IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2018] SGCA(I) 07

Civil Appeal No 224 of 2017 (Summons No 64 of 2018)

Between

BNP PARIBAS SA

… Applicant-Respondent

And

(1) JACOB AGAM
(2) RUTH AGAM

… Respondents-Appellants

In the matter of Singapore International Commercial Court — Suit No 2 of 2016

Between

BNP PARIBAS SA

… Plaintiff

And

(1) JACOB AGAM
(2) RUTH AGAM

… Defendants

JUDGMENT

[Civil Procedure] — [Appeals] — [Deemed withdrawal]
[Civil Procedure] — [Litigants in person]
[Civil Procedure] — [Service]

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BNP Paribas SA
v
Jacob Agam and another

[2018] SGCA(I) 07

Court of Appeal — Civil Appeal No 224 of 2017 (Summons No 64 of 2018)
Andrew Phang Boon Leong JA, Dyson Heydon IJ and David Edmond Neuberger IJ
6 July 2018

5 October 2018 Judgment reserved.

David Edmond Neuberger IJ (delivering the judgment of the court):

Introduction

1 This is an application for: (a) a declaration that an appeal be deemed to have been withdrawn pursuant to O 57 r 9(4) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("ROC") on account of the appellants' failure to comply with their obligations under O 57 r 9(1) of the ROC concerning the filing and service of documents related to their appeal; and (b) ancillary relief in connection with the question of costs.

2 Apart from issues as to the interpretation and implementation of O 57 r 9 of the ROC, this application also raises issues concerning the proper service of documents and the degree of indulgence that should be shown to litigants in person as regards their compliance with procedural rules.

Facts

The background

3 BNP Paribas SA ("the Bank") is a private bank incorporated in France which conducts business in Singapore through a locally registered branch. It is:

(a) the substituted plaintiff in the suit below, *viz*, Singapore International Commercial Court ("SICC") Suit No 2 of 2016 ("the Suit"),

(b) the respondent in the appeal against the outcome in the Suit, *viz*, Civil Appeal No 224 of 2017 ("the Appeal"), and

(c) the applicant in the present summons in the Appeal, *viz*, Summons No 64 of 2018 ("the Application").

4 Mr Jacob Agam ("Mr Agam") and Ms Ruth Agam ("Ms Agam") are siblings and Israeli nationals. They were clients of the Bank's former subsidiary company, BNP Paribas Wealth Management ("BNPWM"), which subsequently merged with the Bank.

5 In 2010, BNPWM advanced a total of approximately €61.7m ("the Loans") to companies which were owned by Mr Agam and Ms Agam ("the Agams"). The Loans were secured by, amongst other things, personal guarantees executed by the Agams ("the Guarantees").

6 On 27 November 2015, BNPWM commenced the Suit against the Agams in the Singapore High Court seeking the recovery of around €30m as unpaid sums pursuant to the Guarantees. The action was transferred to the SICC in April 2016.

7 In May 2016, the Agams filed an application to stay the Suit pending the determination of proceedings in France. The application was dismissed on 28 October 2016: see *BNP Paribas Wealth Management v Jacob Agam and another* [2017] 3 SLR 27. There was no appeal.

8 In October 2016, following a merger agreement between BNPWM and the Bank, the Bank applied to be substituted as plaintiff in the Suit. This application was allowed at first instance: see *BNP Paribas Wealth Management v Jacob Agam and another* [2017] 4 SLR 14. This decision was upheld on appeal: see *Jacob Agam and another v BNP Paribas SA* [2017] 2 SLR 1.

9 On 12 January 2017, a case management conference was conducted at which the trial of the Suit was fixed before the SICC for 10 days commencing on 7 August 2017. At that time, the Agams were represented by solicitors from the law firm, Hin Tat Augustine & Partners ("Hin Tat"), who had instructed Mr Cheong Yuen Hee ("Mr Cheong") as counsel.

10 On 17 July 2017, the Agams filed an application to stay the Suit pending the determination of proceedings which had been commenced on or around 11 July 2017 by Ms Agam and others in Israel. The Agams instructed lawyers from another law firm, Legis Point LLC, to argue the stay application before the SICC.

11 On 24 July 2017, Hin Tat applied to be discharged as solicitors for the Agams. The supporting affidavit stated that Mr Cheong had also indicated that he would cease to act for the Agams.

12 On 26 July 2017, Steven Chong JA heard both the stay and discharge applications as a single judge of the SICC coram pursuant to O 110 r 53(1A) of

the ROC on the basis that trial of the Suit was imminent. He dismissed the stay application, and granted the discharge application on certain conditions which were intended to protect the interests of the Agams.

The decision below

13 In August 2017, trial of the Suit proceeded before a three-judge coram of the SICC, comprising Chong JA, Roger Giles IJ, and Dominique Hascher IJ.

14 On 17 November 2017, written judgment of the court was delivered by Giles IJ in favour of the Bank: see *BNP Paribas SA v Jacob Agam and another* [2017] SGHC(I) 10 ("the Judgment"). The SICC's principal conclusions were as follows (at [129]):

> (a) the Agams were jointly and severally liable to pay the Bank a total of around €32.2m (inclusive of contractual interest) as at 10 August 2017, together with further interest until payment;
>
> (b) Mr Agam's counterclaim for damages and a declaration that he was discharged from all liabilities under the Guarantees was dismissed; and
>
> (c) the Agams were jointly and severally liable to pay the Bank the costs of the action and of the counterclaim on an indemnity basis.

15 The Bank also provided an undertaking that it would give credit to the Agams for sums recovered from the realisation of other securities held in respect of the Loans and applied in reduction or repayment of those loans (see the Judgment at [128]).

16 Around three weeks later, the Agams filed a declaration dated 5 December 2017 in the Suit, asserting that "the case has no substantial connection with Singapore and is an offshore case" ("the Declaration").

17 In response to the Declaration, on 24 January 2018, the Bank filed Summons No 5 of 2018 in the Suit for a declaration that the action was not or was no longer an offshore case, and consequently, that the Declaration ceased to have effect ("the Declaration Application").

18 On 15 March 2018, Vivian Ramsey IJ heard the Declaration Application. He held that the Declaration was not a valid offshore case declaration under O 110 r 35 of the ROC, and that in any event the action was not an offshore case: see *BNP Paribas SA v Jacob Agam and another* [2018] 4 SLR 57. The Declaration Application was therefore allowed. There was no appeal.

Events relating to the Appeal

19 While the Declaration and the Declaration Application were being dealt with, the Agams concurrently instituted an appeal against the Judgment. The history of the Appeal is somewhat convoluted, and we will limit ourselves to the events which are relevant to the present Application.

20 On 7 December 2017, after receiving correspondence from the Agams indicating an intention to appeal against the Judgment, the legal registry of the Supreme Court of Singapore ("the Registry") wrote a letter to the Agams stating that it was willing to assist them in the recording of the Notice of Appeal, "given that [they] are currently unrepresented and based overseas, and given also that the matter is time sensitive". The offer was "**subject strictly to the terms and limitations**" [emphasis in original] specified in the letter, including that:

> e. The responsibility for filing all future documents in the appeal (including documents which you might statutorily be required to file under the [ROC] and other applicable legislation) will rest on you, and the SICC Registry will not be in a position to assist you in the recording of these other documents.

