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ORDER 3 RULE 2(2): RECENT CASES ON THE COURT’S GENERAL POWER

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A Significance of O 3 r 2(2) of RoC 2021

1 Three years have passed since the introduction of the Rules of Court 2021 ("RoC 2021"). The purpose of this article is to examine how the courts have applied or considered O 3 r 2(2) of the Rules of Court 2021 ("RoC 2021") in this period. Order 3 r 2(2) states:

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

2 Order 3 r 2(2) is an extremely significant rule as it empowers the court to make appropriate orders when a rule lacks specificity or there is no applicable rule. Order 3 r 2(2) must be read in the context of the new philosophy of the RoC 2021 which is to reach fair and just outcomes in situations which are not specifically addressed by the RoC 2021. As stated at para 9 of the Introduction to the Civil Justice Commission Report:

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

3 This new approach is complimented by O 3 r 2(2) of the RoC 2021, which enables the court, when faced with the absence of a rule to regulate an issue, to "do whatever [it] considers necessary on the facts of the case before it to ensure that justice is done". There are multiple judgments illustrating how this rule has been, or might be, engaged in ensuring just outcomes. These include areas such as the production of documents, stay of

proceedings, setting aside a consent order, security for costs prior to the commencement of an action, amendment of a judgment or order, abuse of process and striking out a related claim, the filing of a notice of intention to contest or not contest in the absence of an originating process, and the power to impose terms in the absence of statutory provisions. In the final part of this article, consideration will be given to the relationship between O 3 r 2(2) and the doctrine of inherent power.

B Production of documents

4 Unlike the position under the Rules of Court (2014 Rev Ed) ("RoC 2014"), the RoC 2021 do not specifically provide for the inspection and production of documents in pleadings or affidavits. Order 24 r 10(1) of the RoC 2014 provided that if a party's pleading or affidavit referred to a document, any other party could serve a notice to produce it for inspection pursuant to the procedure set out in O 24 r 10(2). If the notice was challenged or ignored, an application could be made to the court under O 24 r 11 of the RoC 2014. The rationale of the procedure is that a party must have the necessary information before he responds to a pleading or affidavit. If a document is referred to, it should be made available to the responding party so that he is not at a disadvantage when pleading his case.

5 In *Interactive Digital Finance Ltd v Credit Suisse AG* [2023] 5 SLR 1735 ("*Interactive Digital*"), the General Division of the High Court resolved the issue by deciding that the court may order the production of documents referred to in the pleadings pursuant to O 11 r 4 of the RoC 2021. (This rule and other rules of O 11 of the RoC 2021 are considered in previous issues: see (2023) CLU 7 (September 2023, Issue 7) and (2022) CLU 7 (July 2022, Issue 7)).

6 In *Interactive Digital*, Chua Lee Ming J also pointed out that, apart from O 11 r 4, the court also has the general power under O 3 r 2(2) of the RoC 2021, in the absence of statutory provision, "... to do

whatever [it] considers necessary ... to ensure that justice is done ... so long as it is not prohibited by law and is consistent with the Ideals" (at [35] & [37]). As the learned judge observed, O 3 r 2(2) enables a judge to make the order of production under this rule (before the single application pending trial and in the absence of an application) to ensure a just outcome in accordance with the Ideals in O 3 r 1(2). Chua J specifically referred to the Ideals of expeditious proceedings (O 3 r 1(2)(b)) and fair and practical results suited to the needs of the parties (O 3 r 1(2)(e)).

7 As O 11 r 4 concerns the general power of the court to order the production of documents (without particularising the circumstances in which this power might be exercised), it was appropriate for the learned judge to consider the application of O 3 r 2(2) in the light of the Ideals. If there is any doubt as to whether O 11 r 4 could apply, O 3 r 2(2) would undoubtedly enable the court to reach a just outcome in accordance with the Ideals. In contrast, O 3 r 2(2) has no application where a statutory provision or rule specifically addresses and governs the determination of the issue (see para C10 below).

C Stay of proceedings

8 The effect of O 3 r 2(2) is that, in the absence of a statutory rule which restricts the power of the court in a particular situation, lawyers can no longer argue that the court lacks the discretion to make orders (including the alteration of a previous order) which would result in a just outcome. In *HQH Capital Ltd v Chen Liping* [2023] 4 SLR 885 ("*HQH*"), the defendant argued that the judge who had previously issued a Tomlin Order (a consent order where a court action is stayed, on agreed-upon terms which are included in a schedule to the order) was *functus officio* when he subsequently granted a revised Tomlin Order ("*Revised Order*"), except as to his power to enforce or clarify or correct the terms of the schedule to the order.

9 The defendant submitted that the judge did not have the power to lift the stay for the purpose of granting the

Revised Order. This argument failed to recognise that a stay order is an order that suspends the continuation of court proceedings which may be resumed if it is necessary for the court to enforce the terms or make a new order (the Revised Order in *HQH*). The court referred to O 3 r 2(2) as the rule which empowers the court to stay proceedings. The power to stay proceedings entails the power to lift a stay (*HQH* at [34]). Although the Appellate Division of the High Court did not deliver a judgment in this case, it confirmed this proposition (see the editorial note in this case).

