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

[2023] SGHC 64

Suit No 321 of 2021

Between

TG Master Pte Ltd

… *Plaintiff*

And

(1) Tung Kee Development (Singapore) Pte Ltd
(2) Yung, Man Tung

… *Defendants*

Counterclaim of 1st Defendant and 2nd Defendant

Between

(1) Tung Kee Development (Singapore) Pte Ltd
(2) Yung, Man Tung

… *Plaintiffs in Counterclaim*

And

TG Master Pte Ltd

… *Defendant in Counterclaim*

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SUPPLEMENTAL JUDGMENT

[Civil Procedure — Further arguments — Request for further arguments after trial]

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TG Master Pte Ltd
v
Tung Kee Development (Singapore) Pte Ltd and another

[2023] SGHC 64

General Division of the High Court — Suit No 321 of 2021
Goh Yihan JC
13, 14 September, 12 October, 2 November 2022, 26 January 2023, 9 February 2023

20 March 2023 Judgment reserved.

Goh Yihan JC:

1 Following the release of my decision in *TG Master Pte Ltd v Tung Kee Development (Singapore) Pte Ltd and another* [2022] SGHC 316 ("the Judgment") on 19 December 2022, counsel for the plaintiff wrote in on 30 December 2022 requesting for further arguments to be heard after the trial. I agreed to this request on 10 January 2023. However, in addition to further arguments pertaining to aspects of my decision, I directed the parties to address me on whether I, sitting as a judge in the General Division of the High Court ("High Court"), even have the jurisdiction to hear further arguments *after a trial* due to s 29B of the Supreme Court of Judicature Act 1969 (2020 Rev Ed) ("SCJA").

2 Having considered the parties' further arguments, I concluded that the High Court does not have jurisdiction to hear further arguments after a trial. On

this basis, I cannot consider further arguments made to me after the trial. The result is that I, in effect, affirm my decision contained in the Judgment. I provide my reasons for coming to this conclusion. On the assumption that I am wrong on whether I have the jurisdiction to hear further arguments after a trial, I also deal briefly with the plaintiff's further arguments and explain why I nonetheless would not have varied my decision.

Whether the High Court has the jurisdiction to hear further arguments after a trial

The plaintiff's arguments

3 The plaintiff's argument in favour of the High Court's jurisdiction to hear further arguments on the merits of a decision given after trial is founded on three main grounds. First, the plaintiff submits that the Court of Appeal decision of *Thomson Plaza (Pte) Ltd v Liquidators of Yaohan Department Store Singapore Pte Ltd (in liquidation)* [2001] 2 SLR(R) 246 ("*Thomson Plaza*") and the High Court decision of *Long Well Group Ltd and others v Commerzbank AG and others* [2018] SGHC 164 ("*Long Well*") both endorsed the view that "[t]he power for a court to hear further arguments after trial is contained within the inherent jurisdiction of the court", such inherent jurisdiction being preserved by O 92 r 4 of the Rules of Court (2014 Rev Ed) ("ROC 2014").[1]

4 Second, the plaintiff submits that a court always has the inherent jurisdiction to hear further arguments as long as the order of court has not been extracted and that this is the view endorsed in procedural textbooks.[2]

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1 Plaintiff's Further Arguments dated 26 January 2023 at para 5.

2 Plaintiff's Further Arguments dated 26 January 2023 at para 8.

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5 Third, the plaintiff submits that s 29B of the SCJA is an "enabling provision" that provides for the High Court's ability to hear further arguments in respect of a decision made after a hearing that is not a trial, but which does not otherwise affect the High Court's ability to hear further arguments after a trial.[3]

Situating further arguments within the High Court's jurisdiction and power to amend its order

The distinction between substantive and non-substantive amendments

6 Before considering the plaintiff's arguments, it is useful to situate the High Court's supposed jurisdiction to hear further arguments within its *broader* jurisdiction and power to amend its orders. It is well established under Singapore law that a court can recall and vary its decision before it is perfected. However, it is important to bear in mind the distinction between the courts' jurisdiction and power to make (a) *substantive* amendments and (b) *non-substantive* amendments to their orders. The need for finality, which gives effect to fairness and certainty, means that there is a more limited scope for courts to make substantive amendments that go towards the merits of the matter in their orders once they have been made. Thus, as the High Court put it in *Godfrey Gerald QC v UBS AG and others* [2004] 4 SLR(R) 411 ("*Godfrey Gerald*") (at [18]), "[a] final decision, once made, cannot be revisited".

7 That said, there remains limited avenues for a court to reconsider the substantive merits of its decision. For example, pursuant to O 3 r 2(8) of the Rules of Court 2021 ("ROC 2021"), a court can, among others, "revoke any judgment" on any of the four grounds listed in O 3 r 2(8)(*a*) to O 3 r 2(8)(*d*) if

[3] Plaintiff's Further Arguments dated 26 January 2023 at para 10.

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it is "in the interests of justice". This arguably includes the making of substantive amendments to its orders. Another example is the opportunity for parties to make further arguments pursuant to s 29B of the SCJA to convince the court to reconsider and change its decision, even though it has already been pronounced. In this regard, the Court of Appeal had elaborated on the purpose of further arguments in *Singapore Press Holdings Ltd v Brown Noel Trading Pte Ltd and others* [1994] 3 SLR(R) 114 ("*Singapore Press Holdings*") (at [40]):

> The intent and purpose of s 34(1)(*c*) of the re-enacted Supreme Court of Judicature Act and O 56 r 2 of the Rules of the Supreme Court is to us abundantly clear and free from doubt. It is to *prescribe a procedure for appeals in interlocutory matters heard by a judge in chambers* being brought to this court, which may have arisen from full arguments not being presented to the judge in chambers due to the shortness of time available for the hearing of such applications or due to the judge in chambers having to decide on an issue without the time available to him for mature consideration. …
>
> [emphasis added]

From this, it is clear that the purpose of further arguments as contemplated in s 34(1)(*c*) of the Supreme Court of Judicature Act (Cap 322) (1999 Rev Ed) ("SCJA 1999") was to allow an unsuccessful party to have a second opportunity to argue their case *on the merits* before the same judge. This broad purpose of further arguments remains valid today despite subsequent amendments to the SCJA 1999. It is therefore clear that the outcome of successful further arguments is for *substantive* amendments to be made to the order that has already been pronounced.