The letter provided the electronic links to the ROC and the SICC Practice Directions. The concluding paragraphs of the letter again stressed that "the responsibility for the filing of all future documents will rest solely with [the Agams] or [their] lawyers."

21 The Registry's letter was duly acknowledged by Mr Agam, who e-mailed the Registry on 8 December 2017 and stated that "[b]y now I believe my sister and I have fulfilled all of your court's requirements as indicated in your letter. Please confirm whether our appeal have been duly filed."

22 On 13 December 2017, the Registry confirmed that it had recorded the Notice of Appeal against the Judgment in the court's electronic filing system.

23 On 30 January 2018, the Registry sent a notice to the Agams (copied to the Bank) pursuant to O 57 r 5(2) of the ROC stating that the Record of Proceedings was available for collection. This notice is a standard document issued for all appeals in the Supreme Court. The notice expressly identified the obligations with which the parties to an appeal are required to comply and the consequences of non-compliance:

> 3 As regards the filing, tendering and service of appeal documents, all parties are to comply with the requirements set out in Order 57 of the [ROC] and Part XI of the Supreme Court Practice Directions. A non-exhaustive reference of the relevant requirements are set out in **Annex A**, attached hereto. …
>
> 4 The time for the Appellant to file the documents stated in Order 57 Rule 9(1) shall run from the date of this notification. **Please note that, if the Appellant fails to comply with Order**

> **57 Rule 9(1) of the [ROC], the appeal shall be deemed to have been withdrawn under Order 57 Rule 9(4).**
>
> [emphasis in original]

Annex A, which was referred to in the letter, elaborated on the format, page limit, and method of submission of documents relating to an appeal, including the Appellant's Case, the Core Bundle, and the Record of Appeal (collectively, "the Appeal Documents").

24 In February 2018, the Agams requested the Registry's assistance to put an affidavit that they had filed in the Declaration Application before the Court of Appeal. The Registry declined to do so, citing the salient parts of its letter dated 7 December 2017, which stated that the responsibility for the filing of future documents in the Appeal rested on the Agams as the appellants (see [20] above). Mr Agam replied, on behalf of Ms Agam as well as himself, stating that: (a) the Registry's decision deprived them of their fundamental rights to due process and representation; and (b) no law firm was willing to represent them because the argument of partiality which they wished to raise against the lower court would open the law firm to the possibility of criminal prosecution.

25 On 6 March 2018, Mr Agam sent the Registry an e-mail on behalf of himself and his sister, marked for the attention of Ramsey IJ (who heard the Declaration Application), annexing a draft Summons requesting an extension of time until 30 May 2018 to file the Appeal Documents ("the Purported EOT Application"). The Agams stated in their draft supporting affidavit that:

(a) they were unrepresented, based overseas, and "unfamiliar with the relevant rules and procedures of the Singapore courts";

(b) they had approached various law firms but none were willing to represent them in the Appeal "for fear of criminal prosecution";

(c) they needed time to secure the services of a law firm; and

(d) according to the Registry's letter dated 30 January 2018 (see [23] above), these documents "must be filed and served within two (2) months from the date of their letter (i.e. by 30 March 2018) failing which the Appeal will be deemed to have been withdrawn."

26 On 13 March 2018, the Registry replied to Mr Agam, setting out the process for filing the relevant documents through a nominated filing agent, and stressing that the Purported EOT Application "will be processed by the SICC Registry only when they have been filed in accordance with the steps outlined … above".

27 The Agams did not file any application for an extension of time.

28 After Ramsey IJ delivered his decision on the Declaration Application on 15 March 2018 (see [18] above), Mr Agam wrote to the Registry, on behalf of Ms Agam as well as himself, on several occasions alleging bias, unfairness, and the deprivation of their right to a fair trial and due process on the part of the Singapore courts.

29 On 30 March 2018, Mr Agam sent an e-mail to the Registry attaching a 466-page document entitled "the Appellant's Case" which he requested to be filed on behalf of Ms Agam and himself.

30 On 10 April 2018, the Registry sent an e-mail to Mr Agam and a letter by registered post to Ms Agam. The e-mail and letter referred to the Registry's earlier correspondence and the timelines under O 57 rr 9(1) and 9(4) of the ROC for the filing of the Appeal Documents, and stated that under these rules, the Agams "had to file the [Appeal Documents] by 2 April 2018, being the next

working day after 30 March 2018 (which was a Public Holiday)", but that this had not been done. The Registry further acknowledged the 466-page attachment to Mr Agam's e-mail dated 30 March 2018, but stated that this did not constitute a filing in accordance with the prescribed procedure. Ordinarily, therefore, the Appeal would be deemed to have been withdrawn. The e-mail and letter then conveyed this Court's directions as follows:

> 6 Please note that the Court of Appeal has directed as follows:
>
> (a) You are granted a final extension of time to file and serve the documents pursuant to Order 57 Rule 9(1) of the [ROC] by 24 April 2018, without prejudice to the Respondent's ability to object to such an extension of time being granted.
>
> (b) If you fail to comply with Order 57 Rule 9(1) of the Rules by the date stipulated in paragraph (a) above, [the Appeal] shall forthwith be deemed to have been withdrawn pursuant to Order 57 Rule 9(4) of the [ROC].
>
> (c) Your documents will be processed by the Registry only if they are filed in accordance with the permitted methods of filing documents as set out in the 7 December Letter and the 13 March Letter, namely, by:
>
> (i) filing your documents at the Service Bureau as is required of all litigants in person;
>
> (ii) obtaining legal representation and having your lawyer file the documents on your behalf; or
>
> (iii) availing yourself of the procedure for filing your documents through your nominated filing agent.
>
> (d) For the avoidance of doubt, the timeline for the filing of the Respondent's Case pursuant to Order 57 Rule 9A(2) of the [ROC] will be held in abeyance until such date on which you serve the relevant documents on the Respondent pursuant to Order 57 Rule 9(1) of the [ROC].

31 On 23 April 2018 (which was one day before the end of the final extension), Mr Lawrence Kang ("Mr Kang") attended at the counter of the Registry at around 5.30pm to file certain documents on behalf of the Agams. However, he left the premises before a staff member could attend to him.

32 On 24 and 25 April 2018, letters were exchanged between the Registry, the Agams, and a law firm in Singapore which appeared to be Mr Kang's employer. The upshot was that the Registry facilitated the Agams' filing of the Appellant's Case through Mr Kang on 3 May 2018, upon payment of the necessary filing fees, despite several instances of non-compliance with the directions mentioned in the Registry's previous correspondence regarding the filing of documents through nominated service agents. The Registry also stated that the Court of Appeal may be invited to consider whether the filing should be backdated to 24 April 2018 (which was the last day of the final extension) after the requisite filing fees have been paid.

33 On 4 May 2018, the Registry informed the Agams that the filing of the Appellant's Case had been accepted and backdated to 24 April 2018, without prejudice to the Bank's right to object to the same.

Events relating to the Application

34 On 8 May 2018, the Bank wrote to the Registry objecting to the acceptance and the backdating of the filing of the Appellant's Case, and stating that, pursuant to O 57 r 9(4) of the ROC, the Appeal should be deemed to have been withdrawn for non-compliance with the ROC.

