IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2023] SGHC 238

Registrar's Appeal (State Courts) No 4 of 2023

Between

Blomberg, Johan Daniel

… *Appellant*

And

Khan Zhi Yan

… *Respondent*

In the matter of Protection from Harassment Court Originating Application No 9 of 2022

Between

Khan Zhi Yan

… *Applicant*

And

Blomberg, Johan Daniel

… *Respondent*

JUDGMENT

[Civil Procedure — Judgments and orders]
[Civil Procedure — Amendments — Orders]

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Blomberg, Johan Daniel
v
Khan Zhi Yan

[2023] SGHC 238

General Division of the High Court — Protection from Harassment Court Originating Application No 9 of 2022 (Registrar's Appeal (State Court) No 4 of 2023)
See Kee Oon J
3 July 2023

30 August 2023 Judgment reserved.

See Kee Oon J:

Introduction

1 This is an appeal against the learned District Judge's ("DJ") decision to set aside an order of court, made by the parties' consent, under the Protection from Harassment Act (Cap 256A, 2015 Rev Ed) (the "POHA") on the basis of its imprecise terms and wide ambit.

2 The appellant, Mr Johan Daniel Blomberg ("Mr Blomberg"), and the respondent, Ms Khan Zhi Yan ("Ms Khan") are ex-spouses. They are involved in ongoing court proceedings in Singapore and Sweden, including proceedings under the Guardianship of Infants Act 1934 (2020 Rev Ed) in the Family Justice Courts ("FJC").

Procedural history

The Consent Order

3 Mr Blomberg commenced DC/PHA 93/2020 against Ms Khan seeking, *inter alia*, a protection order to prohibit her from making any false accusations or any false police reports against him. In his supporting affidavit dated 15 August 2020, Mr Blomberg alleged that Ms Khan had committed various acts of harassment against him, which included making false statements and/or police reports. The claim was settled when the parties obtained an Order of Court by consent dated 10 May 2021 (DC/ORC 1737/2021) (the "Consent Order"), which states as follows:

> 1. Without admission of liability in DC/PHA 93 of 2020, [Ms Khan] (either in person or through any third party acting under her instructions or authorization) hereby undertakes not to make or file any statement or report in respect of [Mr Blomberg] in any court, or to any local or overseas public authority, by any means, and in any form or manner, and agrees that any breach of this undertaking will constitute a breach by [Ms Khan] of the relevant provisions of the Protection from Harassment Act so as to entitle [Mr Blomberg] to obtain a Protection Order against [Ms Khan] based on the aforesaid breach. However, [Ms Khan] may apply and seek the leave of any court to make or file any statement or report in respect of [Mr Blomberg] in any court, or to any local or overseas public authority, if [Ms Khan] has at least prima facie evidence to satisfy the court considering [Ms Khan]'s application for leave and such leave is granted by the aforesaid court.
>
> [("Paragraph 1")]
>
> 2. In consideration of [Ms Khan]'s undertaking in paragraph 1 above, [Mr Blomberg] hereby undertakes not to take any action in respect of any breach by [Ms Khan] of the expedited protection order dated 19 August 2020, or any action or conduct related to the proceedings in DC/PHA 93 of 2020, and will also take no further action in respect of [Ms Khan]'s acts and conduct prior to this Order.
>
> 3. Both parties (either in person or through any third party acting under their respective instructions or authorization) undertake not to use any information related to the expedited protection order dated 19 August 2020, or any action or

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> conduct related to the proceedings in DC/PHA 93 of 2020, in any court, or to any local or overseas public authority or any private entity, and any breach by either party of this undertaking will constitute a breach of the relevant provisions of the Protection from Harassment Act so as to entitle the aggrieved party to obtain a Protection Order against the other party based on the aforesaid breach.

The application to set aside the Consent Order

4 On 10 June 2022, Ms Khan applied in PHC/OA 9/2022 for the Consent Order to be set aside *ab initio* or on such terms as the court deems fit. Her application was allowed on 3 October 2022.

Ms Khan's case

5 Ms Khan argued that the court should set aside the Consent Order by exercising its power under s 12(7) of the POHA,[1] which provides as follows:

> **Protection order**
>
> …
>
> (7) The court may, on the application of the victim or a relevant party, vary, suspend or cancel the protection order or extend the duration of the protection order.

6 Ms Khan argued below that the ambit of the Consent Order was too wide because it barred her from filing any report or statement or taking out any application in any court anywhere in the world. This led to ambiguity and uncertainty concerning its applicability and, accordingly, the Consent Order was unenforceable.[2] It was also "plainly wrong and an abuse of the due process [of any] overseas jurisdiction" that the Consent Order curtailed her actions in

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1 Ms Khan's Supplementary Skeletal Submissions dated 29 September 2022 in the court below ("Ms Khan's Second Submissions below") at paras 10–11.

2 Ms Khan's Skeletal Submissions dated 31 August 2022 in the court below ("Ms Khan's First Submissions below") at paras 11, 12 and 17.

