Published on e-First 13 August 2021

# 23. MEDIATION AND APPROPRIATE DISPUTE RESOLUTION

Nadja **ALEXANDER**[1]
*BA, LLB (Hons) (Qld), Dip International Studies (Vienna),*
*LLM D Jur (summa cum laude) (Tübingen);*
*Professor, Yong Pung How School of Law,*
*Singapore Management University;*
*Director, Singapore International Dispute Resolution Academy;*
*Mediator, Singapore International Mediation Centre (SIMI certified).*

Shouyu **CHONG**
*LLM (National University of Singapore);*
*Research Fellow, Singapore International Dispute Resolution Academy,*
*Singapore Management University;*
*Visiting Lecturer, The Dickson Poon School of Law,*
*King's College London;*
*PhD Research Student, Centre of Construction Law &*
*Dispute Resolution.*

## I. Introduction

23.1 2020 was an important year for mediation in Singapore. On 4 February 2020, the Singapore Parliament passed the Singapore Convention on Mediation Bill,[2] which came into effect on 12 September 2020. The enactment of the Singapore Convention on Mediation Act 2020[3] implements Singapore's obligations under the United Nations Convention on International Settlement Agreements Resulting from Mediation[4] ("Singapore Convention on Mediation" or "Singapore Convention"), into Singapore law.

23.2 In this chapter, arbitration will not be discussed unless it forms part of a mixed-mode dispute resolution process, which has mediation as an element.[5] The authors will analyse negotiated settlement agreements

1 The authors would like to thank Terence Yeo for his excellent research work on this chapter.
2 Bill 5 of 2020.
3 Act 4 of 2020.
4 The United Nations Convention on International Settlement Agreements Resulting from Mediation, GA Res 73/198, adopted at the United Nations General Assembly, 73rd Session (20 December 2018).
5 See, for example, the SIAC–SIMC Arb-Med-Arb protocol at Singapore International Mediation Centre, "Arb-Med-Arb" (http://simc.com.sg/dispute-resolution/arb-med-

*(cont'd on the next page)*

alongside mediated settlement agreements ("MSAs"), bearing in mind the recent observation by the Court of Appeal that "parties' negotiations with a view to a settlement also happen on platforms that 'effectively [take] the place of a mediation'".[6] It is further noted that the body of jurisprudence on subject matter related to mediation and appropriate dispute resolution ("ADR") is evolving. The authors therefore reiterate that the categories of cases in this chapter may evolve and vary year to year. For the 2020 Annual Review, the authors review cases in five categories. First, one noteworthy case from the District Court, deciding on a matter of enforcing a mediation agreement, will be examined. Secondly, the authors will examine cases on the enforcement of negotiated and/or (mediated) settlement agreements, with an additional focus on reliance on dispute resolution clauses in such settlement agreements to do so. Thirdly, the authors will briefly discuss an interesting case (the first one reported in almost 20 years) where the approval of the High Court was essential in giving effect to a negotiated settlement deed during insolvency proceedings pursuant to s 272(1)(*d*) of the Companies Act[7] ("CA"). Next to be reviewed are the cases which address issues in mediation and ADR practice and ethics. Finally, the authors consider cases dealing with civil procedure aspects of mediation, including confidentiality of settlement agreement terms and the ability of parties to accept offers to settle after a judgment on the merits has been rendered.

23.3 A number of these cases may also be examined in other chapters of this Annual Review, as the cases deal with legal issues beyond mediation. In this chapter, case reviews focus on mediation-related issues only.

arb/) (accessed July 2021); and the Singapore Infrastructure Dispute Management Protocol at Singapore International Mediation Centre, "New Singapore Dispute Protocol Launched to Minimise Time and Cost Overruns in Infrastructure Projects" (23 October 2018) <http://simc.com.sg/blog/2018/10/23/new-singapore-dispute-protocol-launched-minimise-time-cost-overruns-infrastructure-projects/>) (accessed July 2021).

6 *LVM Law Chambers LLC v Wan Hoe Keet* [2020] 1 SLR 1083 at [28], citing *Ian West Indoor and Outdoor Services Pty Ltd v Australian Posters Pty Ltd* [2011] VSC 287 at [25].

7 Cap 50, 2006 Rev Ed. It bears note that this provision has since been repealed in the Companies Act, and it has been replaced word-for-word by s 144(1)(*d*) of the Insolvency, Restructuring and Dissolution Act 2018 (Act 40 of 2018), which came into force from 30 July 2020.

| Category | Focus of review comments | Case |
|---|---|---|
| Enforcement of mediation clauses and mediation agreements | Agreement to proceed to mediation at the Singapore Mediation Centre ("SMC") before initiating judicial proceedings | *Zhongguo Remittance Pte Ltd v Samlit Moneychanger Pte Ltd*[8] |
| Recognition and enforcement of (mediated) settlement agreements | Enforcing (mediated) settlement agreements | *Alphire Group Pte Ltd v Law Chau Loon*;[9]<br>*Navin Jatia v Ram Niranjan*;[10]<br>*Oei Hong Leong v Chew Hua Seng*;[11]<br>On appeal, *Oei Hong Leong v Chew Hua Seng*;[12]<br>*Leiman, Ricardo v Noble Resources Ltd*;[13]<br>*Inngroup Pte Ltd v M Asset Pte Ltd*[14] |
| | Dispute resolution clauses in (mediated) settlement agreements | *Retrospect Investment (S) Pte Ltd v Lateral Solutions Pte Ltd*;[15]<br>*VJZ v VKB*[16] |
| Court approval of settlement agreements | Application to approve settlement deed under s 272(1)(*d*) of the Companies Act[17] | *Re Seshadri Rajagopalan*[18] |

8 [2020] SGDC 73.
9 [2020] SGCA 50.
10 [2020] 1 SLR 1098.
11 [2020] SGHC 39.
12 [2020] SGCA 78.
13 [2020] 2 SLR 386.
14 [2020] SGHC 197.
15 [2020] 1 SLR 763.
16 [2020] SGHCF 11.
17 It bears note that this provision has since been repealed in the Companies Act, and it has been replaced word-for-word by s 144(1)(d) of the Insolvency, Restructuring and Dissolution Act 2018 (Act 40 of 2018), which came into force on 30 July 2020.
18 [2021] 3 SLR 1344.

| Category | Focus of review comments | Case |
|---|---|---|
| Mediation, ADR practice and ethics | Ethical considerations: Conflict of interests | *LVM Law Chambers LLC v Wan Hoe Keet*[19] |
| | Therapeutic justice ("TJ") | *VDZ v VEA*[20] |
| Mediation, ADR and civil procedure | Confidentiality of settlement agreement terms | *TYN Investment Group Pte Ltd v ERC Holdings Pte Ltd*[21] |
| | Acceptance of offers to settle *after* judgment on the merits | *Michael Vaz Lorrain v Singapore Rifle Association*[22] |

## II. Enforcement of mediation clauses and mediation agreements

23.4 The enforcement of dispute resolution provisions in commercial disputes is normally an issue of procedural importance. In this regard, the common law is broadly accommodating with the enforcement of adequately drafted mediation clauses and agreements to enter into mediation, referred to here as "mediation agreements" generally. Recently, this sentiment has been laid out by the Technology and Construction Court of the Queen's Bench Division in England, in *Ohpen Operations UK Ltd v Invesco Fund Managers Ltd*.[23] In Singapore, the enforcement of mediation agreements is an uncommonly addressed matter in the courts. Section 8 of the Mediation Act 2017[24] specifically provides the Singapore

19 [2020] 1 SLR 1083. See also paras 11.9–11.17.
20 [2020] 2 SLR 858.
21 [2020] 5 SLR 894.
22 [2020] 2 SLR 808.
23 [2019] BLR 576. It bears note that O'Farrell J ruled (at [32]) that the English court:

> … has a discretion to stay proceedings commenced in breach of an enforceable dispute resolution agreement [(including mediation agreements)]. In exercising its discretion, the court will have regard to the public policy interest in upholding the parties' commercial agreement and furthering the overriding objective in assisting the parties to resolve their disputes.

The court further observed (at [58]):

> There is a clear and strong policy in favour of enforcing alternative dispute resolution provisions and in encouraging parties to attempt to resolve disputes prior to litigation. Where a contract contains valid machinery for resolving potential disputes between the parties, it will usually be necessary for the parties to follow that machinery, and the court will not permit an action to be brought in breach of such agreement.

See also Shouyu Chong & Nadja Alexander, "Case Note: Enforceability of Agreements to Mediate in English Law" *Kluwer Mediation Blog* (16 April 2020).
24 Act 1 of 2017.

courts with powers to enforce mediation agreements. However, the provision has so far been seldom invoked.

23.5 An example of a mediation agreement may be found in *VJZ v VKB*.[25] The beneficiaries of an estate were embroiled in a dispute over its administration. Some beneficiaries applied to the Singapore High Court (Family Division) for an order that the dispute be resolved at mediation, leading to the conclusion of an international mediated settlement agreement ("iMSA") in 2018 to resolve their disputes over the relevant estate in Singapore and Indonesia; the iMSA contained the following multi-tier dispute resolution clause:[26]

> The Parties hereby submit to the exclusive jurisdiction of the Courts of Singapore. The Parties agree that in respect of all disputes, controversies, claims or disagreements arising out of or in connection with this Agreement, including but not limited to its existence, validity, breach and enforcement, shall be first submitted to mediation at the Singapore International Mediation Centre and the mediator shall be Mr [xxx] *S.C.* The Parties further agree that only if the Parties have in good faith carried out the mediation and they have not been able to resolve their dispute, controversy, claim and/or disagreement, then, and in that event, only, the Parties shall commence legal proceedings in Singapore.

23.6 In 2020, there was one unreported case[27] from the Singapore District Court which briefly addressed the enforcement of a mediation agreement. This case will be discussed next.[28]

### *A. Agreement to proceed to mediation at the Singapore Mediation Centre before initiating judicial proceedings*

23.7 In *Zhongguo Remittance Pte Ltd v Samlit Moneychanger Pte Ltd*,[29] the parties involved were in dispute over an unlawful means conspiracy and harassment claim. On 3 November 2017, the plaintiff applied to the Singapore District Court for a judicial remedy against the first to third defendants. Subsequently, on 3 July 2018, the parties entered into a consent judgment, in which the defendants agreed to cease their offensive actions against the plaintiff. Additionally, all parties had agreed to the following dispute resolution provision, which contains an agreement to proceed to mediation, in cl 8 of the consent judgment:[30]

25 See para 23.3 above.
26 *VJZ v VKB* [2020] SGHCF 11 at [25].
27 *Zhongguo Remittance Pte Ltd v Samlit Moneychanger Pte Ltd* [2020] SGDC 73.
28 See paras 23.7–23.12 below.
29 See para 23.3 above.
30 *Zhongguo Remittance Pte Ltd v Samlit Moneychanger Pte Ltd* [2020] SGDC 73 at [11].

