UJM *v* UJL

[2021] SGCA 117

Case Number : Originating Summons No 21 of 2021

Decision Date : 15 December 2021

Tribunal/Court : Court of Appeal

Coram : Andrew Phang Boon Leong JCA; Steven Chong JCA

Counsel Name(s) : Mahmood Gaznavi s/o Bashir Muhammad and Julian Martin Michael (Mahmood Gaznavi Chambers LLC) for the applicant; Remya Aravamuthan (Remya. A Law Practice) for the respondent.

Parties : UJM — UJL

Civil Procedure – Appeals – Leave – Section 47 of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed)

15 December 2021

Judgment reserved.

Andrew Phang Boon Leong JCA (delivering the judgment of the court):

Introduction

1 It is sometimes the case that matters which appear, at the first glance, to be wholly unrelated to each other are in fact deeply and inextricably intertwined. The application before us in CA/OS 21/2021 ("OS 21") is rooted in a matrimonial dispute arising from the division of matrimonial assets and costs in a Pakistani divorce under Islamic law. The resolution of OS 21, however, hinges upon the applicable laws and principles on the grant of leave to appeal from a decision of the Appellate Division of the High Court ("AD/CA Leave Application").

2 In *Noor Azlin bte Abdul Rahman and another v Changi General Hospital Pte Ltd* [2021] 2 SLR 440 ("*Noor Azlin (transfer)*"), this court considered the wide-ranging amendments to the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) ("SCJA") which established the Appellate Division of the High Court ("AD") on 2 January 2021. The application before us in OS 21 is the first AD/CA Leave Application, and presents a valuable opportunity for this court to consider a further aspect of this profound and momentous change to the Singapore court system.

3 By way of a brief procedural overview, OS 21 arises from the *ex tempore* judgment of the AD in *UJM v UJL* [2021] SGHC(A) 10 (the "AD Judgment") which affirmed the judgment of the General Division of the High Court judge (the "Gen Div Judge") in *UJL v UJM* HCF/OSF 1/2019 and HCF/DCA 37/2019 (published by Registrar's Notice dated 23 January 2021) (General Division of the High Court (Family Division)) (the "Gen Div Judgment") to grant financial relief to the respondent-wife pursuant to Ch 4A of Pt X of the Women's Charter (Cap 353, 2009 Rev Ed) ("Ch 4A") arising out of her divorce from the applicant-husband in Karachi, Pakistan on 4 May 2016. We refer hereafter to the parties as the "Husband" and the "Wife", and the appeal that the Husband seeks leave to bring as the "Anticipated Appeal".

Facts and background to the dispute

4 The matrimonial dispute that resulted in OS 21 concerns the division of matrimonial assets and costs, a large part of which centres on an alleged "Settlement Agreement" which we refer to in more detail below at [10].

5 The parties were born in Pakistan, but are now Singapore citizens. They were married in Pakistan on 3 August 1995 under Islamic marriage laws and moved soon after to Singapore in mid-August 1995. They have four sons (collectively, the "Children"), all of whom are Singapore citizens. Both parties have been living in Singapore since 1995, except for a period when the Wife lived in Pakistan from 1999–2002 and another period in the lead-up to their divorce (see the Gen Div Judgment at [2]).

6 The Husband is the director and shareholder of Company [A], out of which he operates as a property agent. He also works as a marketing manager with Company [B]. He had worked previously in an electronics company and an apparel business. The Wife was a housewife during her marriage to the Husband (see the Gen Div Judgment at [4]). She has been a Singapore citizen since 25 September 2007.

7 The Husband purchased various properties during the marriage. As at the date of the divorce, there were four properties in Singapore (see the Gen Div Judgment at [3]) and three properties in Pakistan which formed part of the pool of matrimonial assets. As referred to in the Gen Div Judgment at [83], the three properties are "R-022", "A01" and "R228" (collectively, the "Three Properties").

8 The parties were divorced on 4 May 2016 by the court in Karachi, Pakistan (see the AD Judgment at [1]). However, cracks in the marriage had been apparent since the early 2000s. In 2002, the Wife commenced a suit for the dissolution of marriage by way of *khulla* (also spelled *kula* or *khulu*) in the court in Karachi. The parties reconciled and entered into a "Compromise Decree" on 24 March 2003. In 2005, the Husband pronounced one *talaq* against the Wife via a "Deed of First Divorce". However, the parties reconciled and entered into a "Compromise Deed" in respect of the Deed of First Divorce. In January 2016, the Wife again commenced a suit for the dissolution of the marriage by *khulla* in Karachi. This time, there was no reconciliation and the parties were divorced with effect from 4 May 2016. The court order made no reference to the Children, nor did it provide for the division of matrimonial assets. The Husband alleged that the Wife had agreed to a settlement agreement dated 13 July 2015 which dealt with the assets, and that the Husband had complied with the said agreement (see the Gen Div Judgment at [5]).

9 On 18 April 2019, the Wife applied to the Singapore Syariah court for *nafkah iddah* and *mutaah* (see the AD Judgment at [35]). She was unsuccessful both at first instance and before the Syariah Court of Appeal.

10 The two-page Settlement Agreement was the focal point of the parties' dispute before both the Gen Div and the AD (see the AD Judgment at [9] and the Gen Div Judgment at [5]–[6]). The Husband claimed that the Wife should not be granted any financial relief under Ch 4A because she had agreed to the terms contained within the Settlement Agreement. The Wife disagreed. While she admitted to signing on its second page which starts with the word "Details" [emphasis in original], she denied signing its first page which starts with the word "AGREEMENT" [emphasis in original]. She alleged that the signature above her name on the first page was not hers (see the AD Judgment at [9]–[10] and the Gen Div Judgment at [25]–[26]).

A brief procedural history

11 OS 21 is the latest episode in a series of protracted legal proceedings commenced originally by the Wife to seek financial relief from the Singapore court (pursuant to Ch 4A) following foreign matrimonial proceedings, namely, the parties' divorce in Karachi, Pakistan. The majority of these prior applications (and appeals) are irrelevant to OS 21 and we therefore summarise only the key episodes in this ongoing saga. A fuller picture of the procedural history can be found in the Gen Div Judgment

at [8]–[14].

12 For context, an applicant for financial relief under Ch 4A must show under s 121B of the Women's Charter (Cap 353, 2009 Rev Ed) ("Women's Charter") that:

(a) the marriage has been dissolved or annulled, or the parties to the marriage have been legally separated by means of judicial, or other proceedings in a foreign country (see s 121B(*a*) of the Women's Charter); and

(b) the divorce, annulment or judicial separation is entitled to be recognised as valid in Singapore under Singapore law (see s 121B(*b*) of the Women's Charter).

13 The various applications in this case broadly follow the two-stage process for the grant of financial relief as stipulated under Ch 4A.

(a) First, leave of court must be obtained before any application for foreign relief can be made (see s 121D(1) of the Women's Charter). Leave is granted only where the court considers that there is "substantial ground for the making of an application for such an order" (see s 121D(2) of the Women's Charter).

(b) Second, the court determines whether and, if so, how financial relief ought to be granted. Before making an order for financial relief, the court must consider "whether in all the circumstances of the case, it would be appropriate for such an order to be made by a court in Singapore" under s 121F of the Women's Charter.

In the meanwhile, the court also has the power to award interim financial relief under s 121E of the Women's Charter.

14 On 7 April 2017, the Wife applied in FC/OSF 37/2017 seeking, *inter alia*, leave to file an application for financial relief under s 121B of the Women's Charter and interim maintenance for the Children (see the Gen Div Judgment at [9]).

15 The Wife successfully obtained the requisite leave from the District Judge (the "DJ") who also ordered that the Husband pay interim maintenance of $1,500 per month for the Children and the Wife (see the Gen Div Judgment at [10]).

16 The Husband's appeal against the DJ's grant of leave in HCF/RAS 1/2018 was dismissed by the Gen Div Judge on 2 May 2018. The Gen Div Judge also varied the DJ's interim maintenance order, such that the Husband would pay interim maintenance of $1,500 per month for the Children, and not the Wife. This was on the basis that the Wife was not entitled to maintenance beyond the *nafkah iddah* and *mutaah* after an Islamic divorce was finalised (see the Gen Div Judgment at [11]).

17 The parties appeared before the Gen Div Judge again in 2019 and 2020 and, after seven days of hearing, the Gen Div Judgment was published on 28 January 2021. It concerned two matters (see the Gen Div Judgment at [1]):

(a) HCF/OSF 1/2019 ("OSF 1/2019"), which was the Wife's application for financial relief under Ch 4A; and

(b) HCF/DCA 37/2019 ("DCA 37/2019"), which was the Wife's appeal against the District Judge's refusal to grant a variation of the interim maintenance order sought in FC/OSF 37/2017.

We focus on OSF 1/2019 as the Gen Div Judge's decision to dismiss DCA 37/2019 was not the subject of any appeal by the parties before the AD.

18 The Gen Div Judge allowed OSF 1/2019 as he found it appropriate for the Singapore court to make an order for financial relief under s 121G of the Women's Charter. He ordered the Husband to pay the Wife $2,586,088.01 in three instalments, respectively, within three, six and nine months of the date of the Gen Div Judgment (see the Gen Div Judgment at [213]). The Gen Div Judge also granted maintenance of $2,750 per month for the Children (see the Gen Div Judgment at [254]–[255]). This was to last until their eldest child graduates or ceases to study. After this point in time, the Husband was ordered to pay the Wife a sum of $1,980 per month. The Gen Div Judge made no order as to costs (see the Gen Div Judgment at [256]–[257]).

19 Dissatisfied, the Husband filed an appeal against the Gen Div Judge's decision in AD/CA 16/2021 ("AD 16"). AD 16 concerned only the Judge's decision on OSF 1/2019, specifically, the division of matrimonial assets and costs (see the AD Judgment at [2]). On 26 August 2021, the AD released the AD Judgment dismissing the Husband's appeal and ordering costs of $10,000 (all-in) against him in respect of the appeal (see the AD Judgment at [38] and [40]).

20 OS 21 is the Husband's application for leave to appeal against the whole of the AD Judgment. Prayer 1 of OS 21 seeks "leave to file this application out of time" because OS 21 was filed late on 9 September 2021.

Decision of the Gen Div

21 The 131-page Gen Div Judgment considers the numerous matrimonial properties and assets in meticulous detail, and touches upon a number of interesting points of law which arise out of the unusual circumstances of the present case – *ie*, an Islamic marriage dissolved in a foreign court and litigated in Singapore on the basis of Ch 4A. Unfortunately, it appears that the parties had *not* canvassed these *legal* issues when litigating their respective cases before the AD, nor has the Husband relied upon them in bringing OS 21 before this court. We highlight just a few of them at [35] and [37] below even though, as we explain later at [132] below, these issues are not relevant in the context of the present application as they were not litigated before the AD.

22 It is not strictly necessary to examine the Gen Div Judgment in detail as OS 21 is an AD/CA Leave Application against the AD Judgment. We therefore summarise its main points only in so far as it is relevant to the AD Judgment.

23 The Gen Div Judge identified three main issues for determination (see the Gen Div Judgment at [27]).

(a) Was there a valid divorce in Pakistan that should be recognised in Singapore by the Singapore court?

