IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2017] SGCA 49

Civil Appeal No 112 of 2016

Between

(1) Trisuryo Garuda Nusa Pte Ltd

… *Appellant*

And

(1) SKP Pradiksi (North) Sdn Berhad
(2) SKP Senabangun (South) Sdn Bhd

… *Respondents*

Civil Appeal No 124 of 2016

Between

(1) Southern Realty (Malaya) Sdn Bhd

… *Appellant*

And

(1) Darren Chen Jia Fu @ Suryo Tan
(2) Hendra Ade Putra
(3) Christina Suryo

… *Respondents*

GROUNDS OF DECISION

[Conflict of Laws] – [Choice of jurisdiction] – [Exclusive]

[Conflict of Laws] – [Natural forum] – [Stay of proceedings]

Trisuryo Garuda Nusa Pte Ltd
v
SKP Pradiksi (North) Sdn Bhd and another and another appeal

[2017] SGCA 49

Court of Appeal — Civil Appeals Nos 112 and 124 of 2016
Sundaresh Menon CJ, Judith Prakash JA and Tay Yong Kwang JA
27 March 2017

18 August 2017

Judith Prakash JA (delivering the grounds of decision of the court):

Introduction

1 Earlier this year, we heard two appeals centring on the issue of whether two law suits, which at their root involve the same Singapore company, Trisuryo Garuda Nusa Pte Ltd ("TGN"), should be heard in Singapore or in Indonesia. The two High Court Judges who heard the applications came to opposite conclusions: one action was stayed in favour of Indonesia while the other was allowed to proceed here. Appeals were lodged against both decisions.

2 TGN was the defendant in the first law suit, S 252 of 2016 ("S 252"), it being claimed that TGN held certain shares in two Indonesian companies on trust for the plaintiffs in the action. This was the action in which the application

to move the proceedings to Indonesia was unsuccessful. In the second case, S 349 of 2016 ("S 349"), while TGN was not itself a party, it was the focus of the litigation as the question was whether its issued shareholding belonged both legally and beneficially to the defendants who were the registered holders of the same or whether they were holding the TGN shares on trust for the plaintiffs. This was the action that had been stayed in favour of Indonesia.

3 After hearing the parties, we decided that both actions should be allowed to proceed in Singapore. This meant we dismissed the appeal against the decision to dismiss the stay application in S 252 and allowed the appeal against the decision to stay proceedings in S 349.

4 Although the parties in the two actions were connected and although the underlying facts were in many respects the same, the two stay applications involved different legal approaches and this difference carried over into the appeals. One appeal raised questions regarding the relevance of foreign public policy and illegality under the laws of the place of performance to the court's decision on whether to grant a stay of proceedings on the ground that Singapore was *forum non conveniens* or inappropriate for the proceedings. The other appeal, though requiring some *forum non conveniens* discussion, had as its central focus the effect of what appeared to be exclusive jurisdiction agreements in favour of the foreign forum, Indonesia, and what amounted to strong cause to displace such agreements.

The parties

5 The two law suits involve parties from Malaysia and Singapore who are competing over the ownership of companies in Indonesia which are in the

oil palm business. The complexity in the facts leading to the actions is due to certain difficulties experienced by Malaysian parties who seek to participate in the oil palm industry in Indonesia. These difficulties led the parties here to corporate re-structuring in an effort to resolve the problem.

6 Southern Realty (Malaya) Sdn Bhd ("Southern Realty") is a Malaysian company engaged in the business of palm oil milling, real property and investment holding. Southern Realty is the plaintiff in S 349 and was the appellant in Civil Appeal No 124 of 2016 ("CA 124"), which was its appeal against the High Court's decision to grant a stay of proceedings in S 349. Southern Realty's claim in S 349 is to be declared the beneficial owner of the issued share capital of TGN.

7 TGN is an exempt private company which was incorporated in Singapore to carry on the business of holding investments. It has 100 issued shares.

8 Darren Chen Jia Fu @ Suryo Tan ("Suryo Tan") is a Singaporean who is primarily based in Jakarta due to his extensive business interests there. Christina Suryo ("Mrs Suryo") is his wife and Hendra Ade Putra ("Mr Hendra") is his wife's cousin. Suryo Tan, Mr Hendra and Mrs Suryo are respectively the first, second and third defendants in S 349 and the respondents in CA 124. Presently, Suryo Tan and his wife are the registered holders of all issued shares in TGN. They deny that they are holding these shares on trust for Southern Realty.