> 8. … Any future dispute arising between the parties, including but not limited to disputes arising out of or in connection with this Settlement Agreement, such as any question regarding its existence, validity or termination, shall be submitted for mediation. The aggrieved party shall submit a request to the Singapore Mediation Centre for mediation within 21 days of the dispute arising. Such party to the mediation must be represented by a representative who has the authority to negotiate and settle the dispute. Unless agreed by the parties, the mediator shall be appointed by the Singapore Mediation Centre. The mediation shall take place in Singapore in the English language and the parties agree to be bound by any settlement agreement reached. Should the parties fail tor [*sic*] reach a settlement through mediation, then the parties may proceed to resolve the dispute in through [*sic*] the courts and/or the law enforcement agencies of the Republic of Singapore. For avoidance of doubt, the parties shall be deemed to have failed to reach a settlement if either party serves written notice terminating the mediation.

23.8 In May 2019, the plaintiff applied to enforce the consent judgment against the second and third defendants for non-compliance, by applying for an order of committal at the District Court. To stave off contempt proceedings, the second and third defendants sought to rely on the mediation agreement, reproduced above.

23.9 Citing the High Court in *Ang Boon Chye v Ang Tin Yong*,[31] District Judge Jiaying Koh observed that where the plaintiff had voluntarily undertaken to refrain from taking out committal proceedings (for example, by agreeing to a dispute resolution provision which sets out alternative enforcement mechanisms), the defendants may successfully stay the plaintiff's application for leave to apply for an order of committal.[32] The court therefore opined that it was imperative to interpret the scope of the mediation agreement: District Judge Koh definitively found that such committal proceedings would fall within its scope (that is, of "any future dispute arising between the parties").[33]

23.10 In deciding that the plaintiff could commence committal proceedings, District Judge Koh opined that:[34]

> … there was only an agreement not to resolve the dispute through the courts if *all* parties reached a settlement through mediation. This would mean that *all* parties [including the first, second and third defendants] would have to agree

31 [2011] SGHC 124.

32 *Zhongguo Remittance Pte Ltd v Samlit Moneychanger Pte Ltd* [2020] SGDC 73 at [10].

33 *Zhongguo Remittance Pte Ltd v Samlit Moneychanger Pte Ltd* [2020] SGDC 73 at [12].

34 *Zhongguo Remittance Pte Ltd v Samlit Moneychanger Pte Ltd* [2020] SGDC 73 at [12].

> to mediation once the aggrieved party submitted the request to the Singapore Mediation Centre [emphasis in original].

Further, the court gave weight to the fact that the first defendant did not – according to evidence from the SMC – wish to proceed to mediation, and therefore concluded that as not all parties agreed to mediation after the request was made to the SMC, the matter could proceed to court. In other words, the court recognised the mediation agreement but interpreted it in such a way that meant it had been effectively fulfilled.

23.11 Respectfully, it is submitted that the court's interpretation of the mediation provision does not seem to give effect to the plain intention of the parties, who had in clear (and mandatory) terms provided for a two-tier mechanism for dispute resolution: (a) mediation at the SMC shall be the forum of first resort; and (b) if mediation did not result in settlement, the parties may next proceed to court.

23.12 Finally, it is noteworthy that whilst the court allowed the committal proceedings against the second and third defendants to proceed, the plaintiff's application for an order of committal was dismissed.

## III. Recognition and enforcement of (mediated) settlement agreements

23.13 It bears reiterating that the ability of parties to obtain recognition and enforcement relief from courts in respect of a validly concluded (mediated) settlement agreement is a crucial consideration in dispute risk management. Enforcement relief may manifest in the form of either specific performance of the obligations, or damages in lieu of it, at the election of the party seeking enforcement.[35] The review below will focus substantially on how the courts have considered various defences raised by parties against the enforcement of (mediated) settlement agreements.[36] It also seeks to remind readers about the importance of careful and meticulous drafting of (mediated) settlement agreements. For example, parties and their legal advisers must be mindful of the framing of provisions which may fall foul of the contractual rule against penalties,[37] and make provisions for dispute resolution or further recourse mechanisms if the settlement agreement were subject to further

35 See *Inngroup Pte Ltd v M Asset Pte Ltd* [2020] SGHC 197, which is discussed at paras 23.38–23.41 below.

36 See generally paras 23.17–23.37 below.

37 *Leiman, Ricardo v Noble Resources Ltd* [2020] 2 SLR 386.

disputes.[38] There will also be a note made of an interesting case,[39] where a third party to an iMSA successfully applied to rely on its terms, namely, on a jurisdiction clause contained in the agreement.[40]

23.14 In this part, decisions dealing with settlement agreements resulting from mediation as well as those resulting from negotiation are examined as the jurisprudence on negotiated settlement agreements will be relevant to MSAs. This is the reason for the references to (mediated) settlement agreements throughout this chapter.

### *A. Enforcing (mediated) settlement agreements*

23.15 The following cases are illustrative of the Singapore courts' approach to enforcing (mediated) settlement agreements.

#### *(1) Settlement agreements generally need not comply with strict formal requirements to be enforceable*

23.16 In the 2019 Annual Review, *Law Chau Loon v Alphire Group Pte Ltd*[41] was discussed.[42] It was briefly raised in footnote that the case was appealed to the Court of Appeal, where it was dismissed.[43] Whilst the Court of Appeal upheld most of the High Court's findings and consequential orders, it is noteworthy that the court varied the declaration, in that "the Order should refer to an oral settlement agreement between the applicant and the respondent made on 2 February 2019 which is valid and binding on the respondent".[44] This is of note because it emphasises the fact that settlement agreements generally need not comply with strict formal requirements (such as an in-writing requirement) in order for enforcement to be possible: so long as parties are able to provide the enforcing court with evidence that a settlement agreement has been definitively concluded, and that its terms may be clearly discerned (for instance, these terms may be recorded through a subsequent text message communication between the parties), the court may provide enforcement relief, regardless of whether the settlement agreement is an oral or written one.

38 *Retrospect Investment (S) Pte Ltd v Lateral Solutions Pte Ltd* [2020] 1 SLR 763.
39 See paras 23.50–23.55.
40 *VJZ v VKB* [2020] SGHCF 11.
41 [2019] SGHC 275.
42 See (2019) 20 SAL Ann Rev 614 at 627–629, paras 22.42–22.49 for a report on the facts of this case.
43 *Alphire Group Pte Ltd v Law Chau Loon* [2020] SGCA 50.
44 *Alphire Group Pte Ltd v Law Chau Loon* [2020] SGCA 50 at [15].

*(2) Duty of disclosure is a narrow exception to the rule that non-disclosure of material facts does not provide parties with any excuse or right to avoid contracts*

23.17 In the 2019 Annual Review, *Ram Niranjan v Navin Jatia*[45] was discussed.[46] It was briefly raised in footnote that the case was appealed to the Court of Appeal, where the appeal was allowed.[47] The appeal turned on the High Court's finding that the claimant, Ram, could successfully apply to have a settlement deed ("the 2015 Deed") set aside on the basis of material non-disclosure of facts by some of the defendants (collectively, "the Defendants" in this part).

23.18 In *Navin Jatia v Ram Niranjan*,[48] the Court of Appeal reversed the High Court's decision that the 2015 Deed may be set aside for material non-disclosure of facts. Delivering the judgment of the Court of Appeal, Woo Bih Li J first emphasised that the duty of disclosure is a narrow exception to the general rule in contract law that non-disclosure of material facts does not provide parties with any excuse or right to avoid contracts, which is *confined to family arrangements*.[49] Woo J succinctly summarised the origins of this exception:[50]

> In essence, the law presumes that parties to a family arrangement repose a certain degree of trust and confidence in one another, such that there is an obligation to make full and frank disclosure of all material facts. In such domestic arrangements the contracting parties may be led to believe, simply by virtue of their relationship, that the counterparty can be trusted not to take advantage of their ignorance, and to similarly negotiate on the basis of sentiment and the greater good of the family.

23.19 However, the Court of Appeal observed that where parties to a family arrangement are not on good terms with each other (for instance, if they are engaged in some sort of a hopeless[51] family conflict or disharmony), the presumption that the parties would repose a degree of trust and confidence in one another is rebutted, and the law would instead view them as being parties entering into agreements at arm's

45 [2020] 3 SLR 982.

46 See (2019) 20 SAL Ann Rev 614 at 627–629, paras 22.42–22.49 for a report on the facts of this case.

47 *Navin Jatia v Ram Niranjan* [2020] 1 SLR 1098.

48 See para 23.3 above.

49 *Navin Jatia v Ram Niranjan* [2020] 1 SLR 1098 at [52], citing *Bell v Lever Brothers Ltd* [1932] AC 161 at 227.

50 *Navin Jatia v Ram Niranjan* [2020] 1 SLR 1098 at [53].

51 It must be noted that the Court of Appeal "stress[ed] that the mere fact of family disharmony and disagreement over certain issues does not necessarily mean that a relationship of trust and confidence is absent": *Navin Jatia v Ram Niranjan* [2020] 1 SLR 1098 at [57].

length.[52] In this context, the defence of material non-disclosure of facts would not be available.

23.20 Since the relationship between Ram and the Defendants was highly acrimonious,[53] the Court of Appeal thought it unlikely for the parties to be bound by a duty of disclosure and ruled that the 2015 Deed could *not* be set aside for material non-disclosure of facts.[54]

23.21 Furthermore, even though this issue was not raised at the High Court, the Court of Appeal suggested that the analysis could be further refined by distinguishing between "family arrangements which were negotiated on the *basis* of existing trust and those which are negotiated with a view to *regaining or achieving* that trust" [emphasis in original].[55] Woo J opined in *obiter dictum* that such a distinction would be relevant but left the legal question open for a future case which may turn on such a precise finding.[56]

*(3) Terms of settlement agreement must be clear*

23.22 The case and facts of *Oei Hong Leong v Chew Hua Seng*[57] serve as a reminder that not all outcomes arising from informal meetings between disputing parties who attempt to amicably resolve their disputes are enforceable, no matter how sincere or earnest the settlement negotiations. The court must be satisfied that the parties had objectively intended to create legal relations, an important threshold question benchmarked by the precise facts and circumstances of each case. Whilst this case is noteworthy in the chapter on contract law,[58] it is also relevant in this chapter: a negative answer to the threshold question of having a common intention to create legal relations when (mediated) settlement agreements are concluded in informal settlement or mediation settings will have implications for the enforceability of such agreements.

52 See *Navin Jatia v Ram Niranjan* [2020] 1 SLR 1098 at [54]–[57], citing William Williamson Kerr, *A Treatise on the Law of Fraud and Mistake as Administered in Courts of Equity* (William Maxwell & Son, 1st Ed, 1868) at pp 79–80; and *Irvine v Kirkpatrick* (1850) 7 Bell 186 at 209.

53 The Court of Appeal accepted the High Court's judgment that the parties' relationship when the 2015 Deed was signed may be described as "anything but one of trust and confidence": see *Navin Jatia v Ram Niranjan* [2020] 1 SLR 1098 at [58].