(b) If (a) is answered in the affirmative, is it appropriate for the court to make an order for financial relief, bearing in mind the considerations under s 121F of the Women's Charter?

(c) If (b) is answered in the affirmative, what order should the court make in respect of the division of matrimonial assets?

Issue 1: Was there a valid divorce in Pakistan that should be recognised in Singapore?

24 It was common ground between the parties that their divorce in Pakistan could be legally recognised in Singapore under the rules of private international law. The parties' dispute focused, instead, on whether the divorce should be recognised because of the circumstances surrounding it. The Wife argued that the divorce obtained in Pakistan was one of "convenience" and claimed that the parties had intended to retain the marital relationship after the *khulla.* She averred that the divorce was obtained in accordance with the Husband's plan for her to apply for a Housing Development Board ("HDB") flat in Singapore following the divorce. The Husband seized on this and argued that s 121B of the Women's Charter was not satisfied because, on the Wife's own account, the divorce in Pakistan was a "sham", and therefore should not be recognised as valid in Singapore under Singapore law. On that basis, he claimed that the Wife could not rely on that divorce in the Ch 4A proceedings in Singapore (see the Gen Div Judgment at [29]–[33]).

25 The Gen Div Judge held that there was a valid divorce in Pakistan and that it should be recognised in Singapore. As a starting point, *it was common ground between the parties that the divorce in Pakistan was valid.* In so far as the Husband's argument was that the Wife should not be entitled to *rely upon* the divorce, his argument was opportunistic since his position was also that the marriage had already ended. Further, if the Wife's account were true, *the Husband* would have been the one who procured, or at least instigated the falsehood, and correspondingly, misled the Wife into applying for the *khulla*, and then subsequently reneged on his promise to continue taking care of the family. His conduct would thus be more objectionable than the Wife's conduct, or at the very least, equally so. Even if the Wife's account were accurate, there was no evidence that the Pakistan court would not have granted the divorce if it had known that its purpose was to enable the Wife to apply for an HDB flat. The Gen Div Judge therefore found that the divorce was valid and that it ought to be recognised in Singapore (see the Gen Div Judgment at [34]–[42]).

26 The Gen Div Judge added that, though the divorce and the marriage were effected under Islamic law, the Gen Div had jurisdiction under Ch 4A because the Gen Div retained residual jurisdiction by virtue of ss 16 and 17 of the SCJA and could grant relief under s 121G of the Women's Charter (see the Gen Div Judgment at [42] and also the decision of this court in *TMO v TMP* [2017] 1 SLR 565 at [54]–[55]).

Issue 2: Was it appropriate for the court to make an order for financial relief?

27 The Gen Div Judge found it appropriate for the Singapore court to grant financial relief. His analysis proceeded broadly in two parts:

(a) whether the parties had entered into the Settlement Agreement and, if so, the effect of it; and

(b) whether the Wife could have obtained relief in the Pakistan proceedings.

28 The Gen Div Judge noted the Wife's position that she did not enter into the Settlement Agreement. The Wife conceded that she had signed the second page, but asserted that it was not a settlement agreement. She claimed that the Husband had presented the first page together with the second page to convince the court that the parties had agreed on a full and final settlement of the division of matrimonial assets (see the Gen Div Judgment at [25]).

29 The Gen Div Judgment contained the following evidential findings and observations in respect of the Settlement Agreement.

(a) The Gen Div Judge was not satisfied that the parties had agreed to obtain a "paper"

divorce in Pakistan so as to allow the Wife to apply for an HDB flat in Singapore (see the Gen Div Judgment at [52]).

(b) The Gen Div Judge did not place significant weight on the alleged attestation of the Settlement Agreement due to the uncertainty in the evidence given by both parties (see the Gen Div Judgment at [58]).

(c) The Gen Div Judge accepted the substance of the expert report by a Senior Consultant Forensic Scientist and found, *inter alia*, that the signatures purporting to belong to the Wife on the two pages as well as the accompanying handwriting were in fact her signatures and handwriting. While there was no objective evidence that the two pages were signed at the same time, there was equally no evidence that the pages were not, in fact, signed together (see the Gen Div Judgment at [77]).

(d) The Husband had initially exhibited only the second page, and exhibited the first page *only after* time was granted for further affidavits to be filed. The Gen Div Judge, however, rejected the Wife's contention that the first page was fabricated in 2017 in the course of proceedings (see the Gen Div Judgment at [78] and [82]).

(e) The Gen Div Judge found that the Settlement Agreement did not reflect the reality of how the Three Properties located in Pakistan were dealt with.

(i) On R022: The Settlement Agreement stated that the Husband would transfer the ownership of R022 to the Wife, the property having been "previously purchased & Fully Paid by [the Husband] under joint name in the year 2007". The Gen Div Judge rejected the Husband's case that the transfer of R022 to the Wife was intended to be part of the full and final settlement of the divorce, as the Husband was unable to prove that he had purchased R022 and therefore, had failed to adduce evidence to corroborate what was written in the Settlement Agreement (see the Gen Div Judgment at [88]).

(ii) On A01: The Settlement Agreement provided that the Husband would not claim the money paid for the purchase of A01, the property being "previously Purchased under name of [the Wife] and 50% money paid by [the Husband]". The Gen Div Judge found that it was the Wife's mother who paid for A01 and that A01 was then registered in the Wife's name. A01 was returned to the Wife's mother in 2015. The Husband's claim that he had paid for 50% of the purchase price of A01 was also not supported by any evidence. The Husband was therefore unable to prove that he had paid for the property and that his decision not to "claim" his share of A01 was part of a settlement provided for under the Settlement Agreement (see the Gen Div Judgment at [91]–[92]).

(iii) On R228: The Settlement Agreement provided that "[a]s a Part of Full and Final Settlement of all claims between the parties whether past or present or future, [the Husband] has paid Pak Rupees 1,24,58,983/= (Pak Rupees One Crore Twenty Four Lacs Fifty Eight Thousand Nine Hundred Eighty Three only) to the seller of the house upon the instructions of [the Wife]", which includes "Pak Rupees, 113,00,000/= (Pak Rupees One Crore Thirteen Lacs) for purchase of constructed House no. R228". Despite some evidential deficiencies, the Gen Div Judge found that the Husband had funded most of the purchase price of R228 (see the Gen Div Judgment at [98]).

30 The Gen Div Judge stated that, in considering whether it would be appropriate for the Singapore court to make an order for financial relief, the mere existence of a document purporting to be a

settlement agreement could not be conclusive, if the other facts in the case suggested that there existed other reasons why the Singapore court should consider granting such an order (see the Gen Div Judgment at [101]).

31 Overall, the Gen Div Judge found that there was sufficient doubt as to whether the Settlement Agreement accurately reflected the reality of the arrangements between the Husband and the Wife. The Gen Div Judge did not accept the Husband's account in relation to A01 and R022. Even if the Husband's provision for the Wife by way of R288 could be attributed to a settlement, the Gen Div Judge was of the view that the court should not treat this as being exhaustive of all her rights in *every* jurisdiction. The Settlement Agreement did not refer to any of the properties in Singapore, and there was no evidence that the Wife would have knowingly given up all her rights to property in any other country. The Settlement Agreement was never referred to in any of the Pakistan court documents, and there was no order of court that registered the consent of both parties. Moreover, whatever agreement the parties had allegedly entered into would have to be considered against what the Wife would have been entitled to under the law in Pakistan. As the Gen Div Judge found that the Wife would not have been able to obtain any share of the matrimonial assets in Pakistan, a finding that we explain in more detail below at [32], he found that less weight should be given to the Settlement Agreement as it would have arguably been negotiated against a baseline of that entitlement. Finally, the Gen Div Judge noted that the absence of any mention of maintenance for the Children, or anything to do with their custody, care and control in the Settlement Agreement, undermined the Husband's claim that the Settlement Agreement was intended to be in full and final settlement of the matters arising from the divorce (see the Gen Div Judgment at [102]–[104]).

32 Returning to the question of whether the Wife could have obtained financial relief in the Pakistan courts following the divorce by *khulla*, the Gen Div Judge considered whether it could be concluded that the Wife would not have been able to obtain relief in Pakistan. He then considered the significance of his conclusion, particularly in relation to the interaction between Islamic law and general secular law in Singapore (see the Gen Div Judgment at [105]). The Gen Div Judge held that, on the available evidence, the Wife would not have been entitled to any share in the matrimonial property, or any maintenance after the *iddat* period upon the dissolution of the marriage by way of *khulla* (see the Gen Div Judgment at [109]–[110]).

33 The Gen Div Judge considered the factors under s 121F of the Women's Charter and concluded that it was appropriate for an order of financial relief to be made by the Singapore court (see the Gen Div Judgment at [125]).

34 In arriving at the above conclusion, the Gen Div Judge recognised that the Wife could not have obtained any financial relief upon a divorce by *khulla* in the Pakistan courts and gave explicit consideration to the significance of this factor (which is a statutorily mandated consideration per s 121F(2)(*f*) of the Women's Charter) to the question as to whether it was appropriate for the Singapore court to grant relief (see, for example, the Gen Div Judgment at [111]).

35 This, in turn, raised questions as to:

(a) the statutory purpose of Ch 4A and the grant of financial relief thereunder;

(b) whether the grant of relief in such a situation would offend the comity of nations; and

(c) the religious element stemming from the fact that the Pakistan courts apply Islamic law and whether this would affect the appropriateness of the Singapore court granting relief under

Ch 4A by applying law that is secular in nature.

Issue 3: What order should the court make in respect of the division of matrimonial assets?

36 The Gen Div Judge approached the division exercise by first considering what the Husband and the Wife would have each received from a division of assets, if the divorce had occurred in Singapore under general secular law, and subsequently making adjustments to the division ratio on the basis of the Three Properties in Pakistan. He eventually reached an overall ratio of 52.5:47.5 in favour of the Wife (see the Gen Div Judgment at [201]–[208]).

37 In arriving at the above approach, the Gen Div Judge considered a number of thought-provoking legal issues, as follows.

(a) First, whether a court exercising its powers under s 121G of the Women's Charter to make an order for financial relief should apply the same approach in granting financial relief as a court dealing with the ancillary matters upon a divorce in Singapore. While this issue was not raised by the parties, the Gen Div Judge observed that the wording of s 121G of the Women's Charter suggests that the approach may very well differ in an application under Ch 4A (see the Gen Div Judgment at [133]).

(b) Second, what are the principles that would apply to the court's exercise of powers under s 121G of the Women's Charter (see the Gen Div Judgment at [140])?

(c) Third, in the event of an Islamic divorce obtained overseas, should the Gen Div exercise its discretion and powers according to Islamic law or the general secular law (see the Gen Div Judgment at [141])?

(d) Fourth, if the global assessment methodology is to be used in the division of matrimonial assets, what is the appropriate approach to the division exercise where the parties are foreign citizens and own considerable assets in a foreign country? Should the court proceed by considering what the Husband and the Wife would receive from a division of assets in Singapore before considering if any adjustments ought to be made for foreign assets or to consider all the assets together (see the Gen Div Judgment at [144])?

Decision of the AD

38 At the outset, it bears emphasising that the AD Judgment was *almost entirely* ***factual*** in nature. This is attributable to the fact that the parties had *chosen* ***not*** to litigate the legal points raised above at [35] and [37], and had instead run their cases along ***factual*** lines. In particular, the AD Judgment records the following areas as ***common ground*** between the parties.

