Dresdner Kleinwort Ltd v CIMB Bank Bhd
[2008] SGHC 59

Case Number : Suit 661/2007, RA 20/2008

Decision Date : 14 April 2008

Tribunal/Court : High Court

Coram : Chan Seng Onn J

Counsel Name(s) : Hri Kumar SC, Tan Su-Lin and Bhavish Advani (Drew & Napier LLC) for the plaintiff; Alvin Yeo SC, Nish Shetty and Tan Hsiang Yue (WongPartnership LLP) for the defendant

Parties : Dresdner Kleinwort Ltd — CIMB Bank Bhd

Civil Procedure – Stay of proceedings – Defendant intending to commence action against third parties – Risk of third-party claims becoming time barred before stay is lifted – Whether temporary stay subject to condition allowing action to be commenced against third parties

Civil Procedure – Stay of proceedings – Plaintiff seeking temporary stay pending determination of foreign proceedings – Defendant seeking permanent stay on basis of forum non conveniens – Whether permanent stay application should be heard first

Conflict of Laws – Choice of law – Restitution – Choice of law rules governing restitutionary claims where contract procured by fraud – Whether governing law the proper law of the contract or the law of the country where enrichment occurred

Conflict of Laws – Natural forum – Company incorporated in England claiming restitution of payment made under invalid agreement – Payment received in Singapore – Whether Singapore or England the natural forum

14 April 2008 Judgment reserved.

Chan Seng Onn J:

Introduction

1 The plaintiff's application is for a *temporary* stay of its own action pending a final determination of another suit, *Siemens Financial Service GmbH v Dresdner Kleinwort Ltd*, file no. 11 HK O 21619/05 (District Court of Munich 1) and 7 U 4791/06 (Superior Regional Court of Munich), before the courts of Munich in Germany ("German proceedings").

2 The defendant's application is for a *permanent* stay on the ground that Singapore is not the natural and appropriate forum for the action but England is.

3 At the hearing below, the Assistant Registrar, Ms Denise Wong ("the AR"), heard the plaintiff's application first and allowed the action to be temporarily stayed pending the conclusion of the German proceedings. The AR refused to hear the defendant's application and adjourned it to a date after the lifting of the temporary stay. The defendant appealed against her orders.

4 During the appeal before me, the plaintiff argued that its application should be heard first because it was filed earlier, and hearing the defendant's application first would completely undermine and make redundant the plaintiff's application, and thereby irrevocably prejudice the plaintiff's application. The defendant objected that it was wrong in principle to hear the plaintiff's application

first without hearing the fundamental issue of the appropriate forum. Until and unless 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. I found the defendant's argument to be more compelling.

5 The logic of the defendant's argument becomes more apparent when two hypothetical scenarios are used to aid in the analysis. Suppose the plaintiff chooses a totally inappropriate forum say the courts in New Zealand to try the matter and then applies for a temporary stay and a deferment of the hearing of an application concerning *forum non conveniens* until after the temporary stay is lifted. Obviously, it makes no sense to defer the *forum non conveniens* hearing as New Zealand in any event is not the appropriate forum to hear the action in the first place and consequently also to hear any related interlocutory application (including that of a temporary stay) in relation to the action. The horse must be put in front of the cart so to speak. The most fundamental question must be determined first, which is whether or not New Zealand is the appropriate forum, and not the secondary question of whether a temporary suspension of the action should be allowed. If New Zealand is in any event not the appropriate forum, then a permanent stay should be ordered and the matter should end there. The action in New Zealand should not be allowed to be temporarily suspended, which serves no useful purpose. The same applies if the plaintiff commences the action in Malaysia. If either Singapore or London is the far more appropriate forum than Malaysia, then again the question which must be accorded priority is the *forum non conveniens* question so that the action is then properly brought as soon as possible in the appropriate forum where the case can be most suitably tried having regard to the interest of the parties and the ends of justice. The temporary stay question in my view should then be heard by the appropriate forum. But the question of which is the appropriate forum can only be answered after the application for the permanent stay is heard first.

6 Although logically the defendant's permanent stay application should be heard and determined first, nevertheless I decided to hear the merits of both applications before making any decision on both applications. This approach also enables any relevant cross or linked issues to be considered at the same time. If I were to allow the permanent stay application, then there will of course be no need for me to decide the temporary stay application. However, if I were to dismiss the permanent stay application on the basis that Singapore is the appropriate forum to hear the matter, then I will have to decide whether or not to allow the temporary stay application, and if so, then on what terms (if any).

7 After hearing both applications, I dismissed the permanent stay application and varied the order of the AR to allow the defendant to proceed with its intended third party actions in the meantime whilst the substantive action between the plaintiff and the defendant is temporarily stayed until the final outcome of the German proceedings is known.

8 I now give my reasons on an expedited basis as the defendant has filed an expedited appeal due to its concern with the fast approaching time bar.

Brief facts

9 In this action, the plaintiff (a company incorporated in England offering banking services in the United Kingdom and elsewhere, including the discounting of promissory notes) seeks to recover from the defendant (a bank licensed in Malaysia with branches in other places including London and Singapore), the sum of USD8,199,869.50 paid to the defendant ("payment") under an alleged sale and purchase agreement ("agreement") entered into on 6 May 2002 for the purchase without recourse of

eight promissory notes ("notes") of total nominal value USD10,000,000 from the defendant.

10 The notes with a maturity date of 3 February 2004 were issued on 1 February 2002 by Innaria Sdn. Bhd., Kota Kinabalu ("Innaria"), to the order of V.V. Enterprise, Luyang and payable at Maybank Berhad, Kota Kinabalu. These corporate entities are all located in Sabah, Malaysia. In the notes, the authorised signatures for Innaria were made in the name of Lye Kok Keng @ Harry and Mohamed Zulfikar Bin Muzaffar, both named as directors of Innaria.

11 The notes were allegedly guaranteed per aval by Jabatan Kerja Raya, the Public Works Department, Sabah, Malaysia. The signatures for the guarantee were purportedly made in the name of officers from the Jabatan Kerja Raya, namely, John Baptist Badai and Lontou Ujum. A signed stamp of the "Commissioner for Oaths" was located next to these two signatures.

12 Accompanying the notes was a confirmation letter from Innaria that (a) the promissory notes related to the financing of the import and installation of pipes under a certain contract ("project"); and (b) the notes represented Jabatan Kerja Raya's unconditional and irrevocable undertaking to pay on the promissory notes on the maturity date upon presentation at Maybank Berhad at Kota Kinabalu. The letter also confirmed that all the signatures on the notes were authentic, and legally and validly binding, and the persons were fully authorized to enter into the transaction. It further confirmed that the notes would be governed and construed according to English Law, and that Innaria irrevocably submitted to the non-exclusive jurisdiction of the courts in England. As with the notes, this confirmation letter was signed by Lye Kok Keng @ Harry and Mohamed Zulfikar Bin Muzaffar for Innaria, and also by John Baptist Badai and Lontou Ujum as officers of Jabatan Kerja Raya. A signed stamp of the "Commissioner for Oaths" was again located next to the two latter signatures. The defendant purportedly confirmed that the signatures of all the abovementioned four persons were authentic and legally binding on Innaria and Jabatan Kerja Raya. The verified signature of George Chau Ket Siong ("George Chau") appeared on this confirmation together with a signed stamp of the "Commissioner for Oaths" next to it.

13 In the agreement, the named buyer was Dresdner Kleinwort Wasserstein Limited (the former name of the plaintiff bank), Riverbank House at 2 Swan Lane, London. The named seller was the Inanam branch at Inanam Plaza, 8 Inanam New Township in Sabah ("Inanam branch") of the defendant, then known as Bumiputra – Commerce Bank Berhad.

14 On 5 June 2002, the plaintiff sent the payment by SWIFT via its US dollar correspondent bank, the Bank of New York, to the defendant's Singapore branch ("Singapore branch"). In its SWIFT message, the plaintiff instructed that the said funds be credited to the Inanam branch ***as the beneficial customer***. These instructions of the plaintiff were made pursuant to clause 6.1 of the alleged agreement, which provided that the net proceeds of the transaction would be remitted to the defendant as per the defendant's separate instructions in writing. Although the separate instructions (allegedly given by the defendant to the plaintiff on or about 29 May 2002) were to remit the payment to the Singapore branch and for the plaintiff also to instruct the Singapore branch to credit the payment to the defendant's Inanam branch ***for the account of V.V. Enterprise***,the plaintiff did not in its SWIFT message give any instructions to credit V.V. Enterprise as V.V. Enterprise was not a party to the agreement.

15 On 6 June 2002, the Singapore branch received the payment. The Bank of New York sent a SWIFT message to the plaintiff which contained the confirmation from the Singapore branch that it had effected payment on 6 June 2002 in accordance with the plaintiff's instructions.

16 After the defendant endorsed the notes to the plaintiff, the plaintiff endorsed the notes to DF

Deutsche Forfait AG ("DF") and warranted to DF the legal existence of the notes and the avals contained therein. DF resold the notes to Siemens Financial Service GmbH ("SFS") and assigned the warranty to SFS.

17 The chain of the sale and purchase transactions for the notes from the defendant to the plaintiff, from the plaintiff to DF, and finally from DF to SFS were arranged by Bon Pour Aval ("BPAL").

18 When the notes matured on 3 February 2004, SFS presented them for payment. However, the notes were dishonoured.

19 On 9 November 2005, SFS sued the plaintiff in the German proceedings for breach of the warranty. On 18 August 2006, SFS obtained judgment for USD10,015,759.93 and EUR17,664.90 plus interest. The plaintiff filed an appeal to the Superior Regional Court of Munich on 25 September 2006.

20 I was informed that the German proceedings are not likely to conclude before the end of 2009 as there are further levels of appeal after that. In the meantime, the plaintiff commenced the present suit against the defendant on 17 October 2007.

The defendant's position

21 The defendant's position is that the agreement is not valid and binding on it. In its defence, all allegations of wrongdoing in the statement of claim are denied.

22 The defendant's internal investigations concluded that the underlying project was non-existent, the supporting documents to validate the issuance of the notes were fictitious and the notes were issued in furtherance of a fraud. Although the sales officer of the Inanam branch, George Chau, had proceeded to confirm the issuance of the notes, this was outside the scope of his authority, whether actual, usual or apparent. George Chau also had no authority to sign the agreement. Further, the defendant had expressly communicated the limitation of authority to the plaintiff via a fax dated 21 May 2002 ***before*** the plaintiff made the payment for the notes on 5 June 2002. The fax stated that two authorised signatures were required for endorsement of promissory notes above USD10,000. However, only one signature appeared on the agreement, that of George Chau.

23 Hence, the defendant challenges the plaintiff's position that it was operating under a mistake when it made the payment. Other defences are, *inter alia*, the defendant's change of position in good faith.

Statement of claim

24 The plaintiff avers, *inter alia*, at paragraph 10 of the statement of claim that all transactions relating to the notes are valid, and in particular, the notes, the avals and the agreement themselves are also valid. The plaintiff says that this position is evident in the German proceedings where the plaintiff (the defendant in the German proceedings) has expressly asserted in its defence that the notes and the avals are valid.

