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

[2026] SGHCR 10

Originating Application No 1158 of 2025 (Summons No 3759 of 2025)

Between

Michal Beranek

… *Applicant*

And

(1) Sreerangam Muruthi
(2) Rasheed Thaiyar Mohamed
(3) LSCS Pte Ltd

… *Respondents*

GROUNDS OF DECISION

[Civil Procedure — Material non-disclosure — Setting aside]
[Civil Procedure — Service — Substituted service — Setting aside — Defendant outside Singapore at the time of service — Whether substituted service without permission to serve out of the jurisdiction should be set aside]
[Conflict of Laws — Jurisdiction — Defendant outside Singapore at the time of service — Whether service out of the jurisdiction necessary to establish court's jurisdiction over defendant — Section 16(1)(*a*) Supreme Court of Judicature Act 1969]

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Beranek, Michal
v
Sreerangam Muruthi and others

[2026] SGHCR 10

General Division of the High Court — Originating Application No 1158 of 2025 (Summons No 3759 of 2025)
AR Chua Rui Yuan
23 January 2026

6 April 2026

AR Chua Rui Yuan:

Introduction

1 It is sometimes said that service is "not about playing technical games": *Abela v Baadarani* [2013] 1 WLR 2043 ("*Abela*") at [38]. There is some truth in that. However, it would be wrong to treat service, especially when it concerns originating process, as a technicality. This is because, under our law, service of originating process is the primary basis on which our courts assume jurisdiction over persons. In most cases, therefore, the existence of the court's jurisdiction over the defendant depends on service being properly effected.

2 In this application, the first respondent, Mr Sreerangam Muruthi ("Mr Muruthi"), sought the setting aside of an order for substituted service previously obtained by the applicant, Mr Michal Beranek ("Mr Beranek"), and the service effected on him pursuant to that order. Mr Muruthi challenged the validity of

service on him on two grounds. First, he submitted that service had not been properly effected as Mr Beranek should have, but failed to, obtain permission to serve him out of the jurisdiction. This argument raised a fundamental issue at the heart of the legal framework on service of originating process which, surprisingly, does not appear to have been directly addressed in the local case law: when will it be necessary for a claimant to serve originating process out of the jurisdiction on the defendant? The answer to this, it will be seen, requires a proper understanding of the nature, limits, and historical underpinnings of the court's jurisdiction over persons.

3 The second of Mr Muruthi's grounds of challenge was less novel but no less important. According to Mr Muruthi, Mr Beranek had failed to make full and frank disclosure to the court when he had applied for substituted service, by omitting to disclose evidence in his knowledge that Mr Muruthi was located outside Singapore. Challenges against orders made without notice on the basis of material non-disclosure are by no means uncommon, but it is always well to emphasise that the duty of full and frank disclosure is the principal safeguard against the unfairness of an order being made against a party before he or she has had the opportunity to be heard.

4 After hearing the parties, I allowed Mr Muruthi's application and set aside both the order for substituted service and the service effected pursuant to it. I agreed with Mr Muruthi that service had not been properly effected on him in light of Mr Beranek's failure to obtain permission for service out of the jurisdiction. I also agreed that Mr Beranek had been guilty of material non-disclosure of an extreme degree in his application for substituted service, for which no satisfactory explanation had been given. Based on the latter ground, I considered it appropriate to award Mr Muruthi costs on an indemnity basis. I

now give the full reasons for my decision, which elaborate in particular on my reasons on the necessity of service out of the jurisdiction in this case given the importance and novelty of the issue. In the course of these grounds of decision, I also take the opportunity to holistically examine and restate the law on service of originating process and the duty of full and frank disclosure in without notice applications.

Background facts

5 On 15 October 2025, Mr Beranek commenced HC/OA 1158/2025 ("OA 1158") in which he sought leave to bring a statutory derivative action under s 216A of the Companies Act 1967 (2020 Rev Ed) (the "CA") in the name of LSCS Pte Ltd ("LSCS") (the third respondent in OA 1158) against Mr Muruthi (the first respondent in OA 1158) and Mr Rasheed Thaiyar Mohamed ("Mr Rasheed") (the second respondent in OA 1158), for breaches of fiduciary duty. Mr Beranek, Mr Muruthi, and Mr Rasheed are all directors and shareholders of LSCS.

6 On 7 November 2025, Mr Beranek issued two summonses pertaining to the service of OA 1158 on Mr Muruthi and Mr Rasheed:

(a) In HC/SUM 3260/2025 ("SUM 3260"), Mr Beranek sought an order that service on Mr Muruthi be effected by substituted service through a combination of three modes: (i) posting sealed copies of OA 1158 and the supporting affidavit[1] on the front door or gates of an apartment at Commonwealth Avenue (the "Commonwealth Property"); (ii) delivering sealed copies of OA 1158 and the supporting affidavit by

[1] 1st Affidavit of Michal Beranek dated 15 October 2025 filed in HC/OA 1158/2025.

registered post to the Commonwealth Property; and (iii) sending sealed copies of OA 1158 and the supporting affidavit to two e-mail addresses used by Mr Muruthi.[2]

(b) In HC/SUM 3261/2025 ("SUM 3261"), Mr Beranek sought permission for OA 1158 to be served out of the jurisdiction on Mr Rasheed at his address in Western Australia.[3]

7 Two affidavits were filed in support of the application for substituted service on Mr Muruthi in SUM 3260. I briefly summarise their contents.

8 In an affidavit deposed to by Mr Beranek,[4] Mr Beranek explained that the solicitors acting for Mr Muruthi at the time, Nakoorsha Law Corporation ("NLC"), had indicated to Mr Beranek's solicitors, Dauntless Law Chambers ("DLC"), that NLC had no instructions to accept service of process on Mr Muruthi's behalf.[5] Mr Beranek also confirmed that four attempts at personal service of OA 1158 on Mr Muruthi had been made between 22 October 2025 to 28 October 2025.[6] Finally, Mr Beranek confirmed his belief that the proposed modes of substituted service in respect of the Commonwealth Property and the two e-mail addresses would be effective to give notice of OA 1158 to Mr Muruthi as: (a) the Commonwealth Property was reflected as Mr Muruthi's registered address in a recent business profile search of LSCS on the portal of

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2 HC/SUM 3260/2025 dated 7 November 2025, Prayers 1–2.

3 HC/SUM 3261/2025 dated 7 November 2025, Prayer 1.

4 2nd Affidavit of Michal Beranek dated 7 November 2025 filed in HC/OA 1158/2025 ("MB-2").

5 MB-2 at para 5.

6 MB-2 at para 7.

the Accounting and Corporate Regulatory Authority ("ACRA");[7] and (b) Mr Muruthi had recently used the two e-mail addresses to correspond with Mr Beranek and Mr Rasheed.[8]

9 In an affidavit deposed to by one Mr Sukor bin Ali ("Mr Sukor"),[9] a solicitor's clerk employed by DLC, Mr Sukor confirmed and detailed the four attempts at personal service on Mr Muruthi between 22 October 2025 and 28 October 2025. These four attempts were as follows:

(a) On 22 October 2025, at around 11.30am, Mr Sukor made a first attempt at personal service at LSCS' registered address at Coleman Street. On arrival, he was informed by an Indian man that this was not Mr Muruthi's place of business and only a registered business address.[10]

(b) Later the same day at around 6.40pm, Mr Sukor made a second attempt at personal service at the Commonwealth Property. However, at the Commonwealth Property, he was informed by a lady, who appeared to be Mr Muruthi's housekeeper, that Mr Muruthi was overseas in Indonesia and would only return on 26 October 2025.[11]

(c) On 27 October 2025, at around 10.30am, Mr Sukor made a third attempt at personal service at the Commonwealth Property. He was also informed on this occasion by a lady, who appeared to be Mr Muruthi's

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7 MB-2 at para 9.

8 MB-2 at para 10.

9 Affidavit of Sukor bin Ali dated 7 November 2025 filed in HC/OA 1158/2025 ("SK-1").

10 SK-1 at paras 6–8.

11 SK-1 at paras 11–13.

housekeeper, that Mr Muruthi was overseas. But this time, Mr Muruthi was away in Vietnam and she did not know when he would return to the Commonwealth Property.[12] I record that it is unclear from Mr Sukor's affidavit if the lady who he encountered on this occasion was the same person who he had encountered during his second attempt at personal service above.

(d) On 28 October 2025, at around 10.00am, Mr Sukor made a fourth attempt at personal service at the Commonwealth Property. On this occasion, there was no response.[13]

10 An order-in-terms was granted for both SUM 3260 and SUM 3261 on 10 November 2025.[14] Subsequently, Mr Beranek effected substituted service on Mr Muruthi on 20 November 2025 pursuant to the order made in SUM 3260.[15]

11 On 29 December 2025, Mr Muruthi brought the present application seeking to set aside the order for substituted service made in SUM 3260 and any service effected thereunder.

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12 SK-1 at paras 14–15.

13 SK-1 at paras 16–17.

14 HC/ORC 6888/2025 dated 10 November 2025 (for SUM 3260) and HC/ORC 6889/2025 dated 10 November 2025 (for SUM 3261).

15 4th Affidavit of Michal Beranek dated 13 January 2026 filed in HC/SUM 3759/2025 ("MB-4") at para 5.5.

The parties' cases

Mr Muruthi's arguments

12 Mr Muruthi's case for setting aside the substituted service order and the service effected pursuant to it was twofold.

13 First, Mr Muruthi argued that substituted service is not a valid means of service on a person who is not ordinarily resident in Singapore. In this regard, Mr Muruthi was ordinarily resident in Indonesia and not Singapore. Before me, his counsel, Mr Mahmood Gaznavi s/o Bashir Muhammad ("Mr Gaznavi"), submitted that, as a matter of law, if a defendant was ordinarily resident outside Singapore, the claimant would have to proceed by service out of the jurisdiction (and obtain permission to do so) before resorting to substituted service. Since Mr Beranek did not obtain permission to serve OA 1158 out of the jurisdiction, the service on Mr Muruthi was irregular and should be set aside.

14 Second, Mr Muruthi submitted that the order for substituted service should be set aside based on Mr Beranek's non-disclosure of material facts to the court when applying for substituted service in SUM 3260. More specifically, Mr Beranek knew but failed to disclose to the court that Mr Muruthi was resident in Indonesia. In this regard, Mr Gaznavi referred me to, among other things, the history between Mr Muruthi and Mr Beranek (including a period of cohabitation when Mr Beranek resided with Mr Muruthi in Jakarta), messages between the two which indicated Mr Beranek's knowledge that Mr Muruthi was based in Indonesia, and most importantly, an e-mail sent by Mr Muruthi to Mr Beranek's solicitors, DLC, on 30 October 2025 – around a week before the filing of SUM 3260 – in which Mr Muruthi had stated that he was resident in Indonesia (the "E-mail"). These matters meant that it could not have been lost

on Mr Beranek that Mr Muruthi was resident outside Singapore, but this fact was not disclosed to the court in SUM 3260. Furthermore, despite the extreme degree of non-disclosure, Mr Beranek had failed to provide any explanation on affidavit for his lack of candour in SUM 3260.

Mr Beranek's arguments

15 In response to the two grounds of challenge advanced by Mr Muruthi, Mr Beranek's case was as follows.

16 First, Mr Beranek submitted that the service on Mr Muruthi was not irregular as the evidence established that Mr Muruthi's ordinary residence was either Singapore or Singapore *and* Indonesia. On either view, Mr Muruthi being ordinarily resident in Singapore meant that Mr Beranek was entitled to serve OA 1158 on Mr Muruthi by substituted service, and it was not necessary for Mr Beranek to attempt service out of the jurisdiction or obtain the permission of the court for this. Before me, Mr Beranek's counsel, Ms Sarah Khan ("Ms Khan"), relied primarily on Mr Muruthi's ownership of the Commonwealth Property and the listing of the same as Mr Muruthi's registered address on LSCS' ACRA business profile as evidence of Mr Muruthi's ordinary residence in Singapore.

17 Second, although Ms Khan conceded at the hearing that Mr Beranek had been guilty of material non-disclosure in so far as the E-mail was concerned, she contended that this was the full extent of non-disclosure and that none of the other matters raised by Mr Muruthi needed to be disclosed as they were not material. Furthermore, Ms Khan sought to downplay the culpability of Mr Beranek's failure to disclose the E-mail as she characterised it as an inadvertent oversight as opposed to deliberate suppression. Given the limited extent of non-disclosure (being confined to the E-mail) and it being the result of inadvertence,

the substituted service order should not be set aside and service pursuant to it should stand.

A conceptual framework for setting-aside applications concerning service

18 I begin with a preliminary point. In their submissions, both Mr Gaznavi and Ms Khan tended to refer to the setting aside of the "order for substituted service" and "service" interchangeably. In my view, this elision was imprecise and should be avoided. There is a difference between setting aside an order for substituted service and setting aside service effected pursuant to that order. The former will typically subsume the latter, in that service effected pursuant to an order that is set aside will also be set aside as the substratum for service falls away, but the converse is not true as it is possible for service to be set aside on a ground that does not affect the underlying order itself. An applicant in a setting-aside application should therefore properly identify the subject of the challenge – *ie*, the order or service – and ensure that the grounds of challenge are legally relevant to that target.

19 A party challenges an *order* on the basis that the order should not have been made. This can be for a number of reasons, but the thrust of the challenge is that the requirements for making the order were not met. Mr Muruthi's second ground of challenge in this case – material non-disclosure – was an argument of this kind. It is trite that the applicant in an *ex parte* or without notice application is subject to a duty to make full and frank disclosure of all facts relevant to the court's assessment of whether to make the order sought. By arguing that Mr Beranek had failed to make full and frank disclosure in SUM 3260, Mr Muruthi was arguing that Mr Beranek had not satisfied one of the conditions for the making of the order and that the substituted service order should be set aside on

that basis. The position would be similar if the argument was that Mr Beranek had failed to establish that personal service on Mr Muruthi was impractical, as required by O 7 r 7 of the Rules of Court 2021 ("ROC 2021"), or that the proposed modes of substituted service were not modes which would likely bring OA 1158 to Mr Muruthi's notice.

20 In contrast, a party challenges *service* on the basis that it was not properly effected. This too can occur for a few reasons. But, in broad overview, service may be challenged on the basis that it was not in accordance with the prescribed manner of service under the ROC 2021 – for example, originating process was not served by personal service as is generally required under O 6 r 4 of the ROC 2021 – or, where service is conducted pursuant to an order of court, that it was not in accordance with the terms of the order – for example, substituted service was effected by posting the document to address *B* when the order provided for posting to address *A*. Apart from this, and most pertinent for the present case, service may be challenged on the basis that the claimant had *no right* to serve the defendant with originating process. As I explain below, Mr Muruthi's first ground of challenge – that OA 1158 should have been served out of the jurisdiction – was an argument of this kind because it was not so much an argument that the order for substituted service should not have been made, but an argument that service pursuant to that order was irregular and should be set aside because Mr Beranek had failed to obtain permission to serve OA 1158 out of the jurisdiction.

Issues to be determined

21 Based on the parties' arguments and Mr Muruthi's grounds of challenge, the issues arising for determination were as follows:

(a) first, whether the service of OA 1158 on Mr Muruthi should be set aside due to Mr Beranek's failure to obtain permission to serve OA 1158 out of the jurisdiction; and

(b) second, whether the substituted service order made in SUM 3260 should be set aside on the ground of material non-disclosure.

My decision

Whether service should be set aside due to Mr Beranek's failure to obtain permission for service out of the jurisdiction

22 I address first Mr Muruthi's argument that the service on him should be set aside due to Mr Beranek's failure to obtain permission to serve OA 1158 out of the jurisdiction. In my view, this argument can be addressed in four parts:

(a) first, the circumstances when it will be necessary for originating process to be served on the defendant out of the jurisdiction (see [24]–[117] below);

(b) second, the relationship between substituted service and service out of the jurisdiction (see [118]–[166] below);

(c) third, the consequences when a claimant fails to effect service out of the jurisdiction when this was necessary (see [167]–[214] below); and

(d) fourth, whether, on the facts, it was necessary for Mr Beranek to serve OA 1158 on Mr Muruthi out of the jurisdiction and the consequences that should follow from my decision on this (see [215]–[228] below).

23 Given the length and depth of my discussion on the first to third points, I have included a relatively comprehensive and self-contained restatement of the legal framework at [196]–[214] below, which encapsulates the key takeaways from my discussion on the first to third points, before going on to apply that framework to the facts of this case under the fourth point.

When is service out of the jurisdiction necessary?

24 I begin by observing that it was common ground between the parties that it would have been necessary for OA 1158 to be served on Mr Muruthi out of the jurisdiction if he was not "ordinarily resident" in Singapore. The parties' arguments proceeded on this basis and were thus focused on establishing if Mr Muruthi's ordinary residence was Indonesia (as Mr Muruthi submitted) or either Singapore or both Singapore and Indonesia (as Mr Beranek submitted).

25 In my view, this common assumption was mistaken. Indeed, before even examining the issue from principle, it would be clear from the statutory scheme for service out of the jurisdiction that the fact that a defendant may be ordinarily resident in Singapore does not mean that he or she need not be served out of the jurisdiction, since ordinary residence in Singapore is itself a gateway by which a claimant can establish a sufficient nexus to Singapore to justify the grant of permission for service out of the jurisdiction: see O 8 r 1 of the ROC 2021 read with para 63(3)(*d*) of the Supreme Court Practice Directions 2021 ("SCPD 2021").

26 The question, then, is what the correct touchstone for service out of the jurisdiction is. To state my conclusion upfront, which I develop in detail in the following paragraphs, the correct focal point is the defendant's *presence* within the jurisdiction *at the time of service*. As I explain below, this reflects the

territorial nature of the court's *in personam* jurisdiction and is consistent with the history of, and the current statutory scheme, for *in personam* jurisdiction. It follows that a claimant seeking to establish the court's *in personam* jurisdiction over the defendant by service of originating process should:

(a) Service within the Jurisdiction: if the defendant is present within Singapore at the time of service, serve originating process on the defendant, which the claimant may do so as of right; or

(b) Service Out of the Jurisdiction: if the defendant is not present in Singapore at the time of service, serve originating process on the defendant, which the claimant will generally require the permission of the court for under O 8 r 1(1) of the ROC 2021.

(1) The jurisdictional function of service

27 It is well-established that service of originating process serves two functions: (a) first, it gives notice to the defendant of the proceeding; and (b) second, it establishes the civil jurisdiction of the court over the parties' dispute: *COSCO Shipping Specialized Carriers Co, Ltd v PT OKI Pulp & Paper Mills* [2024] 3 SLR 807 ("*COSCO*") at [25].

28 The jurisdictional function of service ought to be situated in the statutory framework on the jurisdiction of the Singapore courts. This is important because our courts are creatures of statute and therefore only possess such jurisdiction that is conferred on them by the enabling legislation: *Re Nalpon Zero Geraldo Mario* [2013] 3 SLR 258 at [14]; *Allenger, Shiona v Pelletier, Olga* [2022] 3 SLR 353 at [23]. In this regard, service of originating process is the primary mode of establishing the court's *in personam* jurisdiction over a defendant. It

follows that, because the court's jurisdiction is both given and limited by statute, service will only be effective in establishing the jurisdiction of the court over a defendant if it is compliant with the terms of the statute.

29 The relevant statute as far as the General Division of the High Court ("General Division") is concerned is the Supreme Court of Judicature Act 1969 (2020 Rev Ed) (the "SCJA"). More specifically, s 16(1) of the SCJA prescribes that the General Division will have *in personam* jurisdiction over a defendant in three situations:

(a) Service Within the Jurisdiction: where an originating process is served on the defendant in Singapore in the manner prescribed by the Rules of Court or Family Justice Rules (see s 16(1)(*a*)(i) of the SCJA);

(b) Service Out of the Jurisdiction: where an originating process is served on the defendant outside Singapore in the circumstances authorised by and in the manner prescribed by the Rules of Court or Family Justice Rules (see s 16(1)(*a*)(ii) of the SCJA); and

(c) Submission to Jurisdiction: where the defendant has submitted to the jurisdiction of the court (see s 16(1)(*b*) of the SCJA).

30 I do not propose to dwell on the last of these as it is not in issue in this case. It suffices to say that, consistent with what I have said above on the court's jurisdiction being limited by statute, s 16(1)(*b*) of the SCJA is not engaged by a mere *agreement to submit* to the Singapore court's jurisdiction through, for instance, a choice of court agreement: Yeo Tiong Min, *Commercial Conflict of Laws* (Academy Publishing, 2023) ("*Commercial Conflict of Laws*") at para 02.062; *Halsbury's Laws of Singapore* vol 6(2) (LexisNexis, 2024)

("*Halsbury's*") at para 75.009. Thus, even if the parties have agreed by contract to submit to the jurisdiction of the Singapore courts, the claimant will typically still be required to invoke the court's jurisdiction over the defendant by service of originating process: see para 63(3)(*d*)(iv) of the SCPD 2021. It is, however, probable that if the parties have agreed to submit to the jurisdiction of the Singapore courts, they may also have agreed to service out of the jurisdiction without the need for the court's permission: see O 8 r 1(3) of the ROC 2021 and *NW Corp Pte Ltd v HK Petroleum Enterprises Cooperation Ltd* [2025] 3 SLR 607 ("*NW Corp*").

31 I focus on s 16(1)(*a*) of the SCJA which provides for service as a mode of establishing the court's jurisdiction over a defendant. Given that the court's *in personam* jurisdiction can only exist within the terms of s 16(1) of SCJA, a claimant seeking to establish the court's jurisdiction over a defendant would have to satisfy either ss 16(1)(*a*)(i) or 16(1)(*a*)(ii) of the SCJA. This raises the question of what the relevant factor distinguishing the two provisions is.

32 A comparison of the two provisions reveals two differences. The first is that s 16(1)(*a*)(i) refers to service of originating process "in Singapore" whereas s 16(1)(*a*)(ii) refers to service of originating process "outside Singapore". The second is that while s 16(1)(*a*)(i) provides that service in Singapore should be "in the manner prescribed by Rules of Court", s 16(1)(*a*)(ii) provides that service outside Singapore should be "*in the circumstances authorised by and* in the manner prescribed by Rules of Court" [emphasis added].

33 In my judgment, the difference between the two limbs of s 16(1)(*a*) of the SCJA is that their respective applications depend on whether the defendant is present in Singapore at the time that originating process is served on him or

her. Specifically, if the defendant is served with originating process while he or she is present in Singapore, the court's jurisdiction will be established under s 16(1)(*a*)(i) of the SCJA. But, if the defendant is not present in Singapore, the court's jurisdiction can only be established by service under s 16(1)(*a*)(ii) of the SCJA. The phrases "in Singapore" and "outside Singapore" in ss 16(1)(*a*)(i) and 16(1)(*a*)(ii) of the SCJA are thus references to the location of the defendant: Adrian Briggs, *Civil Jurisdiction and Judgments* (Informa Law, 8th Ed, 2025) ("*Civil Jurisdiction and Judgments*") at para 1.01. This, in turn, leads to the second difference noted in the language of the two provisions:

(a) If the defendant is present in Singapore, the claimant may serve the defendant with originating process *as of right* (*ie*, no permission or authorisation is needed from the court or any other person), and establish the court's jurisdiction over the defendant, subject to compliance with the prescribed manner of service in the Rules of Court: *PT Gunung Madu Plantations v Muhammad Jimmy Goh Mashun* [2018] 4 SLR 1420 at [67]. This explains why s 16(1)(*a*)(i) of the SCJA only requires service to be "in the manner prescribed by Rules of Court".

(b) If the defendant is not present in Singapore, the claimant is not entitled to serve originating process on the defendant and invoke the court's jurisdiction over the defendant as of right. Instead, the claimant would have to establish a right to serve the defendant with originating process based on the rules for service out of the jurisdiction under the Rules of Court. This additional condition explains why s 16(1)(*a*)(ii) of the SCJA requires that service not only be "in the manner prescribed by Rules of Court", as s 16(1)(*a*)(i) of the SCJA also does, but requires that service also be "in the circumstances authorised by [Rules of Court]".

Under the Rules of Court currently in force in the ROC 2021, there are two sources for the right to serve originating process on a defendant outside Singapore:

(i) first, permission from the court obtained through an application under O 8 r 1(2) of the ROC 2021; and

(ii) second, the defendant's agreement under O 8 r 1(3) of the ROC 2021.

34 The difference between the two limbs of s 16(1)(*a*) of the SCJA reflects the fundamental principle that a court's jurisdiction over a person is based on territorial dominion: *Emilia Shipping Inc v State Enterprise for Pulp and Paper Industries* [1991] 1 SLR(R) 411 at [16] and [19]. What this means is that a court's jurisdiction is presumptively territorial and limited to persons within the territory. The rigidity of this rule has been cut back over time such that the law now permits, through the enacted rules for service out of the jurisdiction, the assertion of jurisdiction over persons outside Singapore. But the general rule remains and finds expression in the distinction between ss 16(1)(*a*)(i) and 16(1)(*a*)(ii) of the SCJA. It follows that the defendant's location at the time the procedural act which engages the court's jurisdiction – *ie*, service of originating process – is taken is of critical importance: *Siemens AG v Holdrich Investment Ltd* [2010] 3 SLR 1007 at [6]–[7] ("in recognition of the primarily territorial nature of the court's jurisdiction, the court begins with the location of the defendant when it decides whether it has jurisdiction over a dispute …").

35 To better understand this, it is useful to trace the historical development of *in personam* jurisdiction under English law because s 16(1) of the SCJA was intended to put the Singapore courts on the same footing as the English courts

jurisdiction-wise: see the speech of the Minister for Law at the second reading of the Supreme Court of Judicature (Amendment) Bill (Bill No 12/1993) in *Singapore Parl Debates*; Vol 61, Sitting No 1; Col 95; [12 April 1993] (S Jayakumar, Minister for Law). Indeed, the current structure of the English law on *in personam* jurisdiction is the same as s 16(1) of the SCJA as the English courts' jurisdiction over a defendant is founded on service of originating process or the defendant's submission: *Stichting Shell Pensioenfonds v Krys* [2015] AC 616 at [27]; see also, Rules 31, 32, 35–37 (respectively, on service, service within the jurisdiction and service out of the jurisdiction) and 33 (on submission) in *Dicey, Morris & Collins on the Conflict of Laws* (Lord Collins of Mapesbury & Jonathan Harris gen eds) (Sweet & Maxwell, 16th Ed, 2022) ("*Dicey (16th Ed)*"). Much insight on s 16(1)(*a*) of the SCJA can thus be gained from an appreciation of the English law perspective. Accordingly, I trace the development of English law in the next section before coming back to our existing statutory framework under the SCJA and the ROC 2021.

(2) The development of the English law on *in personam* jurisdiction

36 It is fair to say that jurisdiction over a defendant has in modern times become so intertwined with service of originating process that it has recently been said by Professor Adrian Briggs that "[a] fundamental characteristic of the common law's approach to jurisdiction is that it equates jurisdiction with the service of process" and "it is service, and only service, and always service, and nothing but service that gives the court personal jurisdiction over the defendant": *Civil Jurisdiction and Judgments* at para 1.05. The element of hyperbole aside, this statement does depict relatively accurately the importance that service now holds under English and Singapore law.

37 But, as Professor Andrew Dickinson has demonstrated in a magisterial review of the history of the English courts' *in personam* jurisdiction, it is not strictly correct to say that service acquired the significance it now has through the common law as the common law in fact only recognised one basis for the court's jurisdiction over the defendant, which was not service of originating process but the defendant's formal appearance by his presence in the court room: Andrew Dickinson, "Keeping Up Appearances: The Development of Adjudicatory Jurisdiction in the English Courts" (2017) 86 BYIL 6 ("*Keeping Up Appearances*"). The abrogation of the requirement of appearance and the modern significance of service is the result of statutory development atop of the common law. But it is with the common law position that I begin with.

(A) APPEARANCE

38 Under the common law, the court did not have jurisdiction over the defendant unless he or she appeared before it. The mere issue of a writ which contained a summons to appear coupled with service of it on the defendant did not suffice. A claimant was, however, not left to rely entirely on the defendant's voluntary appearance as "the law had at its command various engines for compelling the appearance of the defendant": Frederick Pollock & Frederic William Maitland, *The History of English Law* vol 2 (Cambridge University Press, 1898) ("*Pollock and Maitland*") at p 593. These took the form of mesne processes aimed at coercing the defendant to appear, and broadly consisted of a combination of steps taken to bring the writ to the notice of the defendant and steps taken against his or her property and/or person: *Keeping Up Appearances* at 10–11. So, if the defendant failed to answer the summons in the writ, mesne process that could be resorted to included (see Nathan Levy Jr, "Mesne Process

in Personal Actions at Common Law and the Power Doctrine" (1968) 78 Yale LJ 52 ("*Levy*") at 59–64):

> (a) A writ of attachment, which commanded the sheriff to seize the defendant's goods or make the defendant find sureties. If the defendant did not appear after attachment, the attached property would be forfeited to the Crown and the sureties fined.
>
> (b) A writ of *distringas*, which commanded the sheriff to distrain goods and profits of the defendant's land, which would be forfeited to the Crown if the defendant did not appear.
>
> (c) A writ of arrest (for example, a writ of *capias ad respondendum*) which commanded the sheriff to arrest the defendant. If the defendant were arrested, he could procure his release from the sheriff until the time for his appearance in court by providing bail, and later execute the same in court, the latter of which would constitute his appearance.

39 However, the common law requirement of appearance was of exacting strictness in that the defendant's presence in the jurisdiction would not suffice, even if coupled with service of the writ and mesne process, to give the court jurisdiction: *Keeping Up Appearances* at 14. An obstinate defendant could thus ultimately succeed in denying the court's jurisdiction over him or her by refusing to appear even under the coercion of mesne process, which Story J noted in *Picquet v Swan* 19 F Cas 609 (1828) at 612–613:

> The principles of the common law (which are never to be lost sight of in the construction of our own statutes) proceed yet farther. In general, it may be said, that they authorize no judgment against a party, until after his appearance in court. He may be taken on a *capias* and brought into court, or distrained by attachment and other process against his

> property to compel his appearance; and for non-appearance be outlawed. But still, even though a subject, and within the kingdom, the judgment against him can take place only after such appearance. So anxious was the common law to guard the rights of private persons from judgments obtained without notice, and regular personal appearance in court.