(a) The divorce in Pakistan was valid and was entitled to be recognised as valid in Singapore under Singapore law (see the AD Judgment at [8]).

(b) The parties had a substantial connection with Singapore and the Husband owned properties in Singapore (see the AD Judgment at [9]).

(c) The acceptance of the Gen Div Judge's approach to the division of matrimonial assets – *ie*, of considering what the parties would receive from a division of assets in Singapore, before making any necessary adjustment to the division to account for matrimonial assets in Pakistan (see the AD Judgment at [36]).

39 In AD 16, the Husband's main contention was that the Singapore court should not grant the Wife any financial relief under Ch 4A because the Wife had agreed to the terms contained within the Settlement Agreement dated 13 July 2015, which she had signed. The Husband had discharged his obligations as stipulated under the Settlement Agreement and it was not a situation where the Wife had received nothing. The Wife's main argument was that she had signed only the second page of the said agreement, and the signature above her name on the first page was not hers (see the AD Judgment at [9]–[10]).

40 Before addressing the parties' main argument, the three judges of the AD (the "AD Judges") addressed the Wife's allegation that the parties had only intended to enter into a "paper" divorce in Pakistan for the purpose of obtaining an HDB flat in Singapore. They found that this was *not* made out. They considered that both parties had proceeded on the premise that the divorce was valid before the AD, and the Gen Div Judge's finding that the divorce was therefore valid and should be recognised in Singapore. They added (at [7]) that as:

> 7 … neither party had applied to set aside the order for divorce in Pakistan, the divorce remained valid there. It would have been incongruous for the Singapore court to say that the divorce was not valid while it was still considered valid in Pakistan.

The above observations of the AD Judges are *obiter dicta* since neither of the parties disputed the Judge's conclusion that there was a valid divorce in Pakistan and that it was entitled to be recognised as valid in Singapore under Singapore law (see the AD Judgment [3]–[8]).

41 The AD Judges held that financial relief ought to be granted. While they saw no reason to disturb the Gen Div Judge's factual finding that the Wife had signed on both pages of the Settlement Agreement (see the AD Judgment at [12]), they reiterated that even if a settlement made in contemplation of a divorce purports to be comprehensive and had been voluntarily entered into, the parties are not necessarily bound by it. The court may still grant additional relief whether under the ordinary domestic context or in an application under Ch 4A, if it is in the interest of justice to do so taking into account the interests of the parties and the children of the marriage. The court would also have to decide what weight to give to such a settlement, and is entitled not to hold the parties to the terms thereof (see the AD Judgment at [14]–[16]).

42 While the AD Judges disagreed with some of the Gen Div Judge's conclusion with regard to the Three Properties, they agreed with his approach of considering whether the terms genuinely reflected the background to the acquisition of the Three Properties and the scope of the agreement (see the AD Judgment at [20]).

43 In any event, it was implicit in the AD Judgment that the AD Judges were of the view that the difference between their view and the Gen Div Judge's view on the Three Properties was not material as: (a) the Settlement Agreement did not reflect the reality of the Husband's other assets in both Singapore and Pakistan; (b) the value of the Three Properties (approximately $370,000) paled in comparison to the value of the Husband's other assets (approximately $4.68m); and (c) the scope of expenses covered was also not as comprehensive as the Husband had argued. In all the circumstances, the AD Judges were of the view that it would be unjust to hold the Wife to the terms of the Settlement Agreement. They therefore held that it was appropriate for the Gen Div Judge not to place too much weight on the Settlement Agreement, and to grant financial relief to the Wife after taking into account the various factors set out in s 121F(2) of the Women's Charter (see the AD Judgment at [27]–[28]).

44 The AD Judges also considered the question of why the Wife did not obtain financial relief from

the Pakistan court following the divorce by *khulla* (see the AD Judgment at [29]). They noted the Gen Div Judge's conclusion that this was because the Wife would not have been entitled to claim any matrimonial asset or maintenance in Pakistan (likewise at [29]).

45 The AD Judges also rejected the Husband's argument that, if the AD had found that the Pakistan court had jurisdiction to grant financial relief, the Wife should have claimed relief from that court at the time of the divorce order, and as such, her failure to do so caused her to fall afoul of the rule in the Court of Chancery decision of *Henderson v Henderson* (1843) 67 ER 313 ("*Henderson*"). This was for the following three reasons.

(a) First, the Husband's argument was based on the faulty premise that the AD would find that the court in Pakistan had the requisite jurisdiction to grant such relief, a finding which the AD did not make (see the AD Judgment at [32]).

(b) Second, the divorce in Pakistan was not one with contested ancillaries and it was doubtful whether the rule in *Henderson* could apply (see the AD Judgment at [33]).

(c) Third, and more fundamentally, this was an entirely new argument raised only on appeal in AD 16 (see the AD Judgment at [32]).

46 The AD Judges agreed with the Gen Div Judge that the Gen Div has the power to grant relief under Ch 4A, including an order for division of assets, where the Syariah court was not seised of jurisdiction. In this case, the Syariah court had no jurisdiction to grant a division order since the divorce application was not made to it. The AD Judges observed that the Gen Div Judge's approach to the division of assets was not disputed on appeal. They recognised that this particular circumstance might not necessarily exist for all cases under Ch 4A and, correspondingly, left open the question of the proper approach for division under Ch 4A for determination on a more suitable occasion (see the AD Judgment at [35]–[36]).

47 In so far as the division of matrimonial assets was concerned, the AD Judges agreed with the Gen Div Judge that as this was a long single-income marriage, the approach set out by this court in *TNL v TNK and another appeal and another matter* [2017] 1 SLR 609 would apply such that the starting point was equal apportionment – *ie*, a division of the matrimonial assets in a 50:50 ratio. This crucial fact did not change just because the Wife had received substantial benefits under the Settlement Agreement. In any event, the Gen Div Judge had already accounted for those benefits in arriving at his eventual decision. The AD Judges saw no reason to disturb the Gen Div Judge's findings or eventual decision and thus dismissed the appeal. Costs of $10,000 inclusive of disbursements were ordered against the Husband (see the AD Judgment at [37] and [40]).

Arguments of parties in OS 21

48 The Husband submits that OS 21 ought to be allowed as the Anticipated Appeal raises a point of law of public importance under s 47(2) of the SCJA. His submissions do not directly address how this requirement is fulfilled. It appears to us that the Husband takes the view that the statutory requirements for leave are self-evidently fulfilled because he simply lists six questions *with little, or even no elaboration in support of* his AD/CA Leave Application in respect of s 47(2) of the SCJA as follows.

(a) Question 1: In a Muslim divorce, where a woman who initiates the divorce in a foreign jurisdiction says the court granting her the divorce did not have jurisdiction to grant her reliefs and the rigours of such a regime are addressed by entering into a settlement agreement, what is

the weight to be accorded to the said agreement without which the woman would have obtained nothing?

(b) Question 2: If the Singapore court says the foreign court did have jurisdiction, must the woman satisfy the court that she sought reliefs in the foreign court but was not given these reliefs, hence necessitating the Singapore court's assistance. Do the principles in *Henderson* apply in such a situation?

(c) Question 3: Where a woman who initiates a divorce in a foreign jurisdiction has indicated unequivocally that she wishes to return to that jurisdiction after divorce, and in fact does so, should the court look at this factor in evaluating the fairness of the settlement agreement when she subsequently seeks the Singapore court's assistance by returning to Singapore, when this return was not contemplated by the parties to the said agreement?

(d) Question 4: Should the settlement agreement be evaluated taking into account the desires and requirements of the woman at the time when it is entered into, or after she reneges on the terms of the said agreement and returns to Singapore to seek further reliefs?

(e) Question 5: Where a woman who displays overall bad conduct launches her claim solely on the footing that she did not sign the settlement and that it is a forgery and the court finds otherwise, then whether a spouse who reneges on the terms of an agreement and offers wholly false reasons for its reneging is able to invoke the Singapore court's jurisdiction under Ch 4A to assist her when Ch 4A is meant to assist vulnerable spouses?

(f) Question 6: Does an action under an Originating Summons depart from the principles of pleadings in writ actions and allow the court to look at the OS claim and fill in the gaps therein? Is it open to the court to rewrite the Wife's case based on matters she sought to cover up?

49 The Husband submits that it is appropriate for the Court of Appeal to hear a further appeal from the AD based on two grounds which we reproduce as follows.

(a) Ground 1: Where a settlement agreement is entered in a third attempt at divorce (with the two previous attempts resulting in a reconciliation of the parties) should the fact that the woman was legally represented in the two previous failed divorces be a factor in persuading the court that the woman did have legal advice in entering the said agreement, especially when she was legally represented at the hearing of the final divorce that is the subject matter of the proceedings in Singapore?

(b) Ground 2: In a Muslim marriage, where a woman is universally entitled to *nafkah iddah* and *mutaah* and does not seek such reliefs, does this point to the existence of a settlement agreement that had indeed taken care of these two reliefs and if so, what is the effect on a woman who practises intense deception to hide the existence of the said agreement?

50 The Husband does not explain why OS 21 was filed late.

51 The Wife objects to the grant of leave on the basis that OS 21 was filed out of time, highlighting that the Husband has not provided any explanation for the same. Unlike the Husband, the Wife takes the position that the applicable grounds warranting the grant of leave to appeal are those laid down by this court in *Lee Kuan Yew v Tang Liang Hong and another* [1997] 2 SLR(R) 862 ("*Lee Kuan Yew*"). Given that the Husband has not made appropriate submissions to address the *Lee Kuan Yew* grounds and the AD had already heard the Husband's appeal and "had considered the issues at

some length", leave should only be granted in *exceptional circumstances*. As these circumstances do not exist in the present case, OS 21 should be disallowed.

Issues

52 Two issues arise for our determination in OS 21:

(a) Issue 1: Whether leave ought to be granted for OS 21 to be filed out of time.

(b) Issue 2: Whether OS 21 is meritorious such that leave ought to be granted for the Husband to bring the Anticipated Appeal before the Court of Appeal.

53 It bears mention at this juncture that either of these issues, if answered in the negative, is determinative of OS 21.

Issue 1: OS 21 was filed late with no explanation

54 The Husband seeks "leave to file [OS 21] out of time" in Prayer 1 of OS 21. This is necessary given that the AD Judgment was released on 26 August 2021. OS 21 was filed on 9 September 2021 – ten working days thereafter. OS 21 is therefore out of time as O 57 r 2A(1) of the Rules of Court (Cap 322, R5, 2014 Rev Ed) ("ROC") states as follows:

> **Application to Court of Appeal for leave to appeal against decision of General Division or Appellate Division (O. 57, r. 2A)**
>
> **2A.**—(1) Subject to paragraph (2), an application to the Court of Appeal for leave to appeal to that Court against a decision of the General Division or the Appellate Division must be made within 7 days after the date of the decision of the General Division or the Appellate Division, as the case may be.