25 However, at paragraphs 12 and 13 of the statement of claim, the plaintiff states that if the defendant's position is correct that the agreement is not valid and binding, then the plaintiff claims that:

(a) The payment by the plaintiff is the result of a mistake with regards to the validity of the agreement;

(b) The defendant is unjustly enriched and the plaintiff is entitled to repayment of the money had and received by the defendant under a mistake of fact;

(c) Alternatively, the consideration for which the plaintiff made the payment has totally failed. The defendant is unjustly enriched, and the plaintiff is entitled to repayment of the money had and received by the defendant for a consideration that totally failed.

26 The plaintiff prays for a declaration and an order that in the event a final and binding judgment is obtained against the plaintiff in the German proceedings, the defendant is liable to pay the plaintiff the sum of USD8,199,869.50 as money had and received by the defendant including interest thereon.

Defendant's application for permanent stay

27 The defendant applied for a permanent stay of all further proceedings on the ground that Singapore is not the natural and appropriate forum for the action.

28 The governing principle for such a stay was recently reiterated by the Court of Appeal in *Rickshaw Investments Ltd and Another v Nicolai Baron von Uexkull* [2007] 1 SLR 377 ("*Rickshaw*"). The Court of Appeal held:

12 The governing principle in natural forum cases is that articulated in the seminal House of Lords decision of *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460 ("*Spiliada*"), which has been approved by the Singapore Court of Appeal on many occasions as being part of our local law (see, for example, the Singapore Court of Appeal decisions of *Brinkerhoff Maritime Drilling Corp v PT Airfast Services Indonesia* [1992] 2 SLR 776 ("Brinkerhoff") and *PT Hutan Domas Raya v Yue Xiu Enterprises (Holdings) Limited* [2001] 2 SLR 49).

13 In *Brinkerhoff*, Chao Hick Tin J (as he then was), delivering the judgment of the court, observed as follows (at 784, [35]):

> Lord Goff, who delivered the judgment of the House [in the Spiliada case], to which the other four Law Lords agreed, restated the law (and in so restating, took into account the Scottish authorities as well) which is summarized in the third cumulative supplement to Dicey & Morris on Conflict of Laws (11th Ed) at para[s] 393–395 as follows:
>
> (a) the basic principle is that a stay will only be granted on the ground of forum non conveniens where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, ie in which the case may be tried more suitably for the interest of all the parties and the ends of justice;
>
> (b) the legal burden of proof is on the defendant, but the evidential burden will rest on the party who asserts the existence of a relevant factor;
>
> (c) the burden is on the defendant to show both that England is not the natural or appropriate forum, and also that there is another available forum which is clearly or distinctly more appropriate than the English forum;
>
> (d) the court will look to see what factors there are which point to the direction of another forum, as being the forum with which the action has the most real and substantial connection, eg factors affecting convenience or expense (such as availability

of witnesses), the law governing the transaction, and the places where the parties reside or carry on business;

(e) if at that stage the court concludes that there is no other available forum which is clearly more appropriate it will ordinarily refuse a stay;

(f) if there is another forum which prima facie is clearly more appropriate the court will ordinarily grant a stay unless there are circumstances by reason of which justice requires that a stay should not be granted, and, in this inquiry the court will consider all the circumstances of the case. But the mere fact that the plaintiff has a legitimate personal or juridical advantage in proceeding in England is not decisive; regard must be had to the interests of all the parties and the ends of justice.

29 In *Peters Roger May v Pinder Lillian Gek Lian* [2006] 2 SLR 381, VK Rajah J said:

> 19 It ought to be noted that, in the final analysis, the real issue is not one of convenience per se but of appropriateness. In evaluating competing considerations the acid test simply is which is the more appropriate forum to hear the matter…
>
> 20 A court has to take into account an entire multitude of factors in balancing the competing interests. The weightage accorded to a particular factor varies in different cases and the ultimate appraisal ought to reflect the exigencies dictated by the factual matrix.
>
> 21 In granting a stay application the court must be persuaded that compelling reasons have been advanced precipitating the conclusion that the interests of the parties seeking justice can be more appropriately secured in some other jurisdiction. As Lord Sumner aptly put it in *Societe du Gaz de Paris v Societe Anonyme de Navigation "Les Armateurs Francais"* 1926 SLT 33 at 37:
>
> > The object under the words "forum non conveniens" is to find that forum which is the more suitable for the ends of justice, and is preferable, because pursuit of the litigation in that forum is more likely to secure those ends.

30 Hence the ultimate question that must always be borne in mind in a stay application on the ground of *forum non conveniens* is to ascertain where the case should suitably be tried having regard to the interest of the parties and the ends of justice: *Q&M Enterprises Sdn Bhd v Poh Kiat* [2005] 4 SLR 494 at [13].

31 In the present case, the burden rests on the defendant to show that Singapore is not the natural or appropriate forum for the trial of the action and that there is another available forum, which is clearly or distinctly more appropriate than Singapore. For this, I examined the material facts and the issues in dispute to determine the jurisdiction with which the action would have the most real and substantial connection. If at this stage ("first stage"), I do not find that England is clearly or distinctly more appropriate, then I will ordinarily refuse the stay. However, if the defendant is able to show that England is clearly or distinctly the more appropriate forum, then I will ordinarily grant a stay ***unless*** the plaintiff can show circumstances ("unless question") by reason of which justice requires that a stay should not be granted ("second stage").

32 In considering the connecting factors, the court must have regard to the likely issues in dispute: *Yeoh Poh San & Anor v Won Siok Wan* [2002] SGHC 196. Therefore, connecting factors material and relevant to the issues in dispute must be considered (at the first stage). Depending on the nature of the various causes of action and the defences, the court may give different weights to

the various connecting factors. However, for determining the "unless question" in the second stage, all relevant circumstances of the case must be taken into account, including any legitimate personal or juridical advantages together with the connecting factors considered earlier in the first stage. Hence, the scope of inquiry during the second stage (if reached) becomes much wider than the first stage.

33 I will now consider the submissions of the parties with respect to each of the main issues in dispute.

Connecting factors with England according to the defendant

(1) Whether the agreement was valid and enforceable

34 With the plaintiff's assertion in the statement of claim that the agreement is valid, the defendant rightly regards the validity and consequently, the enforceability of the agreement to be a major issue in dispute. If the agreement is valid, the plaintiff will be entitled to enforce the strict guarantees and warranties provided by the defendant under condition 4.3 read with 6.2 in the agreement. See [132] and [133].

35 On the validity of the agreement, I agree with the submission of the defendant that England is the more appropriate forum to determine that issue for the following reasons:

(a) The agreement was drafted by the plaintiff's London branch.

(b) The alleged contractual offer to purchase the notes was transmitted by facsimile from the plaintiff's London branch to the Inanam branch in Malaysia. The alleged acceptance of the plaintiff's offer was received by facsimile at the plaintiff's London branch from the Inanam branch in Malaysia. The plaintiff's London branch faxed its confirmation of the sale and purchase of the notes, subject to satisfactory documentation, to the Inanam branch in Malaysia.

(c) On the face of the notes, there was a purported guarantee by a Malaysian government entity, Jabatan Kerja Raya ["JKR"]. The notes were accompanied by a confirmation letter from Innaria which stated that "*[the notes] shall be governed and construed according to English law and [Innaria and JKR] irrevocably submit to the non-exclusive jurisdiction of the courts of England.*"

(d) Clause 6.5 of the agreement provided that: "*This transaction is governed by and construed in accordance with the Laws of England*."

(emphasis made)

(2) Potential factual witnesses

36 According to the defendant, most of the potential factual witnesses are residents in London.

37 Based on the correspondence and the defendant's internal investigations, the defendant submits that Ms Amanda Callaghan ("Callaghan"), an employee at the plaintiff's London branch, appears to have had primary responsibility for the transactions relating to the notes on behalf of the plaintiff.

38 Ms Callaghan liaised closely with BPAL, the arrangers of the transactions relating to the notes. She corresponded and met with BPAL's then managing director, Mr Mark De Fraine and one of BPAL's

representatives, Mr Ray Brown, in relation to the transactions on various occasions. Mr Shaun Little ("Little") of the plaintiff's London branch also participated in communications with BPAL.

39 The defendant's internal investigations further revealed that there were numerous exchanges of correspondence between Callaghan and George Chau of the Inanam branch in respect of the transactions relating to the notes.

40 Callaghan sent a fax dated 19 April 2002 to George Chau which sought to confirm the defendant's sale and the plaintiff's purchase of the notes.

41 In a fax dated 6 May 2002 to Callaghan, George Chau requested Callaghan to verify his signature with the defendant's London branch.

42 Two faxes dated 14 May 2002 from George Chau were sent to Callaghan. The first fax enclosed an extract of the defendant's authorised signature book showing that George Chau was an authorised signatory of the defendant. The second fax purportedly gave the confirmation that "Bank Negara Malaysia has given approval vide their letter 10 May 2002 to [V.V. Enterprise] to obtain foreign loans in USD."

43 Callaghan liaised with Ms Andrea Francis ("Francis"), a Trade Finance Officer at the defendant's London branch, on various occasions to verify the validity and authority of George Chau to sign the notes and the transactions relating to the notes (including the agreement) on behalf of the defendant.

44 On 20 May 2002, Callaghan made a telephone call to Francis regarding the notes and the agreement. This was followed up with a fax on the same day from Callaghan to Francis. The fax attached a copy of the 14 May 2002 fax from George Chau to Callaghan enclosing the extract from the defendant's authorised signature book. It also attached a copy of a fax dated 15 May 2002 from the Inanam branch to Callaghan signed by the then Customer Officer of the Inanam branch, Mr Yussof Momin ("Momin"). In the fax dated 15 May 2002, Momin purportedly confirmed that George Chau was authorised to sign alone on behalf of the defendant and that George Chau's sole signature was sufficient and legally binding upon the defendant in respect of the verification and certification of all documents relating to the notes. In her fax to Francis on 20 May 2002, Callaghan requested confirmation from Francis that Momin's signature on the 15 May 2002 fax was legal and binding and that he had authority to sign on behalf of the defendant.

45 On 21 May 2002, Callaghan received a fax from the Inanam branch. The fax (which was copied to Callaghan) was addressed to the defendant's London branch and marked for the attention of Encik Jamal Hussein. The fax was signed by the (then) Head of Customer Service of the Inanam branch, Ms Linda Sia Henry Sum ("Sum") and Momin who purported to confirm that only one authorised signatory of the defendant was required to verify and certify documents for the transactions relating to the notes presented to the defendant and that George Chau was an authorised signatory of the defendant.

46 On 21 May 2002, Callaghan sent a further fax to Francis seeking verification of the facsimiles referred to above in the preceding paragraph. On the same day, Callaghan also received a fax from the Inanam branch. The fax was addressed to the defendant's London branch and marked for the attention of Francis. Essentially, the Inanam branch requested Francis to send written confirmation to Callaghan that Momin and Sum were legal and binding signatories of the Inanam branch.

47 By a fax dated 21 May 2002 from Francis to Callaghan, Francis confirmed that George Chau was

an authorised signatory of the defendant but stated however that two signatories were required for the endorsement of promissory notes over USD10,000.

48 Hence, according to the defendant, Callaghan and Francis are likely to give evidence in respect of the issues in the action and their knowledge is most relevant to the key issues in dispute, particularly whether the plaintiff made the payment under a mistake that the agreement was valid and binding.