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other countries.[3] Furthermore, it prevented her from filing a police report notwithstanding that this was her fundamental right and might need to be done with haste.[4] It might also require the court to wrongfully usurp the powers of the Police and the Attorney-General's Chambers.[5] Ms Khan also pointed out that the Consent Order required her to seek leave before filing applications in the FJC, despite the fact that the FJC might be best placed to deal with such matters.[6]

7 In addition, in the 16 months since the Consent Order had been made, Mr Blomberg had not alleged any instance of Ms Khan violating the Consent Order and it would not prejudice him if it were to be set aside.[7] She argued that Mr Blomberg did not need the protection of the Consent Order and he had instead weaponised the Consent Order for his own benefit.[8]

8 Ms Khan argued additionally that since Mr Blomberg had applied unsuccessfully for a protection order based on the Consent Order, the Consent Order was therefore spent.[9] She also argued that the Consent Order was "only valid until there is a breach of the undertaking" and was hence spent.[10] Further, allowing the Consent Order to remain in place indefinitely would mean that

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3 Ms Khan's Second Submissions below at para 20.

4 Ms Khan's First Submissions below at paras 13 and 15; Ms Khan's Second Submissions below at para 22.

5 Ms Khan's First Submissions below at para 14.

6 Ms Khan's First Submissions below at para 16.

7 Ms Khan's First Submissions below at para 21; Ms Khan's Second Submissions below at para 8.

8 Ms Khan's First Submissions below at para 21; Ms Khan's Second Submissions below at para 30.

9 Ms Khan's Second Submissions below at para 5.

10 Ms Khan's Second Submissions below at paras 17–18.

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Mr Blomberg benefits from it without proving his case for a protection order;[11] Ms Khan contended that either the court should exercise its powers under s 12(7) of the POHA or Mr Blomberg should apply to take the Consent Order "to a full trial or hearing to determine if [a protection order] was warranted".[12]

Mr Blomberg's case

9 Mr Blomberg argued that the POHA does not provide the court with the power to set aside the Consent Order, but only that it may vary, suspend, cancel or extend the duration of the Consent Order. Accordingly, the court did not have the power to grant Ms Khan's application.[13] The relevant case law indicates that a consent order cannot be set aside save for exceptional reasons; in particular, given that the Consent Order was a contractual consent order, the court should only vary or set it aside pursuant to principles of contract law.[14] Since the grounds for Ms Khan's application related to her "unhappiness with the operation of the Consent Order", these did not justify setting it aside.[15]

10 Mr Blomberg also argued that there was no merit to Ms Khan's application, for the following reasons. The Consent Order did not restrict Ms Khan's rights as she may obtain the leave of any court to make or file a statement or report, including retrospectively, further, these restrictions were

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11 Ms Khan's Second Submissions below at paras 6–7.

12 Ms Khan's Second Submissions below at para 9.

13 Mr Blomberg's Written Submissions dated 5 August 2022 in the court below ("Mr Blomberg's First Submissions below") at paras 5–8.

14 Mr Blomberg's First Submissions below at paras 13–19.

15 Mr Blomberg's First Submissions below at para 21.

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agreed to by Ms Khan.[16] She was not pressured into agreeing to the Consent Order; instead, she had the opportunity to consult her lawyers,[17] and she did not face any undue pressure.[18]

11 Mr Blomberg submitted that, if the court allows Ms Khan's application, the Consent Order should only be set aside prospectively to uphold his legitimate expectation that Ms Khan obeys the Consent Order and to preserve his right to take action in respect of any breaches of the Consent Order which Ms Khan previously committed.[19]

The decision below

12 The DJ allowed Ms Khan's application and set aside the Consent Order for the following reasons.

13 First, the DJ found that the Consent Order was not an order granted under s 12(2) of the POHA, and thus the court could not set it aside under s 12(7) of the POHA. Instead, since the Consent Order is in essence a contract between the parties, the Consent Order may be set aside only where vitiating factors recognised in contract law apply.[20] The unworkability or impracticality of the Consent Order is not a recognised contractual vitiating factor.[21]

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16 Mr Blomberg's First Submissions below at para 22; Mr Blomberg's Written Reply Submissions dated 3 October 2022 in the court below ("Mr Blomberg's Second Submissions below") at para 17.

17 Mr Blomberg's First Submissions below at para 23. See also Mr Blomberg's Second Submissions below at para 15.

18 Mr Blomberg's First Submissions below at paras 25–28.

19 Mr Blomberg's First Submissions below at paras 32–33.

20 Notes of Evidence ("NE") for 3 October 2022 at pp 8 and 10.

21 NE for 3 October 2022 at p 10.

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14 The DJ further noted that the Consent Order confirmed and documented the finalised agreement between the parties. The draft version of the settlement terms had been well and fully considered by Ms Khan, Ms Khan had indicated her agreement after consulting her lawyer, and there was no evidence of pressure by the court or Mr Blomberg that suggested that Ms Khan had been coerced into accepting the settlement terms.[22] The DJ also rejected Ms Khan's complaints that the Consent Order curtailed her rights and personal liberties and that it amounted to an abuse of process.[23]

15 Second, the DJ accepted Ms Khan's argument that the legality of the Consent Order was questionable, due to its imprecise terms and the wide ambit of restrictions imposed.[24] In particular, the DJ found the following requirements problematic, and thus decided that Paragraph 1 of the Consent Order could not stand.