55 While the actual length of the delay is not significant, the Husband has provided *no explanation whatsoever for it and has given no reasons to support* Prayer 1 of OS 21 in either his written submissions or supplemental submissions for OS 21. Furthermore, there is no attempt to address the general requirements for the grant of an extension of time (as listed, for example, in the decision of this court in *Bin Hee Heng v Ho Siew Lan (acting as executrix and trustee in the estate of Gillian Ho Siu Ngin)* [2020] SGCA 4 at [23]). The Husband was certainly aware of the delay at the time of the filing of OS 21 and it was incumbent upon him and his counsel to address this glaring and fundamental issue in his submissions. He also had *a further opportunity* to seek leave to address the point when he sought leave to file supplemental submissions on the Wife's allegation that the Husband had paid for her divorce lawyers in Pakistan, but chose not to avail himself of it. The filing deadlines in the ROC cannot simply be sidestepped or circumvented with *a wholly unsubstantiated* prayer for leave to file out of time. We therefore dismiss OS 21 on this basis alone.

56 Given that the present AD/CA Leave Application is the first of its kind to come before this court, we nevertheless proceed to consider the applicable statutory provisions and principles which pertain to such applications. We also explain why leave to bring the Anticipated Appeal would have been ***denied*** to the Husband on the merits of OS 21 ***in any event***.

The applicable principles governing AD/CA Leave Applications

57 The AD was established on 2 January 2021, pursuant to the coming into force of the

amendments to the SCJA in the Supreme Court of Judicature Amendment Act 2019 (Act 40 of 2019). These same amendments also brought into play a host of new statutory provisions, including those which relate to AD/CA Leave Applications.

58 OS 21 is the ***first*** AD/CA Leave Application to come before this court. However, it is not the first application for leave to appeal to the Court of Appeal and there exists a rich body of jurisprudence on the principles governing the grant of leave to appeal from a decision of the Gen Div (formerly known as the High Court) to the Court of Appeal and the AD (as laid out in *Lee Kuan Yew* at [16]). As exemplified by the parties' submissions in OS 21, the new statutory scheme in respect of AD/CA Leave Applications and the new prospect of a further tier of appeal have generated no small amount of uncertainty. In the sections below, we analyse these new statutory provisions and explain how they are to be interpreted and applied.

59 Our analysis will touch on the following points.

(a) The statutory scheme governing AD/CA Leave Applications.

(b) The interaction between the applicable statutory provisions in AD/CA Leave Applications ("AD/CA Leave Provisions") and the existing common law principles.

(c) The proper interpretation of these statutory provisions.

60 Before embarking on the analysis proper, we set out three key points which not only frame the overall context in which AD/CA Leave Applications are brought before the Court of Appeal, but also inform our analysis on the statutory scheme governing AD/CA Leave Applications.

(a) First, AD/CA Leave Applications are brought in situations where the AD has *already heard an appeal and delivered its decision* (see *Noor Azlin (transfer)* at [7]). The parties would have already had an opportunity to litigate their disputes before an appellate court which usually sits as a *coram* of three judges. The parties are therefore seeking a "*further appeal from the Appellate Division*" [emphasis added] by way of such an application (see O 57 r 2A(3) of the ROC).

(b) Second, the AD was established for reasons that have both quantitative and qualitative roots – namely, to alleviate the growing caseload of the Court of Appeal whilst simultaneously permitting the Court of Appeal to focus its resources on matters which would benefit from its expertise as the apex court of the land (see *Noor Azlin (transfer)* at [5]).

(c) Flowing from the above two points, the AD is "a court which in some respects is akin to an intermediate appellate court" (see *Noor Azlin (transfer)* at [2]). We pause for a moment to stress that the key words in that sentence are "akin to", and not "intermediate appellate court". While the Court of Appeal remains the apex court of Singapore with the AD located just under it in the court hierarchy, the AD *is not meant to be seen as a "further tier" of appeal that must be crossed before a matter can reach the Court of Appeal*. In the vast majority of cases, once an appeal has been heard by the AD, the AD will serve as the final appellate court (see *Noor Azlin (transfer)* at [2] and [38]; see also the Second Reading of the Supreme Court of Judicature (Amendment) Bill (Bill No 32/2019), *Singapore Parliamentary Debates, Official Report* (5 November 2019) vol 94 ("2019 Parliamentary Debates")).

The statutory scheme governing AD/CA Leave Applications

An overview of the statutory scheme

61 The purpose of the statutory scheme governing AD/CA Leave Applications within the SCJA and ROC is to provide a ***tightly confined and highly limited avenue*** for parties to appeal against ***certain decisions*** of the AD. During the 2019 Parliamentary Debates, the Senior Minister of State for Law, Mr Edwin Tong Chun Fai ("Senior Minister of State for Law") took pains to emphasise that "[i]t will not be commonplace for appeals to be brought to the Appellate Division first and then further brought on to the Court of Appeal". Among other things, the provisions of the SCJA and the ROC make clear that any appeals against decisions of the AD may only be brought with leave of the Court of Appeal and "[a]ll such applications for leave will be assessed based on criteria that is more stringent than the usual common law principles that govern applications for leave to appeal against a decision of the [Gen Div]". The Senior Minister of State for Law elaborated that the rationale behind the restrictiveness of this route was that "the parties would already have had one round of appeal."

The relevant statutory provisions

62 Part IV of the SCJA deals with matters concerning the "APPELLATE DIVISION OF HIGH COURT" [capital letters in original]. Division 1 provides for general matters such as the jurisdiction and composition of the AD, as well as how decisions are to be made (see ss 31–33 of the SCJA). Division 2 contains provisions which expound on the AD's civil jurisdiction. These include the power to direct that certain matters be heard without oral arguments and the power of the AD to summarily dismiss any appeal or application on its own motion (see ss 37–38 of the SCJA). Division 3 contains provisions for appeals against decisions of the AD and is the focus of our analysis here.

63 Division 3 of the SCJA provides as follows:

> *Division 3 —Matters that are non-appealable or appealable only with leave*
>
> **No appeal in certain cases**
>
> **46.** An appeal cannot be brought against a decision of the Appellate Division in the cases specified in the Ninth Schedule.
>
> **Leave required to appeal**
>
> **47.**—(1) An appeal against a decision of the Appellate Division made in the exercise of its appellate civil jurisdiction may only be brought with the leave of the Court of Appeal.
>
> (2) The Court of Appeal may grant leave under subsection (1) only if the appeal will raise a point of law of public importance.
>
> (3) In deciding whether to grant leave under subsection (1) or in determining, for the purposes of subsection (2), whether an appeal will raise a point of law of public importance, the Court of Appeal is to have regard to matters prescribed by the Rules of Court.
>
> (4) To avoid doubt —
>
>> (*a*) the Court of Appeal is not required to grant leave under subsection (1) even if the appeal will raise a point of law of public importance; and
>>
>> (*b*) leave may be granted under subsection (1) even if the decision of the Appellate Division sought to be appealed against —

(i) was made in an appeal transferred by the Court of Appeal to the Appellate Division under section 29E(1); or

(ii) was made in an appeal to the Appellate Division that the Court of Appeal declined to transfer to itself under section 29D(1).

64 Division 3 of the SCJA may be seen as the bedrock of the AD's existence as a court "*akin to*" [emphasis added] an intermediate appellate court (see *Noor Azlin (transfer)* at [2]). Its provisions reflect a fine balance; they highlight that the AD is the final appellate court in *the vast majority of cases*, while simultaneously underscoring the Court of Appeal's status as the apex court of Singapore. This balance is achieved in six key ways.

(a) First, the AD's decision in respect of any case that falls within the Ninth Schedule to the SCJA is *final*, there being no further avenue of appeal that dissatisfied litigants can avail themselves of pursuant to s 46 of the SCJA.

(b) Second, the Court of Appeal has the power to hear appeals against decisions of the AD in respect of cases that *do not* fall within the Ninth Schedule to the SCJA. We term such appeals "Eligible Appeals".

(c) Third, Eligible Appeals cannot be brought automatically *as of right.* In all cases, parties must first make an AD/CA Leave Application to the Court of Appeal to seek leave to bring an Eligible Appeal before the Court of Appeal under s 47(1) of the SCJA.

(d) Fourth, the Court of Appeal may grant leave in respect of an Eligible Appeal "***only if*** the appeal will raise a point of law of public importance" [emphasis added] under s 47(2) of the SCJA. The provision therefore contains a *threshold condition* which, if not fulfilled, will automatically cut-off any prospect of the grant of leave. We refer to this as the "Threshold Merits Requirement".

(e) Fifth, in deciding whether:

(i) leave ought to be granted under s 47(1) of the SCJA; or

(ii) the appeal fulfils the Threshold Merits Requirement under s 47(2) of the SCJA,

the Court of Appeal is to have regard to matters prescribed in the ROC pursuant to s 47(3) of the SCJA.

(f) Finally, even if the Eligible Appeal fulfils the Threshold Merits Requirement under s 47(2) of the SCJA, the Court of Appeal has the discretion to decline to grant leave as stipulated under s 47(4) of the SCJA. In particular, s 47(4)(*a*) of the SCJA states that "the Court of Appeal is *not required* to grant leave under subsection (1) *even if* the appeal will raise a point of law of public importance" [emphasis added].

65 The "matters prescribed by the Rules of Court" in s 47(3) of the SCJA refer presently to those contained in O 57 r 2A(3) of the ROC which states as follows:

Application to Court of Appeal for leave to appeal against decision of General Division or Appellate Division (O. 57, r. 2A)

…

(3) For the purposes of section 47(3) of the Supreme Court of Judicature Act, in deciding whether to grant leave under section 47(1) of that Act, the Court of Appeal is to have regard (in addition to the matter specified in section 47(2) of that Act of whether the appeal will raise a point of law of public importance) to whether it is appropriate for that Court to hear a further appeal from the Appellate Division, taking into account all relevant matters, including either or both of the following:

(*a*) whether a decision of the Court of Appeal is required to resolve the point of law;

(*b*) whether the interests of the administration of justice, either generally or in the particular case, require the consideration by the Court of Appeal of the point of law.

66 It is evident that O 57 r 2A(3) of the ROC further restricts the cases in which the Court of Appeal will grant leave in AD/CA Leave Applications under s 47 of the SCJA.

(a) In addition to the Threshold Merits Requirement under s 47(2) of the SCJA, the Court of Appeal will also consider the *further* question of "whether it is appropriate for [the Court of Appeal] to hear a further appeal from the Appellate Division" pursuant to O 57 r 2A(3) of the ROC when deciding whether to grant leave under s 47(1) of the SCJA. We refer to this as the "Discretionary Appropriateness Requirement".

(b) In considering the Discretionary Appropriateness Requirement, the Court of Appeal takes into account all relevant matters, including either one or both of the two stipulated matters under O 57 rr 2A(3)(*a*) or 2A(3)(*b*) of the ROC (collectively the "Stipulated Considerations").

Two perceived ambiguities in relation to the statutory scheme governing AD/CA Leave Applications

67 At this juncture, we digress briefly to resolve two perceived ambiguities in the statutory scheme laid out above.

(1) The first ambiguity

68 The first ambiguity is whether the Stipulated Considerations are to be considered under the Threshold Merits Requirement or the Discretionary Appropriateness Requirement (collectively referred to as the "Requirements").