49 In addition, the evidence of other employees at the plaintiff's and defendant's London branches *e.g.* Mr Aziz Mohad Jaafar ("Aziz"), the Assistant General Manager to whom Francis reported, and Ms Mastulu Nurdin ("Mastulu"), the Operations Manager, are also relevant according to the defendant. Mastulu of the defendant's London branch had sent a covering fax, attaching correspondence in relation to the plaintiff's request to verify the notes signed by George Chau, to Ms Raihan Kamaruddin of the defendant's International Banking Division in Kuala Lumpur. Noted on this fax was a handwritten note to Ms Raihan, where the writer wrote that he had spoken to Mastulu and confirmed that George Chau did not sign any promissory notes and that Mastulu was to check further with the branch.

50 Francis and Mastulu are still employees of the defendant's London branch, presently residing in London.

51 The defendant further submits that the correspondence, files and other documents relevant to the issues in dispute, located in London in both the London branches of the plaintiff and the defendant, are pertinent to the question of what was known to the plaintiff and the defendant at the time the payment was made. It is not likely that there are many relevant documents in Singapore as the Singapore branch was not at all involved in the negotiation, execution or verification of the notes and the agreement.

(3) Whether the plaintiff made the payment as a result of a mistake

52 On the question whether the plaintiff made the payment to the defendant as a result of a mistake that the agreement was binding and valid, the defendant submits that again England is the more appropriate forum to determine that issue for the following reasons:

(a) Persons involved in the verification of the validity of the notes and the agreement and the execution of the transactions relating to the notes are relevant witnesses. The relevant documents are in the possession of these persons located in London. The plaintiff's employees at its London branch were responsible for the negotiation, verification and execution of all transactions relating to the notes on behalf of the plaintiff.

(b) The defendant's London branch played a central role in notifying the plaintiff that the notes and all transactions relating to the notes (including the agreement) were not valid and binding upon the defendant.

(c) The Singapore branch was not involved in the negotiation, execution or verification of the notes or the agreement and was never provided with copies of the notes, letters, agreement or any documents relating to the notes. The payment was simply made to the Singapore branch, and the monies were retransferred to an account in HSBC, Hong Kong on the same day.

(4) Change of position of the defendant upon receipt of the payment and the involvement of the Singapore branch.

53 Receipt of the payment on 6 June 2002 marks the commencement of the involvement of the defendant's branch in Singapore.

54 It is not disputed that the payment was received at the Singapore branch on 6 June 2002 from the plaintiff. The plaintiff gave instructions via SWIFT to the Singapore branch that the beneficiary of that payment was the Inanam branch. No instruction was received from the plaintiff that the payment was meant for some third party customer of the Inanam branch. However, the Singapore branch transferred the payment on the same day to a third party account in HSBC Hong Kong belonging to a customer of the Inanam branch because of the following events and purported instructions received from the Inanam branch:

(a) Pursuant to letter dated 6 June 2002 from V.V. Enterprise to the Inanam branch, V.V. Enterprise alleged that the plaintiff had remitted the payment to the Singapore branch in its favour. In this letter, V.V. Enterprise instructed the Inanam branch to request the Singapore branch to immediately retransfer the sum of USD8.2 million to the account of its supplier, New Speed Technologies Ltd ("New Speed"), at HSBC, Hong Kong instead.

(b) On 6 June 2002, a fax of 5 pages was sent to the Singapore branch for the attention of Mr Paul Ma ("Paul Ma"), the assistant general manager of the Singapore branch. The signature on the cover page appears to be that of George Chau. The 2nd page is a letter dated 6 June 2002 on the letter head of the Inanam branch addressed to the manager of the Singapore branch. It is signed by George Chau and Mr Ahmad HJ Khamis ("Khamis"). Khamis was the then Customer Service Manager of the Inanam branch. This letter stated that the plaintiff had on 6 June 2002 remitted USD8.2 million to the Singapore branch in favour of the Inanam branch *for account of V.V. Enterprise,* and instructed the Singapore branch to remit immediately the proceeds as instructed by its customer V.V. Enterprise to the account of the customer's supplier, New Speed, in HSBC Hong Kong. This letter enclosed a letter dated 6 June 2002 purportedly from V.V. Enterprise addressed to the Inanam branch, which instructed the Singapore branch to remit immediately the amount
USD8.2 million that V.V. Enterprise said it had received from the plaintiff in its favour, to the credit of the HSBC account of its supplier, New Speed, in Hong Kong. Page 3 of the fax is a letter from V.V. Enterprise, which showed that George Chau at the Inanam branch had apparently verified the signatory of the letter. I observed that these two purported letters appear to have remarkably similar fonts, although one is supposed to have originated from V.V. Enterprise and the other from the Inanam branch. Pages 4 and 5 of the fax are two pages extracted from the authorised signature book of the defendant showing the names and authorised signatures of George Chau and Khamis. Presumably, this is to enable the Singapore branch, upon receipt of the fax, to have the "convenience" of verifying the authority of these two persons and the authenticity of their signatures, which then avoids the hassle of verifying from another independent source.

(c) Over and above the 5 page fax sent to Paul Ma, George Chau had further contacted him presumably over the telephone. Mr Raja Sulong Razak ("Sulong Razak"), the general manager of the Singapore branch, also contacted the Inanam branch to confirm that the transfer to New Speed's account in HSBC, Hong Kong should go ahead. Thereafter, Ms Roshida ("Roshida"), Paul Ma's assistant arranged for the transfer of the monies to New Speed's account in HSBC, Hong Kong.

55 Roshida is still an employee with the Singapore branch but Sulong Razak is now located at the defendant's Taman Pelangi Branch in Johor, Malaysia.

56 The defendant contends that the Singapore branch simply responded to the request from the Inanam branch and transferred the monies to HSBC, Hong Kong on the same day. There is a handwritten note which reads as follows:

> GM
>
> Remitter VV Enterprise was supposed to remit funds to HK but came to us instead. Inanam Br. agreed we charge nominal (USD 100 + charges 120) for retransfer.
>
> For approval pls.
>
> (Initials apparently of Mr Paul Ma)
>
> 6/6/02

57 Another handwritten note addressed to Ms Roshida states "Pls pay", with the initials apparently of Paul Ma below it.

58 Payment to HSBC then proceeded. After this, the Singapore branch was not involved in any other way.

59 Based on the defendant's investigations and the various correspondence, the defendant contends that BPAL was engaged by Innaria and V.V. Enterprise to arrange investors for the notes in return for a commission. BPAL, a company incorporated in England and with no corporate presence in Singapore, was at that time carrying on the business of arranging finance. BPAL referred to itself as "Forfait and Trade Finance Specialists".

60 The defendant has reasonable grounds to believe that BPAL's London office including its then managing director Mr Mark De Fraine, its directors, Mr Paul Mills and its representative Mr Ray Brown played a central role in arranging the transactions in connection with the notes. This included:

(a) Liaising directly with Innaria and V.V. Enterprise in respect of the preparation of documentation in support of the notes;

(b) Procuring the sale of the notes to DF;

(c) Arranging for the plaintiff to become involved in the transactions relating to the notes as BPAL's "closing bank"; and

(d) Communicating with George Chau regarding the execution of documents relating to the notes.

61 The defendant submits that BPAL's knowledge and its relationship with the plaintiff who was acting as BPAL's closing bank will almost certainly be relevant to the issues in the action.

62 BPAL's annual return dated 12 June 2007 showed that the directors of BPAL including Mr Mark De Fraine, Mr Paul Mills and Mr Peter Skowron were residents in England. It is likely that some or all of these directors will be called as witnesses to give evidence in the action as a result of their involvement. The relevant documents in the possession of BPAL will likely be in its London office.

63 The defendant, in addition, intends to join BPAL as a party to any proceedings brought by the plaintiff in order to seek contribution from BPAL. If the action were to go ahead in Singapore, the

defendant submits that it is not clear if BPAL would be amenable to jurisdiction of the Singapore courts. It is certainly much easier for BPAL and its principals to avoid taking part in proceedings (and to avoid the consequences of judgment against them) if the proceedings were in Singapore than would be the case if the proceedings were taking place in England. On this, I note however that reciprocal enforcement arrangements do exist between Singapore and the United Kingdom for the enforcement of judgments obtained in the High Court of Singapore in the United Kingdom. Hence, if third party proceedings were properly served out of jurisdiction on BPAL by the defendant, I do not think it is likely that BPAL will simply ignore the third party action and not defend itself in Singapore, and risk having a judgment, enforceable by registration in the United Kingdom, of a very substantial sum of some USD10m entered against them.

Connecting factors with Singapore according to the plaintiff

64 The plaintiff contends on the other hand that the following are likely issues in dispute for the main action which on the whole are connected with Singapore:

(1) Whether there was a failure of consideration for the payment, if the agreement was not valid and binding as contended by the defendant;

(2) Whether in making the payment, the plaintiff laboured under a mistake that the agreement was valid and binding;

(3) Whether the defendant changed its position after receiving the payment;

(4) Whether, in changing its position, the defendant acted in good faith; and

(5) The proper law of the restitutionary obligation.

I propose to deal with each issue in turn.

(1) Whether there was a failure of consideration for the payment, if the agreement was not valid and binding as contended by the defendant

65 I accept the plaintiff's submission that the first issue of whether there was a failure of consideration is predominantly a question of law with hardly any factual issues involved. The location and convenience of witnesses are thus largely irrelevant for this issue.

(2) Whether in making the payment, the plaintiff laboured under a mistake that the agreement was valid and binding

66 For this second issue of mistake, the relevant witnesses according to the plaintiff are Callaghan and Little, both of whom are the plaintiff's employees involved in the payment. The plaintiff will have them available to testify in Singapore. The defendant had named the following witnesses for this issue: Francis, George Chau, Aziz, Mastulu, Steve Loughe, Steve Hagopian and BPAL representatives. Except for Francis and George Chau who communicated with Callaghan in relation to the payment, the defendant has not explained how or why the evidence of these other witnesses is relevant to the payment issue. It is not clear how they were involved with the payment. As Francis is still in the defendant's employ, the defendant could fly her to Singapore to testify. George Chau is no longer in the employ of the defendant. His attendance cannot be compelled whether in England or in Singapore. I agree with this submission of the plaintiff's.

67 According to the defendant, BPAL played a central role in arranging the transactions and in dealing with the plaintiff. As such, the BPAL witnesses would have relevant evidence to give on the issue of whether the plaintiff acted on a mistake when it made the payment, or alternatively, whether the consideration for the payment failed. BPAL is an English company, not readily amenable to the jurisdiction of the Singapore courts. The defendant intends to call the directors of BPAL to give evidence of their involvement.

68 However, it seems to me that the defendant's desire to call the directors and employees of BPAL as its witnesses (to establish that the plaintiff was not labouring under any mistake when it made the payment) is nothing more than mere wishful thinking. Why would the BPAL employees want to testify for the defendant when the defendant has made known that it will be bringing a third party action against BPAL for negligence, breach of contract, contribution and conspiracy (presumably with George Chau and others in Sabah)? Is the defendant hoping that the BPAL witnesses will be cooperative and will testify in support of the defendant's case that they (the BPAL witnesses) had somehow told or made known to the plaintiff that the notes, the agreement and the other documents were forged or invalid documents, so that the plaintiff would be infected with the knowledge that they were forged or invalid? If the BPAL witnesses were to do that, it will not only damage BPAL's defence in the third party action, it can also implicate them as one of the co-conspirators who had knowledge of the forgery at the time they advised on and facilitated the transactions. I would have thought that the BPAL witnesses would in all likelihood testify on behalf of BPAL in defence of the third party action, rather than on behalf of the defendant. Hence, the alleged desire of the defendant to call the BPAL witnesses to testify in support of the defendant's case, be it in Singapore or in England, appears wholly unrealistic to me, unless it is meant to give contrived support to the defendant's application for a permanent stay of this action.