40 This was of course unsatisfactory. That a defendant's non-appearance could be punished by forfeiture of his or her property to the Crown was cold comfort to a claimant who was nonetheless unable to proceed. Indeed, as one commentator put it, the law at the time appeared to view the defendant's refusal to appear as "more an affront to the King's Court than to any principle of justice to the plaintiff": *Levy* at 60. Two renowned legal historians criticised the rigidity of the rule of appearance as a "respectable sentiment that ha[d] degenerated into stupid obstinacy" (see *Pollock and Maitland* at p 594–595):

> One thing our law would not do: the obvious thing. It would exhaust its terrors in the endeavour to make the defendant appear, but it would not give judgment against him until he had appeared, and, if he was obstinate enough to endure imprisonment or outlawry, he could deprive the plaintiff of his remedy. … Our law would not give judgment against one who had not appeared. Seemingly we have before us a respectable sentiment that has degenerated into stupid obstinacy. The law wants to be exceedingly fair, but is irritated by contumacy. Instead of saying to the defaulter 'I don't care whether you appear or no,' it sets its will against his will: — 'But you shall appear.' To this we may add that the emergence and dominance of the semi-criminal action of Trespass prevents men from thinking of our personal actions as mere contests between two private persons. The contumacious defendant has broken the peace, is defying justice and must be crushed. Whether the plaintiff's claim will be satisfied is a secondary question.

41 A recognition of these limitations provided the impetus for subsequent statutory reforms that shaped English law into what it is today. These reforms initially relaxed and later abrogated the common law rule in two different ways. First, the court's jurisdiction over a defendant was gradually decoupled from

the defendant's appearance such that service of originating process on the defendant sufficed (see [43]–[46] below). Second, there was a further expansion of the court's jurisdiction by allowing originating process, which hitherto had no effect on persons outside the jurisdiction, to be served on a defendant outside the jurisdiction if certain conditions were met (see [47]–[55] below).

42 Before turning to these developments, it is worth noting that a corollary of the strictness of the common law rule was that the defendant's appearance in court, whether voluntarily or otherwise, meant that the court had jurisdiction over him or her irrespective of how that had come to be. The defendant's unconditional appearance in court was taken as curing any irregularity in service or mesne process as the purpose of bringing the defendant into court had been fulfilled: *Keeping Up Appearances* at 12. Seen in this light, the common law's use of appearance as the touchstone of jurisdiction is the origin of what is now known as jurisdiction founded on submission: *Keeping Up Appearances* at 16. This, as noted above, is the alternative ground for jurisdiction provided for under s 16(1)(*b*) of the SCJA, which is established by the taking of a step by the defendant that is incompatible with the position that the court does not have jurisdiction: see, for example, *Reputation Administration Service Pte Ltd v Spamhaus Technology Ltd* [2021] 2 SLR 342 at [20(a)].

(B) SERVICE WITHIN THE JURISDICTION

43 Coming then to the statutory reforms, the first area of development saw the gradual dilution of the importance of the defendant's appearance in court. This began with the creation of mechanisms for deeming the defendant's appearance and ultimately ended with the law dropping the pretence and moving away from appearance altogether.

44 Although change occurred incrementally, a wind of change deserving of specific mention is the Frivolous Arrests Act 1725 (c 29) (UK), which allowed a claimant whose cause of action was valued at less than £10 to serve the defendant with a writ and to proceed to enter an appearance on behalf of the defendant if the defendant did not appear within four days of the return date. Thus, while still adhering to the requirement of appearance as a condition for jurisdiction to give judgment, the rule was relaxed in so far as it could be satisfied by a *fiction* of appearance based on an act of the claimant rather than the defendant's actual appearance: *Keeping Up Appearances* at 17–18. It would not escape keen eyes that this was a rudimentary version of the procedure for judgment in default of appearance under the former Rules of Court (2014 Rev Ed) ("ROC 2014") and judgment in default of a notice of intention to contest or not contest under the current ROC 2021.

45 The device of having the claimant enter an appearance for the defendant became further entrenched and was extended in its application up until the early 19th century. Thus, in *Williams v Lord Bagot* (1825) 3 B & C 772, it was held that the court below had erred by declaring judgment before the defendant had appeared or had an appearance entered for him by the claimant (at 788). Four years later, in a report by the Royal Commission whose recommendations led to the Uniformity of Processes Act 1832 (c 39) (UK), the position and the history behind it was summarised as follows (see British Royal Commission, *First Report Made to His Majesty By the Commissioners Appointed to Inquire into the Practice and Proceedings of the Superior Courts of Common Law* (19 February 1829) ("*1829 Report*") at p 70):

> In all Actions it is a fundamental rule that the plaintiff is not permitted to declare till the defendant has appeared. The rule, as so expressed, has reference to that ancient state of practice by which the plaintiff or defendant personally, or by their

> respective attornies, were opposed to each other in open Court, and conducted *viva voce* their altercations. The plaintiff at that period, from an obvious consideration of justice, was not allowed to declare, that is, prefer his claim or complaint, except in presence of his adversary. But the *appearance*, whether of plaintiff or defendant, has for centuries past ceased to be an actual one, and the declaration and all the pleadings are delivered in writing, out of Court, between the parties. The rule above mentioned accordingly imports at the present day no more than this;—that the plaintiff shall not deliver his declaration till by some formal entry or act in Court, (of such kind as the practice of the Court in different cases prescribes,) the defendant has first admitted that he has had sufficient intimation of the suit, and that the plaintiff is consequently in a situation to declare against him; such entry or act on the part of the defendant being called his *appearance*.

It is noteworthy that, despite acknowledging that the requirement of appearance was not "indispensably necessary to the fairness of the judicial proceeding" as it was possible to establish a system without it if its purpose – the protection of defendants by giving them sufficient notice and opportunity to contest claims made against them – could be fulfilled by some other mode, the Commissioners recommended that the institution of appearance be retained as it was a "useful and convenient": *1829 Report* at p 70.

46 The survival of appearance was, however, somewhat short-lived, as it was abolished some two decades later by the Common Law Procedure Act 1852 (c 76) (UK) (the "1852 Act"): *Keeping Up Appearances* at 27. The 1852 Act was, in many respects, a watershed moment that put English law into the position that it stands today. Apart from sounding the death knell for appearance as the touchstone of the court's jurisdiction over a defendant and ushering in service of originating process in its place, the 1852 Act extended the court's jurisdiction to persons outside the territory by making provision for service out of the jurisdiction, which I come to next. But, staying on course for the moment,

the displacement of appearance by service as the touchstone of jurisdiction was achieved, in the main, by the following provisions of the 1852 Act:

(a) Section 2 provided that all personal actions against defendants residing or supposedly residing within the jurisdiction were to be commenced by a writ of summons in the prescribed form.

(b) Section 16 provided that the writ of summons could be served in any county.

(c) Section 26 repealed the provisions in existing legislation relating to the claimant entering appearance on behalf of the defendant (see [44] above). In its place, s 27 introduced the modern apparatus for default judgment, as it provided that in the event of a defendant's non-appearance, the claimant could obtain judgment by default on filing of an affidavit attesting to the service of the writ on the defendant.

(d) Section 32 confirmed that proceedings commenced by writ could continue in default of a defendant's appearance.

(C) SERVICE OUT OF THE JURISDICTION

47 By ss 18 and 19 of the 1852 Act, a claimant could issue a writ for service out of the jurisdiction if the cause of action arose in England or concerned a breach of contract made in England, and could proceed with the action in the event of the defendant's non-appearance upon satisfying a judge by an affidavit confirming, among other things, that the cause of action was a valid one for service out of the jurisdiction and that the writ had been personally served on the defendant or that reasonable steps had been taken to effect personal service.

48 In this way, the 1852 Act represented a paradigm shift in the traditional understanding of the court's jurisdiction. Prior to this, it was well-understood under the common law that a court could only exercise jurisdiction over persons present within the territory: *Gosper v Sawyer* (1985) 160 CLR 549 at 564–565. The common law's insistence on the defendant's appearance in the court room was, in some sense, an extreme instantiation of the territoriality of jurisdiction. Although varying accounts have been given for this, one justification is that the courts were seen as exercising the authority of a sovereign and were thus subject to the same limitation in their jurisdiction as the sovereign in terms of his or her territorial competence: see Mark Leeming, *Authority to Decide: The Law of Jurisdiction in Australia* (Federation Press, 2nd Ed, 2020) ("*Authority to Decide*") at pp 178–182; *Commercial Conflict of Laws* at para 02.005. In turn, a writ, which was seen as an expression of sovereign authority (as noted by the Court of Appeal in *Fortune Hong Kong Trading Ltd v Cosco Feoso (Singapore) Pte Ltd* [2000] 1 SLR(R) 962 ("*Fortune*") at [29]), could only be served on a person within the territory over which the sovereign had dominion (see Adrian Briggs, *Private International Law in English Courts* (Oxford University Press, 2nd Ed, 2023) ("*Private International Law in English Courts*") at p 163):

> The common law rules of jurisdiction, as modified by Parliamentary legislation and by subordinate legislation in the form of Rules of Court or Civil Procedure Rules, drew and still draw a distinction between cases in which the defendant to be sued is physically within the territorial jurisdiction of the court at the point when service of [the] document instituting the proceedings is made and those where he is not … it is sufficient to observe that where the person to be sued was not within the jurisdiction of the court when service was to be made, the right to summon to court was understood to belong to another sovereign, within whose territory the defendant was. For the document instituting the proceedings to be served in such a case was, in some sense, for an English court to reach into the territory of another sovereign and issue a command, which to some minds was something not to be lightly done.

49 The territorial nature of jurisdiction found expression in two maxims. The first was that the "King's writ does not run beyond the sea" or that "the writ does not run beyond the limits of the State": *Laurie v Carroll* (1958) 98 CLR 310 at 322. This embodied the "constitutional principle that the Sovereign's authority, and therefore, the jurisdiction of the Sovereign's Courts, is territorial" and "[p]ersons who are out of the realm of England are out of the sphere of the Sovereign's authority, in so far as it is exercised by his Courts of Law": Francis Taylor Piggott, *Service Out of the Jurisdiction* (Williams Clowes and Sons, 1892) ("*Piggott*") at p xxxvii. As the High Court of Australia observed in *McGlew v The New South Wales Malting Company Ltd* (1918) 25 CLR 416, "[t]he efficacy of the civil process of a Colony was limited by the territorial limits of the Colony, beyond which limits the writs of the Supreme Court were, as it used to be said, mere waste paper" (at 420).

50 The second maxim was the Roman law principle *actor sequitur forum rei*, which roughly translates to the plaintiff having to sue in the jurisdiction in which the defendant is present. This was said by Lord Selborne, delivering the advice of the Privy Council in *Sirdar Gurdyal Singh v The Rajah of Faridkote* [1894] 1 AC 670 (*"Sirdar Gurdyal Singh*"), to be a principle which "lie[s] at the root of all international, and of most domestic, jurisprudence on this matter" (at 683). His Lordship went on to elaborate as follows (at 683–684):

> All jurisdiction is properly territorial, and "extra territorium jus dicenti, impune non paretur." Territorial jurisdiction attaches (with special exceptions) upon all persons either permanently or temporarily resident within the territory while they are within it; but it does not follow them after they have withdrawn from it, and when they are living in another independent country. It exists always as to land within the territory, and it may be exercised over moveables within the territory; and in questions of status or succession governed by domicil, it may exist as to persons domiciled, or who when living were domiciled, within the territory. As between different provinces under one

> sovereignty (e.g., under the Roman Empire) the legislation of the sovereign may distribute and regulate jurisdiction; but no territorial legislation can give jurisdiction which any foreign Court ought to recognise against foreigners, who owe no allegiance or obedience to the Power which so legislates.
>
> In a personal action, to which none of these causes of jurisdiction apply, a decree pronounced in absentem by a foreign Court, to the jurisdiction of which the defendant has not in any way submitted himself, is by international law an absolute nullity. He is under no obligation of any kind to obey it; and it must be regarded as a mere nullity by the Courts of every nation except (when authorized by special local legislation) in the country of the forum by which it was pronounced.
>
> There are doctrines laid down by all the leading authorities on international law … and no exception is made to them, in favour of the exercise of jurisdiction against a defendant not otherwise subject to it, by the Courts of the country in which the cause of action arose, or (in cases of contract) by the Courts of the locus solutionis. In those cases, as well as all others, when the action is personal, the Courts of the country in which a defendant resides have power, and they ought to be resorted to, to do justice.

Subsequently, this statement was cited by Lord Parmoor in *Employers' Liability Assurance Corporation, Ltd v Sedgwick, Collins and Company Ltd* [1927] AC 95 ("*Employers' Liability*") for the proposition that "the right to serve a writ, in an action in personam, on a foreign defendant, only becomes effective, as a source of jurisdiction, to be recognized in other countries when, at the date of service, such defendant is within the territorial jurisdiction of the English courts" (at 114–115).

51 The proposition stated by Lord Parmoor has been watered down as far as an English court's view of the limits of its own jurisdiction is concerned, as statutory provision has been made since the 1852 Act for service of originating process on persons outside the jurisdiction as an effective means of establishing the court's jurisdiction over such persons. However, it does remain an accurate

statement of how most *foreign* courts, at least those in the common law tradition, would view the limits of the English court's jurisdiction, which is strictly what Lord Parmoor and Lord Selborne were concerned with in *Employers' Liability* and *Sirdar Gurdyal Singh* respectively. This is because it is well-established that it is the defendant's presence in the jurisdiction, rather than service of originating process, that would establish a court's (international) jurisdiction to give a judgment *in personam* against a defendant that would be recognised and enforced in another jurisdiction: *Rubin v Eurofinance SA* [2013] 1 AC 236 at [7]; Rule 47 of *Dicey (16th Ed)* at para 14R-045; see, for the similar position in Singapore, *Giant Light Metal Technology (Kunshan) Co Ltd v Aksa Far East Pte Ltd* [2014] 2 SLR 545 at [13]–[17]. In *Adams v Cape Industries Plc* [1990] 1 Ch 433 ("*Adams*"), the English Court of Appeal summarised the position thus (at 519A–C):

> … we would, on the basis of the authorities referred to above, regard the source of the territorial jurisdiction of the court of a foreign country to summon a defendant to appear before it as being his obligation for the time being to abide by its laws and accept the jurisdiction of its courts while present in its territory. So long as he remains physically present in that country, he has the benefit of its laws, and must take the rough with the smooth, by accepting his amenability to the process of its courts. In the absence of authority compelling a contrary conclusion, we would conclude that the voluntary presence of an individual in a foreign country, whether permanent or temporary and whether or not accompanied by residence, is sufficient to give the courts of that country territorial jurisdiction over him under our rules of private international law.

In my view, the fact that the common law to this day recognises presence, and not service, as a basis for the court's jurisdiction to give a judgment *in personam* against a defendant stands as tangible proof of the territorial nature of the court's jurisdiction.

52 It is, however, open to every sovereign to extend its jurisdiction beyond that which will be seen as legitimate and given effect to by other jurisdictions through what Lord Selborne referred to in *Sirdar Gurdyal Singh* as "special local legislation" (see [50] above). Sections 18 and 19 of the 1852 Act were provisions in that light. As one commentator has explained, "a rule of the common law may be changed by the sovereign through his legislature", and "[t]he courts would be obliged to obey the legislature … but they would obey under protest, aware that their action would receive no recognition from any other country": Joseph H Beale, "The Jurisdiction of A Sovereign State" (1923) 36 Harv L Rev 241 ("*The Jurisdiction of A Sovereign State*") at 242–243. Accordingly, while an English court may regard itself competent to give judgment against a defendant who is not present in the jurisdiction based on the rules for service out of the jurisdiction, whether such a judgment would be recognised and enforced in other jurisdiction is a different matter. Put a different way, the court's international jurisdiction (*ie*, jurisdiction that will be recognised by other sovereign states) is not necessarily of the same scope as its domestic jurisdiction (*ie*, jurisdiction under its own law): *The Jurisdiction of A Sovereign State* at 244; Clive M Schmitthoff, *A Textbook of the English Conflict of Laws* (Sir Issac Pitman & Sons, 2nd Ed, 1948) ("*Schmitthoff*") at p 379; *Schibsby v Westenholz* (1870) LR 6 QB 155 at 159–160.

53 Thus, ss 18 and 19 of the 1852 Act extended the jurisdiction of the English courts to defendants outside the territory. These provisions paved the way, after the subsequent unification of the common law and equity courts by the Supreme Court of Judicature Act 1873 (c 66) (UK) and Supreme Court of Judicature Act 1875 (c 77) (UK), for the introduction into English law of the rules for service out of the jurisdiction under Order XI of the English Rules of the Supreme Court 1883 (SI 1883 No 5009) (UK) ("RSC 1883 (UK)"), the

ancestor to the English Civil Procedure Rules 1998 (SI 1998 No 3132) ("CPR (UK)") and the former O 11 of the ROC 2014 and the current O 8 of the ROC 2021. The rules, broadly speaking, allowed for service out of the jurisdiction if the permission of the court was obtained upon satisfying certain conditions that continue to be applied today. It should not be lost sight of, however, that the enactment of such rules was as an *exception* to the general rule of territoriality rather than a wholesale abrogation of it, and indeed, the courts often emphasised this: see the *dicta* collected in Lawrence Collins, "Some Aspects of Service Out of the Jurisdiction in English Law" in *Essays in International Litigation and the Conflict of Laws* (Oxford University Press, 1994) at pp 227–230. Some choice expressions of caution include:

(a) *Société Générale de Paris v Dreyfus Brothers* (1885) 29 Ch D 239, where Pearson J said (at 242–243):

> [I]t becomes a very serious question, and ought always to be considered a very serious question, whether or not … it is necessary for the jurisdiction of the Court to be invoked, and whether this Court ought to put a foreigner, who owes no allegiance here, to the inconvenience and annoyance of being brought to contest his rights in this country, and I for one say, most distinctly, that I think this Court ought to be exceedingly careful before it allows a writ to be served out of the jurisdiction.

(b) *In re Busfield* (1886) 32 Ch D 123, where Cotton LJ stated that "[s]ervice out of the jurisdiction is an interference with the ordinary course of the law, for generally Courts exercise jurisdiction only over persons who are within the territorial limits of their jurisdiction" (at 131).

(c) *McDonald v Mabee* 243 US 90 (1917), where Holmes J said (at 91):

> The foundation of jurisdiction is physical power, although in civilized times it is not necessary to maintain that power throughout proceedings properly begun, and although submission to the jurisdiction may take the place of service upon that person. No doubt there may be some extension of the means of acquiring jurisdiction beyond service or appearance, but the foundation should be borne in mind.

(d) *Johnson v Taylor Bros & Company, Ltd* [1920] AC 144, where Viscount Haldane stated that Order XI of the RSC 1883 (UK) "does not lay down in imperative terms a new principle of law as to be applicable in all cases" as it "leav[es] intact the old principle that by the law of England jurisdiction depends, broadly speaking, on presence within the jurisdiction" while "enabl[ing] the Court to give special leave for service out of the jurisdiction in certain circumstances" (at 153). Lord Dunedin said, to similar effect, that while "English law does not feel bound by the Roman maxim 'Actor sequitur forum rei'" as jurisdiction is based on service, "service naturally and normally would be service within the jurisdiction", although "there is an exception to this normal rule, and that is service out of the jurisdiction" (at 154).

54 These statements make the point that, despite the statutory extension of the court's jurisdiction beyond the territory, it has always been that the court's jurisdiction is limited in the first place to persons present in the territory. This was encapsulated in a distinction drawn between: (a) "the original jurisdiction which the courts exercise at common law" based on the two principles of presence and submission; and (b) "the assumed jurisdiction which was conferred upon the Courts by the [1852 Act] and is now exercised by virtue of Order 11 of [RSC 1883 (UK)] which are issued by authority of the Judicature Act": *Schmitthoff* at pp 387–398. This largely corresponds to the aforesaid

distinction between the court's international jurisdiction that will be recognised by other jurisdictions and its jurisdiction under domestic law (see [52] above).

55 A clear summary of the position after the introduction of the regime for service out of the jurisdiction, and which makes clear that the relevant distinction is the defendant's presence within or outside the territory, can be found in an earlier edition of *Dicey (16th Ed)*. At the turn of the 20th century, the law on jurisdiction established by service was neatly restated as Rules 45 and 46 in A V Dicey*, A Digest of the Law of England With Reference to the Conflict of Laws* (Stevens & Sons, 2nd Ed, 1908) ("*Dicey (2nd Ed)*") (at pp 217 and 222):

> Rule 45. — When the defendant in an action *in personam* is, at the time for the service of the writ, in England, the Court has jurisdiction in respect of any cause of action, in whatever country such cause of action arises.
>
> Rule 46. — When the defendant in an action *in personam* is, at the time for the service of the writ, not in England, the Court has (subject to the exceptions hereinafter mentioned) no jurisdiction to entertain the action.

The "exceptions" referred to in Rule 46 were the provisions for service out of the jurisdiction under Order XI of the RSC 1883 (UK). The text also explained that the effect of the RSC 1883 (UK) was to modify the common law position that "a writ could never be served on a defendant when out of England" and the general rule that "the Court has … no jurisdiction to entertain an action *in personam* against a defendant who, at the time for service of the writ, is in a foreign country": see *Dicey (2nd Ed)* at p 223.

(D) THE SIGNIFICANCE OF THE DEFENDANT'S PRESENCE IN THE JURISDICTION

56 It is unnecessary to trace the further development of the rules for service out of jurisdiction under English law as changes since the RSC 1883 (UK) have generally been supplementary rather than revolutionary. It suffices to say that Rules 45 and 46 in *Dicey (2nd Ed)* have been substantially retained in the current edition of *Dicey (16th Ed)* (at paras 11R-001, 11R-037 and 11R-097):

> Rule 31—The court has jurisdiction to entertain a claim in personam if, and only if, the defendant is served with process in England or abroad in the circumstances authorised by, and in the manner prescribed by, statute or statutory order.
>
> Rule 32—The court has jurisdiction … to entertain a claim in personam against a defendant who is present in England and duly served there with process.
>
> Rule 35—The court has jurisdiction to entertain a claim in personam against a defendant … who is not in England at the time for the service of process whenever it assumes jurisdiction in any of the cases mentioned in this Rule.

Although Rule 35 above does not make a clear reference to service out of the jurisdiction, the commentary that follows it explains that that is the basis on which the English court "assumes jurisdiction" over a defendant. Indeed, the commentary on Rule 35 in *Dicey (16th Ed)* tracks the commentary on Rule 46 in *Dicey (2nd Ed)* which I have referred to at [55] above, as it makes the same point that jurisdiction over defendants outside the territory is based on statutory reform of the common law position (see *Dicey (16th Ed)* at para 11-098):

> If the defendant is not in England and served there with process and does not submit to the jurisdiction, the court has no jurisdiction at common law to entertain a claim in personam against it. But this common law principle was modified, first by ss. 18 and 19 of the [1852 Act], and later by [Order XI of the RSC 1883 (UK)]. Rule 6.20 of the Civil Procedure Rules replaced [Order XI of the RSC 1883 (UK)] in 2000. Today, the only Rule is [CPR (UK)], r.6.36, which provides that in any proceedings to which Rule 6.32 or Rule 6.33 do not apply the claimant may serve a claim form out of the jurisdiction with the permission of

> the court if any of the grounds set out in para.3.1 of PD6B apply. Under these gateways, the court has a discretionary power in a number of cases … to permit service of process on a defendant irrespective of nationality who is out of England.

57 The modern jurisprudence of the English courts has also continued to emphasise that the court's jurisdiction is generally territorial and the importance of the defendant's presence in the jurisdiction. Two categories of cases are worth noting. The first category, which I address only briefly, consists of cases in which the court's jurisdiction has been held to be established over a defendant who was served with originating process despite only being present in the jurisdiction for a transient period of time: *Colt Industries Inc v Sarlie* [1966] 1 WLR 440 ("*Colt Industries*"); *HRH Maharanee Seethadevi Gaekwar of Baroda v Wildenstein* [1972] 2 QB 283 ("*Maharanee*"). These cases confirm the territoriality of jurisdiction, and the defendant's presence in the territory as a basis for the court's jurisdiction over him or her, as it has been held that the duration that the defendant is in the territory for is "wholly immaterial" so long as he or she *is* here at the time of service: *Colt Industries* at 443–445.

58 Thus, in *Maharanee*, the claimant issued a writ in the English courts and served it on the defendant at the racecourse a year later when the defendant had come over from France to attend the Ascot horseraces. The defendant applied to set aside the writ and service. Although he was successful at first instance, the English Court of Appeal held that he had been properly served and the claimant had thus validly invoked the jurisdiction of the English courts. Lord Denning MR said (at 291):

> In this case the writ has been properly served on the defendant in this country. This makes the case very different from those in which the defendant is in a foreign country and the plaintiff has to seek leave to serve him out of the jurisdiction.

Similarly, Edmund Davies LJ (as he then was) said that the claimant "did no wrong in taking out a High Court writ … and serving it here at the first available opportunity upon the defendant", as "[b]oth in taking it out and serving it (albeit when the defendant was only fleetingly on British soil) she was doing no more than our law permits, even though it may have ruined his day at the races" (at 294).

59 The second category of case involves the converse situation: where the claimant seeks to serve the defendant in the jurisdiction when the defendant is not present in the jurisdiction. This warrants closer attention as it directly tests the proposition, which lies at the heart of the question at hand, that a defendant who is not present in the jurisdiction must generally be served based on the rules for service out of the jurisdiction. It will be seen from the survey of the case law below that, while this proposition has at times come under doubt, there is now a consensus that it is correct.

60 The proposition above was first articulated by Lawrence Collins J (as he then was) in *Chellaram v Chellaram (No 2)* [2002] 3 All ER 17 ("*Chellaram*"). Lawrence Collins J is, of course, an esteemed authority on private international law who lends his name to the leading treatise on the topic in *Dicey (16th Ed)*. His Lordship said that (at [47]):

> … it has always been, and remains, a fundamental rule of English procedure and jurisdiction that a defendant may be served with originating process within the jurisdiction only if he is present in the jurisdiction at the time of service, or deemed service.

61 In *Chellaram*, the claimants had sought to serve the defendant with a claim form and particulars of claim under provisions of the CPR (UK) which permitted service by first-class post at the "usual or last known residence" of an

individual defendant and which deemed service to occur on the second day (excluding weekends and public holidays) after it was posted. The claim form and particulars of claim were sent to the defendant's address in London on 7 June 2001 and service was therefore deemed to occur on 11 June 2001 (9 and 10 June being the weekend). The defendant was out of the jurisdiction during this time – he was in Hong Kong until 9 June 2001 and in Bombay from 10-16 June 2001 (at [36]–[38]). On these facts, Lawrence Collins J held that the defendant had not been validly served for two reasons (at [47]). The first, which is less pertinent, was that his Lordship was not satisfied that the London address was even the defendant's "last known residence" as the defendant had only used it occasionally on the rare occasions that he visited London. The second reason, which is the material point, was that, in any event, the defendant could not be served within the jurisdiction as he was not present at the time of service.

62 Lawrence Collins J referred to the House of Lords' decision in *Barclays Bank of Swaziland Ltd v Hahn* [1989] 1 WLR 507 ("*Barclays Bank*"). The essential facts of *Barclays Bank* were not dissimilar to those of *Chellaram*. The plaintiff had sought to serve a writ on the defendant under O 10 r 1(2)(*b*) of the Rules of the Supreme Court which provided that, as an alternative to personal service, a writ could be served by inserting a copy of it through a letter box at the defendant's "usual or last known address", following which service would be deemed to have occurred seven days later if the writ had come to the attention of the defendant. The defendant, who was not present in the jurisdiction at the exact time when a copy of the writ was inserted through his letter box but touched down at Heathrow airport about two hours later on the same day, argued that he had not been validly served. It was clear from the defendant's refusal to return home – as he stayed at a hotel – and his departure on at outbound flight the next day that he had been aware of the service of the writ.

63 The House of Lords held that the service on the defendant was valid. It affirmed the proposition that "the defendant must be within the jurisdiction at the time when the writ is served" and rejected the claimants' argument that the defendant's presence within the jurisdiction was not necessary as it sufficed that the writ was served at a place within the jurisdiction (at 510). Lord Brightman, with whom the other members of the House agreed, considered that this would "outflank Order 11 (relating to service of process outside the jurisdiction)" (at 511). But, to justify the validity of the service on the defendant, his Lordship took an expansive view of the relevant time that the defendant had to be present in the jurisdiction, as he held that it was enough that the defendant was present in the jurisdiction on the day of service (rather than down to the exact second of service) and had acquired knowledge of the writ (at 511–512).

64 However, the fundamental rule stated in *Chellaram* was subsequently doubted by the English Court of Appeal in *City & Country Properties Ltd v Kamali* [2007] 1 WLR 1219 ("*Kamali*"). There, the claimant landlord had served the defendant tenant, who had absconded while in default of rent, by posting a claim form to the defendant's business address in England. After the defendant failed to respond, the claimant proceeded to enter default judgment. The defendant applied to set aside the judgment on the basis that he had not been properly served as he had been, and was known by the claimant to have been, outside the jurisdiction when the claim form had been served.

65 Surprisingly, the English Court of Appeal held that the service on the defendant was valid. In so doing, it cast doubt on the principle in *Chellaram* and distinguished *Barclays Bank* on the basis that it had been decided based on a different civil procedure regime than the CPR (UK). The strongest repudiation of the principle was delivered by May LJ, who said that Lawrence Collins J had

erred "both intrinsically and [as a matter of authority]" (at [1]). Neuberger LJ (as he then was) was more measured, as he acknowledged that "the principle relied on by Lawrence Collins J … deserves respect and serious consideration" given the judge's eminence in this field (at [19]), but his Lordship ultimately echoed May LJ's view that the principle in *Chellaram* was no longer good law under the CPR (UK) (at [32]–[33]). The final member of the court, Wilson LJ (as he then was), agreed with both May LJ and Neuberger LJ, and added that he did not think that it was right that the "inquiry into the validity of service of the claim form should depend upon where the defendant turns out to have happened to be present on the day of [service]" (at [35]).