10 Order 3 r 2(2) has no application in relation to a stay of proceedings (or any other matter) where a statutory provision or rule specifically addresses and governs the determination of the issue. For example, in *Presscrete Engineering Pte Ltd v SsangYong-Wai Fong Joint Venture* [2023] SGHC 8 ("*Presscrete*"), a party sought a stay of court proceedings pursuant to s 6(2) of the Arbitration Act 2001 (2020 Rev Ed) ("*Arbitration Act*") and, in the alternative, under O 3 r 2(2). As s 6(2) sets out the principles governing such an application, there is no need to resort to O 3 r 2(2) (as the applicant did in that case). Indeed, it would be wrong for the court to decide a matter according to the broader principles of justice contemplated by O 3 r 2(2) when specific criteria or principles for determining that matter have been provided for by a statutory provision or rule. This is clearly indicated by the opening sentence of O 3 r 2(2): "Where there is no express provision in these Rules or any other written law on any matter ..." (see para A1 above). Therefore, in *Presscrete*, the court considered s 6 of the Arbitration Act alone in reaching its decision to grant a stay (see *Presscrete* at [88]).

D Contractual consent orders

11 Despite the broad power of the court to ensure a just outcome or to prevent injustice pursuant to O 3 r 2(2) of the RoC 2021, this is a procedural rule which does not entitle the court to alter the

parties' contractual rights. In *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2017] 2 SLR 12 ("*Turf Club*") (which was decided under the RoC 2014), the Court of Appeal had ruled that while a court has a residual discretion not to enforce contractual or consensual "unless" orders or other consensual procedural orders, this discretion does not extend to contractual consent orders that affect the substantive rights of the parties (at [159]). Therefore, in *Blomberg, Johan Daniel v Khan Zhi Yan* [2024] 3 SLR 1079 ("*Blomberg*"), the General Division ruled that a "contractual consent order should only be set aside pursuant to ordinary principles of contract law, and accordingly only the existence of recognised vitiating factors in contract law can justify setting aside such contractual consent orders" (at [40]). It follows that O 3 r 2(2) does not affect the ruling of the Court of Appeal in *Turf Club*. A distinction must always be made between consensual procedural orders (orders based on procedural arrangements agreed to by the parties) and consensual contractual orders, which are governed by substantive law.

E Security for costs in proceedings prior to commencement of action

12 Order 3 r 2(2) of the RoC 2021 may be applicable when there is a need for an order prior to the commencement of proceedings, as when a party seeks security for costs. This was the situation in *Gillingham James Ian v Fearless Legends Pte Ltd* [2023] SGHCR 13 ("*Gillingham*"), which concerned an order for the pre-action production of documents and information ("the order") pursuant to O 11 r 11 of the RoC 2021. The respondents argued that the order should be made conditional on the provision of security of costs by the applicant because the respondent had incurred liability for costs and fees in responding to the pre-action application and recovery from the applicant was unlikely.

13 As the court pointed out in *Gillingham*, unlike O 24 r 6(6)(a) of RoC 2014, O 11 r 11 of the RoC 2021 does not address security for costs before action. Nevertheless, the court was satisfied that it could order security pursuant to O 3 r 2(2) of RoC 2021 (*Gillingham* at [53]). The issue was what principles should govern the decision to grant security for costs in proceedings prior to the initiation of an action. As O 9 r 12 of the RoC 2021 governs security for costs in the action itself, it did not operate to pre-action applications. In any event, O 3 r 2(2) is not constrained by any other rule. It simply requires the court to reach a fair and just outcome on the facts before it. Indeed, this was the approach of the learned Assistant Registrar who determined that it would be just to make the order for the production of documents and information conditional upon the provision of security for costs.

F Non-substantive amendments of judgments and orders

14 The former O 20 r 11 of the RoC 2014 stated: "Clerical mistakes in judgments or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the Court by summons without an appeal." As there is no equivalent rule in the RoC 2021, the question arises as to whether the court may exercise this power pursuant to O 3 r 2(2). In *TG Master Pte Ltd v Tung Kee Development (Singapore) Pte Ltd* [2023] SGHC 64 at [9], the court thought it "arguable" that O 3 r 2(2) of the RoC 2021 preserves this power. However, it took the view that this power "might be more properly located" within the doctrine of inherent power (see also *Retrospect Investment (S) Pte Ltd v Lateral Solutions Pte Ltd* [2020] 1 SLR 763 at [19] in the context of O 92 rr 4 and 5 of the RoC 2014). The relationship between the inherent power of the court and O 3 r 2(2) of the RoC 2021 is considered below under the heading "Comparing O 3 r 2(2) with the court's inherent power" (see paras J18–22 below).