69 Hence, based on the approach of the Court of Appeal in *Rickshaw* (see [28] above), the main witnesses who should be considered in determining the appropriate forum are Francis and George Chau, the principal witnesses relevant to the issue of the plaintiff's mistake. They are the only ones who communicated with Callaghan in relation to the payment (and who therefore could arguably have an effect on Callaghan's state of mind). Francis can be flown down to Singapore. Any costs incurred by the defendant should the defendant succeed, can be compensated by an appropriate order for costs. There should be no issue of the plaintiff being unable to pay such costs. Hence, the location of the key witness, Francis, is not a connecting factor of any significance. As for Callaghan, the plaintiff will ensure her presence in Singapore.

70 The whereabouts of George Chau (formerly with the Inanam branch in Sabah and the main actor in the alleged fraudulent scheme) are unknown. If he should be found in Malaysia, then he will not be a compellable witness, irrespective of whether the forum is England or Singapore.

71 The defendant accepts that the number of documents on this issue number around 12 and most of the documents have been exhibited in the affidavits before me. Hence, there should be no difficulty making them available for the trial proper in Singapore.

(3) Whether the defendant changed its position after receiving the payment

72 It is not seriously disputed that this third issue is principally connected to Singapore. The Singapore branch received the payment from the plaintiff. The Singapore branch remitted the payment to HSBC, Hong Kong.

73 Hence, employees in the Singapore branch will be able to give evidence on the defendant's alleged change in position. Their state of mind will be most relevant for this issue. These matters have

no real connection with England at all. The documents relevant to the defendant's receipt of the payment and the subsequent diversion of the payment to Hong Kong are likely to be found in Singapore not London.

74 Evidence on the issue of whether or not there was a "bona fide change of position" arose not only in the Singapore branch. What took place in the Inanam branch is also material as it was the Inanam branch, which purportedly gave the instructions to the Singapore branch to transfer the payment to HSBC Hong Kong in favour of a *third party*, which was contrary to the SWIFT instructions of the remitting bank (*i.e.* the plaintiff), to remit the payment to the Inanam branch, with the defendant itself as *beneficiary bank*, and not to any third party or any customer of the beneficiary bank. As the transaction took place within less than one day on 6 June 2002, the evidence and the documentation evidencing the transaction are likely be based almost entirely in Singapore and Malaysia.

75 It is clear to me that matters in relation to this issue do not have any real and substantial connection with England.

(4) Whether, in changing its position, the defendant acted in good faith

76 For this issue, the defendant's own case is that it had given written notice to the plaintiff on 21 May 2002 that George Chau did not have authority to sign the agreement. On 23 May 2002, the defendant's Kuala Lumpur branch was notified of possible security problems regarding the transaction.

77 The purported instructions from George Chau to the Singapore branch to transfer the payment to HSBC Hong Kong came later and were addressed to Paul Ma on 6 June 2002, and not to Paul Ma's superior, Sulong Razak who was then the general manager of the Singapore branch. Hence, a further sub-issue will be whether the Singapore branch and, more particularly, Paul Ma were internally notified of these possible security problems *before* the Singapore branch acted on these purported instructions and remitted the payment to HSBC Kong Kong.

78 In my view, these witnesses are crucial to the question of whether or not the defendant acted in good faith when it transferred the payment to Hong Kong. Their state of mind is relevant in determining whether the defendant had changed its position in good faith. Any relevant documents on this will primarily be in the Singapore branch, though some may be in the Inanam branch in Sabah as the purported instructions originated from there.

79 If any other persons had aided or abetted George Chau to make the transfer from Singapore to HSBC Hong Kong (assuming George Chau to be a participant of the conspiracy to defraud), it would likely be the then employees of the defendant in the Singapore branch.

80 Compellability of a key witness, especially an uncooperative witness, to attend and testify at the trial, and the compellability of that key witness under the Evidence Act (Cap 97, 1997 Rev Ed) to answer certain specific and relevant questions that might likely be put to him at the trial by either party, are important factors.

81 I note that the crucial witnesses on this issue, George Chau and Paul Ma, are no longer in the employ of the defendants and their compellability will be a significant consideration. However, neither the defendant nor the plaintiff has informed me whether these witnesses will be more likely to be found in Singapore in the case of Paul Ma, or in Malaysia in the case of George Chau, or are they both more likely to be found in England or elsewhere in the world. I am not sure if the party intending to call them knows in which country these two witnesses are likely to be found. Even if the party did

know, the question of the address of the place at which they can possibly be found to effect service of the subpoena will still remain. Without more, and if I have to take this factor into account, I am more inclined to weigh this factor on the basis of their last known place of residence, which is Singapore in the case of Paul Ma, and Malaysia in the case of George Chau. In any event, England is not featured in the *forum non conveniens* balancing equation where this particular connecting factor in relation to the compellability of these two ex-employees as witnesses is concerned.

82 For all the other potential witnesses ***still in the employ of the parties***, who are most likely to testify on behalf of their respective employers, their attendance can be ensured at the trial by the parties themselves, whether it is held in Singapore or in England without the need for any issue of subpoenas. Neither side will suffer any real prejudice. In any case, both parties have not said that witnesses who are still their employees will not be made available to testify, whether the trial is in Singapore or England. On the contrary, the plaintiff took pains during the hearing to impress upon me that it will facilitate the attendance of its London witnesses before the Singapore court, if the permanent stay application is not granted. Similarly, the defendant informed me that it will facilitate the attendance of its Singapore and Malaysian witnesses before the English court, if the action were stayed. As some of these potential witnesses are located in England and others in Singapore and Malaysia, I will not regard the convenience and cost factor to be weighing distinctly in favour either of Singapore or England for the trial. It is a fairly neutral factor in my judgment.

83 At this juncture, it is worth noting that Mr Alvin Yeo, counsel for the defendant, had informed me at the commencement of the hearing that essentially, the plaintiff and the defendant were innocent victims of the fraud. Counsel for the plaintiff did not take issue with that characterisation. If indeed they were both victims, then I do not believe that the defendant is seriously going to mount any argument at the trial that the plaintiff did not make any mistake because it made the payment knowing full well at that time that (a) the transaction and the notes were fraudulent and (b) the agreement, which was the result of the fraud, was invalid and not binding. I do not believe the defendant's defence to be that the plaintiff bank is a party to the fraud by knowingly facilitating it. If so, then the plaintiff might even have participated in money laundering. A mistake in making the payment due to negligence or due to pure ignorance of the true facts because of clever deception by the fraudsters is very different from a payment made knowingly to facilitate a fraud.

84 Neither do I believe that the plaintiff, in turn, will be seriously mounting an argument that the Singapore branch of the defendant remitted the payment to HSBC Hong Kong, knowing full well that the instructions received for that remittance were fraudulent. Again, I do not believe that the plaintiff is going to contend that the defendant bank is another party facilitating the fraud.

85 As both parties are going to proceed on the common ground that the agreement was invalid and not binding (see [139] for the undertaking provided by the plaintiff) and when one looks at the factual matrix in this case, it is clear that both parties basically accept that a fraud was perpetrated on both of them.

86 In essence, the facts as they are likely to unfold at the trial will be as follows:

(a) Part 1 of the fraud begins with the elaborate deception of the plaintiff which then ends with the plaintiff sending the payment to the Singapore branch.

(b) In Part 2 of the fraud, the Singapore branch was next deceived into remitting that payment out to HSBC Hong Kong, where I suppose the fraudsters withdrew the money.

87 Hence, unless parties are resorting to clutching at evidential straws, I do not think that they

will be calling or cross-examining the witnesses currently in their employ, to prove that neither the plaintiff nor the defendant was deceived or that each one of them had acted with knowledge of the fraud, which then goes against the grain of the accepted positions of both parties for the trial. If both parties are generally agreed that they were both deceived in turn to part with the money, then all the numerous witnesses mentioned who may have to be called because they handled the various transactions in their respective banks in one way or another, and who were probably deceived, are really not so essential, except perhaps for the two main witnesses, Callaghan and Francis. If that is the case, then the parties may save a lot of time and costs, if certain facts can be agreed to show that they were both innocent parties, whom the fraudsters (which may have included certain employees) managed to deceive through a fairly elaborate scheme, despite the security and verification systems having been put in place by the parties.

(5) Unjust enrichment and the proper law of the restitutionary obligation

88 In *Kartika Ratna Thahir v PT Pertambangan Minyak dan Gas Bumi Negara (Pertamina)* [1994] 3 SLR 257 at 270, the Court of Appeal cited the following Rule 230 (then known as Rule 201) in Dicey & Morris on The Conflict of Laws (14th Ed, 2006) ("Dicey & Morris"):

> (1) The obligation to restore the benefit of an enrichment obtained at another person's expense is governed by the proper law of the obligation.
>
> (2) The proper law of the obligation is (*semble*) determined as follows:
>
> > (a) If the obligation arises in connection with a contract, its proper law is the proper law of the contract;
> >
> > (b) If it arises in connection with a transaction concerning an immovable (land), its proper law is the law of the country where the immovable is situated (*lex situs*);
> >
> > (c) If it arises in any other circumstances, its proper law is the law of the country where the enrichment occurs.

89 At paragraph 34-017 of Dicey & Morris, the authors explained that the above are not inflexible rules:

> Clause (1) is therefore stated in the form of a general rule. Such a rule, because of its **flexibility**, enables account to be taken of the variety of restitutionary claims which may arise. It may be regarded as the general principle of which the particular solutions identified in clause (2) of the Rule are **examples**… (emphasis made)

90 In relation to Rule 230(2)(a), the Court of Appeal quoted with approval the following paragraph 34-020:

> Although the obligation to restore an unjust benefit does not arise *from* a contract, it may, and very frequently does, arise **in connection** with a contract. **This is the case where a party seeks to recover money paid pursuant to an ineffective contract**, *eg* by reason of a total failure of consideration or as a repayment of money paid under an illegal contract or where he claims a *quantum meruit* for work done or services rendered under a contract which turned out to be void**. In all these and similar cases, it is submitted that the existence and the scope of the obligation to restore the benefit are in principle governed by the law which governs the contract, or by what would have been the governing law of the contract, if it had been**

validly concluded. (emphasis made)

91 Paragraph 34-028 of Dicey and Morris states:

> [C]lause (2)(a) seeks only to assist in the identification of the proper law of the restitutionary obligation in circumstances of contractual failure; it does not state an inflexible rule which must be applied without exception to every case connected to a contract.

92 On the other hand, Rule 230(2)(c), which provides for the application of the law of the country where the enrichment occurs, generally applies to cases where there exists **no prior contractual relationship** between the parties (whether actual or supposed).

93 In my judgment, Rule 230(2)(c) may be applicable to:

(a) cases where the signature to an alleged contract is forged and the party purported to be a signatory to the contract does not even know the forged contract exists until perhaps after the forgery of that party's signature is discovered;

(b) cases where an employee on a frolic of his own enters into an alleged contract on behalf of his employer when clearly the employee has no real nor apparent authority to do so; and

(c) cases where the defence of *non est factum* to a claim under an alleged contract is made out.