35 On 11 May 2018, the Registry conveyed the following directions of this Court to the Bank, with a copy sent to each of the Agams:

> (a) The Application is to be taken out by 18 May 2018, with a supporting affidavit.
>
> (b) The [Agams] have liberty to file and serve a response affidavit by 1 June 2018.
>
> (c) The [Bank] has liberty to file and serve a final reply affidavit by 15 June 2018.
>
> (d) The parties are to file and serve written submissions (if any) by 29 June 2018.
>
> (e) The parties are to attend before the Court of Appeal for the hearing of the Application on 6 July 2018. All parties will be informed of the exact time of the hearing at a later date.

36 The Bank duly filed the Application and the supporting affidavit (collectively, "the Application Documents") on 18 May 2018.

37 On 22 May 2018, Mr Agam e-mailed the Registry stating that as of that day, the Bank had not yet served the Application Documents on him or on Ms Agam. Accordingly, both Ms Agam and he "will not be able to file [their] response as scheduled in [the Registry's] letter".

38 Later the same day, counsel for the Bank replied to Mr Agam (copying the Registry on the e-mail), stating that copies of the Application Documents had been "served on [him] and [Ms Agam] yesterday, by way of e-mail and registered post".

39 Further correspondence then ensued between the Agams, the Bank, and the Registry regarding the proper service of the Application Documents.

40 On 29 May 2018, Mr Agam confirmed by e-mail to the Registry that he had been duly served with the Application Documents, but stated that Ms Agam

had not been served. Mr Agam also requested, among other things, that the Court grant the Agams the right to appear via video-conference at the upcoming hearing on 6 July 2018, with Ms Agam being allowed to have her own translator during such hearing.

41 On 1 June 2018, the Registry conveyed this Court's direction that the Bank was to file an Affidavit of Service addressing all the issues concerning the service of the Application Documents by no later than 4 June 2018. The Court also granted an extension to the parties for the filing and service of their respective affidavits in the Application as follows:

> (a) Time is extended for the [Agams] to file and serve a response affidavit by no later than 8 June 2018.
>
> (b) The [Bank] is to file and serve any final reply affidavit by no later than 22 June 2018.
>
> (c) The parties are to file and serve their written submissions (if any) by 29 June 2018.
>
> (d) The hearing of the Application shall remain as fixed on 6 July 2018. The hearing on 6 July 2018 will commence at 2.30pm Singapore time.
>
> (e) The timeline for the filing of the Respondent's Case … will continue to be held in abeyance pending the determination of the Application.

42 The Registry further acknowledged the Agams' request to appear by way of video-conferencing and conveyed this Court's direction that the request was allowed subject to the following conditions:

> (a) The [Agams] must complete Form 7 (enclosed in this letter) and submit the completed Form 7 to the Registry in accordance with paragraph 11 of the Singapore International Commercial Court Practice Directions ("SICC PD"), by 6 June 2018.
>
> (b) The [Agams] must pay all the requisite fees for the use of video-conferencing facilities in accordance with paragraph 60 of the SICC PD.

> (c) The [Agams] are to cooperate fully in their compliance with all provisions of the SICC PD applicable to the use of video-conferencing facilities in the Court, in particular paragraph 58(3) of the SICC PD relating to, among other things, equipment testing with the Registry at least 5 working days before the hearing of the Application.
>
> (d) [Ms Agam] is to make her own arrangements to have her own translator present during the hearing of the Application.

43 Neither of the Agams attended or dialled in to the video-conferencing test sessions arranged by the court staff despite repeated reminders to do so. These test sessions were scheduled first on 27 June 2018, and then again on 4 July 2018 on account of the Agams' failure to participate in the earlier session. Neither did the Agams make the requisite payment for the use of the court's video-conference facilities.

44 On 4 June 2018, counsel for the Bank duly filed an Affidavit of Service, in which the following were stated:

> (a) On 22 May 2018, the Application Documents were served on the Agams by registered post to their respective addresses on record in the Appeal. The Application Documents were also sent by registered post to another known address of Mr Agam in the UK.
>
> (b) The Bank sent e-mails attaching the Application Documents to Mr Agam's e-mail address on 21 and 22 May 2018, to which Mr Agam responded.
>
> (c) On 4 June 2018, the Application Documents were also served on the Agams by "Certificate of Posting" to their respective addresses on record.

45 On 11 June 2018, Mr Agam e-mailed the Registry on behalf of himself and Ms Agam, alleging that the Registry's letter dated 1 June 2018 evidenced prejudice, partiality, and unconstitutionality. Mr Agam also stated that the Agams shall no longer be taking part in these proceedings. The e-mail further stated that as of that date, Ms Agam had not yet been served the Application Documents.

Arguments in the Application

46 The Agams did not file any reply affidavit in the Application. Nor did either of them appear, whether in person, by representation, or through video-conference (even though court staff were on standby to handle any incoming call) at the hearing before this Court on 6 July 2018.

47 On 5 July 2018, the day before the hearing of the Application, Mr Agam sent an e-mail (expressly on behalf of both himself and Ms Agam) to the Registry, copying counsel for the Bank, requesting that the e-mail be "regarded as a submission of [their] pleadings" in the hearing. The e-mail also requested that all previous correspondence between Mr Agam and the Registry be deemed "an integral part" of their submissions. Substantively, the e-mail alleged that this Court had ignored the Agams' rights, including the right "to be served", the right to a fair and impartial trial, the right to representation, and the right to due process.

48 In its written and oral submissions, the Bank took the position that the Application should be allowed, and the Appeal should be deemed to have been

withdrawn pursuant to O 57 r 9(4) of the ROC. Counsel for the Bank argued that:

(a) the Agams should not be treated differently simply because they are litigants in person;

(b) there is no reason for the Court to exercise its discretion to allow the Agams a further extension of time to comply with the requirements of the ROC; and

(c) the Bank would suffer significant prejudice if the Agams are granted yet another extension of time.

49 In relation to the Application Documents, the Bank submitted that they had been duly served on the Agams given that:

(a) Mr Agam had in fact acknowledged effective service of the Application Documents on him; and

(b) as for Ms Agam: (i) service should be deemed to have been effected at the time at which the documents would be delivered in the ordinary course of post under O 62 r 6(1) of the ROC read with s 2(5) of the Interpretation Act (Cap 1, 2002 Rev Ed) ("IA"), and she had not provided any evidence to rebut this presumption; and (ii) in any event, she has had actual notice of the Application Documents.

50 The Bank further submitted that, if it succeeded on the foregoing issues, costs should be awarded in its favour on an indemnity basis pursuant to clauses providing for the same in the Guarantees. Further, it asked the Court to grant an order that the security paid into court by the Agams for the costs of the Appeal

be used to satisfy the Bank's awarded costs before the balance is returned to the Agams.

The issues to be determined

51 So far as the arguments raised by the parties are concerned, there are three main issues for consideration:

(a) As a preliminary issue, whether the Application Documents have been properly served on both of the Agams.

(b) Whether the Application should be allowed such that the Appeal is deemed to have been withdrawn pursuant to O 57 r 9(4) of the ROC.

(c) The appropriate order as to costs and direction as to payment out of the security for costs.