9 Southern Realty has an indirect equity stake in SKP Pradiksi (North) Sdn Bhd ("SKPP") and SKP Senabangun (South) Sdn Bhd ("SKPS"), which

are also Malaysian companies. We will refer to SKPP and SKPS collectively as "the SKP Companies". The SKP Companies are the plaintiffs in S 252 and were the respondents in Civil Appeal No 112 of 2016 ("CA 112"), which was an appeal against the High Court's refusal to grant a stay of proceedings in S 252. TGN is the defendant in S 252 and the appellant in CA 112. The dispute in S 252 is over whether TGN is holding shares in the Indonesian companies named below on trust for the SKP Companies.

10 The SKP Companies are investment holding companies. They have business interests in Indonesia through their investment in two Indonesian companies namely PT Pradiksi Gunatama ("PTPG") and PT Senabangun Anekapertiwi ("PTSA"). We will refer to PTPG and PTSA collectively as "the PT Companies". The PT Companies are engaged in the business of oil palm plantation development in Indonesia. Prior to November 2012, SKPP was the registered shareholder of 13,000 shares in PTPG, representing 80% of PTPG's paid up share capital, and SKPS was the registered shareholder of 8,000 shares in PTSA, representing 80% of PTSA's paid-up share capital.

The facts

The parties' relationship

11 As the law suits are in their preliminary stages, no facts have yet been established. Our recital of the facts is based on the parties' affidavits and some "facts" must be understood to be allegations only. We begin with Suryo Tan's account.

12 According to Suryo Tan, in or around November or December 2011 he was approached in Indonesia by two gentlemen, Nick Low and Raymond Wong.

They informed him that the PT Companies had been experiencing difficulties with the Indonesian authorities since September 2011. Their fear was that certain land titles held by the PT Companies would be revoked, such that the PT Companies would lose their only assets which were two palm oil plantations located in the Paser Regency of East Kalimantan. The PT Companies had already received warning letters threatening revocation of the land titles. Suryo Tan asserted that Nick Low and Raymond Wong had approached him because he had extensive business interests in various parts of Indonesia and these had given him the necessary expertise and connections to assist them in protecting the land titles. At that time, however, Suryo Tan declined to assist the PT Companies.

13 Sometime around the middle of February 2012, Suryo Tan was approached by one Low Boon Lai ("Bill Low") in Kuala Lumpur. Bill Low is Nick Low's uncle, and he introduced himself as the Chairman of the Board of Southern Keratong Plantations Sdn Bhd ("SKP"). He too sought Suryo Tan's assistance with the problems faced by the PT Companies. Suryo Tan met Bill Low and the Board of Directors of SKP in early April 2012 for discussions. According to Suryo Tan, he was subsequently appointed chairman of an Emergency Action Committee with responsibility for running the PT Companies and for sorting out the issues regarding their land titles. He came up with a strategy to deal with those difficulties and liaised with local government authorities and other interest groups in Indonesia. His efforts to protect the land titles came, in his words, "at the risk of [his] own life". Suryo Tan described an understanding between the parties that he was to be "a partner in the enterprise by way of shareholding and management control", the details of which were to be discussed.

14 According to one Low Kock Ching, a director of Southern Realty who filed an affidavit in S 349, the PT Companies' problems with their land titles began sometime later than Suryo Tan had suggested, around the first half of 2012. Aside from these difficulties, the PT Companies also faced "a perceived anti-Malaysian sentiment against Malaysian-owned businesses operating in Indonesia". At or around that time, Suryo Tan represented to the SKP Companies and/or Southern Realty that he could assist the PT Companies with regard to their operational and licensing difficulties and could mitigate the effect of the anti-Malaysian sentiment.

The parties' oral agreement

15 It is undisputed that sometime in the third quarter of 2012, there was an oral agreement to which Suryo Tan was a party. The nature and terms of this oral agreement are, however, heavily contested and indeed these are matters that lie at the heart of the actions.

16 According to Suryo Tan, he met Bill Low in Jakarta on 25 October 2012. Bill Low told him that in return for his assistance, arrangements would be made for SKP or its subsidiaries to sell substantial minority shareholdings in the PT Companies to Suryo Tan. In order to facilitate dealings with the authorities in Indonesia and other local interests, Suryo Tan would also be appointed Commissioner of the PT Companies. The parties agreed that Suryo Tan's direct equity stake and appointment were necessary to bring his assistance "to the next level", because beyond a certain point the local authorities and villagers would only deal with a person who could demonstrate his official capacity to act for the PT Companies. Suryo Tan was to purchase 32% of the shares in each of the

two PT Companies. Suryo Tan agreed to the proposal as he was satisfied that there was "considerable potential" in the PT Companies.

