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8. CIVIL PROCEDURE

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I. Taking of evidence for foreign proceedings

8.1 In *Re Civelli, Carlo Giuseppe*,[1] the General Division of the High Court ("General Division") considered an application pursuant to the Evidence (Civil Proceedings in Other Jurisdictions) Act 1979[2] ("ECPOJA") to take evidence for foreign proceedings.[3] The appellants had made an application ("OA 258") for a private examiner to examine Gerard Rene Jacquin ("Mr Jacquin"). This appeal was brought before the General Division following the dismissal of the application by the assistant registrar ("AR") below. The main issue before the court was whether the ECPOJA allowed for the appointment of a private examiner to take evidence for foreign proceedings. The court granted the application following an examination of the applicable legislative framework.

8.2 The application was based on a letter of request ("Letter of Request") from the United States District Court for the Southern District of Texas ("Texas Court") for international judicial assistance.[4] The application sought various orders including that: (a) Mr Jacquin attend in person before Dianne Fischer ("Ms Fischer"), an experienced US lawyer familiar with the US Federal Rules of Evidence and Federal Rules of Civil Procedure, to be orally examined under oath by the appellants' counsel; and (b) Mr Jacquin's oral testimony be subject to the US Federal Rules of Evidence and Federal Rules of Civil Procedure.[5]

8.3 The court had to first consider a preliminary issue on whether the General Division's jurisdiction was invoked pursuant to s 3 of the ECPOJA.[6] There are three requirements imposed by s 3 of the

1 [2024] 5 SLR 446.
2 2020 Rev Ed.
3 *Re Civelli, Carlo Giuseppe* [2024] 5 SLR 446 at [1].
4 *Re Civelli, Carlo Giuseppe* [2024] 5 SLR 446 at [3].
5 *Re Civelli, Carlo Giuseppe* [2024] 5 SLR 446 at [4].
6 *Re Civelli, Carlo Giuseppe* [2024] 5 SLR 446 at [17].

ECPOJA before the General Division's jurisdiction is invoked. The three requirements are that:[7]

> (a) there was an application to the [General Division] for an order for evidence to be obtained in Singapore; (b) the request was made by a court or tribunal exercising jurisdiction in a country outside Singapore; and (c) the evidence was to be obtained for the purposes of civil proceedings which had been instituted before the request court, or whose institution before that court was contemplated.

8.4 Applied to the facts, the court held that the requirements had been satisfied, in that: "(a) OA 258 was the application; (b) the request was made by the Texas Court, which exercised jurisdiction in a country outside Singapore; and (c) the evidence was to be obtained for the purposes of civil or commercial proceedings before the Texas Court".[8] Additionally, the court noted that the Texas Court had authorised Mr Civelli "to make the necessary application(s) on behalf of [the Texas Court] to give effect to the Letter of Request as required under O 55 r 2(1) of the [Rules of Court 2021]".[9]

8.5 In deciding whether to grant the application to allow for a private examiner to take evidence for foreign proceedings, the court considered the applicable law in the ECPOJA together with the provisions in the Rules of Court 2021 ("ROC 2021").[10] The court first considered how the applicable sections of the ROC 2021 delineated the orders which the General Division was empowered to make in civil proceedings.

8.6 While O 9 r 24(6) provides that a pre-trial examination that takes place in Singapore for the purpose of obtaining evidence must be before a judge or the Registrar, the court is conferred broad discretion under O 3 r 2(1) to order that the examination need not take place before a judge or the Registrar.[11] The court is also allowed to make special directions under O 55 r 4(2) dictating the manner in which evidence is to be taken.[12]

8.7 Read together, O9 r 24, O 55 rr 4 and 5, and O 3 r 2(1) of the ROC 2021 evince a framework in which a pre-trial examination for the purposes of obtaining evidence in civil proceedings may be conducted by an examiner who is a fit and proper person nominated by a party which the court deems fit.[13]

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7 Evidence (Civil Proceedings in Other Jurisdictions) Act 1979 (2020 Rev Ed) s 3.
8 *Re Civelli, Carlo Giuseppe* [2024] 5 SLR 446 at [18].
9 *Re Civelli, Carlo Giuseppe* [2024] 5 SLR 446 at [19].
10 *Re Civelli, Carlo Giuseppe* [2024] 5 SLR 446 at [11]–[16].
11 *Re Civelli, Carlo Giuseppe* [2024] 5 SLR 446 at [21].
12 *Re Civelli, Carlo Giuseppe* [2024] 5 SLR 446 at [21].
13 *Re Civelli, Carlo Giuseppe* [2024] 5 SLR 446 at [22].

8.8 The court noted that the taking of evidence was still subject to judicial oversight despite it not taking place before a judge or the Registrar, as the Registrar of the Supreme Court had to certify the deposition and provide a certificate with the seal of the Supreme Court pursuant to O 55 r 5 of the ROC 2021.[14]

8.9 For completeness, it was held that s 5 of the ECPOJA, which dealt with the privilege of witnesses, did not prohibit the appointment of private examiners as the court still retained judicial oversight over the exclusion or inclusion of privileged information.[15] If a witness from which evidence was to be taken had an objection to answering questions, they could make an objection under the grounds of privilege provided for in ss 5(1) or 5(3) of the ECPOJA.[16] The onus would then be on the applicant to file an application to the Singapore courts for an order for the witness to answer the questions posed, during which the witness is able to substantiate his claim of privilege.[17]

8.10 A witness who objects to answering questions on the grounds of privilege is also able to raise a ground of privilege not available under Singapore law pursuant to s 5(2) of the ECPOJA read with s 5(1)(*b*) of the Act.[18] The burden then shifts to the witness to apply to the foreign court for an order that the information is privileged under the laws of the requesting court.[19]

8.11 In deciding whether to grant the application, the court considered that the general principle to be followed was that the Singapore court would ordinarily give effect to a request for international judicial assistance under the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters[20] as far as was proper and practicable, and to the extent that was permissible under Singapore law.[21] Hence, the General Division in granting the application, had a broad discretion under O 55 r 4(2) of the ROC 2021 to make appropriate modifications to the order sought by the appellants.[22]

14 *Re Civelli, Carlo Giuseppe* [2024] 5 SLR 446 at [25].
15 *Re Civelli, Carlo Giuseppe* [2024] 5 SLR 446 at [29].
16 *Re Civelli, Carlo Giuseppe* [2024] 5 SLR 446 at [30].
17 *Re Civelli, Carlo Giuseppe* [2024] 5 SLR 446 at [31].
18 *Re Civelli, Carlo Giuseppe* [2024] 5 SLR 446 at [32].
19 *Re Civelli, Carlo Giuseppe* [2024] 5 SLR 446 at [32].
20 (18 March 1970), 847 UNTS 231 (entered into force 7 October 1972, accession by Singapore 26 October 1978).
21 *Re Civelli, Carlo Giuseppe* [2024] 5 SLR 446 at [34].
22 *Re Civelli, Carlo Giuseppe* [2024] 5 SLR 446 at [35].

8.12 Turning to the facts, the court held that regard must be had to the Letter of Request from the Texas Court in determining the appropriate conditions to be imposed under O 55 r 4(2) of the ROC 2021 to safeguard the examination process. As the Letter of Request had requested the General Division to "compel the oral testimony under oath before a diplomatic officer, consular agent or other competent authority recognized by law",[23] the court held that a "competent authority recognized by law" should be construed as "an authority with some position officially recognised by Singapore law, and not merely a private examiner".[24]

8.13 Therefore, the court held that Ms Fischer could be the private examiner, but the examination of Mr Jacquin had to take place before the Registrar to give effect to the Letter of Request's specification.[25]

II. Withdrawal of summons filed by a party

8.14 The dispute in *Victory International Holdings Pte Ltd v Borrelli, Cosimo*[26] arose out of a minority sale and purchase agreement of shares ("Minority SPA") between the claimant, Victory International Holdings Pte Ltd ("Victory") and the first defendant Cosimo Borrelli ("Mr Borelli"), who was the receiver of shares in relation to the Minority SPA.[27] Victory had commenced the originating application, HC/OA 1214/2023 ("OA 1214"), against Mr Borelli and had in the process sought, in HC/SUM 195/2024 ("SUM 195"), permission to cross-examine Mr Borrelli pursuant to O 15 r 7(6)(*b*) of the ROC 2021.[28]

8.15 One day before the hearing for SUM 195, Victory requested that SUM 195 be held in abeyance until after the substantive merits of OA 1214 were decided, or in the event that the court refused that request, that Victory be allowed to withdraw SUM 195[29] (collectively, the "Requests"). Victory's request to withdraw SUM 195 was ostensibly made pursuant to O 16 r 6 of the ROC 2021. The High Court observed that there was little, if any, by way of case law on O 16 r 6 and its predecessor, O 21 r 6 of the Rules of Court 2014[30] ("ROC 2014"). After an examination