69 On the one hand, s 47(3) of the SCJA states that the Court of Appeal is to have regard to the matters prescribed by the ROC when considering whether to grant leave under s 47(1) of the SCJA ***or, "in determining, for the purposes of [s 47(2) of the SCJA], whether an appeal will raise a point of law of public importance"*** [emphasis added]. This suggests that the Stipulated Considerations may be relevant also to the Threshold Merits Requirement, by virtue of the fact that they are self-evidently contained within the ROC.

70 On the other hand, O 57 r 2A(3) of the ROC states that, in deciding whether to grant leave under s 47(1) of the SCJA, the Court of Appeal "is to have regard (***in addition to*** the matter specified in [s 47(2) of the SCJA]) to whether it is appropriate for [the Court of Appeal] to hear a further appeal from the Appellate Division, taking into account all relevant matters" [emphasis added], including the Stipulated Considerations. This indicates that the Stipulated Considerations are relevant *only to* the Discretionary Appropriateness Requirement.

71 In our judgment, the Stipulated Considerations ought to be considered under the Discretionary Appropriateness Requirement. We say this for three reasons.

72 First, a consideration of the AD/CA Leave Provisions as a whole reveals that the Stipulated Considerations feature only under the Discretionary Appropriateness Requirement. As a starting point, we do not think that the words in s 47(3) of the SCJA which require the Court of Appeal "to have regard to ***matters prescribed by the Rules of Court***" to determine "for the purposes of [s 47(2) of the SCJA], whether an appeal will raise a point of law of public importance" [emphasis added] definitively parks the Stipulated Considerations under *both* the Threshold Merits Requirement and the Discretionary Appropriateness Requirement. The phrase "matters prescribed by the Rules of Court" is worded broadly so as to require the Court of Appeal to consider the ROC, including any future amendments to the ROC pertaining to the AD/CA Leave Provisions. There is no mention of the Stipulated Considerations in s 47 of the SCJA, much less any indication that Parliament intended for the Court of Appeal to consider the Stipulated Considerations in the context of the Threshold Merits Requirement. This being the case, s 47 of the SCJA does not specifically contemplate the Stipulated Considerations and is not immediately clear as to exactly *where and when* they ought to be considered as part of the Court of Appeal's inquiry.

73 In contrast, the words in parentheses in O 57 r 2A(3) of the ROC (*ie*, "***in addition to*** the matter specified in section 47(2) of that Act of whether the appeal will raise a point of law of public importance" [emphasis added]), draw a clear line between the Threshold Merits Requirement and the Discretionary Appropriateness Requirement, and parks the Stipulated Considerations firmly under the *latter* inquiry. As such, ***the plain wording*** of the AD/CA Leave Provisions indicates that the Stipulated Considerations feature only under the Discretionary Appropriateness Requirement.

74 Second, our interpretation above is aligned with Parliament's intention as to the manner in which the Court of Appeal's inquiry would proceed in AD/CA Leave Applications. During the 2019 Parliamentary Debates, the Senior Minister of State for Law introduced the Stipulated Considerations in the context of AD/CA Leave Applications by stating that:

> The Court of Appeal will consider granting leave only if the appeal raises a point of law of public importance. The Court of Appeal ***may also take into consideration other factors***, such as *whether a decision of the Court of Appeal, as the apex [court], is required to resolve the point of law and whether the interests of the administration of justice require the Court of Appeal's consideration of that point of law*. [emphasis added in italics and bold italics]

In response to questions from two Members of Parliament, Mr Murali Pillai and Mr Louis Ng Kok Kwang, about the power of the Court of Appeal to decline to grant leave for a further appeal from the AD even if the Threshold Merits Requirement is fulfilled, the Senior Minister of State for Law further elaborated that the Court of Appeal would turn to the Stipulated Considerations as a *subsequent step.* He stated as follows:

> Under our proposed amendments, it is a requirement that the appeal ought to raise a point of law of public importance for leave to be considered. *However, as Members would appreciate, this alone would not be sufficient as a criterion to grant leave of appeal.*
>
> Other matters in the interest of the administration of justice were also considered. That in fact is the position today.
>
> Whether or not there should be further appeal should take into account the fact that the parties had had already a chance to raise their arguments, and nothing new is coming through in the

application for leave to appeal. They raised the arguments before the Appellate Division, and the Appellate Division has reviewed them and decided on that point of law.

> *In other jurisdictions, it is not always sufficient as well just to rely on a point of law of public importance to seek and obtain permission for leave to appeal* and I will just cite one example. In Australia, section 35A of Australia's Judiciary Act provides that the High Court of Australia may, when determining whether to grant special leave to appeal, "have regard to any matters that it considers relevant" and that this shall include not only whether the appeal involves a question of law of public importance, but also other factors, such as whether the interests of justice require it. *So, there is a degree of flexibility in the discretion given to the judge to assess a particular case and to assess whether, on top of the question of public importance, there are other reasons in the dispensation of justice for this to be heard on appeal.*
>
> [emphasis added]

75 These two excerpts from the 2019 Parliamentary Debates show that a clear distinction must be drawn between the Threshold Merits Requirement and the Discretionary Appropriateness Requirement. The former is a rigid *threshold* condition that must be fulfilled in order for the Court of Appeal to grant leave, a point we have made above at [64(d)]. The latter is a requirement that accords the Court of Appeal *a degree of flexibility* in the exercise of its discretion. In line with this spirit of flexibility, the Court of Appeal is empowered to take into account "all relevant matters", including either or both of the Stipulated Considerations under O 57 r 2A(3) of the ROC. Further, it is clear from the excerpts that the legislative drafters had contemplated the Stipulated Considerations as falling only under the latter.

76 Third and flowing from the above two points, it is logical for the Stipulated Considerations to be considered only under the Discretionary Appropriateness Requirement in the context of AD/CA Leave Applications. Both Stipulated Considerations are fulfilled only in respect of *points of law*. This, in itself, is already a sub-requirement that must be fulfilled under the Threshold Merits Requirement, a point which we return to later at [94] onwards. It would be strange if the same sub-requirement of "point of law" would need to be considered *twice* under the threshold stage of the Court of Appeal's inquiry in AD/CA Leave Applications, and again under the discretionary stage. There would be a curious duplication of effort if the Stipulated Considerations were relevant to both Requirements since if the Stipulated Considerations are satisfied under the Discretionary Appropriateness Requirement (which are explicitly parked under in O 57 r 2A(3) of the ROC), there would be no reason why they would not also satisfy the Threshold Merits Requirement.

77 Drawing together the above points, in our judgment, the Stipulated Consideration must be considered only under the Discretionary Appropriateness Requirement, *after* the applicant shows to the satisfaction of the Court of Appeal that the appeal he seeks to bring fulfils the Threshold Merits Requirement.

78 For the avoidance of doubt, we state that our view in respect of the proper position of the Stipulated Considerations within the statutory scheme pertains *only to AD/CA Leave Applications.* In so far as an applicant seeks to convince the Court of Appeal that the appeal will raise a point of law of public importance *in the context of a transfer application*, the holding in *Noor Azlin (transfer)* will continue to apply.

79 While we recognise that there are a large number of similarities in terms of how the words "a point of law of public importance" ought to be interpreted in the light of the fact that the same statutory language is used in both s 47 of the SCJA and O 56A r 12(3)(*b*) of the ROC (see further at

[96] below), the fact remains that the *nature and purpose of the two applications* are different and both must be evaluated separately (albeit with careful regard to the replicated statutory wording within both provisions and Parliament's intention behind this). *AD/CA Leave Applications* concern the grant of ***leave*** for an applicant to bring a second further appeal against a decision of the AD, while *transfer applications* pertain to the appropriate court before which an appellant can bring a ***first*** appeal.

(2) The second ambiguity

80 The second ambiguity is whether the fulfilment of both Requirements will *guarantee* the grant of leave under s 47(1) of the SCJA. It is evident from s 47(2) of the SCJA that the Threshold Merits Requirement is a threshold condition which must be fulfilled before the Court of Appeal can grant leave, and must therefore be considered either prior to, or in tandem with the Discretionary Appropriateness Requirement (see s 47(3) of the SCJA).

81 This point is underscored by s 47(4)(*a*) of the SCJA, a hugely significant provision which makes explicit that the fulfilment of the Threshold Merits Requirement does not *ipso facto* lead to the grant of leave (as explained above at [64(f)]). There is, however, no equivalent provision in respect of the Discretionary Appropriateness Requirement.

82 In our judgment, the fulfilment of both Requirements only goes towards increasing the applicant's prospects of obtaining leave and not towards guaranteeing it. Order 57 r 2A(3) of the ROC merely states that the Court of Appeal "is to have regard" to the Discretionary Appropriateness Requirement. This means that *the fulfilment of the Discretionary Appropriateness Requirement is* ***but one*** *of the considerations that the Court of Appeal may have regard to when deciding whether to grant leave.* There is no mention of this requirement being determinative and furthermore "appropriateness" is not a monolithic concept. It is a matter of degree to be determined according to the unique facts and circumstances of the case. As we will explain later, this view is supported by both the plain reading of the AD/CA Leave Provisions, as well as the purpose and object of O 57 r 2A(3) of the ROC and the Discretionary Appropriateness Requirement (see at [113]–[127] below).

A summary of the statutory scheme

83 The statutory scheme governing AD/CA Leave Applications can be summarised as follows.

(a) First, the applicant must ascertain whether the further appeal that he or she seeks to bring before the Court of Appeal falls within any of the prescribed categories of cases in the Ninth Schedule to the SCJA.

(i) If the answer is in the affirmative, no appeal may be brought to the Court of Appeal pursuant to s 46 of the SCJA.

(ii) If the answer is in the negative, the appeal is an Eligible Appeal and the applicant can move to the next step.

(b) Second, the applicant must seek leave to bring the Eligible Appeal before the Court of Appeal in an AD/CA Leave Application.

(c) Third, in the AD/CA Leave Application, the applicant must show that the Eligible Appeal fulfils the Threshold Merits Requirement.

(i) If the answer is in the affirmative, proceed to the next step.

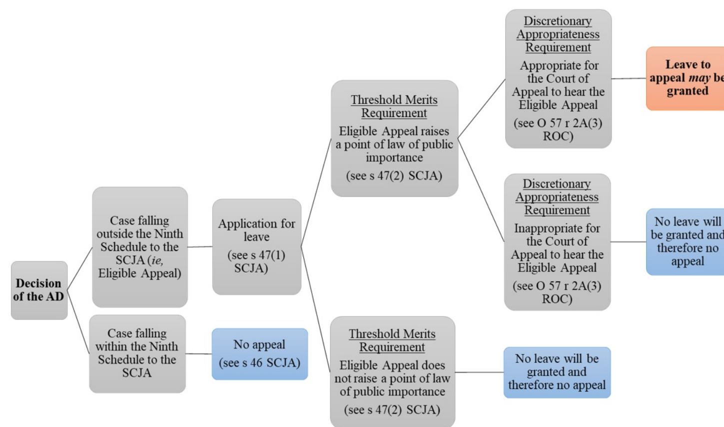
(ii) If the answer is in the negative, leave will not be granted by the Court of Appeal.

(d) Fourth, the applicant must show that the Eligible Appeal fulfils the Discretionary Appropriateness Requirement.

(i) If the answer is in the affirmative, leave ***may*** be granted by the Court of Appeal.

(ii) If the answer is in the negative, leave will not be granted by the Court of Appeal.