54 *Navin Jatia v Ram Niranjan* [2020] 1 SLR 1098 at [61].

55 *Navin Jatia v Ram Niranjan* [2020] 1 SLR 1098 at [60].

56 *Navin Jatia v Ram Niranjan* [2020] 1 SLR 1098 at [61].

57 See para 23.3 above.

58 See paras 13.25–13.32.

23.23 In *Oei Hong Leong v Chew Hua Seng*,[59] two prominent Singapore businessmen, Oei Hong Leong and Chew Hua Seng, were stakeholders in Raffles Education Corporation Ltd ("REC").[60] There was a dispute between Oei and Chew in relation to REC, which compelled Oei to convene an extraordinary general meeting of REC's shareholders by issuing a notice of requisition seeking to remove Chew as chairman and director of REC.[61]

23.24 On 16 October 2017, Oei and Chew met at the house of Oei's sister, Sukmawati Widjaja, at about 8.30pm. Also present at the meeting was Chew's wife, Doris Chung, who is REC's director of operations and human resources. Sukma is also a friend of Chew and Chung's. It was unclear how the meeting came to be organised, but the trial court found that it was a meeting arranged for Oei and Chew to hear each other out, regarding the REC dispute, in an informal setting.[62] Evidence of that informal meeting showed that the conversations between Oei and Chew were of a friendly nature and that they were intent on burying the hatchet.[63] The trial court specifically observed that the objective of any agreement to be made between Oei and Chew from that meeting "was to make peace, a distinctively personal motivation", and "[f]ollowing their discussion, Oei and Chew not only shook hands but also embraced".[64] An agreement was reached between Chew and Oei, which was recorded on a piece of paper:[65]

> Confidential Agreement
>
> 16 Oct 2017
>
> Today at the house of Sukmawati both MR OEI HONG LEONG AND MR CHEW HUA SENG HAVE come to an amicable solution with regards to the differences of opinion of the operation of Raffles Education.
>
> MR CHEW will procure a buyer for MR OEI [*sic*] lot of shares to buyer [*sic*] at a price of SD0.44 cents per share within one month from today. The last day of transaction is on 15th Nov 2017.
>
> The lot of shares as of 16 October 2017 after market close is 12.88 percent.
>
> [Signatures of Oei, Chew and Sukma]

59 [2020] SGCA 78.
60 The precise nature of their stake holding is not relevant for the purposes of the discussion in this chapter.
61 *Oei Hong Leong v Chew Hua Seng* [2020] SGCA 78 at [4].
62 *Oei Hong Leong v Chew Hua Seng* [2020] SGHC 39 at [42].
63 *Oei Hong Leong v Chew Hua Seng* [2020] SGHC 39 at [43].
64 *Oei Hong Leong v Chew Hua Seng* [2020] SGHC 39 at [43].
65 *Oei Hong Leong v Chew Hua Seng* [2020] SGCA 78 at [22]; *Oei Hong Leong v Chew Hua Seng* [2020] SGHC 39 at [17].

23.25 Oei and Chew signed the agreement, and Sukma signed off on it as a witness. The agreement was reproduced, and Oei and Chew each kept a copy.[66] It was noted as a finding of fact by the trial court that the discussion between Oei and Chew on the sale of REC shares was concluded in a short period of time, within less than two minutes.[67] Following that, the parties then celebrated with champagne.[68] Text message time stamps suggest that the parties returned home at around 9.47pm.

23.26 Subsequently, around 25 October 2017, Chew informed Oei that he had identified a potential purchaser for the latter's shares. Chew facilitated the negotiations between Oei and the buyer on the sale of the shares, but the negotiations did not yield fruit.[69] Consequently, Oei filed a suit against Chew for breach of contract, claiming that the agreement they concluded on 16 October 2017 was legally binding, and sought damages for the latter's failure to procure a buyer for the former's shares, as per the terms of the agreement.[70]

23.27 The High Court ruled that the agreement Chew and Oei concluded was not a legally binding contract because they did not have a common intention to create legal relations;[71] Lee Seiu Kin J dismissed Oei's claim in its entirety.[72] The Court of Appeal arrived at the same conclusion and dismissed Oei's appeal. Andrew Phang Boon Leong JA emphasised on the importance of discerning an intention to create legal relations between parties when they meet informally in an endeavour to resolve a current dispute between themselves.[73] If there is no such common intention found, whatever compromises reached between the parties will not be legally binding.[74] Phang JA noted:[75]

> The doctrine of intention to create legal relations is, by its very nature, an intensely factual one. Much would depend upon what the precise facts and circumstances of the case are … [I]t is one of the essential legal elements that must be established before a binding contract can be found between the parties …

66 *Oei Hong Leong v Chew Hua Seng* [2020] SGHC 39 at [5].
67 *Oei Hong Leong v Chew Hua Seng* [2020] SGHC 39 at [43]; *Oei Hong Leong v Chew Hua Seng* [2020] SGCA 78 at [20].
68 *Oei Hong Leong v Chew Hua Seng* [2020] SGHC 39 at [43].
69 *Oei Hong Leong v Chew Hua Seng* [2020] SGCA 78 at [6].
70 *Oei Hong Leong v Chew Hua Seng* [2020] SGCA 78 at [7].
71 *Oei Hong Leong v Chew Hua Seng* [2020] SGHC 39 at [57].
72 *Oei Hong Leong v Chew Hua Seng* [2020] SGHC 39 at [93].
73 *Oei Hong Leong v Chew Hua Seng* [2020] SGCA 78 at [10].
74 *Oei Hong Leong v Chew Hua Seng* [2020] SGCA 78 at [10].
75 *Oei Hong Leong v Chew Hua Seng* [2020] SGCA 78 at [11].

23.28 The Court of Appeal also emphasised the need to discern the intention of the parties, based on the *precise* facts and circumstances available, from an objective perspective.[76] Mere subjective assertions by the parties are generally insufficient indicators of such intention, but they may be considered in light of the entire context of facts to help the court ascertain if the parties had indeed intended to conclude a legally binding agreement.[77] Furthermore, the Court of Appeal was firm in reminding the parties that the fact that enforceable settlement agreements *may* be concluded under informal settings has no actual bearing on the case at hand between Oei and Chew, as "the inquiry to be concluded is ultimately fact-specific".[78]

23.29 Examining the precise facts of the case, the Court of Appeal agreed with the trial court that Oei was unable to show that Chew had entered the agreement on 16 October 2017 intending for it to be legally binding. Most notably, the court focused on the brevity of the discussions between Oei and Chew, leading to the signing of the agreement, which was concluded in under two minutes.[79] Crucially, the court opined that it was unlikely for Chew to have intended to bind himself to such an onerous legal obligation as to procure a buyer for Oei's shares under such an informal setting, with little negotiations leading up to the signing of the agreement.[80] Considering the commercial implications, had a binding contract been concluded, Chew would have had to procure a buyer of shares in a transaction involving more than $60m within a month and selling those shares at a premium.

23.30 Furthermore, the Court of Appeal found that the signed agreement did not reflect the complete terms of the alleged compromise between Oei and Chew in relation to their dispute over REC. Whilst the signed agreement purported to resolve a dispute between Oei and Chew, it did not make any reference to Oei's obligation to withdraw the notice of requisition.[81] When considered against the backdrop of facts found by the trial court that Oei and Chew had concluded the signed agreement after a brief discussion lasting less than two minutes and that "it was plausible that the parties only intended to use the 16 October Note as a 'symbolic gesture'",[82] the lack of clarity and meticulousness in drafting was, in the Court of Appeal's judgment, objectively indicative of the position that the

76 *Oei Hong Leong v Chew Hua Seng* [2020] SGCA 78 at [12].
77 *Oei Hong Leong v Chew Hua Seng* [2020] SGCA 78 at [12].
78 *Oei Hong Leong v Chew Hua Seng* [2020] SGCA 78 at [18].
79 *Oei Hong Leong v Chew Hua Seng* [2020] SGCA 78 at [20].
80 *Oei Hong Leong v Chew Hua Seng* [2020] SGCA 78 at [20].
81 *Oei Hong Leong v Chew Hua Seng* [2020] SGCA 78 at [23].
82 *Oei Hong Leong v Chew Hua Seng* [2020] SGCA 78 at [22].

parties did not intend for what was provided in the signed agreement to be legally binding.[83]

23.31 In the context of mediation and ADR, this case serves to illustrate that the courts will scrutinise the substance of any settlement agreement arising from mediation and ADR according to its precise facts and circumstances before providing enforcement relief. Enforcement relief will not be provided if the courts are unable to objectively discern a common intention between the parties to create legal relations with each other, in spite of the fact that an agreement may appear to have been drawn out in form and the parties may have signed off on that putative agreement. The meticulousness and clarity of the drafting of settlement agreements (or lack thereof) may also be indicative of the parties' intention to create legal relations.

*(4) Liquidated damages provisions are not enforceable if they violate the "no penalty" rule*

23.32 *Leiman, Ricardo v Noble Resources Ltd*[84] serves to remind us that the terms of settlement agreements, which fall foul of the "no penalty" rule in contract law, are not enforceable. Whilst this case is noteworthy in the chapter on "Contract Law",[85] it remains relevant here in relation to the drafting (mediated) settlement agreements.

23.33 In *Leiman, Ricardo v Noble Resources Ltd*,[86] Ricardo Leiman, who was the chief operating officer of Noble Group Ltd ("NGL"), had entered into a settlement agreement with Noble Resources Ltd ("NRL"), which is part of the Noble group of companies ("Noble"), on 9 November 2011. The settlement agreement was the result of negotiations between Leiman and Noble, in anticipation of the former's resignation from NRL. It provided for Leiman's severance payments and benefits, whilst regulating the terms of his resignation. For the purposes of this chapter, cl 3(a) of the settlement agreement is most relevant, and is reproduced below:[87]

> 3. Severance Payments and Benefits
>
> (a) Noble [that is, NRL] and [Leiman] shall, on the Effective Date, execute a payment schedule attached hereto as Exhibit A. [Leiman] shall be entitled to receive the payments and benefits provided for in this Section 3 and the schedule but only if he complies with his ongoing non-competition and confidentiality

83 *Oei Hong Leong v Chew Hua Seng* [2020] SGCA 78 at [23].
84 See para 23.3 above.
85 See para 13.123.
86 [2020] 2 SLR 386.
87 *Leiman, Ricardo v Noble Resources Ltd* [2020] 2 SLR 386 at [21].

> obligations under the provisions of the Employment Agreement and this Settlement Agreement and which shall continue in full force and effect regardless of this termination.