8 The scope of the courts' jurisdiction and power to make non-substantive amendments to their orders is much wider. In *Godfrey Gerald*, the High Court clarified (at [18]) that the principle of finality cannot be applied "as a sterile and

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mechanical rule in matters where there are minor oversights, inchoateness in expression and/or consequential matters that remain to be fleshed out". This explains why courts have employed devices such as the "slip rule" and the implied "liberty to apply" proviso to redress or clarify such problems (see *Godfrey Gerald* at [18]). Accordingly, in the Court of Appeal decision of *Retrospect Investment (S) Pte Ltd v Lateral Solutions Pte Ltd and another* [2020] 1 SLR 763 ("*Retrospect Investment*"), Steven Chong JA held (at [12]) that it is clear that "the court possesses the inherent jurisdiction and power to clarify the terms of its orders and to give consequential directions". The learned judge further noted that the exercise of this jurisdiction or power is not uncommon (see *Retrospect Investment* at [15]). Parenthetically, it should be noted that the learned judge did not determinatively decide whether the court's ability to make non-substantive amendments to its orders should be considered a matter of its jurisdiction or its power. As such, I have deliberately used the expression "jurisdiction and power" to describe a court's ability to make non-substantive amendments to its orders. Similarly, in the High Court decision of *Thu Aung Zaw v Ku Swee Boon (trading as Norb Creative Studio)* [2018] 4 SLR 1260 ("*Thu Aung Zaw*"), in the context of summary judgments, Tan Siong Thye J concluded (at [23]) that a court can make non-substantive amendments to its orders so long as "the amendment only corrects an irregularity and does not *substantively vary the decision*" [emphasis added].

9 The courts' jurisdiction and power to make non-substantive amendments to their orders can be grounded either in their statutory or inherent jurisdiction/power. In regard to the former, O 20 r 11 of the ROC 2014 had expressly provided as such:

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> **Amendment of judgment and orders (O. 20, r. 11)**
>
> **11.** Clerical mistakes in judgments or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the Court by summons without an appeal.

While this provision does not appear in an equivalent form in the ROC 2021, it is arguable that the courts' statutory jurisdiction and power is preserved through the general power provided in O 3 r 2(2). This rule provides that the court may do whatever it considers necessary on the facts of the case before it to ensure that justice is done or to prevent an abuse of the process of the court, so long as it is not prohibited by law and is consistent with the Ideals set out in O 3 r 1 of the ROC 2021. However, given the lack of a more specific provision in the ROC 2021 on the courts' jurisdiction and power to make such non-substantive amendments to their orders, such jurisdiction or power might be more properly located within their inherent jurisdiction or power (see *Retrospect Investment* at [12]).

Foreign authorities

10 Turning now to other jurisdictions, the distinction between substantive and non-substantive amendments is also well established. However, it would appear that there is less scope for the courts elsewhere to make substantive amendments to their orders as compared to Singapore.

11 To begin, in the UK, there is no equivalent provision of s 29B of the SCJA. The closest provision in the UK is r 3.1(7) of the Civil Procedure Rules 1998 (SI 1998 No 3132) (UK) ("CPR 1998"), which, in general, allows for the variation or revocation of an order. It provides:

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> **The court's general powers of management**
>
> …
>
> (7) A power of the court under these Rules to make an order includes a power to vary or revoke the order.

12 While phrased quite broadly, this rule does not allow the courts to make substantive amendments to their orders. Thus, as has been observed in *The White Book Service 2022* vol 1 (Peter Coulson *et al* eds) (Sweet & Maxwell, 2022) (at para 40.9.3):

> … The rule does not give a judge, in effect, power to hear an appeal from themselves in respect of a final order, and should not be used to revoke approval to a final settlement, whether of the whole or part of a claim (*Roult v North West Strategic Health Authority* [2009] EWCA Civ 444, CA (rejecting the submission that the court's power may be exercised where a subsequent unforeseen event destroyed the assumption on which the order was made)). The court's jurisdiction under r.3.1(7) is not a substitute for an appeal and it is exercisable where there is additional material before the court in the form of evidence (or, possibly, argument) (*Edwards v Golding* [2007] EWCA Civ 416; *The Times*, 22 May 2007, CA (judge justified in setting aside Master's order, rather than requiring applicant to make an appeal out of time, as the case before him was essentially different, and in doing so the judge did not usurp the power of the Court of Appeal but rather corrected a fundamental procedural error)). The purpose of the rule is explained in para.3.1.9. … This particular power does not allow any court at any time 'simply to reverse itself if it happens to change its mind' (*SCT Finance Ltd v Bolton* [2002] EWCA Civ 56; [2003] 3 All E.R. 434, CA, at para.58, per Waller LJ). ***The jurisdiction under r.3.1(7) does not give a judge carte blanche to change his mind, and it is not a substitute for an appeal*** *Cole v Howlett*, at para.16. …
>
> [emphasis added in bold italics]

13 Turning then to Australia, where proceedings in the Supreme Court of New South Wales are governed by the Uniform Civil Procedure Rules (Reg No 418 of 2005) (NSW) ("UCPR 2005"), several provisions provide for the power of the court to set aside a judgment or order:

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> **36.15 General power to set aside judgment or order** (cf DCR Part 13, rule 1, Part 31, rule 12A; LCR Part 11, rule 1, Part 26, rule 3)
>
> (1) A judgment or order of the court in any proceedings may, on sufficient cause being shown, be set aside by order of the court if the judgment was given or entered, or the order was made, irregularly, illegally or against good faith.
>
> (2) A judgment or order of the court in any proceedings may be set aside by order of the court if the parties to the proceedings consent.
>
> **36.16 Further power to set aside or vary judgment or order** (cf SCR Part 40, rule 9)
>
> (1) The court may set aside or vary a judgment or order if notice of motion for the setting aside or variation is filed before entry of the judgment or order.
>
> …
>
> (3) In addition to its powers under subrules (1) and (2), the court may set aside or vary any judgment or order except so far as it—
>
> (a) determines any claim for relief, or determines any question (whether of fact or law or both) arising on any claim for relief, or
>
> (b) dismisses proceedings, or dismisses proceedings so far as concerns the whole or any part of any claim for relief.
>
> …
>
> **36.17 Correction of judgment or order ("slip rule")** (cf SCR Part 20, rule 10; DCR Part 17, rule 10; LCR Part 16, rule 10)
>
> If there is a clerical mistake, or an error arising from an accidental slip or omission, in a judgment or order, or in a certificate, the court, on the application of any party or of its own motion, may, at any time, correct the mistake or error.

14 It is clear that r 36.17 allows the court to make non-substantive amendments to its order and manifests the "slip rule" in a similar manner as

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O 20 r 11 of the ROC 2014. In contrast, the other two provisions allow the court to make substantive amendments to its order but only in limited circumstances. First, the purpose of r 36.15(1) UCPR 2005 is "facultative and deals with a matter going to the integrity of the administration of justice itself, namely judgments or orders that may have been entered "irregularly, illegally or against good faith"" (see the New South Wales Supreme Court decision of *Randall v City of Canada Bay Council (No 4)* [2015] NSWSC 1759 at [82]). In this regard, Kirby P (as he then was) in the New South Wales Court of Appeal decision of *Coles v Burke* (1987) 10 NSWLR 429 similarly said of the equivalent District Court of New South Wales provision (at 437) that the rule is concerned with the misconduct or dishonourable conduct of the person who procured the judgment which warrants an exceptional recourse.

15 As for r 36.16(3) of the UCPR 2005, this provision limits the court's power to set aside or vary a judgment or order in relation to interlocutory matters. While this seemingly allows the court to make substantive amendments to its orders, this is clearly a circumscribed power.

16 Turning finally to Canada, the general power of the court to amend, set aside, or vary its order is governed by r 59.06 of the Rules of Civil Procedure, RRO 1990, Reg 194 (Can), which provides:

> **Amending, Setting Aside or Varying Order**
>
> ***Amending***
>
> **59.06** (1) An order that contains an error arising from an accidental slip or omission or requires amendment in any particular on which the court did not adjudicate may be amended on a motion in the proceeding. R.R.O. 1990, Reg. 194, r. 59.06 (1).

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> ***Setting Aside or Varying***
>
> (2) A party who seeks to,
>
> (a) have an order set aside or varied on the ground of fraud or of facts arising or discovered after it was made;
>
> (b) suspend the operation of an order;
>
> (c) carry an order into operation; or
>
> (d) obtain other relief than that originally awarded,
>
> may make a motion in the proceeding for the relief claimed. R.R.O. 1990, Reg. 194, r. 59.06 (2).

17 This distinction between a court's power to make substantive and non-substantive amendments to its order clearly exists in these provisions. First, r 59.06(1) allows the court to make non-substantive amendments and governs situations where there has been an error arising from an accidental slip. In contrast, r 59.06(2) appears to allow the court to make amendments including substantive ones, where the order was induced by fraud or facts arising or discovered after the order was made.

18 Over and above these provisions, these foreign jurisdictions have recognised, to varying degrees, the courts' inherent jurisdiction to reverse a decision at any time before the order is perfected (see, for example, *In re L and another (Children) (Preliminary Finding: Power to Reverse)* [2013] 1 WLR 634 at 640). This clearly pertains to the court's jurisdiction to make a substantive amendment to its order, although not every jurisdiction has employed the process of "further arguments" as used in Singapore.

The issue for determination in the present case

19 From the above discussion, the distinction between a court's jurisdiction or power to make substantive or non-substantive amendments to its order is well

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established in both the local and foreign authorities. While the foreign courts can make substantive amendments to their orders, the circumstances in which they can do so are circumscribed. This is consistent with the need for finality as has been observed by the High Court in *Godfrey Gerald*. Accordingly, as a preliminary point, it seems to me that a court should not lightly claim the jurisdiction or power to make substantive amendments to its orders after they have been pronounced.

20 Returning to the present case, I am here concerned with the High Court's jurisdiction to make substantive amendments to its order upon *hearing further arguments after a trial*. As such, it is important to clarify what this judgment is *not* about. First, nothing in this judgment should be regarded as directly relevant to the High Court's jurisdiction or power to make substantive amendments to its orders by a process other than the hearing of further arguments after a trial, such as where there is an allegation that the judgment was procured by fraud. Second, nothing I say in this judgment should be regarded as directly relevant to the High Court's jurisdiction or power to make non-substantive amendments to its orders. Indeed, as the local and foreign materials show, this is a well-established jurisdiction or power that the High Court possesses.

The High Court does not have the jurisdiction to hear further arguments after a trial

Terminology: jurisdiction or power?

21 With the above background in mind, I disagree with the plaintiff's argument in favour of the High Court's jurisdiction to hear further arguments for the reasons founded on principle, precedent, and policy that I will develop below. Before I do so, I will from this point on deliberately use the word

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"jurisdiction" to describe my conclusion that the High Court does not have the jurisdiction to hear further arguments after a trial. I have done this to avoid any confusion caused by the conflating or inconsistent use of terminology such as "jurisdiction" and "power" in relation to the *specific* instance of a court's jurisdiction to hear further arguments.