66 *Kamali* was swiftly subjected to trenchant criticism by Professor Briggs, who said that it "called for nothing original or profound [but] a straightforward application of orthodox principle", and had somehow "go[ne] awry" and was "bound to produce uncertainty and trouble": see Adrian Briggs, "Decisions of British Courts in 2007" (2007) 78 BYIL 588 at 601–606. The following commentary is insightful (at 602):

> If the decision in *Kamali* is taken to have been correctly reasoned, it will circumvent a very substantial part of the law on service out of the jurisdiction with leave of the court. *If it is taken that service out of the jurisdiction invokes a jurisdiction properly regarded as exorbitant, it is most unwelcome to discover that it can be outflanked by a form of service within the jurisdiction on someone who was not there. … The proposition that the tenant had been served within the jurisdiction was indeed a pretence, and it was extraordinary that the court considered service to have been effectively made thereby.* No doubt it was aware that if permission to serve out had been sought it would certainly have been granted, for the claim concerned the rent of commercial premises in Middlesex; and to set aside the judgment and service would have been an empty formality. … Perhaps also it took the view that the tenant was taking a point which was devoid of substantial merit: he had not paid his rent, and what else was there to argue about? … But the case holds that service out of the jurisdiction may not

> be necessary even though the defendant is out of the jurisdiction for the whole of the period from the issue of the claim form to the date on which its validity for service expires. [emphasis added]

It is clear that Professor Briggs' criticism echoed Lord Brightman's discomfort in *Barclays Bank* with the possibility that a defendant outside the jurisdiction could be served within the jurisdiction in a way that "outflanked" the rules for service out of the jurisdiction (see [63] above). As Professor Briggs has commented more recently, "[t]he idea that a document can be served within the jurisdiction when the defendant is out of the jurisdiction is not one which needs to be encouraged", and "the serious issue of jurisdiction over a defendant should be separated from the procedural, administrative, question of how a document should be served": *Private International Law in English Courts* at p 165. What defines service within the jurisdiction is not the location where the writ is posted to but the location of the defendant.

67 Indeed, before a recent decision that grasped the nettle and declared *Kamali* to be wrongly decided, which I come to shortly, it could be seen from decisions following in the wake of *Kamali* that the there was a clear discomfort with it, and attempts were made to confine it and to resuscitate the principle that had been articulated by Lawrence Collins J in *Chellaram*.

68 In *SSL International plc v TTK LIG Ltd* [2012] 1 WLR 1842 ("*SSL International*"), the English Court of Appeal held that a defendant company which did not have any presence in the jurisdiction could not be validly served by personal service of the claim form on its director. In so holding, the court affirmed the requirement that the defendant must be present in the jurisdiction to be amenable to service within it. *Kamali* was distinguished on the ground that the defendant there had clearly carried on business and presumably resided in

the country, such that he was "by reason of his business if not his residence, subject to the jurisdiction" and his *temporary absence* from the jurisdiction did not change this (at [56]–[57]). What was striking, however, was that despite saying that he "entirely agree[d]" with *Kamali*, Stanley Burnton LJ tried to reconcile it with what Lawrence Collins J had said in *Chellaram* (at [57]):

> It is a general principle of the common law that absent specific provision (as in the rules for service out of the jurisdiction) the courts only exercise jurisdiction against those subject to, i e within, the jurisdiction. Temporary absence, for instance on holiday, does not result in a person not being subject to the jurisdiction. In my judgment, Lawrence Collins J's statement of principle in [*Chellaram*] was correct if read with that qualification, and was not inconsistent with the decision in [*Kamali*].

It is clear, despite his Lordship's diplomacy, that Stanley Burnton LJ had turned *Kamali* from a repudiation of the principle in *Chellaram* to a qualification of it. The court in *Kamali* had stated that *Chellaram* was wrong and not that it was merely inaccurate and could be saved by an appropriate qualification. Indeed, in *Clavis Liberty Fund 1 LP v Revenue and Customs Commissioners* [2015] 1 WLR 2949, Warren J acknowledged that he was bound by the rationalisation of *Kamali* in *SSL International*, but commented that there was "a tension between the reasoning of May LJ … in [*Kamali*] and the reinstatement … of the fundamental principle stated in *Chellaram* [in *SSL International*]" (at [31]).

69 In a stroke of fortune, after I had given my decision and in the course of preparing these grounds, the English Court of Appeal squarely confronted the issue of whether a defendant's presence in the jurisdiction was a necessary condition for service within the jurisdiction in *Fridman v Agrofirma Oniks LLC* [2026] EWCA Civ 139 ("*Fridman*"). In a comprehensive analysis, Lewison LJ, with whom Phillips LJ and Sir Launcelot Henderson agreed, decided that the

principle in *Chellaram* was indeed correct (at [77]). His Lordship held that the principle that "a person may only be served with process in England and Wales if he is present in England and Wales is not a mere matter of procedure" but a rule "found within international law and the principle of territoriality" (at [72]). Since it was not a procedural rule but a jurisdictional one, the court in *Kamali* was wrong to hold that it had been superseded by the CPR (UK), and *Kamali* was said to have been wrongly decided on the basis that it was inconsistent with the binding authority of the House of Lords' decision in *Barclays Bank* (at [76]).

70 In *Fridman*, the issue was whether the defendant, a Russian oligarch who had been sanctioned and thus denied entry into the United Kingdom, had been validly served by the posting of a claim form to his address in London. In the court below, it was held that the service was valid as the judge was satisfied that the defendant had not ceased to be *resident* within the jurisdiction despite the ban and the court was therefore entitled to exercise jurisdiction over him.

71 The English Court of Appeal held that the judge had misdirected himself on the law as "it is presence, not residence, which is the touchstone" (at [24]). Thus, on the facts, it was "legally irrelevant" that the defendant could be said to be resident in England. Furthermore, while the court accepted the qualification in *SSL International* that "temporary absence would not negate presence for the purposes of jurisdiction", it held on the facts that the defendant could not be said to be merely temporarily absent from the jurisdiction as: (a) his absence was not voluntarily; and (b) even though the defendant had professed an intention to return to his London address, his absence was the result of an enforced and indefinite removal from the United Kingdom that placed the possibility of return outside his control (at [79]–[94]). Accordingly, as the defendant was not present in the jurisdiction, he could not be served there and the claimants would be

required to serve him out of the jurisdiction by obtaining the necessary permission to do so, subject to the possibility of applying thereafter for service by an alternative method at the London address (at [95]).

72 *Fridman* neatly caps off the tracing of the development of English law. To summarise, the difference between service within the jurisdiction and service out of the jurisdiction is the defendant's presence within the jurisdiction. The exercise above demonstrates that the law has always seen the court's jurisdiction as tied to the defendant's presence in the jurisdiction – initially, within the court room itself, and subsequently, anywhere in the territory. Indeed, this is reflected in how the common law continues to recognise the defendant's presence in the jurisdiction as a factor that renders a foreign court competent to give a judgment *in personam* against the defendant that will be recognised and enforced in other states. This general rule has, however, been modified on the domestic front by legislation since the 1852 Act that has authorised service on persons outside the jurisdiction. However, this remains an exception to the norm, as seen in how a claimant cannot serve a person outside the jurisdiction as of right but must obtain a right to do so from the court by applying for permission under the rules for service out of the jurisdiction. Those rules, as cases like *Chellaram*, *Barclays Bank* and *Fridman* demonstrate, cannot be circumvented just because the mode of service involves an act taking place within the jurisdiction.

(3) The current legal framework in Singapore

(A) THE JURISDICTIONAL SCHEME UNDER S 16(1)(*A*) OF THE SCJA

73 I return to consider the statutory framework under Singapore law. In my judgment, seeing as s 16(1)(*a*) of the SCJA was intended to mirror the structure of the English courts' *in personam* jurisdiction (see [35] above), it is clear that

jurisdiction by service of originating process "in Singapore" and "outside Singapore" under ss 16(1)(*a*)(i) and 16(1)(*a*)(ii) of the SCJA depend on the defendant's presence in or outside Singapore:

> (a) Section 16(1)(*a*)(i) refers to the court's jurisdiction over a defendant who is present in Singapore at the time originating process is served on him or her. Its roots lie in the common law's requirement of appearance that was later relaxed by statute to the defendant's presence in the jurisdiction at the time of service.
>
> (b) Section 16(1)(*a*)(ii) refers to the court's jurisdiction over a defendant who is outside Singapore at the time originating process is served on him or her based on the rules for service out of the jurisdiction. Its roots lie in ss 18 and 19 of the 1852 Act and Order XI of the RSC 1883 (UK) which the former O 11 of the ROC 2014 and the current O 8 of the ROC 2021 are modern descendants of.

74 It follows that if the defendant is not present in Singapore at the time of service, a claimant that seeks to establish the jurisdiction of the court over the defendant by service must proceed under s 16(1)(*a*)(ii) of the SCJA and the rules for service out of the jurisdiction under O 8 of the ROC 2021.

(B) THE ROC 2021

75 This leads me to the subsidiary legislation under the ROC 2021 which, in my view, do not speak to a different conclusion. It is obvious that the structure of the rules mirrors the two limbs of s 16(1)(*a*): Order 7 is titled "Service in Singapore" and corresponds to s 16(1)(*a*)(i) of the SCJA, whereas Order 8 is titled "Service Out of Singapore" and maps to 16(1)(*a*)(ii) of the SCJA. This

linkage means that if the defendant is outside the jurisdiction, he or she must be served under the regime for service out of the jurisdiction under O 8 of the ROC 2021, upon which jurisdiction will be established under s 16(1)(*a*)(ii) of the SCJA. An attempt at service on a defendant who is not present in the jurisdiction outside of O 8 of the ROC 2021 would be irregular and liable to be set aside as it would constitute a flawed invocation of the court's jurisdiction that does not satisfy either limb of s 16(1)(*a*) of the SCJA.

76 Indeed, my understanding of the legal framework is consistent with how the Court of Appeal saw things in *Burgundy Global Exploration Corp v Transocean Offshore International Ventures Ltd* [2014] 3 SLR 381 ("*Burgundy*") at [93]:

> … in our judgment, *service* is the crucial act that engages the court's jurisdiction over a foreign person. As a matter of Singapore law, personal jurisdiction may be found when the putative defendant is physically within the jurisdiction at the time the writ is served on him (see s 16(1) of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed)) or when the requirements stipulated in O 11 of the ROC [2014] have been met and leave has been given for a writ to be served on a defendant not physically within the confines of Singapore. [emphasis in original]

I will examine this passage again below, but it suffices to say here that the Court of Appeal's definition of a "foreign person" who would have to be served based on the rules for service out of the jurisdiction – formerly under O 11 of the ROC 2014 and now under O 8 of the ROC 2021 – was a person that is "not physically within the confines of Singapore". This is wholly consistent with my conclusion that the touchstone distinguishing service within and out of the jurisdiction is the defendant's presence in Singapore at the time of service.

77 To further make good this claim, I come to the specific rules and sub-rules of O 7 and O 8 of the ROC 2021. In my judgment, there is nothing in either O 7 or O 8 that suggests that the application of the two Orders is subject to a touchstone other than the defendant's presence in Singapore.

78 The general rule is that originating process must be served by personal service: O 6 r 4 of the ROC 2021. Personal service is defined under O 7 r 2(1)(*a*) of the ROC 2021 in the case of a natural person defendant as the leaving of a copy of the document to be served with: (a) the defendant; or (b) the defendant's agent if the defendant is an overseas principal under O 7 r 4. The first of these is obviously consistent with the principle that a defendant must be present in the jurisdiction to be served within it. I need say nothing further about it.

79 The second mode of personal service under O 7 r 4 is trickier as it might suggest, on first impression, that service within the jurisdiction under O 7 is possible in the case of a defendant – an "overseas principal" – who is not present within the jurisdiction. But the better view is that it does not. As I explain below, what O 7 r 4 does is to deem the defendant to be present in Singapore by virtue of his or her agent's presence here. It is thus an application, or perhaps more accurately, an extension, of the principles of the law of agency which attribute to a principal the acts and/or mental state of his or her agent. Indeed, this is reflected in how the requirements for service under O 7 r 4 – which requires an application to court – are focused on the scope of the agent's authority in respect of the principal's affairs: see O 7 rr 4(1)(*b*) and 4(1)(*c*) of the ROC 2021. Seen in this light, O 7 r 4 is consistent with the general rule that a defendant can only be served within the jurisdiction if he or she is present in it, save that the concept of presence is understood in a broader sense so as to encompass not only (actual) physical presence but constructive presence through an agent.

80 The proposition that a defendant can be present in the jurisdiction through an agent so as to be amenable to service within the jurisdiction through the agent is well-established and has been recognised for over a century. Cases of this kind form the context against which O 7 r 4 of the ROC 2021 should be seen and I thus start there.

81 *The Tharsis Sulphur and Copper Company (Ltd) v La Société des Métaux* (1889) 58 LJQB 435 ("*Tharsis Sulphur*") is an example. The claimant, an English company, entered into a contract with the defendant, a French company, under which the defendant appointed an agent in London "on whom any writ or other legal process in respect of any matter arising out of this contract may be served". After the claimant served a writ on the agent, the defendant applied to set aside service on the basis that it should have been served out of the jurisdiction under Order XI of the RSC 1883 (UK) (at 436). The court disagreed and held that service on the defendant's agent was good service. Field J, with whom Lord Coleridge CJ agreed, said that it was open to the parties to agree to appoint an agent in England to accept service (at 438). Although Field J did not refer to Order XI of the RSC 1883 (UK), it is clear from his decision that he did not accept the defendant's argument that it should have been served under Order XI. The logical corollary of this is that the defendant was present in the jurisdiction through its agent so as to be amenable to service there without need for recourse to the rules for service out of the jurisdiction under Order XI.

82 The same conclusion was reached by the English Court of Appeal in *Montgomery, Jones & Co v Liebenthal & Co* [1898] 1 QB 487 ("*Montgomery*"). The contract between the claimant, an English company, and the defendant, a Scottish company, provided that, for the purposes of any legal proceedings arising out of the contract, the defendant should be served by "leaving the [writ]

at the office of the London Corn Trade Association" and posting a copy to the defendant in Scotland. The claimant issued a writ to enforce an arbitral award and served it in the manner provided for in the contract. The defendant's application to set aside the service of the writ was dismissed. The headnote of the law report summarises the proposition on which the court's decision is based as follows (at 487):

> An agreement by a person domiciled or ordinarily resident in Scotland, that a writ for breach of contract may be served by leaving it with an agent in England, appointed by him to accept service, is valid, and service upon the agent is good service on the defendant.

83 The court considered that *Tharsis Sulphur* was on all fours with the case before it and it therefore fell to be decided in the same way. The law report also records that the defendant had argued that the service on it was bad because: (a) it should have been served out of the jurisdiction based on Order XI of the RSC 1883 (UK); and (b) such service was not possible because Order XI, r 1(*e*) of the RSC 1883 (UK) precluded service out of the jurisdiction if the defendant was domiciled or ordinarily resident in Scotland: *Montgomery* at 489. In this connection, the defendant sought to distinguish *Tharsis Sulphur* and rely instead on *The British Wagon Company, Ltd v Gray* [1896] 1 QB 35 ("*British Wagon*") where the court had held that the claimant was not entitled to serve the defendant (a Scottish company) out of the jurisdiction under Order XI of the RSC 1883 (UK) even though the contract between them had expressly provided for this as "[t]he parties had no power to contract that the Court should have a jurisdiction which is forbidden by the rules": *British Wagon* at 37. In response, the claimant in *Montgomery* submitted that Order XI, r 1(*e*) did not apply, and *British Wagon* was not applicable, as the defendant had been served through an agent in England: *Montgomery* at 490.

84 While the court did not expressly reason that the defendant was within the jurisdiction by reason of its agent's presence, this is implicit in its acceptance of the claimant's argument that *British Wagon* was distinguishable as a case that had been concerned with service out of the jurisdiction under Order XI of the RSC 1883 (UK): *Montgomery* at 491 and 493. This means that, much like *Tharsis Sulphur*, the decision in *Montgomery* was arrived at on the premise that the defendant was within the jurisdiction through its agent such that it was not necessary for it to be served out of the jurisdiction under Order XI. As explained at [79] above, this can be rationalised on the basis that the defendant is deemed to be present in the jurisdiction through its agent: *Private International Law in English Courts* at p 164 ("Service within the jurisdiction will be considered to have been made by serving on someone within the jurisdiction whom the defendant has authorized to accept service").

85 This is confirmed by the decision of the House of Lords in the *Employers' Liability* case which I have referred to earlier at [50] above. An issue arose there as to the validity of service on a Russian insurance company ("Rossia Co") which had nominated a representative, one Mr Collins, to accept service on its behalf pursuant to the requirement under companies legislation that a foreign company file on the register the name of a person authorised to accept service of process on its behalf. Lord Parmoor reasoned that Rossia Co had been validly served as it was "for the purpose of the service of a writ, within the jurisdiction of the English courts, when the writ in question was served" given Mr Collins' authority to accept service on its behalf (at 115).

86 To establish the defendant's presence in the jurisdiction based on agency law principles, it is necessary that the agent be clothed with authority from the defendant to accept service. This is because agency only operates as a basis for

attributing an act of an agent to his or her principal to the extent that the principal has authorised the agent to do that act, although this authorisation can either be as between the agent and principal (actual authority) or as between the principal and a third party who relies on a representation by the principal as to the agent's authority (apparent authority): *Bowstead and Reynolds on Agency* (Peter Watts gen ed) (Sweet & Maxwell, 23rd Ed, 2024) at para 8-025. Either way, it is the principal's agreement to be served through the agent that allows the principal to be deemed present in the jurisdiction and served there on account of the agent's presence in the jurisdiction. So, if the defendant has not authorised another person to accept service or made any representation to the claimant that that person has authority to accept service on his or her behalf, service on that person will not be properly effected on the defendant: see, for example, *Cherney v Deripaska* [2007] 2 All ER (Comm) 785 at [52].

87 The practice of accepting service through solicitors are a ubiquitous example of how agency law principles are applied to establish the defendant's presence in the jurisdiction for the purposes of service. The starting point is that a defendant who is outside Singapore is entitled to require service to be made in accordance with the rules for service out of the jurisdiction even if he or she has solicitors here: *Civil Jurisdiction and Judgments* at para 5.03. Indeed, this is so even if the defendant has instructed solicitors to act in the specific matter because even a solicitor who is acting for his client in all respects in relation to a matter does not have implied authority to accept service of originating process on the client's behalf: *Personal Management Solutions Ltd v Gee 7 Group Ltd* [2016] EWHC 891 (Ch) at [27]. A defendant is under no obligation to make life easy for the claimant or to help the claimant effect service on him or her, for example, by appointing solicitors to accept service: *Al-Zahra (PVT) Hospital v DDM* [2019] EWCA Civ 1103 at [93]; *Wragg v Opel Automobile GmbH* [2024]

EWHC 1138 (KB) at [37]; *Broom v Aguilar* [2024] EWHC 1764 (Ch) ("*Broom v Aguilar (No 1)*") at [103].

88 Hence, unless the defendant's solicitors are authorised in the sense of having either actual or apparent authority to accept service on the defendant's behalf, it will not be possible to serve the defendant as if he or she is present in Singapore as the solicitors' presence here will not be attributed to the defendant: see, by analogy, *Malayan Banking Bhd v Zhang Zhencheng* [2025] 1 SLR 1225 at [18], where the issue was framed in terms of whether the respondent's solicitors "had the respondent's instruction to accept service on behalf of the respondent …". But, if the defendant's solicitors *are* authorised to accept service, then service on the solicitors would be good service on the defendant even if the defendant is outside Singapore: *Shanghai Turbo Enterprises Ltd v Liu Ming* [2019] 1 SLR 779 at [24]. And since the question is ultimately one of the solicitors' authority, it is possible for the solicitors' authority to be subject to the qualification that the defendant remains free to challenge the jurisdiction of the court as if he or she had been served out of the jurisdiction: *Sphere Drake Insurance Plc v Gunes Sigorta Anonim Sirketi* [1988] 1 Lloyd's Rep 139 at 143. The position of solicitors thus demonstrates that, for service on an agent in the jurisdiction to be deemed service on the agent's principal in the jurisdiction based on agency law principles, the agent must be acting with the principal's authority when accepting service.

89 Against this backdrop, I come back to O 7 r 4 of the ROC 2021. In my judgment, what O 7 r 4 does is to modify and/or supplement the general law of agency by allowing the court to serve as an alternate source of authority for an agent to accept service on behalf of his or her principal. As explained at [86]–[88] above, service on the agent will under the law of agency only be treated as

service on his or her principal in so far as the principal has authorised the agent to accept service. In general, due to the seriousness of service of originating process, an agent will not generally have authority to accept service of originating process even if he or she has a wide general authority over the principal's affairs: *Sino Channel Asia Ltd v Dana Shipping and Trading (Singapore) Pte Ltd* [2018] Bus LR 532 at [43]–[45]. Order 7 r 4 of the ROC 2021 is a qualification on this and the general rule that an agent's authority is limited by what has been conferred by the principal as it empowers *the court* to authorise service on an agent even if the principal has not authorised the agent to accept service. But even though the source of the agent's authority is different in that it is conferred by the court rather than the principal, the end-result is the same, and service on an agent present in the jurisdiction pursuant to O 7 r 4 has the same effect as service on an agent who has been authorised to accept service by the principal, in that the principal is deemed to be present in the jurisdiction through the agent. Seen from this perspective, O 7 r 4 is not an exception to but in fact wholly consistent with the general principle that a defendant can only be served within the jurisdiction if he or she is present in it at the time of service.

90 In this regard, I respectfully disagree with Professor Yeo Tiong Min's suggestion that O 7 r 4 suggests that "the division in the Rules of Court between service in and service out does not match the division in the parent legislation", which is based on his understanding that the jurisdictional provision which O 7 r 4 corresponds to is s 16(1)(*a*)(ii) rather than s 16(1)(*a*)(i) of the SCJA: Yeo Tiong Min, *Past, Present, and Future Tensions: Jurisdiction Over Absent Defendants*, Yong Pung How Professorship of Law Lecture 2024 (23 May 2024) ("*Absent Defendants*") at para 26. Although the requirement that the claimant obtain the court's permission to effect service on an agent under O 7 r 4 superficially supports Professor Yeo's view that O 7 r 4 is in substance a

specialised form of service out of the jurisdiction, I do not think this is correct because the focus of O 7 r 4 is clearly different from that of the requirements for permission for service out of the jurisdiction under O 8 r 1(2) of the ROC 2021 read with para 63(2) of the SCPD 2021.

91 As noted above, O 7 r 4 is focused on the scope of the agent's authority. In contrast, the requirements for permission to serve out of the jurisdiction are squarely directed to the question of whether it is appropriate for the court to exercise jurisdiction over a person who is outside Singapore. As mentioned at [48] above, the historical reticence against a court asserting jurisdiction over a person outside its territory was because it was seen as an exercise of sovereignty in (and thus an invasion of the sovereignty of) a foreign state: see, for example, *Cookney v Anderson* (1863) 1 De G J & S 365 at 380–381; *Ong & Co Pte Ltd v Chow Y L Carl* [1987] SLR(R) 281 at [7]. This has to some extent fallen out of vogue in modern times based on a philosophical shift encouraged by a change in the language of originating process from a command to a notification to the defendant, as well as a recognition that cross-border litigation is the norm rather than the exception in this day and age: *Fortune* at [29]–[30]; *Abela* at [53]; Adrian Briggs, "Service Out in a Shrinking World" [2013] LMCLQ 416 at 417–418. But, even without the angle of sovereignty, service of originating process on a defendant outside the jurisdiction remains a serious matter as it raises the question of "whether it is just to require a defendant to answer a claim before a court in a country which is alien to him": Andrew Dickinson, "Service Out – An Inconvenient Obstacle?" (2014) 130 LQR 197 at 200–201; *Cecil v Bayat* [2011] 1 WLR 3086 at [61]. The legal requirements controlling the assertion of jurisdiction over persons outside the jurisdiction thus "ensure that litigants do not unjustly draw foreign defendants into a jurisdiction thereby causing inconvenience to them": *Lee Hsien Loong v Review Publishing Co Ltd* [2007]

2 SLR(R) 453 ("*Lee Hsien Loong*") at [26]. This is borne out on a consideration of the individual requirements themselves.

92 Under O 8 r 1(1) of the ROC 2021, the court may grant permission to the claimant to serve originating process out of the jurisdiction if it is satisfied that "the Court has the jurisdiction or is the appropriate court to hear the action". The claimant may make an application for permission pursuant to O 8 r 1(2) of the ROC 2021 by showing, among other things, that the Singapore court has the jurisdiction or is the appropriate court to hear the action. This is supplemented by para 63(2) of the SCPD 2021, which defines the court as "the appropriate court" if the following three requirements are met:

(a) first, there is a good arguable case that there is a sufficient nexus to Singapore (the "Nexus Requirement");

(b) second, Singapore is the *forum conveniens* (the "Natural Forum Requirement"); and

(c) third, there is a serious question to be tried on the merits of the action (the "Merits Requirement").

93 The Nexus Requirement is expressed in the gateways listed in para 63(3) of the SCPD 2021. Its purpose is to identify a connection between either the defendant or the subject-matter of the dispute and Singapore so as to justify the court's assertion of jurisdiction over the defendant who is outside its territorial jurisdiction: *Brownlie v FS Cairo (Nile Plaza) LLC* [2022] AC 995 at [192]–[193]. Put another way, the Nexus Requirement "define[s] the maximum extent of the jurisdiction which the [Singapore] court is permitted to exercise" based on relevant connections to Singapore: *Brownlie v Four Seasons Holdings Inc* [2018] 1 WLR 192 ("*Brownlie I*") at [31].

94 However, even if it is *legitimate* for the Singapore court to assert jurisdiction over a foreign defendant based on the existence of a sufficient nexus to Singapore, it does not necessarily mean that it would be *appropriate* to do so. Thus, under the Natural Forum Requirement, the court may decline to exercise jurisdiction if it is satisfied that the dispute would be better resolved in another forum: *Brownlie I* at [31]. The premise of the Natural Forum Requirement is that, if a dispute or defendant has connections to more than one jurisdiction, this may give rise to multiple available fora, in which case the Singapore court should consider if "there is some other available and more appropriate forum for the trial of the action": *CIMB Bank Bhd v Dresdner Kleinwort Ltd* [2008] 4 SLR(R) 543 at [26]. The Merits Requirement, on the other hand, allows the court to decline jurisdiction on the basis that "a foreign defendant should not be brought within the jurisdiction unless there is a serious case to be answered": *Commercial Conflict of Laws* at para 02.045.

95 In short, while the Nexus Requirement justifies the *existence* of jurisdiction on the basis of territorial connection to Singapore, the Natural Forum Requirement and Merits Requirement recognise utilitarian justifications – namely, the existence of a more appropriate forum or the lack of merits in the claim – for the court to decline *exercising* jurisdiction that it has. However, the three Requirements work in tandem to answer a single overarching question, *ie*, whether it is appropriate for the Singapore court to require a foreign defendant to appear before it to protect its rights. In contrast, one can find nothing in O 7 r 4 that is directed to this question. This suggests, as explained above, that the premise underlying O 7 r 4 is that the defendant is *not* outside the jurisdiction such that the court need not consider if it is appropriate to call on the defendant to appear before it. Indeed, if Parliament had intended for O 7 r 4 to be a form of service out of the jurisdiction under s 16(1)(*a*)(ii) of the SCJA as Professor

Yeo suggests, one would have expected O 7 r 4 to have been drafted as part of O 8 and not O 7 of the ROC 2021.

(C) IS THE DEFENDANT'S PRESENCE IN SINGAPORE A REQUIREMENT FOR SERVICE WITHIN THE JURISDICTION?

96 It would follow from my review of the statutory scheme under the SCJA and the ROC 2021 that I consider the defendant's presence in Singapore to be a necessary condition for service within the jurisdiction under O 7 of the ROC 2021 read with s 16(1)(*a*)(i) of the SCJA. If, therefore, the defendant is not present in Singapore at the time of service, he or she can only be served with originating process through the rules for service out of the jurisdiction under O 8 of the ROC 2021, upon which the court's jurisdiction over the defendant would be established under s 16(1)(*a*)(ii) of the SCJA.

97 This should suffice to make good the point as a matter of principle. But, as a matter of authority, I am cognisant that a different analysis of the statutory scheme was taken in *COSCO*, which is a decision of a Judge of the High Court. In broad overview, while my analysis sees presence in the jurisdiction at the time of service as the touchstone that distinguishes the two limbs of s 16(1)(*a*) of the SCJA as well as O 7 and O 8 of the ROC 2021, the court in *COSCO* thought the relevant distinction to be the location of the *act of service* (at [26]).

98 As *COSCO* is a decision of a Judge of the High Court, I accept that it would in principle be binding on me. But, in my respectful opinion, this is an exceptional case where it is open for me to depart from *COSCO*, for two main reasons:

(a) First, the reasoning in *COSCO* is inconsistent with a different decision of a High Court Judge in *Consistel Pte Ltd v Farooq Nasir*

[2009] 3 SLR(R) 665 ("*Consistel*") which addresses the relationship between substituted service and service out of the jurisdiction and which is thus directly applicable to the present case as compared to *COSCO* which would apply only analogically. In the circumstances, I consider myself bound by *Consistel* which, as I explain below, is generally consistent with my view.

(b) Second, my doubts over *COSCO*, which I particularise below, are limited only to the proposition that the point of distinction between O 7 and O 8 of the ROC 2021 is the location of the act of service rather than the location of the defendant. As I explain below, even on my view that the relevant distinction is the location of the defendant, the case would be decided the same way.

