9. CONFLICT OF LAWS

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Introduction

9.1 For 2008, there are 12 cases which will be examined in this review.

9.2 As in previous years, it is useful to note that conflict of laws cases sometimes relate to other areas of law. In these situations, this review will only examine those parts of the case that are relevant to the field of conflict of laws.

9.3 For the sake of completion, it is appropriate to mention that two cases reported in 2008 have already been reviewed last year. These cases are *Pacific Recreation Pte Ltd v S Y Technology Inc* [2008] 2 SLR 491 and *VH v VI* [2008] 1 SLR 742.

Jurisdiction

9.4 There was one case relating to the jurisdiction of the courts: *Murakami Takako v Wiryadi Louise Maria* [2008] 3 SLR 198 (HC), [2009] 1 SLR 508 (CA).

9.5 The facts can be simply stated. The plaintiff was the executor for the deceased person's estate and sought to amend her statement of claim against the defendants over the deceased person's assets to include, *inter alia*, moneys in two Australian bank accounts and foreign immovables.

9.6 At the High Court, Andrew Ang J allowed the amendments relating to the bank accounts, concluding that the plaintiff was neither issue estopped nor cause of action estopped. However, the learned judge did not allow those amendments relating to foreign immovables on the basis that the personal equities exception to the *Moçambique* rule (*The British South Africa Co v The Companhia de Moçambique* [1893] AC 602) did not apply because the dispute was not sufficiently connected to the forum to warrant the intervention of equity. Andrew Ang J further held that even if the personal equities exception applied and the court did have jurisdiction, he would decline to exercise

jurisdiction on the ground of *forum non conveniens*. The appellant appealed against the decision to disallow these amendments.

9.7 Apart from jurisdiction, this case also dealt with matters of stay of proceedings (considered at paras 9.51–9.53), choice of law (considered at paras 9.69–9.71) and foreign judgments (considered at paras 9.83–9.87). Each of these matters will be dealt with in the respective sections of this chapter.

9.8 On jurisdiction, the Court of Appeal first stated that the *Moçambique* rule (*The British South Africa Co v The Companhia de Moçambique* [1893] AC 602) and the personal equities exception was part of Singapore law. Put another way, the court will generally have no jurisdiction over claims to foreign immovable properties except for, *inter alia*, claims with respect to equitable obligations. The court then noted that the trust claims in this case fell into this category. Andrew Ang J had held that there was a requirement for the dispute to be sufficiently connected to the forum before the personal equities exception could apply. The Court of Appeal disagreed. The court considered the authorities and concluded that while this may have been the legal position pre-1873, there was no longer any such requirement. Presence, submission or service of a writ or other originating process out of jurisdiction in accordance with the prevailing civil procedure rules was sufficient for the courts to assume jurisdiction. In delivering its decision, the Court of Appeal also helpfully clarified that the personal equities exception to the *Moçambique* rule is one which relates to jurisdiction instead of choice of law (as suggested by English authorities).

Stay of proceedings

9.9 There were seven cases relating to stay of proceedings. The first case was *Carona Holdings Pte Ltd v Go Go Delicacy Pte Ltd* [2008] 1 SLR 161 (HC), [2008] 4 SLR 460 (CA).

9.10 The first appellant and the respondent entered into an exclusive franchise agreement containing an arbitration clause. The respondent commenced proceedings against the appellants when differences arose and the appellants applied for a stay based on the arbitration clause and declined and failed to file their defence by the stated deadline. The respondent applied for and obtained a default judgement which on appeal was upheld. It was not clear why counsel had agreed to have the application for the default judgment heard before the stay application.

9.11 On further appeal, the appellants argued that once an application for a stay has been filed, all timelines should automatically

come to a standstill. They also argued that a stay application should be heard before any application for summary or default judgment.

9.12 On the first argument, the Court of Appeal considered the proposition too extravagant. It noted that the Rules of Court (Cap 322, R 5, 2006 Rev Ed) were silent on this matter and accepting this proposition would encourage the filing of frivolous stay applications to stall for time.

9.13 On the second argument, the court broadly agreed with the appellants and provided guidance on the correct procedure to follow when parties sought to stay proceedings based on an arbitration clause. The application should be filed within the time limit for filing of the defence and include a prayer asking, *inter alia*, for the filing of the defence to be stayed until the stay application had been determined. Pending a stay application, even though the court timelines still ran, a defendant should not be asked or compelled to file its defence. The rationale was to allow the defendant to concentrate on the stay application and not be distracted by running two contradictory courses of action at the same time. When appropriate, the court could exercise its discretion to vary the timelines. Concurrently pending applications for a stay and a default judgment application should be heard together and the merits of the stay heard first to avoid duplication of arguments and to minimise costs. Finally, in situations where counsel sought to abuse the process or behave unreasonably, the court may impose appropriate costs sanctions.

9.14 It is submitted that the reasoning of the court is both sound and pragmatic. It is also assumed that the rationale and guidelines provided by the court are equally applicable in applications based on *forum non conveniens* and jurisdiction clauses.

9.15 The second case was *CIMB Bank Bhd v Dresdner Kleinwort Ltd* [2008] 3 SLR 761 (HC), [2008] 4 SLR 543 (CA). Apart from stay of proceedings, this case also dealt with choice of law (considered at paras 9.60–9.64)

9.16 The facts of this case can be stated simply. The respondent, a foreign company with a registered office in England offering banking services, entered into an agreement for the purchase of promissory notes and paid the appellant, a Malaysian bank, US$8.2m. The agreement was brokered by an English company BPAL and provided for the law of England to apply and for the parties to submit to the non-exclusive jurisdiction of the English courts. The promissory notes were dishonoured upon presentation, and the respondent commenced proceedings against the appellant on the ground of unjust enrichment, or alternatively, on the basis of total failure of consideration.

9.17 The appellant alleged that its employee had executed the contract without authority thereby perpetrating a fraud on both parties. This was accepted by the respondent who undertook not to assert that the agreement was valid. The respondent applied for its action to be temporarily stayed pending the outcome of certain proceedings in Germany by other parties in connection with the promissory notes. The appellant applied for a permanent stay on the ground of *forum non conveniens* arguing that England was the more appropriate forum.

9.18 Assistant Registrar Wong heard the respondent's application first and allowed the action to be temporarily stayed pending the conclusion of the German proceedings. The assistant registrar also refused to hear the appellant's application and adjourned it to a date after the lifting of the temporary stay. On appeal to the High Court, Chan Seng Onn J heard both applications together and dismissed the application for a permanent stay and varied the temporary stay granted by the assistant registrar for the appellant to take all essential steps for it to commence any intended third-party proceedings. A further appeal by the appellant was dismissed by the Court of Appeal.

9.19 A number of observations can be made about this case. First, it is interesting to note that the appellant applied for a stay of proceedings based upon the doctrine of *forum non conveniens* and not on the non-exclusive foreign jurisdiction clause. Perhaps this is because the parties had proceeded on the assumption that the agreement and, therefore, the jurisdiction clause was void. However, there is authority to suggest that at least with regard to exclusive jurisdiction clauses, in situations where the validity of the agreement is in question, courts have been willing to refer the matter to the chosen forum to make the determination of whether the agreement was valid. This would have been an opportunity to see if the court would take a similar approach with regard to non-exclusive jurisdiction clauses. Of course, if the court applied the *forum non conveniens* analysis to dealing with non-exclusive jurisdiction clauses, then the jurisdiction clause would be taken as a strong but non-conclusive factor pointing towards England.