23 *Re Civelli, Carlo Giuseppe* [2024] 5 SLR 446 at [37].
24 *Re Civelli, Carlo Giuseppe* [2024] 5 SLR 446 at [38].
25 *Re Civelli, Carlo Giuseppe* [2024] 5 SLR 446 at [39].
26 [2024] SGHC 79. An appeal was brought before the Appellate Division (see *Victory International Holdings Pte Ltd v Borelli, Cosimo* [2025] SGHC(A) 1) but the Appellate Division did not address the issue on withdrawal of summons.
27 *Victory International Holdings Pte Ltd v Borrelli, Cosimo* [2024] SGHC 79 at [1]–[5].
28 *Victory International Holdings Pte Ltd v Borrelli, Cosimo* [2024] SGHC 79 at [1]–[5].
29 *Victory International Holdings Pte Ltd v Borrelli, Cosimo* [2024] SGHC 79 at [26].
30 2014 Rev Ed. See *Victory International Holdings Pte Ltd v Borrelli, Cosimo* [2024] SGHC 79 at [30].

of the applicable law, the court declined to grant permission to Victory to withdraw or hold in abeyance SUM 195.[31]

8.16 In deciding whether to grant the request to withdraw SUM 195, the High Court noted that the purpose behind O 16 r 6 of the ROC 2021 is to discourage frivolous or unnecessary applications and the court is imbued with the discretion to decide whether to grant a party permission to withdraw a summons.[32]

8.17 In the absence of case law on how the discretion is to be exercised under O 16 r 6 of the ROC 2021, the High Court held that a court can have regard to the body of case law and principles that have been developed in relation to the court's discretion to order that an action or claim be discontinued pursuant to O 16 r 3 of the ROC 2021.[33] Similar to an application under O 16 r 6 of the ROC 2021 to withdraw a summons, the broad purpose behind O 16 r 3 of the ROC 2021 is to ensure that a party cannot assume that he can simply disengage from the court process at whim, particularly if he is responsible for the initiation of the step which he now wishes to revoke.[34]

8.18 The High Court noted in its examination of the relevant case law under O 16 r 3 of the ROC 2021 that the factors the court would consider when exercising its discretion to grant permission to discontinue an action include: (a) whether injustice is caused to the defendant; and (b) whether there was public interest in the granting of permission to withdraw a claim.[35]

8.19 Applying these principles, the High Court observed that injustice to the counterparty is particularly crucial in the court's exercise of its discretion to grant a party permission to withdraw a summons as the court lacks the power to impose conditions, such as precluding the applicant from bringing a fresh summons at a later stage.[36] The High Court observed that this is because O 16 r 6 of the ROC 2021, unlike O 16 r 3(1) of the ROC 2021, does not expressly provide that a court can impose conditions if it allows a summons to be withdrawn.[37]

8.20 The High Court further observed that such injustice to the counterparty could include the deprivation of an advantage in the

31 *Victory International Holdings Pte Ltd v Borrelli, Cosimo* [2024] SGHC 79 at [40].
32 *Victory International Holdings Pte Ltd v Borrelli, Cosimo* [2024] SGHC 79 at [30]–[31].
33 *Victory International Holdings Pte Ltd v Borrelli, Cosimo* [2024] SGHC 79 at [31].
34 *Victory International Holdings Pte Ltd v Borrelli, Cosimo* [2024] SGHC 79 at [31].
35 *Victory International Holdings Pte Ltd v Borrelli, Cosimo* [2024] SGHC 79 at [33]–[34].
36 *Victory International Holdings Pte Ltd v Borrelli, Cosimo* [2024] SGHC 79 at [34].
37 *Victory International Holdings Pte Ltd v Borrelli, Cosimo* [2024] SGHC 79 at [34].

litigation that the counterparty had already enjoyed, such as a clearly superior case to the applicant as may be objectively ascertained.[38] This is especially so if the counterparty is on the cusp of victory.[39] In such situations, the practical effect of a discontinuance would be to allow the plaintiff to remain free to bring another action for the same claim as well as render the extensive submissions tendered by the counterparty to resist the summons redundant.[40] The High Court also noted that in so far as public interest is concerned, it is more likely that the court would have also made substantive preparations towards the hearing of the summons.[41]

8.21 On the facts of the case, the High Court rejected Victory's request to withdraw SUM 195. The High Court held that granting permission to withdraw SUM 195 would be prejudicial to Mr Borelli who had already made extensive written submissions.[42] Additionally, Victory's reasons for withdrawing SUM 195 were effectively the same as those that Mr Borelli had advanced to resist SUM 195.[43] As such, the High Court held that it would be prejudicial to allow Victory to escape defeat despite conceding that SUM 195 had no real merit, and effectively avoiding a detrimental judgment by withdrawing SUM 195 at the last possible moment.[44]

III. Striking out of action commenced by way of originating application

8.22 In *Sullivan, Sir Cornelius Sean v Hill Capital Pte Ltd*,[45] the second respondent ("Ms Ban") applied to strike out the whole of the applicant's action against her. Ms Ban contended that the action should be struck out under, *inter alia*, O 9 r 16(1)(*a*) of the ROC 2021, as it disclosed no reasonable cause of action.[46]

8.23 In the context of an originating claim ("OC"), a reasonable cause of action meant a cause of action with some chance of success when only the allegations in the pleadings were considered.[47] Further, in determining

38 *Victory International Holdings Pte Ltd v Borrelli, Cosimo* [2024] SGHC 79 at [35].
39 *Victory International Holdings Pte Ltd v Borrelli, Cosimo* [2024] SGHC 79 at [36].
40 *Victory International Holdings Pte Ltd v Borrelli, Cosimo* [2024] SGHC 79 at [35].
41 *Victory International Holdings Pte Ltd v Borrelli, Cosimo* [2024] SGHC 79 at [36].
42 *Victory International Holdings Pte Ltd v Borrelli, Cosimo* [2024] SGHC 79 at [39].
43 *Victory International Holdings Pte Ltd v Borrelli, Cosimo* [2024] SGHC 79 at [39].
44 *Victory International Holdings Pte Ltd v Borrelli, Cosimo* [2024] SGHC 79 at [39].
45 [2024] SGHC 198.
46 *Sullivan, Sir Cornelius Sean v Hill Capital Pte Ltd* [2024] SGHC 198 at [15]–[17].
47 *Iskandar bin Rahmat v Attorney-General* [2022] 2 SLR 1018 at [17].

a striking out application, the court would not undertake a minute and protracted examination of the documents and facts.[48]

8.24 The General Division had to consider the novel question of how these principles would transpose to the context of striking out a claim in an action commenced by way of originating application[49] ("OA"). In addressing this question, the General Division distilled three key principles, relying in part on the English High Court decision of *Knapman v Servian*.[50]

8.25 First, the court would consider the affidavit filed in support of the OA. The supporting affidavit would be treated as the equivalent of the claimant's pleadings in an action commenced by way of OC. This was because the supporting affidavit was intended to disclose the cause of action.[51]

8.26 Second, the court was not bound to unthinkingly accept the claimant's interpretation or characterisation of documentary evidence in their supporting affidavit.[52] The General Division observed that this was consistent with O 15 r 7(5) of the ROC 2021, under which the court would decide an OA action on the basis of affidavit evidence as well as submissions. If the claimant could not even establish a reasonable cause of action based on their own evidence, the OA action should be struck out. It would be contrary to the "Ideals" set out in O 3 rr 1(2)(*b*)–1(2)(*d*) of the ROC 2021 (expeditious proceedings, cost-effective work and efficient use of court resources) for the action to proceed.[53]

8.27 Third, the court would not ordinarily consider affidavits filed in the striking out application itself. The effect of O 6 rr 12(6) and 13 of the ROC 2021 is that the claimant in an OA action is expected to make good his claim in the supporting affidavit. Consequently, whether a reasonable cause of action has been made out should be assessed with reference to the supporting affidavit.[54] In the present case, there was no reason for the court to consider the applicant's subsequent affidavit. However, as Ms Ban had addressed the further evidence adduced in the applicant's subsequent affidavit, the General Division took the further evidence into account.[55]

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48 *Gabriel Peter & Partners v Wee Chong Jin* [1997] 3 SLR(R) 649 at [18].
49 *Sullivan, Sir Cornelius Sean v Hill Capital Pte Ltd* [2024] SGHC 198 at [27].
50 [1978] 1 WLR 540.
51 *Sullivan, Sir Cornelius Sean v Hill Capital Pte Ltd* [2024] SGHC 198 at [28].
52 *Sullivan, Sir Cornelius Sean v Hill Capital Pte Ltd* [2024] SGHC 198 at [32].
53 *Sullivan, Sir Cornelius Sean v Hill Capital Pte Ltd* [2024] SGHC 198 at [33].
54 *Sullivan, Sir Cornelius Sean v Hill Capital Pte Ltd* [2024] SGHC 198 at [29].
55 *Sullivan, Sir Cornelius Sean v Hill Capital Pte Ltd* [2024] SGHC 198 at [30].

