IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2022] SGCA 31

Originating Summons No 24 of 2021

Between

Pradeepto Kumar Biswas

… *Applicant*

And

(1) Sabyasachi Mukherjee
(2) Gouri Mukherjee

… *Respondents*

Originating Summons No 25 of 2021

Between

Indian Ocean Group Pte Ltd

… *Applicant*

And

Gouri Mukherjee

… *Respondent*

GROUNDS OF DECISION

[Civil Procedure — Jurisdiction — Original jurisdiction]
[Civil Procedure — Trial — Applications — Application for new trial]
[Abuse of Process — *Henderson v Henderson* doctrine]

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Pradeepto Kumar Biswas
v
Sabyasachi Mukherjee and another
and another matter

[2022] SGCA 31

Court of Appeal — Originating Summonses Nos 24 and 25 of 2021
Andrew Phang Boon Leong JCA, Steven Chong JCA and Quentin Loh JAD
4 March 2022

11 April 2022

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

Introduction

1 This court was faced with two applications. Both were filed in respect of matters that had concluded some *two years* prior. Quite aside from the questionable timing of the applications, of greater concern was their manifest lack of merit, and the abuse of process they entailed.

2 The first application, CA/OS 24/2021 ("OS 24"), was an application filed by Pradeepto Kumar Biswas ("Mr Biswas"). Mr Biswas asked that a new trial (otherwise referred to as a "retrial") be ordered in respect of S 1270/2014 ("S 1270"). The respondents in OS 24, Sabyasachi Mukherjee ("Dr Mukherjee") and his wife, Gouri Mukherjee ("Mrs Mukherjee"), were the successful plaintiffs in S 1270. Belinda Ang J (as she then was; the "Judge")

found in S 1270 that Mr Biswas was liable for breach of fiduciary duty due to his mishandling of the Mukherjees' funds that were meant to be investments.

3 The other application, CA/OS 25/2021 ("OS 25"), was an application by Indian Ocean Group Pte Ltd ("IOGPL"). Mr Biswas is the sole shareholder and Managing Director of IOGPL. IOGPL sought a retrial in respect of HC/S 417/2017 ("S 417"). In S 417, the Judge dismissed IOGPL's claim to recover a loan. Mrs Mukherjee is the respondent in OS 25; she was the successful defendant in S 417.

4 S 1270 and S 417 were heard together and culminated in a single written judgment, delivered by the Judge on 11 December 2018 (see *Sabyasachi Mukherjee and another v Pradeepto Kumar Biswas and another suit* [2018] SGHC 271 (the "Judgment")). As noted, the Judge allowed the Mukherjees' claims in S 1270 but dismissed IOGPL's claim in S 417. Mr Biswas and IOGPL appealed *vide* CA/CA 2/2019 ("CA 2") and CA/CA 3/2019 ("CA 3"), respectively. On 25 November 2019, we struck out CA 2 due to Mr Biswas's breach of an unless order (see the decision of this court in *Pradeepto Kumar Biswas v Sabyasachi Mukherjee and another* [2019] SGCA 79). CA 3 was deemed withdrawn on 9 April 2019.

5 Almost two years after CA 2 was struck out, Mr Biswas and IOGPL filed the present applications, alleging a miscarriage of justice and seeking retrials pursuant to s 60A of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) ("SCJA"). They argued, primarily, that the Mukherjees had committed *perjury*, and that the Judge had erred in finding that the Mukherjees' investments were "shams or duds".

6 On 4 March 2022, having heard parties' submissions, we orally dismissed OS 24 and OS 25, on the basis that this court was without jurisdiction to hear the applications. We now provide our detailed grounds of decision.

Background

7 We briefly recount the facts and procedural history behind OS 24 and OS 25.

8 Mr Biswas was the Mukherjees' investment advisor. He had introduced various investments to them, and helped the Mukherjees transact with the various companies. The Mukherjees sought to recover reasonable sums from Mr Biswas out of the US$4.5m which they had invested in the following products:

(a) Swajas Air Charters Limited ("Swajas"), US$500,000;

(b) Neodymium Holdings Ltd ("Neodymium"), US$250,000;

(c) Peak Commodities Inc ("Peak"), US$500,000;

(d) Pacatolus Growth Fund Class 6 ("Pacatolus"), US$2,250,000;

(e) Trade Sea International Pte Ltd ("Trade Sea"), US$200,000;

(f) Farmlands of Africa Inc. ("Farmlands"); US$300,000 and

(g) SEW Trident Global Pte Ltd ("SEW"), US$500,000 (out of which the Mukherjees sought to recover only US$250,000).

The Mukherjees alleged, and the Judge accepted, that Mr Biswas had used the aforementioned funds which were purportedly for investments in Neodymium,

Peak, Pacatolus, Trade Sea, and SEW (collectively referred to as "the Investments") for his own purposes which were never disclosed. The Judge dismissed the Mukherjees' claim in respect of returns on the investments in Swajas and Farmlands (see the Judgment at [112] and [208], respectively).

9 In 2014, the Mukherjees brought S 1270 against Mr Biswas. Their allegation was that Mr Biswas had fraudulently procured investments from them, and "swindled them of US$3.45m through a complex labyrinth of financial instruments" (see the Judgment at [1]).

10 Subsequently, in 2017, IOGPL brought S 417 against Mrs Mukherjee to recover an alleged loan made in 2012 through an entity known as "IOEL". IOGPL owned the single share in IOEL. In July 2012, IOEL made two remittances to the Mukherjees' UOB account, amounting to US$1.6m. IOGPL's case was that these were loans as Mrs Mukherjee needed funds for her business. Mrs Mukherjee refuted this, taking the position that the transfers of US$1.6m were the Mukherjees' own funds and the transfers were made pursuant to their instructions (see the Judgment at [275]–[279]).