9.20 Secondly, at the High Court, the appellant argued that the permanent stay application should be heard before the temporary stay application and that the assistant registrar had erred by listening to the temporary stay application first. Chan Seng Onn J was persuaded by this and opined that the *forum non conveniens* question should be accorded priority so that the action might properly be brought as soon as possible in the appropriate forum. Until the appropriate forum is determined, there is no justification for any court in any forum to either leave this issue in limbo or proceed on the assumption that it has undisputed jurisdiction to decide whether or not there is sufficient basis shown for a temporary stay of the main action. As a matter of principle and policy, it

is submitted that this must be correct. As the learned judge put it, "[t]he horse must be put in front of the cart".

9.21 Thirdly, one of the connecting factors considered at stage 1 of the test from *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460 ("*The Spiliada*") was the *lex causae*. The Court of Appeal in reiterated that where a dispute is governed by a foreign law, there could be savings in time and resources in litigating the dispute in the forum of the applicable law because the foreign court would be more adept in applying that law. We will engage in a more detailed look at the court's analysis of the *lex causae* (see paras 9.60–9.64). For the purposes of this section, it is sufficient to note that the court opined that the *lex causae* was Singapore law and, therefore, this factor pointed to Singapore as the natural forum. Having said that, the Court of Appeal also opined that in this case, even if the *lex causae* had been English law, this factor might not have been as important as the Singapore law on unjust enrichment is similar, if not identical, to that prevailing in England. As such, the Singapore courts would be able to apply English law without the aid of foreign experts.

9.22 Fourthly, on the connecting factor of location of evidence and witnesses, the court highlighted that what is significant are the witnesses whose evidence is potentially material and relevant to the issues in the action. Further, the location of witnesses is only really significant in relation to third-party witnesses who are not in the employ of the party as it could give rise to issues of compellability. Finally, the court acknowledged that with the advances in technology, the convenience of witnesses who may be located in a different jurisdiction should also be considered against the easy availability of video conferencing. On analysis, the court concluded that this factor favoured a trial in Singapore. This is yet another example of the trend of taking a more robust and context-sensitive approach to assessing this factor. It is interesting to note that, as a result of the respondent's undertaking to not assert the validity of the agreement, a certain group of witnesses were automatically classed as less relevant or irrelevant. One can foresee potentially using such undertakings or admissions as strategic moves to position the determination of what is the natural forum.

9.23 Fifthly, the court considered the appellant's argument that it was intending to institute third-party action in England and that the main action should also be heard in England. The court accepted that a multiplicity of closely-related proceedings continuing simultaneously before different courts in different jurisdictions was undesirable. The real test, however, to determine whether a third-party action should be heard together with the main action is whether the two were inextricably linked. The court opined that the actions were two very distinct claims based on very different allegations of fact. As such, there

would be no danger of inconsistent judgments arising. A joint hearing would cause hardship to the respondent as it would have to sit through the hearing of issues which did not concern it thereby prolonging time and increasing costs that the appellant would need to spend on the case. As such, the court concluded that this factor did not point towards England.

9.24 The court found that the appellant had not discharged its burden at stage 1 of *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460 ("*The Spiliada*") by showing that England was clearly the more appropriate forum. The writer agrees and the court could have dismissed the matter. It is interesting to note, and this is the final point, that the court went on to consider stage 2 on the assumption that it was wrong and that the natural forum, at least after stage 1, was England. The court balanced off the respondent's argument that it would be severely prejudiced if its action were not heard in Singapore because it would be deprived of the opportunity to subpoena essential witnesses against the appellant's argument that if the main action were to be held in Singapore, it would not be able to subpoena BPAL's employees, who were in London, as well as its London employees who had left its employment, to testify.

9.25 The court's analysis here is odd for two reasons. First, the matter of compellability of witnesses is something usually dealt with in stage 1 and not at stage 2, where matters of substantive justice are considered. Perhaps the court is indicating that this factor is also available for consideration at stage 2. Secondly, stage 2 traditionally considers disadvantages to the plaintiff, in this case the respondent. The defendant appellant's disadvantages are not relevant. It is, therefore, troubling that the court balances off the respondent's disadvantage against the appellant's. Perhaps the court is indicating a new approach to stage 2? While this is *dicta*, it would be useful for the court to clarify this at some later opportunity.

9.26 The third case was *Focus Energy Ltd v Aye Aye Soe* [2009] 1 SLR 1086. Apart from stay of proceedings, this case also dealt with choice of law (considered at paras 9.65–9.68).

9.27 The plaintiff company (incorporated in the Territory of the British Virgin Islands ("BVI") and registered as a branch of a foreign corporation in Myanmar) was a contractor to the Myanmar Oil and Gas Enterprise ("MOGE") and is in the business of enhancing oil production at an oilfield in Myanmar. The defendant was a director of the plaintiff managing its day-to-day operations until 20 November 2007.

9.28 Payments by MOGE to the plaintiff was initially made by telegraphic transfer to the plaintiff's UBS AG account in Zurich. Due to an inability to effect payment by telegraphic transfer, MOGE started paying the plaintiff in cash which was couriered by KMA Corp Pte Ltd ("KMA"), a company incorporated in Singapore, to a UOB account in Singapore.

9.29 The plaintiff alleged that, of the fee charged by KMA (5% of the amount of cash couriered), the defendant pocketed 3%. The plaintiff also alleged that the defendant diverted the cash payments into her personal accounts and continued to do so even after the telegraphic transfer payments were reinstated.

9.30 The plaintiff commenced proceedings against the defendant for the tort of conspiracy and breach of fiduciary duties and praying for an accounting for all moneys received by the defendant and restitution of all misappropriated funds. The defendant applied for a stay of proceedings arguing that Myanmar was the natural forum. This application was dismissed by Assistant Registrar Teo Guan Siew.

9.31 At the High Court, Judith Prakash J dismissed the appeal and found Singapore to be the natural forum due to the location of the evidence and witnesses and the law governing the issues before the court. While this case does not represent an advancement on the law relating to *forum non conveniens*, two points are worth noting about the court's treatment of the connecting factors.

9.32 The first relates to the location of witnesses as a connecting factor. The defendant had argued that Myanmar was the more appropriate forum as the relevant witnesses were resident in Myanmar and unlikely to leave Myanmar to testify in Singapore. Judith Prakash J took on board the Court of Appeal's statements in *Rickshaw Investments Ltd v Nicolai Baron von Uexkull* [2007] 1 SLR 377 that the importance of this factor is variable depending upon whether the main disputes revolve around questions of fact. She opined that since the defendant had admitted to the fact of diverting the funds, the testimony of witnesses that could be examined only in Myanmar relating to this point faded in importance. Had the defendant not made this admission, the court acknowledged that this would be a stronger factor. As the testimony of witnesses revolving around the circumstances of the diversion could be examined in Singapore, this did not support the defendant's argument of Myanmar as the natural forum. It is submitted that the court's approach is correct and represents a context sensitive approach to examining and weighting the connecting factors traditionally considered by the court at stage 1 of the test from *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460.