8.28 The General Division held that the applicant could not establish a reasonable cause of action against Ms Ban. The applicant's evidence did not support his case that Ms Ban owed him fiduciary duties.[56] Further, there was no reason to convert the claim to an OC action. The absence of sufficient evidence did not mean that there were disputes of fact which needed to be tried.[57] Consequently, the General Division struck out the action against Ms Ban, pursuant to O 9 r 16(1)(*a*) of the ROC 2021.[58]

IV. Scope of production of documents

8.29 *DFD v DFE*[59] was a decision by an AR of the High Court arising out of an originating application HC/OA 222/2023 ("OA 222") brought by the claimant to enforce an arbitral award that it had obtained against the first and second respondents.[60] In particular, the case concerned the production of documents which was requested not directly in connection with OA 222, but with HC/SUM 952/2023 ("SUM 952"), which was filed by the second respondent to set aside HC/ORC 1189/2023 ("ORC 1189") in which the court had granted the claimant permission to enforce the arbitral award.

8.30 By way of HC/SUM 2897/2023 ("SUM 2897"), the second respondent applied for the claimant to produce eight categories of documents pursuant to O 11 r 3 of the ROC 2021, which it claimed were material to the determination of SUM 952.[61] The court subsequently granted the application brought by the second respondent to the limited extent that seven of the eight categories of documents requested in SUM 2897 were ordered to be produced by the claimant.[62]

8.31 In coming to its decision, the court had stated the three requirements that a party seeking a production of requested documents had to meet, *ie*, the requested documents must be: (a) described with sufficient particularity; (b) "material" to the "issues in the case"; and (c) proven to be in the possession or control of the producing party.[63]

56 *Sullivan, Sir Cornelius Sean v Hill Capital Pte Ltd* [2024] SGHC 198 at [75]–[76].
57 *Sullivan, Sir Cornelius Sean v Hill Capital Pte Ltd* [2024] SGHC 198 at [77].
58 *Sullivan, Sir Cornelius Sean v Hill Capital Pte Ltd* [2024] SGHC 198 at [75] and [78]–[79].
59 [2025] 3 SLR 362.
60 *DFD v DFE* [2025] 3 SLR 362 at [1].
61 *DFD v DFE* [2025] 3 SLR 362 at [2].
62 *DFD v DFE* [2025] 3 SLR 362 at [2].
63 *DFD v DFE* [2025] 3 SLR 362 at [22].

8.32 On the facts, the court had found difficultly in identifying the "issues of the case" for the purposes of assessing if the documents satisfied the legal criteria in O 11 r 3(1) of the ROC 2021.[64] The court observed that this was because they had to determine how O 11 r 3(1) of the ROC 2021 was to be applied beyond the quintessential context of an OC, in which the court could have had regard to the pleadings to identify the "issues in the case".[65]

8.33 Additionally, the court observed that the cases in which reference was made to the pleadings to identify the "issues of the case" involved the production of documents as part of the procedural steps for obtaining all required evidence in preparation for the trial of the OC. In such a case, the OC is the "case" for which production is sought, and the pleadings provide the reference point by which the "issues in the case" are to be identified.[66]

8.34 This led to two issues which the court dealt with in turn, namely: (a) whether there is any limitation on the "case" in respect of which the production of documents can be requested; and (b) how such "issues in the case" are to be identified where the proceedings in question are not founded upon pleadings but on affidavits like SUM 2987.[67]

8.35 First, the court held that there is no limitation on the "case" in respect of which the production of documents can be requested, and requests for production of documents can be made in connection with proceedings arising in the action such as SUM 2987.[68] As the word "case" in O 11 r 3(1)(*b*) of the ROC 2021 is not defined in the ROC 2021, the court held that it would encompass an "action" which is defined in O 1 r 3(1) of the ROC 2021 as "proceedings commenced by an [OC] or [OA]".[69] Hence, the fact that O 11 r 3(1) of the ROC 2021 on the production of requested documents uses a generic term like "case" rather than a defined term like "action" suggests that it is not the intention of the drafters of the ROC 2021 to limit requests for production of documents to be made only in connection with the "action" itself (such as the OC or the OA).[70] Thus, a party to an action could make a request for the production of documents in connection with any other proceedings arising in the action pursuant to O 11 r 3(1) of the ROC 2021.

64 *DFD v DFE* [2025] 3 SLR 362 at [23].
65 *DFD v DFE* [2025] 3 SLR 362 at [23].
66 *DFD v DFE* [2025] 3 SLR 362 at [23].
67 *DFD v DFE* [2025] 3 SLR 362 at [23].
68 *DFD v DFE* [2025] 3 SLR 362 at [24].
69 *DFD v DFE* [2025] 3 SLR 362 at [24].
70 *DFD v DFE* [2025] 3 SLR 362 at [24].

8.36 Second, the court held that reference could be made to the affidavits filed by parties in support of or responding to the OA or the application in identifying the "issues in the case".[71] The court observed that the "issues in the case" for the purposes of O 11 r 3(1) of the ROC 2021 are identified with reference to the factual positions taken by the parties in support of their respective cases, and are often identified from written statements in which the parties set out all the relevant facts.[72] As such, the closest functional equivalent of pleadings would be the affidavits filed by the parties in proceedings commenced by way of an OA or for applications filed in the OA or OC.[73]

8.37 In identifying issues in an affidavit, the court cautioned that affidavits would lack the precision or clarity that pleadings ought to have and not everything contained in an affidavit would be relevant in the process of issue identification.[74] In that regard, the court held that the two-fold objectives underlying the regime for production of documents in Singapore's rules of civil procedure continue to be relevant even when parties conduct their case on the basis of affidavits, namely that: (a) parties disclose all relevant evidence before the hearing of the matter; and (b) all relevant evidence is put before the court so that the court can base its decision on a firm foundation of fact.[75]

8.38 However, the court noted in *obiter* that an argument might be made that a narrower approach ought to be taken where the court is asked to order production of documents where parties conduct their case on the basis of affidavits.[76] Affidavits ought to set out in full both the factual positions and documentary evidence they rely on, unlike pleadings which are not accompanied by documentary evidence of any form. Therefore, where parties conduct their case on the basis of affidavits and a party chooses not to adduce certain documents, that party bears the evidential consequences of its decision.

V. Specific production of documents

8.39 In *Lutfi Salim bin Talib v British and Malayan Trustees Ltd*[77] ("*Lutfi*"), the defendant trustee appealed against the AR's order that the defendant produce three categories of documents pursuant to a request

71 *DFD v DFE* [2025] 3 SLR 362 at [26].
72 *DFD v DFE* [2025] 3 SLR 362 at [26].
73 *DFD v DFE* [2025] 3 SLR 362 at [26].
74 *DFD v DFE* [2025] 3 SLR 362 at [27].
75 *DFD v DFE* [2025] 3 SLR 362 at [29].
76 *DFD v DFE* [2025] 3 SLR 362 at [28].
77 [2024] 5 SLR 86.

for production of documents by the claimants under O 11 r 3 of the ROC 2021.[78] The request for production of documents by the claimants was in relation to an action alleging breaches of trust, fiduciary duty and duty of care by the defendant trustee.[79]

8.40 One of the issues on appeal before the High Court in relation to two out of the three categories ("Categories 3 and 6") of documents was whether the defendant's statement on affidavit that it did not have any further documents in its possession and/or control was conclusive in its nature.[80] The key issue was the scope of the exceptions to the general rule that an affidavit relating to the production of documents is conclusive.[81]

8.41 The court examined the body of case law that had developed under the previous versions of the Rules of Court, and found that an affidavit relating to the production of documents is not conclusive if there was a reasonable suspicion that further discoverable documents existed.[82]

8.42 However, the court held that the applicable test under O 11 r 3 of the ROC 2021 is the "plain and obvious" test, and the "reasonable suspicion" test under the previous versions of the Rules of Court had no place in the ROC 2021.[83] This is because the court cannot resolve a dispute as to the sufficiency of affidavits relating to production of documents at the interlocutory stage of proceedings, and a higher threshold is required before the court can go behind the affidavits.[84]