A preliminary point

52 Before turning to the issues identified in [51] above, it is right to mention one preliminary point.

53 Order 57 of the ROC lays down the rules applicable to an appeal to the Court of Appeal. Order 57 r 9 is headed "Record of Appeal and Appellant's Case". Order 57 r 9(1) provides that "[w]ithin 2 months after service of [the Registry's notice pursuant to O 57 r 5(2) of the ROC (see [23] above),] the appellant must file" three sets of the Appeal Documents, consisting namely of (a) one copy of the Record of Appeal; (b) the Appellant's Case; and (c) a Core Bundle of documents. Order 57 r 9(1) also requires the appellant to serve a copy of these documents "on every respondent to the appeal or his solicitor" within

the same two-month period. Order 57 rr 9(2), 9(2A), and 9(3) in turn set out what should be included in each of the Appeal Documents.

54 Order 57 r 9(4) of the ROC then provides for the consequences of an appellant's omission to comply with the requirements of O 57 r 9(1):

> Where an appellant omits to comply with paragraph (1), the appeal shall be deemed to have been withdrawn, but nothing in this Rule shall be deemed to limit or restrict the powers of extending time conferred upon the Court of Appeal.

55 It appears to us that there is a powerful case for saying that O 57 r 9(4) of the ROC is effectively self-executing, so that it could be said that the issues raised by this application could be bypassed. In other words, it appears to us that there is a strong case for saying that, if an appellant fails to comply with O 57 r 9(1), then, without any application having to be made by any party, the effect of O 57 r 9(4) is that the appeal is automatically treated as withdrawn. Such an interpretation seems to be consistent with the opening eighteen words of the paragraph, amongst which the phrase "shall be deemed to have been withdrawn" suggests that nothing is needed other than the satisfaction of the requirement in the preceding words. The concluding twenty-three words of the paragraph do not undermine that view. If anything, they appear to confirm it, as it would only be necessary to expressly refer to the power of the Court of Appeal to extend time if the appeal had actually been deemed withdrawn, and therefore any subsequent extension of time would not merely extend time for the preparation of documents, but would also revive the appeal. If the appeal was merely susceptible to being withdrawn pursuant to an application such as that made here by the Bank, there would be no need to refer to the court's power to extend time, because there would be no reason for it not to be invocable in the normal way, that is, by way of an application by the party who is seeking an extension of time.

56 We consider that it is right to make this point, lest this case be said to suggest an implicit approval by this Court of the view that O 57 r 9(4) of the ROC takes effect only when an application to invoke it is made and granted. But having stated our present views on the issue, we do not consider that it would be right to decide the Application on this ground for the following reasons.

57 First, the point has not been expressly argued or examined by the parties.

58 Secondly, given that the Agams were not at the hearing and do not have any formal legal representation, it might be thought to be inappropriate to decide this Application on a ground which they have not had an opportunity to consider or meet.

59 Thirdly, even if this point is a good one, a decision on the present Application may be important for several reasons. One reason is that if the Application succeeds, any subsequent attempt by the Agams to extend time under the closing part of O 57 r 9(4) is much more likely to face difficulties than if the Bank had simply stood by while the paragraph took automatic effect according to its terms. That is because, as demonstrated by the earlier account of the relevant events, the very fact that the Application is being brought shows that the Agams have had ample notice of the effect of O 57 r 9(4) and ample opportunity to comply, even if belatedly, with the requirements stated in O 57 r 9(1). Further, a positive declaration that an appeal has been withdrawn may also add clarity to the validity and enforceability of the decision below, as well as put beyond question any dispute as to the satisfaction or otherwise of the requirements in O 57 r 9(1) such as to fulfil the condition in O 57 r 9(4).

60 Finally, it should also be added in fairness to those advising the Bank that it was at the Court's suggestion that the instant Application was made (see [35] above).

Issue 1: Were the Documents properly served?

Applicable rules governing ordinary service in the SICC

61 Order 110 r 2(*b*) of the ROC provides for the rules relating to proceedings transferred to the SICC. Order 110 r 3 provides that "[s]ubject to this Order, the provisions of these Rules [that is, the ROC] apply to all proceedings in the Court and all appeals from the Court", with the term "Court" being defined as the SICC (see O 110 r 1(1)). There is no provision in O 110 dealing with the issue of service of court documents, save for O 110 r 6, which governs the service of originating processes and therefore does not apply here. Accordingly, the general rules in the ROC relating to the service of non-originating processes in a non-SICC context govern the service of the Application Documents in the present case.

62 In that regard, O 62 r 6 of the ROC, which provides for the methods of "ordinary service", applies to the Application Documents because no provision of the ROC and no order of court requires them to be personally served (see O 62 r 1(1) of the ROC). The salient part of O 62 r 6 provides as follows:

> **Ordinary service: How effected (O. 62, r. 6)**
>
> **6.**—(1) Service of any document, not being a document which by virtue of any provision of these Rules is required to be served personally, may be effected —
>
> (*a*) by leaving the document at the proper address of the person to be served;
>
> (*b*) by post;
>
> (*c*) by FAX in accordance with paragraph (3);

> (*d*) in such other manner as may be agreed between the party serving and the party to be served; or
>
> (*e*) in such other manner as the Court may direct.
>
> (2) For the purpose of this Rule, and of section 2 of the Interpretation Act (Cap. 1), in its application to this Rule, the proper address of any person on whom a document is to be served in accordance with this Rule shall be the address for service of that person, but if at the time when service is effected that person has no address for service his proper address for the purpose aforesaid shall be —
>
> …
>
> (*b*) in the case of an individual, his usual or last known address;
>
> …

63 Order 62 r 6(2) of the ROC refers to s 2 of the IA, which is headed "Interpretation of certain words and expressions" and has six subsections. Subsection (1) contains a large number of specific definitions which apply to the IA and generally to all "written law". Subsection (2) provides that, where a word or expression is defined in a "written law", all forms of that word or expression have "corresponding meanings". Subsection (3) deals with certain references in every "written law" enacted prior to the independence of Singapore. Subsection (4) was deleted in 2014. Subsection (6) deals with publications in the Government *Gazette*.

64 Section 2(5) of the IA, which is the centrally relevant subsection for present purposes, is a deeming provision in relation to the service of documents by post:

> Where an Act authorises or requires any document to be served by post, whether the word "serve", "give" or "send" or any other word is used, then, unless a contrary intention appears, the service shall be deemed to be effected by properly addressing, prepaying and posting a letter containing the document, and, unless the contrary is proved, shall be deemed to have been effected at the time at which the letter would be delivered in the ordinary course of post.

Service on Mr Agam

65 In the present case, we are of the view that the Application Documents have been properly served on both of the Agams.

66 So far as Mr Agam is concerned, he accepted in his correspondence dated 29 May 2018 that he had received proper service of the Application Documents and raised no further objections in this regard (see [40] above). During the hearing on 6 July 2018, the Bank confirmed this by tendering to the Court a hardcopy acknowledgment receipt signed on 29 May 2018 for a letter sent by the Bank by registered post to Mr Agam on 21 May 2018 which annexed the Application Documents. There is therefore no plausible objection that could be raised as regards the service of documents on him.