9.33 Secondly, Judith Prakash J also adopted the view expressed in *Rickshaw Investments Ltd v Nicolai Baron von Uexkull* [2007] 1 SLR 377 that where a dispute is governed by a foreign *lex causae*, the courts of that jurisdiction would be more adept to apply the *lex causae* to the substantive dispute. The learned judge considered each cause of action and opined that for the tort of conspiracy and unjust enrichment, the *lex causae* was the law of Singapore. For breach of fiduciary duty, the *lex causae* was the law of BVI which was, since the competing fora were Myanmar and Singapore, therefore, neutral. On the balance, this factor also pointed to Singapore as the natural forum. The court's analysis and conclusions relating to choice of law for these causes of action will be considered later in this chapter. The defendant has since appealed.

9.34 The fourth case was *Good Earth Agricultural Co Ltd v Novus International Pte Ltd* [2008] 2 SLR 711. The appellant, a Hong Kong-registered company, distributed animal feed products within South-East Asia for the respondent, a Singapore-incorporated company. Disagreements over the rate of commission that the appellant would be paid led to a termination of the parties' oral agreement. The appellant successfully sued the respondent in Hong Kong for wrongful termination of contract. In that action, the respondent had tried to file a counterclaim, which was dismissed, alleging that the appellant had made and retained secret profits by charging its end-customers a higher price than that agreed between the parties. The respondent commenced proceedings in Singapore to recover the alleged secret profits and the appellant applied for a stay of proceedings on the basis that Hong Kong would be the natural or more appropriate forum.

9.35 At first instance, the judge in chambers held that the appellant had failed to discharge its burden under stage 1 of the test in *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460. On appeal, the Court of Appeal opined that Hong Kong was the natural forum for the dispute and allowed the appeal.

9.36 This decision is largely a straightforward application of the 2-stage test in *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460. However, two points are noteworthy. First, as part of its stage 1 analysis, the court was concerned that the respondent might be precluded or estopped from bringing a new action for secret profits in Hong Kong if the Singapore action was stayed. This matter was dealt with by securing an undertaking by the appellant that it would not argue that the Hong Kong court's dismissal of the respondent's counterclaim was *res judicata*. The fact and manner of utilising an undertaking in this way is unremarkable and has been used to deal with, for example, time bars. What is interesting is that the court discussed this as a matter under stage 1 when it is submitted that this should have been a matter for

stage 2. There is no quarrel with the analysis, simply a statement for the need to be conceptually clear where this factor fits.

9.37 Interestingly enough, and this is the second point of note, it was suggested that the appellant in applying for a stay was "judge shopping". The implication must be that the respondent would be disadvantaged if required to sue in Hong Kong because of some form of judicial bias. The Court of Appeal very clearly stated its respect for the Hong Kong judicial system and its view that any suggestion of bias was unjustified. However, it went on to say that if this factor of "judge shopping" were to ever be relevant in a case, it should properly be considered under stage 2 where matters of substantial justice are dealt with. The writer is in agreement with the court both in the way it suggests that the factor of "judge shopping" should be dealt with as well as its approach to judicial comity.

9.38 The fifth case was *Multi-Code Electronics Industries (M) Bhd v Toh Chun Toh Gordon* [2009] 1 SLR 1000. Apart from stay of proceedings, this case also dealt with Mareva injunctions (considered at paras 9.109–9.114). The plaintiffs commenced proceedings against the defendants for breaches of contract, fiduciary duties and conspiracy. These proceedings mirrored the relief claimed in a similar action in Malaysia commenced three days earlier. The plaintiff also obtained Mareva injunctions in Malaysia and Singapore preventing the defendants from disposing their assets worldwide and in Singapore respectively. The defendants applied for a stay of the Singapore proceedings.

9.39 The court considered two grounds upon which a stay could be granted. The first was on the ground of *lis alibi pendens*. The learned judge made an extensive survey of the authorities and began with the observation that when the same plaintiff sues the same defendant in two jurisdictions on substantially the same causes of action, this duplicity of actions verge on vexatious and the burden shifts to the plaintiffs to show very unusual circumstances why the continuance of the concurrent proceedings was justified. Chan Seng Onn J considered the evidence and opined that the actions in Malaysia and Singapore were duplicitous and that very unusual circumstances did not exist to justify the continuance of the Singapore action.

9.40 The court also considered that, once it had come to the conclusion that this was a clear case of *lis alibi pendens*, it was open to the court to put the plaintiff to an election, stay the proceedings or discontinue the proceedings. The learned judge chose to stay the proceedings.

9.41 Of note is the court's observation that the proceedings in Singapore were brought in order to satisfy the requirements for obtaining a Mareva injunction. It did not seem to have a problem with this. It only had a difficulty with the fact that the plaintiffs allowed the action to simultaneously carry on in two jurisdictions after the Mareva injunction had been obtained.

9.42 This case seems to indicate that it is acceptable for parties to commence proceedings in Singapore simply to obtain a Mareva injunction when the "real" proceedings are happening elsewhere. This is reinforced by the court stating, *in obiter*, that even if the defendants had applied to strike out the action in Singapore, the court would be more inclined to grant a stay in order for the jurisdictional basis for the Mareva to remain.

9.43 While there is nothing technically wrong with this, it seems odd when juxtaposed with the Singapore court's approach towards granting Marevas in support of foreign proceedings. While not exactly circumventing the policy by the backdoor, it certainly does not go in by the front. Perhaps this is justifiable on the idea that the courts are validly seised of jurisdiction and should not let it go lightly.

9.44 Be that as it may, the writer agrees with the court's decision to stay the proceedings on *lis alibi pendens*.

9.45 As an alternative ground for a stay, the court considered *forum non conveniens* and indicated that this ground would also be made out. There is nothing too remarkable about the court's analysis of connecting factors at stage 1 and considerations of justice at stage 2 save for this point. It is trite by now that the *lex causae* is both a relevant and sometimes strong connecting factor at stage 1. How much weight is accorded to this depends upon whether the foreign law differs significantly from that in Singapore. Two questions arise. The first is whether it needs to be shown that the laws of the foreign jurisdiction and those of Singapore had no significant differences or that there are significant differences. Flowing from this, the second question is who would bear evidential burden of showing this.

9.46 In the case, the *lex causae* relating to the escrow agreements and the tort was Malaysian law. The court opined that the evidential burden was on the plaintiff to show that there are no significant differences between Malaysian law and Singapore law and if the plaintiffs do not (as it was in this case), then the court would be entitled to assume that there would be some differences.

9.47 The writer finds this hard to agree with. At one level, one can say that the evidential burden must fall on someone and since the

defendant had already shown that the matter was governed by a foreign law, it seems fair to ask the plaintiff to have to show that the factor should not be weighed as heavily by showing no significant differences between the laws. Put another way, having a foreign law as the *lex causae* raises a rebuttable presumption of difference.