8.43 The court observed that the "plain and obvious" test is consistent with the Ideals in O 3 r 1 of the ROC 2021, in particular, expeditious proceedings, cost-effective work and efficient use of court resources, and would filter out often unproductive applications.[85]

8.44 In applying the "plain and obvious" test under O 11 r 3, the court allowed the defendant's appeal in relation to the production of Categories 3 and 6.[86] The documents contained within Categories 3 and 6 pertained to documents and correspondence between the defendant and their solicitors.[87] The court found that the evidence before the AR could

78 *Lutfi Salim bin Talib v British and Malayan Trustees Ltd* [2024] 5 SLR 86 at [1].
79 *Lutfi Salim bin Talib v British and Malayan Trustees Ltd* [2024] 5 SLR 86 at [1].
80 *Lutfi Salim bin Talib v British and Malayan Trustees Ltd* [2024] 5 SLR 86 at [1].
81 *Lutfi Salim bin Talib v British and Malayan Trustees Ltd* [2024] 5 SLR 86 at [22].
82 *Lutfi Salim bin Talib v British and Malayan Trustees Ltd* [2024] 5 SLR 86 at [31].
83 *Lutfi Salim bin Talib v British and Malayan Trustees Ltd* [2024] 5 SLR 86 at [32].
84 *Lutfi Salim bin Talib v British and Malayan Trustees Ltd* [2024] 5 SLR 86 at [33].
85 *Lutfi Salim bin Talib v British and Malayan Trustees Ltd* [2024] 5 SLR 86 at [34].
86 *Lutfi Salim bin Talib v British and Malayan Trustees Ltd* [2024] 5 SLR 86 at [40].
87 *Lutfi Salim bin Talib v British and Malayan Trustees Ltd* [2024] 5 SLR 86 at [35]–[36].

not support a finding that it was plain and obvious that there were further documents falling within the scope of Categories 3 and 6, which had not been produced.[88] Further, the court noted that the defendant's solicitors had confirmed that there were no such documents.[89]

8.45 However, the court cautioned that the defendant's affidavit was conclusive only for the purposes of the specific production application pursuant to O 11 r 3 of the ROC 2021, and it remained open for the claimants' counsel to cross-examine the relevant defendant's witnesses at trial on the defendant's assertion that there were no further documents.[90]

VI. Production of private or internal correspondence which are known adverse documents

8.46 Under O 11 rr 5(2)(*a*)–5(2)(*b*) of the ROC 2021, the court must not order the production of private or internal correspondence, unless (a) it is a special case; or (b) such correspondence are known adverse documents. These are novel provisions which have no parallel in the ROC 2014.

8.47 In *Cachet Multi Strategy Fund SPC v Feng Shi*,[91] the claimant ("Cachet") sought specific production of documents against the second defendant ("Mr Liu").[92] The AR below dismissed Cachet's application, holding that the documents sought were internal documents which could not be disclosed pursuant to O 11 r 5(2) of the ROC 2021. The AR found that the exceptions of "special case" or "known adverse documents" were not made out.[93] In particular, the burden was on Cachet to show that the "known adverse documents" exception could apply.[94]

8.48 Hearing Cachet's appeal, the General Division first considered the scope and purpose of the "known adverse documents" exception (as well as the obligation under O 11 r 2(1)(*b*) of the ROC 2021 to disclose known adverse documents during initial production). The General Division distilled the following principles from the consultation documents which predated the enactment of the ROC 2021:[95]

88 *Lutfi Salim bin Talib v British and Malayan Trustees Ltd* [2024] 5 SLR 86 at [39].
89 *Lutfi Salim bin Talib v British and Malayan Trustees Ltd* [2024] 5 SLR 86 at [39].
90 *Lutfi Salim bin Talib v British and Malayan Trustees Ltd* [2024] 5 SLR 86 at [41].
91 [2024] SGHC 327.
92 *Cachet Multi Strategy Fund SPC v Feng Shi* [2024] SGHC 327 at [1] and [15].
93 *Cachet Multi Strategy Fund SPC v Feng Shi* [2024] SGHC 327 at [18].
94 *Cachet Multi Strategy Fund SPC v Feng Shi* [2024] SGHC 327 at [22].
95 Civil Justice Committee, *Response to Feedback from Public Consultation on the Civil Justice Reports: Recommendations of the Civil Justice Commission and the Civil Justice Review Committee* (11 June 2021).

(a) First, known adverse documents included adverse documents that the party could have knowledge about through reasonable checks and searches.[96]

(b) Second, the purpose of the exception was to ensure the disclosure of all private and internal correspondence relevant to the dispute. Privacy and confidentiality were thus no defence when known adverse documents were concerned.[97]

(c) Third, while parties would have to expend time and costs to disclose known adverse documents, such expenditure was regarded as necessary. a regime without a requirement to disclose known adverse documents would: (i) incentivise the hiding or destruction of adverse documents; (ii) increase the number of requests for further documents; and (iii) operate unfairly in cases where there was information asymmetry between the parties.[98]

8.49 The General Division then observed that, under O 11 r 2(1)(*b*) read with O 11 r (6) of the ROC 2021, parties have a continuing duty to produce internal documents that they know or reasonably ought to know are adverse, unless there are other reasons for non-production such as privilege.[99]

8.50 With this in mind, the General Division disagreed with the AR that the burden was on Cachet to show that the internal documents were known adverse documents. Instead, the requested party, Mr Liu, was expected to either deny the existence or possession of known adverse documents, assert reasons (*eg*, privilege) for non-production, or disclose those known adverse documents.[100]

8.51 On the facts, the General Division dismissed Cachet's appeal. Cachet's requests were too broadly framed to satisfy the requirement of materiality under O 11 r 3(1)(*b*) of the ROC 2021.[101] a class of the requested documents was also covered by litigation privilege.[102] However, the General Division held that it was possible to limit the scope of Cachet's other requests to known adverse documents for the following reasons:[103]

96 *Cachet Multi Strategy Fund SPC v Feng Shi* [2024] SGHC 327 at [20].
97 *Cachet Multi Strategy Fund SPC v Feng Shi* [2024] SGHC 327 at [20].
98 *Cachet Multi Strategy Fund SPC v Feng Shi* [2024] SGHC 327 at [21].
99 *Cachet Multi Strategy Fund SPC v Feng Shi* [2024] SGHC 327 at [23].
100 *Cachet Multi Strategy Fund SPC v Feng Shi* [2024] SGHC 327 at [24].
101 *Cachet Multi Strategy Fund SPC v Feng Shi* [2024] SGHC 327 at [36].
102 *Cachet Multi Strategy Fund SPC v Feng Shi* [2024] SGHC 327 at [32].
103 *Cachet Multi Strategy Fund SPC v Feng Shi* [2024] SGHC 327 at [25].

(a) First, such an approach merely held Mr Liu to his continuing obligation to disclose all known adverse documents. Further, under O 11 r 4 of the ROC 2021, the court could at any time order a person to produce documents in his possession or control.[104]

(b) Second, known adverse documents would necessarily have a significant bearing on the case. Thus, the threshold of materiality would be satisfied.[105]

(c) Third, such an approach was not inconsistent with the "Ideals" or the principles in O 11 r 1(2) of the ROC 2021. Although a claimant was to proceed on the strength of the claimant's case and not on the weakness of the defendant's case, this did not mean that the defendant was entitled to conceal known adverse documents which he had not denied was in his possession.[106]

8.52 Hence, the General Division ordered Mr Liu to file an affidavit stating the existence and possession of known adverse documents falling under the classes not covered by litigation privilege. If there were any such known adverse documents, Mr Liu was to either disclose them or demonstrate on a *prima facie* basis that they were covered by litigation privilege.[107]

VII. Specific production of documents and consequences of breach of unless order

8.53 In *Wuhu Ruyi Xinbo Investment Partnership (Ltd Partnership) v Shandong Ruyi Technology Group Co, Ltd*,[108] the claimant ("Xinbo") was trying to enforce an arbitral award in Singapore. In the course of enforcement proceedings, Xinbo had failed to comply fully with an order for specific production of documents ("Production Order").[109] The AR made an unless order to secure Xinbo's full compliance with the Production Order, failing which Xinbo's OA would be dismissed ("Unless Order").[110] Accordingly, Xinbo filed a second supplementary

104 *Cachet Multi Strategy Fund SPC v Feng Shi* [2024] SGHC 327 at [25].
105 *Cachet Multi Strategy Fund SPC v Feng Shi* [2024] SGHC 327 at [25].
106 *Cachet Multi Strategy Fund SPC v Feng Shi* [2024] SGHC 327 at [26].
107 *Cachet Multi Strategy Fund SPC v Feng Shi* [2024] SGHC 327 at [36].
108 [2024] SGHC 308.
109 *Wuhu Ruyi Xinbo Investment Partnership (Ltd Partnership) v Shandong Ruyi Technology Group Co, Ltd* [2024] SGHC 308 at [23]–[24] and [26].
110 *Wuhu Ruyi Xinbo Investment Partnership (Ltd Partnership) v Shandong Ruyi Technology Group Co, Ltd* [2024] SGHC 308 at [27]–[28].

list of documents, as well as an affidavit explaining Xinbo's compliance.[111] However, the second respondent ("ETS") argued that Xinbo had not fully complied with the Unless Order. The AR below held that Xinbo had breached the Unless Order and dismissed Xinbo's claim.[112]

8.54 Hearing Xinbo's appeal, the General Division had to determine three key issues.[113] First, whether Xinbo had breached the Unless Order. Second, whether the court should enforce the sanctions in the Unless Order. Third, whether there was any fetter on the court's power to enforce an unless order by striking out an award creditor's application to enforce a New York Convention ("NYC") award.