17 Bill and Nick Low further suggested that Suryo Tan incorporate a Singapore special purpose vehicle to hold the shares of the PT Companies. According to Suryo Tan, the choice of a Singapore special purpose vehicle was made because there were certain advantages, including tax efficiencies, that could be had given that Suryo Tan is Singaporean. They also suggested that Suryo Tan use a Singapore corporate secretarial firm, Corporate Finedge Pte Ltd ("Corporate Finedge"), to act as local administrator while he carried out his tasks in Indonesia. In addition, a director of Corporate Finedge, one Florence Tan ("Ms Tan"), should be appointed director of the special purpose vehicle. Ms Tan would report to Suryo Tan and would not take any important steps without his knowledge and approval. Suryo Tan agreed to these arrangements.

18 The version of events put forward by Southern Realty and the SKP Companies is substantially different. According to them, the oral agreement was entered into between Southern Realty and the SKP Companies on one hand and Suryo Tan on the other. The parties agreed that Suryo Tan would become the registered owner of a Singapore company, to be incorporated by Southern Realty, and would hold the shares in that company for and on behalf of Southern Realty. Thereafter, 32% of the shares in each of the PT Companies would be transferred to the new Singaporean company which was then to hold those shares for and on behalf of the SKP Companies.

The transfer of shares in the PT Companies

19 Raymond Wong and Nick Low then took steps to procure the incorporation of the Singapore company that the parties had agreed to set up. TGN was incorporated on 12 November 2012. It issued 100 shares, of which 99 were allotted to Suryo Tan and one to Mr Hendra. On 20 November 2012, TGN allegedly wrote to Southern Realty. This letter ("the Trust Letter") was signed by Ms Tan, purportedly for and on behalf of the Board of TGN. It reads as follows:

> …
>
> On behalf of the board of directors of Trisuryo Garuda Nusa Pte Ltd ("TGN"), we write to confirm the following as per your instruction dated 15 November 2012:-
>
> (a) TGN holds 5,200 (five thousand two hundred) shares of IDR 1,000,000 per share representing 32% of all the current paid-up shares of PT Pradiksi Gunatama ("PTPG") in-trust for SKP Pradiksi (North) Sdn Bhd; and
>
> (b) TGN holds 3,200 (three thousand two hundred) shares of IDR 1,000,000 per share representing 32% of all the current paid-up shares of PT Senabangun Anekapertiwi ("PTSA") in-trust for by SKP Senabangun (South) Sdn Bhd.
>
> …

Suryo Tan contests the authenticity of the Trust Letter. According to him, he had never seen this letter before it was sent to his lawyers on 18 April 2016, after the commencement of litigation. Nor had he, whether as shareholder or director of TGN, ever authorised the issue of such a letter.

20 On 1 February 2013, the SKP Companies and TGN entered into two deeds (collectively, "the Deeds") in Indonesia for the sale and purchase of shares in the PT Companies. The first deed ("the PTPG Deed") concerned the

sale of 5,200 shares in PTPG from SKPN to TGN, at a face value of IDR1m per share (or a total amount of IDR5.2b). Article 6 of the PTPG Deed stated as follows:

> Regarding this deed and all consequences as well as implementation hereof, the parties hereto selected the common and permanent domicile with the Registrar's office of the District Court of South Jakarta in Jakarta.

The second deed ("the PTSA Deed") concerned the sale of 3,200 shares in PTSA from SKPS to TGN, at a face value of IDR1m per share (or a total amount of IDR3.2b). Article 6 of the PTSA Deed was identical to Art 6 of the PTPG Deed and any references henceforth to Art 6 shall be construed as a reference to either or both as may be required. Further, we will refer to the shares in the PT Companies that were transferred to TGN as a result of the Deeds as "the PT Shares".

21 Thereafter, the required approvals for the transfer of the PT Shares were obtained from the relevant authorities, and TGN's ownership of the PT Shares was registered with the Ministry of Law and Human Rights of the Republic of Indonesia. Suryo Tan was also appointed as Commissioner of the PT Companies.

Breakdown in the parties' relationship

22 Suryo Tan claimed that he was, to a large extent, successful in protecting the land titles of the PT Companies. Subsequently, however, certain disagreements arose amongst the directors and shareholders of the PT Companies and these led to legal proceedings in the Indonesian courts concerning the control of the PT Companies. Suryo Tan suggested that control of TGN's 32% shareholding in the PT Companies came to be regarded as key

to resolving these disputes, and that this was the reason why the present proceedings in Singapore were commenced.

23 Suryo Tan became aware that something was wrong when he tried to get in touch with Ms Tan regarding certain queries that he had about TGN's accounts and documents. He was told that he had no direct access to Ms Tan and would have to communicate with her through Southern Realty's secretarial office. On 17 December 2015, Suryo Tan removed Ms Tan as a director of TGN. TGN then employed a new corporate secretarial firm in place of Corporate Finedge.