99 I elaborate on these points and my opinions on the reasoning in *COSCO* below. Before doing so, however, I should say that to the extent that my views differ from those of the learned Judge in *COSCO*, they are made in the spirit of these observations of AR Goh Yihan (as he then was) in *Lim Quee Choo v David Rasif* [2008] SGHC 36 ("*Lim Quee Choo*") which I respectfully adopt (at [59]):

> While I am fully aware that I am bound by higher authority, I am equally of the view that where such higher authority is not entirely clear, or has been qualified indirectly by another authority of equal standing in recent times, the lower court should not be precluded solely by the matter of precedence from re-examining the case law and determining whether there is scope for further clarification of the law in order to do justice as a matter of fairness and principle.

100 In *COSCO*, the claimant, COSCO Shipping, commenced a limitation action in Singapore following an allision between a vessel under its ownership and a trestle bridge of a jetty in Indonesia. The owner of the jetty, OKI, was

named as the first defendant, and the head charterer of the vessel, COSCO Europe (a related company to COSCO Shipping), was named as the second defendant. Under the procedural rules applicable to limitation actions, COSCO Shipping was only required to serve the originating claim on one of the defendants: O 33 r 36(4) of the ROC 2021. COSCO Shipping chose COSCO Europe as the party to be served, and effected service on COSCO Europe by e-mail to its Singapore solicitors after the solicitors had confirmed their authority to accept service. OKI challenged the validity of the service on COSCO Europe. It contended that, as COSCO Europe was a foreign defendant, service should have been by way of service out of the jurisdiction under O 8 r 1 read with O 33 r 3 of the ROC 2021 which would have required permission of the court. As no permission was obtained, the service on COSCO Europe was invalid (at [22]).

101 The court held that OKI's submission was "misconceived" (at [23]). The crux of its reasoning was the proposition that "the key factor determining which of [O 7 or O 8 of the ROC 2021] applies is *not* whether the *defendant* is a Singapore-based or foreign defendant *per se*, but *where* the act of service is effected – *in Singapore,* or *out of Singapore*" [emphasis in original] (at [26]). The consequence of this analysis of the scope of O 7 and O 8 of the ROC 2021 was that COSCO Europe had been validly served through its solicitors as "a defendant based overseas can be served in Singapore under O 7 r 2(1)(*d*) of the ROC 2021 in a 'manner agreed with the person or entity to be served', which can include effecting service through the defendant's solicitors in Singapore". In turn, the court found that its jurisdiction had been properly established under s 16(1)(*a*)(i) of the SCJA (at [40]).

102 In my view, the conclusion that the court's jurisdiction had been established under s 16(1)(*a*)(i) of the SCJA due to service on COSCO Europe's

solicitors under O 7 r 2(1)(*d*) of the ROC 2021 was correct. But, with respect, the proposition stated at [26] of *COSCO* that the application of O 7 or O 8 of the ROC 2021 is controlled by "where the act of service is effected" is not. The correct position, as explained above, is that what separates O 7 and O 8 of the ROC 2021 is the location of the defendant, and more precisely, whether the defendant is present in or outside Singapore at the time of service.

103 I start by explaining how *COSCO* would be decided the same way even on my view. The short answer is that *COSCO* was an orthodox case of service on an agent present in the jurisdiction who is authorised to accept service. This, as explained above, results in the defendant being deemed to be present in the jurisdiction for the purposes of being served here, thus obviating the need for service out of the jurisdiction. This has been recognised for over a century since the *Tharsis Sulphur* case. The conclusion that COSCO Europe had been validly served under O 7 r 2(1)(*d*) of the ROC 2021 read with s 16(1)(*a*)(i) of the SCJA is thus correct: by virtue of an agreement with COSCO Shipping that service should be effected on COSCO Europe's solicitors in Singapore, COSCO Europe was present in Singapore through its solicitors and service on the solicitors was good service on COSCO Europe.

104 However, I do not agree with the view in *COSCO* that service within the jurisdiction under O 7 of the ROC 2021 and s 16(1)(*a*) of the SCJA is characterised by the act of service occurring in Singapore. In my opinion, the attempt in *COSCO* to justify why it was not necessary for COSCO Europe to be served out of the jurisdiction proceeded from the false premise that COSCO Europe was not present in the jurisdiction, when this was in fact the case as explained at [103] above. This false premise led the analysis down a wrong path as while the court was instinctively correct on the validity of service in that

COSCO Europe did not have to be served out of the jurisdiction, it was constrained to reach this conclusion by defining service within and out of the jurisdiction based on the location of the act of service. This false premise manifested in at least two points.

105 The first is the treatment given to a passage from the Court of Appeal's decision in *Burgundy* which I have referred to earlier at [76] above. For ease of reference, I set it out here once again (*Burgundy* at [93]):

> … in our judgment, *service* is the crucial act that engages the court's jurisdiction over a foreign person. As a matter of Singapore law, personal jurisdiction may be found when the putative defendant is physically within the jurisdiction at the time the writ is served on him (see s 16(1) of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed)) or when the requirements stipulated in O 11 of the ROC [2014] have been met and leave has been given for a writ to be served on a defendant not physically within the confines of Singapore. [emphasis in original]

The court in *COSCO* opined that the Court of Appeal was focused on "the physical act of service" and "where the act of service may occur" and not the presence of the defendant. Although the presence of the defendant was not unimportant, it was not the focal point as the defendant's location "determines where the act of service can physically take place, not as a matter of law but as a matter of reality" (at [36]).

106 I respectfully disagree. I bear in mind the legal aphorism that the words in a judgment should not be read as if they were a statute (see *Natixis, Singapore Branch v Seshadri Rajagopalan* [2025] 1 SLR 1020 at [74] and the cases cited there). However, it is indisputable that the court in *Burgundy* was concerned with the *defendant's* presence in or outside Singapore and not where the act of service occurs. In the above passage, the subjects of the adverbial phrases

"physically within the jurisdiction" and "not physically within the confines of Singapore" were, respectively, "the putative defendant" and "a defendant". The passage in *Burgundy* is, in my respectful view, not capable of sustaining the interpretation given to it in *COSCO*.

107 To be fair, the court in *COSCO* was correct that, in cases of defendants who are natural persons (which the passage at [93] of *Burgundy* was concerned with), there would typically be a coincidence between the location of the act of service and the location of the defendant, such that it will make no difference whether one approaches things from one perspective or the other. This is for the simple reason that a natural person can only be personally served by the leaving of a document with his or her person if he or she is physically present in Singapore (see [78] above). However, to focus on the location of the act of service rather than the location of the defendant is tantamount to putting the cart before the horse. The fallacy reveals itself when one moves away from an individual defendant to one that is a legal abstraction such as a company.

108 Thus, in *COSCO*, the court referred (at [36]) to the principle that an individual defendant can be served within the jurisdiction even if here only for a transient period of time – citing *Burgundy* at [94], which refers in turn to *Maharanee* that I have discussed at [58] above – and commented that (at [37]):

> … I do not see how the position can be any different for personal service on entities such as COSCO Europe. True enough, a foreign-incorporated company cannot be said to be "physically present" in Singapore in the same way an individual can, but that is why O 7 r 2 of the ROC 2021 exists – to provide for how personal service may be effected on entities. In that regard, personal service may be effected in Singapore on a foreign company under O 7 r 2(1)(*b*) if the company's chairman is served while he is in Singapore, or indeed under O 7 r 2(1)(*d*) if local solicitors agree to accept service on the foreign company's behalf.

There are two difficulties with this extrapolation of the position of an individual defendant to the context of service on a foreign company through its chairman while he is present in Singapore. First, it appears to have been considered that, because a defendant company could not be "physically present" in Singapore in the same way as an individual, the touchstone of service within the jurisdiction under O 7 of the ROC 2021 could not be the defendant's presence in Singapore as that would leave the position of non-individual defendants unclear. Second, it was reasoned analogically from the situation in cases like *Maharanee* that a foreign company could be validly served by service on its chairman while he was fleetingly present in Singapore based on its view that service within the jurisdiction under O 7 of the ROC 2021 was defined by the location of the act of service. In my respectful opinion, neither of these propositions is sound.

109 The first point is that, while it is correct that a foreign company cannot be present in the jurisdiction "in the same way [as] an individual", *COSCO* appears, with the greatest respect, to have overlooked that there is a requirement of "corporate presence" established under the common law that allows a foreign company to be served within the jurisdiction through service on one of its officers present in the jurisdiction if the company itself is present in the jurisdiction by carrying on business within it: *The "Theodohos"* [1977] 2 Lloyd's Rep 428 at 430; *Adams* at 530–531. Accordingly, the fact that a foreign company cannot be "physically present" like an individual does not mean that the focus cannot be on the defendant's location and should instead be on the location of the act of service.

110 The second point which follows from this is that the court in *COSCO* was, with respect, not correct to analogise the position of a chairman of a foreign company to the position of an individual defendant in *Maharanee*, such that a

foreign company could be validly served within the jurisdiction so long as the chairman is present in Singapore even if the chairman is here only for a fleeting period of time such as in transit at the airport. This analogy is unsound because the requirement of corporate presence means that the chairman's presence in Singapore is a necessary but insufficient condition for the company to be served within the jurisdiction under O 7 r 2(1)(*b*) of the ROC 2021.

111 The modern *locus classicus* on the requirement of corporate presence is the decision of the English Court of Appeal in *Okura & Co, Ltd v Forsbacka Jernverks Aktiebolag* [1914] 1 KB 715. Buckley LJ held that a foreign company could only be served with a writ in the jurisdiction if it "[could] be found 'here' for the purpose of being served" in the sense of "carrying on business in this country" (at 718). In a similar vein, Phillimore LJ said that in order for a foreign company to be served in the jurisdiction, it had to be one "which can in some sense be said to be locally in this country" (at 721–722):

> When a human being is about to be sued, it is necessary that there should be a personal service of the writ upon him. In the case of a corporation that cannot be done, and Order IX., r. 8, provides that service shall be sufficient if it is made upon the head officer or secretary of the corporation. The defendants in this case are a corporation incorporated under the laws of Sweden. It may be that there is some person in this country connected with the defendants in such a way that the writ might properly be served upon him as an officer of the corporation. *But that of itself is not sufficient. In order that an officer of a foreign corporation may be served in this country it is necessary that the foreign corporation must be one which can in some sense be said to be locally in this country.* … [emphasis added]

Phillimore LJ's statement directly contradicts the analogy drawn in *COSCO* between a chairman of a foreign company and a defendant who is a natural person for the purposes of service within the jurisdiction. His Lordship made clear that the fact that there was a person related to the company in the

jurisdiction "of itself [was] not sufficient" if the company itself was not "locally in this country".

112 The court in *COSCO* may have been influenced by how the language of O 7 r 2(1)(*b*) of the ROC 2021 does not refer to a requirement that the defendant is "carrying on business" in Singapore and it might be argued from this that the corporate presence requirement is not part of our law. But this argument was made before and rejected in *SSL International* in respect of the equivalent rule under the CPR (UK) which, like O 7 r 2(1)(*b*), is "clear and unqualified" and contains no express reference to the test of corporate presence (at [48]). The English Court of Appeal in *SSL International* set no store by this omission because, as mentioned at [68] above, it agreed that it was a general principle that a defendant could only be served within the jurisdiction if it was present in the jurisdiction (at [56]). Thus, even if it was not expressly referred to in the legislation, the requirement of corporate presence was "a fundamental rule of the common law" that applied to the CPR (UK) (at [49]–[63]). Indeed, it is worth noting that, in arriving at its decision, the court highlighted the absurdity of a foreign company being served within the jurisdiction through "a director … passing through the country on holiday" as a point that supported the corporate presence requirement (at [50]), and rejected any analogy between service on the officers of a company and service on individual defendants as a false equivalence (at [58]):

> … I do not think that it is any answer that an individual who has no connection with this jurisdiction may be personally served if he is here temporarily. If he is here, to state the obvious, he is here. If a director of a foreign company which does not carry on business here is passing through this country, the company is not here.

I respectfully agree. The analysis in *COSCO* was based on the supposition that a foreign company had no way of being present in the jurisdiction because it could not be physically present in the same way as an individual. This led to the rejection of the defendant's presence in the jurisdiction as the touchstone of service within the jurisdiction and a preference for the location of the act of service instead. But, as explained, the requirement of corporate presence fills the gap for corporate defendants such that there is no difficulty in characterising service within the jurisdiction based on the defendant's presence in Singapore.

113 The second area of the analysis in *COSCO* which I consider is the court's concern that defining service within the jurisdiction based on the defendant's presence in Singapore would lead to the absurd consequence of the claimant having to obtain permission from the court to serve the defendant out of the jurisdiction even if the defendant was willing to accept service through solicitors in Singapore. The court considered that requiring the claimant to apply for permission for service out of the jurisdiction in such circumstances would be "pushing an open door", and this supported defining service within the jurisdiction based on the act of service occurring in Singapore so as to avoid this outcome (see *COSCO* at [32]):

> … OKI's interpretation would also not be in accordance with the Ideals of the ROC 2021, particularly those of expeditious proceedings and efficient use of court resources under O 3 r 1(2)(*b*) and O 3 r 1(2)(*d*). On OKI's case, it is not enough that a foreign defendant such as COSCO Europe has agreed to submit to the jurisdiction of the Singapore courts and to accept service of proceedings in Singapore through its local solicitors. A claimant would nonetheless have to apply for the court's permission to serve the originating process *out of jurisdiction* and upon permission being granted, to then effect service *in Singapore* on the solicitors based on their agreement to accept service. On OKI's case, judicial time and resources will have to be expended to schedule a hearing for the grant of permission in circumstances where such an application is entirely otiose

> and unnecessary. To seek the court's permission to serve an originating process out of jurisdiction on a foreign defendant who has already expressed that it is ready and willing to submit to the court's jurisdiction and accept service of process in Singapore *via* its solicitors is, with respect, pushing an open door. An interpretation of the rules which produces such an absurd outcome cannot be correct. [emphasis in original]

114 I agree with the sentiment that it would be wrong for the law to insist on service out of the jurisdiction if the defendant was willing to accept service in Singapore. But, with respect, the risk of the "absurd outcome" of "pushing an open door" eventuating if the touchstone of service within the jurisdiction under O 7 of the ROC 2021 is not the act of service occurring in Singapore but the defendant's presence in Singapore is more apparent than real for two reasons.

115 First, as explained above, if the defendant is agreeable to service on its solicitors in Singapore, it would be deemed present in Singapore such that it can be served within the jurisdiction without need for any application for permission to serve the defendant out of the jurisdiction. This, I have suggested, is the true explanation for the outcome in *COSCO* and finds support in authority dating back to the 19th century. The parties in *COSCO* were, with respect, engaging a straw man because it has long been established that service on an agent within the jurisdiction is valid service on the defendant without need for service out of the jurisdiction. This straw man arose because it was not fully appreciated that the significance of COSCO Europe's agreement to accept service through its Singapore solicitors was that COSCO Europe itself was not outside but present in Singapore based on orthodox agency law principles.

116 Second, even assuming *arguendo* that COSCO Europe was not present in Singapore such that it would be necessary for it to be served out of the jurisdiction, the absurdity of "pushing an open door" envisioned by the court of

COSCO Shipping having to apply to court for permission to serve COSCO Europe out of the jurisdiction would still not eventuate because COSCO Europe's agreement to accept service would likely trigger the operation of O 8 r 1(3) of the ROC 2021, which provision allows service out of the jurisdiction without permission of court if "service out of Singapore is allowed under a contract between the parties". Nothing in O 8 r 1(3) limits its operation to a contract in writing or a contract entered into before the parties' dispute arose. Nor is it limited to cases where the act of service is to occur outside of Singapore rather than in Singapore. In principle, O 8 r 1(3) would cover an agreement of the kind in *COSCO* where a defendant outside the territorial jurisdiction of the Singapore courts agrees to accept service through its Singapore solicitors: *NW Corp* at [50]–[53].

117 Finally, moving away from the reasoning in *COSCO*, I close off with the two final observations. First, the view in *COSCO* that service within the jurisdiction is defined by the location of the act of service is in fact the very argument that was rejected by the House of Lords in *Barclays Bank* on the basis that it could not be right that the rules for service out of the jurisdiction could be outflanked by selecting a manner of service that occurred in the jurisdiction. This has recently been confirmed in *Fridman*. Second, the logical consequence of the view that the defining characteristic of service within the jurisdiction is the location of the act of service is that it would in principle be possible for a defendant who is outside Singapore to be served by substituted service rather than by service out of the jurisdiction as long as the mode of substituted service consists of an act that occurs in Singapore (for example, substituted service by posting to an address in Singapore). But, as Professor Yeo has noted, this is inconsistent with the "hierarchy of service" established in *Consistel*, which requires as a general rule that a claimant serve a defendant who is outside the

jurisdiction by service out of the jurisdiction before resorting to substituted service: *Absent Defendants* at para 24. I have already alluded to this at [98(a)] above, and thus turn to deal with the relationship between substituted service and service out of the jurisdiction in the next section.

The relationship between substituted service and service out of the jurisdiction

118 The *ratio* of *Consistel* is typically expressed as a general rule that is qualified by exceptions: *Consistel* at [35]; *Guanghua SS Holdings Ltd v Lim Yew Cheng* [2023] SGHCR 7 at [24]; *Exchange Union Co v Wo Qi* [2025] SGHCR 26 ("*Exchange Union*") at [13(d)]. I deal first with the general rule.

(1) The general rule

119 The general rule is the aforesaid "hierarchy of service" between service out of the jurisdiction and substituted service: *Law Society of Singapore v CNH* [2022] 3 SLR 777 at [14]. The use of "hierarchy", while not inaccurate, should be read in the context of the underlying logic of the rule. The point that it encapsulates is not so much an *a priori* rule that the one must come before the other or that the claimant must proceed in sequence (although that is generally the result in practice), but that service out of the jurisdiction and substituted service are different tools that are directed towards different purposes:

(a) Service out of the jurisdiction is concerned with the existence of a *right* of the claimant to establish the court's jurisdiction over the defendant by service of originating process. If the defendant is present in the jurisdiction, the claimant has the right to serve the defendant with originating process simply by virtue of the defendant's presence. But, if the defendant is outside the jurisdiction, the claimant does not and must

establish a right to serve originating process on the defendant based on the rules for service out of the jurisdiction.

(b) Substituted service is concerned with the *manner* by which an existing right of the claimant to serve the defendant is carried out. It thus presupposes that the claimant *has* a right to serve the defendant with originating process and is itself agnostic to the location of the defendant.

Accordingly, to say that service out of the jurisdiction is not necessary because substituted service would suffice elides two different things and amounts to a category error. A claimant cannot outflank the rules for service out of the jurisdiction by resorting to substituted service because substituted service is not the solution to the problem which service out of the jurisdiction exists to solve. As Justice Mark Leeming, writing extrajudicially, explains, "[t]he solution to the problem caused by a defendant being outside a court's territorial jurisdiction is not substituted service, but service out": *Authority to Decide* at p 188. What substituted service is a solution to is the impracticality of personal service.

120 This, in essence, is the general rule established in *Consistel*. As Andrew Ang J explained there, it is necessary to be clear on what service out of the jurisdiction and substituted service are respectively exceptions to. The former – service out of the jurisdiction – is "an exception to … the rule that defendants should generally be served within jurisdiction before a court has jurisdiction to hear the case" as "[a]t common law, jurisdiction apropos an action *in personam* was founded upon the physical presence of a defendant in that jurisdiction": *Consistel* at [29]. The latter – substituted service – is "a very limited exception to the general rule of personal service": *Consistel* at [27]. Seen in this light, it becomes clear why there is a "hierarchy of service" as between service out of

the jurisdiction and substituted service: the former, being concerned with establishing a right to serve the defendant with originating process, is a logically anterior question to the latter, which is concerned with how an established right to serve the defendant should be carried out.

121 This point is also borne out by the structure of the ROC 2021. The only reference to substituted service under the ROC 2021 is in O 7 r 7, which is under O 7 that is concerned with service within the jurisdiction. But, as clarified by Lee Seiu Kin J in *Janesh s/o Rajkumar v Unknown Person ("CHEFPIERRE")* [2023] 3 SLR 1191, it does not follow from this that substituted service is not possible in respect of a defendant outside the jurisdiction; instead, the power to order substituted service on a foreign defendant is woven into the court's power to grant permission for service out of the jurisdiction as an ancillary power to authorise substituted service as a manner of service out of the jurisdiction under O 8 r 2(1) of the ROC 2021 (at [86]–[88]). Order 8 r 2(1) states in its own terms that a condition to the question of the manner of service out of Singapore arising is that "the Court's approval has been obtained under Rule 1(2)". This makes clear that, if the defendant is outside the jurisdiction, it will first be necessary for the claimant to establish the right to serve the defendant out of the jurisdiction by applying to court for permission under O 8 r 1(2), before the issue of how service should be effected – for example, by substituted service – under O 8 r 2(1) would arise. In contrast, because the claimant can serve the defendant with originating process as of right if the defendant is present in the jurisdiction, O 7 skips the threshold question, dealt with by O 8 r 1, of whether the claimant has a right to serve the defendant and deals with the manner of service, including personal service under O 7 r 2 and substituted service under O 7 r 7.

122 In this way, the structure of the ROC 2021 is analogous to the CPR (UK), under which the only reference to service by an alternative method (the equivalent to substituted service) is in r 6.15(1) of the CPR (UK) which falls within the section titled "Service of the Claim Form in the Jurisdiction". Like the ROC 2021, no equivalent provision to r 6.15(1) of the CPR (UK) can be found in respect of service out of the jurisdiction. However, similar to my analysis of the statutory scheme above, the English courts have held that the power to order service by an alternative method on a defendant outside the jurisdiction is built into the power to grant permission for service out of the jurisdiction under r 6.37 of the CPR (UK): *Marashen Ltd v Kenvett Ltd* [2018] 1 WLR 288 ("*Marashen*") at [18(iii)]. More specifically, the relevant provision, r 6.37(5)(*b*)(i) of the CPR (UK), allows the court to "give directions about the method of service", and only comes into play "[w]here the court [has] give[n] permission to serve a claim form out of the jurisdiction".

123 The decision of the English High Court in *Marashen* is instructive as it is the analogue to *Consistel* under English law. In that case, the claimant sought to serve a third-party costs order on the defendant's beneficial owner, an individual based in the Russian Federation. To this end, the claimant took out two applications: (a) an application for service out of the jurisdiction under r 6.37 of the CPR (UK); and (b) an application for service by an alternative method under r 6.15(1) of the CPR (UK) seeking for service to be effected on the defendant's English solicitors. At first instance, a High Court Master granted the application for service by an alternative method but did not make an order for service out of the jurisdiction as he considered it unnecessary.

124 David Foxton QC (as he then was), sitting as a deputy High Court Judge, held that the Master was wrong in not making an order for service out of the

jurisdiction. The principle, as he put it, was that "an order for service by an alternative method within the jurisdiction against the defendant who is resident outside of the jurisdiction can only be made if the court has satisfied itself that the case is a proper one for service out of the jurisdiction, and has made an order to that effect" (at [17]). The court's power to order service by an alternative method on a person outside the jurisdiction flowed not from r 6.15(1) of the CPR (UK), but from r 6.37(5)(*b*)(i) of the CPR (UK), which "presupposes that an order for service out of the jurisdiction has been made" (at [18(iii)]).

125 Moreover, Foxton QC rejected the suggestion that permission for service out of jurisdiction was unnecessary because the method of service – service on English solicitors – occurred in the jurisdiction. This was erroneous because it was not possible to establish the court's jurisdiction over a person outside the jurisdiction based solely on service by an alternative method as that was "not a freestanding foundation for jurisdiction"; therefore, "in a case where leave to serve a claim form out of the jurisdiction is required, that requirement cannot be circumvented simply by an order for alternative service": *Marashen* at [19(i)]–[19(iii)]. The same point was made more recently by Marcus Smith J in *Nokia Technologies OY v OnePlus Technology (Shenzhen) Co Ltd* [2022] 1 All ER (Comm) 1384. His Lordship said that service within the jurisdiction was "a matter of right for a claimant" while service out of the jurisdiction was "a matter controlled by the court"; accordingly, "even before one gets to alternative service in an international case the hurdle of service out must be successfully jumped" (at [26]–[27]).

126 This is a convenient point to return to *COSCO*. I have already noted that *COSCO* is inconsistent with *Consistel* to the extent that the "hierarchy of service" established by *Consistel* is founded on the premise that service out of

the jurisdiction is characterised by the defendant's location outside Singapore rather than by the act of service taking place outside Singapore. The facts of *Marashen* demonstrate why the latter view in *COSCO* is incorrect. Although the facts of *Marashen* involved service occurring in England (service on English solicitors), Foxton QC held that this did not mean that service out of the jurisdiction was not necessary because the person being served was located in Russia. What underlies this is the recognition that the factor which determines the necessity of service out of the jurisdiction – and, in turn, the need to establish a right to serve the defendant with originating process – is the defendant's location outside the jurisdiction. This is the same point made in *Barclays Bank* and *Fridman*. If the view in *COSCO* were correct, the first instance decision in *Marashen* that an order for service out of the jurisdiction was unnecessary would have been correct; that it was not shows, with respect, that the view in *COSCO* is doubtful as it would allow a claimant to circumvent the rules for service out of the jurisdiction so long as the manner of service is an act occurring in Singapore.

(2) The time at which the necessity of service out of the jurisdiction is tested

127 In my analysis above, I have discussed the general rule as a proposition that the rules for service out of the jurisdiction cannot be outflanked by substituted service. But, in *Consistel*, an additional element of *timing* was infused into the rule such that it was put in terms that the rules for service out of the jurisdiction could not be circumvented by substituted service if the defendant was outside the jurisdiction *before the writ was issued*: *Consistel* at [30]. Thus, if the defendant had left the jurisdiction after the issue of the writ, service out of the jurisdiction would not be necessary even if the defendant's departure was *bona fide* and without any intention of evading service.

128 According to the court in *Consistel*, the rules for service out of the jurisdiction were introduced to "deal with the situation where the defendant had left the jurisdiction *before the writ was issued*" [emphasis added] (at [28]). In this regard, reference was made to two decisions of the English Court of Appeal in *Jay v Budd* [1898] 1 QB 12 ("*Jay v Budd*") and *Myerson v Martin* [1979] 1 WLR 1390 ("*Myerson*"), and specifically to the following statements in the two cases (see *Consistel* at [32]):

(a) First, the statement of Collins LJ (as he then was) in *Jay v Budd* that (at 19):

> [I]f the writ had not been issued until after the defendant had left this country, the only way in which the defendant could have been properly served would have been by proceeding under the practice as to writs for service out of the jurisdiction.

(b) Second, the statement of Lord Denning MR in *Myerson*, which I have taken the liberty of quoting it with additional context (at 1394):

> If the defendant was in fact outside the jurisdiction at the writ was issued—and the plaintiff in ignorance of it issued a writ for service *within* the jurisdiction—then the plaintiff must wait until the defendant comes back *within* the jurisdiction and serve him personally on his return.
>
> If the defendant was in fact *within* the jurisdiction at the time the writ was issued—and the plaintiff issues a writ for service *within* the jurisdiction—the plaintiff can get an order for substituted service on him, even if he has gone overseas since the issue of the writ.
>
> If the defendant was in fact *outside* the jurisdiction at the time the writ was issued—and the plaintiff knows it—the plaintiff can take his choice and issue a writ for service *within* the jurisdiction; but in that case he has to wait his opportunity and hope that the defendant will return to England and be served personally. There cannot be substituted service.

> Otherwise if the defendant was in fact outside the jurisdiction when the writ was issued—and is likely to remain outside—the proper course for the plaintiff is to apply for leave to serve out of the jurisdiction: in which case he can only get it if the case comes within R.S.C., Ord. 11.
>
> [emphasis added]

129 In my respectful view, the proposition that the relevant time at which the defendant needs to be present in the jurisdiction to be amenable to service within the jurisdiction is the time of the issue of the originating process is incorrect, or, at the very least, must be subject to qualification. Although *Consistel* is a decision of a Judge of the High Court, I consider that I am bound by higher authority – namely, the decision of the Court of Appeal in *Burgundy* – to reject this proposition or at least qualify it (see [132]–[135] below).

130 The short point is that the proposition that service out of the jurisdiction is unnecessary if the defendant is present in the jurisdiction at the time of the issue of the originating process rests on the supposition that the court's jurisdiction is established by the mere issue, rather than the service, of originating process. This, however, is inconsistent with s 16(1)(*a*) of the SCJA which, as discussed at length above, ties the jurisdiction of the Singapore courts over a defendant to *service* of originating process on the defendant. This is recognised by the Court of Appeal in *Burgundy*, and while I have already referred to what the court said at [76] and [105] above, it is useful to reproduce it here by way of reminder (see *Burgundy* at [93]):

> … in our judgment, *service* is the crucial act that engages the court's jurisdiction over a foreign person. As a matter of Singapore law, personal jurisdiction may be found when the putative defendant is physically within the jurisdiction at the time the writ is served on him (see s 16(1) of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed)) or when the requirements stipulated in O 11 of the ROC [2014] have been

> met and leave has been given for a writ to be served on a defendant not physically within the confines of Singapore. [emphasis in original]

It is expressly stated here by the court that the defendant must be present in the jurisdiction "at the time the writ is served on him"; otherwise, service out of the jurisdiction will be necessary based on the rules formerly under O 11 of the ROC 2014 and currently under O 8 of the ROC 2021. The Court of Appeal's view of the relevant time is also consistent with the view expressed by Professor Briggs (see *Private International Law in English Courts* at p 163):

> The common law rules of jurisdiction, as modified by Parliamentary legislation and by subordinate legislation in the form of Rules of Court or Civil Procedure Rules, drew and still draw a distinction between cases in which the defendant to be sued is physically within the territorial jurisdiction of the court *at the point when service of document instituting the proceedings is made* and those where he is not …
>
> *It is the date of service, rather than of the issue of the claim form, which is decisive for this purpose*: a claimant who obtains the issue of a claim form which he intends to serve when the defendant comes into the jurisdiction … does nothing wrong; the defendant who departs from the jurisdiction before service of the claim form is made on him does nothing wrong, for there is no obligation to wait around to be served, or to go out of one's way to facilitate the service of process.
>
> [emphasis added]

131 This also stands to reason because substituted service is not a basis for establishing the court's jurisdiction. What establishes the court's jurisdiction is service within the jurisdiction (under s 16(1)(*a*)(i) of the SCJA) or service out of the jurisdiction (under s 16(1)(*a*)(ii) of the SCJA); and substituted service is a means by which either of these is achieved. To situate this in the language of s 16(1)(*a*) of the SCJA, substituted service relates to the "manner" by which service is effected; it says nothing about whether the claimant is "authorised" to serve originating process on a defendant who is outside the jurisdiction, this

being dealt with by the rules for service out of the jurisdiction under O 8 of the ROC 2021. If the court authorises substituted service on a defendant based on the defendant's location in the jurisdiction at the time of the issue of originating process, but the defendant is outside the jurisdiction at the time of service, such service will only be "in the manner prescribed" and not "in the circumstances authorised by Rules of Court" if the claimant did not also have a right to serve originating process on the defendant under either O 8 rr 1(1) or 1(3) of the ROC 2021. The court's jurisdiction over the defendant would not be validly established under s 16(1)(*a*)(ii) of the SCJA. It also does not make sense, with respect, to say that by opportunistically timing the issue of originating process to a time when the defendant happens to be in the jurisdiction, the claimant can acquire an irrevocable and indefeasible right to serve the defendant with originating process in perpetuity. The right to serve originating process is tied to the defendant's presence in the jurisdiction and only subsists so long as the defendant remains present.