84 This statutory scheme may be illustrated diagrammatically as follows:



Interaction between the AD/CA Leave Provisions and the common law

85 Under the common law, leave to appeal against a decision of the Gen Div has traditionally been granted in three non-exhaustive situations, as set out authoritatively in the case of *Lee Kuan Yew* (at [16]):

(a) where there was a *prima facie* case of error;

(b) where the matter involved a question of general principle decided for the first time; and

(c) where the matter involved a question of importance upon which further argument and a decision of a higher tribunal would be to the public advantage.

These same principles have been adopted in applications for leave to appeal against decisions of the Gen Div before the AD (see the decision of the AD in *Hwa Aik Engineering Pte Ltd v Munshi Mohammad Faiz and another* [2021] 1 SLR 1288 ("*Hwa Aik Engineering*") at [8]). In other words, applications for leave to appeal against decisions of the Gen Div are to be assessed on the same principles, regardless of whether they are placed before the AD or the Court of Appeal. We refer to these two applications collectively as "Gen Div Leave Applications".

86 Having regard to the statutory scheme as laid out above, a preliminary question that must first be answered is *whether the principles in Lee Kuan Yew continue to apply in* ***AD/CA Leave Applications***.

87 We answer this in ***the negative***. AD/CA Leave Applications must be assessed differently from Gen Div Leave Applications for three reasons.

88 First and most importantly, the statutory provisions governing AD/CA Leave Applications mandate that such applications are to be assessed differently from the common law principles laid down in *Lee Kuan Yew.* Unlike Gen Div Leave Applications, ***statute*** lays down precise criteria by which AD/CA Leave Applications are to be assessed by the Court of Appeal (*ie*, the Threshold Merits Requirement and the Discretionary Appropriateness Requirement). While there is *some* similarity between the Threshold Merits Requirement and the third requirement in *Lee Kuan Yew* in the sense that both involve a question of law, the resolution of which would be to the "public" advantage or a question of law of importance, Parliament was certainly aware of the traditional principles governing Gen Div Leave Applications (see the speech of the Senior Minister of State for Law set out below at [89]), but eschewed them in favour of enacting *novel criteria* seen nowhere else in Singapore's law, save for O 56A r 12(3)(*b*) of the ROC, a point to which we return to later at [96]–[99] below. This omission is telling and AD/CA Leave Applications must therefore be assessed on the basis of criteria laid down by the novel statutory provisions in the SCJA and ROC, and *not* the established principles of the common law.

89 Second, Parliament has made clear in no uncertain terms that AD/CA Leave Applications are to be assessed differently from Gen Div Leave Applications, in terms of both ***the criteria and the stringency of review***. During the 2019 Parliamentary Debates, the Senior Minister of State for Law introduced the statutory scheme governing AD/CA Leave Applications in the Supreme Court of Judicature (Amendment) Bill (Bill No 32/2019) as follows:

> Where an appeal has been heard and decided by the Appellate Division, any further appeal against the decision of the Appellate Division may only be brought with the leave of the Court of Appeal. This is consistent with the practice in other jurisdictions such as the United States, United Kingdom and Australia, where there is no automatic right of appeal to the apex court.
>
> ***All such applications for leave will be assessed based on criteria that is more stringent than the usual common law principles that govern applications for leave to appeal against a decision of the General Division. To be clear, if you need to seek leave to appeal from the first instance, High Court currently, or the General Division, those principles are fairly settled***, I think Members know. ***But, the principles on which leave will be [assessed] to be granted for appeals from the Appellate Division up to the apex court, those would be applied in a far more stringent manner. Because in those situations, the parties would already have had one round of appeal.***
>
> *The Court of Appeal will consider granting leave only if the appeal raises a point of law of public importance. The Court of Appeal may also take into consideration other factors, such as whether a decision of the Court of Appeal, as the apex [court], is required to resolve the point of law and whether the interests of the administration of justice require the Court of Appeal's consideration of that point of law.*
>
> To be clear, so that I do not come across as suggesting that there are automatically three stages, three tiers of Courts, the Appellate Division should not be seen as a further tier of appeal that must be crossed before a matter can reach the Court of Appeal. Where an appeal lies from a decision of the General Division, then the appeal will lie either to the Appellate Division or to the Court of Appeal. It will not be commonplace for appeals to be brought to the Appellate Division first and then further brought on to the Court of Appeal. I hope I have explained that clearly enough.
>
> [emphasis added in italics and bold italics]

Taken together, the first and second points raised above indicate that AD/CA Leave Applications must be assessed on criteria that are not only different from, but also on standards that are more stringent than, those governing Gen Div Leave Applications – this being the intention of Parliament as gleaned from the plain statutory wording in the SCJA and the ROC, and as expressly articulated in the speech of the Senior Minister of State for Law during the 2019 Parliamentary Debates.

90 Third, the common law principles and standards in Gen Div Leave Applications cannot apply to AD/CA Leave Applications because the two applications are intrinsically different. Parties in the latter application would already have had "one round of appeal" such that, as explained by the Senior Minister of State for Law during the 2019 Parliamentary Debates, they would have already "*raised the arguments before the Appellate Division, and the Appellate Division [would have] reviewed them and decided on that point of law*" [emphasis added] (see [74] above for the full extract).

91 Harking back to the points made above at [60(a)] and [60(c)], the appeals before the AD are usually heard by a *coram* of three judges and the AD is meant to serve as the ***final*** appellate court in the ***vast majority*** of cases. This applies even for appeals against decisions of the Gen Div which are also appeals against the decisions of a lower court judge (for example, District Judges and Assistant Registrars) because these are usually heard by a single judge of the Gen Div (see the High Court decision of *TUC v TUD* [2017] 4 SLR 1360 ("*TUC*") at [12]). The application of the same common law principles to AD/CA Leave Applications would result in an absurd situation. It would mean that in every case where leave to bring an appeal against a decision of the Gen Div is granted by the AD, leave would *ipso facto* be granted in an AD/CA Leave Application against the eventual decision of the AD in the same case. Given that the AD was established to alleviate the growing caseload of the Court of Appeal (see above at [60(b)]), this would lead to the very strange and unintended (and even bizarre as well as contradictory) consequence where the Court of Appeal becomes flooded with appeals and applications by the very same amendments to the SCJA which purport to quantitatively alleviate its case load.

92 By way of observation, the usual constitution of the AD as a bench of three judges, and Parliament's express intention that the AD will usually serve as the final stop for parties in the vast majority of cases, when juxtaposed against the possibility of a two-tier appeal inherent in AD/CA Leave Applications indicate that such applications are more juridically similar to the following two types of applications than Gen Div Leave Applications.

(a) First, an application to refer questions of law of public interest to the Court of Appeal under s 397 of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) in a case where the appeal before the Gen Div had been heard by a specially constituted *coram* of three judges. This would "generally represent a final and authoritative determination of the issues arising from the case" and no leave would (absent exceptional circumstances) be given for a further reference to the Court of Appeal because a three-judge *coram* in a Magistrate's Appeal is a *de facto* Court of Appeal that is convened precisely to deal with important questions affecting the public interest which require detailed examination (see the decision of this court in *Chew Eng Han v Public Prosecutor* [2017] 2 SLR 1130 ("*Chew Eng Han*") generally and specifically at [46]–[49]).

(b) Second, an application for leave to appeal against a decision of the Gen Div in a highly anomalous scenario where the matter was heard by a specially constituted bench of three judges. In such cases, even though the principles in *Lee Kuan Yew* could apply, leave to appeal would not be granted on the second and third grounds save in exceptional circumstances (see *TUC* at [13]). The rationale behind this, as stated by Judith Prakash JA in *TUC* at [12], was that:

> 12 … it is not often that an appeal to the High Court will be heard by three judges. Such a

> procedure is necessary only when there are novel or important legal issues requiring detailed examination. It may fairly be presumed that the resulting decision will consider the issues at some length and the analysis thereof will be highly persuasive. …

Both *Chew Eng Han* and *TUC* are decisions that *pre-date* the establishment of the AD on 2 January 2021. They must therefore be read with the old context of a single-tier appeal system in mind. Nonetheless, they remain instructive in so far as they articulate the considerations behind the Court of Appeal's heightened scrutiny in applications for leave to appeal against decisions made by a *coram* of three judges as opposed to one, even if all the judges sit in the same capacity as Gen Div Judges.

93 Bearing in mind the foregoing, the principles laid down in *Lee Kuan Yew cannot* be imported wholesale into AD/CA Leave Applications. The criteria and standard of review applicable to such applications must be determined on a fresh slate in accordance with the relevant ***statutory*** *requirements*. It therefore follows that the Husband is correct in advancing OS 21 on the basis of the statutory provisions governing AD/CA Leave Applications, as opposed to the common law principles in *Lee Kuan Yew.* The Wife is thus mistaken in arguing otherwise.

94 With this, we turn to consider the statutory provisions that the Husband seeks to rely on in respect of his AD/CA Leave Application in OS 21. In doing so, we will bear in mind the applicable framework for statutory interpretation set out in *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 ("*Tan Cheng Bock*" and "*Tan Cheng Bock Framework"*) at [37].

Interpretation of the AD/CA Leave Provisions

The Threshold Merits Requirement

95 To recapitulate, the Threshold Merits Requirement is encapsulated in s 47(2) of the SCJA which states that:

> The Court of Appeal may grant leave under subsection (1) only if the appeal will raise a point of law of public importance.

As mentioned above at [64(d)] and [80], the words "only if" make it explicit that the Threshold Merits Requirement is a ***threshold*** *condition* which ***must*** be fulfilled before the Court of Appeal may grant leave under s 47(1) of the SCJA. The requirement can be broken up into three parts: (a) "an appeal will raise"; (b) "a point of law"; and (c) "of public importance".

96 Before addressing each part in turn, we return to the point that we had made earlier at [79] above in relation to the interplay between the AD/CA Leave Applications and transfer applications.

97 On the one hand, it is necessary to recognise that the statutory wording of the Threshold Merits Requirement in s 47(2) of the SCJA is wholly replicated under O 56A r 12(3)(*b*) of the ROC. This provision provides that the Court of Appeal may choose to transfer an appeal that has been made to the AD (and which is currently pending before the AD) to itself, on the basis that "it is more appropriate for the Court of Appeal to hear the appeal", if it is satisfied that "the appeal will raise a point of law of public importance". This same point had been considered in *Noor Azlin (transfer)* at [53] and [59]–[62]. In particular, as stated in *Noor Azlin (transfer)* at [61], the identical wording contained within the two provisions suggests that they should be interpreted in a similar fashion, if there is no reason to suggest otherwise (see the decision of this court in *Skyventure VWT Singapore Pte Ltd v Chief Assessor and another and another matter* [2021] 2 SLR 116 at [38]–[39], citing *Tan Cheng Bock* at [58(c)(i)]).

98 On the other hand, one must also bear in mind that O 56A r 12(3)(*b*) of the ROC and the requirement therein appear in the different and distinguishable context of transfer applications.

99 To account for these two competing considerations, we will apply a *modified* approach when considering the possible interpretations of the three parts to the Threshold Merits Requirement under stage 1 of the *Tan Cheng Bock Framework* as follows.