94 In such cases, one (or more) of the named parties in the contract never intended to enter the alleged contract, and never knew of its existence or the terms stated therein. Leaving aside the question of whether the contract is subsequently established to be void or unenforceable for any other reason, no contract on the purported terms ***in fact*** exists as between the named parties. Since no contractual relationship exists, then any claim for unjust enrichment cannot be said to have arisen in connection with a contract (or a failed contract) at all, as that party never knew of the contract (or the failed contract) or its terms, and never did enter into nor intend to enter into such a contract (or failed contract) in question. Whatever may be the legal consequence, and whether the contract is to be regarded as void, voidable, invalid, illegal, ineffective or unenforceable, the fact remains that there is in reality no contract (or more particularly, no failed contract) in existence between them for there to be any connection to begin with for Rule 230(2)(a) to be applicable.

95 The above cases in [93] must therefore be distinguished from other cases, where the parties actually intended to and did knowingly enter into the contract. If that contract later fails or turns out to be void, voidable, invalid, illegal, ineffective or unenforceable in whole or in part, then Rule 230(2)(a) is applicable and not Rule 230(2)(c) because the obligation to restore the benefit of the enrichment has arisen *in connection with a (failed or partly failed) contract* that the parties nevertheless had entered into. Although the intended contract failed to achieve fully its purpose as a binding contract, the fact remains that the parties have at least attempted to make a fully enforceable contract to be governed by the putative system of law for that contract, or by the system of law they have chosen for the contract. Further, the parties may also have performed some of the obligations for that failed contract in the belief that it is an enforceable contract. If one were to apply the overarching general principle stated in [102], then in the majority of cases, the facts and circumstances are likely to point to the same system of law as that which would have been appropriate for the resolution of the contractual issues if the contract had not failed. Hence, Rule 230(2)(a) will appropriately apply to such cases, where it can properly be said that the restitutionary obligation has indeed arisen in connection with a contract, which for some reason has

failed or has become unenforceable.

96 However, the present case is very different from those cases where the contractual parties had entered into a contractual relationship, which failed. As a result of what is likely to be a scam in the present case, the plaintiff appears unfortunately to have been fraudulently induced to believe that it had entered into a valid and binding agreement with the defendant. The defendant in fact never entered or attempted to enter into any such agreement with the plaintiff. Therefore, no agreement in fact exists between them to begin with. In these circumstances, the restitutionary obligation cannot be said to have arisen in connection with any contract between them. As such, Rule 230(2)(a) has no application. The relevant rule is Rule 230(2)(c).

97 The commentary to Rule 230(2)(c) at paragraph 34-030 of Dicey & Morris makes clear that:

> Where money is paid to, or a benefit is conferred upon, another person with whom **no prior contract, or supposed contract, exists**, and it is alleged that the money or the value of the benefit is recoverable, e.g. because of a mistake of fact**, the enrichment is likely to be most closely connected with the country in which it occurred, and the obligation to restore it to be governed by the law of that country**. **The rationale for the traditional formulation of clause (2)(c) is that in the absence of a prior relationship between the parties to which reference may be made, or which may contribute to the identification of the proper law of the obligation to make restitution, 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.** (emphasis added)

98 It must be borne in mind that Rule 230(2)(c) is not an absolute rule that the law of the country where the enrichment takes place must invariably govern the restitutionary obligation. Much depends on the facts and circumstances of each case, and it might well be that in most cases, it usually turns out that the law of the place of the enrichment is the one that has the closest and most real connection with the restitutionary obligation. The learned authors of Dicey & Morris cautioned at paragraph 34-031 that:

> … in view of the diversity of situations in which a restitutionary claim may arise, it may be that the place of the enrichment will not always give an answer which corresponds to the law which has the closest connection with the claim. In some cases, there will be a pre-existing relationship between the parties which, though not contractual, may justify giving weight to the law which governed that relationship in the search for the law with which the obligation to make restitution has its closest connection; in other cases there may be no relationship prior to the event which gives rise to the claim for restitution. The suggestions which follow are put forward as possible solutions in those cases in which there may be a divergence between the place of enrichment and the law which has the closest connection with the claim.

99 In *Luiz Vicente Barros Mattos Junior v Macdaniels Limited* [2005] EWHC 1323, the English High Court stated at [117] to [118]:

> There is … no decision of the Court of Appeal in which approval of [the rule that provides that the proper law is the law of the country where the enrichment occurs], or the application of a similar principle, is the ratio… There is no decision that [the rule] must be treated as a free-standing rule mechanically applying the law of the place where bank accounts are kept irrespective of the factual circumstances and irrespective of the particular issue.
>
> Here parties in Nigeria agreed that one was to sell to the other dollars for delivery in Switzerland

> in exchange for Nigerian currency in Nigeria. This is just the kind of case where the law of the place of the enrichment will not necessarily give an answer which corresponds to the law which has the **closest connection** with the claim or with the issue. (emphasis added)

100 The plaintiff has given an undertaking (see [139]) that it will accept the defendant's position that the contract is invalid and not binding. The defendant's position is that George Chau had no authority to sign the agreement. Two authorised signatures are required for the agreement when the value of the transaction exceeds USD10,000. But the agreement has only one signature. It would appear from the alleged facts that the plaintiff was induced to part with the payment due to some fraudulent acts. In essence, the defendant's position is that no prior contract or supposed contract existed between the defendant and the plaintiff. Based on the plaintiff's undertaking and the position of the defendant as I have understood it, it must follow that there is ***no prior relationship*** between the parties to which reference may be made, or which may contribute to the identification of the proper law of the obligation to make the restitution. As the obligation could not have arisen in connection with any contract, then whatever the fraudulent contract may have stated to be the choice of the forum or the governing law is clearly irrelevant to the determination of the proper law that should govern the restoration of the alleged unjust enrichment.

101 I therefore agree with the submission of the plaintiff that in a situation where the contract and the express choice of law or jurisdiction clause have been impugned for fraud, it will be illogical to nonetheless consider them in the identification of the proper law of the obligation to make restitution. Instead,one must fall back on the general principle that the obligation to make the restitution is governed by the law of the country which has the closest and most real connection with the obligation. I reiterate that in most cases, that may well be the place where the enrichment has occurred, but not invariably so.

102 This overarching general principle referred to earlier is acknowledged at paragraph 34-014 of Dicey & Morris as follows:

> It has been seen that the general approach of the English conflict of laws rules has been to subject claims in the law of obligations to the law with which the obligation has its closest and most real connection… [T]he general principle remains one of identifying the law which has the most significant connection with the claim. It is therefore consistent with this approach that the general choice of law rule for restitutionary obligations is that they are governed by the proper law of the obligation. Once the claim has been classified as one to restore an unjust enrichment, and therefore governed by this Rule, it is necessary to determine what the proper law of the obligation is to be. It was explained above that the claim for restitution may be the consequence of a relationship between the parties, such as an ineffective contract, or may arise independently of any such relationship. It will be seen below that the proper law of the obligation to make restitution may be influenced by the law which governed the anterior legal relationship, but it is an error to suppose that it must be governed by it…

103 After considering all the relevant facts and circumstances in relation to the mistaken payment, I concluded that the place with the closest and most real connection with the obligation to restore the benefit of the alleged enrichment is clearly Singapore and not England. The Singapore branch received the payment and it was supposed to have acted in accordance with the SWIFT instructions of the plaintiff to pay over to the defendant's Inanam branch as the beneficiary. The Singapore branch apparently failed to do so. On some alleged instructions (probably fraudulent) from the Inanam branch, the Singapore branch remitted the payment instead to the HSBC account of the supplier of an alleged customer of the Inanam branch.

104 In my judgment, the governing law to determine the plaintiff's cause of action based on unjust enrichment and restitution should be Singapore law and not English law. This is another significant factor pointing towards a trial of the action in Singapore rather than England for the *forum non conveniens* analysis.

Third party actions

105 No third party action has as yet been commenced by the defendant, as it does not want to be seen to have taken a step in the proceedings before its application for a permanent stay of the action is heard.

(a) Third party claim against HSBC

106 Once its permanent stay application is decided, the defendant intends to bring a claim for unjust enrichment and restitution against HSBC Hong Kong seeking repayment of the money transferred to it on the basis that the defendant was itself also operating under a mistake when it followed the fraudulent instructions to re-transfer the payment to HSBC Hong Kong. The defendant's Singapore branch erroneously believed that the money belonged to a customer, V.V. Enterprise, of the Inanam branch. Had it known that the money represented the proceeds of fraud, the defendant says that it would not have made the transfer.

107 According to the defendant, HSBC Hong Kong may similarly raise a defence of change of position. If so, then it may well be that the restitutionary obligation to return the payment to the defendant is to be governed by the law of Hong Kong, which is the place where the proceeds of the fraud were received by HSBC Hong Kong.

108 This third party action appears to be connected with both Singapore and Hong Kong in different degrees. But it does not appear to me to have anything to do with England. Hence, I do not see how it can even remotely support the defendant's application to permanently stay the main action in favour of England.

(b) Third party claims against BPAL

109 The defendant also intends to bring third party claims against BPAL for negligence, breach of contract, contribution and conspiracy premised, *inter alia*, on the following alleged facts:-

(a) The defendant believes that Innaria and V.V. Enterprise engaged BPAL to arrange investors to purchase the notes in return for a commission and a large fee of USD695,000 and yet BPAL appears to have carried out almost no due diligence. The plaintiff was in fact BPAL's "closing bank" and BPAL's London office arranged for the plaintiff to become involved in the transactions relating to the notes.

(b) BPAL failed to investigate Innaria and the underlying Innaria project. It failed to identify that the underlying project was completely fictitious. BPAL was clearly negligent, and a failure to investigate is tantamount to acting recklessly. BPAL failed to ask obvious questions for fear it might find out the truth that the transaction was a fraud. BPAL knew that the defendant, who charged no fee, and the plaintiff, who charged only USD21,000, was in no position to carry out due diligence.

(c) BPAL also co-ordinated the actions of George Chau, an ex-employee in the Inanam branch, who was later found by an internal investigation to have acted fraudulently in endorsing the

notes without authority. BPAL must have known that he was acting without authority, or failed to enquire, which would be evidence of negligence and recklessness.

(d) Innaria was a dormant company without its own premises at the time of issuing the notes. BPAL failed to investigate Innaria's financial position and ability to meet its financial obligations under the notes or was wilfully blind to evidence which showed Innaria's true financial position. If BPAL had investigated, then it would have been obvious that Innaria's claims to be a sub-contractor in a USD200m government project were false.

(e) BPAL also arranged other fraudulent schemes including a second tranche of Innaria promissory notes for USD15m which was never paid because the fraud was identified by the defendant. Notes for other Malaysian entities Safire and Citra Pedoman were also later found to be fraudulent. The defendant further contends that it is unlikely that BPAL arranged all these transactions without knowing that they were fraudulent.

110 The plaintiff submits that the intended third party claims against BPAL should be heard separately from the present action against the defendant, which involves very narrow and quite different issues based on mistake and total failure of consideration. According to the plaintiff, there is nothing to stop the defendant from proceeding separately against BPAL and HSBC Hong Kong in England. Once these claims against them have been filed and served, the defendant can also apply to stay the action in England, pending the outcome in Singapore.