24 On or about 18 December 2015, Suryo Tan transferred 98 out of the 99 shares that he held in TGN to Mr Hendra. Mr Hendra then transferred the 98 shares he received, together with the one share that he originally held, to Mrs Suryo. As a result, Suryo Tan held one share in TGN and Mrs Suryo held the remaining 99 shares. This is the current shareholding structure of TGN.

Commencement of litigation

25 On 17 March 2016, the SKP Companies commenced S 252 against TGN. In the action, the SKP Companies claim that despite their demands for a transfer of the PT Shares back to the SKP Companies, TGN failed to carry out such transfers and is therefore in breach of an agreement to hold those shares on trust for the SKP Companies. The SKP Companies seek declarations that they are the beneficial owners of the PT Shares and that those shares are held on trust for them, as well as orders that TGN transfer those shares to the SKP Companies.

26 Less than a month later, on 8 April 2016, Southern Realty commenced S 349 against Suryo Tan, Mr Hendra and Mrs Suryo (collectively, "the S 349 defendants"). Its claim in this suit is that pursuant to the oral agreement made in the third quarter of 2012 between the SKP Companies and Southern Realty, on one hand, and Suryo Tan on the other, Suryo Tan held the shares in TGN on trust for Southern Realty. By failing to comply with Southern Realty's instruction that Suryo Tan transfer all of TGN's shares to Southern Realty, amongst other things, Suryo Tan has acted in breach of trust. Southern Realty also claims that Mr Hendra held his shares on an express or resulting trust for it, had dishonestly assisted Suryo Tan in the latter's breach of trust, and was himself in breach of trust by transferring his shares to Mrs Suryo without Southern Realty's consent or knowledge and by refusing to transfer his shares to Southern Realty. Finally, it claims that Mrs Suryo, by receiving shares from Mr Hendra that she knew were transferred to her in breach of trust, is liable in dishonest assistance, and is herself in breach of trust due to her refusal to transfer the TGN shares to Southern Realty. Orders are sought against all the S 349 defendants for the transfer of the TGN shares back to Southern Realty.

The stay applications

27 On 26 April 2016, TGN filed a summons seeking a stay of proceedings in S 252 on the basis that: (i) S 252 was commenced in breach of exclusive jurisdiction clauses found in the Deeds; and (ii) Indonesia, rather than Singapore, was the proper forum for the resolution of the dispute. This application was heard by the High Court judge on 9 June 2016. It was dismissed on the grounds set out in *SKP Pradiksi (North) Sdn Bhd and another v Trisuryo Garuda Nusa Pte Ltd* [2016] SGHC 200 ("GD (TGN application)").

28 The judge held that Art 6 constituted an exclusive jurisdiction agreement in favour of the District Court of South Jakarta in respect of disputes arising out of the Deeds, but that the SKP Companies had successfully demonstrated that there was strong cause against a stay of proceedings. He accepted in substance the SKP Companies' submission that the concept of trusts was not recognised under Indonesian law and that they would have no effective avenue to seek recourse against TGN in Indonesia: GD (TGN application) at [15]–[20]. He also found at [21]–[22] that the law governing the claim for breach of trust was Singapore law as the law with the closest connection to the trust. The judge concluded that the SKP Companies had shown strong cause against a stay because they would be prejudiced by the fact that their trust claim was not likely to be recognised if pursued in Indonesia. He likened the situation to compelling a plaintiff to sue in a foreign court where the plaintiff would be faced with a time bar that was not applicable in Singapore: GD (TGN application) at [23].

29 The judge also rejected TGN's submission that Singapore was not an appropriate forum for the trial of the action. He decided that Indonesia was neither an available nor an appropriate forum as it did not seem to him likely that the SKP Companies' trust claim would be recognised in Indonesia: GD (TGN application) at [28]–[30].

30 In the meantime, on 19 May 2016, the S 349 defendants had jointly filed a summons seeking a stay of proceedings in S 349 on the sole basis that Indonesia rather than Singapore was the proper forum for the trial. This application was therefore a *forum non conveniens* application alone without the added complication of an exclusive jurisdiction agreement. It was heard in August 2016 by a different High Court judge who, subsequently, granted the

stay sought by the S 349 defendants, holding that Indonesia was a more appropriate forum than Singapore. Her decision is set out in *Southern Realty (Malaya) Sdn Bhd v Chen Jia Fu Darren (alias Tan Suryo) and others* [2016] SGHC 230 ("GD (Suryo application)").

31 The judge in S 349 considered that TGN's holding of Indonesian shares was a particularly weighty factor, observing that "if one were to look at substance over form, Indonesia clearly had more real and substantial connections with the dispute than Singapore did": GD (Suryo application) at [21]. She also held at [27] that Indonesian law rather than Singapore law applied to Southern Realty's breach of trust claims as it was the system of law that had a closer connection to the dispute.