> (a) First, we will lay out the analysis in *Noor Azlin (transfer)* which concerns the possible interpretations of the *plain wording of the statutory provision*.
>
> (b) Second, we will consider whether this analysis can apply in the context of s 47(2) of the SCJA within the written law as a whole – *ie*, an AD/CA Leave Application and the statutory scheme governing it as laid out at [62]–[83] above.
>
> > (i) If we answer this in the negative, we will undertake the analysis afresh.
> >
> > (ii) If we answer this in the affirmative, we will consider if there is room to elaborate or build upon the analysis in *Noor Azlin (transfer).*

(1) Part 1: "The appeal will raise"

100 The analysis in *Noor Azlin (transfer)* is as follows (at [54]):

> 54 … The targeted words "the appeal will raise" indicate that the point of law of public importance must be a live issue in the appeal, *ie*, one which directly arises for the court's determination, and which has a substantial bearing on the outcome of the appeal. It cannot be a hypothetical or merely theoretical question which is peripheral or irrelevant to the appeal.

101 The above interpretation accords with a plain reading of the words "the appeal will raise" and is entirely applicable to s 47(2) of the SCJA and AD/CA Leave Applications. We will simply emphasise again that the point of law of public importance must arise directly for the Court of Appeal's determination and must have a substantial bearing on the outcome of the appeal.

102 As a matter of good practice, an applicant in an AD/CA Leave Application ought to explain how the claimed "point of law of public importance" will:

> (a) arise on the facts of the case for the Court of Appeal's determination; and
>
> (b) have a substantial bearing on the outcome of the appeal if leave is granted.

103 In the light of the fact that AD/CA Leave Applications are brought after parties had already availed themselves of an appeal before the AD (see s 47(1) of the SCJA), we add that the point of law of public importance that "the appeal will raise" must arise from the decision and reasoning of the court below, *ie*, *the AD* (see also the decision of the AD in *Ho Soo Fong and another v Ho Pak Kim Realty Co Pte Ltd (in liquidation)* [2021] SGHC(A) 11 at [8] which is to similar effect). It will *not* be sufficient for an applicant to show that the Gen Div had considered the claimed point of law of public importance, *if* that same point had been abandoned by the parties or, for some reason or other, had not been raised before the AD.

104 The simple reason for this is that an appeal (especially, a second-tier appeal if leave is granted under s 47(1) of the SCJA) is not a retrial. As stated by this court in *JWR Pte Ltd v Edmond Pereira*

Law Corp and another [2020] 2 SLR 744 at [32], when hearing an appeal, the Court of Appeal considers, in the main, whether the court below was wrong or otherwise in its decision. It would therefore be an abuse of process (barring exceptional circumstances) for an appellant or applicant to seek to mount arguments on an entirely new case, or, to seek leave to appeal on the basis of arguments which had not been raised before the AD.

(2) Part 2: "A point of law"

105 The analysis in *Noor Azlin (transfer)* is (at [55]) as follows:

> 55 The explicit reference to "law" in O 56A r 12(3)(*b*) of the ROC makes clear that this provision will not be engaged if the appeal relates to points which are factual in nature, even if they are of public importance. The distinction between questions of law and mere questions of fact has been clearly laid down by this court in *Chew Eng Han v Public Prosecutor* [2017] 2 SLR 1130 ("*Chew Eng Han*") at [42]–[44]. The former is necessarily normative in nature given that it would apply generally or universally to other (similar) situations. The latter, on the other hand, is necessarily confined or limited to the case at hand.

106 The above interpretation is cogent and is entirely applicable to s 47(2) of the SCJA and AD/CA Leave Applications.

(3) Part 3: A point of law "of public importance"

107 The analysis in *Noor Azlin (transfer)* is (at [56]–[59] and [61]–[62]) as follows:

> 56 The question of whether a point of law of public importance arises in an appeal must depend upon the facts and circumstances of the case … An ordinary reading of the words indicates that the point (when adjudicated upon) will have weighty ramifications that go beyond the parties to the dispute such that it would be more appropriate for the Court of Appeal than the AD to deal with the appeal by virtue of its powers and stature as the apex court of the land.
>
> 57 By way of a brief aside, the interpretation of the requirement of "question of law of public interest" is to a similar effect in the context of the requirements for leave to bring a criminal reference under s 397 of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) (see *Chew Eng Han* at [43], citing the decision of this court in *Mohammad Faizal bin Sabtu and another v Public Prosecutor and another matter* [2013] 2 SLR 141 at [19]).
>
> 58 Obvious examples of appeals within this provision will include appeals that will engage new questions of law of general application and those that will involve conflicting decisions of the Court of Appeal or the AD which need to be resolved so as to bring certainty to significant areas of law. Conversely, appeals which simply pertain to well-established principles of law or centre on whether the Gen Div or the former High Court has correctly applied established legal principles to the facts of the case, will not fall into this category.
>
> 59 The words "point of law of public importance" must also be read in the context of the written law as a whole. Quite apart from the dictates of the interpretive framework in *Tan Cheng Bock* … at [37(a)], this is important because the wording of the provision is wholly replicated under s 47(2) of the SCJA as a prerequisite for obtaining leave to appeal against a decision of the AD to the Court of Appeal.
>
> …

> 61 It has been previously mentioned that such leave to appeal is granted on very narrow grounds … and certainly on more stringent criteria than a transfer application under s 29D of the SCJA. The identical wording in these provisions indicates that "a point of law of public importance" in O 56A r 12(3)(*b*) of the ROC must be interpreted narrowly as well, and on the basis of similar principles, there being no reason to suggest otherwise (see the decision of this court in *Skyventure VWT Singapore Pte Ltd v Chief Assessor and another and another matter* [2021] SGCA 40 ("*Skyventure*") at [38]–[39], citing *Tan Cheng Bock* at [58(c)(i)]).
>
> 62 While O 56A r 12 of the ROC does not provide any further clues as to what constitutes … "a point of law of public importance", these can be found in O 57 r 2A(3) of the ROC which elaborates on some relevant matters which may go toward fulfilling this ground … [R]elevant matters to be taken into account in order to ascertain whether a point of law of public importance arises in the appeal for the purposes of a transfer application under s 29D of the SCJA would include those matters prescribed under O 57 rr 2A(3)(*a*) and 2A(3)(*b*) of the ROC, as set out above.

108 It is evident that the above passages quoted from *Noor Azlin (transfer)* on O 56A r 12(3)(*b*) of the ROC were greatly influenced by the provisions in s 47 SCJA and O 57 r 2A(3) of the ROC. This is unsurprising given that the court is to consider the "context of that provision within written law as a whole" under stage 1 of the *Tan Cheng Bock Framework* at [37(a)]. In our judgment, these quoted observations are ***equally applicable*** to s 47(2) of the SCJA and AD/CA Leave Applications, save for the discussion on the Stipulated Considerations (see above at [68]–[79]) and whether it would be more appropriate for the Court of Appeal to hear an appeal than the AD. The proper consideration is, instead, whether it is appropriate for the Court of Appeal to hear a ***further appeal*** from the AD. Indeed, this is precisely the inquiry that the Court of Appeal undertakes in respect of the Discretionary Appropriateness Requirement under s 47(3) of the SCJA read with O 57 r 2A(3) of the ROC, and we consider it under the next section.

109 For clarity, the principles applicable to the Threshold Merits Requirement are summarised as follows:

> (a) Whether the Threshold Merits Requirement is fulfilled must depend on the facts and circumstances of the case. It is further implicit at [56] of *Noor Azlin (transfer)* that public importance is not a unitary concept, but a matter of degree. The significance of the appeal as well as its impact beyond the instant parties to the dispute must be assessed on basis of the facts and circumstances of the case at hand.
>
> (b) An ordinary reading of the words indicates that the point (when adjudicated upon) will have weighty ramifications that go beyond the parties to the dispute (see *Noor Azlin (transfer)* at [56]).
>
> (c) Obvious examples of appeals which will fulfil the Threshold Merits Requirement include appeals that will engage new questions of law of general application and those that will involve conflicting decisions of the Court of Appeal or the AD which need to be resolved so as to bring certainty to significant areas of law. Conversely, appeals which simply pertain to well-established principles of law or centre on whether the Gen Div or the former High Court had correctly applied established legal principles to the facts of the case, will not fall into this category (see *Noor Azlin (transfer)* at [58]).

(4) Purpose and object of s 47(2) of the SCJA and the Threshold Merits Requirement

110 The purpose and object of s 47(2) of the SCJA and the Threshold Merits Requirement is clear. As stated above at [64(d)], [80] and [95], the Threshold Merits Requirement serves as a ***threshold condition*** which must be fulfilled before the Court of Appeal may grant leave under s 47(1) of the SCJA. In other words, it serves to sift out unmeritorious matters which do not deserve to be heard in a further appeal before the Court of Appeal from the outset – there is no need to consider the Discretionary Appropriateness Requirement if the Threshold Merits Requirement is not fulfilled.

111 This view finds support in the speech of the Senior Minister of State for Law during the 2019 Parliamentary Debates in which he stated that "[t]he Court of Appeal ***will consider*** granting leave ***only if*** the appeal raises a point of law of public importance." [emphasis added]. The Senior Minister of State for Law further elaborated on this point in response to questions from two Members of Parliament, Mr Murali Pillai and Mr Louis Ng Kok Kwang about the power of the Court of Appeal to decline to grant leave for a further appeal from the AD even if the Threshold Merits Requirement is fulfilled. He explained, in gist, that whether or not a further appeal should be heard should take into account the fact that the parties have already had a chance to raise their arguments before the AD, including in relation to the "point of law of public importance" and "the Appellate Division has reviewed [their arguments] and decided on that point of law". It follows, therefore, that the mere fulfilment of the Threshold Merits Requirement alone would not be sufficient as a criterion to secure the grant of leave. The reply of the Senior Minister of State for Law on this point is reproduced in full at [74] above.

112 The purpose and object of s 47(2) of the SCJA and the Threshold Merits Requirement is therefore entirely in line with the plain reading of the provision in the context of AD/CA Leave Applications as well as the statutory scheme governing it (as set out above at [95]–[109]).

The Discretionary Appropriateness Requirement

113 The Discretionary Appropriateness Requirement is found in O 57 r 2A(3) of the ROC which states as follows:

> (3) For the purposes of section 47(3) of the Supreme Court of Judicature Act, in deciding whether to grant leave under section 47(1) of that Act, the Court of Appeal is to have regard (in addition to the matter specified in section 47(2) of that Act of whether the appeal will raise a point of law of public importance) *to whether it is appropriate for that Court to hear a further appeal from the Appellate Division, taking into account all relevant matters*, including either or both of the following:
>
> > (*a*) whether a decision of the Court of Appeal is required to resolve the point of law;
> >
> > (*b*) whether the interests of the administration of justice, either generally or in the particular case, require the consideration by the Court of Appeal of the point of law.
>
> [emphasis added]

114 The context which frames the Court of Appeal's inquiry in respect of the Discretionary Appropriateness Requirement is found within the statutory formulation of the requirement itself in O 57 r 2A(3) of the ROC. In other words, this involves a situation in which the AD has *already heard an appeal* and presumably dealt with the same legal issues which the applicant was seeking leave to litigate in a *further appeal* before the Court of Appeal. This context must in turn be informed by (a) the status and powers that the Court of Appeal possesses as the apex court of the land, and (b) the court hierarchy as set out in the SCJA and the ROC.

