was unable to understand that his claim was incoherent and not granting the order could result in injustice (in the use of state and court resources, and the toll on the other members of his family); and (b) this was not a case appropriate for s 74 of the SCJA as the litigant’s conduct did not constitute “habitual and persistent” conduct (as required by that provision). Accordingly, the court granted the order requested by the Attorney-General.

94 See paras 8.62–8.63 above.

95 See *Cheong Wei Chang v Lee Hsien Loong* [2019] 3 SLR 326 at [72].

Joinder of parties

8.141 In 2018, there were several decisions that concerned the joinder of parties under O 15 r 6 of the RoC.⁹⁶

8.142 The relevant principles concerning joinder of parties were considered by the Court of Appeal in *Ernest Ferdinand Perez De La Sala v Compañía De Navegación Palomar, SA*⁹⁷ (“*Ernest Ferdinand*”). In this case, the respondent companies commenced proceedings against the appellant, seeking, *inter alia*, a declaration that the assets the appellant transferred to himself belonged to the companies, and a declaration that the assets in each of the companies’ names belonged absolutely to each of them. The appellant argued that he was the sole and beneficial owner of the companies and their assets. In this regard, the learned High Court judge found that the appellant was the apparent beneficial owner of the shares and assets of the companies, but that he held part of his beneficial interest on trust for his three siblings, including one Bobby, and his late mother Camila’s estate. The judge, of his own motion, then ordered that Bobby, who was not a party to the proceedings, be allowed to intervene to seek an account of his own share of the assets and of his share of Camila’s estate’s share of the assets.

8.143 The respondent companies appealed against, *inter alia*, the High Court’s finding that the appellant held part of his beneficial interest on trust for his siblings, and the judge’s dismissal of their claim that the assets in their respective names belonged absolutely to each of them. The appellant appealed, *inter alia*, against the High Court’s decision that Bobby could intervene in the action.

8.144 Overturning the High Court’s decision, the Court of Appeal found that the appellant had to account for and return to the companies the assets that he removed from them, and accordingly, Bobby’s intervention and joinder was no longer relevant to or necessary for the purposes of the appeal proceedings. Nonetheless, to provide clarity and guidance for future cases, the court set out its analysis on the joinder of a party post-judgment and on the joinder provision in O 15 r 6(2) of the RoC.

8.145 The Court of Appeal observed that joinder under O 15 r 6(2) of the RoC required a two-stage inquiry of whether the power to order

96 See also *BUN v BUP* [2018] SGHCR 17, where the court rejected an argument that the action should be struck out on grounds of misjoinder. See paras 8.72–8.74 above.

97 [2018] 1 SLR 894. See paras 8.153–8.156 below.

joinder still *existed* and, if so, whether the power should be *exercised*. In essence:

- (a) The court's power to join a party post-judgment existed if proceedings were still afoot, that is, if and only if something remained to be done in the matter, such as the assessment of damages.
- (b) Once the power of joinder had been determined to exist, it could be exercised under O 15 r 6(2) of the RoC if the court determined:
 - (i) that a party's presence was necessary to ensure that the matter could be effectually and completely determined and adjudicated upon ("the 'necessity' limb"); or
 - (ii) if there was an existing question or issue between the existing parties and it would be just and convenient to join the third party for the purpose of determining the same question or issue ("the 'just and convenient' limb").

8.146 Reliance on either limb of O 15 r 6(2)(b) involved an initial non-discretionary stage (that is, it must be necessary to order joinder and/or there must be a question or issue having the requisite relationship with the main dispute), followed by a discretionary stage (that is, whether joinder should be ordered, taking into account concerns of fairness and justice). The Court of Appeal set out some factors which were of particular relevance to the discretionary stage:⁹⁸

- (a) The court must consider the applicable limitation period to the potential claims arising from the joinder. Where the claim by or against the party sought to be joined is time barred at the date of application, joinder will not be allowed.
- (b) The doctrine of *res judicata* and the related doctrine of abuse of process must also be considered. Where an applicant, who chose not to involve himself in the proceedings at an earlier stage, belatedly seeks to reopen matters already litigated, joinder should not be allowed.
- (c) The length of and explanation for the delay in seeking joinder is highly relevant.
- (d) Procedural fairness and natural justice must be considered – joinder cannot come at the expense of procedural

98 *Ernest Ferdinand Perez De La Sala v Compañía De Navegación Palomar, SA* [2018] 1 SLR 894 at [205]–[210].

unfairness or a breach of natural justice in respect of an existing party (unless that party takes no objection).

(e) Any other prejudice or inconvenience to any party should be considered, including the inconvenience of having to reopen pleadings, redo cross-examination, *etc.*

8.147 On the facts, the Court of Appeal found that the power of joinder had been wrongly exercised by the High Court: Bobby's joinder was not necessary, and there was no existing issue or question between the parties which was relevant to him given his express disavowal of any personal claim to the companies' assets during the proceedings. Further, there were countervailing reasons against granting the joinder. It was procedurally unfair and a breach of natural justice as Bobby had not asserted a personal claim to the respondent companies' assets, and it had not been put to Ernest that he was holding the assets on trust for Bobby. Moreover, Bobby's claim against Ernest (as framed by the High Court judge) would have been time barred. Bobby also lacked standing to seek an account for the beneficial interest of Camila's estate: as a beneficiary, he had no direct equitable interest in the estate's assets. Finally, there was no good explanation for Bobby's excessive delay in seeking to intervene.

8.148 In *Sia Chin Sun*⁹⁹ the plaintiff passed away less than a year after commencing the action. Pending the resolution of the probate proceedings to determine the rightful executor of the estate, the plaintiff's daughter, Sia (a beneficiary of the estate), applied to be added as a second plaintiff under O 15 r 6(2)(b)(ii) of the RoC so as to take the necessary steps in the action to protect the estate's assets.

8.149 The High Court granted the application to intervene. It applied the legal proposition in *Wong Moy*¹⁰⁰ that a beneficiary may, in special circumstances, institute action to protect and recover assets belonging to the unadministered estate. The court held that the *Wong Moy* principle could apply to provide a basis for a beneficiary of an estate to not only commence actions, but be *added to proceedings* so as to protect or recover assets of the estate. The court also noted that establishing "special circumstances" was fact-specific and involved considering all the circumstances of the case, including, *inter alia*, the nature of the assets and the reason for the personal representative's default in taking action.

8.150 On the facts, the court found that there were indeed special circumstances present in this case which warranted Sia's intervention,

99 See paras 8.76 and 8.126–8.128 above.

100 See para 8.53 above.

and found that it was just and convenient under O 15 r 6(2)(b)(ii) of the RoC for her to be added as a second plaintiff in the action. Pending the resolution of the probate proceedings, the estate was without any personal representative; hence, it was impossible for the estate to take any action to protect its position in the action, and to protect the assets of the estate, should the defendant take any action which might be prejudicial to the estate, such as dissipating the assets in Singapore so as to frustrate the recovery of any of the assets of the estate. There was also added need for Sia to intervene, given that the nature of some of the assets was money.

8.151 In *ARW*,¹⁰¹ the appellant appealed against the High Court's decision to grant leave for the Attorney-General to intervene in the dispute to state his position on public interest privilege under s 126(2) of the Evidence Act,¹⁰² which was one of the issues that the respondent was seeking to make further arguments on.

8.152 The Court of Appeal dismissed the appeal and held that the Attorney-General was rightly joined to the applications under the RoC. It affirmed that the Attorney-General had standing to intervene in the applications (although this standing did not arise from s 126 of the Evidence Act but by virtue of the Attorney-General's position as the guardian of the public interest). Following the approach in *Ernest Ferdinand*¹⁰³ in determining whether joinder should be allowed under either or both limbs of O 15 r 6(2)(b) of the RoC, the court found as follows:

(a) On the "necessity" limb under O 15 r 6(2)(b)(i), it was necessary for the Attorney-General to be joined in the proceedings given his role as the guardian of the public interest, and given that he would take into account confidential information and considerations to which other persons (including the Comptroller) are not privy. Further, the appellant was unable to identify any relevant material prejudice that it would suffer as a result of the Attorney-General's joinder that could not be adequately compensated by costs.

(b) On the "just and convenient" limb under O 15 r 6(2)(b)(ii), the non-discretionary requirement was plainly satisfied as there was an existing question on the availability of public interest privilege under s 162(2) of the Evidence Act between the existing parties which involved the Attorney-General. There was also no good reason under the discretionary

101 See paras 8.129–8.134 above and paras 8.157–8.158 below.

102 Cap 97, 1997 Rev Ed.

103 See paras 8.142–8.147 above.

stage to interfere with the High Court's discretion to allow joinder under this limb.

Privilege

“Without prejudice” privilege

8.153 The issue of “without prejudice” privilege was considered by the Court of Appeal in *Ernest Ferdinand*, where the appellant challenged, *inter alia*, the High Court's finding that two documents (a letter marked “without privilege” and an e-mail informing the recipient about the letter) were protected by without prejudice privilege. The Court of Appeal agreed with the High Court judge that there were two prerequisites before “without prejudice” privilege may be invoked in respect of communications between parties: (a) the communications must arise in the course of genuine negotiations to settle a dispute; and (b) the communications must constitute or involve an admission against the maker's interest.

8.154 However, the court was of the view that the High Court judge had erred in the application of these principles, and that neither of the documents were communications made with the purpose of inviting negotiations for a settlement. It found that allegedly “without prejudice” communications had to be considered in context as well as for their cumulative effect – a court could not simply conclude that *because* a party attacked the other side's case and made no explicit concessions, that party necessarily *lacked* an intention to negotiate a settlement. In the same vein, the court also could not always *take at face value* a declared intention to negotiate a settlement when the dominant sense of the communication contradicts it. The inquiry must be an objective one based on the whole content and circumstances of the communication.