132 That said, in my view, *Consistel* may be correct if it is understood as having only addressed the question of the circumstances in which the court may *make* an order for substituted service and not the question of whether service effected pursuant to that order would be valid if the defendant is not present in the jurisdiction at the time of service. In this way, *Consistel* can be reconciled with the Court of Appeal's confirmation in *Burgundy* that service within the jurisdiction requires the defendant to be present in the jurisdiction at the time of service, on the basis that the court may *make* an order for substituted service if the defendant was present in the jurisdiction at the time the originating process was issued, but service pursuant to that order may nonetheless turn out to be invalid if the defendant is outside the jurisdiction at the time of service and the

claimant does not have a right to serve originating process on the defendant under O 8 r 1 of the ROC 2021.

133 At first blush, this conclusion may appear surprising, in that it becomes uncertain when a claimant obtains an order for substituted service if complying with that order may result in valid service, especially in cases where the defendant's subsequent absence from the jurisdiction was not foreseeable at the time the order was made. But, in my view, there is really nothing odd about this outcome. When the claimant applies to court to authorise service to be in a certain manner, the court is being asked to authorise service that will occur *at some future point in time* if it grants the authorisation sought. This is inherently future-looking. So, when the claimant seeks permission for service out of the jurisdiction, the claimant is doing so because it foresees that, at the time when it attempts service, the defendant will be outside the jurisdiction such that the court's jurisdiction over the defendant cannot be established under s 16(1)(*a*)(i) of the SCJA. The claimant does not apply for permission for service out of the jurisdiction because the defendant was outside Singapore at the time of the issue of originating process or even at the time the application for permission is made. The corollary is that, if the claimant does not apply for permission for service out of the jurisdiction, it bears the risk that it will not be able to validly serve the defendant under s 16(1)(*a*)(i) of the SCJA in the event that the defendant is outside the jurisdiction at the time of service.

134 By parity of reasoning, when a claimant applies for substituted service, that application is taken out on the premise that, at the time when service is made in accordance with the court's order (if the court grants an order for substituted service), the defendant will be present in the jurisdiction such that jurisdiction can be established under s 16(1)(*a*)(i) of the SCJA. This premise,

which involves forecasting the defendant's location in the future, will be based on the defendant's location at an earlier time, such as when the originating process was issued or the time of the application for substituted service, subject to these being probative of the defendant's likely location at the time of service. In this way, it may not be wrong, as *Consistel* suggests, that the court can make an order for substituted service if the defendant was present in the jurisdiction at the time the originating process was issued. But whether service effected in accordance with the order is valid is another matter. If the premise on which the order was made is later falsified at the time of service, service pursuant to that order cannot be valid just because it had previously appeared that the defendant would be present in the jurisdiction at the time of service. The fact of the matter is that the defendant was not within the jurisdiction at the crucial time. So, if the claimant does not seek permission for service out of the jurisdiction and opts to apply only for substituted service, it bears the risk that, at the time service is carried out in accordance with the order, the defendant is outside the jurisdiction such that service under s 16(1)(*a*) of the SCJA cannot be validly effected. A claimant who wishes to guard against this can do so by obtaining permission for service out of the jurisdiction, whether before or in conjunction with, his or her application for substituted service.

135 I should clarify that the effect of the defendant's absence from the jurisdiction at the time of service is to render service, rather than the order for substituted service, irregular. The order itself would not be irregular unless it is shown that one of the requirements for making it were not met. In this regard, the fact that a prediction that the defendant would be present in the jurisdiction at the time of service later turned out wrong does not necessarily mean that the prediction was unjustified at the time it was made. However, while the order for substituted service would strictly remain intact, it is unlikely that the claimant

will be able to further rely on it if service is set aside, and to attempt a do-over of substituted service, as the order would be spent by then: see O 7 r 7(3) of the ROC 2021, which requires that substituted service be made within 14 days of the date of the order. The claimant will, in principle, have to make a fresh application for substituted service. This underscores the risk that the claimant takes if it fails to obtain permission for service out of the jurisdiction.

136 As against what I have said above, *Jay v Budd* appears to be the anchor authority for the view that service out of the jurisdiction is not necessary if the defendant was present in the jurisdiction at the time when the writ was issued. It was referred to in *Consistel* (at [32]) and is also cited in *Schmitthoff* for the proposition that "[t]he decisive moment when the defendant must be within the jurisdiction is that of the *issue*, and not of *service* of the writ" [emphasis in original] (at p 388). But, as I explain below, the decision in *Jay v Budd* was in the first place not unanimous but split, and the reasoning of the majority is, with respect, questionable. Furthermore, the decision arguably does not concern substituted service at all.

137 The facts of *Jay v Budd* were peculiar. The claimant and the defendant met at the claimant's office on 5 October 1897, during which the claimant told the defendant that he had heard that the defendant was leaving England and that he would need the defendant to settle a debt. However, the parties did not reach any resolution at the end of the meeting, and the defendant left the claimant's office informing him that he should liaise with one Mr Allingham, who was known to have acted as the defendant's solicitor in various matters. The claimant immediately instructed his solicitors but was advised that it was too late in the day to issue a writ, and that they would do so first thing the next morning. The next day, a clerk instructed by the claimant's solicitors attended

on board a steamship at Southampton Dock and attempted to serve the defendant with a copy of the writ. Mr Allingham was present with the defendant and asked the clerk to produce the original writ, which the clerk could not do as the writ had only been issued in London that morning. Although Mr Allingham declared that service was not complete without the original writ, the clerk nevertheless left a copy of the writ with the defendant. The defendant left for Jamaica later that day. Subsequently, Mr Allingham inquired of the claimant if he had obtained any order for substituted service and, if so, what the terms of said order were. The claimant then applied for an order for substituted service, which was refused at first instance.

138 The English Court of Appeal held, by a two to one majority, that an order for substituted service should be made:

> (a) Lord Halsbury LC referred to the purpose of substituted service as the avoidance of the "expense and inconvenience attendant upon the old mode of procedure". His Lordship noted that the relevant rule under the RSC 1883 (UK) was framed in the broadest terms that an order could be made where it appeared "that the plaintiff is from any cause unable to effect prompt personal service", and considered that there was nothing in this that suggested that substituted service could not be ordered where "the impossibility of effecting personal service arises by reason of the defendant's leaving the country directly after he hears of the litigation". In his Lordship's view, it was just to order substituted service on the facts as the defendant had admitted to the debt and had been handed a copy of the writ, which meant that he had been given notice of the suit against him in England (at 15–16).

(b) Collins LJ's reasoning was generally aligned with that of Lord Halsbury, as he also emphasised the breadth of the rule for substituted service under the RSC 1883 (UK), and said that he did not think that the court "[was] entitled to read into the rules words which are not contained in them" so as to impose a limitation that substituted service could not be ordered against a defendant who had left the jurisdiction (at 19).

(c) Rigby LJ dissented. His Lordship commented that there was "no reported case … in which substituted service has been ordered in a case of this kind where the defendant was out of the jurisdiction" and that, absent any intention of the defendant to evade service of the writ, he did not think the court could make such an order (at 17–18).

139 I make four observations about *Jay v Budd*. First, it is striking that neither Lord Halsbury nor Collins LJ gave any thought to the possibility that the defendant's presence outside the jurisdiction meant that he should be served by service out of the jurisdiction under Order XI of the RSC 1883 (UK). The matter appears to have been heard *ex parte*, so the court only heard argument from the claimant (at 14–15), and there is no reference to Order XI in any of their Lordships' opinions. Indeed, while Lord Halsbury was silent on this point, Collins LJ expressly disavowed the relevance of service out of the jurisdiction as he said that it seemed to him "useless" to cite cases on that front (at 19). However, that, with respect, this assumes that it was even possible for service within the jurisdiction to be possible notwithstanding that the defendant was not present in the jurisdiction.

140 In this regard, both Lord Halsbury and Collins LJ emphasised the breadth of the language of the relevant rule for substituted service under the

RSC 1883 (UK). Their Lordships reasoned, that since the rule only required that "that the plaintiff is from any cause unable to effect prompt personal service", there was nothing that meant that it could not apply against a defendant outside the jurisdiction. But, with respect, this reasoning is too simplistic as it overlooks that substituted service assumes that the claimant has a right to serve originating process on the defendant based on either: (a) the defendant's presence in the jurisdiction; or (b) the rules for service out of the jurisdiction. In my respectful view, Lord Halsbury and Collins LJ erred by eliding the two different questions of the existence of a right to serve originating process and the manner by which service should be carried out, and approaching the matter as a unitary question of whether personal service could not be effected "from any cause". In turn, this caused their Lordships to overlook the need for an order for service out of the jurisdiction under Order XI of the RSC 1883 (UK) as an anterior condition to ordering substituted service over a foreign defendant. But the existence of Order XI meant that the phrase "from any cause" could not be interpreted as referring to difficulties of personal service arising from the defendant's absence from the jurisdiction as that would render Order XI otiose: *Piggott* at p 68. Indeed, not long after *Jay v Budd* was decided, Professor A V Dicey referred to it and commented that "the power to allow service on a defendant out of England otherwise than under Ord XI, r. 1 [of the RSC 1883 (UK)] … is open to some doubt": *Dicey (2nd Ed)* at p 222.

141 Second, although both Lord Halsbury and Collins LJ adverted to the fact that the defendant had obtained notice of the proceedings, this by itself is no basis for not requiring the claimant to serve the defendant out of the jurisdiction. Giving the defendant notice of the claim against him or her is only one of the two purposes of service (see [27] above). It is no substitute to a proper invocation of the court's jurisdiction by service, that is to say, in accordance

with s 16(1)(*a*) of the SCJA, that the claimant has in some way managed to give the defendant notice. If the defendant is outside the jurisdiction, the court's jurisdiction must be established by service out of the jurisdiction under s 16(1)(*a*)(ii) of the SCJA; that is so even if the defendant is already aware of the proceedings because service, rather than the defendant's awareness of the proceedings, is what establishes the court's jurisdiction over the defendant.

142 Third, subject to an alternative analysis of the case I suggest at [143]–[146] below, *Jay v Budd* might be correct to the extent that it uses the defendant's location at the time of the issue of the writ as a proxy for the defendant's likely location at the time when the writ is served, such that the order for substituted service is made on the prediction that the defendant would be within the jurisdiction at the time of service. This, as I have noted at [132]–[134] above, is a possible way to reconcile the proposition that the court can order substituted service on a defendant who is within the jurisdiction at the time of the issue of originating process with the proposition that the defendant must be present in the jurisdiction at the time the originating process is served so that his or her presence gives the claimant the right to serve originating process. But, even on this view, it is arguable that substituted service should not have been ordered on the facts of *Jay v Budd* as it appears that the defendant had left the jurisdiction permanently despite being present when the writ was issued. Given this, it would have been unrealistic to forecast that the defendant would be within the jurisdiction at the time of service. In a case where there is clear evidence that the defendant will not be present in the jurisdiction at the time of service, or where there is no way of making a feasible assessment of this, it would not be correct for the court to order substituted service merely because the defendant was present at the time of the issue of the originating

process. The defendant's presence at the time the originating process was issued would not be probative of his or her likely location at the time of service.

143 Finally, as mentioned above, *Jay v Budd* was arguably a case that should have had nothing to do with substituted service at all. Instead, it seems to me to be a case where personal service had been made on the defendant, albeit perhaps irregularly as only a copy of the writ was handed to him rather than the original writ. In these premises, the question that should have arisen was not whether substituted service should be ordered but whether the personal service on the defendant on board the vessel at Southampton Dock was irregular, and if so, whether the irregularity should be cured. On this view, there would have been no need to order substituted service on the facts since personal service had already been effected, albeit it may have been irregular and thus subject to the court's discretion to cure the irregularity. In fact, support for this can be found in Collins LJ's reasoning, as his Lordship appears to have thought that the service on the defendant might actually have been valid (see *Jay v Budd* at 18):

> The writ in the action appears to have been issued before the defendant left the country. Notice of the fact that it had been issued was given to him, and a service of it was attempted in a manner which might have been valid, and the attempt was only defeated by reason of the fact that the defendant's solicitor being present insisted on the production of the original writ. *I think the practice is that, if, at the time of the service of the copy writ, the production of the original is not required, the service is good without it.* … In this case we have nothing to do with any considerations relating to writs for service out of the jurisdiction, for the writ was one for service within the jurisdiction, and, *if the plaintiff had been fortunate and the defendant's solicitor had not been beside him, it might have been successfully served within the jurisdiction.* … [emphasis added]

144 Indeed, on the facts, it appears that the issue only came to be framed as one of substituted service because the defendant's solicitor, Mr Allingham, had asked the claimant if he had obtained an order for substituted service, which

prompted the claimant to apply for such an order (see [137] above). In my view, the claimant could have been entitled to take the position that he had properly served the defendant, and that if the defendant wished to take the point that service had not been properly effected due to the clerk's inability to produce the original writ, the onus was on the defendant, rather than the claimant, to apply to have service set aside on the basis of the irregularity.

145 Support for my recharacterisation of the true issue in *Jay v Budd* can be found in the decision of the English Court of Appeal in *Golden Ocean Assurance Ltd and World Mariner Shipping SA v Christopher Julian Martin (The "Goldean Mariner")* [1990] 2 Lloyd's Rep 215 ("*The Goldean Mariner*"). In that case, the claimants had obtained permission to serve some of the defendants out of the jurisdiction but, owing to an error on the part of the process server, there was a mix-up in that each defendant was served with a writ addressed to another defendant. The majority of the court, consisting of McCowan LJ and Sir John Megaw, held that this error was a mere irregularity that the court could cure, and their Lordships considered it appropriate to exercise their discretion to do so given that the defendants had not been misled by the error and suffered no prejudice. The dissenting member of the court, Lloyd LJ (as he then was), agreed that the error was in principle curable, but disagreed on how the court's discretion should be exercised.

146 In my view, the alleged irregularity in *Jay v Budd* was of the same ilk as the irregularity in *The Goldean Mariner*. Indeed, the irregularity in *Jay v Budd* (service of a copy of the writ), if it even were an irregularity at all, was clearly less serious than the irregularity in *The Goldean Mariner* where it could have been argued that the defendants had not been served as they had not received writs addressed to them. Given this, there is no reason why the personal service

in *Jay v Budd* should not have been upheld, either on the basis that there was no irregularity (as intimated by Collins LJ) or that any irregularity was purely technical and could be cured.

147 Seen from this perspective, *Jay v Budd* is not strong authority for the view that service out of the jurisdiction is not necessary if the defendant was present in the jurisdiction at the time of the issue of the writ but not at the time of service as the defendant was in fact in the jurisdiction at both the time of issue and the time of service. The case did not call for substituted service at all, and the court's attempt to shoehorn the facts into necessitating substituted service was, in some sense, squaring a peg through a round hole.

148 The later decision in *Myerson* does not change my conclusion. It suffices to say that, while the court concluded there that the weight of authority favoured the view that the relevant time was the time of the issue of the writ, no attempt was made to consider or justify this as a matter of principle. The point was therefore assumed rather than proven. Moreover, *Myerson* can possibly be rationalised in the way I have explained *Consistel* above, in that the court may make an order for substituted service on a prediction that the defendant would be present in the jurisdiction at the time of service based on the defendant's location at the time of the issue of the writ, although the validity of service will ultimately turn on whether the defendant is actually present in the jurisdiction at the time of service (see [132]–[134] above).

149 For all of these reasons, I am satisfied, on both principle and authority, that the relevant time at which the necessity of service out of the jurisdiction is to be determined is the time of service. So, if the defendant is outside Singapore at the time of service, the court's jurisdiction can only be established by service

out of the jurisdiction under O 8 of the ROC 2021 and s 16(1)(*a*)(i) of the SCJA and not substituted service *simpliciter*. It is immaterial if the defendant was present in Singapore at the time the writ was issued or if the court had made an order for substituted service on that footing even if service has been carried out in accordance with the order.

(3) The apparent exceptions to the general rule

150 Finally, to complete the discussion on the relationship between service out of the jurisdiction and substituted service, I address the exceptions to the general rule. In *Consistel*, the "hierarchy of service" between service out of the jurisdiction and substituted service was said to be subject to the two exceptions, such that, if either was operative, the claimant would not need to obtain permission for service out of the jurisdiction and serve the defendant by substituted service *simpliciter* (at [35]):

(a) First, where the defendant leaves the jurisdiction in anticipation that legal proceedings will be initiated against him.

(b) Second, where the defendant is constantly moving from country to country such that it is impossible to serve the writ on him personally.

151 I should clarify that the exceptions were not in issue in this case as Mr Beranek did not invoke them to justify his failure to obtain permission to serve Mr Muruthi out of the jurisdiction assuming that such permission was required as Mr Muruthi submitted. Given this, my discussion of the exceptions below is made mainly for the purpose of giving the legal framework a holistic examination.

(A) ARE THE EXCEPTIONS LEGITIMATE?

152 In my respectful view, there is a powerful argument from principle that *neither* exception should exist. It seems to me that the exceptions, which have the effect of allowing a claimant to establish the court's jurisdiction over a defendant who is outside Singapore outside of the rules for service out of the jurisdiction under O 8 of the ROC 2021 cannot be justified for the simple reason that they are not consistent with the statutory framework for *in personam* jurisdiction established by service under s 16(1)(*a*) of the SCJA.

153 To recap, the courts are creatures of statute and therefore only have such jurisdiction conferred on them by the enabling legislation (see [28] above). Section 16(1)(*a*) of the SCJA provides that if the defendant is outside Singapore, the court's jurisdiction can only be established by service "in the circumstances authorised by" and "in the manner prescribed by" the Rules of Court. The former is a reference to the rules for service out of the jurisdiction under O 8 of the ROC 2021, which set out when the claimant will have a right to serve originating process on a defendant who is outside Singapore and, in turn, the circumstances when the court's jurisdiction can be established over such a defendant by service. It follows that, if the defendant is outside Singapore such that the court's jurisdiction can only be established under s 16(1)(*a*)(ii) of the SCJA, compliance with the rules for service out of the jurisdiction is *mandatory*. It is not open for the court to fashion exceptions that allow it to found jurisdiction over a foreign defendant outside the terms prescribed under s 16(1)(*a*)(ii) of the SCJA. This is tantamount to judicial legislation and a form of jurisdictional bootstrapping.

154 This has been recognised in the case law. In *Humpuss Sea Transport Pte Ltd v PT Humpuss Intermoda Transportasi TBK* [2015] 4 SLR 625

("*Humpuss*"), Steven Chong J (as he then was) observed that "the jurisdiction of this court over foreign defendants is expressly conferred by statute, and service in accordance with O 11 [of the ROC 2014] is a *statutory condition precedent to the exercise of jurisdiction* under s 16(1)(*a*)(ii) of the SCJA" [emphasis in original] (at [100]). The learned judge referred to *Lee Hsien Loong*, where Sundaresh Menon JC (as he then was) said that "[a] plaintiff's jurisdictional title to sue a foreign defendant depends upon the claim falling within the circumstances authorised by the Rules [(specifically, O 11 of the ROC 2014)] as well as upon the writ being served in the manner prescribed by the Rules", and "[i]t was only upon both conditions being met that the jurisdiction of the court could properly be invoked" (at [21]).

155 The essential teaching of both Chong J and Menon JC is that the *only* avenue for a claimant to establish the court's jurisdiction over a foreign defendant is the rules for service out of the jurisdiction under O 8 of the ROC 2021. Chong J puts the point in the clearest possible terms by referring to service in accordance with O 11 of the ROC 2014 (now O 8 of the ROC 2021) as a "statutory condition precedent" to jurisdiction over a foreign defendant. It is not clear, with respect, how a "statutory condition precedent" can be watered down by judicially fashioned exceptions. For my part, I would respectfully suggest that *in no case* should it be possible for the court's jurisdiction to be established by service on a defendant who is outside Singapore at the time of service other than by way of the rules for service out of the jurisdiction.

156 In any event, considering each of the exceptions specifically, I find that neither has a compelling justification that supports allowing the court's jurisdiction on a foreign defendant to be invoked by substituted service without an accompanying order for service out of the jurisdiction.

(B) DEFENDANTS WHO SEEK TO EVADE SERVICE

157 The first exception in *Consistel* is where the defendant has the intention of evading service. This, in my view, provides no logical justification for dispensing with the need for service out of the jurisdiction if the defendant is outside the jurisdiction.

158 In the first place, a defendant is under no obligation to assist the claimant with effecting service (see [87] above). It is thus not illegitimate *per se* for a defendant to take steps to evade service. As HHJ Paul Matthews put the point in *Broom v Aguilar* [2024] EWHC 1961 (Ch), "if you seek to avoid service, you are unlikely to be recommended for an honour for civic solidarity, but it is not *wrong*" [emphasis in original] (at [13]). So too it is not wrong for a defendant who is not desirous of being sued in the Singapore courts to stay out of Singapore so as to deny the claimant the opportunity of serving him or her with originating process as of right. It is, with respect, unclear *why* proof of an intention to evade service is a basis for dispensing with the need for service out of the jurisdiction.

159 In my view, the first exception in *Consistel* involves the same category error that the general rule recognises and cautions against (see [119] above). It conflates two things: (a) the difficulty created by the defendant being outside the jurisdiction; and (b) the difficulty created by the defendant intending to evade service. The problem created by the former is that the claimant is unable to serve the defendant with originating process as of right. The solution, therefore, is to apply for permission for service out of the jurisdiction under O 8 of the ROC 2021 so as to acquire such a right. The problem created by the latter, on the other hand, is inability to serve the defendant by personal service. The solution, here, is to apply for substituted service. Both problems can manifest at

the same time in a case of a defendant who intends to evade service and remains outside the jurisdiction pursuant to that intention. But the two are conceptually distinct and should be disentangled. It is not correct to collapse them into one, frame the issue *solely* as one of evasion of service and in turn use that framing to justify substituted service as a panacea to the entire situation. This overlooks that the defendant's absence from the jurisdiction is a separate issue for which the law provides a separate solution in the rules for service out of the jurisdiction (see [140] above).

160 For completeness, my view that the first exception ought not to exist at all naturally means that I also do not agree with the extension of it in the recent decision of *Exchange Union* to encompass the case where "the intention to evade service crystallised after the defendant had left the jurisdiction" (at [47]). In my respectful view, there is no basis for this extension for the reasons I have canvassed above. The defendant does nothing wrong by refusing to come into the jurisdiction to be served here. So, if the defendant has exited the jurisdiction before service is attempted and is likely to remain outside, the solution is to apply for service out of the jurisdiction. Whether the defendant's decision to remain outside the jurisdiction is animated by an intention to evade service is beside the point. Evasion of service can justify dispensing with personal service but not service out of the jurisdiction.

(C) NOMADIC OR PERIPATETIC DEFENDANTS

161 The second exception in *Consistel* concerns the position of what may be called a nomadic or peripatetic defendant, meaning a defendant who is "not in any jurisdiction long enough to be served": *Consistel* at [45]. This exception was fashioned to rationalise the decision of the Court of Appeal in *Ng Swee*

Hong v Singmarine Shipyard Pte Ltd [1991] 1 SLR(R) 980 ("*Ng Swee Hong*"). It is therefore useful to start by considering that case.

162 In *Ng Swee Hong*, the claimant attempted to serve a writ on the defendant ("Ng") but was informed by Ng's solicitors that Ng had left Singapore. The claimant then applied for and obtained an order for substituted service of the writ by, *inter alia*, posting it to Ng's address in Singapore. Ng applied to set aside service of the writ on the basis that he was outside Singapore. The Court of Appeal declined to set aside the order for substituted service. The material part of its reasoning is as follows (at [11]):

> … it is clear that [Ng] travels extensively. No process server would be able to catch up with him. It is also clear that he is in contact with his family. He is able to send them photocopies of his passport. He has called from Argentina. It is also clear to us that the writ and statement of claim served at [Ng's address in Singapore] were brought to [Ng's] notice. The requirement of O 62 r 5 being satisfied, we therefore dismissed the appeal.

163 I make three observations about *Ng Swee Hong*. The first is that the Court of Appeal appeared to focus only on the notice function of service. Thus, it reasoned that substituted service had achieved its purpose because "the writ and statement of claim … were brought to [Ng's] notice". It does not appear that the court considered if its jurisdiction had been properly established over Ng by service in light of Ng's absence from the jurisdiction.

164 The second point flows from the first. In my view, it is likely that the jurisdictional dimension of service did not arise in *Ng Swee Hong* because the statutory scheme for the jurisdiction of the Singapore courts under the SCJA at the time *Ng Swee Hong* was decided was different from that which is currently in force, in that unlike the law as it now stands, the jurisdiction of the court was not tied to service of originating process on the defendant. More specifically,

s 16(1) of the Supreme Court of Judicature Act (Cap 322, 1985 Rev Ed) did not draw any distinction between subject matter and personal jurisdiction:

> **Civil jurisdiction — general**
>
> **16.**—(1) The High Court shall have jurisdiction to try all civil proceedings where —
>
> (*a*) the cause of action arose in Singapore;
>
> (*b*) the defendant or one of several defendants resides or has his place of business or has property in Singapore;
>
> (*c*) the facts on which the proceedings are based exist or are alleged to have occurred in Singapore; or
>
> (*d*) any land the ownership of which is disputed is situated within Singapore:
>
> Provided that the High Court shall have no jurisdiction to try any civil proceeding which comes within the jurisdiction of the Syariah Court constituted under the Administration of Muslim Law Act [Cap. 3].

165 Given that s 16(1) of the SCJA at the time *Ng Swee Hong* was decided did not tie the court's jurisdiction over Ng to service on him, it is no surprise that the Court of Appeal did not consider the jurisdictional function of service as the court's jurisdiction over Ng would have been established by virtue of Ng's residence in Singapore under sub-section (b) above: Jeffrey Pinsler SC, *Principles of Civil Procedure* (Academy Publishing, 2011) at para 04.039; *Halsbury's* at para 75.007. Indeed, this difference in the legislative scheme was acknowledged by Ang J in *Consistel*, albeit the learned judge hesitated to distinguish *Ng Swee Hong* on this basis (at [44]–[45]). In my view, the point is a good one, and there was thus no need to attempt to fit *Ng Swee Hong* into the current regime on jurisdiction and service.

166 My third point is that, in the case of a peripatetic defendant who travels across different jurisdictions extensively, what should be done is not to apply

for substituted service *simpliciter* but to apply for *both* service out of the jurisdiction and substituted service. The situation of peripatetic defendants is, in substance, no different to the situation where the claimant does not know of the identity of the defendant – for example, in cases of misappropriation of cryptoassets by persons unknown – or does not know of the defendant's location. In such cases, since it will not be possible to serve the defendant within the jurisdiction under s 16(1)(*a*)(i) of the SCJA, the only way in which the court's jurisdiction over the defendant can be established is by service out of the jurisdiction under s 16(1)(*a*)(ii) of the SCJA, which may in turn be carried out in the manner of substituted service: *Osbourne v Persons Unknown* [2023] EWHC 39 (KB) at [24]; *Broom v Aguilar (No 1)* at [96]. As Professor Yip Man has explained, if "it cannot be assumed that [the defendants] are all within the jurisdiction", service out of the jurisdiction will be necessary "on the basis that some or all of the defendants are potentially located overseas": Yip Man, "The Mareva Injunction and Crypto Fraud" in *Fraud and Risk in Commercial Law* (Paul S Davies & Hans Tjio eds) (Hart Publishing, 2024) at p 130. The inability to locate a defendant for service is no justification for dispensing with the need for service out of the jurisdiction; on the contrary, this uncertainty forecloses the possibility of service within the jurisdiction and thus *confirms* the need for service out of the jurisdiction. The second exception in *Consistel* is, with respect, untenable as it turns the position on its head.

The consequences if service out of the jurisdiction is not properly effected

167 To recap, my analysis in the foregoing sections has established a straightforward rule that can be expressed in two ways:

(a) if the defendant is present in the jurisdiction at the time of service, the claimant can establish the court's jurisdiction over the

defendant by service of originating process within the jurisdiction under s 16(1)(*a*)(i) of the SCJA; and

(b) if the defendant is outside the jurisdiction at the time of service, the claimant can only establish the court's jurisdiction over the defendant by service of originating process out of the jurisdiction under s 16(1)(*a*)(ii) of the SCJA, which will require the claimant to proceed under the rules for service out of the jurisdiction under O 8 of the ROC 2021.