23.34 In other words, Leiman was entitled to receive the payments and benefits set out in cl 3 and the payment schedule attached to the settlement agreement only if he complied with his non-competition and confidentiality options under the employment agreement and the settlement agreement. Clauses 3(c) and 3(d) had set out Leiman's entitlements to the NGL shares and share entitlements. These entitlements were, however, subject to the condition that he "not act … to the detriment of Noble", and NGL's remunerations and options committee ("R&O Committee") was said to have the power to make the "final determination in the event of any dispute".[88]

23.35 The Court of Appeal ruled that cl 3(a) of the settlement agreement was an unenforceable penalty clause.[89] It suffices to *briefly note* for the purposes of discussion in this chapter the reasons for the court's findings. Further, this note must be discussed in light of subsequent guidance from the Court of Appeal, in *Denka Advantech Pte Ltd v Seraya Energy Pte Ltd*,[90] on the applicable test to be applied in relation to penalty clauses: the test from the House of Lords case of *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd*[91] ("the *Dunlop* test") applies in Singapore.[92] Delivering the judgment of the Court of Appeal, Sundaresh Menon CJ observed, in the first place, that cl 3(a) may be construed as imposing a secondary obligation on Leiman;[93] Leiman's right to his entitlement benefits under cl 3 was contingent on the fact that he did not breach his primary contractual obligations of non-competition and confidentiality.[94] Secondly, the Court of Appeal ruled that the contractual right of NRL to disentitle Leiman (as a matter of secondary obligations) from receiving his entitlement benefits under cl 3 was not a genuine pre-estimate of any losses or damages suffered by NRL (applying the *Dunlop* test) as a result of a breach of his non-competition and confidentiality obligations (primary obligations), because of its "all-or-nothing" nature: regardless of the nature and extent of Leiman's breach, cl 3(a) provides for a complete disentitlement of his benefits.[95] Menon CJ observed:[96]

88 *Leiman, Ricardo v Noble Resources Ltd* [2020] 2 SLR 386 at [21].
89 *Leiman, Ricardo v Noble Resources Ltd* [2020] 2 SLR 386 at [107].
90 [2021] 1 SLR 631.
91 *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1915] AC 79.
92 *Denka Advantech Pte Ltd v Seraya Energy Pte Ltd* [2021] 1 SLR 631 at [185].
93 *Leiman, Ricardo v Noble Resources Ltd* [2020] 2 SLR 386 at [106].
94 *Leiman, Ricardo v Noble Resources Ltd* [2020] 2 SLR 386 at [106].
95 *Leiman, Ricardo v Noble Resources Ltd* [2020] 2 SLR 386 at [107].
96 *Leiman, Ricardo v Noble Resources Ltd* [2020] 2 SLR 386 at [107].

> There was simply no correlation between the damages that might be awarded to NRL for any breach of contract on Mr Leiman's part and the sanction for such breach, namely, the forfeiture of whatever rights Mr Leiman had under cl 3 to the payments and benefits enumerated therein.

23.36 Thirdly, it was also observed that cl 3(a) functioned as a surcharge on Leiman because NRL had nevertheless retained the right to pursue damages against Leiman in respect of any of his breaches of his non-competition and confidentiality obligations.[97]

23.37 For these key reasons, the Court of Appeal ruled that cl 3(a) of the settlement agreement was not enforceable because it amounted to a penalty, *per* the *Dunlop* test. Terms which fall foul of the "no penalty" rule in contract law are not enforceable.

*(5) Parties to a mediated settlement agreement may elect for specific performance or damages in the event of a breach*

23.38 In *Inngroup Pte Ltd v M Asset Pte Ltd*,[98] the plaintiff, Inngroup Pte Ltd ("Inngroup") had applied to the High Court to enforce the terms of an MSA against the defendant M Asset Pte Ltd ("Asset"). The parties were owners of adjoining leasehold shophouses along Hong Kong Street. They were initially locked in a dispute over their property boundaries in 2016. In June 2018, they proceeded to mediation, chaired by a retired judge of the Supreme Court.[99] An MSA was concluded and the parties had agreed to a commercial arrangement where Inngroup would lease a part of Asset's property in furtherance of Inngroup's venture to convert their property into a boutique hotel and/or working space.[100] The essential terms of the MSA were that Asset had agreed to lease their property to Inngroup on terms which were clearly articulated in the MSA. It is also noteworthy that the parties had *not* set out expressly what the leased property was to be used exclusively for.[101]

23.39 Unfortunately, Asset had not been co-operative throughout the drafting process of the tenancy agreement ("TA") after the MSA was concluded. After working through eight different drafts, the parties were still unable to conclude a TA.[102] Consequently, Inngroup filed a suit in

97 *Leiman, Ricardo v Noble Resources Ltd* [2020] 2 SLR 386 at [107].
98 See para 23.3 above. The Court of Appeal affirmed the High Court's findings (except on the issue of costs borne by parties, which is not relevant to the discussion in this chapter) on 12 May 2021: *M Asset Pte Ltd v Inngroup Pte Ltd* [2021] SGCA 54.
99 *Inngroup Pte Ltd v M Asset Pte Ltd* [2020] SGHC 197 at [15].
100 *Inngroup Pte Ltd v M Asset Pte Ltd* [2020] SGHC 197 at [19]–[20].
101 *Inngroup Pte Ltd v M Asset Pte Ltd* [2020] SGHC 197 at [134].
102 *Inngroup Pte Ltd v M Asset Pte Ltd* [2020] SGHC 197 at [106].

the High Court against Asset for breach of the MSA. The dispute was essentially centred around the parties' inability to conclude a TA as provided for under the terms of the MSA.[103] After considering the evidence and arguments submitted by the parties, Lai Siu Chiu SJ ruled that Asset was in breach of the MSA, when it provided numerous versions of draft tenancy agreements to Inngroup.[104] The court had also rejected the defence which Asset relied on, that the TA to be concluded was to be premised on their property being used solely as a hotel.[105]

23.40 Because Asset was found to be in breach of the terms of the MSA, Inngroup was entitled to claim remedies flowing from such a breach. Whilst ordinarily, a claim for specific performance of the terms of the MSA may be obtained (that is, an order for Asset to comply with the MSA by concluding a TA as provided for under the terms of the MSA), Inngroup elected to claim for damages instead.[106] It appears that Inngroup made this election primarily because the dispute over the MSA was litigated through the COVID-19 pandemic,[107] and it would be in its best interest financially to walk away from this dispute with damages, rather than with a leasehold which they would encounter much difficulty in monetising in the short term.[108] When assessing the amount of damages the court should award to Asset, Lai SJ was mindful that Asset "should be adequately compensated for its loss, but it should not obtain a windfall at the expense of the Defendant".[109]

23.41 In the context of mediation and appropriate dispute resolution, this case serves to illustrate how parties to an MSA may elect for specific performance or damages, in the event of a breach by a counterparty. Where damages may be awarded in lieu of specific performance for a breach of an MSA, the court will be mindful of providing adequately, but not indulgently, for the claimant seeking relief.

103 *Inngroup Pte Ltd v M Asset Pte Ltd* [2020] SGHC 197 at [132].
104 *Inngroup Pte Ltd v M Asset Pte Ltd* [2020] SGHC 197 at [166].
105 That is, anything to the contrary would have entitled Asset to walk away from the mediated settlement agreement without satisfying their obligations, as Asset would argue. See *Inngroup Pte Ltd v M Asset Pte Ltd* [2020] SGHC 197 at [166].
106 *Inngroup Pte Ltd v M Asset Pte Ltd* [2020] SGHC 197 at [169].
107 *Inngroup Pte Ltd v M Asset Pte Ltd* [2020] SGHC 197 at [168].
108 See *Inngroup Pte Ltd v M Asset Pte Ltd* [2020] SGHC 197 at [174], where Lai Siu Chiu SJ broadly recognised that the COVID-19 pandemic had caused substantial hardship in the hotel and tourism industry.
109 *Inngroup Pte Ltd v M Asset Pte Ltd* [2020] SGHC 197 at [175].

## *B. Dispute resolution clauses in (mediated) settlement agreements*

### *(1) Court has no power to amend consent order after discontinuance of suit*

23.42 In *Retrospect Investment (S) Pte Ltd v Lateral Solutions Pte Ltd*,[110] the parties had agreed to settle a minority oppression dispute out of court prior to the commencement of the trial (referred to as Suit No 236 of 2017 ("Suit 236")). The respondents in this appeal had agreed to buy out the appellant's shares in Sei Woo Technologies Pte Ltd ("SWTPL"). On 20 August 2018, a consent order ("the Consent Order") was recorded before the High Court judge, and leave was granted to the appellant to discontinue Suit 236 with no order as to costs. Consequently, the appellant served the notice of discontinuance on 27 August 2018, and it was filed on 31 August 2018. The respondents had consented to the discontinuance of Suit 236; thus, it was discontinued under such circumstances.[111]

23.43 Subsequently, the parties were unable to come to an agreement on the reference date for the valuation of the appellant's shareholding in SWTPL. The parties were deadlocked over whether the valuation date should be the date of the consent order or an earlier date (31 December 2015) prior to when the oppressive conduct was first alleged to have occurred (8 April 2016). As a result, the parties filed cross-applications in the High Court for a determination of the valuation date ("the Cross-applications").[112]

23.44 On 10 January 2019, the High Court pointed out to the parties that the Consent Order did not provide for any right to enable the parties to ask the court for a determination of the applicable valuation date.[113] As such, the parties agreed to amend the Consent Order by filing an application by way of a consent summons to do so. The parties applied to add the following paragraph into the Consent Order in Suit 236:[114]

> In the event that parties are unable to come to an agreement on the reference date for the valuation of the [Appellant's] shares in [SWTPL], the parties shall be at liberty to refer the matter to the Court for determination, which determination shall be final.

110 See para 23.3 above.
111 *Retrospect Investment (S) Pte Ltd v Lateral Solutions Pte Ltd* [2020] 1 SLR 763 at [3].
112 *Retrospect Investment (S) Pte Ltd v Lateral Solutions Pte Ltd* [2020] 1 SLR 763 at [4].
113 *Retrospect Investment (S) Pte Ltd v Lateral Solutions Pte Ltd* [2020] 1 SLR 763 at [5].
114 *Retrospect Investment (S) Pte Ltd v Lateral Solutions Pte Ltd* [2020] 1 SLR 763 at [6].

23.45 The assistant registrar granted the application on 29 January 2019. It is noteworthy that the parties did not have in mind the issue of whether the Consent Order could be amended in this way when they filed their application, in light of the discontinuance of Suit 236.[115]

23.46 Working under the assumption that the court had jurisdiction to hear the Cross-applications, because the Consent Order was properly amended, the High Court ruled that the valuation date of the appellant's shareholding in SWTPL should be the date of the Consent Order. Dissatisfied with the outcome, the appellant appealed the High Court's ruling. The Court of Appeal expressed graver concerns in relation to whether the High Court had jurisdiction to hear the Cross-applications in the first place.[116] The Court of Appeal expressed doubts over whether the High Court had jurisdiction because it was of the view that the High Court had no power to amend the Consent Order in light of the discontinuance of Suit 236.