22 In this regard, as V K Rajah JA observed in the Court of Appeal decision of *Re Nalpon Zero Geraldo Mario* [2013] 3 SLR 258 ("*Re Nalpon Zero*") (at [13]), the jurisdiction of a court is "its authority, however derived, to hear and determine a dispute that is brought before it" (citing Chan Sek Keong J (as he then was) in *Muhd Munir v Noor Hidah* [1990] 2 SLR(R) 348 ("*Muhd Munir*")). In contrast, as Rajah JA also observed in *Re Nalpon Zero* (at [31]), again citing Chan J in *Muhd Munir* (at [19]), the powers of a court constitute "its capacity to give effect to its determination by making or granting the orders or reliefs sought by the successful party to the dispute". These are necessarily distinct concepts, and the court's jurisdiction must be established *before* the court can consider what powers it possesses and may exercise (see the decision of the Court of Appeal in *Pradeepto Kumar Biswas v Sabyasachi Mukherjee and another and another matter* [2022] 2 SLR 340 at [28]).

23 In the context where the High Court is asked to hear further arguments after a hearing, it is better to regard this as an instance of whether the court has the *authority* to consider the further arguments, as opposed to whether it has the capacity to give effect to any prior determination. This is because the High Court is *functus officio* after it has rendered its final decision (see *Thu Aung Zaw* at [19]). As such, it no longer possesses the authority to hear further arguments on the merits of the case unless such authority is provided for statutorily or by the common law. Given this, it would not be accurate to ask if the High Court

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has the "power" to hear further arguments when its authority to do so is in question.

24 With this in mind, I turn to my reasons for my decision why the High Court does not have the jurisdiction to hear further arguments *after a trial*.

Principle: Parliament has curtailed the High Court's inherent jurisdiction to hear further arguments after a trial under the SCJA

(1) Legislative amendments

25 I begin with a point of principle. Since the High Court is a creature of statute, the *starting point* for locating its jurisdiction must necessarily be found in statute. In this regard, the key statute is the SCJA. Prior to 2010, the SCJA did not contain a specific provision dealing with the jurisdiction of the High Court to hear further arguments. The SCJA 1999 did, however, contain s 34(1)(*c*), which provided as follows:

> **Matters that are non-appealable or appealable only with leave**
>
> **34.**—(1) No appeal shall be brought to the Court of Appeal in any of the following cases:
>
> …
>
> (*c*) subject to any other provision in this section, where a Judge makes an interlocutory order in chambers unless the Judge has certified, on application within 7 days after the making of the order by any party for further argument in court, that he requires no further argument;
>
> …

26 Having regard to s 34(1)(*c*) of the SCJA 1999, the Singapore courts had legitimately regarded themselves as having the *inherent* jurisdiction to hear further arguments after *any* hearing, *including* after a trial. Indeed, given that

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s 34(1)(*c*) *recognises* the jurisdiction of a High Court judge to hear further arguments (albeit only after the making of an interlocutory order in chambers), but *does not* otherwise provide for this jurisdiction expressly or impliedly, it may be argued that the High Court's jurisdiction to hear further arguments was founded on its inherent jurisdiction.

27 However, in light of the subsequent amendments to s 34(1)(*c*), I find that Parliament has curtailed the High Court's inherent jurisdiction to hear further arguments *after a trial*. In this regard, it is pertinent that on 15 November 2010, the SCJA 1999 was amended by the Supreme Court of Judicature (Amendment) Act 2010 (Act 30 of 2010) to insert a new s 28B ("the 2010 Amendment"), which is the predecessor provision of the present s 29B. Section 28B first appeared in the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) ("SCJA 2007"), as amended. It provides, as relevant, the following:

> **Further arguments before Judge exercising civil jurisdiction of High Court**
>
> **28B.**—(1) Before any notice of appeal is filed in respect of any judgment or order made by a Judge, in the exercise of the civil jurisdiction of the High Court, *after any hearing other than a trial of an action*, the Judge may hear further arguments in respect of the judgment or order, if any party to the hearing, or the Judge, requests for further arguments before the earlier of —
>
> (*a*) the time the judgment or order is extracted; or
>
> (*b*) the expiration of 14 days after the date the judgment or order is made.
>
> [emphasis added]

28 For completeness, s 29B of the SCJA provides for substantively the same but breaks up s 28B(1) of the SCJA 2007 into two subsections, as follows:

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> **Further arguments before notice of appeal is filed**
>
> **29B.**—(1) This section applies to a decision made by a Judge in the exercise of the original or appellate civil jurisdiction of the General Division, *after any hearing other than a trial of an action*.
>
> (2) Before any notice of appeal is filed against a decision to which this section applies, the Judge who made the decision may hear further arguments in respect of the decision if any party to the hearing, or the Judge, requests for further arguments before the earlier of the following:
>
> (*a*) the time at which the judgment or order relating to the decision is extracted;
>
> (*b*) the 15th day after the date on which the decision is made.
>
> [emphasis added]

Section 29B also refers to the General Division of the High Court, being a newly created division at the time. In this context, I have, for convenience, used the term "High Court" to refer both to the General Division of the High Court, as well as the High Court prior to the creation of the General Division. As there is no indication from the relevant parliamentary debates as to why s 29B is framed differently from s 28B (see *Singapore Parliamentary Debates*, *Official Report* (5 November 2019) vol 94 (Mr Edwin Tong Chun Fai SC, Senior Minister of State for Law)), and that the two sections are materially similar, I will concern my discussion primarily with s 28B and regard the points made as being equally applicable to s 29B.