115 As a court akin to an intermediate appellate court, the AD has the power to overrule decisions of the Gen Div as well as other lower courts. It can depart from previous AD precedents but it does not have the powers, unlike the Court of Appeal to: (a) overturn or overrule other decisions of the AD; or (b) depart from decisions of the Court of Appeal. This much is obvious from the scheme of the SCJA as a whole which allows decisions of the Gen Div to be appealed to the Court of Appeal and the AD, and decisions of the AD to be appealed to the Court of Appeal in limited situations (see ss 29C and 47 of the SCJA), as well as the established principles of *stare decisis* (see *Chew Eng Han* at [49]).

116 Reading O 57 r 2A(3) of the ROC in the light of the above context, three things are immediately apparent about the Discretionary Appropriateness Requirement.

117 First, in contrast to the Threshold Merits Requirement which functions as a threshold condition for the grant of leave, the Discretionary Appropriateness Requirement provides the Court of Appeal with the *discretion* to determine whether a further appeal against a decision of the AD ought to be heard.

118 Second, as mentioned above at [82], "appropriateness" is not a monolithic concept, but rather a matter of degree. Whether the threshold for leave is crossed should be determined according to the facts and circumstances of the case.

119 Third, in determining whether the threshold is crossed, the Court of Appeal has the flexibility to consider any and all matters that it considers relevant. This means that its discretion in respect of the Discretionary Appropriateness Requirement is a broad and wide-ranging one. That said, this discretion can only be exercised after considering, at the minimum, one of the two Stipulated Considerations under O 57 r 2A(3)(*a*) and O 57 r 2A(3)(*b*) of the ROC along with any other matter deemed relevant by the Court of Appeal. We elaborate upon these three points in turn.

(1) Order 57 r 2A(3)(*a*) of the ROC

120 The first Stipulated Condition is whether a decision of the Court of Appeal is required to resolve the point of law *per* O 57 r 2A(3)(*a*) of the ROC. The word "required" suggests that no court apart from the apex court is capable of resolving the instant point of law that arises in the appeal for which leave is being sought. It is not enough for the point of law to be novel, or for it to be one that has not been considered by the Court of Appeal before. This is because the AD is well-equipped to resolve novel and complex points of law by virtue of the number of judges that usually constitutes a *coram* of the AD, as well as their seniority and expertise. Situations which ***require*** a decision of the Court of Appeal to resolve a point of law will be ***rare and exceptional***. Examples of scenarios which *might* fulfil O 57 r 2A(3)(*a*) of the ROC include (see also *TUC* at [13]–[14]):

(a) where there are conflicting decisions of the Court of Appeal on the point of law;

(b) where there are conflicting decisions of the AD on the point of law;

(c) where the bench of the AD which had heard the appeal is split on the result of the case – even then, however, the divergence must be on a point of law which has a substantial bearing on the outcome of the case and had directly contributed to the split; and

(d) where the bench of the AD is unanimous in their decision, but in circumstances where the bench expresses serious reservation or strong disagreement with legal principles set out in a past decision of the Court of Appeal even though the AD was bound by law to apply them.

(2) Order 57 r 2A(3)(*b*) of the ROC

121 The second Stipulated Condition is whether the interests of the administration of justice, either generally or in the particular case, require the consideration by the Court of Appeal of the point of law *per* O 47 r 2A(3)(*b*) of the ROC.

122 Order 57 r 2A(3)(*b*) of the ROC is a stricter but, at the same time, more lenient provision than O 57 r 2A(3)(*a*) of the ROC. It is stricter because a decision of the Court of Appeal is not only "required" in a general sense, but also required for the specific purpose of furthering "***the interests of the administration of justice***" [emphasis added]. It is more lenient because the words "generally or in the particular case" suggest that O 57 r 2A(3)(*b*) of the ROC may be fulfilled even where the interests of the administration of justice are furthered only in a particular case. This strikes a good balance – the provision allows the Court of Appeal to step in when it is absolutely crucial to further the administration of justice in a particular case, but at the same time prevents abuse of this provision by opportunistic litigants through imposing a heightened threshold of necessity.

123 In our judgment, cases where O 57 r 2A(3)(*b*) of the ROC will be engaged in relation to *specific* litigants or the *particular* case before the court will be few and far between, given the threshold condition that the point of law raised in the appeal must be of "public importance" under s 47(2) of the SCJA.

124 Further, while it is difficult to prescribe hard and fast rules in respect of O 57 r 2A(3)(*b*) of the ROC, examples of cases in which the Court of Appeal's consideration of a point of law may be required "in the interests of the administration of justice" may include those which will concern the functioning of crucial aspects of Singapore's legal system or will remedy serious injustice.

(3) "All relevant matters"

125 Apart from the two Stipulated Considerations, it is presently unclear what other matters may be "relevant" to the Court of Appeal's inquiry under O 57 r 2A(3) of the ROC. It is not necessary at this juncture to lay out concrete rules in respect of what constitutes a "relevant matter" for the purposes of OS 21.

126 It suffices for us to simply state that the Court of Appeal's scrutiny in respect of any allegedly "relevant matter" must be searching so as to prevent the abuse of the statutory scheme governing AD/CA Leave Applications. Bearing in mind the purpose and object of the statutory provisions which animate the AD, only a truly exceptional case will warrant the grant of leave so as to:

(a) prevent duplication of effort in having two appellate courts decide on the same case;

(b) forestall any undermining of the statutory scheme governing AD/CA Leave Applications which aims to provide a tightly confined and highly limited avenue for parties to appeal against only certain decisions of the AD; and

(c) conserve the resources of the Court of Appeal so as to enable it to focus on matters which would benefit from its expertise as the apex court of the land.

(4) Purpose and object of O 57 r 2A(3) of the ROC and the Discretionary Appropriateness Requirement

127 The above reading of the Discretionary Appropriateness Requirement and O 57 r 2A(3) of

the ROC is in line with their purpose which is two-fold. First, the provision acts as a fine-meshed sieve to further restrict the number of cases which will warrant a further appeal before the Court of Appeal because "appropriateness" is an added requirement which an applicant must satisfy the court of, prior to the grant of leave. Second, it accords the Court of Appeal a broad and wide-ranging discretion to determine whether to hear a further appeal against a decision of the AD.

128 Support for this can be found, once again, in the speech of the Senior Minister of State for Law during the 2019 Parliamentary Debates which states that, much like s 35A of Australia's Judiciary Act 1903, the provision for the Court of Appeal to consider "all relevant matters" creates "a degree of flexibility in the discretion given to the judge to assess a particular case and to assess whether, on top of the question of public importance, there are other reasons in the dispensation of justice for this to be heard on appeal" (see [74] above).

129 Bearing in mind the principles set out above, we turn, for completeness, to consider the merits of OS 21 in the next section. Before proceeding to do that, however, we reiterate once more that the purpose of AD/CA Leave Applications and the statutory scheme governing them within the SCJA and the ROC is to provide a ***tightly confined and highly limited avenue*** for parties to appeal against ***certain decisions*** of the AD. The AD is meant to function as the final appellate court in the vast majority of cases and any AD/CA Leave Applications brought to the Court of Appeal will be subject to searching scrutiny. Leave to bring a further appeal will only be granted in ***rare and exceptional*** cases.

130 It flows from our observations above that parties must be circumspect and realistic when considering whether or not to bring AD/CA Leave Applications before this court. Unmeritorious applications brought by applicants who fail to (a) address specifically *both* the Threshold Merits Requirement and Discretionary Appropriateness Requirement, and (b) show satisfactorily that both Requirements could *plausibly* be fulfilled on the facts of the case, will be met with costs consequences. This is especially so if such unmeritorious applications unnecessarily increase the amount of time taken, the costs or the complexity of the proceedings.

Issue 2: OS 21 is wholly unmeritorious

131 In our judgment, OS 21 fails at the outset as the Husband has failed to show that the Anticipated Appeal fulfils the Threshold Merits Requirement, the threshold condition for this court to grant leave in OS 21.

132 The present case is somewhat unusual because the facts and circumstances of the dispute between the parties generate a variety of interesting legal questions which were considered by the Gen Div Judge (as laid out at [35] and [37] above). Furthermore, at least one of these legal questions has the potential to materially affect all future applications for financial relief under Ch 4A – specifically, the question of whether a court exercising its powers under s 121G of the Women's Charter to make an order for financial relief should apply the same approach as a court dealing with the ancillary matters upon a divorce in Singapore. However, these legal issues had ***not*** been raised before the AD as the parties had chosen to run their cases in AD 16 along ***factual*** lines. Correspondingly, the AD Judgment was almost entirely ***factual*** in nature and made no definitive pronouncements on any of the points of law raised by the Gen Div Judge. By way of illustration, the AD recognised that the question of the proper approach of division under Ch 4A arose on the facts of the case, but left the question open for determination in a future case as the Gen Div Judge's approach to the division of assets was not disputed on appeal (see the AD Judgment at [36]). Given that the Husband does not even raise any of these legal points in OS 21, he is deemed not to wish to raise them in his Anticipated Appeal (and, in any event, it would have been too late for him to raise

them as these legal points had not been raised before the AD). As such, even if the legal points considered by the Gen Div Judge are of sufficient "public importance", they will still fail to meet the Threshold Merits Requirement because they will not be raised in the Anticipated Appeal.

133 As for the six questions that the Husband claims will "raise a point of law of public importance", these questions fall far short of fulfilling the Threshold Merits Requirement because they are self-evidently not questions of law, but rather are questions of ***fact***.

(a) Questions 1, 3 and 4 concern the weight that a court ought to give to the terms of the Settlement Agreement. This is a matter within the court's discretion, to be determined with regard to the specific terms of a unique agreement between the parties and the unique factual circumstances surrounding their marriage and divorce.

(b) Question 2 concerns the application of the well-established principles in *Henderson* to the particular facts of the case.

(c) Questions 5 and 6 are ill-disguised factual submissions about the Wife's alleged "bad conduct" and how her actions ought to disentitle her to financial relief under Ch 4A.

134 In the circumstances, the Husband has failed to show that his AD/CA Leave Application in OS 21 fulfils the threshold requirement for the grant of leave under s 47(2) of the SCJA. There is therefore no need to consider his two grounds as to why it is appropriate for the Court of Appeal to hear a further appeal against the AD Judgment. For completeness, those two grounds are clearly ***factual*** questions in relation to whether the Wife had legal advice when she signed the Settlement Agreement, whether the Settlement Agreement had existed to take care of the Wife's needs after the divorce and how the Wife's conduct ought to be treated by the court.

135 To summarise, even if leave is granted for OS 21 to be filed out of time, OS 21 is wholly unmeritorious and bound to fail because none of the questions that the Husband seeks to raise in the Anticipated Appeal are questions of ***law***, much less questions of law of public importance. The Husband therefore fails to cross the Threshold Merits Requirement.

Conclusion

136 We dismiss OS 21 on the sole basis that it was filed out of time with no attempt by the Husband or his counsel to put forth an explanation for the delay. In any event, OS 21 is wholly unmeritorious and bound to fail. The Husband is to pay costs of $5,000 (all-in) to the Wife. As the Wife is legally aided, costs may be paid in favour of the Director, Legal Aid or such other person/entity as the parties agree is appropriate. The usual consequential orders will apply.

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