23.47 Delivering the judgment of the Court of Appeal, Steven Chong JA pointed out that the courts were *functus officio* once Suit 236 was discontinued.[117] Whilst the court yields the inherent jurisdiction and power to provide clarifications on the terms of its orders and to provide consequential directions,[118] such jurisdiction and power is confined to non-substantive amendments to its orders after the conclusion of a matter in court.[119]

23.48 As such, the Court of Appeal ruled that the High Court did not have the jurisdiction or power to amend the Consent Order,[120] even if both parties had consented to the amendment. Consequently, the High Court did not have jurisdiction to determine the parties' dispute over the reference date for the valuation of the appellant's shareholding in SWTPL: the court was found to be "acting *extra cursum curiae* with the consent of the parties".[121]

23.49 In the context of mediation and appropriate dispute resolution, this case serves to illustrate the importance of comprehensive drafting

115 *Retrospect Investment (S) Pte Ltd v Lateral Solutions Pte Ltd* [2020] 1 SLR 763 at [7].
116 *Retrospect Investment (S) Pte Ltd v Lateral Solutions Pte Ltd* [2020] 1 SLR 763 at [10].
117 *Retrospect Investment (S) Pte Ltd v Lateral Solutions Pte Ltd* [2020] 1 SLR 763 at [11].
118 *Retrospect Investment (S) Pte Ltd v Lateral Solutions Pte Ltd* [2020] 1 SLR 763 at [12], citing *Godfrey Gerald QC v UBS AG* [2004] 4 SLR(R) 411 at [18]; Goh Yihan, "The Inherent Jurisdiction and Inherent Powers of the Singapore Courts: Rethinking the Limits of Their Exercise" [2011] Sing JLS 178 at 186.
119 *Retrospect Investment (S) Pte Ltd v Lateral Solutions Pte Ltd* [2020] 1 SLR 763 at [15].
120 *Retrospect Investment (S) Pte Ltd v Lateral Solutions Pte Ltd* [2020] 1 SLR 763 at [18].
121 *Retrospect Investment (S) Pte Ltd v Lateral Solutions Pte Ltd* [2020] 1 SLR 763 at [18].

of settlement agreements, especially those which parties wish to have recorded as consent orders. Where there is the possibility of a disagreement in the implementation of the settlement agreement, for instance, a valuation of assets, it is prudent for parties to insert a dispute resolution provision in their settlement agreement, to ensure that any disputes which may subsequently arise may be appropriately dealt with at an agreed and appropriate forum (such as in arbitration or in the courts).

*(2) Example of when a third party to an international mediated settlement agreement may rely on its terms and apply to court seeking necessary relief*

23.50 In *VJZ v VKB*,[122] the parties were embroiled in a complicated cross-border dispute over the administration of a deceased person's estate ("the Estate"). The precise details of the dispute are not of concern in this chapter due to space constraints. On 8 May 2017, the High Court (Family Division) ordered all the beneficiaries ("the Parties") of the Estate to appoint a mediator and proceed to mediate their disputes.[123] On 16 and 17 April 2018, the Parties participated in mediation at the SMC.[124] They concluded an iMSA on 18 April 2018 which purported to resolve all disputes in relation to the Estate in jurisdictions including but not limited to Singapore, Malaysia, Indonesia, Hong Kong and the People's Republic of China.[125] The iMSA laid out that the Parties had agreed that VJZ and VKA ("the Administrators") would be administrators and/or executors of the Estate in all jurisdictions.[126] Furthermore, the iMSA set out the Parties' entitlements under the Estate. Clause 19 of the iMSA contained the following dispute resolution provision:[127]

> The Parties hereby submit to the exclusive jurisdiction of the Courts of Singapore. The Parties agree that in respect of all disputes, controversies, claims or disagreements arising out of or in connection with this Agreement, including but not limited to its existence, validity, breach and enforcement, shall be first submitted to mediation at the Singapore International Mediation Centre and the mediator shall be Mr [xxx] *S.C.* The Parties further agree that only if the Parties have in good faith carried out the mediation and they have not been

122 See para 23.3 above. However, it bears further note that this case was appealed. Whilst the Court of Appeal in *VKC v VJZ* [2021] SGCA 72 dismissed the appeal, Belinda Ang Saw Ean JAD (delivering the grounds of decision of the court on 29 July 2021) expressed the court's reservations over some of the High Court's reasoning in this case. The appeal will be examined in next year's Annual Review.

123 *VJZ v VKB* [2020] SGHCF 11 at [3].

124 *VJZ v VKB* [2020] SGHCF 11 at [5].

125 See *VJZ v VKB* [2020] SGHCF 11 at [7].

126 *VJZ v VKB* [2020] SGHCF 11 at [5].

127 *VJZ v VKB* [2020] SGHCF 11 at [25].

> able to resolve their dispute, controversy, claim and/or disagreement, then, and in that event only, the Parties shall commence legal proceedings in Singapore.

23.51 At this juncture, it bears emphasis that the "Parties" referred to in the iMSA do not include the Administrators, and Tan Puay Boon JC was mindful to reiterate: "It was not disputed that the Administrators were not … parties to the Settlement Agreement."[128]

23.52 It subsequently transpired that one of the Indonesian beneficiary parties to the iMSA, VKC, was dissatisfied with the way the Estate was administered, as the Administrators were carrying out their duties in Indonesia.[129] VKC commenced proceedings against the Administrators in the Central Jakarta District Court,[130] the latter of whom were served with papers from the Embassy of the Republic of Indonesia on 7 February 2020 informing them of the Indonesian proceedings.[131] Consequently, the Administrators applied to the Singapore courts, seeking to rely on the Singapore jurisdiction agreement contained in cl 19 of the iMSA:[132] if they could rely on the iMSA (and, as such, the choice of court agreement contained within it) even though they were third parties to it, they could have successfully applied for an anti-suit injunction to restrain VKC from commencing court proceedings in Indonesia.[133]

23.53 There was no dispute in respect of whether Singapore law ought to apply in the determination of whether the Administrators could rely on the iMSA. The court relied heavily on the provisions of the Contract (Rights of Third Parties) Act[134] ("CRTA"). Section 2(1) of the CRTA provides that a third party may rely on the terms of a contract if (a) the contract expressly provides that they may do so; or (b) there is a term in the contract which purports to confer a benefit on them (and if there are no other terms in the contract which contradict that finding).[135] As there were no terms in the iMSA which set out expressly that the administrators could enforce cl 19,[136] the court had to identify terms in the iMSA which purported to confer such a benefit on them.[137]

---

128 *VJZ v VKB* [2020] SGHCF 11 at [26].
129 *VJZ v VKB* [2020] SGHCF 11 at [11] and [12].
130 *VJZ v VKB* [2020] SGHCF 11 at [12].
131 *VJZ v VKB* [2020] SGHCF 11 at [13].
132 *VJZ v VKB* [2020] SGHCF 11 at [26].
133 See *VJZ v VKB* [2020] SGHCF 11 at [23].
134 Cap 53B, 2002 Rev Ed.
135 Contract (Rights of Third Parties) Act (Cap 53B, 2002 Rev Ed) ss 2(1) and 2(2).
136 Contract (Rights of Third Parties) Act (Cap 53B, 2002 Rev Ed) s 2(1)(*a*).
137 Contract (Rights of Third Parties) Act (Cap 53B, 2002 Rev Ed) s 2(1)(*b*).

23.54 In determining if its terms purported to allow the Administrators to rely on the dispute resolution provisions in the iMSA, Tan JC first emphasised that the iMSA should be considered in its entirety.[138] Considering the iMSA as a whole, Tan JC opined that the Parties had agreed to submit all matters relating to the settlement agreement, including disputes concerning the Administrators, to the exclusive jurisdiction of the Singapore courts, *per* cl 19.[139] Furthermore, the court ruled that it was obvious that the iMSA envisaged that the Parties' co-operation with the Administrators, including the facilitation of their work, was a fundamental pillar of the settlement.[140] Considering the context under which the iMSA was concluded,[141] the court ruled that the dispute resolution clause in cl 19 was specifically intended by all parties to channel *all future disputes* to Singapore for resolution:[142] such disputes "could not be neatly divided from the conflicts that might involve the Administrators … [following the court's] conclusions on the centrality of the Administrators to the operation of the settlement". It is on this basis that Tan JC ruled that, in respect to all disputes flowing from the iMSA, the Parties "have bound themselves not to proceed against the Administrators in any other jurisdiction for matters falling within [the cl 19 jurisdiction clause]".[143] It was on this basis that the court found s 2(1)(*b*) of the CRTA to operate.[144] It is noteworthy that the court also found no grounds which indicated that the parties did not intend cl 19 to be enforceable by the third party Administrators.[145] Consequently, the Administrators had a right under s 2(5) of the CRTA to enforce cl 19, which was a Singapore choice of court agreement, by way of an anti-suit injunction.[146]

23.55 This is an important case which should be noted by cross-border mediation practitioners. It exemplifies how a third party to an iMSA may conceivably rely on its terms and apply to court seeking the necessary reliefs.[147]

138 *VJZ v VKB* [2020] SGHCF 11 at [31].
139 *VJZ v VKB* [2020] SGHCF 11 at [41].
140 *VJZ v VKB* [2020] SGHCF 11 at [43].
141 Specifically, noting the history of conflict and the various legal proceedings in multiple jurisdictions which the parties to the international mediated settlement agreement were involved before its conclusion: *VJZ v VKB* [2020] SGHCF 11 at [47].
142 *VJZ v VKB* [2020] SGHCF 11 at [47].
143 *VJZ v VKB* [2020] SGHCF 11 at [49].
144 *VJZ v VKB* [2020] SGHCF 11 at [51].
145 *VJZ v VKB* [2020] SGHCF 11 at [50], considering s 2(2) of the Contract (Rights of Third Parties) Act (Cap 53B, 2002 Rev Ed).
146 *VJZ v VKB* [2020] SGHCF 11 at [51].
147 See *VJZ v VKB* [2020] SGHCF 11 at [30], where Tan Puay Boon JC notes that there are quite a number of classes of commercial contracts which are excluded from the Contract (Rights of Third Parties) Act (Cap 53B, 2002 Rev Ed) ("CRTA")
*(cont'd on the next page)*

## IV. Court approval of settlement agreements

23.56 It bears reiterating that under common law, (mediated) settlement agreements do not ordinarily need to be approved by the courts in order for it to be rendered enforceable by the parties. However, under some specific circumstances, legislation provides the court with some oversight powers over the disputing parties' ability to arrive at a fair compromise through a settlement agreement, and such court approval is necessary to give validation to that settlement agreement. This occurs, for instance, in the insolvency context, where due regard must be paid to the CA which grants liquidators a range of powers,[148] some of which may be exercised at their own volition, and others may require court approval.[149] Specifically, s 272(1)(*d*) of the CA provides that the liquidator's power to compromise debts owing to the company in liquidation through a settlement agreement is subject to approval by the court or the committee of inspection.[150]

23.57 In 2020, there was one case[151] from the High Court which briefly set out some of the considerations which the court would take into account when approving a settlement agreement under s 272(1)(*d*) of the CA.