32 In addition, the judge held that Southern Realty's claim raised issues of Indonesian public policy, as the S 349 defendants would be relying on the defence that any agreement to create a trust over the TGN shares was contrary to Indonesian public policy. Indonesian law prohibits the holding of shares in an Indonesian company on behalf of another and the issue raised was whether its public policy would extend this prohibition to the shares of a foreign company like TGN which owns Indonesian shares. Applying *Eng Liat Kiang v Eng Bak Hern* [1995] 2 SLR(R) 851 ("*Eng Liat Kiang*"), the judge decided that since a court applying Indonesian law would inevitably be confronted with questions of Indonesian public policy, it was preferable to leave the dispute to the Indonesian courts: GD (Suryo application) at [30]–[31]. She further held at [34] that even if Singapore law applied to the dispute, Indonesian public policy considerations would still be pertinent because it was "part of *Singapore's public policy and desire for international comity* to respect the public policy of

foreign and friendly States" [emphasis in original], citing *Peh Teck Quee v Bayerische Landesbank Girozentrale* [1999] 3 SLR(R) 842 ("*Peh Teck Quee*") in support of her approach. Likewise, the Indonesian courts were better placed to decide such issues.

33 The judge was also influenced by the fact that TGN had commenced litigation against the SKP Companies in Indonesia. She found that the "underlying factual inquiry" which the Singapore and Indonesian courts would have to embark on in both proceedings was "ultimately *one and the same*: did the parties intend for [Suryo Tan] to hold the [PT Shares] on trust for [Southern Realty] and/or its related companies, or did the parties intend to transfer the [PT Shares] to [Suryo Tan] outright?" [emphasis in original]. Thus there was a "real risk" that the Indonesian and Singapore courts would reach conflicting findings of fact on material issues, were the Singapore proceedings not stayed: GD (Suryo application) at [41]–[42].

34 Moving to the second stage of the *forum non conveniens* analysis, the judge rejected Southern Realty's argument that in the circumstances justice required that no stay be granted. The circumstances relied on were that the Indonesian courts would not recognise Southern Realty's equitable claim because Indonesian law does not have this concept. The judge explained that Southern Realty's concerns really related to the disadvantages that it would face if Indonesian law were the applicable law, and not if Indonesia was the forum of litigation. If the dispute were heard in Singapore but Indonesian law applied, Southern Realty would still have to overcome the fact that trusts were illegal under Indonesian law. If the matter were heard by an Indonesian court, and that court were to find that Singapore law applied, it "would be compelled to give

effect to the respect that Singapore law accords to the laws of friendly foreign States": GD (Suryo application) at [45]–[46]. The judge granted a stay pending the outcome of the actions in Indonesia.

The issues in the appeals

35 While it is evident that there is a significant overlap in the facts underpinning each action and the stay applications therein, it is important to observe that there are key distinguishing features between the two matters that have a bearing on the analysis. First, S 349 involves an alleged trust over shares in a *Singapore* company. Therefore, although the assets held by that company are Indonesian shares, it is the beneficial ownership of Singapore shares that is directly at issue in S 349. Second, the stay application in S 252 involved documents containing alleged exclusive jurisdiction agreements. No such jurisdiction agreements were at issue in the stay application in S 349. Due to this significant difference, the approach taken to each application had to vary.

36 We will begin the analysis with CA 124 which was the appeal against the decision on the stay application in S 349. In our judgment, this was the appeal that had greater substantive importance to the overall dispute between the parties. If Southern Realty (which has an indirect interest in the SKP Companies) was allowed to pursue its action against the S 349 defendants and succeeded in its action, this would mean that it was the beneficial owner of TGN's shares and would therefore, indirectly, be the beneficiary of TGN's assets, the PT Shares. The sole question in the stay application in S 349 was whether Indonesia was clearly or distinctly more appropriate than Singapore for the determination of Southern Realty's equitable claims against the S 349 defendants. The analysis required to answer the question was the two-stage

analysis governed by the principles set out in *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460 ("*Spiliada*"), which were applied by this court in *Rickshaw Investments Ltd and another v Nicolai Baron von Uexkull* [2007] 1 SLR(R) 377 ("*Rickshaw Investments*").