11 The two suits were heard together and disposed of collectively. On 11 December 2018, the Judge found Mr Biswas to be in breach of fiduciary duties owed to the Mukherjees. Mr Biswas was made liable to pay the Mukherjees US$3.45m for the Investments (see the Judgment at [273]). The Judge dismissed S 417, finding that the US$1.6m was indeed the Mukherjees' funds which they had given to Mr Biswas to manage (see the Judgment at [274]–[294]). The Judge ordered that costs be taxed if not agreed. Parties were unable to agree on costs.

12 Mr Biswas and IOGPL appealed against the Judge's decision in the Judgment *vide* CA 2 and CA 3, respectively. CA 2 was struck out on 25 November 2019 for Mr Biswas's breach of an unless order. CA 3 was deemed withdrawn on 9 April 2019.

Events following the filing of the present applications

Events in OS 24 and OS 25

13 OS 24 was filed on 6 October 2021, and OS 25 was filed the next day on 7 October 2021. On 1 December 2021, Mr Biswas filed an affidavit in OS 25 that alleged that his lawyers in S 417, M/s Niru & Co ("Niru"), had not disclosed certain evidence at trial. In other words, Mr Biswas made allegations against solicitors who were not involved in the present proceedings. The Mukherjees' lawyers, Drew & Napier LLC ("D&N"), raised this issue via a letter to the court.

14 On 8 December 2021, which was the deadline for filing of written submissions, D&N filed written submissions for both OS 24 and OS 25 on behalf of the Mukherjees. The solicitors for Mr Biswas, Carson Law Chambers ("Carson"), filed written submissions for OS 24, but not OS 25. On the same day, D&N wrote to court addressing the issue of the allegations against Niru (as noted above). They stated that they had written to Carson about the issue but had received no response. Accordingly, they wrote to Niru directly. Niru had replied and refuted the allegations made ("Niru's response"). D&N attached their correspondence with Niru and stated that Niru's response should be attached to a supplementary affidavit to be filed by IOGPL. Later that same day, Carson wrote to court agreeing to file the supplementary affidavit with Niru's response attached. They requested that Mr Biswas be given until 29 December 2021 to file the supplementary affidavit with Niru's response attached, and that

parties' submissions (which were meant to be filed that day) be filed and exchanged one week after 29 December 2021.

15 In essence, Carson was asking for an extension of time to file its written submissions. On 9 December 2021, D&N objected to Carson's request and insisted that Carson file its written submissions by 8 December 2021 (which had already elapsed). Subsequently, the court issued to parties the following directions:

(a) Carson was directed to file the supplementary affidavit, as well as its written submissions on the merits of OS 25, on 29 December 2021.

(b) D&N was to file responsive written submissions to only those portions of Carson's submissions that dealt with the allegations against Niru. Such submissions were not to deal with the merits of OS 24 and OS 25. The deadline for these submissions was set at 7 January 2022. If D&N deemed that such submissions were not necessary, they were to inform the court by 31 December 2021.

(c) There were to be no further extensions of time granted if Carson failed to file written submissions by the stipulated deadline, and OS 24 and OS 25 would be decided based on the available material.

16 Both parties abided by the stipulated deadlines. However, Mr Biswas, in his supplementary affidavit, included further allegations beyond those pertaining to Niru.

Concurrent related proceedings

17 After OS 24 and OS 25 were filed, Mr Biswas filed AD/OS 53/2021 ("OS 53") on 8 November 2021 and HC/S 921/2021 ("the New Suit") on

10 November 2021, and IOGPL filed AD/OS 62/2021 ("OS 62") on 8 December 2021.

18 OS 53 was an application for leave to appeal against the decision of the General Division of the High Court ("the High Court") *not* to strike out a statutory demand served on Mr Biswas, such statutory demand being premised on the judgment debt arising from S 1270. Mr Biswas's allegations in OS 53 by and large mirrored those in the present OSes. OS 53 was being held in abeyance pending disposal of the present OSes.

19 The New Suit, filed against the Mukherjees, appeared to be a claim in unjust enrichment. The allegations in the New Suit by and large mirrored those in OS 24 and OS 25, namely, that the Mukherjees retained possession of valuable investments/assets.

20 OS 62 was IOGPL's application for leave to appeal against Andre Maniam J's decision in HC/RA 199/2021. Maniam J had dismissed IOGPL's appeal against an Assistant Registrar's decision to grant Mrs Mukherjee an extension of time for taxation of the costs of S 417. The matters in OS 62 were distinct from those in the present applications. OS 62 was dismissed by the Appellate Division of the High Court ("the AD") on 13 January 2022.

Parties' arguments

21 Mr Biswas and IOGPL alleged that the Mukherjees had committed perjury in S 1270 and S 417 by failing to disclose their (the Mukherjees') possession of valuable investments. This, Mr Biswas alleged, showed that the Judge was wrong to find that the Investments (listed at [8] above) were "shams or duds". Mr Biswas alleged that he had new evidence demonstrating the aforementioned. There was accordingly a miscarriage of justice.

22 The Mukherjees raised three arguments. First, they argued that this court was without jurisdiction to order a retrial of S 1270 and S 417, as there was no appeal filed before it. Further and in the alternative, Mr Biswas and IOGPL failed to establish the necessary grounds for a retrial. In addition and in the further alternative, the extended doctrine of *res judicata* applied.

Issues

23 Three issues arose:

(a) whether this court had the *jurisdiction* to hear the applications;

(b) whether the *threshold for a retrial* had been met; and

(c) whether Mr Biswas and IOGPL acted in *abuse of process*.

The Mukherjees would prevail if they were successful on any one or more of these issues. For the applications to be allowed, however, Mr Biswas and IOGPL had to prevail on *all three* issues.

24 For the reasons set out below, we found in the Mukherjees' favour on all three issues, and we consequently dismissed the applications.