(*eg*, contracts for the carriage of goods by sea), as well as the possibility that parties may expressly provide in their international mediated settlement agreement ("iMSA") that the application of statutes similar to the CRTA are to be excluded in the enforcement of the iMSA. It bears further note that this case was appealed, and the Court of Appeal in *VKC v VJZ* [2021] SGCA 72 did not agree with Tan JC's analysis. Belinda Ang Saw Ean JAD (delivering the grounds of decision of the court on 29 July 2021) resolutely ruled: "In our view, the [CRTA] does not permit a non-party to a contract to avail itself of the terms of an exclusive jurisdiction clause in that contract, unless the contract itself provides to the contrary" (at [54]). The appeal will be examined in next year's Annual Review.

148 It is noteworthy that the winding-up provisions in the Companies Act have since been repealed, and replaced by the Insolvency, Restructuring and Dissolution Act 2018 (Act 40 of 2018), which came into force on 30 July 2020.

149 See *Re Seshadri Rajagopalan* [2021] 3 SLR 1344 at [1].

150 Companies Act (Cap 50, 2006 Rev Ed) s 272(1)(*d*) (It bears note that this provision has since been repealed in the Companies Act, and it has been replaced word-for-word by s 144(1)(*d*) of the Insolvency, Restructuring and Dissolution Act 2018 (Act 40 of 2018), which came into force on 30 July 2020); *Re Seshadri Rajagopalan* [2021] 3 SLR 1344 at [1].

151 *Re Seshadri Rajagopalan* [2021] 3 SLR 1344.

## *A. Application to approve settlement deeds*

### *(1) Example of application to approve settlement deed under s 272(1)*(d) *of the Companies Act*

23.58 In *Re Seshadri Rajagopalan*,[152] the parties had been locked in a minority oppression dispute. After a series of litigation proceedings,[153] the High Court ordered The Wellness Group Pte Ltd ("Wellness") to be wound up on 2 May 2019 under ss 254(1)(*f*) and 254(1)(*i*) of the CA,[154] on an application by two of its shareholders (referred to collectively as "the Vickers Funds").[155] The Vickers Funds were reported to have subsequently withdrawn their application, and another shareholder, EQ Capital Investments Ltd ("EQ Capital") was substituted in their place.[156] On 17 May 2019, the High Court approved the appointment of the liquidators, but no committee of inspection was established in respect to the liquidation.[157]

23.59 Without indulging in the precise technical details of the insolvency proceedings (as this does not fall within the scope of this chapter), it suffices to note that the liquidators had engaged in without prejudice negotiations with some of Wellness's shareholders over the cross-claims they may have had against each other, with a view to reaching a compromise on those cross-claims. A settlement deed was concluded, compromising the cross-claims Wellness had against three of its shareholders and other relevant stakeholders: (a) Sunbreeze Group Investments Ltd ("Sunbreeze"); (b) Manoj Mohan Murjani ("Manoj"); and (c) Kanchan Manoj Murjani ("Kanchan"). The liquidators then filed an originating summons seeking the High Court's approval for them to compromise the claims Wellness had against Sunbreeze and Manoj on the terms of the settlement deed pursuant to s 272(1)(*d*) of the CA.[158]

152 See para 23.3 above.
153 See *The Wellness Group Pte Ltd v OSIM International Ltd* [2016] SGHC 64.
154 See *EQ Capital Investments Ltd v The Wellness Group Pte Ltd* [2019] SGHC 154. The appeal against the High Court's winding-up order was dismissed: See *Re Seshadri Rajagopalan* [2021] 3 SLR 1344 at [9].
155 *Re Seshadri Rajagopalan* [2021] 3 SLR 1344 at [6].
156 *Re Seshadri Rajagopalan* [2021] 3 SLR 1344 at [6].
157 *Re Seshadri Rajagopalan* [2021] 3 SLR 1344 at [8].
158 *Re Seshadri Rajagopalan* [2021] 3 SLR 1344 at [16].

23.60 Section 272(1)(*d*) of the CA[159] provides:

> **Powers of liquidator**
>
> **272.**–(1) The liquidator may with the authority either of the Court or of the committee of inspection —
>
> …
>
> (*d*) compromise any calls and liabilities to calls, debts and liabilities capable of resulting in debts and any claims present or future, certain or contingent, ascertained or sounding only in damages subsisting, or supposed to subsist, between the company and a contributory or other debtor or person apprehending liability to the company, and all questions in any way relating to or affecting the assets or the winding up of the company, on such terms as are agreed, and take any security for the discharge of any such call, debt, liability or claim and give a complete discharge in respect thereof; and
>
> …
>
> (2) The liquidator may —
>
> …
>
> (*b*) compromise any debt due to the company, other than calls and liabilities to calls and other than a debt where the amount claimed by the company to be due to it exceeds $1,500;
>
> …

23.61 Upon examining the positions taken in England[160] and Australia,[161] Chua Lee Ming J opined:[162]

> In my view, in deciding whether to approve an application by a liquidator under s 272(1)(*d*) of the CA, the court has to satisfy itself that the terms of the compromise are in the interests of the company. In making this determination, the court:
>
> (a) neither 'rubber stamps' the liquidator's decision to enter into the compromise nor reviews the liquidator's decision as though it were hearing an appeal;

159 It bears note that this provision has since been repealed in the Companies Act, and it has been replaced word-for-word by s 144(1)(*d*) of the Insolvency, Restructuring and Dissolution Act 2018 (Act 40 of 2018), which came into force on 30 July 2020.

160 See UK Insolvency Act 1986 (c 45) s 167(1)(*a*), read with Part I of Schedule 4; *Re Edennote Ltd (No 2)* [1997] 2 BCLC 89 at 92; *Re Greenhaven Motors Ltd* [1999] BCLC 635 at 642.

161 See s 477(1)(*d*) read with ss 477(2A) and 477(2B) of the Australian Corporations Act 2001 (Cth); *Re Sheahan* [2018] FCA 1499 at [16].

162 *Re Seshadri Rajagopalan* [2021] 3 SLR 1344 at [28].

(b) does not speculate on whether better terms could have been obtained;

(c) should not approve a compromise if its terms are unclear;

(d) should accord weight to the liquidator's view unless there are substantial grounds to suspect bad faith or that the liquidator's view is clearly flawed;

(e) should consider the interests of those who have a real interest in the assets of the company and accord weight to their views unless there are substantial grounds to suspect bad faith or that the views are clearly flawed; if necessary, the court may direct that a meeting be called for this purpose;

(f) should disregard the interests of those who will be unaffected whichever way the decision goes, for example, the interests of contributories who have no realistic prospect of receiving a distribution in any foreseeable circumstances, or the wishes of preferential or secure creditors who will be paid in full in any event; and

(g) should ask the question as to whether the interests of those who have a real interest in the assets of the company are likely to be served by permitting the company to enter into the compromise than by not permitting the company to do so.

23.62 Chua J ruled that the settlement deed should be approved.[163] The court took the view that the settlement deed was *prima facie* concluded in the best interests of the company. Due consideration was given to the fact that its terms were clear and that there was no evidence of bad faith in relation to the liquidator's views (nor were their views clearly flawed).[164] The court also noted that the settlement deed would substantially reduce (or remove) the risks and costs of protracted litigation.[165] It is also noteworthy that Sunbreeze, Manoj and Kanchan undertook not to dispute, and to agree to a judgment if the liquidators had to take the settlement deed to court for enforcement. Furthermore, the settlement deed provides that the liquidators would receive a substantial payment of $2m total over a span of six months from Sunbreeze, Manoj and Kanchan. On its totality, Chua J ruled that the interests of Wellness and its contributories were better served through the approval of the settlement

163 *Re Seshadri Rajagopalan* [2021] 3 SLR 1344 at [32].

164 *Re Seshadri Rajagopalan* [2021] 3 SLR 1344 at [32].

165 *Re Seshadri Rajagopalan* [2021] 3 SLR 1344 at [33]. "Although Wellness's claims for repayment of the Sunbreeze Excess Distribution and the Manoj Suit 187 Costs seemed to be strong ones, it did not necessarily mean that any action to recover the same would not be more costly and/or protracted" (at [32]).

deed.[166] As such, the High Court granted its approval of the settlement deed.[167]

## V. Mediation, ADR practice and ethics

23.63 In this section, two cases will be examined: first, a case heard by the Court of Appeal, which considered whether there was a conflict of interest in a situation in which a lawyer represented a different client against *the same defendants* in a dispute over the same substantial issues, and set out the appropriate equitable remedies available to the parties. The second is a case heard by the Court of Appeal, which encouraged the application of TJ in highly contentious family court disputes.

### *A. Ethical considerations: Conflict of interests*

#### *(1) Whether a lawyer can represent a different client against the same defendants in relation to a substantially similar dispute*

23.64 *LVM Law Chambers LLC v Wan Hoe Keet*[168] was discussed in last year's Annual Review.[169] An appeal was filed, and the Court of Appeal allowed the appeal. In this case, Wan and Ho applied for an injunction from the High Court to restrain LVM Law Chambers LLC ("LVM") from representing a person named Chan against themselves in Suit No 806 of 2018 ("Suit 806"). This was because in an earlier suit in the High Court, Suit No 315 of 2016 ("Suit 315"), Lok Vi Ming SC of LVM had represented the plaintiff, Lee, in that suit and in subsequent settlement negotiations against Wan and Ho, who were the defendants in that suit. Wan and Ho sought the injunction as they were aggrieved that LVM would act for Chan in Suit 806, whilst possessing confidential information obtained from settlement negotiations from Suit 315; Wan and Ho were defendants in both Suits 806 and 315. The High Court granted the injunction.[170]

23.65 On appeal, the Court of Appeal was provided with the opportunity to set out the law in Singapore in the instances which a lawyer or legal representatives (which includes law firms generally) should be restrained from representing a client against a counterparty where the legal representatives had previously encountered that same counterparty from a previous set of proceedings and had been privy to confidential

166 *Re Seshadri Rajagopalan* [2021] 3 SLR 1344 at [34].
167 *Re Seshadri Rajagopalan* [2021] 3 SLR 1344 at [37].
168 See para 23.3 above.
169 See (2019) 20 SAL Ann Rev 614 at 636–638, paras 22.71–22.76.
170 See *Wan Hoe Keet v LVM Law Chambers LLC* [2019] SGHC 103.

information obtained through settlement negotiations.[171] Delivering the judgment of the Court of Appeal, Andrew Phang Boon Leong JA first observed that where lawyers or legal representatives have agreed in contract to be bound by a duty of confidentiality, that agreement will be effective *per* the precise terms of that contract, which will dictate whether they may represent a client against the same counterparty from a previous set of proceedings which were resolved through settlement negotiations or mediation.[172] In other words, the exact scope of the lawyer's or legal representatives' duties are founded in the contractual agreement.