37 As we explained in our recent decision in *Rappo, Tania v Accent Delight International Ltd and another and another appeal* [2017] SGCA 27 at [70], it is the quality of the connecting factors that is crucial in determining whether a particular forum is more appropriate than another for the determination of a dispute. The search is for the connections that are most relevant to the dispute so as to enable it to be tried in the jurisdiction that is most suitable for the interests of the parties and the ends of justice. We considered that the critical connection in the S 349 stay application was the law that governed Southern Realty's equitable claims against the respondents. This was not only because the applicable law was a relevant connection for the purpose of determining the forum that had the closest and most real connection to the dispute. In this particular case, the governing law was critical for a separate reason: if Indonesian law, rather than Singapore law, applied to the dispute and Indonesian law did not recognise causes of action in equity, then regardless of whether the matter was heard by a Singapore court or an Indonesian court Southern Realty's claims were likely to fail at the first hurdle. Thus there would be little basis for Southern Realty to argue, at the second stage of the *forum non conveniens* analysis, that it would be deprived of substantial justice if it were left to pursue a remedy before the Indonesian courts because those courts would not recognise its equitable claims.

38 CA 112 was TGN's appeal against the decision on the stay application in S 252. Whereas in CA124 the search was for connecting factors which would indicate whether Indonesia was a more appropriate jurisdiction than Singapore, the main issue in CA 112 related to the effect of Art 6. The judge held that Art 6 constituted an exclusive jurisdiction agreement and, further, that the dispute in S 252 fell within the scope of the jurisdiction agreement. TGN argued that having made those findings the judge was wrong to have held thereafter that the SKP Companies had shown that there was strong cause against a stay of proceedings. The main issue in this appeal was, therefore, whether such strong cause did indeed exist.

The stay application in S 349: Appropriate forum

39 In *Rickshaw Investments* at [14], this court explained the two-stage analysis for determining whether the forum in which an action has been brought is not an appropriate one in the legal sense. The first question is whether there is *prima facie* some other available forum that is more appropriate for the case to be tried. As explained above, this requires identifying the factors that have the most relevant and substantial association with the dispute. There are five factors that are generally relevant: first, the personal connections of the parties and the witnesses; second, the connections to relevant events and transactions; third, the law applicable to the dispute; fourth, the existence of proceedings elsewhere; and fifth, the "shape of the litigation", which is shorthand for the manner in which the claim and the defence have been pleaded: *JIO Minerals FZC v Mineral Enterprises Ltd* [2011] 1 SLR 391 at [42]). In any particular case, it is essential to identify those factors that are likely to be material to the fair determination of the dispute, and to ascribe greater weight to such factors over others. As is well-established, the burden at the first stage lies on the

defendant (who seeks the stay). If the defendant succeeds in this regard, the burden shifts to the plaintiff (who resists the stay) to satisfy the court that there are circumstances by reason of which justice requires that a stay should nonetheless not be granted.

Connecting factors

(1) Governing law

40 We begin the analysis with the issue of the law governing Southern Realty's claims against the S 349 defendants which, as explained above, we considered to be the crucial consideration.

41 The relevant principles are summarised in *Halsbury's Laws of Singapore* Vol 6(2) (LexisNexis, 2016) ("*Halsbury's*") at para 75.330, as follows: "The proper law of the trust is the law chosen by the trustee, or, in the absence of such choice, the system of law to which the trust has the closest connection". In *Augustus v Permanent Trustee Co (Canberra) Ltd* [1971] 124 CLR 245, the High Court of Australia held that the general rules established for determining the choice of law in relation to contracts are also generally applicable in determining the governing law of a trust. This means that it is open to parties to choose the governing law and that if they have done so, effect will be given to it. But if they have not expressed such an intention, then the law to be applied will be ascertained as a matter of implication, looking at all the circumstances of the transaction. Along similar lines, in *Rickshaw Investments* at [81], this court accepted Prof Yeo Tiong Min's thesis in *Choice of Law for Equitable Doctrines* (Oxford University Press, 2004) that where equitable duties arise from a factual matrix where the legal foundation is premised on an

independent established category such as contract or tort, it is appropriate to centre the choice of law analysis on the established category concerned.

42 We turn to Southern Realty's equitable claims against the S 349 defendants. Its case is, essentially, that Suryo Tan had acted in breach of an agreement to hold TGN's shares on trust for Southern Realty. Its further claims against Mr Hendra and Mrs Suryo for dishonest assistance in breach of trust, knowing receipt and breach of trust flow from this initial agreement. In the absence of any express choice of law governing the oral agreement to hold the shares on trust, the inquiry shifted to the existence of any implied choice of law. The search was for "a real and not merely hypothetical common intention of the contracting parties, but as objectively ascertained from the terms of the contract and the surrounding circumstances": *Halsbury's* at para 75.346.