Jurisdiction

25 The Mukherjees argued that OS 24 and OS 25 were "nothing but an attempt to reverse the [Judgment] without going through the appellate process". The applications were "in substance an attempt to invoke the original jurisdiction of the Court of Appeal, which does not exist".

Applicable principles

26 It is trite that this court has no original civil jurisdiction (see Cavinder Bull SC (gen ed), *Singapore Civil Procedure* (2021) (Sweet & Maxwell, 2020) ("*Civil Procedure*")) Vol 2 at para A/29A/1, citing the decision of this court in *Au Wai Pang v Attorney-General* [2014] 3 SLR 357 ("*Au Wai Pang*")). Consequently, this court cannot and will not hear *de novo* applications. Instead, in granting relief to litigants, this court only exercises *appellate jurisdiction* (in the context of civil appeals; see s 53 of the SCJA), or *incidental appellate jurisdiction* (in certain applications where the Court of Appeal possesses all the jurisdiction and powers of the puisne court to determine matters which are *incidental* to the hearing and determination *of an appeal*; see the High Court decision of *Naseer Ahmad Akhtar v Suresh Agarwal and another* [2015] 5 SLR 1032 at [108], citing *Au Wai Pang* at [70]).

27 The provision invoked in OS 24 and OS 25 was s 60A of the SCJA ("s 60A"). The specific question presented to us was whether this court had the jurisdiction, under s 60A, to grant Mr Biswas and IOGPL the relief they sought.

28 In this regard, it is important to recognise that s 60A is a *power* conferring provision. Such a *power* must be understood separately from the anterior inquiry on *jurisdiction*. Jurisdiction is the court's "authority, however derived, to hear and determine a dispute that is brought before it" (see *Muhd Munir v Noor Hidah* [1990] 2 SLR(R) 348 ("*Noor Hidah*") at [19]). On the other hand, the "powers of a court constitute its capacity to give effect to its determination by making or granting the orders or reliefs sought by the successful party to the dispute" (see *Noor Hidah* at [19]). The relationship between these two concepts is clear: a court's *jurisdiction* must be established *before* that court can consider what *powers* it possesses and may exercise.

29 Specific to the present case, the power that Mr Biswas and IOGPL sought to invoke was the power to order a retrial. This power may only be exercised pursuant to the court's *appellate jurisdiction*, in the context of an *appeal* or in an application *ancillary to a pending appeal*. The relief cannot be awarded in the context of a standalone originating summons. This is borne out upon an examination of the relevant provisions of the SCJA.

30 The power in s 60A of the SCJA must be understood in the context of, and read consistently with, the jurisdiction-conferring provisions in the same statute. These, as correctly highlighted by the Mukherjees, are ss 49 and 53 of the SCJA, which codify the position expressed in *Au Wai Pang*: that this Court only has *appellate* civil jurisdiction. The only apparent exception to this rule, found in s 53(2)(*d*) of the SCJA, is *irrelevant* for present purposes, as it pertains to civil applications that raise issues falling within the *criminal* jurisdiction of this court.

31 To elaborate, s 60A falls within the same part (Part 5) and division (Division 2) of the SCJA as s 53. It is accordingly circumscribed by s 53, and does not confer the court any jurisdiction beyond that stipulated in s 53. The words of s 60A make this amply clear:

> **New trial**
>
> **60A.**—(1) ***Subject to this Act***, the Court of Appeal may order a new trial of —
>
> (*a*) any matter that has been tried by the General Division in the exercise of the original or appellate civil jurisdiction of the General Division; or
>
> (*b*) any matter that has been tried by the Appellate Division in the exercise of the civil jurisdiction of the Appellate Division.
>
> [emphasis added in bold italics]

32 There is also *no* language in s 60A that has the effect of a phrase such as "upon application by a party" (*cf*, for example, s 58(2) of the SCJA). Section 60A simply states that this court "may order" a new trial. This buttresses the notion that the relief under s 60A must be sought *in the course of a civil appeal*; it cannot form the subject of a standalone application. Put another way, without first establishing the court's jurisdiction, the court cannot exercise its powers under s 60A of the SCJA. It also bears noting that the court "*may* order" a new trial – it is *not bound* to do so.

33 Case law corroborates the position set out above. In *Su Sh-Hsyu v Wee Yue Chew* [2007] 3 SLR(R) 673 ("*Su Sh-Hsyu*"), this court ordered a retrial in the context of a civil appeal. That case did not involve s 60A of the SCJA; it was an *appeal* arising from an application under O 35 r 2(1) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) to set aside a High Court judgment. However, the critical point remains – the relief of a retrial was sought in the context of an *appeal*, not a standalone originating summons. This was also the case in *Susilawati v American Express Bank Ltd* [2009] 2 SLR(R) 737 ("*Susilawati*"), where the appellant sought, *in the course of her appeal*, the relief of a retrial.

Application to the present case

34 At the time the applications were made, CA 2 and CA 3 had been struck out and deemed withdrawn, respectively. There were no pending appeals. This court was accordingly *not* seised of appellate jurisdiction. The only logical conclusion was that Mr Biswas and IOGPL were attempting to invoke, by way of standalone originating summonses, this court's *non-existent original jurisdiction*. This could not be done. It followed that this court, not being seised

of such jurisdiction, could not even *consider* granting the relief sought by Mr Biswas and IOGPL under s 60A of the SCJA to begin with.

35 We therefore found ourselves to be without jurisdiction to hear the present applications. On this basis alone, OS 24 and OS 25 were dismissed. We nevertheless elaborate below why, in any event, we would have dismissed the applications on further and alternative grounds, assuming that we had the jurisdiction to hear the applications.