Service on Ms Agam

67 Ms Agam has not submitted any document in the Application or corresponded with the Registry, although based on Mr Agam's representations on her behalf, it appears that she denies that there has been proper service of the Application Documents on her (see again [40] above). In this regard, the Bank's position stated in the Affidavit of Service was that the Application Documents had been served on Ms Agam in the following ways (see [44] above):

(a) On 22 May 2018 by registered post to Ms Agam's address on record in the Appeal.

(b) On 4 June 2018, by ordinary post to the same address.

68 We should clarify, at the outset, that there is no inconsistency between what was said by the Bank in its e-mail to the Agams mentioned at [38] above, namely that service was effected on Ms Agam by registered post on 21 May

2018, and what was said in the Bank's Affidavit of Service, as mentioned at [44(a)] above, namely that service by registered post was effected on Ms Agam on 22 May 2018. These different dates simply related to different letters sent by the Bank to Ms Agam. In this Application, the Bank relies on the letter sent on 22 May 2018, which is the date of postage referred to in its Affidavit of Service.

69 There are three independent elements in the Bank's substantive argument as to why Ms Agam had properly been served with the Application Documents.

Actual service on Ms Agam

70 First, the Bank argued that Ms Agam must have had actual notice of the Application Documents and the nature of the Application through Mr Agam who was, in effect, her representative and agent in these proceedings.

71 We agree. On the facts, it is overwhelmingly likely that Ms Agam had actual notice of the Application Documents on or shortly after 29 May 2018. In the course of correspondence between Mr Agam, the Registry, and the Bank, both in relation to the Appeal and the Application (see [20] to [45] above), Mr Agam had consistently and expressly communicated and acted on behalf of Ms Agam. By his words and conduct, which Ms Agam did not challenge or qualify at any point in time, Mr Agam made it clear that he was acting for himself, and as Ms Agam's agent, in these proceedings. There is every reason to accept the veracity and accuracy of what Mr Agam said on this point. On that basis, we agree that notice to Mr Agam as to the Application Documents should be considered notice to Ms Agam of the same. Furthermore, specific support for the fact that Ms Agam has had actual notice of the Application Documents may be found in Mr Agam's e-mail to the Registry dated 29 May 2018, where he indicated that both he and Ms Agam had perused the Application Documents:

"By now and after glancing [at] the content of this Summons, it seems to us that …".

Actual postal service on Ms Agam

72 Secondly, the Bank contended that it had served the Application Documents in accordance with O 62 r 6(1)(*b*) read together with O 62 r 6(2) and/or O 62 r 6(2)(*b*) of the ROC. This was on the basis of a postage receipt, which was tendered at the hearing on 6 July 2018, signed on 5 June 2018 in respect of the letter that the Bank sent by registered post on 22 May 2018 to Ms Agam's address as stated in the Notice of Appeal. This letter annexed the Application Documents.

73 In our judgment, it was plainly correct for the Application Documents to have been sent to Ms Agam at the address which she herself had stated as her address in the Notice of Appeal. In the absence of any evidence to the contrary, that must be considered her "proper address" within the meaning of O 62 r 6(2), and in any event her "usual or last known address" under O 62 r 6(2)(*b*) of the ROC. Accordingly, it must follow, in the absence of contrary evidence, that Ms Agam was properly served with the Application Documents by 5 June 2018 at the latest. In so far as it might be argued that this would not have given her much time to comply with the extended timeline for the filing of her reply affidavit in the Application by 8 June 2018 (see [41] above), we do not consider that this could be sustained as she would only have to deal with the narrow and factual issue of the circumstances of her receipt (or otherwise) of the Application Documents, which had already been detailed by Mr Agam in his correspondence with the Registry. In any event, there was nothing to prevent Ms Agam from making an application for an extension of time to comply with that order, which she did not.

Presumed postal service on Ms Agam

74 Thirdly, if for some reason the methods of service referred to above are ineffective, the Bank argued that under O 62 r 6(1)(*b*) of the ROC, read with the presumption in s 2(5) of the IA, service by posting to the address provided by Ms Agam is deemed to be effected at the time at which the letter would be delivered in the ordinary course of posting, so long as the Bank had properly addressed, prepaid, and posted the letter, which it did.

75 We also agree with this argument. As explained at [73] above, the letter was sent to the correct address. It is also accepted that the phrase "by post" in O 62 r 6(1)(*b*) includes registered post (see *Singapore Civil Procedure 2018* vol I (Foo Chee Hock JC gen ed) (Sweet & Maxwell, 2018) ("*Singapore Civil Procedure*") at para 62/6/4). Subject to one point of concern which we will come to, there is nothing to rebut the presumption that service was properly effected at the time the letter would be delivered in the ordinary course of post, which would, at the latest, be on or around 30 May 2018 based on the time it took for a letter sent on 21 May 2018 to reach Mr Agam.

76 The point of concern is whether it is open to the Bank to rely on s 2(5) of the IA. We have difficulty in accepting that s 2(5) of the IA can be of assistance, at least according to its own terms, when it comes to applying O 62 r 6(1)(*b*) of the ROC. The opening words of s 2(5), "[w]here an Act…", delimit the scope of the provision's applicability to an "Act", and s 2(1) of the IA in turn defines the word "Act" when used in the IA and "in every written law enacted before or after 28th December 1965" as meaning:

> … an Act of the Parliament of Singapore and includes any Ordinance or Act of Singapore or Malaysia having the force of law in Singapore; and "Act", when used in any subsidiary legislation, means the Act under the authority of which the subsidiary legislation was made; …

77 The ROC constitute subsidiary legislation, promulgated pursuant to primary legislation under s 80 of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed). The ROC are therefore not, in relation to the first part of the statutory definition reproduced above, an "Act". Nor does the second part of the statutory definition apply. Accordingly, we do not consider that s 2(5) of the IA can assist the Bank on the issue of service – at least if one confines oneself to the wording of the IA. The position might have been different if s 2(5) of the IA had, like ss 2(1), 2(2) and 2(3), referred to "written law" rather than "an Act" (see [63] above), as "written law" is defined in s 2(1) as extending to "all Acts, Ordinances and enactments … and subsidiary legislation made thereunder …", but that was not the case.

78 Having said that, it is necessary to address the fact that O 62 r 6(2) has been drafted in such a way as to make clear an assumption that s 2 of the IA does apply to the rule: the relevant words of the O 62 r 6(2) in this regard being "… section 2 of the Interpretation Act (Cap. 1), in its application to this Rule …".

79 There is obvious force in the simple argument that, if, as we have explained, s 2(5) of the IA does not by its own terms apply to the ROC, then a strictly literal construction of O 62 r 6(2) means that the extent of the "application" of s 2(5) to the rule is nil.

80 While acknowledging the force of that argument, we are nonetheless of the view that the correct interpretation of O 62 r 6(2) of the ROC is that s 2(5) of the IA is to be treated as if it did apply to O 62 r 6. In common law courts, the exercise of interpretation of any document involves attempting to discern and then to give effect to the intention of the drafter responsible for the document being interpreted. In the case of statutory interpretation in Singapore,

this common law principle is given statutory effect by s 9A(1) of the IA, which is in these terms:

> In the interpretation of a provision of a written law, an interpretation that would promote the purpose or object underlying the written law (whether that purpose or object is expressly stated in the written law or not) shall be preferred to an interpretation that would not promote that purpose or object.