43 In our judgment, the nature of the alleged trust agreement and the surrounding circumstances pointed to an implied choice of Singapore law. As observed at [26] above, S 349 involves an alleged trust over shares in a Singapore company. As Suryo Tan himself confirmed, the parties made a considered decision to incorporate a Singapore company as the special purpose vehicle for their transaction. Given that (i) the parties chose Singapore as the place of incorporation of the special purpose vehicle; (ii) the only assets allegedly subject to a trust are shares in that Singapore company; and (iii) the primary inquiry in S 349 concerns the beneficial ownership of those same shares, we held that the parties must have intended, in all probability, that Singapore law should govern the alleged trust agreement in respect of TGN's shares. For these reasons, we also found that Singapore law was the system of law with the closest connection to the trust.

44 The judge who granted the stay sought in S 349 focused on the fact that TGN had "no business operations of its own" and that the "sole purpose of its incorporation was to be the legal vehicle through which [Suryo Tan] could hold the [PT Shares]". She surmised that the PT Shares were "the true *raison d'être* for this dispute, and the oral agreement to be tested in this suit was in substance a part of the parties' larger Indonesian business ventures" and therefore concluded that the governing law of the dispute was Indonesian law: GD (Suryo application) at [27]. We did not think that this line of reasoning was sound. We make two points in this regard.

45 First, it is not uncommon for a company to be incorporated for the sole purpose of holding shares in another company and to not have any other business activity beyond this function. Indeed, the creation of such special purpose vehicles or investment holding companies is a common occurrence in the complex commercial environment that exists today. Such entities are frequently set up by parties for tax reasons or other perceived advantages that accrue from their incorporation in a particular jurisdiction (as Suryo Tan alleged was the case in relation to the incorporation of TGN in Singapore). Thus the fact that the sole objective of the parties in incorporating such a company was for it to hold certain shares – or indeed any other type of asset – would not in itself provide a sufficiently strong basis to assume that the governing law of those assets is also the law applicable to the ownership of shares in the holding company itself.

46 Second, it would be anomalous to ignore the structure that the parties have chosen to govern their arrangements by focusing on the governing law of the underlying assets. The parties in this case chose not only to incorporate a

separate entity to which the PT Shares would be transferred (instead of transferring those shares directly to Suryo Tan), they also made a deliberate decision that Singapore should be the jurisdiction in which TGN would be constituted. In determining the implied choice of law of the parties, one must consider all the terms of the parties' agreement and the surrounding circumstances. We considered that the parties' choice of corporate structure to effect their agreement was a key feature of those circumstances and should be taken into account as a pointer towards a choice of Singapore law.

(2) Public policy considerations

47 As described at [32] above, the judge found that Indonesian public policy was relevant to the determination of the dispute, given that the S 349 defendants intended to argue that Indonesian public policy prohibits trust arrangements in respect of shares in a foreign company that holds shares in an Indonesian company. The Indonesian public policy that the judge referred to stemmed from Art 33 of Indonesian Law No 25 of 2007 on Investment, which reads as follows:

> **Article 33 of Investment Law:**
>
> (1) Domestic and foreign investors who undertake investment in the form of a limited liability company are prohibited from making an agreement and/or statement which confirm that the ownership of the shares of the limited liability company is for and on behalf of another party.
>
> *Elucidation*
>
> *The purpose of this provision is to avoid the situation where a company is normatively owned by a person but materially and substantively is owned by other person.*
>
> (2) In the event domestic and foreign investors have made an agreement and/or statement as mentioned in paragraph (1), the agreement and/or statement shall be declared as null and void.

Elucidation

Sufficiently clear

48 The judge referred to the opinions provided by the parties' experts on Indonesian law, Ms Rahayu Ningsi Hoed for Southern Realty and Mr M Yahya Harahap for the S 349 defendants. As the judge observed, the parties' experts concurred – as was stated quite clearly in Art 33 itself – that the effect of Art 33 was to prohibit investors from entering into an agreement and/or making a statement that ownership of shares in a limited liability company is for and on behalf of another party. The disagreement between the parties' experts pertained to the question of whether the prohibition in Art 33 applied to Southern Realty's claims against the S 349 defendants. Mr Harahap took the position that Art 33 was not relevant as it only applied to trusts sought to be created over shares in an Indonesian company, and not shares in a Singapore company (such as TGN). In contrast, Ms Rahayu contended that an Indonesian court could apply Art 33 even when faced with claims involving alleged trusts over the shares of a foreign company.

49 The judge reasoned (see [30]–[31] of GD (Suryo Application)) that assuming Indonesian law applied to the dispute, the court would be required to determine whether Art 33 or any other rule of Indonesian law directly prohibited the holding of shares in foreign companies on behalf of another, or whether "the policy behind Article 33 would be undermined if a special purpose vehicle holding Indonesian company shares was itself held on trust for another". She then referred to *Eng Liat Kiang* at [31]–[32] for the proposition that issues of foreign public policy are best left for determination by the foreign court.