The merits of the applications

Applicable principles

36 It is uncontroversial that a retrial will only be ordered where it serves the interests of justice. The thrust of the inquiry is whether there has been a miscarriage of justice – the parties were *ad idem* on this threshold. The specific situations in which this will be the case cannot be exhaustively stated or classified (see *Susilawati* at [22]). For example, a retrial may be ordered where there is *irrefutable proof* that material evidence relied upon by the trial judge is false. Another example would be where an adjournment had been improperly rejected by the trial court and there is good reason to believe that the absence of material evidence has prejudiced a fair outcome of the trial process (see *Susilawati* at [22]).

37 Where the grounds that are being relied upon are premised on an "alleged discovery of fresh evidence", the principles in the English Court of Appeal decision of *Ladd v Marshall* [1954] 1 WLR 1489 ("*Ladd v Marshall*") will apply (see *Susilawati* at [23]). The well-accepted test bears three conditions: (a) non-availability; (b) relevance, *ie*, the evidence must have an important influence on the result of the case; and (c) reliability, *ie*, the evidence

must be apparently credible. To be clear, the *Ladd v Marshall* requirements ought to be understood as *anterior and cumulative* to the inquiry as to whether there had been a miscarriage of justice. In other words, an applicant/appellant must prove that its new evidence is admissible, *and* that the omission of such evidence has resulted in a miscarriage of justice, albeit we would observe that there is a close relationship between the "relevance" limb of *Ladd v Marshall* and the inquiry on miscarriage of justice with which we are presently concerned.

38 It has also been emphasised in the case law that establishment of the above grounds will not *necessarily* warrant a retrial, especially if it can be shown that the result was correct in any event (see the decision of this court in *SIC College of Business and Technology Pte Ltd v Yeo Poh Siah and others* [2016] 2 SLR 118 at [48]).

The lack of merits in OS 24 and OS 25

OS 24

39 In OS 24, Mr Biswas's case was that after the decision in S 1270, new evidence emerged showing that the Investments listed above at [8] were genuine and not shams. This alleged evidence took the form of a letter from the Mukherjees' then lawyers, M/s Tan Kok Quan Partnership ("TKQP"), dated 29 August 2019 ("the TKQP Letter"). Mr Biswas's claim was that the TKQP Letter showed that the Mukherjees admitted that the Investments were not shams.

40 Mr Biswas also pointed to an order of court made in HC/RA 260/2021 ("RA 260" and "the RA 260 Order"). For context, in July 2021, the Mukherjees served a Statutory Demand ("the SD") on Mr Biswas. Mr Biswas then attempted to set the SD aside on the basis that it was defective. He failed to set

aside the SD and appealed *vide* RA 260, which was heard and dismissed by Vinodh Coomaraswamy J. Mr Biswas argued that Coomaraswamy J had acknowledged in the RA 260 Order that the Investments were not shams.

41 Mr Biswas argued, based on the above, that the Judge's decision could not be justified as it would allow the Mukherjees to not only keep the Investments (which Mr Biswas claimed were real), but also the judgment sum which was largely made up of the value of the Investments, *ie*, that the Mukherjees would profit twice over. In other words, Mr Biswas contended that the Judge would have arrived at a very different decision had she been aware of the alleged fresh evidence.

(1) The TKQP Letter

42 Mr Biswas's case based on the TKQP Letter was cumulative and double-pronged: he argued that the TKQP Letter: (a) is admissible fresh evidence; *and* (b) shows that evidence relied upon by the Judge was false.

43 On point (a), the *Ladd v Marshall* test applies. Two of the *Ladd v Marshall* requirements would likely be fulfilled. First, as argued by Mr Biswas, the TKQP Letter would be apparently credible, being official correspondence from a law firm and signed by the Mukherjees' solicitors. Second, it was not available for use at trial as it did not even exist at the time. The difficulty with Mr Biswas's case, however, lay in the requirement that the TKQP Letter must have had an important influence on the outcome of the case. In our view, the letter did not disclose a miscarriage of justice.

44 Mr Biswas relied on paragraph 2(c) of the TKQP Letter which states:

> **Within 7 working days** from our clients' receipt of the cashier's order(s) and/or demand draft(s), our clients shall take all

> necessary steps to transfer all beneficial interests and rights in [the Investments] (and any corresponding returns) to Mr Biswas:
>
> > (i) The investment in [Neodymium], with the principal investment amount being US$250,000.00;
> >
> > (ii) The investment in [Peak], with the principal investment amount being US$500,000.00;
> >
> > (iii) The investment in [Pacatolus], with the principal investment amount being US$2,250,000;
> >
> > (iv) The investment in [Trade Sea], with the principal investment amount being US$200,000; and
> >
> > (v) The investment in [SEW], with the principal investment amount being US$250,000.00.
>
> [emphasis in original]

45 Mr Biswas's argument was that the above demonstrated that the Mukherjees had admitted that the Investments were not shams and had value, as shown by the fact that TKQP had ascribed a value to each investment and/or asset.

46 The Mukherjees, however, argued that this must be understood in the context of correspondence sent by Mr Biswas to TKQP in July 2019. This correspondence spanned the period between 2 July 2019 and 19 July 2019.

(a) On 2 July 2019, Mr Biswas emailed TKQP and offered to help the Mukherjees "recover and buyout their investments at cost under a settlement agreement".

(b) On 9 July 2019, Mr Biswas emailed TKQP again, repeating his offer. On the same day, TKQP replied and asked him to explain what he meant by "recover and buyout [the Mukherjees'] investments at cost".

(c) Finally, on 19 July 2019, Mr Biswas replied, explaining the settlement agreement. The proposed settlement agreement required that

> the Mukherjee's "drop hands on the appeal, so that the appeal is ruled in [Mr Biswas's] favour". In return, the Mukherjees would receive US$3.45m, and the Mukherjees would transfer all the Investments to Mr Biswas so that he could "pursue recovery".