81 As we mentioned (at [77] above), the term "written law" is defined in s 2(1) of the IA to include subsidiary legislation, and therefore the same principle of construction would apply to the ROC.

82 When one considers the various subsections of s 2 of the IA, the only one which the drafter of O 62 r 6(2) of the ROC can realistically be taken to have had in mind is subsection (5), as the other subsections simply have no significant or specific part to play in relation to O 62 r 6, which, like s 2(5) of the IA, is concerned with service of documents. The notion that the drafter would have thought it worthwhile to make an express reference in O 62 r 6(2) simply to the other four subsections of s 2 of the IA seems to us to be nothing short of fanciful. Once one concludes that the drafter had assumed or intended that s 2(5) of the IA should apply to O 62 r 6, it seems wholly contrary to the drafter's obvious intention to conclude that the extent of the application of s 2(5) is nil. In our view, the effect of the reference to s 2 of the IA in O 62 r 6(2) of the ROC is that s 2(5) is to be treated as incorporated into the rule. Accordingly, in determining whether ordinary service under O 62 r 6(1)(*b*) has been properly effected, the court can and should have due regard to s 2 of the IA and, in particular, the deeming provision in s 2(5) of the IA.

83 We note that in *Chia Kim Huay (litigation representative of the estate of Chua Chye Hee, deceased) v Saw Shu Mawa Min Min and another* [2012]

4 SLR 1096, the Singapore High Court expressly referred (at [45]–[47]) to s 2(5) of the IA in the context of a discussion on whether ordinary service by post under O 62 r 6(1)(*b*) had been satisfied, albeit without elaborating on the proper interaction between the provision and the rule. Similarly, a reference is also made, without much elaboration, to s 2(5) of the IA in para 62/6/4 of *Singapore Civil Procedure*, which discusses the issue of ordinary service by post under O 62 r 6(1)(*b*).

Conclusion on service

84 For these reasons, we are of the view that both the Agams were properly served with the Application Documents. In the case of Mr Agam, he accepted that he had been properly served, and there can be no doubt that he was right to do so. In the case of Ms Agam, we consider that she was properly served in three ways: (a) in the light of all the evidence, she was properly served when, or shortly after, the Application Documents were served on Mr Agam; (b) she was properly served by virtue of O 62 r 6(1)(*b*) read with O 62 r 6(2) and/or O 62 r 6(2)(*b*) given the postage receipt signed on 5 June 2018; and (c) she was properly served with the Application Documents by virtue of O 62 r 6(1)(*b*) read together with O 62 r 6(2), incorporating the presumption in s 2(5) of the IA.

85 For completeness, we add that, if it had to be served, the Bank's Affidavit of Service dated 4 June 2018 had also properly been served: (a) on Mr Agam by registered and ordinary post, and by e-mail; and (b) on Ms Agam by registered and ordinary post. In so far as service by registered post is concerned: (a) a postal receipt in relation to the letter to Mr Agam signed on 3 July 2018 was tendered; and (b) while Ms Agam did not acknowledge receipt, there is no evidence to suggest that it was not effectively served on her.

Issue 2: Should the Appeal be deemed to be withdrawn?

The operative rule

86 We have provided an overview of O 57 r 9 of the ROC and reproduced O 57 r 9(4) above at [53] to [54]. As the appellants in the Appeal, the Agams are obliged to comply with the requirements of O 57 r 9(1) in their conduct of the appeal, like any other appellant. And, failing such compliance, their appeal will be deemed to have been withdrawn pursuant to O 57 r 9(4).

87 In *Singapore Civil Procedure* at para 57/9/12, it is stated, correctly in our view, that the court's power to grant an extension of time in the context of O 57 r 9(4) is "purely discretionary" and that the burden is on the applicant for such an extension to:

> … [raise] grounds sufficient to persuade the court to show sympathy to [him] … The judge will not allow an extension of time where the conduct of the appellants is 'wholly inexcusable and nothing short of a blatant and callous disregard for the rules' … [internal citations and quotations omitted]

Application to this case

88 In the present case, the Bank relied on four instances of non-compliance with O 57 r 9(1) of the ROC on the part of the Agams:

(a) They did not file a Record of Appeal or seek an extension of time to do so.

(b) They did not file a Core Bundle or seek an extension of time to do so.

(c) They did not file the Appellant's Case in time notwithstanding an extension of time granted by the Court.

(d) The Appellant's Case belatedly filed exceeded the 50-page limit prescribed in para 87(4A) of the Supreme Court Practice Directions and would not ordinarily have been accepted for filing.

89 We do not regard point (d) as material. Although the Appellant's Case filed by the Agams is 466 pages in length, the substantive part of the document is only 20 pages. The remaining 446 pages are annexures, such as precedents and documents. The Agams could, and indeed should, have separately filed the annexures, in which event the Appellant's Case would have been compliant with the page limit. Therefore, in this context, even if we assume (without deciding) that a breach of the court's Practice Directions (as opposed to a breach of the express provisions of O 57 r 9(1) itself) could justify the invocation of O 57 r 9(4), we consider that it would be wrong to hold that this contravention would justify the sanction of treating the Appeal as being deemed to have been withdrawn. (We should add that the relevant rule is in para 145(5) of the SICC Practice Directions, rather than in para 87(4A) of the Supreme Court Practice Directions, but the two provisions are to the same effect.)

90 Nevertheless, it is clear that points (a), (b), and (c) in [88] are all instances of non-compliance by the Agams with the requirements of O 57 r 9(1), each of which would without more warrant the Appeal being deemed to have been withdrawn pursuant to O 57 r 9(4).

91 The Agams did not apply for an extension of time. But it seems just to consider whether one should be granted. While O 57 r 9(4) enables the Court to extend time and hence to allow any non-compliance to be "cured", we would not consider this to be a case where an extension should be granted in the light of the combined effect of a number of different factors.

92 First, while an extension of time might cure the Agams' non-compliance in relation to point (c) (the belated filing of the Appellant's Case), it would not be capable of curing their non-compliance in relation to points (a) and (b) (the non-filing of the Record of Appeal and Core Bundle). This is because the Agams have not made any attempt to file these documents or to request an extension of time in relation to the filing of these documents. Indeed, even after having seen (more than a month before the hearing of this Application) the Application, they did not indicate any intention to file these documents.

93 Secondly, the extent of non-compliance in this case is egregious because all three classes of appeal documents mentioned in O 57 r 9(1) were either not filed or not filed in time.

94 Thirdly, while the period of delay is not exceptionally long in relation to the filing of the Appellant's Case, which was in fact filed on 3 May 2018 and backdated to 24 April 2018, the periods of delay in relation to the Record of Appeal and the Core Bundle are. Pursuant to the final extension granted by this Court, they should have been filed on 24 April 2018, but to date that has not been done. This is a delay of more than two months by the time of the hearing of the Application on 6 July 2018 (and, now, close to five months).

95 Fourthly, the Agams have provided no good explanation for the delay. In the Purported EOT Application (see [25] above), they stressed that they needed time to find legal representation. They claimed to have approached "various local and foreign law firms to engage them for the Appeal" but apparently none were willing to assist them. But the supporting affidavit shows that the Agams had approached only two local law firms, and, while they did seek out four foreign firms or counsel, that is of limited relevance as the action was held in March 2018 not to qualify as an "offshore case" (see [18] above).