9.48 However, it is equally valid to say that part of the evidential burden of the defendant at stage 1 is to show that there is some difference between the *lex causae* and the *lex fori* so that the connecting factor of the *lex causae* should have more weight. It seems odd to hive off, within a stage where the evidential burden clearly falls on the defendant, a sub-evidential burden and foist it on the plaintiff. It is still open to the plaintiff to show no significant difference between the two laws but it is submitted that it should not have to bear the evidential burden of this.

9.49 This latter approach has two other advantages. First, from a practical perspective, it is difficult to prove a negative. Requiring a plaintiff to show no differences between the *lex causae* and the *lex fori* is like requiring him/her to show something does not exist. One can never conclusively do this. It would make more sense for the person who is asserting the difference to show it. This approach would also be consistent with, and this is the second advantage, the rule that where there has been no proof of foreign law, the court will presume that the foreign law is the same as Singapore law.

9.50 It is, therefore, submitted that the latter approach, *ie*, of having the defendant show that there is a difference between the *lex causae* and *lex fori* is a more defensible one and it is hoped that this matter can be clarified by the courts at some future opportunity.

9.51 The sixth case was *Murakami Takako v Wiryadi Louise Maria* [2008] 3 SLR 198 (HC), [2009] 1 SLR 508. This case was discussed earlier in relation to jurisdiction over foreign immovables (at paras 9.4–9.8).

9.52 On *forum non conveniens*, the court decided that even though it had jurisdiction over foreign immovables (via the personal equities exception), it would, nonetheless, decline to exercise jurisdiction as Indonesia was the natural forum for the dispute. In coming to this conclusion, it applied the approach restated most recently in *Rickshaw Investments Ltd v Nicolai Baron von Uexkull* [2007] 1 SLR 377 and took into account connecting factors, including the *lex causae*. This factor in particular will be discussed later.

9.53 It is useful to note that in its analysis, it considered the decision of Gzell J in the Supreme Court of New South Wales regarding a stay application relating to proceedings commenced by the appellant with

respect to the disputed properties in Australia. While the court acknowledged that Australia adopted a different approach to *forum non conveniens*, the analysis of factors considered there applied with equal force in the context of approach to *forum non conveniens* used by the Singapore courts.

9.54 The final case was *Wing Hak Man v Bio-Treat Technology Ltd* [2009] 1 SLR 446. In this case, the plaintiffs claimed that the defendants conspired to deprive them of their shares in the first defendant (a company incorporated in Bermuda and listed on the Main Board of the Singapore Stock Exchange) through fraudulent misrepresentations thereby allowing the defendants to take control of the plaintiffs' shares in the first defendant and dishonestly benefit from their sale. The first defendant successfully applied to an assistant registrar for a stay of the Singapore proceedings on the basis of *forum non conveniens*. On the same day, the plaintiffs called upon the second defendant to file his defence within 48 hours failing which default judgment would be obtained. The second defendant then filed his defence. The plaintiffs appealed the stay granted by the assistant registrar. The second and fourth defendants separately applied for a stay of proceedings as well as an extension of time to file their respective defences.

9.55 This case involved a straightforward application of the principles from *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460. Specifically, the analysis revolved around the connecting factors in stage 1. On this, Belinda Ang Saw Ean J stated the four connecting factors highlighted in *Rickshaw Investments Ltd v Nicolai Baron von Uexkull* [2007] 1 SLR 377 and opined that the factors pointed to Hong Kong as the natural forum. She also concluded that there were no compelling grounds for asserting that the interests of justice required that the Singapore action should not be stayed.

9.56 Three observations may be made. First, as part of the analysis in stage 1, the court considered the jurisdiction in which the tort occurred. This was significant because the place of the tort is *prima facie* the natural forum for determining the claim. This necessitated the application of the substance of the tort test which required the court, in deciding where the alleged conspiracy took place, to "look back over the series of events" constituting the elements of the tort and ask where in substance the cause of action arose. Belinda Ang J opined that the court must ascertain what the true object of the agreement entered into by the conspirators was and this required looking at the actual conduct which was contemplated by the conspirators. The learned judge drew guidance from *Grupo Torras SA v Al-Sabah* [1999] CLC 1469 which identified some of the factors the court takes into consideration in the substance of the tort test. This included "the identity, importance and location of the conspirators, the place(s) of any agreement or combination, the

nature and place(s) of the concerted action, the nature and place(s) of any unlawful act or means, the plaintiff(s)' location and the place(s) where he or it suffered loss": *Wing Hak Man v Bio-Treat Technology Ltd* [2009] 1 SLR 446 at [27]. Taking these factors into account, the court concluded that Hong Kong was the one single place where the whole conspiracy could be regarded as having been committed in substance.

9.57 Secondly, the court considered the choice of law applicable in this case, the rationale being that the courts of the *lex causae* would be far more suited to apply its own laws. The plaintiffs argued that Singapore law applied as the matter involved a company whose shares were listed on the Singapore Stock Exchange. The court disagreed, opining instead that the applicable law in relation to the tort in question is the law of Hong Kong and that the law of Hong Kong will govern the issues of compensation.

9.58 The final observation highlights the interrelation between applications for stay of proceedings and court procedure. On the day the stay application was made, the plaintiffs had given the second defendant 48 hours to file his defence. The court cited the Court of Appeal's views in *Carona Holdings Pte Ltd v Go Go Delicacy Pte Ltd* [2008] 4 SLR 460 (considered in paras 9.9–9.14) that a defendant should not be asked or compelled to file his defence whilst the stay application was pending in that a defendant should not be made to adopt two contrary courses of action simultaneously. The court considered the plaintiffs' action inappropriate as they would already be aware of the pending stay application.

9.59 Where a defendant has filed a defence, the court will not automatically take it to mean that the defendant has abandoned the application for a stay and submitted to the jurisdiction of the Singapore courts. Instead, the court will look for an unequivocal, clear and consistent intention to have the dispute determined by the Singapore courts as opposed to the foreign forum. The court opined that in this case, the circumstances supported the conclusion that the defendant did not demonstrate acquiescence or an acknowledgment that the dispute should be determined in Singapore as it was the proper forum.

Choice of law

9.60 There were three cases relating to choice of law. The first was *CIMB Bank Bhd v Dresdner Kleinwort Ltd* [2008] 3 SLR 761 (HC), [2008] 4 SLR 543 (CA). This case was discussed earlier in relation to stay of proceedings (at paras 9.15–9.25). Essentially, the respondent sued the appellant for unjust enrichment on dishonoured promissory notes. The purchase agreement included a choice of English law and the parties

were in agreement that the agreement was not valid for fraud. The appellant applied for a stay and the court considered the *lex causae* as one of the connecting factors in stage 1 of the test from *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460.

9.61 This case is interesting for its analysis of what law governs a restitutionary obligation that arises out of a contract that is invalid. The court began by considering rr 230(2)(a) and 230(2)(c) of *Dicey, Morris and Collins on The Conflict of Laws* (Sweet & Maxwell, 14th Ed, 2006). The former rule provides that where a restitutionary obligation arises in connection with a contract, the governing law is the proper law of the contract. Otherwise, the latter rule provides that the governing law is the law of the country where the enrichment occurred. Thus, it became important to determine if the void contract was significant.