> (a) The Consent Order prohibited Ms Khan from "mak[ing] or fil[ing] any statement or report in respect of [Mr Blomberg] in any court, or to any local or overseas public authority, by any means, and in any form or manner". The DJ found that it was unclear if this prohibition applied only to matters related to the parties' divorce proceedings in the FJC, or ongoing proceedings between the parties, or all future proceedings involving the parties.[25]
>
> (b) The Consent Order suggested that Ms Khan should seek leave in "any court" whether in Singapore and overseas, even if neither the law

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22 NE for 3 October 2022 at p 9.

23 NE for 3 October 2022 at pp 10–11.

24 NE for 3 October 2022 at p 11.

25 NE for 3 October 2022 at p 12.

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nor governing rules of that court required her to do so and despite that no other court would be prepared to hear her leave application. In the DJ's view, this caused uncertainty.[26]

(c) The requirement that the Protection from Harassment Court ("PHC") "review" Ms Khan's statements in any legal cause of action pertaining to and reports or complaints against Mr Blomberg also called into question the legality of the Consent Order, since the parties cannot by their agreement grant the PHC the power to "gatekeep" Ms Khan's submission or filing of such statements or reports. This requirement would pose additional problems where Ms Khan seeks to make a statement or a police report overseas.[27]

(d) The Consent Order did not provide clarity as to "the filtering process … in order to ascertain if the prima facie evidential standard is met when the statement or report contains bare facts or when it relates to an administrative inquiry".[28]

(e) It was inappropriate that the Consent Order requires Ms Khan to satisfy the court that she has *prima facie* evidence before lodging a police report or submitting a statement to the Police, as it is for the Police and the Attorney-General's Chambers to determine if there is *prima facie* evidence before the commencement of criminal proceedings. Further, such an inquiry should not have to be done before investigations have been conducted.[29]

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26 NE for 3 October 2022 at pp 12–13.

27 NE for 3 October 2022 at p 13.

28 NE for 3 October 2022 at pp 13–14.

29 NE for 3 October 2022 at p 14.

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(f) The Consent Order provides that "any breach of [the undertaking in Paragraph 1] will constitute a breach by [Ms Khan] of the relevant provisions of the Protection from Harassment Act so as to entitle [Mr Blomberg] to obtain a Protection Order against [Ms Khan] based on the aforesaid breach". First, this is wholly unenforceable as it is contrary to s 12 of the POHA, which requires instead that all requirements therein be met to the court's satisfaction before a protection order is granted. This requirement cannot be circumvented by the agreement between the parties.[30] Second, this undermines the POHA framework because it suggests that, if Ms Khan breaches Paragraph 1 of the Consent Order, Mr Blomberg can obtain a protection order that provides the same protection in substance as that already provided under the Consent Order, and it is neither just nor equitable to grant him protection that he already has under the law.[31]

16 The DJ then decided that the rest of the Consent Order could not be retained by severing Paragraph 1, and that it was just and equitable for the Consent Order as a whole to be set aside *ab initio*.[32]

Grounds of the appeal

17 On 10 October 2022, Mr Blomberg filed an appeal against the entirety of the DJ's decision given on 3 October 2022, for the following reasons:

(a) the DJ had mischaracterised the nature of the Consent Order as it is a protection order granted under s 12(2) of the POHA;

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30 NE for 3 October 2022 at p 15.

31 NE for 3 October 2022 at pp 15–16.

32 NE for 3 October 2022 at p 16.

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(b) since s 12(7) of the POHA only empowers the court to vary, suspend, cancel or extend a protection order, the DJ had no jurisdiction to set aside the Consent Order *ab initio*;

(c) the Consent Order is not illegal;

(d) any issues with the workability of the Consent Order should be addressed by varying the Consent Order; and

(e) further or in the alternative, the court should apply the "blue pencil test" and strike out the unenforceable provisions in the Consent Order.[33]

The parties' cases on appeal

Mr Blomberg's case

18 Mr Blomberg's first argument is that the DJ did not have jurisdiction to set aside the Consent Order *ab initio*. The Consent Order is a protection order granted under s 12(2) of the POHA because it was given pursuant to Mr Blomberg's application under s 12(1) of the POHA; it is entitled "Order of Court (PO)" and states that it was filed "[in] the matter of Section 12(1) of the Protection from Harassment Act 2014 (Act 17 of 2014)". Ms Khan herself agrees that the Consent Order is a protection order under s 12 of the POHA.[34] Accordingly, the Consent Order is governed by s 12 of the POHA. It is a contractual consent order that relates to the substantive issues in the case and the parties' substantive rights (a "substantive contractual consent order"). Hence, it can only be set aside pursuant to ordinary principles of contract law

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33 Mr Blomberg's Written Submissions dated 8 March 2023 ("Mr Blomberg's Submissions") at para 14.