A. First issue: whether Xinbo had breached the Unless Order

8.55 The General Division began by considering the applicable legal principles when assessing Xinbo's statements on affidavit that it had complied with the production order.[114] First, although Xinbo's affidavit was not filed in response to a specific production order issued under O 11 r 3 of the ROC 2021, the parties did not dispute that *Lutfi* was applicable. The General Division stated that *Lutfi* was correct to set a heightened threshold under the ROC 2021, under which the court would only go behind the affidavit if it is "plain and obvious" that there are further documents to be discovered.[115] Contrary to academic criticism of *Lutfi*,[116] this would not give *carte blanche* for parties to withhold material documents from production. If parties made bald assertions on affidavit that they had no responsive documents in their possession or control, they would be in breach of their secondary obligation to provide a satisfactory account of their inability to produce the documents ordered.[117]

111 *Wuhu Ruyi Xinbo Investment Partnership (Ltd Partnership) v Shandong Ruyi Technology Group Co, Ltd* [2024] SGHC 308 at [29]–[31].
112 *Wuhu Ruyi Xinbo Investment Partnership (Ltd Partnership) v Shandong Ruyi Technology Group Co, Ltd* [2024] SGHC 308 at [45]–[47].
113 *Wuhu Ruyi Xinbo Investment Partnership (Ltd Partnership) v Shandong Ruyi Technology Group Co, Ltd* [2024] SGHC 308 at [65] and [182].
114 *Wuhu Ruyi Xinbo Investment Partnership (Ltd Partnership) v Shandong Ruyi Technology Group Co, Ltd* [2024] SGHC 308 at [66]–[67].
115 *Wuhu Ruyi Xinbo Investment Partnership (Ltd Partnership) v Shandong Ruyi Technology Group Co, Ltd* [2024] SGHC 308 at [74].
116 Jeffrey Pinsler, "Case Law Developments Concerning Production of Documents" [2024] CLU 5.
117 *Wuhu Ruyi Xinbo Investment Partnership (Ltd Partnership) v Shandong Ruyi Technology Group Co, Ltd* [2024] SGHC 308 at [75]–[80].

8.56 Second, the General Division laid down four general expectations as to such affidavits:[118]

> (a) The affidavit should address all documents covered by the production order.
>
> (b) The court would expect some particularity in an affidavit. If a class of documents comprised different types of documents, it would be prudent to address each type of document specifically.
>
> (c) An explanation should not throw up as many questions as it answered. If there was an obvious follow-on question to a statement on affidavit, that question should be proactively addressed.
>
> (d) The affidavit should not be framed in equivocal terms that allow prevarication. For instance, a party should not ordinarily state that it was "unsure" if a document was in its possession or control.[119]

8.57 The General Division remarked that, given the heightened threshold, there was a fair argument that the courts ought to apply greater scrutiny to affidavits made under the ROC 2021.

8.58 On the facts, the General Division found that Xinbo had committed three breaches of the Unless Order and/or Production Order.

8.59 First, Xinbo had failed to provide an adequate explanation of how it had lost possession or control of certain WeChat messages responsive to the Production Order.[120] Notably, Xinbo's obligation to give an adequate explanation was not governed by the "plain and obvious" test.[121] Xinbo's explanation, that its representatives had changed their mobile phones, was deficient in three respects:

> (a) Xinbo had not accounted for all its representatives that could reasonably be believed to have responsive WeChat messages.[122]

118 *Wuhu Ruyi Xinbo Investment Partnership (Ltd Partnership) v Shandong Ruyi Technology Group Co, Ltd* [2024] SGHC 308 at [82]–[86].
119 *Price v Price* (1879) 48 LJ Ch 215.
120 *Wuhu Ruyi Xinbo Investment Partnership (Ltd Partnership) v Shandong Ruyi Technology Group Co, Ltd* [2024] SGHC 308 at [91(a)] and [116].
121 *Wuhu Ruyi Xinbo Investment Partnership (Ltd Partnership) v Shandong Ruyi Technology Group Co, Ltd* [2024] SGHC 308 at [117]–[118].
122 *Wuhu Ruyi Xinbo Investment Partnership (Ltd Partnership) v Shandong Ruyi Technology Group Co, Ltd* [2024] SGHC 308 at [101]–[105].

(b) Xinbo had not particularised the time(s) at which its representatives supposedly lost possession or control. This was an obvious follow-on question, especially since there would have been doubts as to the veracity of Xinbo's explanation that all of its representatives had lost possession of the WeChat messages for the same reason.[123]

(c) Xinbo had said nothing about whether its representatives could still access the WeChat messages on their old phones.[124]

8.60 Second, Xinbo had yet to disclose other responsive WeChat messages. Since these messages were in the possession of one Mr He Hanchu ("HHC"), the General Division had to consider the issue of when messages in a third party's possession might be said to be in the responding party's "possession or control".[125] The General Division, applying prior authorities on the scope of "possession, custody or power" under O 24 of the ROC 2014,[126] held that the notion of control encompassed not just the legal right to obtain documents from a third party, but also the practical ability to do so.[127] The General Division then adopted the following general principles[128] from the English High Court cases of *Berkeley Square Holdings Ltd v Lancer Property Asset Management Ltd*[129] and *Social Security v Al-Rajaan Al-Wazzan*:[130]

(a) The relationship between the parties is not determinative. It is not necessary for the responding party to have some sort of control over the third party, such as in the case of a parent and subsidiary relationship.

(b) There has to be an arrangement or understanding that the third party would search for, or make available, relevant documents.

(c) The arrangement or understanding can apply to all documents held by the third party. Alternatively, it can be limited to a particular class of documents, or to allow the third party to

123 *Wuhu Ruyi Xinbo Investment Partnership (Ltd Partnership) v Shandong Ruyi Technology Group Co, Ltd* [2024] SGHC 308 at [107]–[110].
124 *Wuhu Ruyi Xinbo Investment Partnership (Ltd Partnership) v Shandong Ruyi Technology Group Co, Ltd* [2024] SGHC 308 at [111].
125 *Wuhu Ruyi Xinbo Investment Partnership (Ltd Partnership) v Shandong Ruyi Technology Group Co, Ltd* [2024] SGHC 308 at [91(b)] and [120]–[122].
126 *Natixis, Singapore Branch v Lim Oon Kuin* [2024] 3 SLR 1502 at [35].
127 *Wuhu Ruyi Xinbo Investment Partnership (Ltd Partnership) v Shandong Ruyi Technology Group Co, Ltd* [2024] SGHC 308 at [123]–[126].
128 *Wuhu Ruyi Xinbo Investment Partnership (Ltd Partnership) v Shandong Ruyi Technology Group Co, Ltd* [2024] SGHC 308 at [129]–[130].
129 [2021] EWHC 849 (Ch).
130 [2024] EWHC 480 (Comm).

withhold confidential or commercially sensitive documents. In essence, there does not need to be "unfettered access".[131] On the other hand, the arrangement or understanding should not be limited to a specific request.

(d) The existence of the arrangement or understanding could be inferred from the surrounding circumstances. Evidence of past access to documents in the same proceedings would be a highly relevant factor.

(e) An understanding that the third party would co-operate in providing access is sufficient. There does not need to be an understanding as to *how* the documents would be accessed.