111 To determine whether the alleged third party claims should be allowed to be brought in the present action, regard in my view must be had to Order 16 r 1 of the Rules of Court (Cap 322, R 5, 2007 Rev Ed) which states that:

Third party notice (O. 16, r. 1)

1. —(1) Where in any action a defendant who has entered an appearance —

(a) claims against a person not already a party to the action any contribution or indemnity;

(b) claims against such a person any relief or remedy relating to or connected with the original subject-matter of the action and substantially the same as some relief or remedy claimed by the plaintiff; or

(c) requires that any question or issue relating to or connected with the original subject-matter of the action should be determined not only as between the plaintiff and the defendant but also as between either or both of them and a person not already a party to the action,

then, subject to paragraph (2), the defendant may issue a notice in Form 16 or 17, whichever is appropriate (referred to in this Order as a third party notice), containing a statement of the nature of the claim made against him, and, as the case may be, either of the nature and grounds of the claim made by him or of the question or issue required to be determined.

112 The Singapore Court Practice 2006 (LexisNexis, 2006) at para 16/4/4 states that:

There may be circumstances in which the third party has no concern in the suit between the plaintiff and the defendant. Here the court may determine that there may be nothing to be gained from determining all matters at once and direct that the third party dispute be adjudicated after the main action, particularly if a common proceeding would prejudice or embarrass the

plaintiff.

113 Hence, where the intended third party claim is one that is unlikely to have any real and significant connection with the subject matter in the main suit in Singapore between the plaintiff and the defendant, and one that is likely to prejudice and embarrass the plaintiff if tried in the same proceedings when it should properly be the subject of a separate action to be adjudicated after the main action, then it goes without saying that little weight will be given to the mere existence of an intention to file such a third party claim, even if such an intended third party claim (viewed on its own) is more appropriately tried elsewhere *e.g.* in England. But if the intended claim against a third party is likely to satisfy Order 16 r 1 and is likely to be allowed as a third party action to be heard together with the main action, then it should in my view be given appropriate consideration in the overall *non forum conveniens* equation, and should not be ignored.

(c) Effect of third party claims in consideration of the appropriate forum

114 Counsel for the plaintiff referred me to *Nam Kwong Medicines & Health Products Co Limited v China Insurance Company Limited* [1999] HKCU 1216, where the defendant applied to stay the plaintiff's Hong Kong action in favour of Singapore on the basis that Singapore was a more natural and appropriate forum for the trial of the action and for all connected litigation including third party proceedings. *Inter alia*, the defendant relied on a third party claim which it intended to bring in Singapore (under its statutory right to contribution). The Hong Kong High Court held:

> [A]t the end of the day [Counsel for the defendant's] argument under this head is dependent upon suggesting potential problems in the context of a *separate* (albeit related) action between two insurers which has not yet seen the light of day, either in Hong Kong or in Singapore. And persuasively though this line of argument was advanced, in my view it is a somewhat ambitious approach to justify a stay of existing Hong Kong proceedings on the basis of an action not yet in existence.
>
> It clearly remains open to the Defendant to mount third party proceedings within the context of the existing action, and in my judgment the mere fact that a potential contributory is based in Singapore does not suffice to get the Defendant home on this application.

115 Plaintiff's counsel also cited *The Standard Steamship Owners' Protection and Indemnity Association (Bermuda) Ltd v Gann and another* [1992] 2 Lloyd's Rep 528. After the plaintiffs there sued the defendants in England, the defendants instituted proceedings against the plaintiffs and its brokers (the main third parties) in San Diego. The defendants sought to stay the English proceedings in favour of San Diego. It was contended that the dispute should be looked at as a whole, with regard not only to the dispute between the plaintiffs and the defendants, but also the dispute between the defendants and the third parties. It was further contended that all these disputes should be tried together in one single action to avoid the risk of inconsistent decisions. The English High Court said at 536-537:

> While in my judgment the main emphasis in the present context must be on the dispute between the plaintiffs and the defendants in these English proceedings, I consider that Mr Gaisman's "tail wagging the dog" argument puts the matter too high, and that regard must also be paid to the defendants' claim against their brokers and the other third parties in the Californian proceedings.
>
> Even on this wider basis, however, I am satisfied that the centre of gravity of the case is in London and not in California for the following reasons, not necessarily in order of importance:

(i) On all the main issues the crucial point of contact is in London between the London brokers and the plaintiffs. The witnesses relevant to these aspects are in London, and the relevant documents will mainly be in London.

(ii) The present defendants' claims against third parties, who are by no means all United States-based, will only arise if the plaintiffs succeed in their claim against the defendants.

116 I note that the above two cases cited by counsel for the plaintiff do not stand for the proposition that no attention should be paid to the factor of third party proceedings when evaluating the *forum non conveniens* factors. Depending on the facts and circumstances of each case, the appropriate weight to be given to the potential third party proceedings will vary.

117 The defendant in my view rightly contends that the contemplated third party actions and their likely impact on the main proceedings are relevant to the consideration of the appropriate forum. Where a defendant intends to initiate third party proceedings which come within the requirements of Order 16 r 1, it is generally convenient, in the interests of justice and in saving court time and costs, for those proceedings to be determined at the same time, and in the same court, as the main proceedings. These considerations according to defendant's counsel were considered in a number of cases. In *Baring Futures (Singapore) Pte Ltd (in liquidation) v Deloitte & Touche (a firm) & Anor* [1997] 3 SLR 312, Lai Kew Chai J opined at [2] that:

> ... only by bringing all the principal players together before one forum for adjudication could the responsibility be justly, sensibly and more efficiently ascertained and distributed between those concerned...This approach would avoid the potential disaster of inconsistent verdicts which could be given if similar disputes with overlapping facts involving the same or different parties were litigated before two courts in two different jurisdictions...

118 Counsel for the defendant also cited *IPCO International Construction Limited v S T Kay & Co & Anor* [1998] SGHC 198 ("*IPCO International Construction*"), where there were two applications before the court - one by the defendants and the other by the third party, to stay the main action and the third party proceedings in Singapore in favour of proceedings already before the Philippines court. The defendants' solicitors contended that if the court granted the third party a stay, then the main action should also be stayed in favour of the Philippines action. The plaintiffs' counsel contended that the main action was independent of the third party proceedings which had a life of its own and hence any stay of the third party proceedings should not affect the main action and should not be a valid reason for staying the main action.

119 Counsel for the defendant referred me to the following passage where the High Court opined that:

> 36. In my judgment, one had to consider the entire circumstances of the case and the nature of the proceedings. In this case, the matters involving the third party and the plaintiffs were inextricably linked to the dispute between the plaintiffs and the defendants…
>
> 41. ...In my judgment, the entire proceedings involving all three parties should properly be before the same Court. I regarded the third party proceedings as an integral and inseparable part of the main action. The defendants in the third party proceedings were not claiming for any contribution or indemnity from the third party. Therefore, it would not be right to stay the third party proceedings in favour of the Philippines proceedings but to allow the action between the plaintiffs and the defendants to be tried in Singapore. Multiplicity of closely related proceedings continuing simultaneously before different courts in different jurisdictions was obviously

undesirable. Concurrent litigation involving the same parties and the same issues leads to unnecessary expense and inconvenience to the parties, quite apart from the very real risk of conflicting decisions being handed down. Multiplicity of proceedings in Singapore and abroad as a consequence of refusing a stay is a significant factor to be taken into consideration under the doctrine of *forum non conveniens*.

120 I note that in *IPCO International Construction,* the third party proceedings had already been brought and the third party was in fact applying for a stay of the third party action in favour of the Philippines, and that the third party proceedings there were an integral and inseparable part of the main action.

121 In the present case before me, I recognise that the defendant has not yet commenced any third party proceedings, not because it does not want to but because it wants the permanent stay application, and the question of the appropriate forum to be determined before taking any steps to file the third party proceedings. From the alleged facts presented by the defendant, I am quite certain that the defendant is serious about bringing those third party proceedings against BPAL and HSBC Hong Kong, once the court has adjudicated the permanent stay application and determined the appropriate forum.

122 The defendant submits that the payment that was transferred to HSBC Hong Kong is clearly intertwined within the same factual matrix. Nevertheless, it has not been ascertained whether the intended third party actions will prejudice or embarrass the plaintiff and the third parties, and whether they should be adjudicated after the main action has been heard and determined, especially where the circumstances are such that the third parties may well have no real concern in the suit between the plaintiff and the defendant, and nothing much could be gained from determining all the varied and somewhat different matters and issues at the same trial (*e.g.* arising from claims of negligence, breach of contract and conspiracy against BPAL by the defendant).

123 On the face of it, it does appear to me that the claims against BPAL for negligence, breach of contract and conspiracy might well complicate matters, significantly enlarge the scope of the issues to be tried, many of which may be of no concern to the other parties (*e.g.* the plaintiff or the other potential third party, HSBC Hong Kong), and it may therefore prolong the main trial unnecessarily and make it more costly and inconvenient overall for all the parties involved (as opposed to a situation where the intended multiple third party actions were to be tried separately from the main action). If so, then it appears that this intended third party action against BPAL is not likely to add much weight to those other connecting factors pointing towards England as the appropriate forum for the main action.

124 In any case, these matters concerning the potential third parties will probably be fully ventilated, if and when an application is taken out to have the third party actions tried separately or to have the third party actions stayed in favour of some other more appropriate jurisdiction to try the matter between the defendant, and BPAL and HSBC Hong Kong. The third parties themselves will then also have the opportunity to present their position fully on the matter.

125 For these reasons, I believe that it is more prudent to put aside the issues referred to in [122], and not have them influence to any substantial degree, the evaluation that I have to consider here, which is whether or not to stay the main action in favour of England. This does not mean that for the *forum non conveniens* evaluation, I have not considered the location and compellability of the BPAL's employees who had dealt with the plaintiff or the defendant, in so far as they may be relevant witnesses for the ***main*** action (*e.g.* in relation to whether the plaintiff had made the payment in the mistaken belief that the agreement was valid and binding).

126 But if I have to decide the issue, and factor that decision (on the intended third party actions by the defendant) in the evaluation of the *forum non conveniens* equation, then my position will be that the claim by the defendant against BPAL is more suitably tried in England, and also tried separately and not as part of the main suit between the plaintiff and the defendant, because the nature of the defendant's claims against BPAL in particular for negligence, breach of contract and conspiracy are clearly very wide ranging, and very different from the more straightforward claims by the plaintiff against the defendant for mistake and failure of consideration. The factual matrices for the two sets of claims are also very different although both may have originated from the same USD10m notes issued by Innaria. It does not appear to me to be appropriate to append the third party action to the main action, which is focussed on fairly narrow issues. Second, the contribution claim against BPAL is also dependent upon the defendant being found liable first to the plaintiff in the main action, and that must be determined first. Overall, I believe that it is going to be very costly, time consuming and unnecessary for the plaintiff's main action to be bogged down by what appears to me to be long and very involved proceedings between the defendant and BPAL with multiple claims under very varied causes of action.

127 However, at the present point in time and without prejudging the issue, without all the facts and without hearing BPAL, I can only have a tentative view that the defendant's claims against BPAL are more suitably tried in a separate action (and probably, also more appropriately tried in England) after the main action in Singapore is heard. They are not so inextricably linked that BPAL must be joined as a third party to the action. If so, then I do not think that the intended claims of the defendant against BPAL help advance the defendant's permanent stay application to any significant degree. For these reasons, I am giving the intended third party claims against BPAL very minimal weight in the evaluation of connecting factors for the *forum non conveniens* equation.