9.62 The court opined that it was not sufficient to state that the contract was void and that one needed to examine the factual circumstances of each case to determine the cause for the contract being void. The court took the view that where parties had intended to enter into a contract but, due to other circumstances or reasons, the contract had become void, it should be taken that the parties had intended to enter into the contract, including the choice of law clause. In such a situation, r 230(2)(a) would be applicable and the proper law of the contract would apply to any consequential restitutionary obligations. Where the contract was void because there was no meeting of the minds, then r 230(2)(c) would apply.

9.63 It is important to note that fraud itself, which was the vitiating factor argued in this case, could lead to both situations. The court considered the appellant's argument that its employee had perpetrated a fraud on both parties by executing the contract without authority and opined that the effect of the respondent undertaking to accept this meant that there was no contract between the parties as there was no meeting of the minds. It was not a matter where fraud was alleged by one party but denied by the other or that the agreement was one which the parties had intended to enter into but subsequently failed or became ineffective. As such, r 230(2)(c) would apply. Applying this, the court determined that Singapore was the country which was most closely connected with the claim and, therefore, the place where the enrichment occurred. As such the *lex causae* was Singapore law.

9.64 The court's analysis is significant in that it advances our understanding and jurisprudence on the choice of law relating to restitutionary obligations and is welcome indeed.

9.65 The second case was *Focus Energy Ltd v Aye Aye Soe* [2009] 1 SLR 1086. This case was discussed earlier in relation to stay of

proceedings (at paras 9.26–9.33). Essentially, the plaintiff company sued the defendant director for the tort of conspiracy and breach of fiduciary duties. The defendant applied for a stay and, as one of the connecting factors in stage 1 of the test from *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460, the court considered the *lex causae* of the various causes of action.

9.66 With regards to the tort of conspiracy, Judith Prakash J sidestepped the double-actionability rule by concluding that since the facts indicated that the tort occurred in Singapore, the double-actionability rule was moot; the *lex fori* and the *lex loci delicti* were the same. As such, the *lex causae* was Singapore law. This appears to be a straightforward application of the "substance of the tort" test and while one can split hairs about whether the double-actionability rule even applies, the conclusion that Singapore law applies must be correct.

9.67 With regards to the breach of fiduciary duty, the discussion is more interesting. Judith Prakash J cited the Court of Appeal's approval of Yeo's thesis (TM Yeo, *Choice of Law for Equitable Doctrines* (Oxford University Press, 2004) in *Rickshaw Investments Ltd v Nicolai Baron von Uexkull* [2007] 1 SLR 377 that the concept of equity is not a separate and distinct category itself for choice of law purposes and that equitable rights and remedies arise from foundational sources such as contract and tort. Put another way, the law governing those foundational sources would similarly govern those equitable rights and remedies. However, she also noted that the court limited its holding to equitable duties that arise out of an independent established category such as contract or tort and opined that in the absence of a contract between the parties specifying the governing law, the law that should govern equitable claims is to be determined by the legal source of the equitable claim in question. She concluded that the legal source of the plaintiff's claim arose out of the relationship of the defendant with the plaintiff as its director. Since the plaintiff was incorporated in BVI, the law that governed this relationship was BVI law. It is submitted that this analysis is consistent with the notion that equitable rights and remedies arise from foundational sources.

9.68 It is interesting to note that Judith Prakash J considered an alternative conception of the plaintiff's claim as an action based on unjust enrichment. Citing *Dicey, Morris and Collins on The Conflict of Laws* (Sweet & Maxwell, 14th Ed, 2006) ("*Dicey, Morris and Collins*") at para 34-030, she noted (*Focus Energy Ltd v Aye Aye Soe* [2009] 1 SLR 1086 at [35]) that "the law of the place where the enrichment occurred may be expected to be that which has the best claim to be applied to any obligation to restore". While she acknowledged the Court of Appeal's observation in *CIMB Bank Bhd v Dresdner Kleinwort Ltd* [2008] 4 SLR 543 at [59] (considered earlier in paras 9.15–9.25 and

9.60–9.64) that "in view of the diverse situations in which a restitutionary claim may arise, the place of enrichment may not always be the place with which the claim has the closest connection", she went on to conclude that Singapore had the most real and substantial connection to the claim as it was where the defendant had allegedly been enriched and also the place of the defendant's wrongful conduct in refusing to account for or return the moneys. As such, Singapore law was the *lex causae*.

9.69 The final case was *Murakami Takako v Wiryadi Louise Maria* [2008] 3 SLR 198 (HC), [2009] 1 SLR 508. This case was discussed earlier in relation to jurisdiction over foreign immovables (at paras 9.4–9.8) and stay of proceedings (at paras 9.51–9.53).

9.70 The court had decided earlier it had jurisdiction over foreign immovables as part of the personal equities exception (see para 9.8). As part of the court's deliberations as to whether it should exercise its discretion, the court considered the *lex causae* of the matter as one of the connecting factors. Instead of applying the *lex fori* as part of invoking the personal equities exception, the court adopted the approach it had taken in *Rickshaw Investments Ltd v Nicolai Baron von Uexkull* [2007] 1 SLR 377 in relation to choice of law for equitable obligations. Put simply, instead of an automatic and blanket application of the *lex fori* in every situation relating to an equitable claim, the court will closely examine the nature and origin of the equitable obligation concerned.

9.71 In this case, the court concluded that the claims were to be determined by the *lex domicilii* (Indonesian law) and that this was, therefore, the law that governed this particular equitable claim.

Foreign judgments

9.72 There were three cases relating to foreign judgments. The first was *Desert Palace Inc v Poh Soon Kiat* [2009] 1 SLR 71.

9.73 The defendant patronised the plaintiff's casino in Las Vegas and the plaintiff extended credit to the defendant to obtain chips to play at the gambling table. Not surprisingly, the defendant made losses and did not repay the debt. The creditor obtained three judgments from different states in the US to enforce the debt: the Nevada judgment (29 March 1999), the first judgment (2 June 1999) and the second judgment (9 November 2001). The plaintiff then sought to sue on the second judgment in Singapore. Assistant Registrar Teo dismissed the plaintiff's application for summary judgment, who then appealed.

9.74 On appeal, the defendant argued that the plaintiff's claim was either void or unenforceable under ss 5(1) and 5(2) respectively of the Civil Law Act (Cap 43, 1999 Rev Ed). He also argued that the claim was time-barred as the debt was incurred more than six years earlier and that suing on the second judgment was the plaintiff's attempt at circumventing the time bar.

9.75 On the issue of whether the claim was void or unenforceable, the defendant argued that in essence, the plaintiff's action was brought to recover moneys won upon a wager and should not be allowed to circumvent s 5(2) of the Civil Law Act (Cap 43, 1999 Rev Ed) merely because it had obtained a foreign judgment upon that action first.