8.61 On the facts, it was "plain and obvious" that Xinbo had practical control over the WeChat messages in HHC's possession. HHC had voluntarily produced at least one message (and possibly more messages) on Xinbo's request, while rebuffing ETS's attempts to contact him.[132]

8.62 The third breach was that Xinbo had failed to produce the originals of the documents it disclosed for ETS's inspection.[133]

B. Second issue: whether the court should enforce the sanctions in the Unless Order

8.63 As a preliminary point, the General Division observed that an unless order is "self-executing" by nature, meaning that its sanctions are supposed to flow automatically upon breach, without needing to take out a separate summons.[134] However, the existing practice is for the court to consider, on its own motion, the appropriateness of the sanctions taking effect.[135] The General Division disagreed that this existing practice should be the general rule. The court should not proactively act to protect a defaulting party who had not itself applied for relief. However, this was *obiter* because ETS did not take the point, although Xinbo had not put in an application for relief.[136]

131 Disapproving of *Ardila Investments NV v ENRC NV* [2015] EWHC 3761 (Comm).
132 *Wuhu Ruyi Xinbo Investment Partnership (Ltd Partnership) v Shandong Ruyi Technology Group Co, Ltd* [2024] SGHC 308 at [131].
133 *Wuhu Ruyi Xinbo Investment Partnership (Ltd Partnership) v Shandong Ruyi Technology Group Co, Ltd* [2024] SGHC 308 at [133]–[141].
134 *Wuhu Ruyi Xinbo Investment Partnership (Ltd Partnership) v Shandong Ruyi Technology Group Co, Ltd* [2024] SGHC 308 at [143].
135 *Syed Mohamed Abdul Muthaliff v Arjan Bhisham Chotrani* [1999] 1 SLR(R) 361.
136 *Wuhu Ruyi Xinbo Investment Partnership (Ltd Partnership) v Shandong Ruyi Technology Group Co, Ltd* [2024] SGHC 308 at [149]–[150].

8.64 The General Division then considered the appropriate legal test for deciding whether the sanctions should take effect. In *Mitora Pte Ltd v Agritrade International (Pte) Ltd*[137] ("*Mitora*"), the Court of Appeal ("CA") held that even for an intentional and contumelious breach, the court would be guided by considerations of proportionality. However, the General Division held that any assessment of proportionality must be on a light-touch basis,[138] agreeing with Goh Yihan J's earlier decision in *DNG FZE v PayPal Pte Ltd*.[139] The General Division reached this conclusion for the following reasons:

> (a) First, the principles in *Mitora* should be properly situated in the context of the ROC 2021. The traditional assumption was that procedural defaults could be indulged if any prejudice occasioned was compensable by costs. This assumption should be sidelined. Under O 3 r 2(4)(*d*) of the ROC 2021, where there has been non-compliance with a court order, the court could, *inter alia*, dismiss proceedings or give the appropriate judgment if the non-compliance is materially inconsistent with any of the "Ideals", even if the non-compliance can be compensated by costs.[140]
>
> (b) Second, a party who breaches an unless order would have breached at least two successive obligations to do the same thing. There has to be a strong *prima facie* assumption that enforcing the unless order would not be disproportionate.[141]
>
> (c) Third, in making an unless order, the court would already have considered the proportionality of the stated sanction, and in the context of the ROC 2021, whether the sanction is consistent with the "Ideals".[142] Were the court to now undertake a full reconsideration of proportionality, that would be an attack on the earlier decision.[143] On that related point, any concerns of

137 [2013] 3 SLR 1179.
138 *Wuhu Ruyi Xinbo Investment Partnership (Ltd Partnership) v Shandong Ruyi Technology Group Co, Ltd* [2024] SGHC 308 at [153].
139 [2024] SGHC 65.
140 *Wuhu Ruyi Xinbo Investment Partnership (Ltd Partnership) v Shandong Ruyi Technology Group Co, Ltd* [2024] SGHC 308 at [163]–[165].
141 *Wuhu Ruyi Xinbo Investment Partnership (Ltd Partnership) v Shandong Ruyi Technology Group Co, Ltd* [2024] SGHC 308 at [155].
142 *Wuhu Ruyi Xinbo Investment Partnership (Ltd Partnership) v Shandong Ruyi Technology Group Co, Ltd* [2024] SGHC 308 at [156] and [167].
143 *Wuhu Ruyi Xinbo Investment Partnership (Ltd Partnership) v Shandong Ruyi Technology Group Co, Ltd* [2024] SGHC 308 at [156]–[158].

disproportionality should have been ventilated when the unless order was being *sought*.[144]

(d) Fourth, on the facts of *Mitora*, there had been substantive compliance with the unless order. The CA there was concerned that striking out a claim for an arid or technical breach would be disproportionate. *Mitora* is thus of little assistance where the unless order has not been substantively complied with.[145]

8.65 In the present case, Xinbo's breach was intentional and contumelious, and Xinbo did not argue otherwise.[146] On the issue of proportionality, specific production orders would only be made in respect of documents which were material to the adjudicative outcome. Thus, Xinbo's breaches had compromised ETS's ability to present its case, as well as the court's interest in ensuring a measure of fair play in the conduct of litigation.[147] Furthermore, Xinbo's breaches were wide-ranging and affected a substantial portion of the issues in its suit. Hence, the prejudice occasioned by Xinbo's breaches could not be addressed by drawing adverse inferences against Xinbo.[148] Accordingly, it was appropriate for the sanctions in the Unless Order to be enforced.[149]

C. Third issue: whether the NYC or principle of minimal curial intervention fettered the court's power to enforce the Unless Order

8.66 Finally, Xinbo argued that since it was seeking to enforce an NYC award, a striking out sanction would be tantamount to fashioning a new ground for refusal of enforcement, in breach of the NYC, s 31(1) of the International Arbitration Act 1994[150] and the principle of minimal curial intervention.[151] The General Division rejected this argument for the following reasons:

144 *Wuhu Ruyi Xinbo Investment Partnership (Ltd Partnership) v Shandong Ruyi Technology Group Co, Ltd* [2024] SGHC 308 at [160].
145 *Wuhu Ruyi Xinbo Investment Partnership (Ltd Partnership) v Shandong Ruyi Technology Group Co, Ltd* [2024] SGHC 308 at [161]–[162].
146 *Wuhu Ruyi Xinbo Investment Partnership (Ltd Partnership) v Shandong Ruyi Technology Group Co, Ltd* [2024] SGHC 308 at [169]–[170].
147 *Wuhu Ruyi Xinbo Investment Partnership (Ltd Partnership) v Shandong Ruyi Technology Group Co, Ltd* [2024] SGHC 308 at [174]–[175].
148 *Wuhu Ruyi Xinbo Investment Partnership (Ltd Partnership) v Shandong Ruyi Technology Group Co, Ltd* [2024] SGHC 308 at [179]–[180].
149 *Wuhu Ruyi Xinbo Investment Partnership (Ltd Partnership) v Shandong Ruyi Technology Group Co, Ltd* [2024] SGHC 308 at [168].
150 2020 Rev Ed.
151 *Wuhu Ruyi Xinbo Investment Partnership (Ltd Partnership) v Shandong Ruyi Technology Group Co, Ltd* [2024] SGHC 308 at [184] and [198].

(a) First, it is normatively objectionable for any party invoking the Singapore courts' jurisdiction to claim to enjoy immunity from any of its procedural rules. Compliance with court orders is a matter that lies exclusively within the province of the courts.[152]

(b) Second, Art III of the NYC expressly subjects the enforcement of an NYC award to the procedural rules of the enforcing state.[153]

(c) Third, the Singapore courts has always applied its domestic procedural rules in the context of enforcement of arbitral awards.[154] For instance, the doctrine of transnational issue estoppel applies in enforcement proceedings.[155] Similarly, failure to make full and frank disclosure of all material facts may result in the court setting aside its earlier grant of permission to enforce the award.[156]

8.67 Accordingly, the General Division held that its powers were not fettered by the arbitral context and dismissed Xinbo's OA for permission to enforce its award.[157]

VIII. Extended doctrine of *res judicata*

8.68 In *Lim Oon Kuin v Rajah & Tann Singapore LLP*,[158] the CA had to consider the novel issue of whether and how the extended doctrine of *res judicata*, also known as the rule in *Henderson v Henderson*[159] ("*Henderson*"), might be applied within the same action.[160]

8.69 In that case, the appellants applied by originating summons ("OS") to restrain the respondent ("R&T") from representing two companies of whom the appellants were directors or former directors ("Companies"), as well as the Companies' interim judicial managers,