8.155 The Court of Appeal observed that one example of when the court might be prepared to disregard a purported desire to negotiate a settlement was when a party's exclusive emphasis on the other party's legal weakness and precarious position was made so strongly, and at such great length, that a reasonable observer would find it hard to understand why the first party would be willing to accept anything short of acquiescence or to offer any concession of its own. The court might be prepared to infer that the references to negotiation or settlement were fig leaves for a communication the only real purpose of which was to pressure the other party into acquiescing. Such was the case with the letter marked “without privilege”.

8.156 Further, the Court of Appeal clarified that “without prejudice” privilege only applied to communications between parties in a dispute,

or passed through a third party acting as a conduit between parties in a dispute. Accordingly, the e-mail was not privileged because it was not directed at having the recipient act as a conduit to pass on a message to the appellant regarding settlement.

Public interest privilege

8.157 One of the issues in *ARW*¹⁰⁴ was whether the Attorney-General had standing to intervene in the parties' dispute to state his position on public interest privilege. The appellant argued that the Attorney-General had no such standing because the right to raise the issue of public interest privilege under s 126(2) of the Evidence Act resided exclusively with the Comptroller.

8.158 The Court of Appeal found that while s 126(2) of the Evidence Act provides that public interest privilege may be invoked by the relevant officer in one of the specified organisations (that is, the Comptroller), the Attorney-General could raise the public interest privilege in his own right *under the common law*. It rejected the appellant's contention that s 126 had codified the common law position on public interest privilege to such an extent that it excluded any such privilege which the Attorney-General might have. By s 126, Parliament intended no more than to make clear that public officers, and members, officers or employees of, or secondees to, the specified organisations could plead public interest privilege in their own right. The Court of Appeal emphasised that where the Attorney-General intervenes on grounds of public interest privilege, he is not confined to objecting to disclosure of communications that he himself or his office received in official confidence, but he could also intervene where a person falling within s 126 is asked to disclose such communications.

Litigants in person

8.159 In *BNP Paribas SA v Jacob Agam*¹⁰⁵ the appellants were litigants in person. BNP Paribas SA had made an application for a declaration that an appeal be deemed to have been withdrawn pursuant to O 57 r 9(4) of the RoC, on account of the appellants' failure to comply with their obligations under O 57 r 9(1) of the RoC concerning the filing and service of documents related to their appeal.

8.160 The Court of Appeal, in reaching its decision not to grant the appellants an extension of time (which they did not seek) to comply

104 See paras 8.129–8.134 and 8.151–8.152 above.

105 See para 8.10 above, and paras 8.170–8.172, 8.176–8.179 and 8.234 below.

with the requirements in O 57 r 9(1) of the RoC, considered the issue of whether and to what extent courts should afford greater latitude to litigants in person in relation to their compliance with rules of civil procedure. It observed that Singapore courts have so far not conclusively ruled on the question whether the same standard of compliance with procedural rules should be expected of both represented parties and litigants in person, and have instead taken a case-by-case approach. However, the general position appears to be that while the courts may show some greater indulgence to litigants in person, such indulgence is not to be expected as a matter of entitlement, and that such indulgence also does not mean that a litigant in person can act without regard to these rules and procedures.

8.161 The court also considered the principled approach adopted by the UK Supreme Court, which was that the same standard of compliance with procedural rules was generally to be expected of litigants in person as of represented litigants, save in exceptional circumstances, for instance, where the relevant rules were “particularly inaccessible or obscure”, or where they included a “disciplinary factor”, such as the rules on relief from sanctions.¹⁰⁶ While the Court of Appeal saw a great deal of force in this approach, it found that it was neither necessary nor appropriate for it in this case to consider whether to adopt it, either in full or in a more qualified form. On the facts, there was no good reason to give the appellants a second chance – there was nothing legalistic or complex about the relevant rule which they failed to comply with, they understood the consequences of their non-compliance with their obligations, and unlike most litigants in person, they were not helpless babes in the woods.

Locus standi

8.162 The High Court in *Ayaz Ahmed*¹⁰⁷ dealt with a novel issue concerning the scope of so-called *Wong Moy* exception (that is, the Court of Appeal’s holding that beneficiaries may, in special circumstances, take proceedings on behalf of an unadministered estate). In that case, the plaintiffs brought an action in oppression under s 216 of the Companies Act¹⁰⁸ on behalf of the Mustafa Estate. The defendants applied to strike out the plaintiffs’ statement of claim, arguing, *inter alia*, that the plaintiffs did not have standing to commence the action, as they were merely the beneficiaries and not the personal representatives of the Mustafa Estate.

106 *Barton v Wright Hassall LLP* [2018] 1 WLR 1119.

107 See paras 8.53–8.56 above.

108 Cap 50, 2005 Rev Ed.

8.163 The defendants contended that the *Wong Moy* exception did not apply in the present case, as it *only* permitted a beneficiary to institute proceedings (on behalf of the estate) to *recover assets*, as opposed to pursuing a cause of action *simpliciter* of an unadministered estate. The assistant registrar rejected the defendants' argument and found that the *Wong Moy* exception entitled a party to bring an action in oppression on behalf of the estate, and was not restricted only to actions for the recovery of property. The High Court interpreted Hoo Sheau Peng J's holding in *Sia Chin Sun*¹⁰⁹ that the *Wong Moy* exception only permitted a beneficiary to bring "proprietary claims to protect and preserve the assets of an estate"¹¹⁰ to mean that only claims which have as their *object* the protection and preservation of the assets of the estate would pass muster. Accordingly, the High Court found that the present action in oppression would constitute a proprietary claim.

SICC

8.164 There were a number of decisions issued by the SICC in 2018. Three of these laid down the specific principles on costs and security for costs applicable to cases before the SICC.

Costs and security for costs

8.165 In *CPIT Investments Ltd v Qilin World Capital Ltd*¹¹¹ ("*CPIT Investments*"), the plaintiff's claim was commenced in the High Court and was subsequently transferred to the SICC under O 110 r 12 of the RoC. The SICC eventually found in favour of the plaintiff in the judgment on liability, and in dealing with the issue of costs in this judgment, set out some important principles applicable to costs in the SICC. First, the court noted that O 110 r 46 expressly precluded the application of the costs regime under O 59 of the RoC, and obliged an unsuccessful party in the SICC to pay the *reasonable costs* of the proceedings to the successful party unless the court ordered otherwise. Hence, the concept of costs on an "indemnity basis" or "standard basis" would, strictly speaking, not be relevant to SICC proceedings. This rule, together with para 152 of the SICC Practice Directions ("PDs"), gave the court the discretion to take into account such circumstances of the case that the court considered relevant in dealing with costs.

8.166 The SICC also found that for cases which were filed in the High Court and transferred to the SICC under O 110 r 12 of the RoC,

109 See paras 8.76, 8.126–8.128 and 8.148–8.150 above.

110 *Sia Chin Sun v Yong Wai Poh* [2018] SGHC 142 at [50].

111 [2018] 4 SLR 38.

although Appendix G to the Supreme Court PDs did not automatically apply to proceedings in the SICC, it was likely for the SICC to take account of Appendix G in assessing what were reasonable *pre-transfer* costs under O 110 r 46. As for *post-transfer* costs, there was nothing to preclude the SICC from taking account of Appendix G even in assessing reasonable costs under O 110 r 46 in a case transferred from the High Court to the SICC, unless parties had agreed to disregard Appendix G altogether.

8.167 Finally, as the plaintiff in that case had made an offer to settle after the suit was transferred to the SICC, the SICC considered the applicability of O 22A of the RoC to offers to settle in the SICC. It held that O 22A rr 9 and 10, which were intended to operate in the context of the High Court costs regime under O 59, did not apply to offers to settle in the SICC because they were inconsistent with O 110 r 46 (which refers to “reasonable costs” as the measure of costs and does not consider costs on the standard or indemnity bases). However, the other provisions of O 22A, including O 22A r 12 which detailed the matters that the court might take into account in exercising its discretion as to costs, could continue to apply.

8.168 In *B2C2 Ltd v Quoine Pte Ltd*,¹¹² after the transfer of the action to the SICC from the High Court, the defendant filed an application for security for costs. The court held that O 110 r 45 was the rule on security for costs which applies to cases in the SICC; and that in the case of an action *commenced* in the SICC, O 23 rr 1(1) and 1(2) of the RoC do not apply. The mere fact that the plaintiff is a foreign company does not entitle the defendant to obtain security; it must demonstrate that one or other of the threshold conditions set out in O 11 r 45(1B)(a) of the RoC applies and the court has a discretion whether or not to order security on the basis of the facts of each individual case. Separately, in the case of an action *transferred from the High Court*, O 23 r 1(1) of the Rules again does not apply. However, since O 110 r 45(2) (which prohibits ordering security on the sole ground that the plaintiff is a foreign company) is expressly disapplied by virtue of O 110 r 45(2A) of the RoC, the fact that the plaintiff is ordinarily resident out of the jurisdiction is to be notionally added to the threshold conditions of O 110 r 45(1B). As the plaintiff had elected to sue the defendant in the High Court where “foreignness” is a relevant consideration in determining whether to order security against the plaintiff, the defendant should not lose this right by virtue of transfer.

8.169 Applying the principles to the facts, the SICC found that it was not just to make an order for further security. While the plaintiff was a

112 [2018] 5 SLR 105.

UK (and therefore foreign) corporation with no fixed assets in Singapore, it was an established company and had not conducted itself in a manner which was calculated to induce the belief that it might not voluntarily comply with any award. Further, there was a bilateral enforcement regime between Singapore and the UK and the enforcement procedures in UK were tried and tested and efficient.