34 Mr Blomberg's Submissions at paras 17–18.

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and the court does not have a residual discretion to vary or not enforce it. Moreover, s 12(7) of the POHA does not provide the court with the power to set aside a protection order *ab initio*.[35]

19 He further argues that the DJ erred in finding the Consent Order unenforceable due to illegality, since it is not prohibited, expressly or impliedly, pursuant to a statute or an established head of common law public policy.[36] Instead, the DJ's concerns about the "legality" of the Consent Order related to its imprecise terms and wide ambit of restrictions on Ms Khan.[37] To that end, Mr Blomberg submits that there is nothing uncertain or ambiguous about the Consent Order: it is a blanket prohibition on Ms Khan from making or filing any statement or report concerning Mr Blomberg; leave must clearly be obtained from the PHC; and s 12(4) of the POHA provides the basis for the imposition of the requirement to seek leave in respect of statements of reports filed overseas.[38] He concedes that the only unworkable part of the Consent Order is his entitlement to a protection order in the event Ms Khan breaches the Consent Order.[39] To this end, he points out that although the Consent Order provides that he would be entitled to obtain a protection order upon Ms Khan's breach of the Consent Order, he took up committal proceedings to enforce the Consent Order instead. The Consent Order can be varied to reflect that he is entitled to commence committal proceedings.[40]

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35 Mr Blomberg's Submissions at paras 21–22.

36 Mr Blomberg's Submissions at para 26.

37 Mr Blomberg's Submissions at para 27.

38 Mr Blomberg's Submissions at paras 28–31.

39 Mr Blomberg's Submissions at para 47.

40 Mr Blomberg's Submissions at paras 33, 34, 43 and 44.

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20 Finally, Mr Blomberg submits in the alternative that the DJ should have severed unenforceable parts of the Consent Order – namely Mr Blomberg's entitlement to a protection order if Ms Khan breaches the Consent Order – instead of setting it aside *ab initio*. Such severance does not change the fundamental character of the parties' agreement, since it is implicit in the Consent Order that in the event of its breach, Mr Blomberg can commence committal proceedings against Ms Khan.[41]

Ms Khan's case

21 Ms Khan submits, at the outset, that the appeal should not have been filed since Mr Blomberg had alternative recourse, namely, a fresh application for a protection order under the POHA.[42] Ms Khan reiterates her submissions in the court below and the DJ's reasons.[43]

The Young Independent Counsel's Submissions

22 The court appointed a Young Independent Counsel, Mr Benny Santoso ("Mr Santoso"), to assist with the appeal. Mr Santoso was invited to address the following questions.

> (a) In proceedings commenced under s 12(1) of the POHA, where the parties have recorded a settlement order by consent, may the said order be set aside *ab initio*, and if so, under what circumstances? Related to this are questions (b) and (c):

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41 Mr Blomberg's Submissions at paras 47–48.

42 Ms Khan's Written Submissions dated 8 March 2023 ("Ms Khan's Submissions") at para 7.

43 Ms Khan's Submissions at para 6.

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(b) Where an agreement is recorded in the form of a judgment, is the validity of that judgment to be assessed according to contractual principles that might apply to the underlying agreement?

(c) If the answer to (b) is "No", what, if any, other doctrines may apply to allow a court to set aside the consent order, and if any such doctrine is applicable, what are the grounds on which the order may be set aside?[44]

23 Mr Santoso submits that a consent judgment or order cannot generally be set aside save where there are exceptional reasons, citing *Poh Huat Heng Corp Pte Ltd and others v Hafizul Islam Kofil Uddin* [2012] 3 SLR 1003 ("*Poh Huat Heng Corp*") at [18]. In order to do so, there should be grounds which would justify setting aside a contract.[45] These would be existing common law vitiating factors, which include a common mistake between both parties as to the basis upon which they contracted; fraud; illegality; and duress,[46] but exclude instances where a party has been wrongly advised by their lawyer and where the agreement is unworkable.[47]

24 Following the decision of the Court of Appeal in *Turf Club Auto Emporium Pte Ltd and others v Yeo Boong Hua and others and another appeal and other matters* [2017] 2 SLR 12 ("*Turf Club Auto Emporium*"), the court does not have a residual discretion not to enforce or to set aside a substantive contractual consent order on the basis that this is necessary to prevent injustice.

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44 Young Independent Counsel's Submissions dated 16 June 2023 ("Mr Santoso's Submissions") at para 1.

45 Mr Santoso's Submissions at para 28.

46 Mr Santoso's Submissions at paras 30–33.

47 Mr Santoso's Submissions at para 34.

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The court only retains a residual discretion not to enforce the order where it relates only to matters of procedure and not the parties' substantive rights.[48] Mr Santoso notes, however, that this position may not be conclusively settled because, first, O 92 r 4 of the Rules of Court (2014 Rev Ed) ("ROC 2014"), which was the basis for the inherent powers of the court, was not replicated in the current Rules of Court 2021 ("ROC 2021"). Second, it would be necessary to consider whether there are other sources of law including statutory provisions that may possibly provide otherwise, including the POHA, the Rules of Court and s 25 of the Supreme Court of Judicature Act 1969 (2020 Rev Ed).[49]

25 On this second point, Mr Santoso submits that s 12(7) of the POHA does not permit the court to set aside a consent order, because the phrase "vary, suspend[,] cancel… or extend the duration of the protection order" should be interpreted as having prospective effect.

26 In the overall analysis, he submits that the court does not have the power to set aside a contractual consent order unless there are vitiating factors which would render the underlying agreement void *ab initio*.

27 In his oral submissions at the hearing, Mr Santoso also submits that the court cannot vary the Consent Order under s 12(7) of the POHA because it was not a protection order made under s 12(2) of the POHA. He accepts, however, that if the court finds that the Consent Order was a protection order pursuant to s 12(2) of the POHA, then the court can vary it under s 12 of the POHA.