23.66 Where there is no contractual agreement setting out the scope of the lawyer's or legal representatives' duties of confidentiality, an equitable duty of confidence may be imposed by the court in narrow circumstances.[173] If imposed, the equitable duty of confidence would render it inappropriate for the lawyer or legal representative to act for a client against the same counterparty from a previous set of proceedings.[174] In order for the equitable duty of confidence to apply, Phang JA ruled that the counterparty from the previous set of proceedings has to establish the following:[175]

> (a) the information concerned must have the necessary quality of confidence about it;
>
> (b) that information must have been received by the lawyer (or law firm) concerned in circumstances importing an obligation of confidence; and
>
> (c) there is a real and sensible possibility of the information being misused.

23.67 As a matter of burden of proof, it is *incumbent* on the party seeking the relevant reliefs to enforce an equitable duty of confidentiality (for instance, through an application for an injunction) to prove to the court that the information concerned is confidential in nature and that the lawyer or legal representatives are subject to an obligation in equity to maintain its confidentiality.[176] That party seeking relief must also demonstrate that there is a real and sensible possibility of misuse

171 *LVM Law Chambers LLC v Wan Hoe Keet* [2020] 1 SLR 1083 at [12].
172 *LVM Law Chambers LLC v Wan Hoe Keet* [2020] 1 SLR 1083 at [13].
173 *LVM Law Chambers LLC v Wan Hoe Keet* [2020] 1 SLR 1083 at [14].
174 *LVM Law Chambers LLC v Wan Hoe Keet* [2020] 1 SLR 1083 at [14].
175 *LVM Law Chambers LLC v Wan Hoe Keet* [2020] 1 SLR 1083 at [15], citing *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41 (which has been applied by the Singapore courts in *ANB v ANC* [2015] 5 SLR 522 at [17]) and *Smith Kline & French Laboratories (Aust) Ltd v Secretary, Department of Community Services and Health* (1990) 22 FCR 73 at 87. Note that a similar test was applied in a recently decided case from the English Court of Appeal which was rendered four weeks after this decision: See *Glencairn IP Holdings Ltd v Product Specialities Inc* [2020] 3 WLR 810.
176 *LVM Law Chambers LLC v Wan Hoe Keet* [2020] 1 SLR 1083 at [18].

of such information.[177] Mere or vague assertions of confidentiality and/or evidence which do not show a real and sensible possibility of misuse of confidential information would ordinarily be insufficient to discharge this burden of proof.[178]

23.68 The Court of Appeal provided a detailed analysis of the three-step test. First, Phang JA observed that the requirement in (a) is to be applied as a matter of common sense: "If, for example, the information concerned is common or public knowledge, then there *cannot possibly* arise a duty of *confidence*, equitable or otherwise, in the first place" [emphasis in original].[179]

23.69 As to the requirement in (b), the Court of Appeal cautioned that careful attention should be paid to the precise facts and circumstances of the previous set of proceedings.[180] The court then observed, as a matter of illustration, that (b) would be highly relevant in the settlement negotiation context, particularly where it may be proven that the terms and conditions of a (mediated) settlement agreement are taken by the parties at the negotiation in the previous set of proceedings to be confidential as between themselves.[181] This is because the context of settlement negotiations itself would proscribe the lawyers involved from disclosing the terms of any forthcoming settlement agreement, in the absence of a waiver by the relevant parties.[182] This normally arises from the way settlement negotiations are conducted in practice:[183]

> (a) Parties to a settlement negotiation, where a settlement agreement is forthcoming, would ordinarily bind themselves to an obligation of confidentiality to keep the details of the negotiation confidential (unless waived in certain exceptional situations).
>
> (b) Where a party is bound by an obligation of confidentiality, their lawyer or legal representatives will be equally bound to the extent that any information obtained[184] by them during the course

177 *LVM Law Chambers LLC v Wan Hoe Keet* [2020] 1 SLR 1083 at [23].
178 *LVM Law Chambers LLC v Wan Hoe Keet* [2020] 1 SLR 1083 at [23]. See also *Glencairn IP Holdings Ltd v Product Specialities Inc* [2020] 3 WLR 810.
179 *LVM Law Chambers LLC v Wan Hoe Keet* [2020] 1 SLR 1083 at [16].
180 *LVM Law Chambers LLC v Wan Hoe Keet* [2020] 1 SLR 1083 at [17].
181 *LVM Law Chambers LLC v Wan Hoe Keet* [2020] 1 SLR 1083 at [17], citing *James John Mitchell v Pattern Holdings Pty Ltd* [2000] NSWSC 1015 at [39] and *Ian West Indoor and Outdoor Services Pty Ltd v Australian Posters Pty Ltd* [2011] VSC 287 at [21] and [23] as illustrations.
182 *LVM Law Chambers LLC v Wan Hoe Keet* [2020] 1 SLR 1083 at [17].
183 See *LVM Law Chambers LLC v Wan Hoe Keet* [2020] 1 SLR 1083 at [17].
184 Note that it is trite that a lawyer will owe his client an obligation of confidentiality with regard to any information which he acquires through the course of his work for that client: *Taylor v Blacklow* (1836) 3 Bing (NC) 235.

of representation at the settlement negotiation process, covered by (a), would be impressed with an obligation of confidentiality.

(c) Since the lawyer or legal representatives' obligation of confidentiality is drawn directly in this context from (and mirrors) their clients' obligation of confidentiality towards the counterparties at a settlement negotiation, the lawyer or legal representatives cannot simply request for the permission of their clients to use such covered confidential information, as their clients cannot provide the necessary permissions without being in breach themselves towards the counterparties.

(d) It bears note that the "precise contours of the obligation of confidence on the part of the lawyer to keep such information confidential, would, of course, depend on the terms of the confidentiality agreement signed by the client".[185]

23.70 As to the requirement in (c), the Court of Appeal opined that there will be a wide range of cases where the "real sense and possibility" test may be satisfied.[186] There may be cases where the risk of misuse is "patently obvious", and there would be clear evidence of an intention to apply the confidential information in breach of the obligation of confidence.[187] In other cases, two non-exhaustive qualities are considered:[188]

(a) the extent of similarity between the previous set of proceedings which were settled and the subsequent proceedings, for instance, by having similar issues and/or evidence; and

(b) whether the client in subsequent proceedings deliberately retained their lawyer or legal representatives because of their involvement in the previous set of proceedings.

23.71 A fact-sensitive inquiry must be engaged. Phang JA provided some illustrations:[189]

> Where, for example, the issues and/or evidence in the previous and subsequent proceedings are so different that there would be no real and sensible possibility of the information being misused in the subsequent proceedings, the lawyer will be permitted to act for the party in the subsequent proceedings …. [W]here the lawyer acting in the subsequent proceedings had already been retained prior to his acting for the client in the previous set of proceedings … it could not be said that the lawyer's employment was secured in order to take advantage of his knowledge from the previous set of proceedings … Ultimately, the 'real

185 *LVM Law Chambers LLC v Wan Hoe Keet* [2020] 1 SLR 1083 at [17].
186 *LVM Law Chambers LLC v Wan Hoe Keet* [2020] 1 SLR 1083 at [22].
187 *LVM Law Chambers LLC v Wan Hoe Keet* [2020] 1 SLR 1083 at [22].
188 *LVM Law Chambers LLC v Wan Hoe Keet* [2020] 1 SLR 1083 at [22].
189 *LVM Law Chambers LLC v Wan Hoe Keet* [2020] 1 SLR 1083 at [22].

> and sensible possibility' test is one which should be applied holistically; no one factor alone should be taken to be determinative.

23.72 Applying the law elucidated above, the Court of Appeal allowed the appeal and permitted LVM to represent Chan in Suit 806, *on condition* that they do not disclose the terms of the settlement agreement concluded between Wan, Ho and Lee with regard to Suit 315 to Chan (or anyone else), save as required or permitted by law.[190] Whilst the Court of Appeal agreed with the High Court that LVM was bound to keep the terms of the settlement agreement confidential, the court found that Wan and Ho failed to discharge their burden of proving that the other issues flowing from the settlement negotiations with regard to Suit 315 were confidential in the first place. The Court of Appeal thought that when Wan and Ho argued to protect the general manner in which the terms of the settlement agreement were arrived at or the negotiation positions adopted by the parties, they had provided no concrete particulars of their claims for protection under a confidentiality obligation.[191] In other words, the court found that Wan and Ho were making mere assertions and vague generalisations, failing to identify and prove the precise information which was in fact subject to an obligation of confidence.[192] It followed that Wan and Ho could not discharge their burden of proof that there was any real and sensible possibility that confidential information was being misused.

23.73 Finally, the Court of Appeal provided some useful practical advice for parties and their lawyers and legal representatives, when drafting (mediated) settlement agreements at the conclusion of a confidential negotiations process:[193]

> It might make practical sense – and obviate potential difficulties such as those that materialised in the present case – for a counterparty to a settlement to obtain a *contractual* undertaking of confidentiality from the *lawyer* and/or *law firm* concerned. That having been said, the scope of the undertaking will necessarily be governed by the precise language used. [emphasis in original]

190 *LVM Law Chambers LLC v Wan Hoe Keet* [2020] 1 SLR 1083 at [31].
191 *LVM Law Chambers LLC v Wan Hoe Keet* [2020] 1 SLR 1083 at [29].
192 *LVM Law Chambers LLC v Wan Hoe Keet* [2020] 1 SLR 1083 at [30].
193 *LVM Law Chambers LLC v Wan Hoe Keet* [2020] 1 SLR 1083 at [32].

## *B. Therapeutic justice*

### *(1) Therapeutic justice is important, especially in family proceedings*

23.74 In *VDZ v VEA*,[194] the Singapore Court of Appeal expounded on the concept of therapeutic justice ("TJ") and its importance to the resolution of family disputes.[195] In this case, the appellant ("the Wife") and the respondent ("the Husband") were previously married. The parties' initial separation appeared to be amicable – where both parties agreed on joint custody on their two children, with care and control to the Wife and reasonable access to the Husband.

23.75 The relationship subsequently soured. After being influenced by the Wife, the daughter made a series of posts on her social media accounts, alleging that the Husband was a pervert and sexual predator.[196] These posts divulged the Husband's personal information, including his name and employment details. Following these posts, a reporter from a newspaper reached out to the daughter and the Wife allowed the reporter to conduct an interview with her. This interview resulted in a news article being published.