47 With this context in mind, the TKQP Letter could ***not*** be said to have been an admission that the Investments were *real*. The TKQP Letter was simply a formalisation of Mr Biswas's proposed settlement agreement, *ie*, he had been the one who set out the general terms, and TKQP had simply reproduced this (with more specific terms and figures). This was supported by the fact that the proposed settlement agreement by Mr Biswas was consistent with paragraphs 2(a) and (c) of the TKQP Letter. In other words, the terms in the TKQP Letter were not the words of the Mukherjees – they were in fact the words of Mr Biswas himself.

48 It was also significant that at paragraph 2(c) of the TKQP Letter, it is stated that the Mukherjees would transfer the "beneficial interest and rights in [the Investments]". It does not state that the Mukherjees would transfer *legal* title to the Investments. This was consistent with the Mukherjees' explanation that they did not have any documents showing that they had "formal, physical or legal title" to the Investments, *ie*, they were not sure of what rights or interests they had in the Investments, if any. Thus, what the TKQP Letter was actually saying was that once Mr Biswas paid the Mukherjees the sums set out in paragraph 2(a), they would give up *any interests in the Investments that* ***did exist*** (although they were not sure if such interests did indeed exist). It was clearly *not* an admission that the Investments were genuine.

49 Accordingly, the TKQP Letter could not possibly constitute any admission by the Mukherjees that the Investments were real or had any value.

It was, in truth, a response to a proposed settlement agreement (that was originally proposed by Mr Biswas) that would have the Mukherjees give up their beneficial interest in the Investments, *if any*. Thus, it would have no bearing whatsoever to the outcome of the case.

50 The above analysis also disposed of point (b) at [42] above, namely, Mr Biswas's argument that the evidence of the Mukherjees at trial was false. The TKQP Letter could ***not*** be said to be *irrefutable proof* that the Mukherjees' evidence at trial (that the Investments were shams) was false. Mr Biswas had accordingly, in our view, *not* proven a miscarriage of justice.

(2) The RA 260 Order

51 Mr Biswas also relied on the RA 260 Order. He had highlighted "paragraph 3(1)" of that Order and argued that this showed that Coomaraswamy J had acknowledged that the Investments were not shams. There is no paragraph 3(1) in the RA 260 Order. Mr Biswas seemed to be referring to paragraph (3)(a) instead which states that Mr Biswas was to make full payment of the balance of the Judgment debt to the Mukherjees, after which the Mukherjees were to take all steps to transfer to Mr Biswas "all legal, beneficial or other rights and interests … which [the Mukherjees] ***may*** have in the Investments" [emphasis added in bold italics].

52 In our view, Coomaraswamy J did not make any finding on the value of the investments, *ie*, whether they were shams or otherwise. What paragraph 3(a) clearly states, on its face, is that the Mukherjees would have to transfer any interest they had in the Investments, *but only if they had any such interest*. There was ***no*** *finding* as such that the Investments had *any* value and were real. This was evident from the use of the word "may".

53 Thus, it could not be said that the RA 260 Order would have *any* influence on the outcome of the case in S 1270 let alone an "important" influence. It followed that it also could not be taken as "irrefutable proof" that the Mukherjees' evidence in S 1270 regarding the Investments was false.

(3) Conclusion

54 In closing, we highlight that the allegations of perjury/fraud made by Mr Biswas are serious. The court ought not to determine the veracity of these allegations based on affidavit evidence. This court's words at [69] and [73] of *Su Sh-Hsyu* are particularly apposite:

> 69 The rationale for requiring a party to commence a fresh action to impugn a regular judgment is clear. Given that fraud is a serious allegation, the court is required to look into all the particulars of the fraud, examine all the affidavits and apply the strict rules of evidence … Further, it has also been said that since an allegation of fraud is very serious, it should not be decided merely upon the basis of affidavit evidence: *Rowan v Mitchell* [2005] DCR 694 (NZ) at [21].
>
> …
>
> 73 In cases where one party seeks to impugn a regular judgment on the basis of fraud following the discovery of new evidence, the court is typically confronted with evidence of perjury based on the oral evidence of witnesses. In such cases where one person's word is pitted against another's, an appellate court would naturally be most reluctant to make a finding on whether fraud has been clearly established. …

55 As we elaborate upon below, this point is also relevant to the issue of abuse of process (see [79]–[83] below).

OS 25

56 IOGPL sought a retrial of S 417. It will be recalled that the Judge had dismissed IOGPL's claim in S 417 for US$1.6m allegedly owing under a loan given by IOEL (which IOGPL wholly owned) to Mrs Mukherjee. The Judge's

decision was based on two grounds. First, that IOGPL did not have *locus standi* to sue; and second, that the loan in any case did not exist.

(1) The *locus standi* ground

57 In so far as the first ground is concerned, IOGPL claimed that there exists a sale and purchase agreement (the "SPA") that proves that it had *locus standi*. This SPA was allegedly executed between one Mr Vijay Sethu ("Mr Sethu") and IOGPL in July 2014. IOGPL argued that the SPA shows that when IOEL was sold to Mr Sethu, IOGPL took over the loan which was given to Mrs Mukherjee.

58 The principal difficulty with IOGPL's reliance on the SPA was that the SPA was readily available during the trial of S 417. It thus failed to satisfy the requirement of non-availability in the *Ladd v Marshall* test. This appeared to be a difficulty that IOGPL recognised.

59 To this end, IOGPL sought to blame its former lawyers, Niru, for not adducing a signed copy of the SPA, claiming that such a document was always in Niru's possession. The Mukherjees' lawyers, D&N, wrote to Niru about this issue. Niru replied that no such signed SPA was given to them at the material time. IOGPL has since filed a further affidavit by Mr Biswas denying this.