9.76 Chan Seng Onn J first observed that s 5(2) sought to procedurally bar claims brought on contracts, whether made outside or within Singapore, to recover moneys won upon any wager. However, the learned judge went on to consider that there was no authority interpreting s 5(2) to bar a claim or an action brought upon a foreign judgment which was founded upon a gambling debt. He opined that an action in Singapore to recover an overseas gambling debt was materially very different from an action in Singapore upon a foreign judgment. In the latter case, the cause of action was based on the valid, final and conclusive foreign judgment.

9.77 Chan Seng Onn J drew guidance from the Court of Appeal decision in *Liao Eng Kiat v Burswood Nominees Ltd* [2004] 4 SLR 690 ("*Burswood* case") and observed that although the court there did not decide whether s 5 of the Civil Law Act (Cap 43, 1999 Rev Ed) would bar the enforcement by way of an action in Singapore based on the foreign judgment derived from that gambling debt, it was implicit in their reasoning that s 5(2) of the Civil Law Act did not operate *directly* to preclude claims to enforce judgments entered in actions to recover moneys pursuant to gaming contracts. Chan J also noted the distinction the Court of Appeal drew between domestic and international public policy and opined that even though the *Burswood* case revolved around registration of a foreign judgment under the Reciprocal Enforcement of Commonwealth Judgments Act (Cap 264, 1985 Rev Ed), there was no reason for distinguishing between the relevant public policy considerations at common law and under statute for enforcement action upon a foreign judgment obtained on a gambling debt. As such, Chan J concluded that s 5(2) did not procedurally bar the plaintiff's claim.

9.78 While the writer has critiqued an aspect of the approach in *Liao Eng Kiat v Burswood Nominees Ltd* [2004] 4 SLR 690 (see (2004) 5 SAL Ann Rev 145 at 160–161, paras 8.66–8.69), it is submitted that the outcome in that case is correct and that Chan J's analysis in this case is sound. If public policy does not exclude the registration of a judgment

based on a gambling debt, then neither should it exclude recognising and enforcing a similar foreign judgment at common law.

9.79 On the issue of whether the time-bar applied, Chan Seng Onn J first dealt with the question of whether the time bar for an action upon a foreign judgment was six or 12 years. This involved a detailed analysis of the Limitation Act (Cap 163, 1996 Rev Ed) as well as case law from this and other jurisdictions. For our purposes, it is sufficient to note that Chan J observed that the Court of Appeal in *Murakami Takako v Wiryadi Louise Maria* [2007] 4 SLR 565 had essentially held that the time bar for a fresh action upon an Indonesian judgment for enforcement was six years. As such, Chan J concluded that the relevant time bar for foreign judgments was six years. The Nevada and first judgments were, therefore, time-barred.

9.80 The question that remained was whether the enforcement action on the second judgment should be similarly time-barred. *Prima facie*, the action on the second judgment was begun within the six-year limitation period. The defendant argued that the second judgment did not create a fresh cause of action which re-set the limitation period but that it was essentially the debt created by the Nevada judgment. The assistant registrar accepted this argument, opining that Singapore law was the relevant law for determining the nature of the second judgment.

9.81 Chan Seng Onn J disagreed, opining instead that Californian law, as the law of the jurisdiction from which the judgment originated, operated to determine the true nature and legal effect of the second judgment. On the basis of expert evidence, he concluded that the second judgment created a new obligation on the debtor. As such, the second judgment was not time-barred.

9.82 This matter has been appealed to the Court of Appeal.

9.83 The second case was *Murakami Takako v Wiryadi Louise Maria* [2008] 3 SLR 198 (HC), [2009] 1 SLR 508. This case was discussed earlier in relation to jurisdiction over foreign immovables (at paras 9.4–9.8), stay of proceedings (at paras 9.51–9.53) and choice of law (at paras 9.69–9.71).

9.84 One of the issues that the High Court dealt with (that did not go on appeal) related to whether the plaintiff was either issue estopped or cause of action estopped from amending the pleadings.

9.85 In relation to the landed property in Australia, the defendants sought to argue that the Singapore court did not have jurisdiction over the matter because the Supreme Court of New South Wales had granted the defendants a stay on grounds of *forum non conveniens*, *ie*, that

Australia was a clearly inappropriate forum compared to Indonesia. Andrew Ang J did not accept this argument. He opined, and it is submitted correctly, that the issues before the two courts were not identical. The Supreme Court of New South Wales was concerned with the exercise of its jurisdiction, whereas the question before the Singapore court was an *a priori* one, *ie*, whether it had jurisdiction in the first place: *Murakami Takako v Wiryadi Louise Maria* [2008] 3 SLR 198 (HC) at [7].

9.86 In relation to the Australian bank accounts, the defendants sought to argue that the plaintiff, when arguing before the Supreme Court of New South Wales that Australia was not the most appropriate forum, did not argue that Singapore was the most appropriate forum. As such it was estopped from now arguing that Singapore was the more appropriate forum. Again, the court dismissed this holding that the plaintiff was seeking to persuade the Supreme Court of New South Wales that Australia was not a clearly inappropriate forum. A plaintiff should not be expected to weaken its case by having to argue that Singapore was a possible alternative forum.

9.87 As such, Andrew Ang J allowed the amendments.

9.88 The final case was *Westacre Investments Inc v The State-Owned Co Yugoimport SDPR* [2009] 2 SLR 166 (CA). This was an appeal from the High Court decision *Westacre Investments Inc v The State-Owned Co Yugoimport SDPR* [2007] 1 SLR 501.

9.89 This case involved the registration in Singapore of an English judgment obtained in a common law action on an arbitration award. Judgment was entered in 1998. Some six years later, the judgment creditor, Westacre, registered the English judgment in Singapore pursuant to the Reciprocal Enforcement of Commonwealth Judgments Act (Cap 264, 1985 Rev Ed) ("RECJA"). When given notice of the registration, the judgment debtor applied to set aside the registration. This application was dismissed by the Assistant Registrar although the restriction of execution by way of garnishee proceedings was imposed. The judgment debtor appealed.

9.90 On appeal, Kan Ting Chiu J held that the court had discretion to order registration of a judgment even if it was *prima facie* beyond the 12-month period provided for by s 3(1) of the Reciprocal Enforcement of Commonwealth Judgments Act (Cap 264, 1985 Rev Ed) as long as it was "just and convenient". On application to the facts, the court held that the judgment creditor's reasons for delay in registration were not sufficient to balance off against the potential prejudice caused to the judgment debtor. As such, it was not just and convenient to allow late registration of the English judgment.

9.91 This gave rise to cross appeals, with the judgment debtor appealing against the judge's determination on the limitation issue and with the judgment creditor appealing against the setting aside of the registration of the English judgment.

9.92 The judgment debtor's appeal on the limitation issue was briefly dispatched by the Court of Appeal. Two points can be noted here. First, in response to the argument that more than six years had passed since the English judgment had been delivered, it was time-barred by s 6(1) of the Limitation Act (Cap 163, 1996 Rev Ed). The court rightly pointed to the distinction between seeking to enforce a judgment at common law (which is subject to the 6-year limitation period) and seeking to register the judgment under s 3(1) of the Reciprocal Enforcement of Commonwealth Judgments Act (Cap 264, 1985 Rev Ed) ("RECJA"), which explicitly gives the court the discretion to allow a judgment to be registered even if it was beyond the 12-month registration period. Secondly, in response to the suggestion that registration of the English judgment under the RECJA involved the exercise of a substantive right and that this was time-barred under s 24(1) of the Limitation Act (UK), the court rightly agreed with the High Court that a court in Singapore in making a determination of whether a judgment was time-barred should apply Singapore law.