23.76 In response, the Husband initiated committal proceedings against the Wife for breach of court orders. These court orders prohibited the parties from making disparaging remarks about the other party to the children and also restrained them from involving the children in the litigation between them, including showing them copies of any legal or court documents. The High Court held that the Wife had indeed breached the negative obligations to refrain from involving the children in the litigation between her and her Husband.[197] Belinda Ang Saw Ean J found that the Wife had, at the very least, shown the daughter copies of legal or court documents.[198] These documents then formed the basis of the daughter's social media posts, as the daughter's posts included details which she could not have obtained herself unless she had read the Wife's affidavit from the aforementioned court proceedings. The High Court's decision was upheld by the Court of Appeal and the Wife was sentenced to a one-week imprisonment term.[199] However, owing to the unfortunate fact that the Wife was suffering from cancer at the time these contempt of court proceedings were afoot (which rendered her incarceration

194 See para 23.3 above.
195 *VDZ v VEA* [2020] 2 SLR 858 at [75]–[79].
196 *VDZ v VEA* [2020] 2 SLR 858 at [7].
197 See *VDZ v VEA* [2020] 4 SLR 921 at [41]–[42].
198 *VDZ v VEA* [2020] 4 SLR 921 at [41].
199 *VDZ v VEA* [2020] 2 SLR 858 at [65].

a life-threatening possibility),[200] the Court of Appeal, in this exceptional instance, exercised judicial mercy and ordered her to pay a fine of $5,000 instead for contempt of court.[201]

23.77 Of particular note in this chapter is the Court of Appeal's pronouncements on TJ, after sentencing the Wife to pay a fine.[202] Delivering the judgment of the Court of Appeal, Andrew Phang Boon Leong JA acknowledged that the concept of TJ was first discussed in great detail by Debbie Ong J in her speech at the Family Justice Courts Workplan Speech 2020.[203] Essentially, TJ is a non-adversarial process that focuses on "problem solving" and allowing the "healing, restoring and recasting of a positive future".[204] Phang JA emphasised the importance of TJ:[205]

> TJ is not merely an ideal; it is a necessity. It is not merely theoretical but is intensely practical. It is axiomatic that *relationships* constitute the very pith and marrow of a family. When familial relationships break down those relationships (between spouses and between each spouse and the children) are damaged. Such damage cannot be repaired (completely at least) by way of material recompense; *healing* needs to take place. It is both logical and commonsensical that healing cannot even begin to take place if the parties (in particular, the former spouses) are in an antagonistic relationship – still less when one or both parties wage war against each other. As Justice Ong noted, a kind act begets a kind response while a nasty act inflames the other (see *Speech* at [18]). Indeed, what occurred in the present case was an extreme example of such warfare [emphasis in original].

23.78 The court observed that the Wife's approach of forcing her children to pick sides and turn against their father, with whom they previously had a healthy relationship, was an affront to the concept of TJ. Emphasising that "[i]t is axiomatic that the parties and the court always act in *the **best interests** of the child (or children, as the case may be) – phrased as a legal principle, the **welfare** of the child (or children) is **paramount***" [emphasis in italics and bold italics in original],[206] Phang JA strongly urged the Wife to "put aside her negative attitude and emotions and *encourage the children to restore their relationship with their father*" [emphasis in original].[207] The application of TJ must encourage healing

200 *VDZ v VEA* [2020] 2 SLR 858 at [68].
201 *VDZ v VEA* [2020] 2 SLR 858 at [73].
202 *VDZ v VEA* [2020] 2 SLR 858 at [75]–[79].
203 The Honourable Justice Debbie Ong, "Today Is a New Day", address at the Family Justice Courts Workplan Speech 2020 (21 May 2020).
204 Debbie Ong J, "Today Is a New Day", address at the Family Justice Courts Workplan Speech 2020 (21 May 2020) at para 33.
205 *VDZ v VEA* [2020] 2 SLR 858 at [77].
206 *VDZ v VEA* [2020] 2 SLR 858 at [79].
207 *VDZ v VEA* [2020] 2 SLR 858 at [79].

in the broken relationship between child and divorced spouses. Given the unique facts of the case at hand, Phang JA emphasised on the practical necessity for the parties to mend their fences:[208]

> [G]iven the unfortunate medical condition of the [Wife] … 'should [her] cancer condition severely worsen, the children should be able to rely on the only other parent in their lives, the Husband (with whom they shared a close relationship not long ago), to raise and care for them' …

## VI. Mediation, appropriate dispute resolution and civil procedure

23.79 In this part, two cases are reviewed. The first case discussed is a case which briefly sets out the relevant considerations a court will make when it is asked to seal documents related to a (mediated) settlement agreement, the terms of which have been submitted to court as evidence in a litigation. The second case discussed involves a basic procedural question of whether an offer to settle in respect to a litigation matter may be validly accepted after the court has rendered a judgment on the merits of the case.

### *A. Confidentiality of settlement agreement terms*

#### *(1) Whether court should grant sealing order to maintain confidentiality of settlement agreements*

23.80 In *TYN Investment Group Pte Ltd v ERC Holdings Pte Ltd*,[209] the plaintiff applied to seal documents in the court's file, which it had submitted in a concluded litigation process, in order to maintain the confidentiality of some settlement agreements which it had relied on as evidence during the litigation process.[210] The High Court declined to seal the file.[211]

23.81 It was first established by Vinodh Coomaraswamy J that the matter of whether the court should seal a particular document or the court's file as a whole involves a careful balance between the principle of open justice against countervailing factors.[212] Coomaraswamy J acknowledged that the plaintiff was under a contractual obligation to

208 *VDZ v VEA* [2020] 2 SLR 858 at [79].
209 See para 23.3 above.
210 *TYN Investment Group Pte Ltd v ERC Holdings Pte Ltd* [2020] 5 SLR 894 at [132].
211 *TYN Investment Group Pte Ltd v ERC Holdings Pte Ltd* [2020] 5 SLR 894 at [133].
212 *TYN Investment Group Pte Ltd v ERC Holdings Pte Ltd* [2020] 5 SLR 894 at [132], citing *Hi-P International Ltd v Tan Chai Hau* [2020] SGHC 128 at [23].

keep the existence and terms of the settlement agreement, to which it was party, confidential.[213] However, the court cautioned:[214]

> But a private obligation of confidentiality is not a basis, in and of itself to outweigh the fundamental principle of open justice. The countervailing factor must be something more, *eg*, a need to protect a trade secret, to protect unpublished price-sensitive information, to safeguard a vulnerable individual or to safeguard national security.

23.82 In any event, the court observed that the plaintiff's confidentiality obligation was subject to an express contractual provision, which permitted it to reveal the settlement agreement's existence and its terms, when enforcing or protecting its legal rights. In this matter, Coomaraswamy J declined to grant the plaintiffs a sealing order because there was no risk that they would be exposed to any contractual liability if the order was not granted.[215]

### *B. Acceptance of offers to settle after judgment on the merits*

#### *(1) An offer to settle that requires discontinuance cannot be accepted once judgment has been obtained*

23.83 In *Michael Vaz, Lorrain v Singapore Rifle Association*,[216] the Court of Appeal had the opportunity to consider the validity of an offer to settle accepted after the rendering of a judgment. The appellant, Michael Vaz, was the president of the Singapore Shooting Association's ("SSA's") Council. The respondent, the Singapore Rifle Association ("SRA"), was a member of the SSA. The SRA had commenced an action against Vaz for breach of a mediation agreement and/or a duty of confidence.

23.84 As Vaz did not dispute liability, an interlocutory judgment was entered against him. The High Court awarded damages in favour of the SRA, along with interest and costs. Vaz subsequently appealed against the damages and costs assessed by the trial court. Prior to the hearing of the appeal, the SRA purportedly accepted an offer to settle made by Vaz in April 2017. The parties accepted that the appeal should be withdrawn but consent to a withdrawal was not forthcoming because of costs. The parties then asked the Court of Appeal to determine whether the offer provided for costs.

213 *TYN Investment Group Pte Ltd v ERC Holdings Pte Ltd* [2020] 5 SLR 894 at [133].
214 *TYN Investment Group Pte Ltd v ERC Holdings Pte Ltd* [2020] 5 SLR 894 at [133].
215 *TYN Investment Group Pte Ltd v ERC Holdings Pte Ltd* [2020] 5 SLR 894 at [133].
216 See para 23.3 above.

23.85 In the course of reviewing the parties' submissions, the Court of Appeal noted that the offer contained a term requiring the SRA to file a "Notice of Discontinuance of Claim" within three working days of the receipt of the settlement sum ("the "discontinuance term"). This meant that the parties had to, rather oddly, act to discontinue their suit, notwithstanding that judgment had already been given.[217] The Court of Appeal thus directed the parties to address it on a preliminary point – whether the offer to settle could be validly accepted in law *after* a judgment on the merits has been rendered by the trial court *if* there is a term in that offer to settle mandating the parties to discontinue the claim (which cannot be complied with after a judgment on the merits is rendered).[218]

23.86 After considering the parties' submissions on the issue, the Court of Appeal found that an offer to settle cannot possibly be validly accepted after a court has rendered a judgment on the merits if there is an express condition in that offer that the parties had to discontinue the claim in court.[219] Where there is such an express condition in the offer to settle (that is, that the parties are required to discontinue a suit), that offer will be logically construed as being capable of acceptance only before a judgment on the merits was obtained. Delivering the judgment of the Court of Appeal, Belinda Ang Saw Ean J took a logical approach in arriving at the court's conclusion. In light of the well-established doctrine of merger,[220] which provides that "once a judgment has been given on a cause of action, the cause of action merges with the judgment of the court and ceases to exist as an independent entity",[221] Ang J ruled that it must logically follow that an action can only be discontinued *before* judgment is granted. This is because:[222]

> Clearly, as a matter of principle, there is simply nothing for the parties to 'discontinue' once a judgment has been obtained. Upon judgment, the cause of action merges with the judgment and the doctrine of *res judicata* applies. Accordingly, *as a matter of law*, an action can only be discontinued before judgment. [emphasis in original]

23.87 Since a condition to discontinue a suit in an offer to settle is not capable of compliance because the courts have already rendered a judgment on the merits, it logically follows that an offer to settle

217 *Michael Vaz Lorrain v Singapore Rifle Association* [2020] 2 SLR 808 at [5].
218 *Michael Vaz Lorrain v Singapore Rifle Association* [2020] 2 SLR 808 at [5].
219 *Michael Vaz Lorrain v Singapore Rifle Association* [2020] 2 SLR 808 at [36].
220 *Michael Vaz Lorrain v Singapore Rifle Association* [2020] 2 SLR 808 at [14].
221 *Michael Vaz Lorrain v Singapore Rifle Association* [2020] 2 SLR 808 at [14].
222 *Michael Vaz Lorrain v Singapore Rifle Association* [2020] 2 SLR 808 at [16].

that requires discontinuance is an impotent offer that is incapable of acceptance once judgment has been obtained.[223]

23.88 Interestingly, the Court of Appeal has left open the question of whether an offer to settle may be capable of acceptance if the courts have already rendered a judgment on the merits, where there is *no condition* imposed on the parties to discontinue the suit.[224] In *obiter dictum*, Ang J indicated that the court was inclined to think that there are sound policy reasons why an offer to settle should not be open for acceptance after judgment *generally*.[225] However, the Court of Appeal refrained from passing judgment on this issue, leaving it for a future case.[226]

223 *Michael Vaz Lorrain v Singapore Rifle Association* [2020] 2 SLR 808 at [36].
224 *Michael Vaz Lorrain v Singapore Rifle Association* [2020] 2 SLR 808 at [37].
225 *Michael Vaz Lorrain v Singapore Rifle Association* [2020] 2 SLR 808 at [44].
226 *Michael Vaz Lorrain v Singapore Rifle Association* [2020] 2 SLR 808 at [45].