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48 Mr Santoso's Submissions at paras 35–50.

49 Mr Santoso's Submissions at paras 51, 58–63.

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Issues to be determined

28 The appeal gives rise to two key issues for determination:

(a) whether a substantive contractual consent order may be set aside *ab initio*, and if so, under what circumstances; and

(b) whether, in the present proceedings commenced under s 12(1) of the POHA, the Consent Order should have been set aside *ab initio*.

My decision

Preliminary point: the Consent Order is a protection order under s 12 of the POHA

29 As a preliminary issue, I address whether the Consent Order is a protection order within s 12 of the POHA. Mr Blomberg argues that the Consent Order is a protection order under s 12(2) of the POHA.[50] The DJ[51] and Mr Santoso (as indicated at the hearing) take a contrary view, and Ms Khan appears to do so as well.[52]

30 I accept Mr Blomberg's submissions and I find that the Consent Order is a protection order made under s 12(2) of the POHA, which provides as follows:

> **Protection order**
>
> 12.–
>
> (2) A court may, if it just and equitable in the circumstances to do so, make a protection order against any individual or entity alleged to have contravened section 3, 4, 5,

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50 Mr Blomberg's Submissions at para 14(a).

51 NE for 3 October 2022 at p 8.

52 Ms Khan's Second Submissions below at paras 5–7.

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> 6 or 7 in respect of the victim (called in this section the respondent) if it is satisfied on the balance of probabilities that –
>
> > *(a)* the respondent has contravened section 3, 4, 5, 6 or 7 in respect of the victim; and
> >
> > *(b)* the respondent is likely to continue that contravention or to commit another contravention of section 3, 4, 5, 6 or 7 in respect of the victim.

31 Both in form and substance, the Consent Order affords Mr Blomberg rights which amount to protective rights under the POHA. The Consent Order prohibits Ms Khan from doing certain things in relation to Mr Blomberg. As such, it falls within a description of a protection order in s 12(2B) of the POHA. I also note that the Consent Order was the consequence of Mr Blomberg's application under s 12 of the POHA: this is reflected in the text of the Consent Order, which states "In the matter of *Section 12(1) of the Protection from Harassment Act 2014* (Act 17 of 2014)" [emphasis added] – s 12 of the POHA deals with protection orders – and being titled "ORDER OF COURT (*PO*)" [emphasis added].

32 Ms Khan appears to argue that the Consent Order is not a protection order under s 12 of the POHA because it is "at the EO" stage[53] ("EO" presumably refers to an expedited protection order *per* s 13 of the POHA) and a "further application" must be taken to "crystallize the [Consent Order] into a [protection order]".[54] This is, however, directly contradicted by the references to s 12 of the POHA in the Consent Order. Ms Khan offers no explanation as to why, despite these references, the Consent Order is not a protection order made pursuant to s 12(2) of the POHA. While an expedited order is an interim order,

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53 Ms Khan's Second Submissions below at para 7.

54 Ms Khan's Second Submissions below at paras 8–9.

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it is self-evident that it must operate to avail Mr Blomberg of the substantive protection afforded under s 12 of the POHA.

33 The DJ did not elaborate on her reasons for finding that the Consent Order is not a protection order. She says "[s]ince *the [Consent Order] is not an order granted under section 12(2)*, this Court cannot set it aside under section 12(7) of the POHA" [emphasis added].[55] However, the fact that this was an order made by consent does not change the fact that it was an order made by the PHC for Mr Blomberg's protection, and therefore granted pursuant to s 12(2) of the POHA. There is also nothing in s 12(2) of the POHA limiting the court's power to make a protection order by consent of the parties, where it is just and equitable to do so.

The court can set aside a contractual consent order **ab initio** *in limited circumstances*

34 I note at the outset that Ms Khan does not object, whether in her written submissions or at the hearing, to Mr Blomberg's and Mr Santoso's characterisation of the Consent Order as a substantive contractual consent order.

35 I am of the view that the court can exercise its discretion to set aside a contractual consent order *ab initio*, albeit only in the limited circumstances elaborated on below (at [40]–[41]), for two reasons: first, the case law on contractual consent orders supports this finding, and second, this finding is not inconsistent with the POHA regime.

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55 NE for 3 October 2022 at p 8.

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Circumstances in which a contractual consent order may be set aside

36 Mr Blomberg[56] and Mr Santoso[57] agree that case law concerning contractual consent orders shows that such orders may be set aside where there are vitiating factors which undermine the contract formed between the consenting parties. The DJ's reasoning was similar.[58] Ms Khan does not address this point in her submissions on appeal.[59] Thus, the parties proceeded with their arguments before me on the basis that the point was uncontroversial.

37 I find Mr Santoso's analysis of the conceptual distinctions between: (a) a "contractual consent order" and an "uncontested consent order"; and (b) a "procedural consent order" and a "substantive consent order"[60] helpful. I agree substantially with Mr Santoso's approach and analysis.