8.170 In *BNP Paribas SA v Jacob Agam*,¹¹³ after BNP Paribas SA applied for and was granted a declaration that an appeal (“the Appeal”) be deemed to have been withdrawn (“the Application”), it submitted that it should be awarded the costs of the Application on an indemnity basis, as this was agreed by parties and contained in certain guarantees that had been upheld as valid in the judgment. The Court of Appeal first clarified that strictly speaking, the concept of costs on an “indemnity basis” (as opposed to costs on a “standard basis”) was irrelevant to SICC proceedings. This was made clear in the recent decision of *CPIT Investments*.¹¹⁴ The applicable general principle for costs in SICC proceedings was enshrined in O 110 r 46, and O 59 on costs did not apply to SICC proceedings, including to appeals from the SICC to the Court of Appeal.

8.171 The Court of Appeal noted that O 110 r 46(2) confers upon the court a wide discretion as to any award of costs. On the facts, having regard to the agreement between the parties as to costs, and in the absence of any reason as to why the agreement as to costs ought not to be given effect, the court exercised its discretion under O 110 r 46(2) and considered it appropriate to order that costs of the Application be paid on an indemnity basis, to be taxed if the parties are unable to reach agreement within 14 days from the date of this judgment.

8.172 BNP Paribas SA also requested that the money paid into court by the appellants as security for the costs of the Appeal be used to satisfy the costs order in respect of the Application, before the balance (if any) was returned to the appellants. It relied on the court’s discretion to depart from the general rule regarding the repayment of security for costs under O 57 r 3(3A) of the RoC. The Court of Appeal acceded to BNP Paribas SA’s request, taking into account its right to have the costs order satisfied without undue delay, the appellants’ persistent unwillingness to co-operate in the proceedings and to comply with court orders, and the likely difficulty of a practical enforcement of the costs order otherwise.

113 See paras 8.10 and 8.159–8.161 above, and paras 8.176–8.179 below.

114 See paras 8.165–8.167 above.

Production of documents and the appointment of a single court expert

8.173 In *B2C2 Ltd v Quoine Pte Ltd*,¹¹⁵ the defendant applied for disclosure of certain documents relating to the workings of the plaintiff's automated trading system, which the plaintiff contended embodied highly confidential information. Given the plaintiff's reluctance to allow production of these documents in the normal way, it then sought an order for the appointment of a single court expert under O 40 of the RoC. Accordingly, the SICC considered whether the confidential information as to the workings of the plaintiff's automated trading system should be disclosed, and whether the appointment of a single court expert would save time and costs in this case.

8.174 On the first issue, the SICC clarified that under O 110 r 17(2)(b)(v) of the RoC, which provides that the court has no power to order production if the grounds of commercial or technical confidentiality were compelling, the word "compelling" did not require regard to be had only to the concerns and needs of the party whose confidential information was relevant and material. The circumstances of the case must be such that there was no solution which commended itself to the court other than refusal, and in this regard, it was important to consider the possibility of limiting access to the documents, redactions, or other undertakings. Accordingly, the SICC directed that the plaintiff prepare a supplementary list of documents indicating the documents which it contended contain confidential information, and that these documents not be inspected by or on behalf of the defendant without an order of the court.

8.175 On the second issue, the SICC found that the appointment of a court expert under O 40 depended upon whether it would lead to a just, expeditious and economical disposal of an action. On the facts, it would be unlikely to save time and costs to appoint a single court expert as the court and the parties did not know what information the notional report of the single court expert would rely upon, and the defendant would likely wish to have the opportunity, in some way, to satisfy itself that the report was full and fair.

Offshore case declaration

8.176 In *BNP Paribas SA v Jacob Agam*,¹¹⁶ the defendants had appealed against a judgment previously issued by the SICC and filed an offshore case declaration ("the Declaration") together with their notice

115 [2018] 4 SLR 67.

116 [2018] 4 SLR 57.

of appeal. In response to the declaration, the plaintiff filed the present application under O 110 r 37(1) of the RoC (“the Application”), seeking a declaration that the action was or was no longer an offshore case, and that consequently, the Declaration would cease to have effect.

8.177 The first preliminary issue concerned whether the Declaration was validly made. Order 110 r 35 of the RoC required the defendants to file their offshore case declaration “together with the first document filed by the party in the action”. As the Declaration was evidently filed long after it should have been filed, and since the defendants had neither applied for nor been granted an extension of time, the SICC found that the Declaration was not validly made.

8.178 The second preliminary issue concerned whether it was the SICC or the Court of Appeal which had the jurisdiction to hear the Application. Order 110 r 37(6) of the RoC provided that the SICC’s decision on whether an action was an offshore case was “final” for the purposes of s 34(1)(e) of the SCJA, meaning that no appeal could be brought against the SICC’s decision. Accordingly, the SICC found that it was the SICC and not the Court of Appeal which had the jurisdiction to consider the Application.

8.179 On the merits of the Application, the SICC reiterated that the question of whether an action was an offshore case had to be determined by reference to the particular action and whether it could properly be said that the action had no substantial connection with Singapore. The place of performance of the obligations under the relevant transactions was of fundamental importance, and the other factors (for example, the nationality of the parties or where the witnesses were located) were not, in themselves, determinative. On the facts, the SICC held that since Singapore was the place of performance of the relevant obligations, the action was not one which had no substantial connection with Singapore and was therefore not an offshore case. It also found that the defendants were not entitled to rely on the argument that their defences engaged issues of French law in support of their position that the action was an offshore case. That was because those defences reliant on French law fell away when the defendants decided not to adduce evidence of or prove any issues of French law. Further, it was held that while all SICC cases are international and commercial in nature, not all such cases would be offshore cases. Thus, the fact that the suit had been transferred from the High Court to the SICC was not relevant to the question of whether the action was an offshore case.

Third-party proceedings

8.180 In 2018, the Court of Appeal issued two important decisions relating to third-party proceedings under ss 15 and 16 of the Civil Law Act.

8.181 The matters in *Ho Yew Kong*¹¹⁷ arose out of the decisions made in consolidated actions that involved a dispute between parties regarding a joint venture company (“the Company”) which the plaintiff company, Sakae Holdings Ltd (“Sakae”), had invested in. One of these actions was commenced against the third to fifth defendants for conducting the Company’s affairs in such a way as to amount to oppression and unfair prejudice to Sakae as a shareholder of the Company. The defendants denied liability to Sakae in the consolidated actions, and proceeded to commence third-party proceedings against one Foo, who was a director and chairman of Sakae as well as a director of the Company, for contribution. The High Court dismissed the third-party claims against Foo and ordered indemnity costs against the third to fifth defendants,¹¹⁸ who subsequently appealed.

8.182 The primary issue before the Court of Appeal was whether the third-party claims against Foo should have been allowed having regard to ss 15 and 16 of the Civil Law Act. In order for the claims to succeed, the claimants would have to show that (a) they were *entitled* to recover such contribution pursuant to s 15(1) of the Civil Law Act; and (b) Foo should *not be exempted* under s 16(2) from liability to make contribution. Finally, the *extent* of the contribution awarded to the claimants would have to be determined according to the principles outlined in s 16(1) of the Civil Law Act.

8.183 On the facts, the Court of Appeal agreed with the High Court that the requirements under s 15(1) of the Civil Law Act were not satisfied. However, the court differed from the learned High Court judge in its reasons for so ruling, and found that she had erred in framing the three-step test set out in *Tan Juay Pah v Kimly Construction Pte Ltd*¹¹⁹ (which in turn was adopted from the decision of the House of Lords in *Royal Brompton Hospital NHS Trust v Hammond*)¹²⁰ in an unduly narrow fashion. The High Court judge had adapted the three-step test to the circumstances of the case and stated it in the following terms:¹²¹

117 See paras 8.8–8.9 above and para 8.227 below.

118 *Sakae Holdings Ltd v Gryphon Real Estate Investment Corp Pte Ltd* [2017] SGHC 100.

119 [2012] 2 SLR 549 at [49].

120 [2002] 1 WLR 1397.

121 *Sakae Holdings Ltd v Gryphon Real Estate Investment Corp Pte Ltd* [2017] SGHC 100 at [11].

- (a) What damage was suffered by Sakae as a result of the actions of the [claimants]?
- (b) Are the [claimants] liable to Sakae in respect of that damage?
- (c) Is [Mr Foo] also liable to Sakae in respect of that very 'same damage' or some of it?

8.184 The Court of Appeal found that the High Court judge should not have focused exclusively on the damage suffered by Sakae without considering the damage to the Company at all. It found that a plain and literal reading of s 15(1) contemplated the three-step test set out in *Royal Brompton Hospital NHS Trust v Hammond*, which was as follows:¹²²

- (a) "What damage has A suffered?"
- (b) "Is B liable to A in respect of that damage?"
- (c) "Is C also liable to A in respect of that damage or some of it?"

8.185 The court made two key observations in respect of s 15(1). First, in order for any claim for contribution to be brought, the damage caused by the defendant in the main action, B, to the party who suffered the damage, A, must be the *same as the damage caused to A by the third party* from whom contribution is sought (C). Second, and importantly, there was no requirement under s 15(1) that A must be the plaintiff or the claimant in the main action, and the focus was instead on the separate question of the damage that A has suffered.

8.186 On the facts, the Court of Appeal found that the Company had also suffered damage (in that its assets had been misappropriated) and could be regarded as A for the purposes of s 15(1) even though the actions were brought by Sakae rather than by the Company. The court saw no principled reason why the right to claim contribution should not be extended to defendants in oppression actions. Accordingly, the court applied the three-step test replacing A with the Company, and found that Foo would also be liable to the Company for the very same damage that the claimants were liable to the Company for, albeit on a different legal basis (that is, for his breach of duty of care, skill and negligence) from the claimants (who were held to be liable to the Company for breach of fiduciary duties). Given that the claimants had not proved their pleaded case that Foo acted in breach of his fiduciary duties to the Company, the Court of Appeal affirmed the High Court's decision to dismiss the third-party claims.