9.93 The judgment creditor's appeal revolved around the threshold issue of whether the English judgment remained enforceable by way of a third party (garnishee) order. The Court of Appeal agreed in principle that a prerequisite for registering a judgment in Singapore is that it must be enforceable in the jurisdiction in which it was obtained. This question was referred to the English High Court and was answered in the affirmative (see *Westacre Investments Inc v The State-Owned Company Yugoimport SDPR* [2008] EWHC 801 (Comm)). This matter having been settled, the Court of Appeal proceeded to consider whether it should interfere with the judge's exercise of discretion in the court below.

9.94 The court first explored the principles upon which an interference is warranted and opined that an appeal against the exercise of a judge's discretion will not be entertained unless it be shown that "he exercised his discretion under a mistake of law, in disregard of principle, under a misapprehension as to the facts, or that he took account of irrelevant matters, or [that] the decision reached was 'outside the generous ambit within which a reasonable disagreement is possible'": (*Westacre Investments Inc v The State-Owned Co Yugoimport SDPR* [2009] 2 SLR 166 at [17]). Further, the starting presumption would be that the judge had rightly exercised his discretion.

9.95 The court went on to consider the factors that were relevant when there was a delay in applying for registration. Where there was a substantial delay, one should consider whether the delay has caused prejudice to the judgment debtor; whether the judgment creditor can give a reasonable explanation for its delay in applying to register the Commonwealth judgment; whether the judgment creditor has been reasonably diligent in seeking to enforce the Commonwealth judgment; and whether the judgment debtor has been obstructive. This inquiry was summed up by the court (*Westacre Investments Inc v The State-Owned Co Yugoimport SDPR* [2009] 2 SLR 166 at [24]) as "[w]here do the interests of justice lie, having regard to the factual matrix of the case?"

9.96 The court followed with an analysis of the application of these factors to the facts of the case and concluded that the learned judge below had erred in setting aside the registration of the English judgment.

9.97 Two observations can be made here. First, the court's analysis of the application of the stated factors is instructive. Characteristic of this court, it took a robust and nuanced approach to considering the factors. For example, it took into account the arduousness of the task before any judgment creditor when faced with an uncooperative judgment debtor with the ability to easily transfer money and assets in a wired world. It also warned against assessing the creditor's diligence in enforcement with the benefit of hindsight.

9.98 Secondly, the distinction drawn by the court between the registration and enforcement of the judgment as it relates to the notion of prejudice to the debtor is helpful. With regard to the former, although some prejudice to the debtor would inevitably follow from registration under the Reciprocal Enforcement of Commonwealth Judgments Act (Cap 264, 1985 Rev Ed), such prejudice is irrelevant. Otherwise, no judgment can be registered at all. Registration is dependent upon the threshold issue of whether the judgment remains enforceable in the jurisdiction from which it originated. Prejudice to the debtor becomes relevant when considering whether it is just and convenient to enforce the judgment in Singapore in the circumstances and this takes into account the factors as set out by the court.

Anti-suit injunctions

9.99 There were two cases involving anti-suit injunctions. The first was *Regalindo Resources Pte Ltd v Seatrek Trans Pte Ltd* [2008] 3 SLR 930. The defendant commenced arbitration proceedings in Singapore against the plaintiff over a breach of a time charter agreement. Prior to the

commencement of arbitration, the defendant obtained in January 2008 a Rule B attachment in the US District Court for security in the amount of US$3,777,200. This attachment prevented the plaintiff from transferring money to one of its suppliers in Indonesia. The plaintiff then applied to the High Court to restrain the defendant from continuing with the foreign proceedings and to release all moneys attached pursuant to the Rule B attachment notice.

9.100 At the High Court, the plaintiff based its application on two grounds. As a starting point, Andrew Ang J noted that the law relating to the granting of anti-suit injunctions is well settled and while there are distinct grounds upon which the injunction may be grounded, the touchstone is exercised on the basis of the "ends of justice".

9.101 On the ground that the foreign proceedings was in breach of the arbitration agreement, the court clarified that in order for foreign proceedings to qualify as breaching an arbitration (or jurisdiction) agreement, the proceedings should relate to those establishing liability and did not extend to proceedings to enforce a judgment or award or to obtain security. Put another way, unless the arbitration has clear and unequivocal language to the contrary, the defendant's seeking security in the US was not inconsistent with the agreement to arbitrate. As the plaintiff had disputed entering into the time charter, it is interesting to note that it relied on the arbitration clause in that agreement. This point was not discussed by the court, which seemed to proceed on the assumption that the arbitration clause existed.

9.102 The other ground the plaintiff relied on was on vexation and oppression. It was submitted that the proceedings disrupted the plaintiff's conduct of its business, that Rule B attachment was only available in New York which was also not the natural forum for the dispute. The court noted that the defendant was not entitled to prejudgment security in Singapore either by way of *in rem* remedies or a Mareva injunction. As such it had to turn to the US courts. Andrew Ang J opined that just because the remedy in question was not available in Singapore did not automatically mean that an anti-suit injunction ought to be granted. In deciding whether to do so, the court had to consider if the defendant had good reason behind its institution of the foreign legal process and to balance the hardship caused to the plaintiff by the foreign proceedings against the defendant's need to invoke the foreign process. The court found that, on the facts, there was a real likelihood that the plaintiff would not be able to satisfy the arbitration award if the defendant succeeded in the arbitration and that there were some indications, albeit not supported by evidence, that the plaintiff was diverting its business to other companies. The court balanced this against any hardship caused to the plaintiff and opined that the balance

favoured the defendant. As such, it dismissed the plaintiff's application on this ground.

9.103 While one cannot say that the decision was incorrect, it is troubling that this judgment is in essence giving effect to a procedural remedy of a foreign court. While it is one thing to not favour domestic law over foreign law (in the interests of international comity), one could argue that this comity must relate to foreign substantive and not procedural law. This case allows for a party, who while unable to obtain security in Singapore based on Singapore law, to go to an unconnected jurisdiction and obtain security there to support proceedings in Singapore. In situations where the circumstances were reversed, the Singapore courts have declined to provide injunctive relief in support of foreign proceedings. Of course, one could argue that just because Singapore refuses to be an "international busybody", we should not judge other jurisdictions that choose to. Fair enough. And in this case, perhaps there was no oppression. However, it is submitted that it can come pretty close and that, in appropriate cases, the court can and should exercise its discretion to issue an anti-suit injunction. At the very least, parties to a suit in Singapore are entitled to not be troubled by the extended reach of foreign courts.