38 I briefly explain these conceptual distinctions here. The first distinction between a contractual consent order and an uncontested consent order recognises that "consent" could refer either to a contract made between the parties, or a situation where parties do not object to the order, in which case there is no real contract between the parties (*Siebe Gorman & Co Ltd v Pneupac Ltd* [1982] 1 WLR 185 ("*Siebe Gorman*") at 189, affirmed in *Poh Huat Heng Corp* at [18]). In order to ascertain which category a consent order falls under, the court would have regard to, *inter alia*, whether there was prior negotiation or clear written correspondence (*Wellmix Organics (International) Pte Ltd v Lau Yu Man* [2006] 2 SLR(R) 117 ("*Wellmix*") at [30]), and whether there was

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56 Mr Blomberg's Submissions at para 21.

57 Mr Santoso's Submissions at paras 21–28.

58 NE for 3 October 2022 at pp 8 and 10.

59 Ms Khan's Submissions at paras 7–10.

60 Mr Santoso's Submissions at paras 12–20.

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consideration (*Wiltopps (Asia) Ltd v Drew & Napier and another* [1999] 1 SLR(R) 252 ("*Wiltopps*") at [19]). Only contractual consent orders may only be interfered with on the same grounds as any other contract (*Siebe Gorman* at 189). I elaborate on this at [40] below.

39 The second conceptual distinction is between "procedural" and "substantive" consent orders. This is concerned with whether a consent order deals with the parties' procedural rights in the litigation process, or parties' substantive rights in the suit (*Turf Club Auto Emporium* at [162]–[164]; *Sumber Indah Pte Ltd v Kamala Jewellers Pte Ltd* [2018] SGHC 70 ("*Sumber Indah*") at [46]).

40 I find that a contractual consent order should only be set aside pursuant to ordinary principles of contract law, and accordingly only the existence of recognised vitiating factors in contract law can justify setting aside such contractual consent orders: *Wiltopps* at [27]; *Bakery Mart Pte Ltd v Ng Wei Teck Michael and others* [2005] 1 SLR(R) 28 ("*Bakery Mart*") at [11]; *Airtrust (Singapore) Pte Ltd v Kao Chai-Chau Linda* [2014] 2 SLR 693 at [22]; *Turf Club Auto Emporium* at [151] and [163]. The authorities also show that where a contractual consent order is set aside due to the existence of vitiating factors, it is set aside *ab initio* (*Turf Club Auto Emporium* at [151]).

41 I also find that the court does not retain a residual discretion to set aside substantive contractual consent orders in order to prevent injustice. In this connection, I am bound by the Court of Appeal's decision in *Turf Club Auto Emporium* (at [159], [163] and [164]). In particular, the Court of Appeal stated in no uncertain terms at [159] that the court's residual discretion does not extend to not enforcing substantive contractual consent orders, and much less to setting aside such orders:

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> While we agree … that the court has a residual discretion *not to enforce* contractual or consensual "unless" orders or other consensual procedural orders, as has been established in a line of authorities, such a discretion does not, in our judgment, extend to contractual consent orders that relate to the substantive issues in the case and the substantive rights of the parties, much less to *set aside* such orders.
>
> [emphasis in original]

The Court of Appeal further explained (*Turf Club Auto Emporium* at [163]) that there is "no conceptual basis for extending such a discretion to a contractual consent order that encapsulates a settlement agreement covering the substantive causes of action between the parties, much less to *set aside* such orders" [emphasis in original]. This ruling was followed by the High Court in *Sumber Indah* at [49] and [74].

42 Mr Santoso raises a concern as to the foregoing analysis concerning the court's residual discretion to set aside substantive contractual consent orders. He points out that *Turf Club Auto Emporium* was decided when the inherent powers of the court resided in O 92 r 4 of the ROC 2014, but this provision is not replicated in its exact terms in the ROC 2021. In my view, this concern does not affect my conclusion that the court does not have such a residual discretion (although I offer my provisional views on his point at [43]–[45] below). The reasoning of the Court of Appeal (which led them to find that the court did not have a residual discretion not to enforce, much less set aside, substantive contractual consent orders) was not predicated on O 92 r 4 of the ROC 2014. Instead, the Court of Appeal had regard to: (a) the principle of finality; (b) the fact that parties entered into consent orders not to enable the court to exercise supervisory jurisdiction but rather to be able to enforce the judgment; (c) consistency in how the law regards consent; and (d) the demands of fairness (*Turf Club Auto Emporium* at [163]). These reasons continue to be relevant

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today. I therefore find that *Turf Club Auto Emporium* remains authoritative and supports my finding above.

43 The parties did not make substantive arguments on the juridical basis to set aside consent orders. Only Mr Santoso did so in his written submissions. The existing case law on the court's inherent power is predicated on O 92 r 4 of the ROC 2014, which provided as follows:

> **Inherent powers of Court (O. 92, r. 4)**
>
> 4. For the avoidance of doubt it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

44 In my view, O 92 r 4 of the ROC 2014 can be considered to be subsumed under O 3 r 2(2) of the ROC 2021, which provides as follows:

> **General powers of Court (O. 3, r. 2)**
>
> …
>
> (2) Where there is no express provision in these Rules or any other written law on any matter, the Court may do whatever the Court considers necessary on the facts of the case before it to ensure that justice is done or to prevent an abuse of the process of the Court, so long as it is not prohibited by law and is consistent with the Ideals.