Undertaking by plaintiff provided at the hearing and determination of the appropriate forum

128 The statement of claim contained the following paragraph:

> 10. It is the Plaintiff's position that all transactions relating to the Notes are valid. In particular, it is the Plaintiff's position, *inter alia*, the Notes, the Avals, the BCB-Dresdner contract and the Dresdner-DF contract are valid. The Plaintiff's position is evident in the German Proceedings where the Plaintiff has expressly asserted in its defence that the Notes and the Avals are valid.

129 The plaintiff's position appears to be that all the transactions relating to the notes are valid, including the notes, the avals and the agreement.

130 In the German proceedings before the District Court of Munich 1, the plaintiff had also taken the position that:

> (a) The promissory notes and the aval guarantees were authentic and legally effective on the basis that the promissory notes issued by Innaria had been used to finance the acquisition of building materials from the company V.V. Enterprise;
>
> (b) Innaria had in fact been commissioned as the subcontractor of the general contractor SBCT Port-Kebangan Resources JV in the context of a governmental construction project of Jabatan Kerja Raya; and
>
> (c) George Chau was in fact authorised to sign for the defendant a first side letter with regard to the notes according to the presented list of signatures.

131 Although the plaintiff does not state in the statement of claim that it is relying on any clause in the agreement to further strengthen its claim, nevertheless the plaintiff can potentially, with a subsequent amendment to the statement of claim, rely on the strict guarantees and warranties provided by the defendant in the agreement with respect to the legal existence of the aval guarantees of Jabatan Kerja Raya, which secured the sold promissory notes. Further, the defendant also vouched in the agreement that the signatures of the purported officers of the Jabatan Kerja Raya and Inanam were genuine and authentic, and that the officers had the relevant authority.

132 The guarantee and warranty clause 4.3 in the agreement states that:

> The Seller [*i.e.* the defendant] guarantees and warrants
>
> - the legal existence of the Promissory Note and of the Aval sold to BUYER [*i.e.* the plaintiff] hereunder
>
> - the legal effectiveness of the endorsements in favour of BUYER
>
> - that it has received a warranty from the Vendor or from the Obligor/Guarantor that all consents and approvals necessary for the underlying transaction and the free transfer of funds in effective currency, if any, have been duly obtained
>
> - that it has received a warranty from the Vendor that the delivery of the goods has been or will be duly executed in full, paying attention to all relevant domestic and foreign laws.

133 Under clause 6.2 of the agreement, all warranties and guarantees are given, regardless of fault, by the seller with claims under these warranties and guarantees made subject to a limitation period of 5 years after the maturity date of the notes (*i.e.* 3 Feb 2009). There is also the possibility of the German proceedings concluding before the 3 Feb 2009. There is also the possibility of the plaintiff discontinuing their appeal in the German proceedings, which then means that the plaintiff can proceed immediately with its action against the defendant.

134 Should the court find the agreement to be valid and enforceable, the defendant will likely be fully liable under the strict warranties and guarantees provided to the plaintiff in the agreement.

135 But I could not be certain that if I disallowed the permanent stay application and allowed the action to continue in Singapore, the plaintiff would not later amend the statement of claim (should it later proceed in Singapore after failing in the German courts), and then rely fully on all its rights under the alleged agreement, which would then change the entire *forum non conveniens* analysis.

136 It will be prejudicial to the defendants if I dismissed the defendant's permanent stay application merely on an **assumption** that the plaintiff is not contesting the validity of the agreement. What if the plaintiff later amends the statement of claim to include further causes of action pursuant to the warranties and guarantees? It is not apparent on the face of the statement of claim that the validity of the agreement is a dead issue.

137 On the issue of the validity of the agreement, there are very strong factors distinctly pointing to England as being clearly the more appropriate forum to try the action.

138 In fact, I am quite minded to allow the defendant's application to permanently stay the action in favour of England, if the issue on the validity of the agreement remained a live issue between the

parties as this, in my view, is a critical issue in dispute, involving a number of witnesses and documents in England and also an agreement, which if valid would have to be construed in accordance with English law.

139 In order to resolve this doubt before I made any decision on *forum non conveniens*, I asked if counsel, on behalf of the plaintiff, was prepared to give an undertaking that the plaintiff will not, in this action, be arguing that the agreement is valid, and neither will the plaintiff be relying on the guarantees and warranties in the agreement to further its claims. After taking instructions, counsel for the plaintiff, Mr Bhavish Advani, reverted to me and agreed to provide the undertaking which I recorded in the following terms:

> Will undertake on behalf of the plaintiff that in this action in Singapore, plaintiff will not take the position that the agreement is valid and the plaintiff will not pursue their rights (if any) under the agreement in this action.

140 With the undertaking in place, it becomes very clear that the dispute on the issue of the validity of the agreement is settled and the plaintiff can no longer reverse its position in this action. The trial will then proceed on the basis that both parties are taking the ***same*** position that the alleged agreement is invalid and not binding. The scope of the factual dispute between the plaintiff and the defendant is consequently narrowed. The number of relevant witnesses is reduced considerably. Much time and expense will be saved.

141 Since most of the submissions of the defendant in support of its permanent stay application relates to the issue of the validity of the alleged agreement, the shape of the *forum non conveniens* equation changed dramatically after the undertaking of the plaintiff was put in place. The fact that clause 6.5 of the alleged agreement provides that the transaction is to be governed by and construed in accordance with the laws of England does not matter anymore, since the parties are going to proceed on the basis that the agreement is invalid and not binding. The fact that the confirmation letter accompanying the notes states that the notes will be governed and construed in accordance with English law and that Innaria and Jabatan Kerja Raya have irrevocably submitted to the non-exclusive jurisdiction of the courts of England does not matter anymore. The oral testimony of the witnesses and the documentary evidence in relation to the transactions leading up to the finalisation and confirmation of the alleged agreement by the plaintiff also do not really matter anymore. Whether the necessary authorisation had been given to George Chau to sign the letters, documents and the agreement becomes irrelevant. Whether one or two authorised signatures were necessary for the agreement also do not matter anymore.

142 The consequence of the undertaking is that both parties at the trial will not dispute that the agreement, the notes, the warranties and the aval guarantees are invalid and non binding. Both parties are precluded from asking the court to enforce the agreement, the notes or any of the terms therein.

143 Taking full account of the ***remaining issues in dispute***, I can no longer see why England should be the clearly or distinctly more appropriate forum than Singapore. In fact, Singapore is plainly the more natural and appropriate forum for the trial of the remaining live issues because the following factors connected the remaining issues in dispute more distinctly with Singapore than with England:

(a) The defendant's unjust enrichment occurred in Singapore;

(b) The plaintiff's causes of action principally for restitution, payment under a mistake and for money had and received arose in Singapore;

(c) The defendant's alleged change of position occurred in Singapore;

(d) The defendant's state of mind, if and when it changed its position will, *inter alia*, be that of its employees in its Singapore branch. In any event, witnesses who are still employees of the defendant or the plaintiff will be readily made available at the trial by the parties themselves wherever that trial is held.

(e) For witnesses who are not employees, Paul Ma (if he can be found) is likely to be in Singapore. George Chau (if he can be found) is likely to be in Malaysia.

(f) The documents relating to the defendant's alleged change of position are mainly in Singapore;

(g) The governing law of the plaintiff's action in restitution is Singapore law;

(h) It is undisputed that the Singapore courts have jurisdiction over the plaintiff's present action.

(i) It is undisputed that the defendant has a presence in Singapore and carries on business in Singapore.

144 Since the defendant has failed to discharge its burden to show that there is another forum (*i.e.* England in this case) which is clearly or distinctly more appropriate than Singapore to try the action, I refused the application of the defendant for a permanent stay of the plaintiff's action in Singapore.

Plaintiff's application for a temporary stay

145 I turn now to the plaintiff's application for a temporary stay. If the plaintiff succeeds in the German proceedings, the plaintiff will discontinue the action here as it will then have suffered no loss. The present action is commenced as a precautionary measure to avoid the time bar (which the plaintiff believes is 6 June 2008, being 6 years after the defendant received the payment for the notes from the plaintiff). Therefore, the plaintiff's prayers for recovery of monies and interest from the defendant are made contingent on a final and binding judgment against the plaintiff in the German proceedings.

146 The plaintiff submits that the temporary stay will cause no prejudice to the defendant. Both parties will avoid wasted costs and expenses, if the German proceedings are resolved in the plaintiff's favour.

147 Counsel for the plaintiff cited the following cases in support of the contention that the plaintiff is entitled to apply for a stay of its own action:

(a) In *Deaville and Others v Aeroloft Russian International Airlines* [1997] 2 Lloyd's Rep 67, the plaintiffs sued the defendants in both France and England in respect of an air accident. The English High Court said at 69:

> [T]he present proceedings in the English High Court have been commenced simply as a precautionary measure should the case in the French Court fail for want of jurisdiction. Thus if the French Court finally determines that there is no jurisdiction to entertain the claims, the proceedings in England will continue. If however the French Court finally determines that it has jurisdiction, then presumably the English plaintiffs will discontinue their proceedings [in

England].

The English High Court later held at 70 and 75 that:

> [T]he Court has power under its inherent jurisdiction to grant a plaintiff an order staying an action brought by him if such an order is appropriate in the interest of justice. …
>
> As regards the plaintiffs' application for a stay, in the exercise of its inherent jurisdiction of the Court I believe such an order is sensible pending the outcome of the litigation in France on the jurisdictional questions. It makes no sense to compel the plaintiffs to be put to additional expense in pursuing English proceedings until the outcome of the French proceedings on jurisdiction is known.
>
> In the result I grant the plaintiffs' application for a stay of these proceedings…

(b) In *The Al Dhabiyyah* [1999] 4 HKC 414, the plaintiffs sued the defendants in Singapore. The defendants contested the jurisdiction of the Singapore courts. As a protective measure, the plaintiffs issued proceedings in Hong Kong before the time bar and applied to stay their own Hong Kong action pending a decision by the Singapore courts. The Hong Kong Admiralty Court granted the plaintiffs' application and held at 419-420:

> The *Arthur Anderson* and *Aeroflot* decisions are both in favour of a temporary stay pending the result of the foreign jurisdiction dispute, as **there was no sense in forcing the local proceedings to continue when a favourable outcome in favour of the foreign proceedings** (in *Arthur Anderson* case New York, in *Aeroflot* case France and in our case, Singapore) **would render it unnecessary to further continue with the local proceedings**. In both cases, that was obviously the just and right thing to do and therefore in both cases, the English court thought 'fit to' so order the temporary stay pursuant to its inherent jurisdiction as confirmed by the English statutory equivalent of our s 16(3).
>
> The very simple question in our case is should I apply the same reasoning and decision as made in the *Arthur Anderson* case and the *Aeroflot* case. I have no doubt that the answer is yes. I can put my yes answer on a number of basis:
>
> (1) Because I think fit to do so, using the language of s 16(3) of the High Court Ordinance;
>
> (2) Because as a matter of case management of my Admiralty List, I regard it as right that a temporary halt of this Hong Kong action should be called pending the outcome of the Singapore jurisdictional dispute. In arriving at this decision, **I take into account not only the balancing exercise between the plaintiffs and the defendant but also the wasted demand made on the Admiralty Court's time and resources to continue with this Hong Kong action which very likely might be abandoned some months later. Modern case management considerations certainly call for my exercise of discretion in favour of the plaintiffs**;
>
> (3) Because **it would be unjust not to do so, as the plaintiffs would be exposed to the wastage of time and expense in the event that the plaintiffs are successful in Singapore resulting in their not pursuing the Hong Kong action** whereas the only disadvantage to the defendant by the order of temporary stay is that this High Court action might be delayed by a few months, if it should later continue. There is further the possibility though disavowed by Mr Dunlop that the defendant will use any refusal to stay or

continuation of Hong Kong proceedings as part of its reason for seeking the Singapore stay.