168 The question that arises from this is what happens if service is effected in circumstances outside of this rule: if the defendant is outside the jurisdiction and the claimant attempts service without obtaining permission for service out of the jurisdiction (under O 8 r 1(1) of the ROC 2021) and without the defendant's agreement (under O 8 r 1(3) of the ROC 2021), what is the status of such service in terms of its effect and validity? I propose to answer this question in two parts:

(a) First, I consider if there is room under our law for recognising an exception based on the defendant being only "temporarily absent" from the jurisdiction. It will be recalled that an exception in these terms has been recognised by the English courts as a limited qualification on the principle that a defendant can only be served within the jurisdiction if he or she is present in the jurisdiction at the time of service (see *SSL International* at [68] above and *Fridman* at [71] above).

(b) Second, I turn to consider the position where service is effected outside the aforesaid rule, in terms of whether such service can be upheld or validated.

(1) A "temporary absence" exception?

169 The proposition that temporary absence from the jurisdiction does not negate presence for the purposes of service within the jurisdiction appears to have originated from the English Court of Appeal's decision in *SSL International*. In that case, Stanley Burnton LJ put the point as follows (at [57]):

> It is a general principle of the common law that absent specific provision (as in the rules for service out of the jurisdiction) the courts only exercise jurisdiction against those subject to, i e within, the jurisdiction. *Temporary absence, for instance on holiday, does not result in a person not being subject to the jurisdiction.* In my judgment, Lawrence Collins J's statement of principle in [*Chellaram*] was correct if read with that qualification, and was not inconsistent with the decision in [*Kamali*]. [emphasis added]

170 In my view, whatever the status of this exception under English law, it should not be recognised as part of Singapore law for the following reasons.

171 First, I have already expressed the view that it is not open to the court to fashion exceptions to the rule encapsulated in s 16(1)(*a*)(ii) of the SCJA that a defendant who is outside the jurisdiction must be served based on the rules for service out of the jurisdiction under O 8 of the ROC 2021 (see [153]–[155] above). Those points apply here. It is not legitimate to make exceptions to s 16(1)(*a*) of the SCJA by judicial fiat as this entails the court expanding its jurisdiction beyond that which has been conferred on it by statute.

172 Second, I do not think that there is a strong argument in principle for recognising an exception based on temporary absence. The argument in favour of it appears to be the discomfort of the validity of service turning on the happenstance of whether the defendant is present in the jurisdiction at the time of service. Indeed, in *Kamali*, Wilson LJ referred to this as a reason for doubting

the correctness of presence as the touchstone for service within the jurisdiction (see [65] above). However, I do not share his Lordship's concern. As Vinodh Coomaraswamy J observed in *Lim Siew Soo v Sembawang Engineers and Constructors Pte Ltd* [2021] 4 SLR 566, "[e]very bright line rule produces seemingly arbitrary results at its margins", but this "does not detract from the utility of the rule in the general run of cases falling within its scope or from the justice of the principled rationale which underlies it" (at [135]). The converse situation in *Maharanee*, where service has been held to be validly effected on a person whose presence in the jurisdiction is only transient or fleeting, is no less adventitious than where service is rendered invalid by reason of the defendant's absence from the jurisdiction. Yet, it has not been thought necessary to carve out an exception based on the defendant being only being "temporarily present" in the jurisdiction. The defendant is either present in the jurisdiction or not. The general rule must thus cut both ways. In any event, as explained at [133]–[134] above, no real difficulty exists since it is always open to a claimant who wishes to guard against the risk of service being rendered invalid by the defendant's absence at the time of service to apply for service out of the jurisdiction.

173 Third, an exception of "temporary absence" is a slippery slope. The adjective "temporary" is inherently malleable and introduces a great deal of uncertainty into the law. If it is not kept within reasonable bounds (assuming that is possible), the exception will swallow the rule, as the touchstone of service within the jurisdiction will change from presence to ordinary or some form of sustained residence in the jurisdiction. Moreover, in practice, the exception will raise difficult questions as to how temporary an absence will allow a defendant to remain present in the jurisdiction for the purposes of being served here. The facts of *Fridman*, and the English Court of Appeal's difficulty in applying the temporary absence exception to a situation of a defendant who had clearly

communicated his intention to return to England, but who was unable to do so as he was subjected to sanctions, demonstrates this (see [69]–[71] above). The court's conclusion that an enforced absence results in the defendant's absence ceasing to be temporary is, in my respectful view, not free from doubt.

174 In my opinion, something as fundamental as whether the court's jurisdiction has been validly established by service should be governed by a bright-line rule that promotes certainty. The parties must be able to know where they stand. The touchstone of presence provides certainty because, at the very least, the defendant will at all times know where he or she is located, while the claimant will, for the most part, know whether the defendant is present in the jurisdiction or not. A defendant will not know, on the other hand, whether its absence from the jurisdiction will be viewed as "temporary" or not. So also, a claimant will not know this. An exception of "temporary absence" is a hotbed for satellite litigation as neither party will be able to trust that the defendant's presence will depend not only where he or she is *in fact* but the nature and quality of his or her absence from the jurisdiction.

175 Fourth, as a matter of authority, the status of the exception under English law appears to me to be questionable. It was formulated by Stanley Burnton LJ in *SSL Realisations* in order to reconcile *Kamali* with the general rule stated in *Chellaram*. It is telling that no authority other than *Kamali* itself was cited in support for the proposition that temporary absence did not cause the defendant to cease to be present in the jurisdiction. It is also telling that the House of Lords' decision in *Barclays Bank* was not based on such an exception, as if such an exception existed, it might have been applicable on the facts of that case where the defendant was resident in England but travelled frequently to South Africa and Europe (at 508). Instead, the House of Lords firmly upheld the requirement

of presence in the jurisdiction, save that it took a more expansive view of presence that was satisfied so long as the defendant was present in the jurisdiction on the same day that service was effected even if he was not there at the exact time (see [63] above). To the extent that one might be able to frame this in terms of "temporary absence", *Barclays Bank* at best establishes that an absence that is essentially *de minimis* will not cause the defendant not to be present in the jurisdiction. The exception would not go as far as to cover the facts of *Kamali* or Stanley Burnton LJ's example of a person who has left the jurisdiction on holiday. In any event, given that the court in *Fridman* recently took the view that *Kamali* was wrongly decided, there is no longer need for the temporary absence exception to rationalise *Kamali* as having been correctly decided. Since the status of the exception under English law is itself uncertain, there is no reason to import it into our law in light of the other difficulties I have highlighted above.

(2) The validity of service not in accordance with the general rule

176 I come to the consequences of service not being effected in accordance with the general rule encapsulated in s 16(1)(*a*) of the SCJA.

(A) SERVICE OUTSIDE S 16(1)(*A*) OF THE SCJA IS IRREGULAR

177 The starting point, in my view, is that service that does not comply with s 16(1)(*a*) of the SCJA would not be a nullity, but irregular, and liable to be set aside. Thus, where the claimant attempts service on a defendant who is not present in the jurisdiction outside of the rules for service out of the jurisdiction, the service would be defective. That defect would mean that service is irregular, but until it is set aside, the service would remain effective. As Professor Briggs has explained, "[i]f the claimant serves the defendant without having obtained

the permission which the law required him to obtain, service will have been irregular, but it will have happened and will not have been a nullity"; thus, "even if service has not been executed impeccably, it is … still service; and the fact that it is service means that the court has jurisdiction, at least until the court decides otherwise": *Civil Jurisdiction and Judgments* at paras 8.02, 9.03 and 9.04.

178 This was well-established under the ROC 2014, as O 2 rr 1(1) and 1(2) of the ROC 2014 provided that non-compliance with the rules – for example, the rules for service out of the jurisdiction under O 11 of the ROC 2014 – would be "treated as an irregularity and shall not nullify … any step taken in the proceedings", which "step" would include an attempt at service of originating process:

> **Non-compliance with Rules (O. 2, r. 1)**
>
> (1) Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these Rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein.
>
> (2) Subject to paragraph (3), the Court may, on the ground that there has been such a failure as is mentioned in paragraph (1), and on such terms as to costs or otherwise as it thinks just, set aside either wholly or in part the proceedings in which the failure occurred, any step taken in those proceedings or any document, judgment or order therein or exercise its powers under these Rules to allow such amendments (if any) to be made and to make such order (if any) dealing with the proceedings generally as it thinks fit.

179 The decision of the English Court of Appeal in *Leal v Dunlop Bio-Processes International Ltd* [1984] 1 WLR 874 ("*Leal*") is instructive. In that

case, the claimant had served a writ out of the jurisdiction without obtaining the leave of the court. The defendant applied to set aside service. The court held that this was an irregularity under the English equivalent to O 2 r 1 of the ROC 2014 (at 881E–G). *Leal* was later applied by the High Court in *Maritime (Pte) Ltd v ETPM SA* [1988] 1 SLR(R) 250 ("*Maritime*"). There, the claimant served a writ on the defendant's agent under the predecessor to O 7 r 4 of the ROC 2021 without obtaining prior permission from the court. L P Thean J (as he then was) noted that the *ratio* of *Leal* was that "the failure to obtain leave of the court to serve the writ on the defendants outside the jurisdiction of the court was an irregularity and that the court has the power under O 2 r 1 to cure the irregularity", and considered that the same could be said of the situation before him (at [7]). These authorities establish that service in circumstances where the claimant did not have a right to serve the defendant with originating process due to the defendant's absence from the jurisdiction, whether due to a failure to obtain permission to serve out of the jurisdiction (*Leal*) or a failure to obtain permission to serve on an agent within the jurisdiction (*Maritime*), would result in irregular service that is nonetheless effective until it is set aside by the court.

180 The same should also apply under the current regime in the ROC 2021. Order 3 rr 2(4) and 2(5) of the ROC 2021 deal with non-compliance with the provisions of the ROC 2021 and provide as follows:

> **General powers of Court (O. 3, r 2)**
>
> (4) Where there is non-compliance with these Rules, any other written law, the Court's orders or directions or any practice directions, the Court may exercise all or any of the following powers:
>
> (*a*) subject to paragraph (5), waive the non-compliance of the Rule, written law, the Court's order or direction or practice directions;
>
> (*b*) disallow or reject the filing or use of any document;

> (*c*) refuse to hear any matter or dismiss it without a hearing;
>
> (*d*) dismiss, stay or set aside any proceeding and give the appropriate judgment or order even though the non-compliance could be compensated by costs, if the non-compliance is inconsistent with any of the Ideals in a material way;
>
> (*e*) impose a late filing fee of $50 for each day that a document remains unfiled after the expiry of the period within which the document is required to be filed, excluding non-court days;
>
> (*f*) make costs orders or any other orders that are appropriate.
>
> (5) Where the non-compliance is in respect of any written law other than these Rules, the Court may waive the non-compliance only if the written law allows such waiver.

Although there is no direct parallel to O 2 r 1(1) of the ROC 2014 that expressly provides that non-compliance with the provisions of the ROC 2021 does not nullify an act taken in the proceedings, the power to waive non-compliance with the ROC 2021 under O 3 r 2(4)(*a*) serves the same function as the court's power under the former O 2 r 1(2) of the ROC 2014. The existence of such a power presupposes that the same paradigm continues under the ROC 2021, even if the calculus on how the court's discretion should be exercised in calibrating the appropriate response to non-compliance may be different under the ROC 2021 in light of the Ideals under O 3 r 1: *Wuhu Ruyi Xinbo Investment Partnership (Ltd Partnership) v Shandong Ruyi Technology Group Co, Ltd* [2025] 4 SLR 1262 at [163]–[165]; Jeffrey Pinsler SC, *Singapore Civil Practice* (LexisNexis, 2022) ("*Singapore Civil Practice*") at paras 4-7–4-10.

(B) WHETHER IRREGULAR SERVICE SHOULD BE SET ASIDE OR CURED

181 If service on the defendant is irregular because it does not fall within either s 16(1)(*a*) of the SCJA as the defendant was not present in the jurisdiction

at the time of service and was not served in accordance with the rules for service out of the jurisdiction, what should the court's response be?

182 In my judgment, the starting point is that irregular service in such circumstances should be set aside in the vast majority of cases. Although I do not reject outright the possibility of the court having the power to waive the irregularity, I consider that the exercise of this power would in most cases be subject to two principal obstacles:

(a) First, the scope of the court's power to waive the irregularity is narrow in that the court does not have an unbridled power to dispense with compliance with the rules for service out of the jurisdiction altogether. Instead, the court's power to waive non-compliance with the rules for service out of the jurisdiction only extends to the power to grant permission for service out of the jurisdiction retrospectively.

(b) Second, even though the court has in principle the power to grant retrospective permission for service out of the jurisdiction, this power will not be exercised in most cases for reasons grounded in both policy and practicability.

(I) THE COURT CANNOT DISPENSE WITH THE RULES FOR SERVICE OUT OF THE JURISDICTION

183 I begin with the first point. In my view, the court's power to waive non-compliance with the rules for service out of the jurisdiction under O 8 of the ROC 2021 does not go so far as to dispense with compliance with them completely. The reason is that the need for compliance with the rules for service out of the jurisdiction where the defendant is outside the jurisdiction arises not from the ROC 2021 itself but from s 16(1)(*a*)(ii) of the SCJA. It is not possible

for the court to use a power under the ROC 2021 to circumvent the statutory limits of its jurisdiction under the SCJA.

184 It will be recalled that the power to waive non-compliance with the provisions of the ROC 2021 is located in O 3 r 4(*a*) of the ROC 2021. The ROC 2021, including O 3 r 4(*a*) within it, is subsidiary legislation that is issued under the authority of the SCJA for the purposes of "regulating and prescribing the procedure" to be followed in the General Division: s 80(1) of the SCJA. The court's inability to assert jurisdiction over a defendant who is outside Singapore save as provided for in the rules for service out of the jurisdiction under O 8 of the ROC 2021 is not merely a matter of procedure but a limit on its jurisdiction. It is not a procedural irregularity amenable to cure under O 3 r 4(*a*) of the ROC 2021.

185 This point can be expressed a different way. Under s 19(*c*) of the Interpretation Act 1965 (2020 Rev Ed), "subsidiary legislation made under an Act must not be inconsistent with the provisions of any Act". A similar principle of hierarchy is enshrined within the ROC 2021 itself as O 3 r 5 clarifies that the power under O 3 r 4(*a*) to waive non-compliance with written law other than the ROC 2021 is subject to the written law itself allowing for such waiver. What these provisions codify is the "absolute sense" that subsidiary legislation, being issued under delegated authority from Parliament, cannot be used to override the will of Parliament which is reflected in primary legislation: *Woon Brothers Investments Pte Ltd v Management Corporation Strata Title Plan No 461* [2011] 4 SLR 777 at [14]. In the specific context of the relationship between the ROC 2021 and the SCJA, this means that a power conferred by the ROC 2021 cannot be used to override a limitation of the court's jurisdiction imposed by s 16(1) of the SCJA as the SCJA is the parent Act from which the ROC 2021 derives its

authority from. It is accordingly not open to the court to dispense with non-compliance with the rules for service out of the jurisdiction as s 16(1)(*a*)(ii) of the SCJA makes compliance *mandatory* to the extent that service is relied on as the basis for the court's jurisdiction over a defendant outside Singapore.

186 For completeness, I am cognisant that O 7 r 1(2) of the ROC 2021 gives the court a power of dispensation of service. The scope of the power is expressed in broad terms, as the court may dispense not only with "personal service or with ordinary service", but "service altogether". It might be argued that, if the court has a power to dispense with service of originating process altogether, there is no objection to waiving non-compliance with the rules for service out of the jurisdiction, contrary to what I have expressed above.

187 But, in my view, there are two answers to this argument. First, I am doubtful that O 7 r 1(2) of the ROC 2021 allows the court to dispense with service of *originating process*. I note that Professor Yeo has opined that "it is unlikely that originating processes were intended to be excluded from this rule": *Absent Defendants* at para 14. I respectfully disagree. To dispense with service of originating process would, in my view, run into the same objection I have made at [183]–[185] above of the court using a procedural power to extend its jurisdiction. Section 16(1)(*a*) of the SCJA ties the court's jurisdiction to service of originating process. It is therefore not a mere matter of procedure but a limit on the court's jurisdiction. As I have mentioned, a power that arises from the ROC 2021, as subsidiary legislation regulating procedure, cannot be used to extend the court's jurisdiction under the SCJA.

188 Indeed, Professor Yeo effectively concedes this, as proceeding from the premise that the court can dispense with service of originating process, he

accepts, fairly, that this runs into the issue of consistency with the statutory scheme for jurisdiction under s 16 of the SCJA. His solution which, in fairness, is quite a creative one, is to rely on a fiction of deemed service, in that "the order of no service will be deemed a method of service": *Absent Defendants* at para 14. I do not think such a fiction is tenable. The terms of s 16(1)(*a*) of the SCJA tie jurisdiction to service of originating process. The argument that the language of O 7 r 1(2) of the ROC 2021 does not exclude originating processes from its scope is based on a false premise that stands the relationship between the SCJA and ROC 2021 on its head. It is not necessary for this qualification to be spelled out in O 7 r 1(2) as it must be read subject to s 16(1)(*a*) of the SCJA which stipulates service of originating process as a condition for establishing the court's jurisdiction over a defendant.

189 I note that the English equivalent to O 7 r 1(2) of the ROC 2021 in r 6.16 of the CPR (UK) expressly spells out that it applies to originating process, and the UK Supreme Court has taken the view in *Cameron v Liverpool Victoria Insurance Co Ltd* [2019] 1 WLR 1471 that the court may dispense with service of originating process "even where no attempt has been made to effect it in whatever manner, if the defendant has deliberately evaded service and cannot be reached by way of service [by an alternative method]"; an example of this was said to be "where the defendant is unidentifiable but has concealed his identity in order to evade service" (at [25]). However, I have reservations about this both as a matter of principle and as to whether it is compatible with our law:

(a) As a matter of principle, I fail to see how the concealment or lack of knowledge of the defendant's identity would mean that substituted service (or service by an alternative method) is impossible. It is not uncommon nowadays for our courts to see originating process issued

against persons unknown along with applications for relief such as injunctions. Given that an originating process can be issued without specifically naming a defendant as long as the defendant is described in sufficiently certain terms, there should be no insuperable difficulty in making an order for service out of the jurisdiction (to cover the possibility that the defendant is outside the territorial jurisdiction of the court) coupled with an order for substituted service against an unnamed or unknown defendant (to get around the difficulty of personal service): see, in this context, *CLM v CLN* [2022] 5 SLR 273 ("*CLM v CLN*"). The requirement that two reasonable attempts at personal service be made before an application for substituted service under para 65(2) of the SCPD 2021 poses no difficulty as it can be waived by the court if personal service is impossible: *CLM v CLN* at [82].

(b) In terms of compatibility, the express inclusion of originating process within the scope of the court's power of dispensation of service under r 6.16 of the CPR (UK) is a basis to distinguish the English law position and, if anything, only serves to confirm that the equivalent rule under the ROC 2021 should not be read to include originating process. In any event, even if dispensation of service of an originating process is legitimate under English law, the position in Singapore is also distinguishable on the basis that, unlike the position of the English courts, the *in personam* jurisdiction of the Singapore courts derives from statute under s 16(1) of the SCJA.

190 Second, even assuming *arguendo* that the court can under O 7 r 1(2) of the ROC 2021 dispense with service of originating process, it is unclear if this extends to the situation of a defendant who is outside the jurisdiction such that

the rules for service out of the jurisdiction can be dispensed with as well. It is worth noting that O 7 r 1(2) of the ROC 2021 falls under O 7 which is concerned with service on a defendant within the jurisdiction. It is arguable that where the defendant is present in Singapore, the court's jurisdiction may be established under s 16(1)(*a*)(i) of the SCJA even if service is dispensed with on the basis that the order for dispensation nonetheless means – as paradoxical as it may seem, albeit potentially justifiable on the fiction that Professor Yeo employs – that the defendant has been served "in the manner prescribed by [the ROC 2021]". The additional requirement under s 16(1)(*a*)(ii) of the SCJA in the case of defendants outside Singapore that service be "in the circumstances authorised by [the ROC 2021]" makes it doubtful that the power of dispensation under O 7 r 1(2) of the ROC 2021 includes dispensing with the rules for service out of the jurisdiction under O 8 of the ROC 2021 which are conditions for the existence of jurisdiction over persons outside Singapore.

191 For the foregoing reasons, I am of the view that the court's power to waive non-compliance with the rules for service out of the jurisdiction does not extend to dispensing with them altogether. The short point is that the rules for service out of the jurisdiction are *mandatory* conditions for establishing the court's jurisdiction over persons outside Singapore under s 16(1)(*a*)(ii) of the SCJA notwithstanding that the rules themselves are contained in the ROC 2021. The entrenchment of the rules in s 16(1)(*a*)(ii) of the SCJA means that rank above the power of waiver under O 3 r 4(*a*) of the ROC 2021. Thus, to the extent that the court has a power to waive non-compliance with the rules for service out of the jurisdiction, this must be limited to a power to retrospectively give permission for service out of the jurisdiction, which has been recognised in the case law such as *Leal* and *Burgundy* (at [110]). But, as I come to next, it will generally not be appropriate for the court to exercise this power.

(II) RETROSPECTIVE PERMISSION TO SERVE OUT OF THE JURISDICTION

192 In *Leal*, a general marker was laid down by May LJ who stated that "it will only be in the exceptional case that the court will validate after the event the purported service in a foreign country without leave of process issued by an English court" (at 882G–H). Slade LJ expressed the same view and emphasised that "breaches of the requirements of … Ord. 11, r. 1, relating to the leave of court, are not … likely to be breaches which can be lightly disregarded" (at 885E–F). I agree with the outlook stated by their Lordships. In my view, there are at least two reasons, one of policy and one of practice, that militate against the court exercising its power to grant retrospective permission for service out of the jurisdiction.

193 First, as a matter of policy, the court's discretion should not be seen as a form of insurance against the claimant's failure to take the necessary steps to properly invoke the court's jurisdiction over the defendant. The onus is on a claimant who seeks to draw the defendant into the jurisdictional gravity of the Singapore courts to ensure that it has the requisite authority to serve the defendant with originating process depending on where the defendant is located. As mentioned above, it is open to a claimant who fears that the defendant may not be present in Singapore at the time of service to shore up his or her position by applying for permission for service out of the jurisdiction. In this event, the claimant would have a right to serve the defendant with originating process whether the defendant is present in or outside Singapore at the time of service. The availability of such self-help means that there is little impetus for the court to intervene after the event to regularise service that is defective due to the claimant having had no right to serve the defendant at the material time. It is for

the claimant to internalise the risk of service being made irregular due to the defendant's absence from the jurisdiction.

194 Second, as a matter of practice, an application to set aside service or an order for substituted service will rarely be an appropriate or convenient forum for the court to consider permission for service out of the jurisdiction should be granted. The requirements for the grant of permission to serve out of the jurisdiction are quite specific. Satisfying the court that these requirements are met will require affidavit evidence that is tailored to each requirement, and which will likely not be before the court – at least, not at any depth – in the affidavits before the court in an application to set aside service. The Merits Requirement and the Natural Forum Requirement are particularly challenging. An examination of whether there is a serious issue to be tried is not always an easy matter; and the test for *forum non conveniens* is notorious for how intensely factual it can be: see, for example, *Sinopec International (Singapore) Pte Ltd v Bank of Communications Co Ltd* [2024] 3 SLR 476. Indeed, it is because of this that courts have often expressed dismay at *forum conveniens* challenges getting out of hand in terms of proportionality: see, for example, *Lungowe v Vedanta Resources plc* [2020] AC 1045 at [6]–[14]. This underscores the likelihood that the court will not find itself properly equipped to deal with the issue of whether permission should be granted for service out of the jurisdiction absent a specific application dedicated to that purpose.

195 For these reasons, I respectfully disagree with the more liberal approach of the court in *Exchange Union* to granting retrospective permission for service out of the jurisdiction. In that case, the court seems to have thought that it would be appropriate to grant retrospective permission if the claimant had believed, in good faith, that the defendant was present in the jurisdiction and had attempted

substituted service on that basis when that turned out to be untrue: *Exchange Union* at [50]. I do not agree that this is a good reason for the court to intervene since the risk of the defendant being outside the jurisdiction can be managed by the claimant by applying for permission for service out of the jurisdiction before or together with substituted service. Moreover, although the court considered it appropriate to grant retrospective permission or service out of the jurisdiction, it does not appear that such an order was actually made: see *Exchange Union* at [60], [61] and [63]. I have two reservations about this:

(a) First, it is not satisfactory for the court not to make an order for permission for service out of the jurisdiction if it is prepared to make one, and to simply decide not to set aside the service effected: *Marashen* at [19(v)]. The failure to make such an order means that the claimant's right to serve the defendant with originating process is a theoretical and not an actual one.

(b) Second, it is unclear if the defendant in *Exchange Union* was given notice that the issue of whether permission for service out of the jurisdiction should be granted was live or, at any rate, an opportunity to lead evidence on this. It does not appear to be so, as the court's decision on the requirements for service out of the jurisdiction at [61] referred exclusively to an affidavit deposed to by the claimant. If that was the case, the defendant would have been prejudiced in so far as it did not have the ability to properly argue, and lead evidence in support of its position, whether permission should be granted for service out of the jurisdiction. This illustrates the practical difficulties inherent in such an approach.

Summary: An analytical framework for considering the validity of service of originating process

196 Given the length and depth of the discussion above, it may be useful to collect the different strands above and restate them in an analytical framework for considering the validity of service of originating process.

197 In my view, where the validity of service of originating process is put into issue, it can be broken down into three broad questions:

(a) First, did the claimant have a *right* to serve the defendant with originating process?

(b) Second, did the claimant serve originating process on the defendant in the proper *manner*?

(c) Third, if the answer to either the first or second questions (or both) is "no", what is the consequence that should follow from this?

I elaborate on each of these three questions below. I have endeavoured to make this restatement self-contained, but for ease of explication, I have included where appropriate cross-references to the more detailed analysis of the relevant points in the discussion above.

(1) Whether the claimant has a right to serve originating process on the defendant

198 Beginning with the first question, the question of whether the claimant has a right to serve originating process on the defendant will depend, in the first place, on whether the defendant is present in Singapore at the time of service:

(a) If the defendant is present in Singapore at the time of service, that fact by itself will establish the claimant's right to serve the defendant with originating process. No issue as to the claimant's right will arise and the validity of service will depend in the main on whether service has been in the proper manner. This explains why s 16(1)(*a*)(i) of the SCJA does not refer to the need for "authorisation" to serve originating process and only refers to the need for service to be "in the manner prescribed by the Rules of Court".

(b) If the defendant is not present in Singapore at the time of service, the claimant will have no right to serve the defendant with originating process save as provided for in the rules for service out of the jurisdiction under O 8 r 1 of the ROC 2021. This explains why s 16(1)(*a*)(ii) of the SCJA refers both to the need for service to be "in the circumstances authorised by" and "in the manner prescribed by Rules of Court". In this regard, O 8 r 1 contemplates that a claimant can acquire a right to serve originating process on a defendant outside Singapore in two ways:

(i) First, by applying to court for permission for service out of the jurisdiction under O 8 rr 1(1) and 1(2) of the ROC 2021.

(ii) Second, by agreement with the defendant for service out of the jurisdiction under O 8 r 1(3) of the ROC 2021.

199 The requirement that the defendant be present in the jurisdiction, where the defendant's presence is relied on as the source of the claimant's right to serve originating process on the defendant, is a strict one in that no exception is made based on the defendant being "temporarily absent" from the jurisdiction

(see [169]–[175] above). However, there is a measure of flexibility to the extent that presence includes both the defendant's personal presence in the jurisdiction and constructive presence through an agent who is authorised to accept service on the defendant's behalf. As a limited extension of the latter, the court may authorise service on an agent of the defendant even if the defendant has not authorised the agent to accept service under O 7 r 4 of the ROC 2021 (see [79]–[89] above). In the case of a corporate defendant that is unable to maintain a physical presence in the jurisdiction, presence may be established through the test of corporate presence which, broadly speaking, requires the defendant to be carrying on business in the jurisdiction (see [109]–[112] above).

200 The consequence of the need for a right to serve originating process on the defendant is that, if the claimant foresees a possibility that the defendant will not be present in the jurisdiction at the time of service, or at least wishes to close off the risk that it will not be able to rely on the defendant's presence as a source of the right to serve originating process on the defendant, the claimant may apply for permission for service out of the jurisdiction under O 8 r 1(2) of the ROC 2021, if there is otherwise no agreement between the parties for service out of the jurisdiction under O 8 r 1(3) of the ROC 2021. This will protect the claimant's position in so far as he or she will have a right to serve originating process on the defendant independent of the latter's presence in the jurisdiction (see [133]–[134] above).

201 The defendant may challenge service on the basis that the claimant had no right to serve him or her with originating process. This may be because the defendant was outside the jurisdiction at the time of service and the claimant did not have a right to serve originating process under O 8 r 1 of the ROC 2021. If the claimant takes the position that it had a right to serve out of the

jurisdiction, the defendant may also challenge the existence of that right by: (a) setting aside any order for permission for service out of the jurisdiction on which the claimant had proceeded; or (b) disputing the existence or terms of the agreement under which the claimant had claimed a right to service out of the jurisdiction without permission of court. Either way, a successful challenge by the defendant would mean that the claimant would have had no right to serve the defendant with originating process.

(2) Whether service was effected in the proper manner

202 The second issue that arises if the claimant has (or had) a right to serve originating process on the defendant is whether service has been in the proper manner.

203 The starting point is that, as a general rule, originating process should be served by personal service: O 6 r 4 of the ROC 2021. In principle, this applies equally to both service within the jurisdiction (where the defendant is present in the jurisdiction) or service out of the jurisdiction (where the defendant is outside the jurisdiction). In the latter situation, however, operation of the general rule is subject to the caveat that personal service is not contrary to the law of the foreign jurisdiction: O 8 r 2(6) of the ROC 2021. Order 8 r 2(6) sets a general rule that, to the extent that the method of service is an act that occurs in a foreign country, the Singapore court cannot authorise the doing of any act that is contrary to the law of that country.