60 Three points, in our view, demonstrated the flaws in IOGPL's position. First, the cross-cutting and serious allegations (involving lawyers who were not involved in the present proceedings) called for a proper factual inquiry and perhaps even cross-examination (see *Su Sh-Hsyu* as reproduced at [54] above). An originating summons, in which evidence is given via affidavit, is an inappropriate platform for such allegations to be ventilated.

61 Secondly and in any event, whether Niru had the SPA and failed to adduce it at trial was *irrelevant* to the present application. It was stated in *Susilawati* at [22] that "a new trial will not be directed if because of the inadvertence of counsel, evidence was not adduced during the trial". In the circumstances, the appropriate action for Mr Biswas and IOGPL was arguably to consider the propriety of commencing an action against Niru for professional negligence, as opposed to attempting to obtain a retrial of S 417. Viewed another way, the Mukherjees should not be forced to go through the rigours of litigation a second time simply due to opposing counsel's alleged negligence.

62 Thirdly, it was not clear, in any event, that the SPA would have had an important influence over the outcome of the case. The SPA does not unequivocally show that IOGPL took over the loan. Clause 5.2(h)(ii), which IOGPL relied on, does not mention anything about the taking over of a loan. The second potentially relevant clause, cl 7.2, is a warranty that all existing loans shall be repaid before completion, and that there are no outstanding claims or payments to any parties from IOEL. Once again, there is no mention of IOGPL taking over any loan given by IOEL.

63 The second set of documents that IOGPL relied on consisted of its financial statements from 2014 to 2019. It argued that the loan of US$1.6m had been reflected in the financial statements from 2014 and 2019. There were, however, several difficulties with IOGPL's reliance on these financial statements. First, the financial statements for 2014 were already disclosed in the trial of S 417. Second, the credibility of these financial statements was questionable – there is no indication that they were audited.

64 In any event, all of the above documents did not deal with, or controvert, [285] of the Judgment, where the Judge found that:

> 285 … [p]re-litigation matters were clearly contrary to IOGPL's claim to being the proper party to sue. [Niru]'s warrant to act in [S 417] was given by IOEL and *not* IOGPL. Moreover, the pre-writ letter of demand was issued on behalf of IOEL instead of IOGPL.
>
> [emphasis in original]

65 Consequently, there existed serious doubt as to whether the documents would have had an important influence over the outcome of S 417, specifically as regards the issue of *locus standi*.

(2) The existence of the loan

66 To recap, IOGPL's case at trial was that the money transferred from IOEL had come from investors in Sri Lankan hospitality projects. The Mukherjees' case, on the other hand, was that the money was theirs, and had been placed with IOEL to be managed by Mr Biswas.

67 IOGPL argued that there is "irrefutable evidence" supporting its case. It pointed to a letter dated 20 July 2012 ("the 20 July Letter") addressed to one Mr Vaibhav Hari Kanade ("Kanade") from IOGPL. The 20 July Letter states that Kanade had remitted a total of US$1.5m to IOGPL in July 2012 as contributions towards a project in Sri Lanka. IOGPL also pointed to emails exchanged between Mr Biswas and Kanade on 29 November 2017 (the "29 November Emails"), where Kanade states that he had paid US$1.5m in May 2012 for a real estate project in Sri Lanka.

68 The dates of the 20 July Letter and the 29 November Emails revealed that these would have been readily available to IOGPL at trial. In fact, these documents were adduced on the last day of trial. The condition of non-availability under the *Ladd v Marshall* test was accordingly not satisfied.

69 We also had doubts as to whether the condition of relevance in the *Ladd v Marshall* test was satisfied. The 20 July Letter and the 29 November Emails only showed that money had come into IOEL from Kanade (assuming, for the moment, the reliability of the evidence). They did not show that that money had been loaned *out* to Mrs Mukherjee. Accordingly, it remained questionable whether these documents would have had an important influence over the outcome of the case.

70 Next, there was an assertion by IOGPL that Mrs Mukherjee did not have enough liquidity in her Barclays bank account to withdraw US$1.6m and transfer it to the UOB account. It claimed that Mrs Mukherjee did not disclose her Barclays bank account statements at trial, but that Carson (IOGPL's current lawyers) had reviewed the documents and discovered this omission. However, IOGPL did not demonstrate how this would have had an important influence on the outcome of S 417. It must be reiterated that the Judge had already found that IOGPL did not have *locus standi* to sue – thus, whether or not Mrs Mukherjee had sufficient liquidity would not have changed the outcome of the case. Further, the Judge had stated that it was "immaterial" whether Mrs Mukherjee's account had sufficient funds, as Mrs Mukherjee had acted based on updates given by Mr Biswas (see the Judgment at [291]). In other words, Mr Biswas had given Mrs Mukherjee the impression that *she had sufficient liquidity*. These were issues that were not adequately dealt with by IOGPL at trial.

71 Finally, we should highlight that IOGPL raised a Commercial Affairs Division ("CAD") investigation report ("the CAD Report") where it states that Kanade knew the Mukherjees. IOGPL argued that if the CAD Report had been adduced at trial, Mr Biswas would have instructed his lawyer to probe into the relationship between Kanade and the Mukherjees vigorously, and that it also showed that Mrs Mukherjee had committed perjury at trial. However, it was not

clear from IOGPL's submissions what "important influence" the CAD Report would have had on the outcome of S 417. Put simply, IOGPL was merely making a bare assertion to this effect.

72 In the round, and given that the Judge's dismissal of S 417 was based on cumulative grounds (*locus standi* and the existence of the loan), it appeared to us highly unlikely that any of the "new" evidence that IOGPL pointed to would have had an important influence on the outcome of S 417. OS 25 was therefore quite clearly without merit.

Conclusion on the merits of the applications

73 To summarise, quite apart from the jurisdictional defect in the applications, it was readily apparent to us upon reviewing the parties' cases that OS 24 and OS 25 had little to no chance of success. The threshold that must be met before this court orders a retrial is a high one, and for good reason – there is a need to respect the finality of legal proceedings. The evidence and arguments raised by Mr Biswas and IOGPL, with respect, did not even come close to meeting that high threshold.