29 I begin with the text of s 28B of the SCJA 2007. It is crucial that s 28B expressly provides that a High Court judge "may" hear further arguments after any hearing other than a trial. This is a marked departure from the terms of s 34(1)(*c*) of the SCJA 1999, which does not provide for whether the judge may or may not hear further arguments; it simply recognises his or her jurisdiction to do so. This is crucial because this shows that Parliament had, by

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the 2010 Amendment, moved from merely recognising to *conferring* the jurisdiction on the High Court to hear further arguments.

30 Equally crucially, it would appear that Parliament has confined this conferral of jurisdiction to hear further arguments in the 2010 Amendment to "after any hearing *other than a trial*" [emphasis added]. While there is, strictly speaking, no express prohibition of hearing further arguments after a trial, this prohibition can be inferred given that s 28B of the SCJA 2007 is the only provision within the statute referring to the authority to hear further arguments and expressly confines such authority to after any hearing other than a trial of an action. Therefore, from a textual comparison of s 28B of the SCJA 2007 (and now s 29B of the SCJA) with s 34(1)(*c*) of the SCJA 1999, it can be reasonably inferred that Parliament intended to curtail the High Court's inherent jurisdiction to hear further arguments *after a trial*. Parliament has done this by excluding the hearing of further arguments after a trial from its conferral of statutory jurisdiction to hear further arguments in other matters.

(2) Clear legislative intention behind amendments

31 That Parliament intended to do this can also be seen from the relevant parliamentary debates and relevant materials. During the Second Reading of the Supreme Court of Judicature (Amendment) Bill in October 2010, the Senior Minister of State for Law, Assoc Prof Ho Peng Kee, explained that the purpose behind s 28B of the SCJA 2007 was to remove the then prevailing technical requirement of a party needing to make further arguments before it could file an appeal to the Court of Appeal (see *Singapore Parliamentary Debates*, *Official Report*, (18 October 2010) vol 87 at col 1373). While this does not explain why s 28B expressly included the proviso "after any hearing other than a trial", Assoc Prof Ho did say (at col 1368) that the amendments, including those in

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relation to further arguments, "arose out of two Reports helmed by the Judiciary", including the report by the Law Reform Committee (see Law Reform Committee, Singapore Academy of Law, *Report of the Sub-Committee on the Rationalisation of Legislation Relating to Leave to Appeal* (October 2008) (Chairman: Cavinder Bull) ("LRC Report")). Indeed, as noted by the Court of Appeal in *ARW v Comptroller of Income Tax and another and another appeal* [2019] 1 SLR 499 ("*ARW v Comptroller of Income Tax*") (at [80]), the recommendation to retain the right to request for further arguments in Singapore stemmed from the LRC Report.

32 As such, the reason for why further arguments can only be heard after "other than a trial of an action" becomes clear when we look at the legislative impetus as can be gleaned from the LRC Report. In summary, the possibility of further arguments being heard was only ever intended to apply for interlocutory applications and not a full trial. It is relevant to scrutinise the relevant paragraphs of this report which I reproduce here for convenience:

> 89 The *requirement of further arguments recognises* that, in practice, parties are often given only a *short amount of time* to present their arguments *to the judge in chambers*, and that there will inevitably be instances whereby parties fail to present all relevant arguments whether deliberately for the purpose of saving time or inadvertently. The order would thus have been made without the benefit of the judge having considered the arguments in full. Similarly, *in most interlocutory applications before a judge in chambers, the judge will often have to deal with the issues in a very short time*, and *would often have to make an order quickly and on the spot.*
>
> …
>
> 92 As stated by the Court of Appeal in *Singapore Press Holdings*, the *main rationale behind the rule requiring further arguments* is to allow the judge *an opportunity to reconsider his decision.* This is regarded as necessary and desirable as *interlocutory orders are often made under significant time constraints and without due consideration.*

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> …
>
> 94 Counsel may also have inadvertently left out some relevant arguments. This is likely to occur where there is an *urgent application* to be heard and the *time for preparation is short*, when certain issues become apparent only at the hearing, or when a particular issue is simply not raised or addressed at the hearing *due to a lack of time*.
>
> …
>
> 96 Secondly, just as counsel are expected to present the arguments within a limited time, *a judge is also often required to make an interlocutory order in a short period of time*. Due to the *lack of time*, not only may a judge be deprived of hearing all the relevant arguments as described earlier, but he may also be *denied sufficient time to deliberate on the issues at hand*. As such, it is reasoned that a judge should be afforded an opportunity to review an interlocutory order made under such circumstances, so as to allow him time to rethink and further evaluate the pertinent issues.
>
> …
>
> 105 Since the making of further arguments *was intended to address the possible injustice arising from full arguments not being made before the judge*, further arguments should be allowed in respect of all orders *except those made after a trial*.
> …
>
> [emphasis added]

33 As can be seen from the above, the underlying concerns behind the need to retain the right to request for further arguments were borne out of: (a) the short amount of preparation time that counsels have to present their arguments to a judge in chambers for interlocutory applications, and (b) the correspondingly short amount of deliberation time a judge has before making an interlocutory order quickly, and sometimes, even on the spot for urgent applications. It was for these reasons that the LRC Report suggested for further arguments to be allowed in all orders *except* those made after a trial (at para 105): "Since the making of further arguments was intended to address the possible injustice arising from full arguments not being made before the judge,

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further arguments should be allowed in respect of all orders *except those made after a trial* …" [emphasis added].

34 The key thread that ties these concerns together is the significant time pressure that can arise in interlocutory applications. It seems highly unlikely that such time pressure would exist in the context of a civil trial. In this regard, a civil trial spans months, and even years, of preparation starting from the pleadings all the way to the actual trial. During this whole process, counsel would have had sufficient opportunity to think about their case theory. Similarly, a judge would usually also have ample time to consider counsel's arguments carefully after the trial. Thus, if any argument went unaddressed, it is highly unlikely that it was due to the time pressure that may exist for interlocutory applications. This provides a clear reason as to why Parliament enacted s 28B of the SCJA 2007 (and s 29B of the SCJA) in its present form so as to exclude the High Court's inherent jurisdiction to hear further arguments *after a trial*.