122 *Royal Brompton Hospital NHS Trust v Hammond* [2002] 1 WLR 1397 at [6].

8.187 Finally, the court also found that Foo should in any event be exempted under s 16(2) of the Civil Law Act from any liability to make contribution, albeit for different reasons than those of the High Court. It clarified that, contrary to the High Court's holding, a wrongdoer who engages in deliberate wrongdoing should not automatically or necessarily be precluded from seeking contribution. Instead, the court should exercise its discretion under s 16(2) to exempt a third-party defendant from making contribution to a third-party claimant in at least two particular situations (both of which applied to the third-party claimants in the present case):

- (a) when allowing a third-party claimant to recover contribution from a third-party defendant would have the effect of permitting the third-party claimant to retain part of its wrongly acquired benefit to the extent of any sum that it is able to recover from the third-party defendant, with the result that the third-party claimant would be unjustly enriched; and
- (b) when allowing a third-party claimant to seek contribution from a third-party defendant would in effect be allowing the third-party claimant to rely on its own illegality to recover damages from the third-party defendant.

8.188 In *Sunbreeze Group Investments*,¹²³ the appellants, who were three of the four defendants in the main action, had commenced a third-party action against the respondent. The High Court granted the respondent's striking out application and the appellants appealed. In affirming the High Court's decision to strike out the third-party proceedings, the Court of Appeal considered whether the appellants could rely on ss 15 and 16 of the Civil Law Act to claim a contribution or indemnity from the respondent. It made the following observations:

- (a) Section 15 of the Civil Law Act does not remove the need to identify some legal basis or cause of action in respect of which both the defendant and the third party are liable to the same person for the same damage. If and only if this can be shown may the defendant then seek a contribution from the third party notwithstanding that the third party is not liable to the defendant for any civil wrong.
- (b) As noted in *Ho Yew Kong*,¹²⁴ although the person to whom both the defendant and the third party are liable ("the relevant person") would usually be the plaintiff or the claimant in the main action, this need not necessarily be so and

123 See paras 8.68–8.71 above.

124 See paras 8.181–8.187 above.

could extend to the company where the plaintiff shareholder seeks remedies for the benefit of the company.

(c) As regards the last requirement in the applicable three-step test set out in *Ho Yew Kong* (that is, that the third party must be liable to the relevant person in respect of the same damage as the defendant), s 15 of the Civil Law Act does not require identity in the *legal basis* of the defendant's and the third party's liability to compensate the relevant person. It would, for example, suffice if the defendant is liable to the relevant person in tort while the third party is liable to that person in contract.

8.189 On the facts, the Court of Appeal was not satisfied that the respondent could be liable to the relevant person "in respect of the same damage" as the appellants.

Deemed discontinuance

8.190 In *Jhaveri Darsan Jitendra*,¹²⁵ one Salgaocar commenced Suit No 821 of 2015 ("Suit 821") against the first defendant in Singapore, seeking, *inter alia*, a declaration that the first defendant held assets on trust for him and an order that the first defendant convey the assets to him. Salgaocar subsequently passed away and a dispute then arose between the plaintiff (Salgaocar's widow) and Chandana (Salgaocar's daughter) over who should be appointed administratrix of his estate. This resulted in a paralysis of Suit 821 as there was no one to represent the estate to take the action forward.

8.191 The first defendant argued that Suit 821 had been deemed discontinued under O 21 r 2(6) of the RoC, as no step in Suit 821 had been taken by any party for more than a year. However, the High Court found that upon the death of the plaintiff, the operative regime for failure to proceed with the action was O 15 r 9(1) and not O 21 r 2(6).

8.192 In this regard, the High Court noted that after such due notice had been given, the putative administrator of the estate could apply for a stay of proceedings pending the grant of administration. Thereafter, the administrator could apply to be substituted as a party pursuant to O 15 r 7(2), after obtaining letters of administration. It was only after such a substitution that O 21 r 2(6) of the RoC would become applicable and the action liable to being deemed discontinued in the event of inaction. Accordingly, the High Court rejected the first defendant's argument.

125 See paras 8.105–8.110 above.

8.193 In any event, the High Court also took the view that even if O 21 r 2(6) were the applicable regime, Suit 821 had not been deemed discontinued, given that Chandana's compliance with the court's direction at a pre-trial conference to apply for letters of administration in the Family Justice Courts amounted to taking a step in Suit 821. The court was of the view that it would not accord with the purpose of O 21 r 2(6) to interpret "step or proceeding" to exclude Chandana's compliance just because such compliance took the form of an application in separate proceedings – the filing was in furtherance of Suit 821 and was a step taken towards ensuring that the legal representative of the estate was substituted as plaintiff to enable the action to be taken forward.

Summary judgment

8.194 Five cases concerning applications for summary judgments came before the High Court in 2018.¹²⁶

8.195 In *Ong Keh Choo v Paul Huntington Bernardo*,¹²⁷ the second defendant had written a cheque in consideration for an option to purchase a property, then countermanded the cheque on finding out that the plaintiff had not disclosed that she was the owner of the property. The plaintiff, a real estate agent, sued the defendants for a sum of \$3.16m owed under a cheque and sought to obtain summary judgment. The defendants' defence was that there was no contract between the parties and that even if there was, it was induced by the plaintiff's fraud. The High Court granted the defendants unconditional leave to defend. The High Court noted that at the summary judgment proceedings, the defendants needed to show that there was a plausible and coherent defence, while the plaintiff had to persuade the court that the defences were so palpably weak that they could not withstand scrutiny. It added that pleading fraud would not be enough to stave off a summary judgment if the claim of fraud seemed on its face and in the circumstances too dubious, and in those circumstances, the court might still allow judgment in full or order conditional leave to defend. On the

126 See *Goh Bee Lan v Yap Soon Guan* [2018] SGHC 11, where the court granted the plaintiff summary judgment for \$3.25m which the defendants owed under a settlement agreement; *Capital Springboard Ltd v Vanguard Project Management Pte Ltd* [2018] SGHC 29, where the court granted the plaintiffs summary judgment against the first defendant for breach of contract and fraudulent misrepresentation and against the second defendant under a personal guarantee; and *NK Mulsan Co Ltd v INTL Asia Pte Ltd* [2018] SGHC 241, where the High Court allowed the plaintiff's appeal for summary judgment in part by granting summary judgment against the defendant for about US\$1.65m.

127 [2018] SGHC 175.

facts, the undisputed facts and documents indicated a need for further inquiry.

8.196 *G1 Construction Pte Ltd v Astoria Development Pte Ltd*¹²⁸ involved three summary judgment applications:

(a) In the first summary judgment application, the plaintiff (“G1”) had obtained summary judgment against the defendants for a claim of \$2,968,951.43 for construction works on a project development done under certain contracts. The defendants appealed, arguing that the contracts in question were sham contracts meant to disguise illegal loans made by G1.

(b) In the second application, the plaintiff (“Mface”) sought summary judgment against the defendants for claims amounting to \$5,868,848.92. The assistant registrar granted the defendants leave to defend on condition that the defendants provide a banker’s guarantee or pay into the court the sum of money. When the defendants failed to satisfy this condition, judgment was entered against them. They appealed, contending that the Mface loans were illegal moneylending transactions.

(c) In the third application, the plaintiffs, G1 and Mface, sought summary judgment for \$4,912,199.65 due under a settlement agreement by which G1 and Mface agreed to discontinue all proceedings against the defendants. The assistant registrar gave leave to defend on condition that the defendants provide a banker’s guarantee or pay into the court the sum of money. This condition was not satisfied and the defendants appealed.

8.197 The High Court allowed the appeal in the first application in part. It found that the agreements were not sham contracts meant to disguise loans, and that even if they were, these loans would not be illegal under the Moneylenders Act.¹²⁹ However, as the court agreed with the defendants that the summary judgment order included a double claim of \$880,000 which had already been included in the claim in the second summary judgment application, the amount on which summary judgment had been granted could be reduced by \$880,000.

8.198 For the second application, the issue was similarly whether the Mface loans were in fact personal loans and therefore illegal moneylending transactions. The High Court found this highly improbable. Given that all the defendants had adduced to support the

128 [2018] SGHC 225.

129 Cap 188, 2010 Rev Ed.

allegations of the Mface loans being personal loans were bare, self-serving assertions, their defence that the loans were illegal moneylending transactions was at best a shadowy defence and there was no reason for the court to disturb the assistant registrar's decision to grant conditional leave to defend.

8.199 As regards the third application, the court found that in light of its finding that the defences regarding the agreements with G1 and the Mface loans did not present a reasonable probability of real or *bona fide* defences, the defendants' argument that the settlement agreement was tainted by illegality should also be rejected. The court further found that the defendants' other defences – that they had entered into the settlement agreement under duress and that the plaintiffs had repudiated the settlement agreement – were shadowy at best.

8.200 The defendants sought to reduce the conditional leave sums to \$1m, which they claimed was the maximum sum they could afford, and produced unaudited management accounts as evidence of impecuniosity. The High Court found that it would be very cautious to base a finding of impecuniosity solely on unaudited management accounts as it would be easy for a party to produce unaudited financial statements to give an appearance of impecuniosity. Further, since the management accounts showed that the defendants had made loans to related companies, it was incumbent on them to seek repayment of those loans to pay the conditional sum.

Judgments and orders

8.201 The plaintiff in *SME Care Pte Ltd v Chan Siew Lee Jannie*¹³⁰ sued the defendant as the guarantor for payment of the debt owned by a company. The parties subsequently signed a settlement agreement. As part of the terms, the defendant also signed a consent judgment so that the plaintiff could enter judgment in the suit in the event of default by the defendant. The defendant then informed the court that she was withdrawing her consent to the consent judgment. The consent order was therefore not entered, and the plaintiff subsequently applied for judgment under O 27 r 3 of the RoC on the ground that its claim had been proved on the defendant's admission (in the settlement agreement) of the debt claimed. The plaintiff's application was dismissed and it appealed.