Instead, rather than genuine delay caused by the seeking of new counsel, a fair inference appears to be that the Agams have been in wilful non-compliance of O 57 r 9(1), taking into account the following factors:

(a) The requirements of O 57 r 9(1) were expressly and specifically brought to the Agams' attention as early as 30 January 2018 by the Registry (see [23] above).

(b) In the same letter, it was emphasised in bolded and underlined text that "if the Appellant fails to comply with Order 57 Rule 9(1) of the [ROC], the appeal shall be deemed to have been withdrawn under Order 57 Rule 9(4)" (see again [23] above).

(c) The Agams clearly knew that their appeal may be deemed withdrawn under O 57 r 9(4) if they did not file and serve the Appeal Documents in time. This can be seen from their draft affidavit in the Purported EOT Application referred to at [25] above.

(d) The Agams knew that they could apply for an extension of time, and were in fact reminded by the Registry of the need to file the Purported EOT Application (as recorded at [26] above), but they did not do so.

(e) The Agams made no attempt to comply with the requirements relating to the filing of the Record of Appeal and the Core Bundle, even though O 57 rr 9(2) and 9(2A) clearly explain what these documents should contain.

(f) This Court granted the Agams "a final extension of time to file and serve the documents pursuant to Order 57 Rule 9(1) of the [ROC] by 24 April 2018" (see [30] above), but even then the Agams did not

comply with the extended timelines, and did not even attempt to file the Record of Appeal or the Core Bundle.

96 We should add that we are very dubious about the Agams' claim that local law firms had refused to represent them for fear of criminal prosecution. In an e-mail to the Registry, the Agams annexed an e-mail from a single local law firm citing s 3 of the Administration of Justice (Protection) Act 2016 (No 19 of 2016) ("AJA"), which criminalises the offence of contempt of court. The context of this letter was not clear, but it is worth noting that s 17(1) of the AJA expressly provides that a person "is not guilty of contempt of court … for filing in good faith any action, pleading, application or affidavit in court". In any case, there was nothing showing that other local law firms had declined to represent the Agams on the same ground.

97 Fifthly, we accept that there will be significant prejudice to the Bank if this Court grants an extension of time for the Agams to comply with O 57 r 9(1). The present case concerns the filing of documents necessary for the initiation, or more accurately the prosecution, of an appeal. Although the courts generally adopt a more stringent approach with respect to applications to extend time after, as opposed to before, judgment has been issued at first instance, there is authority in *Lim Hwee Meng v Citadel Investment Pte Ltd* [1998] 3 SLR(R) 101 at [20]–[22] that the test for an extension of time to file documents in an existing appeal is usually more lenient than that to file a notice to appeal in order to initiate the appeal, as the former situation does not involve reopening a judgment or order which would otherwise be final. However, we consider this authority factually distinguishable as there has been no application to date by the Agams for an extension of time to comply with O 57 r 9(1). In this context, even greater prejudice would be occasioned to the Bank if an extension was granted by this Court *suo motu* in the absence of an application by the defaulting

party (assuming that we have the power to do so). We are also not prepared to grant an indefinite extension, leaving it to the Agams to choose when and whether to rectify their non-compliance with the prescribed rules of procedure.

The relevance of the Respondents' status as litigants in person

98 In reaching these conclusions, we have not overlooked the fact that the Agams are litigants in persons. Although they did not expressly raise this point, we consider it fair to assess this factor in determining whether we should exercise our discretion to grant an extension of time, notwithstanding the factors militating the other way. In this regard, the Bank submitted that the ROC should apply equally to all litigants such that the Agams should not be, or expect to be, treated differently or more favourably simply because they are litigants in person.

99 The issue of whether and to what extent courts should afford greater latitude to litigants in person in relation to their compliance with rules of civil procedure turn largely on the facts of each case.

100 The UK Supreme Court recently addressed this issue in *Barton v Wright Hassall LLP* [2018] 1 WLR 1119. The appellant, who was a litigant in person, purported to serve certain documents on the respondent's solicitors by e-mail without obtaining prior agreement as to the method of service. It was common ground that this was not good service. The issue was whether the court should exercise its power to retrospectively validate service. One argument by the appellant was that, as a litigant in person, he should be given some indulgence and be excused from the consequences of technical errors in complying with the UK Civil Procedure Rules ("CPR"). The Supreme Court disagreed and dismissed the appeal by a majority. Lord Sumption JSC (who gave the majority

judgment, with which Lord Wilson and Lord Carnwath JJSC agreed) stated (at [18]):

> Turning to the reasons for Mr Barton's failure to serve in accordance with the rules, I start with Mr Barton's status as a litigant in person. … [Such litigants'] lack of representation will often justify making allowances in making case management decisions and in conducting hearings. But it will not usually justify applying to litigants in person a lower standard of compliance with rules or orders of the court. … The rules do not in any relevant respect distinguish between represented and unrepresented parties. In applications under CPR 3.9 for relief from sanctions, it is now well established that the fact that the applicant was unrepresented at the relevant time is not in itself a reason not to enforce rules of court against him … At best, it may affect the issue 'at the margin', … which I take to mean that it may increase the weight to be given to some other, more directly relevant factor. It is fair to say that in applications for relief from sanctions, this is mainly because of what I have called the disciplinary factor, which is less significant in the case of applications to validate defective service of a claim form. There are, however, good reasons for applying the same policy to applications under CPR rule 6.15(2) simply as a matter of basic fairness. The rules provide a framework within which to balance the interest of both sides. That balance is inevitably disturbed if an unrepresented litigant is entitled to greater indulgence in complying with them than his represented opponent. Any advantage enjoyed by a litigant in person imposes a corresponding disadvantage on the other side, which may be significant if it affects the latter's legal rights, under the Limitation Acts for example. Unless the rules and practice directions are particularly inaccessible or obscure, it is reasonable to expect a litigant in person to familiarise himself with the rules which apply to any step which he is about to take.

101 The dissenting judges were materially aligned in holding that special indulgence should not generally be afforded to litigants in person. Lord Briggs JSC (with whom Baroness Hale of Richmond PSC agreed) stated as follows (at [42]):

> Although a number of the mitigating factors listed above are in a sense characteristics of Mr Barton being a litigant in person, that comes nowhere near saying that being a litigant in person constitutes a free-standing good reason why his botched

> attempt at service should be validated. … Save to the very limited extent to which the CPR now provides otherwise, there cannot fairly be one attitude to compliance with rules for represented parties and another for litigants in person, still less a general dispensation for the latter from the need to observe them. If, as many believe, because they have been designed by lawyers for use by lawyers, the CPR do present an impediment to access to justice for unrepresented parties, the answer is to make very different new rules (as is now being planned) rather than to treat litigants in person as immune from their consequences. …

102 Accordingly, the approach of the UK courts appears to be that the same standard of compliance with procedural rules is generally to be expected of litigants in person as of represented litigants, save in exceptional circumstances, for instance, where the relevant rules are "particularly inaccessible or obscure", or where they include a "disciplinary factor", such as the rules on relief from sanctions.