(3) Section 29B of the SCJA is not an "enabling provision"

35 At this point, I should address the plaintiff's argument that s 29B of the SCJA is an "enabling provision" that sets certain deadlines governing when further arguments may be heard in respect of a decision made after any hearing other than a trial of an action, but which does not disturb the High Court's inherent jurisdiction to hear further arguments in respect of a decision made after a trial. I disagree with this argument because it implies that Parliament has deemed it unnecessary to provide any deadlines that restrict when further arguments may be heard after a trial. This would go against the stated policy aims of such deadlines. In this regard, the LRC Report had noted that the specific reason for the imposition of a deadline is, among others, "to ensure that

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the appeal process is not unduly delayed" (at para 111). Therefore, if Parliament had intended to retain the court's jurisdiction to hear further arguments after a trial, it would not make sense for Parliament *not* to have set any deadline at all for such situations. As such, the better view is that s 28B simply does not contemplate the High Court having the jurisdiction to hear further arguments after a trial.

36 Accordingly, in my view, s 28B of the SCJA 2007 (and now s 29B of the SCJA) has superseded the previous position that the High Court had the inherent jurisdiction to hear further arguments in respect of *all* hearings, which might have been justified by the framing of s 34(1)(*c*) of the SCJA 1999. Section 28B did this by specifically *excluding* trials from the hearings following which the High Court can hear further arguments. As such, I conclude that Parliament intended to curtail the High Court's inherent jurisdiction to hear further arguments *after a trial*. The result is that the High Court has *no* jurisdiction, whether statutory or inherent, to hear further arguments pertaining to the merits of the decision *after a trial*.

Precedent: Local decisions that justified the hearing of further arguments on inherent jurisdiction can be distinguished

37 Bearing in mind my conclusion above that Parliament has curtailed the High Court's inherent jurisdiction to hear further arguments after a trial, I come to the two precedent cases cited by the plaintiff. First, I find that the Court of Appeal decision of *Thomson Plaza* can be distinguished and is therefore not a binding authority on me. To begin with, *Thomson Plaza* must be read in its proper context. There, the court did not decide on the issue of whether further arguments may be heard after all hearings, including a trial of an action. Instead, the specific issue was whether the consequence of a judge agreeing to hear

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further arguments differed depending on whether the further arguments were sought in relation to a final or an interlocutory order (at [6]–[7]). It was *in that context* that Chao Hick Tin JA had held that (at [6]) "[i]t is settled law that *even in respect of a final order*, the judge has an inherent jurisdiction to recall his decision and to hear further arguments, so long as the order is not yet perfected" [emphasis added]. Therefore, *Thomson Plaza* is not authority for the suggestion that further arguments may be heard after a trial of an action.

38 Further, even if we take the learned judge's statement of the law to be of general application to all hearings including after a trial, *Thomson Plaza* can still be distinguished because the case was decided in June 2001. The operative statute was the SCJA 1999, which did not contain the equivalent of s 29B of the SCJA at the time it was decided. As I have explained above (at [26]), the SCJA 1999 made no provision for the High Court's jurisdiction to hear further arguments. As such, it might have been possible to say that the court's jurisdiction to hear further arguments was based on its inherent jurisdiction. Indeed, this would explain why the court relied on *In re Harrison's Share under a Settlement* [1954] 3 WLR 156, an authority which stands for the position in common law that the court has the inherent jurisdiction to hear further arguments before the judgment or order is extracted. However, such a view cannot be satisfactorily maintained after the 2010 Amendment. Indeed, *Thomson Plaza* can be further distinguished on the basis that it was decided *before* Parliament enacted s 28B of the SCJA 2007 to the then prevailing version of the SCJA, which expressly curtailed the court's inherent jurisdiction to hear further arguments after a trial.

39 I turn then to the High Court decision of *Long Well*, which was decided *after* the 2010 Amendment. In *Long Well*, the High Court had delivered its

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judgment in respect of the substantive matters in the suit after trial and had ordered costs to follow the event. However, counsel for the defendants later requested for leave of court to make further arguments regarding the issue of costs. The court had to interpret s 28B of the SCJA 2007. In that case, the court had said this (at [6]):

> Although the power to hear further arguments under s 28B of the SCJA may be limited to hearings other than a trial of an action, the same does not apply to the court's inherent jurisdiction. Both counsel referred me to the case of *Thomson Plaza (Pte) Ltd v Liquidators of Yaohan Department Store Singapore Pte Ltd (in liquidation)* [2001] 2 SLR(R) 246 ("*Thomson Plaza*") where it was said at [6] that it is 'settled law that even in respect of a final order, the judge has an inherent jurisdiction to recall his decision and to hear further arguments, so long as the order is not yet perfected.' …

40 From the above passage, the court in *Long Well* appears to have suggested that the High Court still possessed the inherent jurisdiction to hear further arguments after a trial despite s 28B of the SCJA 2007 on the authority of *Thomson Plaza*. To the extent that this is a correct reading of *Long Well*, I respectfully disagree with the court's suggestion. First, as I have explained above, *Thomson Plaza* should not be taken to have ruled on the effect of s 28B on a court's inherent jurisdiction to hear further arguments after a trial given that it was decided *before* the 2010 Amendment. Second, as I have also explained above, the better view in light of s 28B (and now s 29B of the SCJA) is to regard Parliament as having curtailed the High Court's inherent jurisdiction to hear further arguments after a trial.