45 It is clearly the intent of O 3 r 2(2) of the ROC 2021 to give the court broad powers to give directions and make necessary orders according to the justice of the case. Hence, I would suggest that this forms the juridical basis for setting aside a contractual consent order if there are vitiating factors, subject to the Court of Appeal's views in *Turf Club Auto Emporium* (at [159], [163] and [164]). That said, I offer this suggestion only as a provisional view. The question may be better left for determination in a more appropriate future case, where the court may benefit from hearing full arguments.

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The POHA regime

46 The parties differ in their analysis of the implications of the POHA regime on the question of whether the court has jurisdiction to set aside the Consent Order *ab initio*. I summarise their respective positions as follows.

(a) Ms Khan argues that the court has the power to set aside the Consent Order pursuant to s 12(7) of the POHA[61] but does not provide further explanation or reasons for her position.

(b) Mr Blomberg submits that s 12(7) of the POHA does not provide for the court to set aside the Consent Order and only that it may vary, suspend, cancel or extend the duration of the Consent Order.[62]

(c) Mr Santoso submits that s 12(7) of the POHA does not permit the court to set aside a consent order, let alone to set it aside *ab initio*, since s 12(7) of the POHA only has prospective effect.[63]

47 I agree that the common law principles on setting aside contractual consent orders should apply only in so far as they are not contradicted by the POHA (*Turf Club Auto Emporium* at [164]). In the present case, I find that there is nothing in the POHA regime which displaces or is inconsistent with the above analysis concerning contractual consent orders. Accordingly, a contractual consent order can be set aside *ab initio* only where vitiating factors exist.

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61 Ms Khan's Second Submissions below at paras 10–11; Ms Khan's Submissions at para 6.

62 Mr Blomberg's First Submissions below at paras 5–8; Mr Blomberg's Submissions at paras 22(b) and 22(c).

63 Mr Santoso's Submissions at para 56.

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48 In my view, there is nothing within the legislative framework of the POHA that expressly provides for a consent order to be set aside. On a plain and literal reading, s 12(7) of the POHA clearly does not give the court the power to set aside the Consent Order. Adopting the statutory interpretation framework laid down in *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 (at [37(a)] and [38]), it is thus not possible to interpret s 12(7) of the POHA such that the court may set aside the Consent Order *ab initio*. If Parliament intended for s 12(7) of the POHA to empower the court to set aside protection orders, there is no reason why the express terminology of "setting aside" would not have been used.

49 I also note that, in contrast, s 36 of the Supreme Court of Judicature (Protection from Harassment) Rules 2021 (the "POHA Rules") expressly provides for orders made by the PHC to be set aside in limited circumstances. The rules governing the variation, suspension or cancellation of orders as provided for under s 12(7) of the POHA are separately contained in s 37 of the POHA Rules.

50 Mr Santoso's submissions were based on s 12(7) of the POHA which I have found to be inapplicable for the purposes of setting aside the Consent Order. Given my finding that s 12(7) of the POHA does not empower the court to set aside a consent order, it is unnecessary to venture further to examine Mr Santoso's submission as to whether s 12(7) should only operate prospectively.

51 For the foregoing reasons, I find that the court may set aside a contractual consent order *ab initio* provided that there are recognised vitiating factors in contract law to justify setting it aside. However, in the case of a substantive contractual consent order, having regard to the Court of Appeal's

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observations in *Turf Club Auto Emporium* (at [159]), the court does not have any residual discretion to set aside such an order.

The Consent Order should not have been set aside **ab initio**

52 The DJ rightly found that there were no vitiating factors which justified the setting aside of the Consent Order.[64] The DJ appears to have gone on to question the "legality" of the Consent Order. She then decided solely on this basis to set aside the Consent Order. However, her concerns were in fact about its imprecise terms and wide ambit. With respect, I do not think valid concerns arise as to the legality of the Consent Order, because it is not prohibited, expressly or impliedly, pursuant to a statute or an established head of common law public policy. Even if there are valid concerns that may impact whether the Consent Order can be enforced, they do not demonstrate that illegality was operative as a vitiating factor.

53 I am of the view that the DJ's approach was wrong in law as it is insufficient, for the purposes of setting aside a contractual consent order, to point to the terms of the order being imprecise or too wide. In any case, no authorities were cited by the DJ or Ms Khan to support the proposition that a contractual consent order could be set aside on this basis.

54 In addition, the Consent Order was entered into after the parties, through their solicitors, had voluntarily reached an agreement. Ms Khan had the benefit of legal advice and representation at all times. As the DJ observed, there was no evidence of any undue pressure or compulsion of Ms Khan's will that led her to accept the terms of the Consent Order. Rather, there was a real consensus *ad*

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64 NE for 3 October 2022 at pp 9–10.

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idem.[65] The court should not readily disregard the policy objective of ensuring finality in settlement agreements that the parties have freely entered into (see *Turf Club Auto Emporium* at [163] and *Bakery Mart* at [20]), and all the more so where the parties were both represented.