204 In the case of service out of the jurisdiction, apart from personal service, the claimant may attempt service on the defendant in any other manner provided for under O 8 r 2(1) of the ROC 2021:

(a) any manner contractually agreed between the parties;

(b) in any manner provided for under the relevant Civil Procedure Convention, if one is applicable;

(c) through the government of the foreign country in which the defendant is located, if that government is willing to effect service;

(d) through the judicial authority of the foreign country in which the defendant is located, if that judicial authority is willing to effect service;

(e) through a Singapore consular authority in the foreign country in which the defendant is located seeking the assistance of the relevant authority in that foreign country to effect service; and

(f) any manner provided by the law of the foreign country in which the defendant is located.

These methods of service are subject also to the aforesaid limitation under O 8 r 2(6) of the ROC 2021 that it cannot be contrary to the law of the foreign country in which service takes place. It would be obvious, however, that this issue will only potentially arise in relation to the first method – service by a contractually agreed method – given that the other methods set out in O 8 r 2(1) are methods of service under the law of the foreign jurisdiction or laid down in an international convention which the state in which service is to be effected in has acceded to.

205 If the claimant considers personal service (and, in the case of service out of the jurisdiction, the other manners of service set out in O 8 r 2(1) of the ROC

2021) impractical, the claimant may apply to the court for service to be in the manner of substituted service. To convince the court to authorise substituted service, the claimant must show, first, that personal service is impractical for any reason, and secondly, that the proposed mode of substituted service will be effective in bringing the document to the notice of the person being served: see O 7 rr 7(1) and 7(2) of the ROC 2021.

206 As far as impracticality is concerned, para 65(2) of the SCPD 2021 lays down a general rule of practice that the claimant should have made at least two reasonable attempts at personal service before applying for substituted service. This, in a sense, is a proxy for the test of impracticality of personal service. It is however not a hard-coded rule and the court will ultimately assess if personal service is impractical. This also means that, in an appropriate case, the claimant may convince the court to dispense with the general rule under para 65(2) of the SCPD 2021. This might be achieved by showing that personal service is not merely impractical but impossible – for example, if the identity or location of the defendant is unknown – or that personal service may be futile.

207 As regards the mode of substituted service, it has been said that the claimant must show that the proposed mode will "in all probability, if not certainty, be effective to bring knowledge of the writ … to the defendant": *Storey, David Ian Andrew v Planet Arkadia Pte Ltd* [2016] SGHCR 7 at [9], citing *Porter v Freudenberg* [1915] 1 KB 857 at 889. For my part, I would hesitate to put things in such absolute terms; it seems to me that the principle is better expressed not in terms of abstract probability but whether, in the circumstances of the case, the proposed mode of service is the one that "creates the *highest possible chance* that a defendant would be notified about the proceedings" [emphasis added]: *Zhang Jinhua v Yip Zhao Lin* [2024] 5 SLR

1046 ("*Zhang Jinhua*") at [49]. I say this because there will be cases where it is logically difficult if not impossible to be satisfied if the originating process will "in all probability, if not certainty" be brought to the attention of the defendant. In such cases, it should suffice that the court is satisfied that the proposed mode constitutes the best chance at giving notice to the defendant, or at the very least, is within that realm of probability. To this end, the proposed mode of substituted service can consist of an act (or acts) occurring within Singapore, an act in a foreign jurisdiction, or a combination of these: *Western Suburban and Notting Hill Permanent Benefit Building Society v Rucklidge* [1905] 2 Ch 472 at 474. In so far as the method of substituted service occurs in a foreign jurisdiction, it would be subject to the general requirement that it be compliant with the law of that jurisdiction under O 8 r 2(6) of the ROC 2021.

208 It is important not to conflate the question of whether the claimant has a right to serve originating process with the manner of service of originating process. As explained at [119]–[125] above, this is the essential teaching in *Consistel*. So, if the defendant is not present in the jurisdiction at the time of service, a prior order for substituted service will not, by itself, suffice to effect valid service on the defendant even if the terms of the order have been complied with to the letter. This is because the claimant will not have a right to serve the defendant with originating process at the time of service. Although there are contraindications to this in the form of the two exceptions suggested in *Consistel* which would allow a claimant to serve originating process on a defendant outside the jurisdiction by substituted service *simpliciter*, I have suggested that both exceptions are untenable as they are illegitimate extensions of the jurisdiction of the Singapore courts beyond what has been conferred on them by s 16(1)(*a*) of the SCJA (see [150]–[166] above).

209 The consequence of this can be explained from two dimensions. The first is that, when the claimant applies for substituted service, both the claimant and the court should strictly be focused on the location of the defendant at the time service is to be effected in the event that an order is made on the application. Although this entails crystal ball-gazing as the court is seeking to predict if the defendant will be present in the jurisdiction at a future point in time, the practical difficulty involved is more apparent than real because the requirement that the claimant effect substituted service within 14 days of the order under O 7 r 7(3) of the ROC 2021 means that the horizon of foresight is limited to that time. For the purpose of assessing if the defendant will be present in the jurisdiction at the time of service, the court may base its prediction on the location of the defendant at the time of the issue of the originating process or at the time of the application for substituted service (see [132]–[134] above). If the court is satisfied that the defendant will likely be within the jurisdiction at the time service is to be made, it may make an order for substituted service.

210 The second dimension, however, concerns the position after substituted service has been effected. As mentioned above, since an order for substituted service in itself says nothing about whether the claimant has a right to serve the defendant with originating process, substituted service pursuant to an order of court will nonetheless be irregular if the defendant was not present in the jurisdiction at the time of service. The mere fact that the court made an order for substituted service, and the claimant had complied with it, is therefore not the end of the matter. Even if it appeared at the time the order was made that the defendant would likely be within the jurisdiction at the time of service, the fact that the defendant was not actually present in the jurisdiction at that time would mean that the claimant would have no right to serve the defendant unless a right had been obtained from an order for permission from the court under O 8 r 1(1)

of the ROC 2021 or from an agreement between the parties under O 8 r 1(3) of the ROC 2021. The consequence of this is that service will be irregular, and if it is set aside, the claimant will no longer be able to rely on the earlier order for substituted service and re-attempt service based on that order as the order would be spent by then (see [134]–[135] above).

211 A defendant who wishes to challenge the manner of service can also, to the extent it may be necessary, challenge not only the manner of service directly but attack the basis on which the claimant asserts a right to effect service in a particular manner. So, if the claimant claims that service was effected based on an order for substituted service, the defendant may, apart from showing that the order was not complied with, also seek to have the order set aside. This can be done on the basis that: (a) there was material non-disclosure in the obtaining of the order; or (b) the requirements for substituted service were not met. If an order for substituted service is set aside, it would follow that service effected pursuant to that order would be irregular as there would have been no basis to depart from the general rule of personal service (see [203] above).

(3) The consequence(s) if the claimant did not have a right to serve originating process or if service was not in the proper manner

212 If service was effected in circumstances where the claimant did not have a right to serve the defendant with originating process or not in the proper manner, the service will not be a nullity but irregular service that can be challenged by the defendant in an application to set aside service (see [177]–[180] above). In this regard, as noted at [18]–[20] above, applications to set aside service should not be conflated with applications to set aside orders for service such as orders granting permission for service out of the jurisdiction or orders for substituted service. However, in practice, the defendant may (and

often will) make both applications concurrently in so far as the defendant is attacking *both* the basis on which service was made (the order) and the service itself (see [201] and [211] above).

213 If service is irregular due to the claimant having had no right to serve the defendant with originating process, it will generally be set aside in the vast majority of cases (see [182] above). The court has no power to waive compliance with the rules for service out of the jurisdiction (see [183]–[191] above). Although the court has the power to cure irregular service by granting retrospective permission for service out of the jurisdiction, this power will rarely be exercised for both policy and practical reasons (see [192]–[195] above).

214 If service is irregular due to the claimant having not complied with the proper manner of service, whether the court will cure the irregularity or set aside the service will depend on the circumstances including the nature of the irregularity. Thus, for example, if service was not in the proper manner but nonetheless effective in giving notice of the claim to the defendant, the court may cure the irregularity: see, for example, *The Goldean Mariner* at [145] above and *Jay v Budd*, as I have recharacterised it, at [143], [144], and [146] above. In contrast, if service out of the jurisdiction was in a manner contrary to the law of the foreign jurisdiction in which the act of service occurred, the court will not cure the irregularity: *Humpuss* at [85]–[91].

Whether substituted service of OA 1158 on Mr Muruthi should be set aside

215 Having considered the legal framework, I come to the facts of this case. To recap, the issue of the validity of service of OA 1158 on Mr Muruthi can be approached through the following analytical framework (see [197] above):

(a) First, did Mr Beranek have a right to serve Mr Muruthi with OA 1158?

(b) Second, did Mr Beranek serve OA 1158 on Mr Muruthi in the proper manner?

(c) Third, if the answer to either the first or second questions (or both) is "no", what is the consequence that should follow from this?

216 Mr Muruthi did not submit that Mr Beranek had failed to comply with the terms of the substituted service order made in SUM 3260. There was thus no argument that service had not been effected on Mr Muruthi in the proper manner. Instead, Mr Muruthi's argument that Mr Beranek failed to obtain permission to serve OA 1158 on him was directed at the first question, that is, whether Mr Beranek had a right to serve OA 1158 on him. As explained above, this was dependent on whether Mr Muruthi was present in Singapore at the time of service, *ie*, 20 November 2025 (see [10] above):

(a) If the answer to this was "yes", Mr Beranek would have been entitled to serve OA 1158 on Mr Muruthi as of right by virtue of Mr Muruthi's presence in the jurisdiction. There would be no irregularity in the service as Mr Muruthi would have been validly served within the jurisdiction under s 16(1)(*a*)(i) of the SCJA.

(b) But if the answer was "no", Mr Muruthi would have been correct to say that Mr Beranek required permission to serve him out of the jurisdiction, as absent such permission, Mr Beranek would have had no right to serve OA 1158 on Mr Muruthi, and the service effected would be irregular as it did not constitute valid service under s 16(1)(*a*)(ii) of

the SCJA. The third question would then arise for the court to consider the consequence(s) of Mr Beranek having had no right to serve OA 1158 on Mr Muruthi.

217 Having set things in context, I make two preliminary points. The first relates to the burden of proof. It is relatively well-established, at least in the context of applications to set aside orders for permission for service out of the jurisdiction, that the burden of proof is on the *claimant* seeking to uphold the order rather than the defendant who has made the application for setting aside: *Lee Hsien Loong* at [19]–[21]; *Humpuss* at [102]; *Singapore Civil Practice* at para 10-79. It is not clear if this general rule applies where the specific issue is whether the claimant had a right to serve the defendant with originating process which depends on the location of the defendant at the time of service. On the one hand, it accords with the general principle that he who asserts must prove to require the party serving the writ to show that he was entitled to do so: *Singapore Civil Practice* at para 10-80. But, on the other hand, I can see a fair argument that, because the location of the defendant at any given time is a fact that is especially within his or her knowledge, this would trigger the reversal of the burden of proof onto the defendant under s 108 of the Evidence Act 1893 (2020 Rev Ed).

218 It was, however, not necessary for me to decide this issue and to rest my decision on the burden of proof. This might have been a point of some significance because, as noted at [24]–[25] above, the parties proceeded on the false premise that whether Mr Muruthi should have been served out of the jurisdiction depended on whether he was *ordinarily resident* in Singapore. But the right question to be asked, as I have explained, was whether Mr Muruthi was *present* in Singapore at the time of service. The consequence of the parties'

error meant that there was no evidence before me that could directly establish Mr Muruthi's location at the time of service. Instead, the evidence only went far enough to circumstantially infer if Mr Muruthi was likely to be within Singapore at that time or not. In the circumstances of this case, I was prepared to consider ordinary residence as a proxy for where Mr Muruthi was likely located on the basis that that was how the parties argued their cases. If, however, the evidence was equivocal, the burden of proof would have come to the fore as a tiebreaker. But, as I explain below, while there was no specific evidence on where Mr Muruthi was located at the time of service, it was plain on the evidence that Mr Muruthi was more likely than not to have been outside Singapore at that time as it suggested that he was generally in Indonesia, and that, and not Singapore, was his ordinary residence. I would caution, however, that I adopted this slightly generous approach as a concession to the way the matter was argued before me, and it should not be assumed that the court will be similarly minded to proceed without specific evidence of the defendant's location at the time of service in a future case. Moving forward, the parties should be prepared to adduce evidence specifically directed to the issue of the defendant's location at the time of service if the issue were to arise.

219 The second preliminary point concerns a suggestion, briefly made by Ms Khan at the hearing, that the issue of the validity of service could be glossed over to the extent that Mr Gaznavi's appearance before the court on Mr Muruthi's behalf in this application meant that Mr Muruthi had obtained notice of OA 1158 and service had therefore served its purpose. This argument was, with respect, misconceived for two reasons. First, as explained above, giving notice of the originating process and proceedings is only one of the two purposes of service (see [27] and [141] above). The fact that Mr Muruthi had acquired notice of OA 1158 said nothing about whether the other purpose of service – its

jurisdictional function – was also fulfilled. Second, as I explained to Ms Khan, her argument was riddled with circularity as it would mean that no application to set aside service could ever succeed as a defendant must logically acquire notice of the originating process and proceeding before applying to set aside service: *Lim Quee Choo* at [21].

220 I turn to the state of the evidence. As mentioned, the evidence pointed unequivocally to Mr Muruthi being based in Indonesia. In two affidavits filed in support of his setting-aside application, comprising the initial supporting affidavit[16] and a supplementary affidavit which I granted Mr Muruthi permission to file as Mr Beranek had no objections,[17] Mr Muruthi explained as follows:

(a) he had lived in Jakarta for the last ten years as most, if not all, of his work was within Indonesia, and he also travelled to various countries using Jakarta as his base;[18]

(b) he had a residence permit for his stay in Indonesia that was valid until 24 August 2026;[19]

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16 1st Affidavit of Sreerangam Muruthi dated 29 December 2025 filed in HC/SUM 3759/2025 ("SM-1").

17 2nd Affidavit of Sreerangam Muruthi dated 19 January 2026 filed in HC/SUM 3759/2025 ("SM-2").

18 SM-1 at para 10.

19 SM-2 at para 6 and pp 6–7.

(c) he had a valid lease agreement for an apartment in Jakarta (the "1219 Apartment") for the period of two years between 2 January 2025 and 1 January 2027, at which he was residing;[20]

(d) before moving into the 1219 Apartment, he had previously leased: (i) an apartment in the same building as the 1219 Apartment (the "0818 Apartment"), at which he had regularly stayed between 2015 and June 2024;[21] and (ii) a different property (the "Tamarind Property") after he had moved out of the 0818 Apartment, at which he stayed between 1 July 2024 to 1 January 2025;[22]

(e) Mr Beranek and one "Wulan" – who, according to Mr Beranek,[23] he married in October 2024 – had stayed together with him at the 0818 Property and the Tamarind Property for some time, and the move from the 0818 Apartment to the Tamarind Property had been in response to Mr Beranek's suggestion that they "move to a different place";[24] and

(f) he had sent the E-mail to Mr Beranek's solicitors, DLC, shortly before SUM 3260 was filed, in which he had stated clearly that he continued to live in Jakarta and this was known to Mr Beranek since he had cohabited with Mr Muruthi for some time.[25]

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20 SM-1 at paras 21–23.

21 SM-1 at paras 12–13.

22 SM-1 at paras 21–23.

23 MB-4 at para 6.2.

24 SM-1 at paras 16–17.

25 SM-1 at paras 26–27 and p 37.

221 This facts were undisputed by Mr Beranek, save that he averred that he had not known where Mr Muruthi was residing since ceasing cohabitation with Mr Muruthi at the Tamarind Property on 2 January 2025.[26] In his response affidavit, Mr Beranek had initially annexed what appeared to be a copy of Mr Muruthi's permit to stay in Indonesia, which had an expiry date of 15 February 2025, and he relied on that to suggest that Mr Muruthi had ceased to be resident in Indonesia.[27] However, at the hearing, having sighted a copy of a residence permit valid until 24 August 2026 which Mr Muruthi adduced in his supplementary affidavit, Ms Khan accepted that Mr Muruthi had a valid residence permit for Indonesia, and did not attempt to challenge the authenticity of the copy of said permit adduced by Mr Muruthi.

222 In the course of her submissions, Ms Khan could only point to two indicia which supported Mr Muruthi as having been ordinarily resident (or at least often present) in Singapore. These were, respectively, the fact that he owned the Commonwealth Property (and presumably, stayed there when he was in Singapore) and that a search of LSCS' ACRA business profile that had been undertaken on 23 October 2025, before the filing of SUM 3260, reflected the Commonwealth Property as Mr Muruthi's registered address (see [8] above).[28] To fortify her claim that the Commonwealth Property was a substantial connection to Singapore, Ms Khan highlighted that the housekeeper at the Commonwealth Property, who the process server Mr Sukor had met when he attended there to attempt personal service on Mr Muruthi, had not said that Mr Muruthi did not reside there regularly (see [9] above).

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26 MB-4 at para 7.

27 MB-4 at para 8.

28 MB-2 at pp 46 and 53.

223 In my judgment, the evidence pointed overwhelmingly to Mr Muruthi being based in Indonesia, and this, in turn, supported the inference that he was not present in Singapore at the time of service on 20 November 2025. Even if Mr Beranek's claim that he did not know where Mr Muruthi resided or was present at the material time were true, his knowledge would only have been relevant to the issue of his alleged non-disclosure of material facts in SUM 3260, and not the objective question of where Mr Muruthi was located at the time of service. Moreover, the evidence which Ms Khan relied on to establish Mr Muruthi's ordinary residence in Singapore was thin, to say the least. As I explained to Ms Khan, I did not think that either Mr Muruthi's ownership of the Commonwealth Property or the fact that the Commonwealth Property was Mr Muruthi's registered address on LSCS' ACRA business profile could by any stretch suggest that he was here often.

224 For one, it was not unexpected for a businessman like Mr Muruthi to own property in Singapore. In any event, the fact that Mr Muruthi had consistently leased property in Jakarta supported his claim that Indonesia was his base of operations, and that he travelled to other jurisdictions from there. If Mr Muruthi had only visited Indonesia on occasion, it would not have been likely for him to rent property as opposed to simply staying in a hotel or, perhaps, a serviced apartment. That Mr Muruthi had consistently entered into leases in Indonesia for about ten years before SUM 3260 was filed supported his claim that he was based there.

225 The ACRA business profile also did not bear the weight placed on it by Ms Khan. I agreed with Mr Gaznavi that the ACRA business profile could not be conclusive of where Mr Muruthi was located or based, as a person could omit to update his or her registered address on the ACRA business profile for any

number of reasons. The fact that Mr Muruthi had not reflected an address in Indonesia on LSCS' ACRA business profile therefore could not change the fact that he was not based in Singapore. Ms Khan emphasised that the ACRA business profile was an "official document" and that Mr Muruthi "[could not] claim to be a Singapore director and claim that he is not resident here" since s 145(1) of the CA required the companies which Mr Muruthi was a director of to have a director who was "ordinarily resident in Singapore". However, even if Mr Muruthi might have been in breach of s 145(1) of the CA (which, to be clear, I make no finding on), that could not change the reality of where he was based and present at the time of service. Ms Khan did not go so far as to suggest that the ACRA business profile gave rise to some sort of estoppel that prevented Mr Muruthi from denying that he was resident at the Commonwealth Property or that there was some principle of law that deemed Mr Muruthi to be present in Singapore based on the Commonwealth Property being his registered address. In any event, I did not think any such argument would have been tenable.

226 In contrast, Mr Muruthi had stated clearly in the E-mail that he was resident in Indonesia (see [250] below). Mr Beranek did not adduce any evidence that could directly contradict this, and the furthest that Ms Khan could take her case at the hearing was that they (Mr Beranek and DLC) had suspicions or doubts after receiving the E-mail that Mr Muruthi was telling the truth. In any event, I was satisfied based on the evidence I have catalogued at [220(a)]–[220(e)] above that Mr Muruthi's assertion that he was based in Indonesia was true. Those facts indicated clearly that Mr Muruthi had a longstanding history of residing in Indonesia and that this continued to be the case at present. It was telling that, in the face of this, the most that Ms Khan could muster was the rather technical and speculative point that, even if Mr Muruthi had previously resided in Indonesia, including a period together with Mr Beranek at the 0818

Apartment and the Tamarind Property, these were "old facts" and did not necessarily mean that the position continued to be so.

227 For the foregoing reasons, I was satisfied that Mr Muruthi was based in Indonesia. The evidence did not bear out Mr Beranek's claim that Mr Muruthi was ordinarily resident in Singapore, or at the very least, both Singapore and Indonesia. Thus, to the extent that the dispute between the parties played out as a contest over the location of Mr Muruthi's ordinary residence, and this was used as a proxy for where Mr Muruthi was likely present at the time of service, I was not satisfied that Mr Muruthi was present in Singapore on 20 November 2025 when substituted service was effected on him pursuant to the order of court made in SUM 3260. The upshot of this was that Mr Beranek had no right to serve OA 1158 on Mr Muruthi on 20 November 2025 having not previously sought permission from the court to serve Mr Muruthi out of the jurisdiction. The service effected on Mr Muruthi was therefore irregular.

228 My conclusion that service was irregular raised the question of the appropriate consequence to follow from this. As explained above, in a case where service is irregular due to the claimant having had no right to serve originating process on the defendant in light of the latter's absence from the jurisdiction, the court's curative power is limited to granting retrospective permission for service out of the jurisdiction and does not extend to dispensing with the rules for service out of the jurisdiction altogether. But, in most cases, the court should set aside service. In my view, there was no reason to depart from this general rule. For one, Mr Beranek did not advance a fallback case that, if service was irregular, the court should cure the irregularity. This also meant that I was in no position to decide on whether the requirements for service out

of the jurisdiction were met based on the evidence before the court. In these premises, I ordered that service of OA 1158 on Mr Muruthi be set aside.

Whether the order for substituted service should be set aside for material non-disclosure

229 I turn to the second issue of whether the order for substituted service should be set aside due to Mr Beranek's failure to make full and frank disclosure of material facts in SUM 3260.

The legal framework on full and frank disclosure

230 The legal principles are quite well-established. Indeed, already over a century ago, in *The King v The General Commissioners for the Purposes of the Income Tax Acts for the District of Kensington* [1917] 1 KB 486 ("*Kensington Tax Commissioners*"), Warrington LJ said that the proposition that the court would set aside an order made in circumstances of material non-disclosure was "[p]erfectly plain and requires no authority to justify it" (at 509). However, the present case suggests that there may still be some utility in setting out the law on the duty of full and frank disclosure in some detail, starting with the premise which underlies it, before turning to the content of the duty and the consequences of its breach.

(1) The rationale of the duty of full and frank disclosure

231 The hearing of an application without notice is a limited exception to the norm that a party must be heard before an order is made against it. The exception is justified because, in some cases, it may not be practicable for a matter to be put on hold until all parties are assembled before the court. However, the basic norm continues to be the controlling rule. As Lord Leggatt JSC explained in

Potanin v Potanina [2024] AC 1063 ("*Potanin*"), "the fundamental point is that fairness is not a value which can properly be sacrificed in the interests in efficiency" (at [78]). This explains why an order made on a without notice basis is provisional, in the sense that it is made in the light of the material and arguments put before the court only by one party, and the party affected by an order made at a hearing without notice is entitled to apply to the court to discharge it on the basis that it should not have been made: *Lim Quee Choo* at [17]. As Lord Leggatt JSC observed, this order of things reflects a "basic principle of procedural fairness which requires a court to hear argument from both sides", and which "is fundamental to the operation of the entire legal system and process of administration of justice": *Potanin* at [81]. His Lordship encapsulated the point into what he called "rule one" for judges (see *Potanin* at [1]):

> Rule one for any judge dealing with a case is that, before you make an order requested by one party, you must give the other party a chance to object. Sometimes a decision needs to be made before it is practicable to do this. Then you must do the next best thing, which is—if you make the order sought—to give the other party an opportunity to argue that the order should be set aside or varied. What is always unfair is to make a final order, only capable of correction on appeal, after hearing only from the party who wants you to make the order without allowing the other party to say why the order should not be made.

232 It does not follow, however, that just because there is an opportunity for the affected party to apply to the court to have the order set aside, the applicant does not have a duty of candour to the court when seeking the order. Indeed, to the contrary, irrespective of whether the matter is being heard with notice or without notice, it is an overarching principle that all parties are under a duty not to mislead the court as this would constitute an abuse of process: *Re Fullerton Capital Ltd* [2025] 1 SLR 432 at [133]; *Cooperativa Muratori and Cementisti*

– *CMC di Ravenna, Italy v Department of Water Supply & Sewerage Management, Kathmandu* [2025] 4 SLR 983 at [48]. The duty of full and frank disclosure in without notice applications is, seen in this light, a context-specific application of this general prohibition that is tailored to the heightened risk of the court being misled when it hears only from one side.

(2) The content of the duty of full and frank disclosure

233 The content of an applicant's duty of full and frank disclosure in without notice applications can be examined from two dimensions.

234 The first is the question of *what* matters have to be disclosed to the court. In this regard, it is well-settled that the applicant must disclose all *material* facts to the court. The principles can broadly be stated as follows:

(a) The test of materiality is not limited to matters which are "decisive or conclusive", but extends to "all facts and matters which could or would reasonably be taken into account by the judge in deciding whether to grant the application": *Poon Kng Siang v Tan Ah Keng* [1991] 2 SLR(R) 621 ("*Poon Kng Siang*") at [40]; *The "Vasiliy Golovnin"* [2008] 4 SLR(R) 994 ("*The Vasiliy Golovnin*") at [86].

(b) The test of materiality is an objective one and is decided by the court and not by the subjective assessment of the applicant or his or her advisors: *JTrust Asia Pte Ltd v Group Lease Holdings Pte Ltd* [2018] 2 SLR 159 ("*JTrust*") at [90(a)].

(c) The universe of material facts is not confined to matters which are in the actual knowledge of the applicant. The duty to make full and frank disclosure requires the applicant to disclose not only the facts and

> matters known to him, but "such additional facts which he would have known if he had made proper inquiries": *Tay Long Kee Impex Pte Ltd v Tan Beng Huwah* [2000] 1 SLR(R) 786 ("*Tay Long Kee Impex*") at [21]. The extent of inquiries which will be held to be proper will depend on all the circumstances of the case, including: (i) the nature of the case which the applicant is advancing in the application; (ii) the order(s) sought in the application; and (iii) the probable effect of the order on the respondent: *JTrust* at [90(b)].

235 The second dimension is *how* the applicant should go about making the necessary disclosures of material facts to the court. The short point is that the material facts must be presented in a way that is reasonably effective in bringing them to bear on the judge's mind so as to ensure that the judge receives the most complete and undistorted picture of things: *The Vasiliy Golovnin* at [91]–[92]. Accordingly, it is not enough for the applicant to simply make a fleeting reference to a material document in the affidavit and exhibit it without focusing the judge's attention on the relevant part(s) of the document: *The Vasiliy Golovnin* at [93]–[94]; *Manharlal Trikamdas Mody v Sumikin Bussan International (HK) Ltd* [2014] 3 SLR 1161 at [81]–[82]. That may constitute disclosure in a technical sense, but disclosure without fair and proper presentation will not constitute disclosure in a *meaningful* sense.

236 *6DM (S) Pte Ltd v AE Brands Korea Ltd* [2022] 3 SLR 1300 contains an excellent illustration of this point. The applicant in that case had purported to disclose the existence of exclusive jurisdiction clauses in its supporting affidavit for an application to serve the defendants out of the jurisdiction, which disclosure was made in the following terms (at [108]):

> In the interests of full disclosure, under each of the Agreements, there are exclusive jurisdiction clauses providing that the Agreements are governed by English law: see paragraph 22.2 of the AEBK Agreement, the APB Agreement and the ABA Agreement (collectively exhibited at SYM-1). Nevertheless, I am advised that 6DM's claims do not arise under or are in connection with the Agreements, and the exclusive jurisdiction clauses are thus irrelevant to the present Suit.

237 Mavis Chionh J held that the applicant had failed to disclose that the exclusive jurisdiction clauses were in favour of the courts of England and Wales. The disclosure in the above paragraph was "ambiguous at best, and misleading at worst", because it stated the existence of the exclusive jurisdiction clauses and the *governing law* of the agreements but not the *choice of forum* under the exclusive jurisdiction clauses (at [112]). Proper disclosure would have entailed reproducing the text of the exclusive jurisdiction clauses in the affidavit (rather than simply referencing them as exhibits) and explaining why the exclusive jurisdiction clauses were "irrelevant to the present Suit" as the applicant claimed (at [113]–[114]). Indeed, given how the applicant had spelled out the governing law of the agreements but omitted the choice of forum, Chionh J was satisfied that the omission of the latter was not merely inadvertent or innocent but an attempt to mislead the court by leaving out the "most important parts" of the exclusive jurisdiction clauses (at [120]).

238 In the final analysis, both the extent and the manner of disclosure will invariably depend on context. I would add to this a point that was of some relevance in this case. Mr Beranek's applications for substituted service (in SUM 3260) and service out of the jurisdiction (in SUM 3261) were dealt with on paper without an oral hearing for his counsel to guide the court through the documents. In my view, where there is no oral hearing and "the judge is left to consider on his own in his or her room what may often be a pile of undigested

exhibits", the threshold of adequate disclosure will be a more exacting one: see *Masri v Consolidated Contractors International Co SAL* [2011] EWHC 1780 (Comm) at [58]. This stands to reason as there is inherently a greater risk that a judge or registrar who is left to navigate through a sea of papers unaided may be misled, especially where a decision is expected within a short timeframe.

(3) The consequences of a breach of the duty of full and frank disclosure

239 If an applicant has obtained an order on a without notice basis in breach of the duty of full and frank disclosure, the order may be set aside on that basis. Although older cases have suggested that the setting aside of the order will follow automatically, the modern view is that the court has a *discretion* in the matter, which is to be exercised having regard to all the circumstances of the case: *Lee Hsien Loong* at [56], [57] and [60]; *Poon Kng Siang* at [58].

240 In deciding how its discretion should be exercised, it is useful not to lose sight of the purposes which the discretion serves. In my view, there are two broad purposes in play when the court considers whether it should set aside an order based on material non-disclosure:

(a) First, the discretion is *penal* in nature and serves as a punishment to the applicant for his or her abuse of process in misleading the court at the without notice hearing: *Kensington Tax Commissioners* at 514; *Brink's Mat Ltd v Elcombe* [1988] 1 WLR 1350 at 1359.