9.104 The second case was *Trane US, Inc v Kirkham John Reginald Stott* [2008] SGHC 240. This case essentially involved various agreements leading to distribution arrangements for the first plaintiff's products by the defendants. The commercial relationship broke down and the then current distribution arrangement was terminated. The defendants commenced proceedings in Indonesia claiming damages for wrongful termination of their rights. The plaintiffs applied to the Singapore courts for an order restraining the defendants from commencing or continuing court proceedings elsewhere.

9.105 This case is useful in that it reiterates the principles involved in granting an anti-suit injunction. These are that the court's jurisdiction must be exercised with caution and only when the ends of justice require it. Any order made is directed not against the foreign court but against the party who is amenable to the jurisdiction of the court. Further, a prerequisite for granting an anti-suit injunction is that Singapore is the natural forum for determining this dispute. In applying these principles, Tay Yong Kwang J concluded that Singapore was the natural forum for the determination of this dispute and that the proceedings in Indonesia were vexatious and oppressive. As such, he granted the anti-suit injunction.

9.106 It is hard to follow why the anti-suit injunction should have been granted. Although the writer would submit that the connecting factors in favour of Singapore and Indonesia were closely balanced, the

conclusion that Singapore is the natural forum is not incorrect. What is interesting is the conclusion that the Indonesian proceedings were vexatious and oppressive.

9.107 The learned judge seems to have based his decision on two factors. Firstly, that it would be undesirable for the courts in Singapore and Indonesia to reach different conclusions on the same matter. Secondly, that the proceedings in Indonesia were not far along and that there was no real prejudice if the Indonesia action were put on hold temporarily.

9.108 While these are relevant factors in considering whether to grant an anti-suit injunction, it is hard to see why alone, they would constitute vexation and oppression. First, the defendants had commenced proceedings only in Indonesia. It was not a matter of proceedings by the defendants in multiple jurisdictions. Of course, this does not mean that a single action commenced by the defendants cannot be vexatious and oppressive. The Court of Appeal in *Koh Kay Yew v Inno-Pacific Holdings Ltd* [1997] 3 SLR 121 ("*Koh Kay Yew*") did say that an action commenced in one jurisdiction could be vexatious or oppressive. However, and this is the second point, unlike the situation in *Koh Kay Yew*, it was not as if the defendants had no grounds to commence proceedings in Indonesia. Put another way, it is not so clear that the ends of justice required the granting of an anti-suit injunction.

Mareva injunctions

9.109 There was one case relating to Mareva injunctions: *Multi-Code Electronics Industries (M) Bhd v Toh Chun Toh Gordon* [2009] 1 SLR 1000. This case was discussed earlier under stay of proceedings (at paras 9.38–9.50). A Mareva injunction had been obtained in Singapore and the High Court had subsequently stayed the proceedings in Singapore. The question then arose as to what the effect of the stay had on the Mareva injunction.

9.110 The defendants argued that since obtaining a Mareva injunction was conditional upon there being an accrued cause of action that a Singapore court would have jurisdiction over, it followed that once the proceedings for that cause of action had been stayed, the Mareva injunction should be lifted. Otherwise, this would be tantamount to issuing a Mareva injunction in aid of foreign proceedings.

9.111 The learned judge engaged in an extensive and lengthy consideration of the authorities, both judicial and statutory, and concluded that the court did have the residual jurisdiction under s 4(10) of the Civil Law Act (Cap 43, 1999 Rev Ed) to allow the continuation of

a Mareva injunction despite an order staying the Singapore proceedings in favour of a foreign jurisdiction.

9.112 In so doing, the court helpfully reaffirmed the principles applicable in Singapore when considering the granting of a Mareva injunction. Stated briefly, the court must have jurisdiction over the defendant (with assets in Singapore) regarding an accrued cause of action that is the subject of substantive proceedings in Singapore.

9.113 In its analysis, the court distinguished between an application for stay and an application to strike out a claim. An application for a stay is not based on the notion that the court had no jurisdiction whatsoever over the substantive claim (which would be fatal to an application for a Mareva injunction) but that the court had chosen not to exercise its jurisdiction. This stay, however, would not remove this court's residual jurisdiction to hear the plaintiffs' cause of action nor would it mean that the matter was no longer justiciable. Implicit in a stay of proceedings is that the action still subsists and that the stay could be lifted. As such, this situation was different from that where a Mareva injunction is given as relief in aid of foreign proceedings where there was no connection at all with Singapore.

9.114 While the writer has concerns with parties being able to begin proceedings in Singapore simply to obtain injunctive relief, he agrees with the position taken by the court regarding the status of the Mareva injunction after a stay. The distinction drawn between the existence and exercise of jurisdiction is sound. Further, it would be absurd, as the learned judge points out, for there to have an automatic lifting of all interim injunctions the moment any action was stayed. There are occasions that a stay may be lifted and it would similarly be absurd to have consequential orders in every case, such as a lifting of a Mareva injunction, with every stay of proceedings and a re-imposition of a Mareva injunction with every lifting of a stay.

Exclusion of foreign law

9.115 The final case is *Relfo Ltd v Bhimji Velji Jadva Varsani* [2008] 4 SLR 657. The plaintiff company (incorporated in the UK) had among its shareholders the defendant, his father and a Mr and Mrs Gorecia. In June 2001, the plaintiff sold a property and the tax liability for the sale was estimated at about £1.26m. As a result of various transactions, the Gorecias became the plaintiff's only directors and shareholders. From July 2001 onwards, Mr Gorecia caused the plaintiff to make various purported investments in the Ukraine and Moscow. On 26 April 2004, the United Kingdom Inland Revenue ("UKIR") issued a "Notice of Warning of Legal Proceedings" to the plaintiff in relation to the tax

liability incurred in 2001 and gave a deadline for payment. No payment was made. Instead, various transfers were made between the plaintiff's bank account, Mirren Ltd (a BVI registered company) and the defendant.

9.116 In July 2004, it was resolved that the plaintiff be wound up voluntarily. Eventually, one Bramston was appointed as liquidator. After conducting investigations, Bramston was of the view that the Gorecias may have breached their fiduciary duties to the plaintiff due to the various transfers of funds they had effected. A settlement agreement was reached between the plaintiff and the Gorecias which was paid.

9.117 Bramston's further investigations revealed that a sum transferred to Mirren Ltd ended up in the defendant's account. The plaintiff, therefore, commenced proceedings against the defendant claiming that he was liable to account for the sum of US$878,479.35 on the grounds, *inter alia,* of knowing receipt and dishonest assistance.

9.118 A large part of this case involved a discussion of the law and evidence relating to knowing receipt and dishonest assistance. This does not concern us. Suffice it to say that the court concluded that a *prima facie* case of knowing receipt had been established.

9.119 What is noteworthy is that the court went on to consider whether allowing this claim would be tantamount to enforcing a foreign revenue law. Judith Prakash J first considered the principle in private international law that the courts of one country will not enforce the penal and revenue laws of another country. She then concluded that this claim was an attempt to indirectly enforce the revenue laws of the UK and dismissed the claim.

9.120 Two points can be made here. Firstly, this case is a clear statement that, contrary to the plaintiff's submission, the principle that the courts of one country will not enforce the penal and revenue laws of another country is not an archaic one. Secondly, while this principle has been recognised in Singapore, this case represents the first application of this principle in a Singapore case.