130 [2018] SGHC 96. See also *Resorts World at Sentosa Pte Ltd v Sze Siu Hung* [2018] SGHC 100, where the High Court affirmed the assistant registrar's dismissal of the defendant's applications to set aside an order for leave to serve the cause papers out of jurisdiction, an order for substituted service, and a default judgment entered against the defendant.

8.202 The High Court dismissed the appeal on the basis that the plaintiff's case to have judgment entered on an admission of facts was misconceived and unworkable, but found that the plaintiff was entitled to enter the consent judgment under the settlement agreement. The High Court observed that a settlement agreement is usually intended to displace the litigation commenced such that in the event of a breach, the parties sue on the settlement agreement itself rather than return to litigate on the original action. However, it noted that in some cases (such as the present case), usually where a plaintiff is accepting a much lower payment under the settlement agreement than he is claiming in the action, parties expressly provide a term in their settlement agreement that the original action be adjourned *sine die* (without a date) which either party may restore in the event of a breach.

8.203 The High Court in *UNE v UNF*¹³¹ considered the issue of whether a penal notice needed to be endorsed by a court. The High Court was of the view that this application for a penal notice to be inserted in a court order was unnecessary; since a penal notice is not part of an order of court and is given by the parties, the party who extracts the order may endorse it without leave. The court observed that r 696(4) of the Family Justice Rules 2014,¹³² which sets out the prerequisites to the enforcement of court orders, only required that the order sought to be enforced be “endorsed with a notice in Form 136 [that is, the penal notice]”, and did not expressly state that the notice must be endorsed by the court or that the court's leave is required. Second, parties are expected to comply with court orders, regardless of whether those orders have been endorsed with a penal notice. In other words, the endorsement of a penal notice does not impose any fresh legal obligation on either party, and only serves to provide notice.

Writs of seizure and sale (“WSS”)

8.204 There were two decisions in 2018 – one by the High Court and one by the Court of Appeal – that dealt with the issues of enforcement of a judgment by way of WSS and the severance of joint tenancies. Notably, given the conflicting indications in recent years on whether the registration of a WSS is sufficient to sever a joint tenancy and whether the interest of the joint tenant can be seized by WSS, the High Court sought to clarify the appropriate position under Singapore law. However, given the Court of Appeal's silence on this issue, it is arguable that there is still no conclusive position on this area of law.

131 [2018] SGHCF 15.

132 S 813/2014.

8.205 The plaintiff in *Peter Low LLC v Higgins, Danial Patrick*¹³³ (“*Peter Low*”) had applied for an order attaching the defendant’s interest in a property to satisfy the judgment he had obtained. The assistant registrar below dismissed the application, considering that he was bound by *Malayan Banking Bhd v Focal Finance Ltd*¹³⁴ and *Chan Lung Kien v Chan Shwe Ching*¹³⁵ (“*Chan Lung Kien (HC)*”) to hold that a joint tenant’s interest in immovable property was not exigible to a WSS. The sole issue on appeal was whether a judgment for the payment of money can be enforced by way of a WSS against the judgment debtor’s interest in immovable property which is held under a joint tenancy.

8.206 The High Court found that a WSS may be issued under O 47 r 4 of the RoC against the interest of a joint tenant’s in land, as a joint tenant had a real ownership interest which was capable of immediate alienation without the consent of the other joint tenants. This was the uniform position in Commonwealth jurisdictions and also appeared to be supported by all relevant authorities prior to the decision in *Malayan Banking Bhd v Focal Finance Ltd*. The High Court held that when such a WSS was issued, the joint tenancy would be severed when the WSS was registered pursuant to O 47 r 4(1)(a) of the RoC.

8.207 The court also tended to agree with *Chan Lung Kien (HC)* that the sheriff could not sell the entire property (as opposed to merely the debtor-joint tenant’s interest) without the consent of the other joint tenant. In the absence of any statutory provision to the effect that a WSS against land operated as an equitable charge on the land, it appeared that there was no basis for supposing that the sheriff could apply to court for directions under O 47 r 5(g) of the RoC for the sale of the whole property in spite of the objections of the other joint tenant.

8.208 In *Chan Lung Kien v Chan Shwe Ching*,¹³⁶ the debtor, one Leong Lai Yee, and her husband owned a private residential property as joint tenants. The appellant and respondent separately commenced proceedings against Leong and each obtained judgments against her. The respondent then obtained an order for Leong’s interest in the property to be attached and taken in execution under a WSS to satisfy the judgment, and registered this WSS with the Singapore Land Authority. In the meantime, Leong’s husband started taking steps in an attempt to sever the joint tenancy over the property. He executed an instrument of declaration in the approved form pursuant to s 53(5) of

133 [2018] 4 SLR 1003.

134 [1998] 3 SLR(R) 1008.

135 [2018] 4 SLR 208.

136 [2018] 2 SLR 84.

the Land Titles Act¹³⁷ whereby he declared that he wished to sever the joint tenancy and hold the property as a tenant in common. He subsequently advertised a “Severance Notice” in *The Straits Times*, addressed to Leong and purporting to give her notice that he intended to sever the joint tenancy and hold the property as a tenant in common with her.

8.209 Sometime later, the appellant also obtained a WSS against the property and registered this WSS with the Singapore Land Authority. The appellant applied to the High Court for a declaration that the respondent’s WSS was void and/or unenforceable. The High Court in *Chan Lung Kien (HC)* held that a joint tenant has no distinct and identifiable interest that could be attached and taken in execution under a WSS, unless the WSS concomitantly severs the joint tenancy. The High Court also held that the Severance Notice did not sever the joint tenancy and, accordingly, the appellant’s WSS was ineffective in attaching Leong’s interest in the property. The appellant appealed against the High Court’s decision that his WSS was ineffective because the joint tenancy in the property had not been severed by the acts of Leong’s husband. Notably, neither party appealed against the High Court’s holding that prior to severance, a joint tenant’s interest in jointly held property could not be attached under a WSS.

8.210 The appeal was dismissed. The Court of Appeal held that under the common law, a unilateral declaration of severance by one joint tenant could not sever a joint tenancy, no matter how clear and unequivocal the declaration was. *Sivakolunthu Kumarasamy v Shanmugam Nagaiah*,¹³⁸ which established the law in Singapore on modes of severance at common law, was good law and should not be overruled. Further, on the basis that that case correctly expressed the law, Parliament had taken legislative action in order to provide a statutory mode of severance by unilateral declaration – the relevant provisions were s 53 of the Land Titles Act for registered land and s 66A(3) of the Conveyancing and Law of Property Act¹³⁹ for unregistered land. On a plain reading of ss 53(5) and 53(6) of the Land Titles Act, a joint tenant who wishes to sever his joint tenancy in registered land using the statutory mode would have to take the following steps:

- (a) execute an instrument of declaration in the approved form;

137 Cap 157, 2004 Rev Ed.

138 [1987] SLR(R) 702 at [14].

139 Cap 61, 1994 Rev Ed.

- (b) serve this instrument personally or by registered post on every other joint tenant; and
- (c) register the instrument on the land register.

8.211 On the facts of this case, the attempted severance by Leong's husband was ineffective because he failed to register the executed instrument of declaration, and also failed to serve the instrument by the modes of service specified by s 53(5). Therefore, severance only occurred subsequently by operation of law when Leong was made a bankrupt and, accordingly, her share of the sale proceeds of the property had to be paid to her estate in bankruptcy.

8.212 As the issue of whether the registration of a WSS is sufficient to sever a joint tenancy or whether the interest of the joint tenant can be seized by WSS was not before the Court of Appeal, it did not make any reference to *Peter Low*¹⁴⁰ (which appears to be irreconcilable with *Chan Lung Kien (HC)*) and did not have the opportunity to clarify this area of law. Instead, the Court of Appeal adopted the reasoning of *Chan Lung Kien (HC)* and dealt with the issue of severance of joint tenancy and the need to comply fully with all the steps set out in s 53 of the LTA. Accordingly, it is unclear if the Court of Appeal's decision is taken to have overruled *Peter Low* (despite not having made any express reference to *Peter Low*), or if this question remains very much open.

Variation of terms in consent order

8.213 In *Sumber Indah Pte Ltd v Kamala Jewellers Pte Ltd*,¹⁴¹ the defendant applied for an extension of time to comply with payment obligations under a settlement agreement recorded as a consent order of court. The plaintiff argued that this was an application by the defendant to unilaterally vary the terms of the consent order. The High Court dismissed the application. It held that a consent order fundamentally represented a contract or settlement agreement and, given the contractual nature of the consent order, the court could only intervene where some recognised vitiating factors were present. There were no such vitiating factors in this case.

8.214 The High Court also rejected the defendant's argument that the court had an inherent power, under O 92 r 4 of the RoC, to alter the contractual consent order by allowing the defendant an extension of time. In *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua*,¹⁴² the Court

140 See paras 8.205–207 above.

141 [2018] SGHC 70.

142 [2017] 2 SLR 12.

of Appeal had held that under O 92 r 4, the court had a residual discretion not to enforce contractual or consensual “unless” orders or other consensual procedural orders, but such discretion did not extend to *contractual* consent orders that related to the substantive rights of the parties. Applying these principles, the High Court found that the consent order in this case was a *substantive* consent order as it was recorded pursuant to a settlement agreement between the parties which was intended to determine with finality the substantive rights and obligations of the parties. Therefore, the court had no residual discretion in varying such substantive consent orders.

8.215 Finally, the court found that O 3 r 4 and O 45 r 6 of the RoC did not empower the court to vary a contractual consent order even in the absence of vitiating factors, as these provisions only referred to judgments or orders *made by the court*, and were not applicable to settlement agreements embodied in a consent order.