(b) Second, the discretion is underpinned by an element of *general deterrence* in that the discharge of an order that is obtained by material non-disclosure serves to deter others from similar conduct in the future: *Banco Turco Română SA v Çörtük* [2018] EWHC 662 (Comm) at [45].

> As Belinda Ang Saw Ean J (as she then was) noted in *Treasure Valley Group Ltd v Saputra Teddy* [2006] 1 SLR(R) 358, the condemnation of material non-disclosure by the setting-aside of the order is "[done] in the public interest to discourage abuse of [the court's] procedure in an *ex parte* application" and is "a reminder of the importance of dealing in good faith with the court when *ex parte* applications are made" (at [23]).

However, the pursuit of these purposes is not a zero-sum game, and the court must ensure that the heavy hand of punishment and deterrence is tempered by a due sense of proportionality: *Knauf UK GmbH v British Gypsum Ltd* [2002] 1 WLR 907 at [65]; *Mex Group Worldwide v Ford* [2025] 1 WLR 975 at [121]. As Chan Seng Onn J stated in *Bahtera Offshore (M) Sdn Bhd v Sim Kok Beng* [2009] 4 SLR(R) 365, "[t]he court must determine whether the 'punishment' imposed by way of discharge would outweigh the 'culpability' of the material non-disclosure and distortion" (at [44]).

241 In this regard, although it is difficult to set out an exhaustive list of the relevant considerations, the following factors might be useful yardsticks for the court to assess how its discretion ought to be exercised in any given case (see *Dar Al Arkan Real Estate Development Co v Al Refai* [2012] EWHC 3539 (Comm) ("*Dar Al Arkan*") at [149]):

(a) the culpability of the applicant (and his advisors) with regard to the breach, and in particular, the extent of the breach and whether it was deliberate;

(b) the importance and the significance to the outcome of the application of the matters not disclosed to the court;

(c) the merits of the applicant's case; and

(d) the nature of the order obtained without notice.

(A) CULPABILITY OF THE APPLICANT

242 The first factor is the culpability of the applicant: *Poon Kng Siang* at [59]. The focus here is on what the court ascertains to have been the cause of the non-disclosure considering, among other things, any explanation that the applicant may offer, as well as the extent of non-disclosure; as a matter of logic, an applicant who acts in good faith and earnestly seeks to make the necessary disclosures would be less likely to make grave non-disclosures of obviously relevant matters.

243 The inquiry into the applicant's culpability has typically been expressed in terms of a distinction between whether the non-disclosure was "inadvertent or innocent (in the sense that the applicant did not know [the fact or matter that was not disclosed], forgotten its existence, or failed to perceive its relevance), or whether it was deliberate and intended to mislead the court": *Cosmetic Care Asia Ltd v Sri Linarti Sasmito* [2021] SGHC 157 ("*Cosmetic Care*") at [145]. It is axiomatic that, if the non-disclosure falls within the latter category, the applicant's culpability will be higher and this will weigh heavily in favour of the discharge or setting aside of the order. As the Court of Appeal observed in *Tay Long Kee Impex*, "[w]here there is suppression, instead of innocent omission, it must be a special case for the court to exercise its discretion not to discharge the *ex parte* [order]" (at [35]).

244 However, the distinction between the two categories is one of kind rather than degree, and they should be better understood as resting on a continuum. Thus, while the Court of Appeal in *Tay Long Kee Impex* referred to "suppression" in contradistinction to "innocent omission", I explained to the

parties at the hearing that, in my view, dishonesty was not strictly a necessary element of "suppression" as a conscious and deliberate decision not to disclose something would amount to "suppression" even if the reason for the decision was a thoroughly foolish assessment of the materiality of the fact or matter as opposed to outright dishonesty: *The Libyan Investment Authority v JP Morgan Markets Ltd* [2019] EWHC 1452 (Comm) ("*Libyan Investment Authority*") at [110]. Needless to say, the latter would be of far greater culpability than the former, but the former would still be serious, and be more serious than if, for example, the non-disclosure was not because of a conscious decision to omit the matter but the applicant having absent-mindedly forgotten about it. Put simply, the point is that the analysis must look deeper than merely whether the conduct is generally "innocent" or "deliberate" as there are gradations of severity within each of these categories.

(B) MATERIALITY OF THE NON-DISCLOSURE AND THE MERITS OF THE APPLICANT'S CASE

245 I take the second and third factors – respectively, the materiality of the matter which was not disclosed and the merits of the applicant's case – together as they are related. Both share a similar substance inasmuch as the court is concerned with whether the requirements for making the order sought are made out. However, what distinguishes the two is that the second factor (the materiality of the non-disclosure) is backward-looking, in that it looks at how the non-disclosed matter would have affected the initial decision to grant the order, whereas the third factor (the merits of the applicant's case) is forward-looking, in that it considers whether, based on all the facts now known and put before the court (including any additional material not available at the time the order was initially obtained), the order is justified or not.

246 It is useful, in my view, to evaluate the merits of the applicant's case from both a backward- and forward-looking perspective because they serve distinct purposes. The court may, apart from deciding whether to maintain the original order or to set it aside, also exercise a discretion to discharge the order made without notice and to re-grant it on new terms on a with notice basis: *CZD v CZE* [2023] 5 SLR 806 at [58]; *JTrust* at [90(e)]; *Cosmetic Care* at [145]. Thus, if the non-disclosed matter would not have changed the outcome of the initial application, it may, subject to other factors, be appropriate for the order to be maintained and for the issue of non-disclosure remediated through some other method such as an adverse costs order; but if the disclosure of the fact or matter which was omitted would likely have led to the court refusing to make the order, the court may decide to discharge the initial order, and to reconsider afresh, based on all the material before it, whether a similar order should be made going forward, weighing this against the culpability of the earlier non-disclosure: *Tay Long Kee Impex* at [38]. This may strike a good balance between the penal and deterrent interest of disgorging the applicant of the advantage(s) unfairly obtained through material non-disclosure and the competing interest of avoiding injustice to the applicant if the circumstances do support the making and necessity of the order.

(C) NATURE OF THE ORDER OBTAINED

247 Finally, the court will consider the consequences of the order on the person against whom it was made: *Dar Al Arkan* at [149]. In this regard, it has generally been said that the court will be more inclined to set aside an order on the ground of material non-disclosure where the order is of a more coercive nature such as a freezing order or a search order: *Re OJSC Ank Yugraneft* [2009] 1 BCLC 298 at [104]. This stands to reason because orders of this kind can be

particularly intrusive and prejudicial to the party subject to it, as Hobhouse J (as he then was) noted in *Payabi v Armstel Shipping Corporation (The "Jay Bola"*) [1992] 1 QB 907 (at 918B–D):

> There is a duty of disclosure on all ex parte applications but the extent of the duty and the gravity of any lack of frankness will depend in any given case on the character of the application. At one end of the scale there are *Anton Piller* orders and *Mareva* injunctions where the consequences of the order may be unpredictable and irremediable and very possibly most serious for the proposed defendant: there the very fullest disclosure must be made so as to ensure as far as possible that no injustice is done to the defendant. At the other end of the scale are minor procedural applications where there may be no risk at all of prejudice, or at least none that cannot be fully made good by an order in costs.

248 However, even non-coercive orders such as orders granting permission for service out of the jurisdiction can prejudice the other party, and it should not therefore be assumed that material non-disclosures involving such orders can be waved away as inconsequential. A wrongly obtained order for permission can expose the defendant to considerable costs in a setting-aside application: *Libyan Investment Authority* at [120]. And in the case of an order for substituted service, since substituted service allows the claimant to proceed to enter judgment in default on the basis of deemed notice, the defendant is put to the risk of having a judgment that was unfairly obtained enforced against him or her, or at the very least, the costs and inconvenience of setting aside the order and any judgment obtained pursuant to it: *Zhang Jinhua* at [55].

Whether Mr Beranek failed to make full and frank disclosure

249 Turning to apply the principles above to this case, I begin with the issue of whether Mr Beranek was guilty of material non-disclosure in SUM 3260. In

my view, it was indisputable that Mr Beranek had failed to make full and frank disclosure of at least two matters.

250 The first was the E-mail which, as noted at [17] above, Ms Khan conceded should have been disclosed to the court in SUM 3260. In any event, there was really no sensible argument otherwise. The E-mail contained a clear and unequivocal statement from Mr Muruthi personally, informing DLC that he was resident in Indonesia and that this was known to Mr Beranek:[29]

> Dear Ms Khan,
>
> 1. I am Sreerangam Muruthi.
>
> 2. I note that you act for Michal Beranek.
>
> 3. Your [*sic*] will know that I reside in Jakarta.
>
> 4. He and I did all our dealings, negotiations, meetings and communctions [*sic*] in Jakarta.
>
> 5. In fact, he shared an apartment with me for some time (free of charge) before he left to stay elsewhere in Jakarta while I continue, to his knowledge, to live in Jakarta.
>
> 6. I reserve all rights.
>
> Your sincerely
>
> Sreerangam Muruthi

251 As explained above, where the defendant is outside the jurisdiction, the court's jurisdiction cannot be established by service other than by way of service out of the jurisdiction because the defendant's absence from the jurisdiction would mean that the claimant has no right to serve the defendant with originating process save for as provided by the rules for service out of the jurisdiction under O 8 r 1 of the ROC 2021. Given this, the relevance of a

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[29] SM-1 at p 37.

contemporaneous indication from Mr Muruthi himself, sent about a week before SUM 3260 was filed, that he was not within the jurisdiction, was self-evident.

252 The second area where Mr Beranek's disclosure fell short was in relation to facts which were either already in his knowledge or which he could reasonably have acquired knowledge of as to Mr Muruthi's longstanding residence in Indonesia. I have set out some of these at [220] above. Although they provided a less proximate indication of Mr Muruthi's location as compared to the E-mail, they were material in so far as Mr Muruthi had been resident in Indonesia for a long time, and any reasonable person in Mr Beranek's position, especially given his history with Mr Muruthi, would have reasonably assumed that this continued to be the case unless there was any clear indication otherwise.

253 Before me, Ms Khan argued that not all of the facts pointed out by Mr Muruthi were known to Mr Beranek. For example, Mr Beranek did not know of Mr Muruthi's lease for the 1219 Apartment and was not aware that Mr Muruthi had a residence permit for Indonesia that was valid until August 2026, these being matters only revealed to him (and the court) in the affidavits filed by Mr Muruthi for this application. However, in my view, the full extent of Mr Beranek's knowledge of where Mr Muruthi resided at the time of SUM 3260 was an argument over technicalities. It was ultimately conceded by Mr Beranek that he at the very least knew that Mr Muruthi was resident in Indonesia as of 2 January 2025 (*ie*, when Mr Muruthi moved into the 1219 Apartment). Indeed, having cohabited with Mr Muruthi first at the 0818 Apartment and later at the Tamarind Property, Mr Beranek could not logically claim that he was not aware that Mr Muruthi had resided in Indonesia.

254 Next, Ms Khan attempted to discount the relevance of the facts relating to Mr Muruthi's historical residence in Indonesia on the basis that they were "old facts" which were not probative of where Mr Muruthi was located at the time of SUM 3260 and in the near future when service was to be effected on him (see [226] above). There were, however, a number of problems with this argument.

255 For one, as I pointed out to Ms Khan, there had to be some logical limit to her "old facts" argument. If it were taken to its logical extreme, a claimant who was aware of where the defendant was located on a particular day could simply wait until the next day, file a summons for substituted service, and properly affirm on affidavit that he or she was not aware if the defendant was outside Singapore since the defendant's location the previous day would, strictly speaking, be "old facts". That cannot be right and, thus, the starting point must be that facts known to the claimant (or which the claimant may reasonably be able to obtain knowledge of) as to the defendant's past residence or location are material, and they cannot be disregarded simply because there is a theoretical possibility that the defendant's situation may have changed. Ms Khan accepted this, but argued that it was a matter of degree, and that, by the time of the filing of SUM 3260, enough time had passed from 2 January 2025 (the time which Mr Beranek claimed he was last aware of Mr Muruthi's residence), such that Mr Beranek did not know if Mr Muruthi's living situation remained similar to what it had been at that time.

256 I agreed with Ms Khan that, in principle, there would come a point when the defendant's location at a given earlier time would be sufficiently far-removed that it would recede in probative value as to the defendant's likely location at present. But, in my judgment, this was not so in this case. First, taking

Mr Beranek's claim at face value and assuming that his knowledge of Mr Muruthi's residence in Indonesia was only current up to 2 January 2025, while a lapse of about a year since then was not insignificant, this had to be set against the context that Mr Muruthi had resided in Indonesia for about ten years by then (see [220(a)] above). Given this, any reasonable person would in my view have continued to assume that Mr Muruthi remained in Indonesia unless there was some compelling evidence post-dating 2 January 2025 which indicated otherwise. Mr Beranek was unable to point to anything of the sort. In any event, even if such evidence had existed, it would probably have been incumbent on Mr Beranek to put *both* that evidence and the facts relating to Mr Muruthi's historical residence in Indonesia before the court as a matter of full and frank disclosure, rather than leaving the latter out based on his own evaluation of its (ir)relevance (see [234(b)] above).

257 Second, far from there being evidence of Mr Muruthi having ceased to be resident in Indonesia by the time of SUM 3260, there was evidence which clearly suggested the contrary. In the first place, the E-mail was a clear confirmation by Mr Muruthi that, as of a week before the filing of SUM 3260, Mr Muruthi continued to reside in Indonesia. Even if Mr Beranek did entertain doubt after 2 January 2025 as to whether Mr Muruthi had ceased to reside in Indonesia, this would have dispelled it. And while Ms Khan sought to explain that Mr Beranek had doubted if Mr Muruthi was telling the truth in the E-mail, Mr Beranek's own suspicions or subjective view of Mr Muruthi's honesty did not give him a licence not to disclose the E-mail and his knowledge that Mr Muruthi had historically been resident in Indonesia to the court. Moreover, leaving aside the E-mail, I agreed with Mr Gaznavi that a number of WhatsApp messages between Mr Muruthi and Mr Beranek in April 2025 and October

2025, which were exhibited in the parties' affidavits, indicated that Mr Beranek had known or understood that Mr Muruthi remained resident in Indonesia:

(a) On 18 April 2025, after Mr Beranek asked "what time [Mr Muruthi] will be here as Wulan was planning to ask you to attend church at Central Park", Mr Muruthi stated that he could "[m]eet Mr Beranek at 12.30pm" and would "leave Bellargio at 12noon".[30] "Bellargio" was the building in which the 0818 Apartment and the 1219 Apartment was located.[31] Mr Beranek would have known from this that Mr Muruthi continued to reside in Indonesia, specifically, in the same building at which the 0818 Apartment (which he had previously cohabited with Mr Muruthi) was located.

(b) On 14 October 2025, Mr Muruthi messaged Mr Beranek, telling him that he was "in Singapore now" but that he would be going "back to [Jakarta] on 26th Oct".[32] It was clear that "back to [Jakarta]" would have indicated to Mr Beranek that Mr Muruthi continued to be resident in Indonesia.

At the hearing, Ms Khan suggested that these messages were equivocal and did not show that Mr Beranek had known or understood that Mr Muruthi continued to be resident in Indonesia. I did not agree. This claim to ignorance was, with respect, fanciful, as it was based on a rather obtuse reading of the messages which was wholly unrealistic given the parties' mutual history and familiarity.

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30 SM-1 at p 45.

31 SM-1 at paras 12, 21 and 30.7.

32 MB-4 at p 26.

The consequences of Mr Beranek's material non-disclosure

258 Having found Mr Beranek to have been guilty of material non-disclosure in SUM 3260, I come to the consequences of his non-disclosure. In my judgment, applying the factors set out at [241] above, the only appropriate consequence was for the order for substituted service obtained in SUM 3260 to be set aside.

(1) The culpability of the non-disclosure

259 In my view, Mr Beranek's breach of his duty of full and frank disclosure in this case was of a high culpability for two main reasons.

260 First, the extent to which the court in SUM 3260 had been misled was staggering. There was no indication whatsoever in the affidavits filed in support of SUM 3260 that Mr Muruthi *could* be resident or located outside Singapore. In the affidavit deposed to by Mr Beranek, he simply recounted unsuccessful attempts at personal service on Mr Muruthi. The details of these attempts were supplemented in the affidavit deposed to by Mr Sukor as the person responsible for making those attempts. Both affidavits stated that Mr Muruthi's last-known address was the Commonwealth Property, and this was based on a search of LSCS' ACRA business profile.[33] The impression created by the affidavits filed in support of SUM 3260 was thoroughly misleading in that no one could have developed even the faintest suspicion that Mr Muruthi *could* be resident outside Singapore, still less that he had been resident in Indonesia for around ten years. This suggested, in my view, that there had been a deliberate or at least calculated attempt at concealing Mr Muruthi's connection to Indonesia from the court.

[33] MB-2 at paras 8.1, 8.2 and 9.

This impression was strengthened by the fact that Mr Beranek had applied for permission to serve OA 1158 on Mr Rasheed out of the jurisdiction in SUM 3261 at the same time that SUM 3260 was filed. This meant that the necessity of service out of the jurisdiction on a person who was outside Singapore was not lost on him. The failure to make a similar application in respect of Mr Muruthi, especially given their mutual history, had to be a conscious and deliberate decision.

261 Second, there was completely no explanation from Mr Beranek for his non-disclosure. In his affidavit filed in response to this application, Mr Beranek began by saying that he "wish[ed] to clarify" certain statements made by Mr Muruthi in the latter's supporting affidavit. However, all of the clarifications were over trivial and inconsequential matters, such as the exact time when Mr Beranek got married to Wulan. Mr Beranek's affidavit was, with respect, a masterclass in Nelsonian blindness as he seemed willing to engage with anything but his reasons for not disclosing the E-mail or the facts as to Mr Muruthi's historical residence in Indonesia that had been known to him. All that was said about the E-mail was a bare acknowledgment that it existed and that Mr Beranek "had no reason to believe that the statements alleging his residence in Jakarta set out in [the E-mail] were true". And, as far as Mr Muruthi's historical residence was concerned, all that was said was that Mr Beranek's knowledge was only current up to 2 January 2025 when he ceased residing with Mr Muruthi.[34]

262 At the hearing, Ms Khan attempted to supplement the deficiencies in Mr Beranek's affidavit by explaining, from the bar, that the E-mail had not been

[34] MB-4 at para 8.

disclosed due to an inadvertent oversight by Mr Beranek and DLC, and that the facts as to Mr Muruthi's historical residence in Indonesia had been deemed "old facts" and therefore immaterial. But neither explanation was contained in Mr Beranek's own affidavit, which Ms Khan conceded when it was highlighted to her and she was invited, but was unable, to point to any reference to these explanations in Mr Beranek's affidavit. The silence was not only deafening but completely inexplicable. It beggared belief that Mr Beranek did not, at the very least, provide the first explanation as to the non-disclosure of the E-mail in his affidavit if it were in fact true.

263 The inexplicability was compounded by the fact that, before the filing of this application, Mr Gaznavi's firm had written to DLC indicating Mr Muruthi's position that Mr Beranek had failed to disclose the E-mail and the fact that Mr Muruthi was resident in Indonesia to the court in SUM 3260. To this end, Mr Gaznavi's firm invited Mr Beranek to "consent to an application to set aside the service of the court documents", in which case Mr Muruthi would only look to Mr Beranek for his disbursements.[35] This correspondence was thus a storm warning to Mr Beranek that Mr Muruthi intended to apply to have the order for substituted service and service on him set aside on the ground that there had been material non-disclosure in SUM 3260. In the face of this, it was downright bizarre that, despite staring down the barrel of clearly articulated allegations of material non-disclosure even before this application had been filed, Mr Beranek chose not to address the allegations in his response affidavit. Indeed, the silence continued even in his written submissions filed before the hearing, as the first and only time any hint of an explanation or excuse emerged was an attempt by his counsel to give evidence from the bar at the hearing.

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[35] SM-1 at pp 55–56.

264 Taking the sheer extent of the non-disclosure and the absence of any explanation from Mr Beranek together, the inexorable inference was that Mr Beranek had deliberately presented a misleading picture to the court when he applied for substituted service in SUM 3260. I stopped short of saying that this was because Mr Beranek or his solicitors were dishonest as no such finding was necessary. But, at the very least, I have said above that there was really no rational explanation for Mr Beranek's conduct and position in this application.

(2) Materiality of the non-disclosure and merits of Mr Beranek's case

265 Next, the matters which I found should have been but were not disclosed to the court in SUM 3260 would, in my judgment, almost certainly have resulted in the court refusing to grant an order for substituted service if they had been disclosed.

266 Indeed, I considered that the E-mail alone would have foreclosed the possibility of the court making an order for substituted service. It indicated clearly that Mr Muruthi was resident outside the jurisdiction, and this would have made it clear that an order for permission for service out of the jurisdiction was necessary as it was highly likely that Mr Muruthi would not be present in Singapore at the time of service. Moreover, to the extent that the E-mail revealed that Mr Muruthi had been residing in Indonesia, it would also have dealt a knock-out blow to Mr Beranek's chances of obtaining an order for substituted service for the separate reason that his previous attempts at personal service, all of which had occurred in Singapore and which were relied on to establish that personal service was impractical, could not have been *reasonable* attempts under para 65(2) of the SCPD 2021 since Mr Muruthi was not in Singapore.

267 Given that Mr Beranek had not obtained permission to serve Mr Muruthi out of the jurisdiction, and I was not prepared to make such an order to cure the defect in his right to serve OA 1158 on Mr Muruthi (see [228] above), there was no basis for upholding the order for substituted service or for making a fresh order in similar terms. Indeed, even leaving aside that Mr Beranek's lack of a right to serve OA 1158 on Mr Muruthi, the evidence before me only served to confirm that it would not be appropriate, at least at this juncture, to make an order for substituted service as the requirements for such an order were not met. I give two examples of this.

268 First, it is well-established that proof that personal service is impractical requires the claimant to have used sufficient effort in attempting personal service. Thus, if the claimant has not used sufficient effort at locating the defendant to attempt personal service by not availing himself of "reasonably obvious" methods of communicating with the defendant, the claimant would not be able to establish that personal service is impractical so as to warrant an order for substituted service: *Lim Quee Choo* at [36]–[37].

269 The evidence indicated that Mr Beranek had not used sufficient effort to obtain Mr Muruthi's location before applying for substituted service. I say this because the parties had communicated with one another on WhatsApp, and the last time Mr Muruthi had contacted the respondent was on 14 October 2025 (see [257(b)] above), the day before the filing of OA 1158 and about three weeks before the filing of SUM 3260. Given this, Mr Beranek's rather roundabout approach of embarking on an investigation of Mr Muruthi's address by conducting an ACRA business profile search of LSCS, and relying on Mr Muruthi's registered address as stated there, did not seem logical as he could simply have attempted to contact Mr Muruthi to ask for his address.

270 Ms Khan's response was that Mr Beranek had doubted if Mr Muruthi would give a constructive or honest response as the parties' relationship had broken down by then. However, as I explained to Ms Khan, if Mr Beranek had really been concerned that Mr Muruthi would not be cooperative, it would have in fact *assisted* his case for substituted service if he had contacted Mr Muruthi and put evidence of prevarication or any unconstructive response from Mr Muruthi before the court. It seemed to me that a more likely reason for Mr Beranek's insistence on relying on Mr Muruthi's registered address on LSCS' ACRA business profile was that it gave him a leg to stand on in representing to the court in SUM 3260 that Mr Muruthi was located in Singapore, while also allowing him to maintain plausible deniability as to his knowledge that Mr Muruthi was likely located in Indonesia.

271 This suspicion was fortified by how the circumstances of the case did not show that Mr Muruthi was seeking to evade service. A defendant seeking to evade service of originating process on him is quite unlikely, as Mr Muruthi did, to send an e-mail to the claimant's solicitors identifying himself and informing them of his location. It was strange, to say the least, that there was no follow-up from DLC or Mr Beranek in response to the E-mail. However, whatever Mr Beranek's reasons for not reaching out to Mr Muruthi to obtain his address, whether on WhatsApp or by responding to the E-mail, his failure to avail himself of these rather elementary avenues for obtaining Mr Muruthi's location meant that he could not be said to have used sufficient effort to locate and attempt personal service on Mr Muruthi before applying for substituted service in SUM 3260: see, for a similar situation, *Zhang Jinhua* at [51]–[52].

272 Second, following from the first point, there was also no reason why Mr Beranek did not propose WhatsApp as a mode of substituted service. It was

clear from the message sent by Mr Muruthi on 14 October 2025, the day before OA 1158 was filed, that Mr Muruthi was contactable through that route. Indeed, the messages sent by Mr Muruthi on 14 October 2025 inquiring of Mr Beranek and his family's welfare, as well as informing Mr Beranek that Mr Muruthi was in Singapore but would return to Indonesia soon, were unsolicited and sent by Mr Muruthi on his own accord. It was difficult to understand why, if he had acted in good faith when applying for substituted service, Mr Beranek did not suggest WhatsApp as a mode for serving OA 1158 on Mr Muruthi. As Mohamed Faizal JC explained in *Zhang Jinhua*, while a claimant does not have a duty to probe all the different means of service and to ensure that the means that he or she proposes to use would be the most effective one, "where it is self-apparent to a claimant … that there are obvious and more simple means to bring documents to the notice of the person to be served, then the court should not hesitate to require the provision of good reasons as to why such means of communication were not explored at all" (at [57]).

(3) Nature of the order obtained

273 Lastly, I considered that the consequences of a wrongfully obtained order for substituted service were of sufficient severity that they weighed in favour of setting aside the order made in SUM 3260.

274 In short, substituted service is a qualification on a litigant's right to be heard. It exceptionally allows the claimant to proceed on the basis of deemed (rather than actual) notice to the defendant and to obtain judgment against the defendant in circumstances where the law accepts that it may be possible that the defendant is in fact unaware of the proceedings. The potential prejudice to the defendant in this is obvious. It bears emphasis that substituted service is

intended to apply only in situations where personal service is *genuinely* impractical; it is not an *elective* procedure that the claimant may avail himself of simply because he finds personal service inconvenient. In my view, where the claimant has been found to have been less than forthright with the court, the fact that the defendant would have been exposed to the risk of having judgment entered against it based on an order for substituted service that was unfairly obtained would, in most cases, incline the court towards setting aside the order. This included the present case.

Conclusion

275 For the foregoing reasons, I set aside the service effected on Mr Muruthi on the basis that, having not obtained permission to serve OA 1158 out of the jurisdiction on Mr Muruthi, Mr Beranek had no right to serve OA 1158 on Mr Muruthi as the latter was not present in Singapore at the time of service.

276 Further and/or in the alternative, I also set aside the order for substituted service obtained in SUM 3260 on the basis of Mr Beranek's material non-disclosure. As a consequence, the service effected on Mr Muruthi pursuant to the order was also set aside.

Costs

277 Finally, on the issue of the costs of this application, I considered this to be an appropriate case for an order for indemnity costs.

278 I bore in mind that indemnity costs should only be ordered in exceptional circumstances and had to be specifically justified: *BIT Baltic Investment & Trading Pte Ltd v Wee See Boon* [2023] 1 SLR 1648 at [83]. I was also cognisant

that there is a high hurdle to be surmounted for an order for indemnity costs to be warranted, in that there had to be "some conduct or some circumstance which takes the case out of the norm": *Thakkar v Mican* [2024] 1 WLR 4196 at [19(b)]. Thus, the mere fact that a party had been found guilty of material non-disclosure did not automatically mean that indemnity costs should be awarded; there had to be "a degree of dishonesty, impropriety or abuse of judicial process" to warrant a departure from the usual basis of costs: *Airtrust (Hong Kong) Ltd v PH Hydraulics & Engineering Pte Ltd* [2016] 5 SLR 103 at [32]. In some cases, however, material non-disclosure may cross this threshold: see, for example, *Tecnomar & Associates Pte Ltd v SBM Offshore NV* [2021] SGCA 36 ("*Tecnomar*") at [26]–[29]. The guiding light, in the final analysis, is whether the defendant's conduct was unreasonable: *Lim Oon Kuin v Ocean Tankers (Pte) Ltd* [2022] 1 SLR 434 at [36].

279 In my judgment, the high threshold for indemnity costs was met in this case. There were two main reasons for my decision. First, I have found above that there was a staggering degree of non-disclosure in SUM 3260 in that the court was not given even the slightest inkling that Mr Muruthi might be located outside Singapore. I have also explained my opinion that this non-disclosure was, even if not dishonest, conscious and deliberate. Given this, I considered this case to be one where Mr Beranek had, with respect, "evince[d] a flagrant disregard of [his] duty of full and frank disclose" in SUM 3260, such that his conduct could properly be described as unreasonable: *Tecnomar* at [29].

280 Second, I have also referred to Mr Beranek's failure to give any sort of explanation, at least one that was admissible, for his non-disclosure in SUM 3260. I have also noted that this silence made completely no sense given, in particular, the fact that Mr Gaznavi's firm had put Mr Beranek on notice that

Mr Muruthi would be challenging the order for substituted service on the basis of material non-disclosure. Regardless of what Mr Beranek's reasons for his failure to explain his non-disclosure may have been, the fact that he chose not to address the elephant in the room meant that his attempt at resisting this application was, with respect, bound to fail. This, too, could be considered unreasonable conduct. Taken together with his earlier conduct in SUM 3260, there was ample justification for an award of indemnity costs.

281 After hearing Mr Gaznavi and Ms Khan on the quantum of costs, I fixed the costs of this application in the sum of $9,500 (all-in), payable by Mr Beranek to Mr Muruthi.

Chua Rui Yuan
Assistant Registrar

Suresh Divyanathan, Leong Yu Chong Aaron and Sarah Khan Shu Hui (Dauntless Law Chambers LLC) for the applicant;
Mahmood Gaznavi s/o Bashir Muhammad and Rezza Gaznavi (Mahmood Gaznavi Chambers LLC) for the first respondent.