Abuse of process

74 Our final, and perhaps most unfortunate, observation in respect of the present applications was that they were an abuse of the process of court, and therefore an unacceptable invocation of this court's processes.

OS 24

75 In so far as OS 24 was concerned, while there did not appear to have been a breach of the extended doctrine of *res judicata* (contrary to what the

Mukherjees contended), there was in our view a *classic* abuse of process, *ie*, Mr Biswas had improperly invoked the court's processes by way of OS 24.

76 The Mukherjees' argument, however, based on the extended doctrine of *res judicata* was misconceived. The thrust of their argument was that "[g]iven that [Mr Biswas] has failed to established any grounds for a re-trial of S 1270 under [s 60A], it *follows* that any litigation of issues that were or ought to have been raised in S 1270 would amount to an abuse of process" [emphasis added].

77 The Mukherjees' argument failed to recognise the essence of the doctrine in the English Court of Chancery decision of *Henderson v Henderson* (1843) 3 Hare 100; 67 ER 313 ("*Henderson*"). The extended doctrine of *res judicata* in *Henderson* prevents the raising of issues that *could have been raised, and ought to have been raised*, in prior related proceedings (see, for example, the decision of the Singapore International Commercial Court in *DyStar Global Holdings (Singapore) Pte Ltd v Kiri Industries Ltd and another* [2022] 3 SLR 1 at [15]). In the present proceedings, however, Mr Biswas's allegations were premised on *new* evidence in the form of the TKQP Letter dated 29 August 2019. This was information that had surfaced *after* the Judgment was delivered. The matter could not therefore have been pursued by Mr Biswas at trial.

78 That having been said, we were persuaded that Mr Biswas had committed a *classic abuse of process*, *ie*, he recklessly and improperly invoked this court's processes by way of OS 24. He did so in spite of our repeated cautions, in recent times, that parties should endeavour to avoid ill-thought and impulsive applications, particularly those that seek to reopen legal proceedings that had already been concluded (in this case, for about two years).

79 It is important to recognise the complexion of the present litigation in its totality. At the time the present applications were heard, there were *four* pending matters in relation to this case:

(a) On 6 October 2021, OS 24 was filed. Mr Biswas sought a retrial.

(b) On 7 October 2021, OS 25 was filed. IOGPL sought a retrial.

(c) On 8 November 2021, OS 53 was filed (see [18] above). Mr Biswas sought leave to appeal against Coomaraswamy J's decision in RA 260.

(d) On 10 November 2021, the New Suit was filed (see [19] above). Mr Biswas sought essentially the same relief as that sought in the present applications.

80 The allegations made by Mr Biswas in *all* of these applications were virtually identical: that the Mukherjees had committed perjury before the Judge, and that the Mukherjees are presently holding onto valuable investments.

81 Perhaps the benefit of doubt could be given to Mr Biswas in relation to OS 53, since it was his attempt to resist the Mukherjees' statutory demand. In that narrow sense, OS 53 was an independent proceeding. However, the existence of the New Suit was particularly telling, as was the timing of Mr Biswas's various applications/suit. Put simply, the New Suit *rendered the present applications otiose*. The New Suit offered Mr Biswas, *if* he succeeds, the relief he desires. To elaborate:

(a) The High Court, in the New Suit, will almost certainly have to make findings that overlap with any findings this court may make as regards the Mukherjees' alleged perjury. Para 7 of Mr Biswas's

Statement of Claim states "The Defendants committed perjury during [S 1270] … which led the High Court to making an erroneous decision in awarding them the said judgment sum".

(b) The claim is that "the [Mukherjees] have unjustly enriched themselves at the expense of [Mr Biswas]".

(c) The relief sought is damages thereto.

82 In other words, an unavoidable consequence of the New Suit, *if* Mr Biswas prevails, is that the Judgment will have to be impugned and/or set aside. That was in essence ***identical*** *to the relief sought by Mr Biswas in OS 24*.

83 We highlight the observations in *Su Sh-Hsyu* at [69]–[73] and *Civil Procedure* Vol 1 at para 57/14/2, that where "hotly contested" issues of fact are concerned, in particular allegations of *fraud*, the appellate court will be reluctant to intervene, and the appropriate course may be to commence a fresh writ action. These demonstrate that the appropriate (and indeed, the *only*) action that Mr Biswas ought to have commenced was the New Suit. There was quite simply no conceivable situation in which this court would have ordered a retrial of S 1270 and S 417 whilst the New Suit remained afoot.

84 In the round, the manner in which Mr Biswas has proceeded with his numerous applications was indicative of a desire to oppress the Mukherjees with heavy litigation, as part of his attempt to delay enforcement of the judgment debt that he owes. This is conduct that was most deplorable. If not deliberately oppressive, the present applications were at the very least ill-thought and impulsive. This court has recently cautioned, repeatedly, against the filing of such ill-conceived applications (see, for example, *Miya Manik v Public Prosecutor and another matter* [2021] 2 SLR 1169 ("*Miya Manik*"), *per*

Sundaresh Menon CJ at [1]; *Ong Jane Rebecca v Lim Lie Hoa and other appeals and other matters* [2021] 2 SLR 584, *per* Steven Chong JCA at [57]; and *Mah Kiat Seng v Public Prosecutor* [2021] SGCA 79, *per* Judith Prakash JCA at [73] and [74]).

85 We therefore clarify that in any event, we would have been minded to dismiss OS 24 on grounds of abuse of process. Mr Biswas should not have sought the relief under s 60A of the SCJA in OS 24, when he had *a pending suit* against the Mukherjees for *the same ultimate relief*. He surely ought to commit to *one* course of action.