Choice of Court Agreements Act¹⁴³ (“CCA”)

8.216 *Ermgassen & Co Ltd v Sixcap Financials Pte Ltd*¹⁴⁴ involved the first application brought under the Choice of Court Agreements Act (“CCA”) since its enactment on 1 October 2016. In this case, pursuant to O 111 r 2 of the RoC read with s 13 of the CCA, the plaintiff made an *ex parte* application in the Singapore High Court seeking the recognition and enforcement of a summary judgment made by the High Court of Justice of England and Wales, Queen’s Bench Division, against the defendant.

8.217 At the outset, the High Court clarified that the CCA applies to foreign judgments obtained from the courts of contracting states of the Convention on Choice of Court Agreements¹⁴⁵ (“Hague Convention”), and in every international case where there is an exclusive choice of court agreement concluded in a civil and commercial matter (subject to certain exceptions). In this regard, a “judgment” is:¹⁴⁶

- (a) a final court decision ... on the merits, a consent order, a consent judgment or a judgment given by default, or
- (b) a determination by a court of any costs or expenses relating to any such court decision, consent order, consent judgment or judgment given by default.

143 Cap 39A, 2017 Rev Ed.

144 [2018] SGHCR 8.

145 30 June 2005; entry into force 1 October 2015.

146 Choice of Court Agreements Act (Cap 39A, 2017 Rev Ed) s 2(1).

This would not include decisions to grant interim relief. Further, the procedural rules relating to an application seeking recognition and/or enforcement of a foreign judgment in Singapore under the CCA are set out in O 111 of the RoC.

8.218 The court held that the summary judgment in this case fell within the scope of the CCA as the UK was a Contracting State of the Hague Convention. Further, the enforcement application was an “international case” given that the claim was for the recognition and enforcement of a foreign judgment. There was also an exclusive choice of court agreement applicable to the dispute, and this was concluded in a commercial matter. On the facts, the High Court was satisfied that the enforcement application ought to be granted, having regard to the following key considerations:

(a) The summary judgment entered appeared to be in the nature of a judgment on the merits of the case, as opposed to a default judgment.

(b) It was arguable that an order that “Summary Judgment shall be entered for the Claimant on the entirety of the claim” may not have been adequately supplemented by intrinsic documents to formally constitute “a complete and certified copy of the foreign judgment (including the reasons, if any, for the decision of the court which gave the judgment)”, as required under O 111 r 2(3)(a) of the RoC. Nevertheless, the plaintiff could at this stage be regarded as having sufficiently discharged its burden by adducing extrinsic documents that corroborate its claim on the existence (as well as the effect and enforceability) of the summary judgment in the UK.

(c) The court did not detect any grounds under s 14 or 15 of the CCA on which it had to, or could, at that stage, refuse to recognise or enforce the summary judgment. However, this was without prejudice to the right of the defendant to pursue any actual grounds for determination on an *inter partes* basis in any setting-aside application that it might subsequently bring in accordance with O 111 r 7 of the RoC.

Stay of execution

8.219 In *NK Mulsan Co Ltd v INTL Asia Pte Ltd*,¹⁴⁷ the defendant applied to the High Court for a stay of execution, pending its appeal to the Court of Appeal against the High Court’s earlier decision to grant

147 [2019] 3 SLR 453.

summary judgment in favour of the plaintiff for the judgment sum. The stay application was dismissed. Citing *Strandore Invest A/S v Soh Kim Wat*,¹⁴⁸ the High Court reiterated that the court's discretion to grant a stay must be exercised judicially, that is, in accordance with well-established principles:

(a) As a general proposition, the court does not deprive a successful litigant of the fruits of his litigation and lock up funds to which he is *prima facie* entitled, pending an appeal. There is no difference whether the judgment appealed against was made on a summary basis or after a full trial.

(b) When a party is exercising his undoubted right of appeal, the court ought to see that the appeal, if successful, is not nugatory. Thus, a stay will be granted if it can be shown by affidavit that, if the damages and costs are paid, there is no reasonable probability of getting them back if the appeal succeeds.

(c) An appellant must show special circumstances before the court will grant a stay.¹⁴⁹

8.220 After a review of the relevant case authorities, the High Court also made the following observations:

(a) The alleged merits of an appeal do not usually constitute a relevant factor for the purpose of a stay application unless it can be easily gleaned, without a minute examination of the merits, that the appeal will be likely to fail or succeed.

(b) The fact that a successful litigant is outside Singapore and it would be inconvenient or expensive to seek recovery outside Singapore is not, of itself, a special circumstance warranting a stay. While the absence of any reciprocal enforcement regime may be taken into account with that bare fact, there are more important considerations (for example, whether the successful litigant had huge financial resources with a good reputation, how it had conducted its business and the litigation, whether there was evidence that the successful party was in the habit of making payments late, and whether the successful party acted reasonably in the litigation or was prone to making unsubstantiated allegations or suppressing the truth).

8.221 On the facts, the High Court found that the circumstances did not warrant the granting of a stay of execution: it was not obvious that

148 [2010] SGHC 174 at [7].

149 *NK Mulsan Co Ltd v INTL Asia Pte Ltd* [2019] 3 SLR 453 at [6].

the defendant would succeed on its appeal, the plaintiff was being deprived of the fruits of its litigation, the defendant was relying on the bare fact that the plaintiff was a foreign litigant (which was not a special circumstance in itself), the plaintiff was listed on the Korea stock exchange, and there was no suggestion that the plaintiff was in financial difficulties.

Appeals

Leave to appeal

8.222 The applicant in *Edmund Tie & Co (SEA) Pte Ltd v Savills Residential Pte Ltd*¹⁵⁰ sued the respondent for \$13,385.70, while the respondent argued that the applicant was only entitled to \$6,225. The trial judge dismissed the claim and found that having prayed for the payment of \$13,385.70 as the contract sum, without the phrase “or such sum as the court deems fit”, the applicant was not entitled to any payment. The applicant sought leave before the High Court to appeal against this decision, arguing that the applicant ought to be awarded \$6,225 at the very least.

8.223 The High Court refused to grant leave to appeal and held that the trial judge had made the correct order in not granting something the applicant did not ask for. It clarified that the court may award less but not more than what an applicant claims, and that an applicant cannot ask for a relief that relies on facts that he has challenged throughout the trial. Further, when procedure has not been observed, it is incumbent upon the party in breach to take steps to rectify its error or omission – it cannot expect judgment in its favour on a claim that, unamended, has no merits. On the facts, the applicant did not plead its case adequately, and did not make any attempt to rectify its case (by asking for leave to amend its statement of claim by inserting the phrase “or such sum as the court deems fit”).

150 [2018] 5 SLR 349. See also *BQP v BQQ* [2018] 4 SLR 1364, where the High Court did not grant the plaintiff leave to appeal its dismissal of the plaintiff’s challenge against the jurisdictional ruling of an arbitral tribunal, applying the test in *Lee Kuan Yew v Tang Liang Hong* [1997] 2 SLR(R) 862 at [16] that an applicant seeking leave to appeal needs to demonstrate that there exist questions falling within at least one of the following three limbs: (a) *prima facie* case of error; (b) question of general principle decided for the first time; or (c) question of importance upon which further argument and a decision of a higher tribunal would be to the public advantage.

8.224 The Court of Appeal in *Telecom Credit Inc v Mida United Group Ltd*¹⁵¹ made important clarifications to the interpretation of an “interlocutory application”. The preliminary issue before the court was whether the High Court’s order that a garnishee’s liability to a judgment debtor be determined at trial was an “order at the hearing of any interlocutory application”, such that the appellant would require leave to appeal against it, pursuant to para (e) of the Fifth Schedule to the SCJA. The Court of Appeal clarified that the general philosophy behind the approach under the SCJA was that a party’s ability to appeal an interlocutory matter ought to depend on the importance of that matter to the substantive outcome of that case, and eventually concluded that:

(a) An “order” in para (e) means “interlocutory order”,¹⁵² that is, an order that does not finally dispose of the parties’ rights.¹⁵³

(b) An “interlocutory application” is an application whose determination may or may not finally determine the parties’ rights in the cause of the pending proceedings in which the application is being brought. Accordingly, it would be necessary to look at whether the order which is made on such an application finally disposes of the parties’ rights. If it does, then leave to appeal will not be required, and if it does not, it will be an interlocutory order caught by para (e) and leave to appeal will be required. An interlocutory application may be peripheral to the main hearing, occur between the initiation of an action and trial, or occur after judgment has been given.

8.225 On application to the facts, the Court of Appeal found that an order that a garnishee’s liability to a judgment debtor be determined at trial was:

(a) an order made at the hearing of an *interlocutory application*, as determination of the garnishee show cause proceedings would not necessarily determine the parties’ rights and the court may instead order trial (in which case the substantive rights of the judgment creditor and garnishee would not have been finally determined); and

(b) an *interlocutory order*, as it did not finally determine the appellant’s and the respondent’s rights but instead convened a trial at which those rights may be finally determined.

151 [2019] 1 SLR 131.

152 *Dorsey James Michael v World Sport Group Pte Ltd* [2013] 3 SLR 354 at [85]; *The Nasco Gem* [2014] 2 SLR 63 at [14(b)].

153 *Dorsey James Michael v World Sport Group Pte Ltd* [2013] 3 SLR 354 at [28]; *The Nasco Gem* [2014] 2 SLR 63 at [14].

8.226 As the order made by the High Court was an interlocutory order on an interlocutory application, an appeal against that order could proceed only with leave to appeal. Since the appellant did not obtain leave, the court had no jurisdiction to consider the merits of the appeal and the appeal was dismissed.