152 *Wuhu Ruyi Xinbo Investment Partnership (Ltd Partnership) v Shandong Ruyi Technology Group Co, Ltd* [2024] SGHC 308 at [186] and [200].
153 *Wuhu Ruyi Xinbo Investment Partnership (Ltd Partnership) v Shandong Ruyi Technology Group Co, Ltd* [2024] SGHC 308 at [187]–[193] and [196].
154 *Wuhu Ruyi Xinbo Investment Partnership (Ltd Partnership) v Shandong Ruyi Technology Group Co, Ltd* [2024] SGHC 308 at [194]–[195] and [197].
155 *The Republic of India v Deutsche Telekom AG* [2024] 1 SLR 56.
156 *CZD v CZE* [2023] 5 SLR 806.
157 *Wuhu Ruyi Xinbo Investment Partnership (Ltd Partnership) v Shandong Ruyi Technology Group Co, Ltd* [2024] SGHC 308 at [201].
158 [2024] 2 SLR 654.
159 (1843) 3 Hare 100.
160 *Lim Oon Kuin v Rajah & Tann Singapore LLP* [2024] 2 SLR 654 at [2].

judicial managers, and liquidators ("Insolvency Representatives"). The application was made on the basis that R&T possessed confidential information and documents which they could misuse in their capacity as solicitors for the Companies and their Insolvency Representatives.[161]

8.70 On 12 September 2022, R&T informed the appellants that it had ceased to act for the Companies and their Insolvency Representatives and asked the appellants to discontinue the OSes. On 22 September 2022, R&T applied to strike out the OSes ("Striking Out Applications"). On 25 September 2022, the appellants applied to amend the OSes to include three groups of amendments: (a) a prayer for declarations that, *inter alia*, R&T had acted in breach of confidence; (b) prayers that, *inter alia*, R&T deliver up the confidential information to the appellants and be restrained from using the information; and (c) prayers seeking orders that R&T disgorge the fees it received from representing the Companies and the Insolvency Representatives and/or pay damages for breach of confidence ("Amendment Applications").[162]

8.71 The General Division upheld the AR's decision to disallow the Amendment Applications and to allow the Striking Out applications.[163] On appeal, the CA had to determine three issues. First, whether the rule in *Henderson* could apply to bar the Amendment Applications. Second, whether the Amendment Applications otherwise amounted to an abuse of process. Third, the consequential directions to be issued.[164]

8.72 On the first issue, the CA held that the rule in *Henderson* did not apply to the present case because there had been no prior judicial determination at which the relevant issue could and should have been raised.[165] The CA made a number of observations on the operation and scope of the rule in *Henderson*:

> (a) First, the rule was originally envisioned as an extension of *res judicata* principles. Thus, it sought to protect the same underlying interest as other forms of *res judicata*, *ie*, that there should be finality in litigation and that a party should not be vexed twice in the same matter. The protection of this underlying interest is necessarily linked to the existence of a prior judicial determination.[166]

161 *Lim Oon Kuin v Rajah & Tann Singapore LLP* [2024] 2 SLR 654 at [5]–[8].
162 *Lim Oon Kuin v Rajah & Tann Singapore LLP* [2024] 2 SLR 654 at [9]–[11].
163 *Lim Oon Kuin v Rajah & Tann Singapore LLP* [2024] 2 SLR 654 at [12]–[15].
164 *Lim Oon Kuin v Rajah & Tann Singapore LLP* [2024] 2 SLR 654 at [21].
165 *Lim Oon Kuin v Rajah & Tann Singapore LLP* [2024] 2 SLR 654 at [29].
166 *Lim Oon Kuin v Rajah & Tann Singapore LLP* [2024] 2 SLR 654 at [23]–[24].

(b) Second, while the rule could apply to bar parties from raising issues at later stages of the same action, this similarly protects finality because there would have been a judicial determination at an earlier stage of that action.[167]

(c) Third, the rule is recognised as falling under, and indeed the root of, the doctrine of abuse of process.[168] Other categories of abuse of process do not depend on the existence of a prior judicial determination. That was the source of confusion in the present case. However, in contrast to the other categories of abuse of process, the rule in *Henderson* is largely concerned with preventing unfairness stemming from a party's failure to raise a point at a prior determination where it could and should have been raised.[169]

(d) Fourth, the more "final" the nature of the prior determination, the stricter the *Henderson* doctrine and the more likely it is that a party would be barred from raising it in later proceedings issues which could and should have been raised at that determination.[170]

(e) Fifth, the concepts of *res judicata* and abuse of process are distinct but overlapping areas of law which shared the common aim of preventing unfair litigation from proceeding. The rule in *Henderson*, which lies at the confluence of these two concepts, is concerned with protecting the finality of a prior determination. Accordingly, it could apply even where the parties do not have any improper or dishonest motives. At the same time, the rule in *Henderson* could capture an expanded scope of issues. Accordingly, the courts have been cautious to ensure that there is an element of impropriety, dishonesty or unjust harassment which justifies precluding a party from raising the issue.[171]

8.73 More generally, the CA held that where there was no prior determination, delay alone should not ordinarily bar the subsequent raising of new issues unless there was irremediable prejudice to the other party. The inquiry into abuse of process should have focused on the lack of *bona fides* on the appellants' part in bringing the Amendment Applications.[172]

167 *Lim Oon Kuin v Rajah & Tann Singapore LLP* [2024] 2 SLR 654 at [25].
168 *Goh Nellie v Goh Lian Teck* [2007] 1 SLR(R) 453.
169 *Lim Oon Kuin v Rajah & Tann Singapore LLP* [2024] 2 SLR 654 at [26]–[27].
170 *Lim Oon Kuin v Rajah & Tann Singapore LLP* [2024] 2 SLR 654 at [28].
171 *Lim Oon Kuin v Rajah & Tann Singapore LLP* [2024] 2 SLR 654 at [31]–[33].
172 *Lim Oon Kuin v Rajah & Tann Singapore LLP* [2024] 2 SLR 654 at [30].

8.74 Segueing into the second issue, the threshold for finding an abuse of process is high.[173] On the facts, the CA disagreed with the General Division that the appellants had clearly filed the Amendment Applications for collateral purposes. Crucially, the reliefs sought in the Amendment Applications related to the real issue of confidentiality which was in dispute. The undue delay and timing in the filing of the Amendment Applications did not indicate clearly that the appellants had no genuine wish to pursue those reliefs. An equally reasonable conclusion to draw was that the appellants' pleadings and litigation strategy had simply not been carefully thought through.[174]

8.75 Further, the appellants' delay had not caused irremediable prejudice to R&T which was not compensable by costs.[175] First, the proceedings had remained at a fairly nascent stage; there had not been a hearing on the substantive merits. Second, R&T's voluntary disengagement was not irreversible. In any case, it was difficult to say that the appellant's original claim for only injunctive relief amounted to a representation that they would not add further claims in the future.[176]

8.76 As both the rule in *Henderson* and the doctrine of abuse of process were inapplicable, the CA allowed the Amendment Applications. Accordingly, R&T's disengagement had not given the appellants all the reliefs they sought in the OSes. R&T's Striking Out Applications were therefore dismissed.[177] The CA gave consequential directions that, *inter alia*, the matter would proceed as an OC under the ROC 2021.[178]

IX. Permissible scope of consent interlocutory judgment

8.77 In *Crapper Ian Anthony v Salmizan bin Abdullah*,[179] the CA was invited to decide on two main questions: (a) first, whether parties in a negligence claim for personal injuries arising from motor vehicle accidents ("PIMA") are precluded from entering into an interlocutory judgment by consent without admitting causation; and (b) second, whether the court can order bifurcation of proceedings when causation is reserved.[180] The appeal arose out of a personal injury claim commenced

173 *Beyonics Asia Pacific Ltd v Goh Chan Peng* [2022] 1 SLR 1.
174 *Lim Oon Kuin v Rajah & Tann Singapore LLP* [2024] 2 SLR 654 at [40].
175 *Lim Oon Kuin v Rajah & Tann Singapore LLP* [2024] 2 SLR 654 at [45].
176 *Lim Oon Kuin v Rajah & Tann Singapore LLP* [2024] 2 SLR 654 at [42] and [44].
177 *Lim Oon Kuin v Rajah & Tann Singapore LLP* [2024] 2 SLR 654 at [46].
178 *Lim Oon Kuin v Rajah & Tann Singapore LLP* [2024] 2 SLR 654 at [47(c)].
179 [2024] 1 SLR 768.
180 *Crapper Ian Anthony v Salmizan bin Abdullah* [2024] 1 SLR 768 at [32].

before the Magistrate's Court which was brought by the respondent against the appellant for general damages and special damages.[181]

8.78 Both the appellant and respondent had indicated by consent that interlocutory judgment is entered for the respondent against the appellant at 90%, "leaving the issue of damages and *causation* to be assessed" [emphasis added] at the subsequent stage of the proceedings ("AD Stage").[182] However, during the assessment of damages hearing ("AD Hearing"), a deputy registrar ("DR") of the State Courts expressed concern over whether parties could reserve the issue of causation to the AD Stage.[183]