55 Be that as it may, there is an important anterior question that the DJ, Mr Blomberg and Ms Khan all appear to have overlooked. Only Mr Santoso alludes to this question in his submissions. This relates to the proper characterisation of the Consent Order as a substantive contractual consent order. As the parties do not dispute this characterisation, the question then is how the Court of Appeal decision in *Turf Club Auto Emporium* (at [159]) informs the present enquiry. As highlighted above (at [41]), the Court of Appeal's ruling – that if there are no vitiating factors in contract law justifying the setting aside of a substantive contractual consent order, the court has no residual discretion to set aside such an order – is binding on me (and the DJ as well). In the circumstances, the Consent Order could not and should not have been set aside *ab initio.*

Varying the Consent Order

56 In his submissions, Mr Blomberg proposes varying the terms of the Consent Order to address the DJ's concerns that the Consent Order is imprecise and potentially unenforceable. I agree that these concerns can be addressed by varying the Consent Order, pursuant to the court's power under s 12(7) of the POHA.

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[65] NE for 3 October 2022 at p 9.

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(a) The DJ was concerned as the Consent Order prescribes that Ms Khan seek leave in courts both in Singapore and overseas.[66] The Consent Order should be varied to state that Ms Khan shall apply and seek leave from the PHC specifically.[67]

(b) The DJ was concerned by the fact that the Consent Order provides that a breach by Ms Khan would entitle Mr Blomberg to a protection order.[68] The Consent Order should be varied to state that Mr Blomberg would be entitled to commence committal proceedings against Ms Khan instead.[69]

(c) I disagree with the DJ's finding that the Consent Order is unclear on whether the prohibition preventing Ms Khan from filing any statement or report in respect of Mr Blomberg applied only to matters related to the parties' divorce proceedings in the FJC, or ongoing or all proceedings in future.[70] Paragraph 1 states "any statement or report in respect of [Mr Blomberg]" and clearly imposes no restriction on the subject matter of such statements or reports. There is therefore no need to vary the Consent Order in this regard.

(d) The DJ was also troubled by the lack of clarity concerning "the *filtering process* … in order to ascertain if the *prima facie evidential standard* is met when the statement or report contains bare facts or when

66 NE for 3 October 2022 at pp 12–13.

67 Mr Blomberg's Submissions at para 44.

68 NE for 3 October 2022 at pp 15–16.

69 Mr Blomberg's Submissions at para 44.

70 NE for 3 October 2022 at p 12.

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it relates to an administrative inquiry" [emphasis added].[71] This appears to relate to the applicable test for the purposes of assessing a leave application. I agree that the last sentence of Paragraph 1 of the Consent Order is not well drafted, but I consider that the lack of clarity afflicts not just the *application* of the test of "prima facie evidence", but also the *purpose* of this test – it is unclear if the requirement of *prima facie* evidence to satisfy the court in Ms Khan's leave application is: (a) a precondition for Ms Khan to bring an application seeking leave to file a statement or report concerning Mr Blomberg; or (b) the threshold that Ms Khan's application must meet before the court will grant her leave application. In my assessment, the interpretation in (b) is likely what the parties agreed on, since Ms Khan's reasons and prerequisites for bringing a leave application are her sole concern. Accordingly, it is for the court to decide if the leave application should be granted, and for the court to apply the test of "prima facie evidence". At this juncture, the lack of clarity concerning the *application* of this test is relevant, as it is unclear *what* must be evidenced in order for the court to grant Ms Khan's leave application. This should be addressed by varying the Court Order to remove the phrase: "if the Respondent has at least prima facie evidence to satisfy the court considering the Respondent's application for leave and such leave is granted by the aforesaid court". It is clear that the purpose of the last sentence of Paragraph 1 is to provide an avenue for Ms Khan to make statements or reports in respect of Mr Blomberg by requiring her to first seek the court's leave to do so, and the varied Consent Order continues to fulfil this purpose.

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71 NE for 3 October 2022 at pp 13–14.

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Conclusion

57 I therefore allow Mr Blomberg's appeal against the DJ's decision to set aside the Consent Order with costs to be determined in his favour. To recapitulate, the general common law principle is that a contractual consent order can only be set aside *ab initio* where there are recognised factors which vitiate the agreement underlying the order. I find that no such factors have been demonstrated in this case. More fundamentally, as the Consent Order is a substantive contractual consent order, having regard to the Court of Appeal's observations in *Turf Club Auto Emporium* (at [159]), the court does not have any residual discretion to set aside such an order.

58 Nonetheless, I find that in some respects the Consent Order lacks clarity. Paragraph 1 of the Consent Order should thus be varied to read as follows:

> Without admission of liability in DC/PHA 93 of 2020, the Respondent (either in person or through any third party acting under her instructions or authorization) hereby undertakes not to make or file any statement or report in respect of the Applicant in any court, or to any local or overseas public authority, by any means, and in any form or manner, and agrees that any breach of this undertaking will constitute a breach by the Respondent of this Protection Order so as to entitle the Applicant to commence committal proceedings against the Respondent based on the aforesaid breach. However, the Respondent may apply and seek the leave of the Protection from Harassment Court to make or file any statement or report in respect of the Applicant in any court, or to any local or overseas public authority.

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59 Finally, I would like to express my thanks to Mr Santoso for his thorough and thoughtful submissions pursuant to his appointment as Young Independent Counsel. I found the submissions to be of considerable assistance to my analysis and determination of the issues raised in this appeal.

See Kee Oon
Judge of the High Court

Ranjit Singh and Andre Teo (Francis Khoo & Lim) for the appellant;
Alfred Dodwell (Dodwell & Co LLC) for the respondent;
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