103 The Singapore courts have so far not conclusively ruled on the question whether the same standard of compliance with procedural rules should be expected of both represented parties and litigants in person, and have instead taken a case-by-case approach. But the general position appears to be that while the courts may show some greater indulgence to litigants in person, such indulgence is not to be expected as a matter of entitlement (see, for instance, *Werner Samuel Vuillemin v Overseas-Chinese Banking Corp Ltd and another matter* [2018] SGHC 92 at [36]), and that such indulgence also "does not mean that [a litigant in person] can act without regard to these rules and procedures" (*Ong Chai Hong (executrix of the estate of Chiang Chia Liang, deceased) v Chiang Shirley and others* [2016] 3 SLR 1006 at [40]).

104 While we see a great deal of force in the principled approach adopted by the UK Supreme Court, it is neither necessary nor appropriate for us in this case to consider whether to adopt it, either in full or in a more qualified form.

Whether one adopts the UK Supreme Court approach or the more pragmatic approach so far adopted in Singapore, the answer in the present case is (perhaps unsurprisingly) the same.

105 In the present case, the Agams are litigants in person who face the prospect of having their appeal against a judgment imposing a substantial financial liability on them be treated as withdrawn on account of procedural non-compliance. It seems to us appropriate at least to consider whether it would be a better course to dismiss the Application and examine the merits of the Appeal in greater detail. While in some cases the court might think it appropriate to give such an appellant a second chance, that would be an indulgence which we consider inappropriate on the facts of the present case. In coming to that conclusion we rely in part on the reasons already given in [91] to [97] above. It is also relevant that O 57 r 9(1) is not "particularly inaccessible or obscure": its language is plain and factual, and O 57 rr 9(2) and 9(2A) set out specifically what the Record of Appeal and the Core Bundle should respectively contain. There is thus nothing legalistic or complex about the relevant rule which the Agams failed to comply with. Indeed, the Agams' affidavit in the Purported EOT Application shows that they in fact understood the consequences under O 57 r 9(4) of their non-compliance with O 57 r 9(1) (see [25(d)] above). The rules also do not contain a "disciplinary factor" in the sense that Lord Sumption JSC had used the term. In addition, unlike most litigants in person, the Agams are not helpless babes in the woods. They appreciated the existence of, and knew how to exercise, their right to obtain legal advice and representation – they were represented by lawyers in the initial stages of the proceedings in the SICC (see [9] above), and they instructed a second set of counsel for the purpose of a specific application before the SICC (see [10] above). The commercial context in which the Loans and Guarantees arose also strongly suggests that they are far more commercially savvy than ordinary lay persons. Furthermore, we also note

that Mr Agam is legally trained in multiple jurisdictions and has in fact obtained both a bachelor's and a master's degree in law.

106 Taking all the considerations together, there is no good reason for this Court to exercise its discretion to grant the Agams an extension of time (which they have not sought) to comply with the requirements in O 57 r 9(1) of the ROC. Accordingly, the Application is allowed and the Appeal is deemed to have been withdrawn pursuant to O 57 r 9(4). We do not see this outcome as unfair or harsh. While the Agams are defendants in the Suit, as appellants they have carriage of the Appeal, they have been reminded repeatedly of their consequential obligations, they have been accorded several opportunities to comply with those obligations, they knew of the consequences of non-compliance with those obligations, and nevertheless they appear consciously to have decided not to comply with them. In the circumstances, we consider it appropriate that the consequences lie where they fall.

Issue 3: Costs and security for costs

The appropriate costs order

107 The Bank submitted that it should be awarded the costs of the Application on an indemnity basis, relying on clauses in the Guarantees which provide as follows (or are substantially to the like effect):

> **18. Costs and Expenses**
>
> The Guarantor shall on demand pay, in each case on the basis of a full indemnity, to the Bank all costs and expenses (including legal and out-of-pocket expenses) incurred in connection with … the enforcement … of any of its rights under this Guarantee. …

108 Strictly speaking, the concept of costs on an "indemnity basis" (as opposed to costs on a "standard basis") is irrelevant to proceedings in the SICC,

even though these may be familiar terms in litigation before the Singapore courts. In the recent decision of *CPIT Investments Ltd v Qilin World Capital Ltd and another* [2018] 4 SLR 38, Ramsey IJ made it clear that the costs regimes for proceedings in the SICC and Singapore High Court rest on different bases. This is evidenced by O 110 r 46(6), which provides that the familiar O 59 of the ROC on costs in the Singapore courts does not apply to SICC proceedings, including to appeals from the SICC to the Court of Appeal.

109 Instead, the applicable general principle for costs in proceedings related to the SICC is enshrined in O 110 r 46 of the ROC. In particular, in so far as the present Application is concerned, O 110 r 46(2) confers upon the court a wide discretion as to any award of costs, while providing that the starting position is that the "reasonable costs" of the successful party in any appeal or application to the Court of Appeal must be paid by the unsuccessful party.

110 In the present case, having regard to the agreement between the parties as to costs, which is contained in the Guarantees that have been upheld as valid in the Judgment, and in the absence of any reason as to why the agreement as to costs ought not be given effect, we consider it appropriate to order, pursuant to our discretion in O 110 r 46(2) of the ROC, that costs of the Application be paid by the Agams, on a joint and several basis, to the Bank, on an indemnity basis, to be taxed if the parties are unable to reach agreement within 14 days from the date of this judgment.

111 The Bank made no submission as to the costs of the Appeal. We make no order in this regard, and we do not disturb the costs orders below.

The appropriate direction regarding security for costs

112 Finally, the Bank raised the argument that we should order that the money paid into court by the Agams as security for the costs of the Appeal, be used to satisfy the costs order in respect of this Application, before the balance, if any, is returned to the Agams.

113 In this connection, the Bank relies on the Court's discretion to depart from the general rule regarding the repayment of security for costs under O 57 r 3(3A) of the ROC:

> (3A) Where costs are payable by the appellant to the respondent under any order made by the Court of Appeal —
>
> (*a*) the deposit or sum held pursuant to the undertaking referred to in paragraph (3)(*a*) or (*b*) shall be paid out without set-off to the respondent towards partial or total satisfaction (as the case may be) of such costs; and
>
> (*b*) the balance, if any, of the deposit or sum held pursuant to the undertaking shall be paid out to the appellant,
>
> unless the Court of Appeal otherwise orders.

114 In the present case, we consider that it would be right to accede to the Bank's request, taking into account its right to have the costs order satisfied without undue delay, the Agams' persistent unwillingness to cooperate in these proceedings and to comply with court orders, and the likely difficulty of a practical enforcement of the costs order otherwise.

Conclusion

115 For the foregoing reasons, we make orders:

(a) allowing the Application and granting a declaration that the Appeal is deemed to have been withdrawn pursuant to O 57 r 9(4) of the ROC;

(b) that the Bank's costs of the Application be paid on an indemnity basis by the Agams, jointly and severally, to be taxed if the parties are unable to reach agreement within 14 days from the date of this judgment;

(c) that no order be made as to the costs of the Appeal; and

(d) that the money paid into court by the Agams by way of security for costs be used to satisfy the Bank's costs of the Application, and thereafter the balance, if any, be paid out to the Agams.

Andrew Phang Boon Leong Judge of Appeal	Dyson Heydon International Judge	David Edmond Neuberger International Judge

Pillai K Muralidharan, Luo Qinghui, Andrea Tan
(Rajah & Tann Singapore LLP) for the applicant;
the respondents unrepresented and absent.