Filing of notice of appeal

8.227 In *Ho Yew Kong*,¹⁵⁴ two suits (Suit 1098 and Suit 122) were consolidated at the pre-trial stage, and two judgments were eventually issued by the High Court judge in respect of the claims brought in both suits. The appellant applied for a retroactive extension of time to file an appeal against the findings made by the judge in both judgments in respect of Suit 122, having initially filed a single notice of appeal against the findings made in each of the two judgments in respect of Suit 1098. The Court of Appeal found that the appellant was correct to file a single notice of appeal against each of the two judgments issued by the High Court judge, and that each notice of appeal would cover the findings made in the particular judgment concerned in respect of *both* Suit 1098 and Suit 122. From a plain reading of O 57 r 3 of the RoC, it was clear that only a single notice of appeal needed to be filed for an appeal against a single judgment even if the *judgment* dealt with multiple *actions*. This construction helped to conserve judicial resources and reduce costs for the parties to an appeal, and obviated the need for an appellant to furnish separate security for the costs of each appeal.

Admission of further evidence on appeal

8.228 In *BNX v BOE*,¹⁵⁵ BNX sought to adduce further evidence in support of two appeals to the Court of Appeal that it had brought against the decision of the High Court judge¹⁵⁶ to dismiss its application to set aside the arbitral award rendered in favour of BOE, and to strike out the suit commenced by BNX against BOE after the arbitral award had been rendered. The evidence that BNX sought to introduce on appeal comprised (a) documents from May 2013, which BNX alleged that BOE had wrongfully withheld during the arbitration proceedings (“the May 2013 Documents”); and (b) the pleadings and some correspondence from an earlier suit, which BNX claimed would show that BOE’s witnesses had given false evidence in the arbitration

154 See paras 8.8, 8.9, 8.181–8.187 and 8.227 above. See also *Ho Soo Fong v Revitech Pte Ltd* [2019] 1 SLR 255, where the Court of Appeal dismissed an application for an extension of time to file and serve a notice of appeal.

155 See paras 8.34–8.35 above.

156 *BNX v BOE* [2017] SGHC 289.

proceedings (“the Suit 585 Documents”). BNX argued this evidence would show that BOE had prevailed in the earlier arbitration proceedings by committing fraud and perjury.

8.229 Pursuant to s 37(4) of the SCJA and O 57 r 13(2) of the RoC, BNX had to show that there existed “special grounds” warranting the admission of further evidence in an appeal by satisfying the three cumulative conditions laid down in *Ladd v Marshall*,¹⁵⁷ which were that:¹⁵⁸

- (a) the evidence could not have been obtained with reasonable diligence for use in the lower court (non-availability);
- (b) the evidence would probably have an important influence on the result of the case, although it need not be decisive (relevance and materiality); and
- (c) the evidence had to be apparently credible, although it need not be incontrovertible (credibility or reliability).

8.230 In relation to the May 2013 Documents, the Court of Appeal found that the *Riddick* principle applied because BNX had obtained them in the course of discovery in an earlier suit. As BNX had failed to first apply to the court presiding over the earlier suit to be released from its implied undertaking not to use the May 2013 Documents for any purpose other than the determination of that suit, the May 2013 Documents should not be adduced as further evidence on appeal.

8.231 In any event, BNX had not shown that “special grounds” existed to admit the May 2013 Documents as further evidence on appeal. The first *Ladd v Marshall* requirement was not met because the May 2013 Documents could have been obtained if BNX had acted with reasonable diligence during the arbitration. Further, the first *Ladd v Marshall* requirement could not be relaxed or waived in this case on the ostensible ground that there had been fraud or deception that struck at the very root of the proceedings, given that the May 2013 Documents did not disclose fraud or deception on the part of BOE, much less fraud that struck at the very root of the proceedings. The second *Ladd v Marshall* requirement was also not met as the May 2013 Documents would not have had a material impact on the outcome of the arbitration proceedings or the post-award proceedings.

¹⁵⁷ See para 8.134 above.

¹⁵⁸ *BNX v BOE* [2018] 2 SLR 215 at [74].

8.232 In relation to the Suit 585 documents, the Court of Appeal held that where a court was faced with an application to adduce further evidence of matters that occurred after the trial or hearing that resulted in the decision of the court below that was being appealed, the court's principal concern in deciding whether the further evidence would have a perceptible impact on the decision (and hence should be admitted) was with securing the interests of justice. In considering whether such evidence should be admitted, the court should (a) ascertain what the relevant matters were, of which evidence was sought to be given, and ensure that these were matters that occurred after the trial or hearing below; (b) satisfy itself that the evidence of these matters was at least potentially material to the issues in the appeal; and (c) satisfy itself that the material at least appeared to be credible.¹⁵⁹ The court thereafter also had to assess the weight to be placed on any such evidence as was admitted. On the facts, although the Suit 585 Documents were all further material that came into existence after the date of the judge's decision which was being appealed, the Court of Appeal held that they should not be adduced as further evidence on appeal as they did not concern matters that occurred after the date of the decision below. In any event, the matters to which the Suit 585 Documents purported to relate were also not even remotely relevant or material to the issues that were before the court.

Leave to adduce evidence in interlocutory appeals

8.233 One of the issues in *JTrust Asia*¹⁶⁰ was whether the respondents should be granted leave to adduce evidence *after* the hearing of the appeal. The Court of Appeal found that whether fresh evidence should be admitted on an interlocutory appeal lay in the unfettered discretion of the court, and the *Ladd v Marshall* conditions were not strictly applicable. However, they remained a useful analytical tool, and the court should guard against attempts by a disappointed party seeking to retrieve lost ground by relying on evidence he should have put before the court below. On the facts, the respondents' belated request to adduce evidence was such an attempt, as it was made with the benefit of hindsight from questions posed at the hearing. Given that the issue which the evidence pertained to was always live and the respondents had made a choice from the outset to withhold that evidence, the Court of Appeal rejected the respondents' request.

159 *BNX v BOE* [2018] 2 SLR 215 at [99].

160 See paras 8.114–8.120 above.

Deemed withdrawal

8.234 In *BNP Paribas SA v Jacob Agam*,¹⁶¹ the appellants failed to comply with their obligations under O 57 r 9(1) of the RoC concerning the filing and service of documents related to their appeal. Accordingly, the Court of Appeal granted BNP Paribas's application for a declaration that the appeal was deemed to have been withdrawn pursuant to O 57 r 9(4). The Court of Appeal noted that O 57 r 9(4) enabled it to extend time and hence to allow any non-compliance to be "cured", even if the appellants did not apply for an extension of time. It reiterated that this power was "purely discretionary" and that the burden was on the applicant for such an extension to raise grounds sufficient to persuade the court to show sympathy to him. Further, a judge would not allow an extension of time where the conduct of the appellants was "wholly inexcusable and nothing short of a blatant and callous disregard for the rules". On the facts, it did not consider this to be a case where an extension should be granted in the light of the combined effect of a number of different factors: the appellants did not indicate any intention to comply with obligations; the extent of their non-compliance was egregious; there were long periods of delay in relation to filing and no good explanation for these delays; and there would be significant prejudice to BNP Paribas should an extension of time be granted.

Offers to settle

8.235 Five decisions relating to offers to settle were issued in 2018.¹⁶² Significantly, in two decisions, the Court of Appeal made certain observations on the application of the cost implications under O 22A of the RoC where a defendant makes an offer to settle that is inclusive of costs or proposes that there be no order as to costs.

8.236 In *Inzign*,¹⁶³ the defendant had made two offers to settle: one to settle the plaintiff's claim ("Claim OTS") for \$100,000, and another to

161 See paras 8.10, 8.170–8.172 and 8.176–8.179 above.

162 See *Management Corporation Strata Title Plan No 3563 v Wintree Investment Pte Ltd* [2018] 5 SLR 412, where the High Court dismissed an appeal against cost orders made after the appellant's claim had been struck out, which took into account a respondent's offer to settle the matter by the appellant withdrawing its claim against the respondent. The court held that an outcome where the claim was struck out at the pre-trial stage was not more favourable than the terms of the zero-dollar offer and that the offer had been serious and genuine. See also the High Court's decision in *Noor Azlin Bte Abdul Rahman v Changi General Hospital Pte Ltd* [2018] SGHC 146, where the High Court found that O 22A r 10 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) was satisfied and the cost consequences therein applied. See para 8.244 below.

163 See para 8.26 above.

settle the counterclaim for \$70,000 (“Counterclaim OTS”), but the plaintiff did not accept the offers. The High Court found that the plaintiff was entitled to recover \$52,111.37 on its claim and the defendant was entitled to recover \$78,087.60 on its counterclaim (“the underlying findings”). After the set-off, the final orders that were made were that the plaintiff’s claim was dismissed with costs and judgment was entered on the counterclaim for the sum of \$25,976.23 with costs (“the final orders”). The defendant submitted that pursuant to O 22A rr 9(1) and 9(3) of the RoC, it was entitled to costs on a standard basis up to the date the offers to settle were served and on an indemnity basis thereafter.

8.237 The High Court found that applying O 22A r 9 to the final orders (which would only entitle the defendant to *standard* costs on its counterclaim) would be unfair to the defendant, as it had succeeded in its counterclaim and should be entitled to *indemnity* costs on its counterclaim from the date of service of the Counterclaim OTS. On the other hand, applying O 22A r 9 to the underlying findings (which would entitle the plaintiff to standard costs for its claim until the date of service of the Claim OTS) would also be unfair to the defendant, as having succeeded in its defence of set-off, the defendant was entitled to have the plaintiff’s claim dismissed *with costs*. Accordingly, the court exercised its discretion under O 22A r 9(5) and made an order that the plaintiff was to pay the costs of the dismissal of its claim and the costs of the counterclaim on the standard basis up to the date of service of the offers to settle, and on the indemnity basis thereafter.