OS 25

86 Based on the principles set out at [77] above, we are of the view that OS 25 was an abuse of process under the extended doctrine of *res judicata*.

87 The key documents relied upon by IOGPL which we have discussed earlier – the SPA, the 29 November Emails and the 20 July Letter – could have been raised at trial. The trial for both suits was heard before the Judge from 7 November 2017 until 30 November 2017, and closing submissions were made on 20 April 2018. There was accordingly ample time for the aforementioned documents to have been raised and ventilated before the Judge, whether *during* trial or even between trial and closing submissions, via an application to introduce further documents. We have canvassed the relevant documents, and the dates of significance, at [57]–[71] above.

88 Consequently, the issues that IOGPL raised in OS 25 were factual issues that *could have, and ought to have, been ventilated before the Judge*. This is a paradigm breach of the rule in *Henderson*, and an abuse of process.

Conclusion on abuse of process

89 OS 24 and OS 25 would accordingly have been dismissed on grounds of abuse of process, *even if* we were of the view that we were seised of jurisdiction to hear the applications (which we have held we were not).

90 In view of the questionable circumstances under which the two applications were brought before us, we feel compelled to make certain observations in closing. Collectively, the present applications and their abusive nature cast a dim light on the ongoing litigation. As noted earlier, the applications contributed to the impression that the steps taken by Mr Biswas and IOGPL were part of a concerted effort to delay and deprive the Mukherjees of their recovery of the judgment debt owed to them under S 1270. There has been intertwined litigation ongoing in *every division* of the Supreme Court – in the Court of Appeal (OS 24, OS 25), the AD (OS 53) and in the High Court (the New Suit). The timing of the present litigation – more than three years after the Judge's decision – renders the picture all the more troubling.

91 The sooner the present applications are disposed of, the sooner OS 53 (relating to the Mukherjees' statutory demand) will be able to proceed, and the sooner the Mukherjees will be able to obtain relief. But it is worth mentioning that the Mukherjees now also have the hurdle of the New Suit to cross. In totality, we believe that there are many reasons to greet Mr Biswas's and IOGPL's actions with great circumspection.

92 In the light of the above, we wish to impress upon Mr Biswas's lawyers, Carson, the need for efficiency and prudence in the litigation process. It remains Mr Biswas's lawyers' duty, as *officers of the court*, to advise Mr Biswas appropriately, and to ensure that the court's processes are not abused in wanton

fashion, regardless of the view that Mr Biswas himself may take as regards the correctness of the Judge's decision. Very much the same point was made by Menon CJ in *Miya Manik*, when addressing the issue of *lawyers* assisting their clients in filing patently unmeritorious or abusive applications.

Conclusion and costs

93 For the reasons set out above, we dismissed OS 24 and OS 25. This court was without jurisdiction; the applications lacked merit in any event; and the applications were an abuse of process.

94 Finally, we come to the issue of costs. The Mukherjees, in written submissions, sought costs of S$20,000 to S$35,000, on an indemnity basis and based on the guidelines in Appendix G to the Supreme Court Practice Directions ("Appendix G"). Counsel for the Mukherjees clarified during oral submissions that they were seeking costs of S$30,000 (all-in). Mr Biswas and IOGPL did not provide costs schedules; their counsel submitted that costs should be fixed at S$20,000.

95 We ordered indemnity costs of S$20,000 (all-in) to be awarded to the Mukherjees, and the usual consequential orders applied. This quantum of costs fell within the relevant guidelines in Part V of Appendix G (on applications to the Court of Appeal involving an oral hearing), which stipulated a range of S$9,000 to S$35,000 for each application. Indemnity costs were warranted, as Mr Biswas's and IOGPL's actions fell into all four categories of objectionable conduct warranting such costs (see the High Court decision of *Airtrust (Hong Kong) Ltd v PH Hydraulics & Engineering Pte Ltd* [2016] 5 SLR 103 at [23]):

(a) The present applications were brought in bad faith, as a means of oppressing the Mukherjees or to delay their recovery of the judgment debt (see [90]–[92] above).

(b) The present applications were speculative and clearly without basis. We have explained this above at [39]–[73].

(c) Mr Biswas's conduct could be described as dishonest, abusive and improper. Mr Biswas only disclosed part of the correspondence with TKQP, and not the portion relied on by the Mukherjees which cast an entirely different light on the matter. Mr Biswas acted abusively for the reasons provided above at [74]–[90]. Mr Biswas acted improperly by casting aspersions against lawyers who are not part of the present proceedings without first giving them notice or an opportunity to reply. Such conduct could have led his own lawyers to commit a breach of r 29 of the Professional Conduct (Legal Profession) Rules 2015. Aside from being a matter of fairness and professional courtesy, this rule is meant to protect the conduct and the administration of justice in our courts. It bears reemphasising that such allegations should not be made lightly (see the decision of this court in *Imran bin Mohd Arip v Public Prosecutor and another appeal* [2021] 2 SLR 1198 at [99] and [101]).

(d) OS 25 amounted to wasteful or duplicative litigation (see [86]–[88] above).

96 The only reason the quantum of costs ordered was not higher was due to the relatively simple nature of the applications, and counsel's reasonable conduct of his case at the oral hearing. We nevertheless reiterate our caution to counsel – lawyers should not be emboldening their clients to file impulsive and unmeritorious applications at whim, and must fulfil their roles, as members of

the legal profession as well as officers of the court, in ensuring the smooth and efficient administration of justice.

Andrew Phang Boon Leong
Justice of the Court of Appeal

Steven Chong
Justice of the Court of Appeal

Quentin Loh
Judge of the Appellate Division

Lim Tean (Carson Law Chambers) for the applicants in Originating Summonses Nos 24 and 25 of 2021;
See Chern Yang and Cheng Hiu Lam Larisa (Drew & Napier LLC) for the respondents in Originating Summonses Nos 24 and 25 of 2021.