41 I now turn to other precedent cases which touch upon the issue at hand. Starting with the decision of the Court of Appeal in *ARW v Comptroller of Income Tax*, the relevant facts were that the Comptroller of Income Tax filed an application seeking an extension of time to file a request for further arguments

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in relation to the appellant's application for specific discovery pursuant to s 28B(1) of the SCJA 2007. The Court of Appeal had to answer the question of whether the High Court below had the jurisdiction to extend the 14-day timeline prescribed under s 28B(1)(*b*). In answering that question, the Court of Appeal made this observation (at [58]):

> The fact that the judge can, on his own accord, invoke s 28B of the SCJA ("s 28B SCJA") to hear further arguments does not necessarily mean that the time-limit has to be immutable. Nothing in that fact can in any way be construed to mean that the general power to extend time accorded to the court under s 18(2) SCJA is thereby in any way affected. Indeed, this has always been the position under the common law as the judge retains the inherent jurisdiction to hear further arguments at ***any time*** before the order has been extracted (see this court's decision in *Thomson Plaza (Pte) Ltd v Liquidators of Yaohan Department Store Singapore Pte Ltd* [2001] 2 SLR(R) 246 at [6]) …
>
> [emphasis in original]

42 From the extract, while the Court of Appeal had cited the decision of *Thomson Plaza* for the proposition that the judge "retains the inherent jurisdiction to hear further arguments at *any time* before the order has been extracted" [emphasis in original], the emphasis was really on the words "any time". The Court of Appeal was simply making the point that the High Court had the jurisdiction to extend the 14-day timeline stipulated. The holding of the court did not extend so far as to lay down a general rule that further arguments may be allowed after the trial of an action, a rule which would contradict the clear jurisdictional limit as expressed in s 28B(1) of the SCJA 2007. Therefore, I do not regard this decision to be binding in the present case.

43 Further, the outcome in *ARW v Comptroller of Income Tax* is better explained on the basis that the court's power to extend time was already statutorily provided for in para 7 of the First Schedule to the SCJA 2007 read

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with s 18(2) of the SCJA 2007. Paragraph 7 of the First Schedule to the SCJA 2007 stated as follows:

> **Time**
>
> 7. Power to enlarge or abridge the time prescribed by any written law for doing any act or taking any proceeding, whether the application therefor is made before or after the expiration of the time prescribed, but this provision shall be without prejudice to any written law relating to limitation.

Indeed, the Court of Appeal in that case observed that the time limit in s 28B of the SCJA 2007 was not immutable and did not affect the general power accorded to the court under s 18(2) of the SCJA 2007 to extend time (at [58]).

44 I turn next to examine two High Court decisions which did concern the consideration of further arguments after a trial. The first case is *Tan Chin Hoon and others v Tan Choo Suan (in her personal capacity and as executrix of the estate of Tan Kiam Toen, deceased) and others and other matters* [2015] SGHC 306. There, after delivering the judgment but upon hearing further arguments from the plaintiff, the court eventually decided to recall its previous order dismissing the plaintiff's entire claim in relation to family funds that were entrusted to a certain individual (see [295], [296] and [298]). This was done as both parties in that case accepted that a judge has the inherent jurisdiction to recall his decision and to hear further arguments so long as the order is not yet perfected, citing *Thomson Plaza* (at [297]).

45 The second case is *Muhammad Adam bin Muhammad Lee (suing by his litigation representatives Noraini bte Tabiin and Nurul Ashikin bte Muhammad Lee) v Tay Jia Rong Sean* [2022] 4 SLR 1045. In that case, after the judgment was released (which quantified the damages to be assessed), counsel for the defendant had written to court requesting for further arguments on the question

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of pre-judgment interest (at [308]). The court acceded to the defendant's request for further arguments as both the plaintiff and defendant counsel agreed that the court possessed the "inherent power" to recall its earlier decision and hear further arguments, once again citing *Thomson Plaza* (at [310]).

46 In my respectful view, these decisions are inconclusive on the question of whether the High Court can exercise its inherent jurisdiction to hear further arguments after a trial. First, as already explained above, there are various reasons why *Thomson Plaza* is not a direct authority for the proposition being argued for (see above at [37]–[38]). Second, it does not appear that the implied prohibition against further arguments after a trial in s 28B of the SCJA 2007, and now s 29B of the SCJA, was brought to the court's attention. As such, there was no proper consideration of the issue.

47 Therefore, from this survey of the precedent cases, there does not appear to be any prior decisions which have analysed the issue at hand such that it represented binding or relevant authority.

Policy: There would be practical concerns if the court could hear further arguments after a full trial

48 Finally, as a matter of policy, there would be practical concerns if further arguments were ordinarily heard and considered as a matter of course after a full trial. These are well illustrated by this very case. For instance, in support of its argument that the forfeiture of the Further Sum (as the term is defined in the Judgment) does not offend the penalty rule because such forfeiture is a genuine pre-estimate of its loss, the plaintiff's counsel now argues that they were

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"instructed" that the losses was a certain amount. The plaintiff has even now provided a detailed breakdown of these losses.[4]

49 Two concerns arise. First, these estimated losses were simply never put into evidence and it would be unfair to the defendants to consider these now since the figures were never tested in cross-examination. Second, I doubt whether the plaintiff's counsel being "instructed" on the loss is sufficient. I would have thought that expert evidence is needed on this matter (such as bringing in land valuers, *etc*, in order to determine the greatest loss). These issues go to the ethos behind why there should not be further arguments after a full trial: the plaintiff has had the luxury of time to make their case over the past few months (as opposed to an urgent interlocutory application) and even for a few weeks after the trial to prepare its closing submissions. If they have failed to raise these new arguments at the appropriate time, then given these concerns and my views above, they should not be allowed to raise these belatedly by way of further arguments.