8.79 The matter was subsequently brought before the General Division to be adjudicated upon and it was held that causation could not be reserved at all to the AD Stage in PIMA cases.[184] Following the judgment, the appellant appealed to the Appellate Division of the High Court ("Appellate Division").[185] The Appellate Division held that while there was no *prima facie* case of error in the judgment, there was a question of importance upon which further argument and decision of a higher tribunal would be to the public advantage.[186] As such, the appellant filed an application for the appeal to be transferred to the CA, which was allowed by consent.[187]

8.80 On the first question, the CA held that liability does not need to be fully established before a consent interlocutory judgment can be entered in the context of PIMA cases.[188] In arriving at their decision, the CA had examined the cases cited in the judgment by the General Division, as well as the independent counsel Mr Cavinder Bull SC ("Mr Bull"), and found that the cases cited in support of the holding in the judgment do not concern situations of parties entering interlocutory judgments by consent with an express reservation for causation to be determined at the AD Stage.[189] Accordingly, the CA held that they do not support the proposition that an interlocutory judgment can only be entered after the liability has been established.[190]

181 *Crapper Ian Anthony v Salmizan bin Abdullah* [2024] 1 SLR 768 at [5].
182 *Crapper Ian Anthony v Salmizan bin Abdullah* [2024] 1 SLR 768 at [6].
183 *Crapper Ian Anthony v Salmizan bin Abdullah* [2024] 1 SLR 768 at [10].
184 *Crapper Ian Anthony v Salmizan bin Abdullah* [2024] 1 SLR 768 at [12]–[14].
185 *Crapper Ian Anthony v Salmizan bin Abdullah* [2024] 1 SLR 768 at [22].
186 *Crapper Ian Anthony v Salmizan bin Abdullah* [2024] 1 SLR 768 at [22].
187 *Crapper Ian Anthony v Salmizan bin Abdullah* [2024] 1 SLR 768 at [23].
188 *Crapper Ian Anthony v Salmizan bin Abdullah* [2024] 1 SLR 768 at [35].
189 *Crapper Ian Anthony v Salmizan bin Abdullah* [2024] 1 SLR 768 at [39].
190 *Crapper Ian Anthony v Salmizan bin Abdullah* [2024] 1 SLR 768 at [37].

8.81 The CA further held that the definition of an "interlocutory judgment" does not bear any connotation of establishing liability and had broadly agreed with the definition of an "interlocutory judgment" in *Fidelitas Shipping Co Ltd v V/O Exportchleb*,[191] which held that it is an issue separately determined that is not decisive of the suit.[192] In that regard, the court held that an interlocutory judgment is an intermediate judgment that determines a preliminary or subordinate point but does not finally decide the case.[193]

8.82 Turning to the second question, the CA held that there is nothing in the ROC 2021 that requires a trial be bifurcated along the lines of liability and quantum of damages.[194] The court agreed with Mr Bull that the court has wide powers to bifurcate proceedings, which is intrinsically a matter of case management for the court's discretion,[195] and the key question that has to be answered when ordering a bifurcation is whether the bifurcation is just and convenient in the effective and efficient disposal of the matter.[196] This is supported by precedent, where the court had not always ordered bifurcation on the basis of liability and quantum of damages.[197]

8.83 In closing, the court made some observations in *obiter* that while causation and damage are necessary elements to establish liability in the tort of negligence following *Tan Woo Thian v PricewaterhouseCoopers Advisory Services Pte Ltd*,[198] it does not follow that causation and damage must necessarily be admitted for parties to enter into a consent interlocutory judgment.[199]

X. Stay of appeal pending payment of costs

8.84 In *Huttons Asia Pte Ltd v Chen Qiming*,[200] the Appellate Division had to consider O 21 r 2(6) of the ROC 2021, a novel provision which sets out the court's express power to stay an appeal pending payment of costs below.[201]

191 [1966] 1 QB 630.
192 *Crapper Ian Anthony v Salmizan bin Abdullah* [2024] 1 SLR 768 at [46]–[47].
193 *Crapper Ian Anthony v Salmizan bin Abdullah* [2024] 1 SLR 768 at [47].
194 *Crapper Ian Anthony v Salmizan bin Abdullah* [2024] 1 SLR 768 at [57].
195 *Crapper Ian Anthony v Salmizan bin Abdullah* [2024] 1 SLR 768 at [55].
196 *Crapper Ian Anthony v Salmizan bin Abdullah* [2024] 1 SLR 768 at [57].
197 *Crapper Ian Anthony v Salmizan bin Abdullah* [2024] 1 SLR 768 at [58].
198 [2021] 1 SLR 1166.
199 *Crapper Ian Anthony v Salmizan bin Abdullah* [2024] 1 SLR 768 at [63].
200 [2024] 2 SLR 401.
201 *Huttons Asia Pte Ltd v Chen Qiming* [2024] 2 SLR 401 at [3].

8.85 In that case, the appellant ("Chen") failed to pay costs ordered by the General Division below ("Costs Order").[202] Chen's solicitors said, without providing a reason, that they did not have instructions to accept service of an order for examination of judgment debtor ("EJD") against Chen.[203] The first and second respondents ("Huttons") applied to stay Chen's appeal.[204]

8.86 Under the ROC 2014, special or exceptional circumstances are required before the court would invoke its inherent powers under O 92 r 4 to stay an appeal pending payment of costs below. Since costs were generally recoverable under the normal enforcement process, the payment of costs was a circumstance extraneous to the appeal and should not curtail a party's right of appeal.[205] Accordingly, case law has established that the following two situations do not amount to special or exceptional circumstances. First, that an appellant has the ability to pay the costs below but has not done so. Second, that enforcement proceedings would have to be commenced overseas against a judgment debtor.[206]

8.87 The Appellate Division observed that the court's inherent powers were now to be found in O 3 r 2(2) of the ROC 2021. However, O 21 r 2(6) expressly provides that the court may stay any appeal if a party refuses or neglects to pay any costs ordered within the specified time.[207]

8.88 The Appellate Division held that the threshold of "special or exceptional circumstances" is not applicable under O 21 r 2(6) of the ROC 2021. Thus, if an appellant had refused or neglected to pay the ordered costs, the court could stay an appeal in the two situations mentioned at para 8.86 above. However, the Appellate Division noted that O 21 r 2(6) is not phrased in mandatory terms, *ie*, it uses the word "may", not "shall". Therefore, the court retains a discretion to decide whether to stay an appeal, and the two situations remain useful as relevant circumstances to consider in exercising that discretion.[208]

8.89 On the facts, the Appellate Division held that Chen's attempts to evade payment of costs, as well as the real possibility that Huttons might

202 *Huttons Asia Pte Ltd v Chen Qiming* [2024] 2 SLR 401 at [1].
203 *Huttons Asia Pte Ltd v Chen Qiming* [2024] 2 SLR 401 at [10].
204 *Huttons Asia Pte Ltd v Chen Qiming* [2024] 2 SLR 401 at [1].
205 *Huttons Asia Pte Ltd v Chen Qiming* [2024] 2 SLR 401 at [21].
206 *Independent State of Papua New Guinea v PNG Sustainable Development Program Ltd* [2020] 1 SLR 97.
207 *Huttons Asia Pte Ltd v Chen Qiming* [2024] 2 SLR 401 at [22]–[23].
208 *Huttons Asia Pte Ltd v Chen Qiming* [2024] 2 SLR 401 at [29].

have to enforce the Costs Order overseas, were sufficient reasons to stay the appeal under O 21 r 2(6) of the ROC 2021:[209]

> (a) First, the fact that Chen's solicitors refused to accept service of the EJD order, without explaining why they lacked instructions from Chen to accept service, suggested that Chen was evading payment.[210]
>
> (b) Second, although Chen asserted that his finances had not been stable in recent times, no evidence was adduced to support this assertion. Further, the fact that Chen was apparently able to fund the appeal suggested that he had the capacity and means to comply with the Costs Order but was simply refusing to do so.[211]
>
> (c) Third, it appeared that Huttons would have to enforce the Costs Order overseas and would face difficulty doing so. Huttons might not know Chen's current residential address. Further, Chen had blatantly avoided disclosing his residential address in his prior affidavit. The irresistible inference was that he was seeking to impede any possible attempts to enforce the Costs Order.[212]

209 *Huttons Asia Pte Ltd v Chen Qiming* [2024] 2 SLR 401 at [37].
210 *Huttons Asia Pte Ltd v Chen Qiming* [2024] 2 SLR 401 at [31].
211 *Huttons Asia Pte Ltd v Chen Qiming* [2024] 2 SLR 401 at [34].
212 *Huttons Asia Pte Ltd v Chen Qiming* [2024] 2 SLR 401 at [36].