In the particular circumstances of this case, I have little hesitation in exercising my discretion in favour of the stay sought by the plaintiffs… (emphasis added)

148 Hence, it is clear that the court has the power to, and it may, in its discretion, grant a temporary stay of the plaintiff's action to await the outcome of some foreign proceedings, even though the application is brought by the plaintiff. However, the plaintiff must show that the temporary stay is justified. The court will have to consider all the relevant circumstances and weigh all the factors, including whether the defendant will be prejudiced by such a temporary stay, in order to determine whether a temporary stay is the most sensible and just course of action, having regard not only to the interests of the parties, the savings of time and costs, but also the need for the courts to ensure that actions are not unnecessarily delayed and are concluded within a reasonable time frame, which is an important aspect of the fair, efficient and just system of administration of all the cases filed in the courts. Where appropriate and in order to do justice to the parties, the court may, in its discretion, attach whatever conditions it deems fit, including that of structuring the temporary stay orders so that certain parts or certain aspects of the action may still proceed. A temporary stay order need not invariably be an absolute stay order.

Time bar issues

149 The defendant contends that the temporary stay application up to the conclusion of the German proceedings, if granted, will prejudice its intended third party claims because of the fast approaching time bar on 6 June 2008 with respect to those third party claims.

(a) Time bar for claims against HSBC Hong Kong for unjust enrichment, for recovery of payments made by mistake and for money had and received

150 Section 29(1) of the Limitation Act (Cap 163, 1996 Rev Ed) ("the Act") provides:

Postponement of limitation period in case of fraud or mistake

29. –(1) where, in the case of any action for which a period of limitation is prescribed by this Act –

(a) the action is based upon the fraud of the defendant or his agent or of any person through whom he claims or his agent;

(b) the right of action is concealed by the fraud of any such person as aforesaid; or

(c) the action is for relief from the consequences of a mistake,

the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it.

151 The action must first be one for which there is a period of limitation prescribed by the Act before section 29 becomes applicable to postpone the date of commencement of that limitation period to the date of the discovery (or "deemed discovery") of the fraud or the mistake after the date of actual accrual of that cause of action. The date of the "deemed discovery" is the date at which the plaintiff could with reasonable diligence have discovered the fraud or the mistake.

152 The HSBC third party action appears to be based on a claim for unjust enrichment and

restitution, which is neither grounded in tort or contract, but on a mistake as a result of a fraud, therefore the Act may not apply.

153 In *Management Corporation Strata Title No 473 v De Beers Jewellery Pte Ltd* [2002] 2 SLR 1, the Court of Appeal held at [32]:

> A perusal of the Limitation Act showed that a claim for unjust enrichment which was neither grounded in contract nor tort, and in which equitable relief was not sought, did not fall within the scope of the Act. Hence s 29 was irrelevant, and there was no need for an inquiry as to when the respondent first knew of the mistake, or could with reasonable diligence have known of the mistake.

154 As such, I do not think that the defendant's third party action for unjust enrichment and restitution against HSBC is prejudiced by an unconditional temporary stay of the whole action.

(b) Time bar for contribution claim against BPAL

155 I agree with the plaintiff's submission that a contribution claim brought in Singapore becomes time barred two years after the right to contribution accrues. Section 6A of the Act provides as follows:

> **Special time limit for claiming contribution**
>
> 6A. — (1) Where under section 11 of the Civil Law Act (Cap. 43) any person becomes entitled to a right to recover contribution in respect of any damage from any other person, no action to recover contribution by virtue of that right shall, subject to subsection (3), be brought after the end of the period of 2 years from the date on which that right accrued.
>
> (2) For the purposes of this section, the date on which a right to recover contribution in respect of any damage accrues to any person (referred to in this section as the relevant date) shall be ascertained as provided in subsections (3) and (5).
>
> (3) If the person in question is held liable in respect of that damage —
>
> (a) by a judgment given in any civil proceedings; or
>
> (b) by an award made on any arbitration,
>
> the relevant date shall be the date on which the judgment is given or the date of the award, as the case may be.
>
> (4) For the purposes of subsection (3), no account shall be taken of any judgment or award given or made on appeal in so far as it varies the amount of damages awarded against the person in question.
>
> (5) If, in any case not within subsection (3), the person in question makes or agrees to make any payment to one or more persons in compensation for that damage (whether he admits any liability in respect of the damage or not), the relevant date shall be the earliest date on which the amount to be paid by him is agreed between him (or his representative)and the person (or each of the persons, as the case may be) to whom the payment is to be made.

156 Since the defendant's right to contribution will only accrue after the plaintiff obtains a judgment against the defendant or after the defendant has agreed on an amount that it will pay the plaintiff in compensation of the plaintiff's claim, no time bar will have set in by the time the outcome of the German proceedings is known, and the temporary stay is finally lifted.

(c) Time bar for claim against BPAL for the tort of conspiracy

157 Section 6 of the Act provides that actions founded on tort (which includes the tort of conspiracy) shall not be brought after the expiration of 6 years from the date the cause of action accrues. Where the right of action (which falls within the Limitation Act) is concealed by fraud, section 29 of the Act (see [150]) further provides that the period of limitation shall not begin to run until the plaintiff has discovered the fraud or could with reasonable diligence have discovered it.

158 There are several events or dates which have to be considered in relation to the time bar for a claim against BPAL for the tort of conspiracy:

(a) The date the conspirators completed planning the conspiracy. At this stage, the conspirators have not carried out their plan;

(b) The date of discovery (if any) of the conspiracy before the damage is suffered in consequence of the execution of the plan by the conspirators. The victim sometimes cannot prevent the ensuing damage or loss even though the conspiracy is discovered early;

(c) The date the damage or loss is actually suffered. It does not necessarily mean that the conspiracy must have been discovered by this time. The conspiracy may remain hidden although loss or damage is suffered.

(d) The date the conspiratorial plan is finally discovered or could with reasonable diligence have been discovered by the victim.

159 In my judgment, the cause of action for a tort of conspiracy can only crystallise or accrue after the damage is suffered. Hence, the limitation period cannot begin before the time that the victim has suffered any loss or damage pursuant to the conspiracy. However, if the victim still remains unaware of the conspiracy at the time of the loss or damage (by which time the cause of action will have accrued), then the limitation period is postponed to the date that the victim first discovers the conspiracy or could with reasonable diligence have discovered it, whichever is the earlier of the two.

160 On the bare facts of this case, I can only say tentatively that the conspiracy could possibly have been discovered as early as May 2002, when the defendant's Kuala Lumpur branch was notified of possible security problems regarding the notes and that George Chau did not have the authority to sign the agreement. This early discovery unfortunately failed to prevent the fraud and the subsequent loss was suffered on 6 June 2002 when the Singapore branch remitted the payment to HSBC Hong Kong pursuant to fraudulent instructions emanating from the Inanam branch. In my view, the limitation period for the conspiracy claim against BPAL may well start to run from 6 June 2002. As such, the 6 year time bar crystallises on 6 June 2008. If the defendant is not allowed to file its intended third party in this suit because of the temporary stay, then the defendant will indeed be prejudiced.

161 Suppose the defendant never realised or found out that the instructions to remit the payment to HSBC Hong Kong were fraudulent, until much later when the matter blew up on the date the notes were dishonoured on 3 February 2004 or soon thereafter. I presume those in the chain of sale and

purchase of the notes would be frantically contacting each other soon after Innaria dishonoured the notes. If so, the time bar for the defendant's third party claims against BPAL may well be postponed to 3 February 2010. However, this date is much too close for comfort since the estimated date of conclusion of the German proceedings is towards the end of 2009. It is not possible to predict whether there will be any delays.

162 I do not accept the plaintiff's submission that the limitation period for the defendant's claim against BPAL in tort for conspiracy starts to run only from the date of the final determination of the plaintiff's liability to SFS by the German courts. The time bar for the tort of conspiracy is not quite the same as that for a claim for contribution.

163 In the circumstances, I do not regard the time bar issue for the tort of conspiracy as something fanciful that has been raised by the defendant. It is a substantive matter of real concern. It will, I believe, prejudice the defendant if the temporary stay order of the AR is not modified to allow the defendant to file third party actions in this suit, if it so wishes, in the meantime.

164 In any event, whether the time bar defence is in fact available to BPAL as the potential third party is properly a matter between BPAL and the defendant. No doubt at that stage, the courts will have the full facts to determine the date the fraud was discovered or could with reasonable diligence have been discovered, and the date of commencement of the limitation period for the tort of conspiracy.

(d) Time bar for negligence and breach of contract against BPAL

165 The relevant date for the commencement of the limitation period for the defendant's causes of action in negligence and breach of contract against BPAL cannot be ascertained without the full facts. There may also be postponement to a later date if section 29 of the Act applies. For the same reasons in the preceding paragraphs under ***(c)*** above (see [157] to [164]), I do not think that the time bar issues in respect of these intended claims are fanciful concerns of the defendant.

(e) Prejudice to defendant arising from time bars if the temporary stay were to be absolute

166 In the interest of justice, the most prudent and just order to make under the circumstances is a temporary stay on certain terms, because **some** of the intended third party claims are subject to a time bar, which may well set in before the temporary stay is lifted.

167 Subjecting the temporary stay to a condition that allows the defendant to bring any third party actions it deems fit, in my view, will achieve a fair result, bearing in mind the prejudice that may arise from time bar defences for some of the intended causes of action against third parties. I am also not stopping the plaintiff or any third party from making any application under Order 16 at the subsequent hearing of the third party directions (whilst the temporary stay is still in place). For instance, the third parties themselves may want to apply to strike out the third party actions.

168 A temporary stay subject to such a condition will remove all potential prejudice to the defendant with regards to the time bars. It also avoids any inadvertent conferment of a juridical advantage (of a time bar defence) on the third parties.

Orders Made

169 Accordingly, I dismissed the permanent stay application by the defendant and varied the temporary stay order granted by the AR such that it applied only to the substantive hearing of the

suit as between the plaintiff and the defendant. There is no stay of any third party action that the defendant may wish to bring now to stop the limitation periods (if any) from running.

170 Although I dismissed the permanent stay application, I made no order as to costs because the plaintiff's undertaking not to challenge the defendant on the validity of the agreement was only given at a very late stage of the hearing after almost all the arguments had been heard. The defendant might well have succeeded in its permanent stay application, if the legality of the agreement had remained a contested issue between them.

171 As for the temporary stay application by the plaintiff, I also made no order as to costs because I had to vary the AR's order to avoid prejudice to the defendant arising from the likelihood of the time bar for certain third party claims setting in before the temporary stay could be lifted. On this, I had disagreed with the plaintiff that the defendant would not suffer any possible prejudice from the temporary stay.