G Abuse of process and striking out

15 In *Iskandar bin Rahmat v Attorney-General* [2022] 2 SLR 1018, one of the matters before the Court of Appeal was an oral application by one of the appellants seeking a stay of his execution pending the disposal of his civil claim against his assigned counsel at the criminal trial. The Court of Appeal dismissed the application and struck out the civil claim pursuant to O 3 r 2(2) of the RoC 2021 because it was devoid of merit and constituted an abuse of process. The court justified its reliance on the O 3 r 2(2) “to prevent frustration of the administration of justice” (at [68]). This decision is significant as it confirms that the court is empowered to strike out a proceeding if the facts clearly show that it constitutes an abuse of process.

H Filing of notice of intention to contest or not contest in absence of originating claim

16 In *COSCO Shipping Specialized Carriers Co, Ltd v PT OKI Pulp & Paper Mills* [2024] SGHC 92, the court referred to its earlier decision in which it concluded that the first defendant had not acted improperly when it filed a notice of intention to contest or not contest despite not having been served with the originating claim. Although the RoC 2021 does not address such a situation, the court regarded this as “a gap that had to be filled in the interests of justice by an exercise of [its] discretion under O 3 r 2(2) of the RoC 2021” (at [169]).

I Power to impose terms in absence of statutory provisions

17 The very recent case of *Re Gabriel Silas Tang Rafferty* [2024] SGHC 82 (“*Gabriel Silas Tang*”) concerned the dismissal of an application for admission as an advocate and solicitor of the Supreme Court of Singapore. At the time of the case, the Legal Profession Act 1966 (2020 Rev Ed) did not expressly set out the court's power to impose terms when dismissing an application for admission.

Such terms may be necessary to prevent an applicant from making a new application at a time of his choosing and thereby undermine the interests of justice. The court imposed the condition that the applicant was not to bring a fresh application for a minimum period of five years from the date of the court's decision. In making this order, the learned Chief Justice stated (at [55]): “The court has the inherent power to regulate its own processes to serve the ends of justice. This is implicitly acknowledged in O 3 r 2(2)[.]”

J Comparison of O 3 r 2(2) with court's inherent power

18 The courts have always had an inherent power to prevent injustice or an abuse of process. Order 92 r 4 of the RoC 2014 expressed this as a judicially developed power “to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court”. Whereas O 92 r 4 of the RoC 2014 referred to the court's inherent power as an independent doctrine, O 3 r 2(2) of the RoC 2021 gives it statutory form (“to ensure that justice is done or to prevent an abuse of the process”) and applies when an issue is not addressed by rules of procedure (O 3 r 2(2) is set out in para A1 above).

19 Order 92 r 4 of the RoC 2014 might seem broader than O 3 r 2(2) of the RoC 2021 because the former did not limit the court's power to make orders in situations unregulated by the rules. Theoretically, the court had power under O 92 r 4 to make an order inconsistent with, or beyond the scope of, a rule to prevent injustice or an abuse of process. However, the cases decided prior to the introduction of the RoC 2021 show that the courts only exercised their inherent power if there was a compelling need. It was a rare case indeed when a court would act beyond the scope of a rule. For example, in *The Nagasaki Spirit* [1994] 2 SLR(R) 165, the High Court ruled that a person or entity may be allowed to intervene in admiralty proceedings involving the arrest of a ship even if that person or entity did not have an interest in that property (as required by

O 70 r 16 of the former Rules of the Supreme Court 1970).

20 Order 3 r 2(1) of the RoC 2021 expressly empowers a court to override a mandatory rule of court:

Unless the context otherwise requires and subject to any other written law, all requirements in these Rules are subject to the Court's discretion to order otherwise in the interests of justice, even if they are expressed using imperative words such as "must", "is to" or "shall".

21 There appears to be no case in which a Singapore court has exercised its inherent power pursuant to O 92 r 4 of the RoC 2014 (or previous versions of the RoC) to override a mandatory rule. Therefore, as the combined effect of O 3 rr 2(1) and 2(2) of the RoC 2021 more than meets the scope of the inherent power of the court, there is good reason to hold that O 3 rr 2(1) and 2(2) are broad enough to encompass the doctrine in its entirety. Moreover, O 3

rr 2(1) and 2(2) include express powers which have statutory force. The expectation is that a court will only override a mandatory rule if such a decision is clearly consistent with the Ideals in O 3 r 1(2) and would ensure a just outcome in the particular circumstances of the case (see O 3 r 1(3)).

22 It has been argued that the doctrine of inherent power is now subsumed under O 3 rr 2(1) and 2(2) of the RoC 2021.¹ In *Blomberg* (discussed in para D11 above) at [44], the court considered the doctrine of inherent power to be "subsumed" under O 3 r 2(2) of the RoC 2021. And in *Gabriel Silas Tang* (discussed in para I17 above), it was said to be "implicitly acknowledged" by this rule.

¹ See Jeffrey Pinsler SC, *Singapore Civil Practice* (LexisNexis, 2022) at [2.44] and Jeffrey Pinsler SC, *Singapore Court Practice* (2024) at [3.2.7], available in Lexis Advance.

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