50 As such, having considered the above, the appropriate course of action is for the plaintiff, if it so wishes, to file an appeal against my decision. If necessary, the appellate court can decide whether to hear what are, in effect, new arguments on appeal and admit the further evidence if that is needed. In that context, the appellate court may affirm or reverse my decision. But for present purposes, I find that, in my capacity as a judge in the High Court, I simply do not possess the jurisdiction, statutory or inherent, to hear further arguments after a trial on the merits of the case, with a view to making

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4 Plaintiff's Further Arguments dated 26 January 2023 at para 96.

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substantive amendments to my decision that has already been pronounced in the Judgment.

Even if the High Court has the jurisdiction to hear further arguments after a trial, whether the plaintiff's further arguments would have warranted a variation of my decision

51 Even if I am wrong that the High Court does not have the jurisdiction to hear further arguments after a trial, I would still have affirmed my decision in the Judgment because I did not think that the plaintiff's further arguments merit, without the potential admission of further evidence, a variation of my decision. Because the plaintiff may well appeal against my original decision, I will only provide brief reasons as to why.

The plaintiff's further argument on Clause A being a primary obligation

52 The plaintiff's first argument is that, based on the terms of the eight Options to Purchase dated 3 January 2018 ("the OTPs"), the sum of $500,000 paid for each of them ("the Further Sum") was the agreed consideration for their rental for two and a half years. As such, the plaintiff argues that this makes the payment of the Further Sum a primary obligation, to which the penalty rule does not apply. Among others, the plaintiff cites the recent Court of Appeal decision of *Ethoz Capital Ltd v Im8ex Pte Ltd and others* [2023] SGCA 3 ("*Ethoz*") in support.

53 I disagree with this argument. *Ethoz* was a case concerning the potential payment of accelerated interests and default interests after the borrower defaulted on the repayment of the loan given by the finance company. It was through that lens that the Court of Appeal had to answer the question of whether the acceleration of interest payments upon breach amounted to a primary or

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secondary obligation that was subject to the penalty rule. It held that the primary obligation was to pay the interests over 180 instalment payments and the secondary obligation was the accelerated payment of all the interests upon default (see [54], [55] and [57]).

54 In contrast, the present situation is different as it concerned the forfeiture of the sums *already* paid over in the form of the Further Sum. The governing case is therefore the High Court decision of *Hon Chin Kong v Yip Fook Mun and another* [2018] 3 SLR 534 ("*Hon Chin Kong*"), which dealt squarely with the issue on the law relating to deposits and presented a *context-specific* framework to be applied to the traditional penalty doctrine in *Ethoz*. In particular (at [143]), *Hon Chin Kong* laid down the framework for determining whether the Further Sum should be characterised as a true deposit or as a part payment (and in the latter scenario, with the right to forfeit being tested against the penalty rule).

55 Indeed, it would be wrong to classify the Further Sum as a form of payment to be made "only when there was a breach of contract" under the general traditional test in *Ethoz*, since it has *already* been paid over. In other words, by the plaintiff's argument, the payment of the Further Sum will *never* amount to a secondary obligation to be tested against the penalty rule under the traditional test since it has already been paid over. Further, by this argument, *no* forfeiture will ever attract the application of the penalty rule since they are predicated on a primary obligation to pay money over. This surely is not an accurate reflection of the law.

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The plaintiff's further argument about the forfeiture of the Further Sum not being a penalty

56 The plaintiff's second argument is that, even if I am not with it on the primary obligation argument, the relevant clauses of the OTPs are not penal in nature. To this, the plaintiff makes two sub-points, namely: (a) the payment of the Further Sum was a payment of a deposit pursuant to a property transaction, and (b) the forfeiture provisions were commensurate with the nature of the breach and the loss suffered.

57 On the first sub-point, I would simply refer to my reasons in the Judgment as I do not think that the plaintiff has raised any new point for my consideration. For completeness, I do note that the plaintiff has argued that the defendants had not discharged its burden of proving what the customary rate of a deposit is in the present context. I disagree. The defendants raised the case of *Hon Chin Kong* which mentions the customary 10% rate, and in any event, this is a well-established position in Singapore that the court is entitled to take judicial notice of.

58 On the second sub-point, while I understand the plaintiff's point about the losses that it has had to bear over the two years, the problem is that the plaintiff *did not* adduce evidence of those losses during trial. While the plaintiff's counsel now says that they are "instructed" as to the nature and quantum of these losses, I do not think that it is satisfactory for the court to receive evidence of these figures outside of trial without the opportunity for the defendants to test this evidence (see above at [49]). As such, without admitting this evidence as to the plaintiff's losses, it is not possible for me to assess whether the forfeiture of the Further Sum was commensurate with the nature of the breach and the losses the plaintiff allegedly suffered.

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59 In any event, even without admitting new evidence, the provisions pertaining to the Further Sums, in particular the forfeiture mechanism, are likely incommensurate with the losses that the plaintiff might suffer as a result of a potential breach. Indeed, a helpful indicator for determining whether a clause is a penalty is whether "a single lump sum is made payable by way of compensation, on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damage" (see *Ethoz* at [67(c)]). Here, as the defendants rightly point out, the forfeiture of the Further Sums could occur on a number of different events, some of which may occur early on within the two-year period. Despite this, the *entirety* of the Further Sums would still have to be forfeited in any event. It is unclear whether such forfeiture would not be commensurate with the extent of the losses suffered by the plaintiff in each of those different events, especially in relation to events well within the two-year period. Therefore, I am of the view that the provisions pertaining to the Further Sums are, in totality, penal in nature.

Conclusion

60 For all of these reasons, I affirm my decision in the Judgment. The main ground is that I do not think the High Court has the jurisdiction to consider the plaintiff's further arguments *after the trial*. But even if I were wrong on this point, I would still have affirmed my decision because I am not convinced of the merits of the further arguments.

Goh Yihan
Judicial Commissioner

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