8.238 The Court of Appeal in *NTUC Foodfare Co-operative Ltd v SIA Engineering Co Ltd*¹⁶⁴ (“*NTUC Foodfare*”) considered the novel issue of whether, where a defendant makes an offer to settle that is inclusive of costs or proposes that there be no order as to costs, the court should account for costs and disbursements incurred by the plaintiff (up to the date of the offer to settle) in deciding whether the judgment is not more favourable than the offer to settle under O 22A r 9(3)(b) of the RoC (“the Favourability Requirement”). In this case, the appellants contended that once costs and disbursements were taken into account, the terms of the offer to settle were less favourable than the judgment; hence, the general rule on costs under O 22A r 9(3) did not apply.

8.239 The Court of Appeal agreed with the appellants. It clarified that in determining whether the Favourability Requirement is satisfied, all of the terms of the offer to settle are critical, and the settlement sum stated in the offer to settle would not be the only relevant factor. The analysis would depend on the terms:

164 [2018] 2 SLR 1043.

(a) Where the offer to settle states a monetary sum, but is silent on interest and costs, states that the settlement sum is inclusive of interest and costs, or states that each party shall bear its own costs, it should be interpreted as an “all-in” offer inclusive of interest and costs. For the comparison to be between like and like, since the settlement sum is inclusive of interest and costs, the court should compare the judgment sum together with interest and costs up to the date of the offer with the settlement sum.

(b) On the other hand, where the offer to settle provides for the plaintiff to receive a fixed sum plus interest and costs, it would typically suffice for the court to compare the judgment sum (without accounting for interest and costs) with the fixed sum in the offer to settle to determine whether the Favourability Requirement is satisfied.

8.240 Finally, the Court of Appeal also clarified that under O 22A r 3(5), an offer to settle which did not specify a time for acceptance remained open for acceptance until the disposal of the claim on appeal where there was an appeal, and did not expire upon the conclusion of the trial.

8.241 In *Resorts World at Sentosa Pte Ltd v Goel Adesh Kumar*¹⁶⁵ (“*Goel Adesh Kumar*”), the defendant and third party made two joint offers to settle the plaintiff’s claim for damages in the suit. The plaintiff rejected both offers. The High Court subsequently found that the defendant was to pay the plaintiff’s costs of the suit on a standard basis on the Magistrate’s Court scale up to the date of the first offer, and the plaintiff was to pay the defendant’s costs of the suit on an indemnity basis on the High Court scale from the date of the first offer onwards. The plaintiff appealed, arguing that the court should order the defendant to pay him costs incurred in the suit on a standard basis on the High Court scale from the commencement of the suit.

8.242 The Court of Appeal dismissed the appeal. Applying various aspects of its recent decision in *NTUC Foodfare*,¹⁶⁶ it held that the High Court judge was correct to apply the general costs consequences provided for under O 22A r 9(3), given that (a) the first offer was not withdrawn (even though a second offer was subsequently made) and had not expired before the disposal of the claim on appeal; and (b) the judgment obtained by the plaintiff, even when taken together with the

¹⁶⁵ [2018] 2 SLR 1070. See para 8.247 below.

¹⁶⁶ See paras 8.238–8.240 above.

costs incurred by the plaintiff up to the date of the first offer, was not more favourable than the terms of the offer to settle.

8.243 Finally, the Court of Appeal stated that the quintessential situation in which the court may exercise its discretion to vary the default cost consequences specified under O 22A r 9(3) is where the offer to settle was not a reasonable, serious or genuine offer that was aimed at inducing or facilitating settlement. In determining whether an offer to settle is reasonable, serious or genuine, it would suffice that there is a legitimate basis for the offer made and the offer is not illusory – there is no strict necessity for the offer to provide for each head of the contested claim, nor is there any requirement for the offer to bear some proportionality to the claim. In this case, the Court of Appeal saw no reason to conclude that the High Court judge ought to have exercised this discretion under O 22A r 9(3), given that there was a legitimate basis for the sum proposed in the first offer.

Costs

8.244 A preliminary issue in *Noor Azlin Bte Abdul Rahman v Changi General Hospital Pte Ltd*¹⁶⁷ was whether costs should be awarded to the plaintiff because breach of duty on the part of some of the defendants was found. The High Court made clear that although the plaintiff had succeeded in some measure in establishing duty and breach in respect of the first and second defendants, it was ultimately not causative of the plaintiff's loss. As causation was an integral component of the tort of negligence, the issues that the plaintiff succeeded as against the first and second defendant could not properly be said to be separate or distinct to qualify as a reason for depriving the defendants of costs, whether in whole or in part. In the circumstances, there was no justification to depart from the general rule that costs follow the event and as the defendants were the successful party, the plaintiff was ordered to pay the defendants' costs of the action.

Taxation

8.245 The respondents in *Rockwills Trustee Ltd v Wong Meng Hang*¹⁶⁸ conceded liability for medical negligence and the matter proceeded for

167 [2018] SGHC 146. See also *Long Well Group v Commerzbank AG* [2018] SGHC 164 where the High Court disagreed with the defendants' argument that costs should not follow the event because the plaintiffs failed on all of the numerous issues raised save for the claim for breach of contract; and *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2019] 1 SLR 214, where the Court of Appeal found that the respondents were entitled to the costs of two appeals.

168 [2018] SGHCR 16.

assessment of damages (“AD”). They later disputed the bill filed by the applicant. The learned assistant registrar reiterated the applicable legal principles in taxation proceedings as set out in *Lin Jian Wei v Lim Eng Hock Peter*.¹⁶⁹ the court should first assess the relative complexity of the matter, the work supposedly done against what was reasonably required in the prevailing circumstances, and the reasonableness and proportionality of the resulting aggregate costs. In this exercise, all the factors as set out in Appendix 1 of O 59 of the RoC would be relevant, and reference should be made to existing precedents and guidelines to ascertain the amount of costs allowed for similar cases.

8.246 For work done in preparation for the trial on liability, the High Court held that the case involved both technical and complex medical issues; hence, it would not be appropriate to adopt the range for matters settled after exchange of affidavits of evidence-in-chief under the cost guidelines in Appendix G of the RoC. There were also complex and novel legal issues arising during the AD that made it inappropriate to adopt the daily tariff for trials for non-motor accident cases as set out in the cost guidelines. However, the court found that the applicant’s expert fees were somewhat excessive. Having regard to the complexities and novelty of the issues involved, the fees of the court assessor, and bearing in mind that the scope of the work done by the applicant’s expert would have been significantly wider than that of the court assessor, the High Court decided to tax off 20% of the said expert fees.

Costs of third-party proceedings

8.247 The Court of Appeal in *Goel Adesh Kumar*¹⁷⁰ considered the circumstances under which a plaintiff may be ordered to bear the costs of third-party proceedings commenced by a defendant in response to a claim. The court held that the governing principles were those canvassed in *Telemedia Pacific Group Ltd v Credit Agricole (Suisse) SA*,¹⁷¹ and clarified that in a situation where the claim involved liability of *more than one party* but where only one party has been sued, it remains relevant to determine whether a plaintiff has acted properly and reasonably in bringing all aspects of the claim against that one defendant. If an action brought by a plaintiff raises a claim which implicates a party beyond the defendant, and at least one of the issues ought to be litigated between that plaintiff and a third party (and not between that plaintiff and the defendant), that plaintiff could be said to have commenced the claim in respect of those issue(s) against the wrong party. By failing to include the third party as a co-defendant to its claim

169 [2011] 3 SLR 1052.

170 See paras 8.241–8.243 above.

171 [2015] 4 SLR 1019.

in respect of the aforementioned issue(s), such a plaintiff made it inevitable for the defendant to commence third-party proceedings to seek an indemnity or contribution in respect of that issue and should be made liable for the costs of the third-party proceedings.

Personal liability of solicitor for costs

8.248 In *Bintai Kindenko Pte Ltd v Samsung C&T Corp*,¹⁷² the Court of Appeal found that preparing an agreed bundle of almost 4,000 pages of documents for the purpose of the appeal, which concerned narrow issues of law and even narrower issues of fact, was manifestly excessive and plainly unnecessary. It reiterated that pursuant to O 59 r 8(1) of the RoC, the court was empowered to make an order for costs personally against a solicitor provided the following three-step test was satisfied:¹⁷³

- (a) whether the legal representative of whom complaint was made had acted improperly, unreasonably or negligently;
- (b) if so, whether such conduct caused the applicant to incur unnecessary costs; and
- (c) if so, whether it was, in all the circumstances, just to order the legal representative to compensate the applicant for the whole or any part of the relevant costs.

8.249 The Court of Appeal opined that there were at least two different types of situations where step (a) of the three-step test may be satisfied:

- (i) first, where the solicitor advances a wholly disingenuous case or files utterly ill-conceived applications even though the solicitor ought to have known better and advised his client against such a course of action, the court may, pursuant to O 59 r 8(1)(b), direct the solicitor to bear a portion of the party-and-party costs ordered against his client; and
- (ii) second, where the solicitor engages in thoughtless and undiscerning preparation of documents in respect of court proceedings, the court might, pursuant to O 59 r 8(1)(a), disallow the costs as between the solicitor and his client.

On the facts, the court found that counsel for both parties had acted unreasonably and improperly in failing to conduct proceedings with reasonable competence and expedition by preparing the relevant documents for the appeal in an indiscriminate, undiscerning and

172 [2018] 2 SLR 532.

173 *Bintai Kindenko Pte Ltd v Samsung C&T Corp* [2018] 2 SLR 532 at [66].

thoughtless manner. The inclusion of copious amounts of unnecessary material caused the parties to incur unnecessary costs and also inconvenienced the court. Accordingly, the Court of Appeal held that this was an appropriate case to order, pursuant to O 59 r 8(1)(a) of the RoC, counsel for both parties to bear personal liability for the majority of the photocopying charges and the stamp fees incurred in respect of the agreed bundle of documents.