50 For the purposes of this appeal, we did not think it necessary to reach a determination on whether Art 33 prohibits the holding of shares in a foreign company on trust. Even assuming that it would be contrary to Indonesian public policy (whether embodied in Art 33 or elsewhere) for a foreigner to hold shares in a foreign company for and on behalf of another, we did not think that this mandated a stay of proceedings in S 349 as the judge evidently thought it should. In our view, the judge erred in comparing the present case to *Eng Liat Kiang*.

51 In *Eng Liat Kiang*, the appellant commenced an action against the respondent, who was his father, claiming amongst other things that the respondent held on trust for the appellant, shares in several Singaporean, Malaysian and Hong Kong companies, as well as land in Singapore and Malaysia. The respondent applied for a stay of proceedings in relation to the part of the appellant's claim that concerned shares in two Malaysian companies and the Malaysian land. One of the arguments made by the respondent was that Singapore was *forum non conveniens*. The High Court judge decided against the appellant, holding that Malaysia rather than Singapore was the appropriate forum for the determination of the action, both in relation to the Malaysian land and the Malaysian shares. With regard to the shares, the judge noted that the *situs* of the shares was in Malaysia and that the law governing the creation, validity and transfer of the shares as well as the creation of a trust over the shares was Malaysian law. The judge further observed that if the appellant's claim that a trust existed over those shares succeeded, the appellant would be in breach of Malaysian company law as well as the listing requirements of the Kuala Lumpur Stock Exchange ("the KLSE"). The reason was that under Malaysian company law, a director of a company is obliged to give the company notice in writing of

the interest which he has in the shares of the company, but the appellant had not given such notice. The listing rules of the KLSE also required that an announcement be made to the KLSE of any notice of substantial shareholdings or changes received by the company and the details thereof, but such announcement had not been made.

52 The respondent advanced arguments before the Court of Appeal based on the judge's findings in this regard. This court held as follows:

> 31 … Both these breaches involve a question of public policy in Malaysia. If the appellant's claim is true, then he would have committed some offences or breaches of the listing requirements and the Malaysian courts would have to decide as a matter of public policy whether to enforce the appellant's claim. An issue of Malaysian public policy is best left to be determined by the Malaysian court.
>
> 32 In response, the appellant submitted that as the Malaysian Companies Act and the KLSE listing requirements were both codified, there would be no difficulty for a Singapore court to adjudicate whether a breach has been committed. To examine the provisions of the Malaysian Companies Act and the KLSE listing requirements and determine whether or not the appellant has committed a breach or breaches is not an insuperable problem to the court here. But the difficulty is that having done that, the court then has to decide whether it is against public policy to enforce the trust, and the public policy is that in Malaysia, and that issue the court in Singapore cannot determine.

53 In our judgment, the facts of *Eng Liat Kiang* differed from those of the present case in several significant respects. First, *Eng Liat Kiang* involved Malaysian companies, and the appellant's claim in that case concerned the ownership of shares in those Malaysian companies. As we have emphasised, Southern Realty's suit involves an alleged trust over shares in a Singapore company. Second, the court in *Eng Liat Kiang* accepted that the governing law of the dispute concerning the Malaysian shares was Malaysian law. We held,

as explained at [43] above, that the law governing the alleged trust over the shares in TGN is Singapore law. Third, the Malaysian public policy at issue in *Eng Liat Kiang* did not serve to bar the appellant's claim if the appellant was left to pursue it in Malaysia. Indeed, the issues of Malaysian public policy in *Eng Liat Kiang* did not appear to have any direct bearing on the appellant's claim that the respondent held the shares in those companies on trust for him. The issues of Malaysian public policy would only be raised incidentally if a finding was made that the appellant had an interest in the Malaysian shares. The situation was wholly different in the present case. Article 33 directly prohibits the holding of shares in TGN on trust (assuming, for the sake of argument, that Art 33 applies to the dispute) and therefore directly bars Southern Realty's claim. This had a bearing on the question of whether Southern Realty would be deprived of substantial justice if it were left to pursue its action in Indonesia. In contrast, this was not a difficulty that arose on the facts of *Eng Liat Kiang*.

54 More generally, we do not consider that the implication of issues of foreign public policy would necessarily be dispositive of an application for a stay of proceedings in an action. The decision in *Eng Liat Kiang* should not be read so broadly. The mere fact that such issues are raised in an action does not mean that the Singapore court should, as a matter of course, cede the determination of the matter to the foreign forum. We make two observations in this regard, the first evidential and the second conceptual.

55 First, every law, local or foreign, is based on a policy of some sort. Whether a particular rule arises to the level of public policy must be amply demonstrated by way of evidence. It is not sufficient to show that a particular prohibition exists in the foreign law. Therefore the mere invocation of foreign

public policy, without more, should not be seen as a sort of trump card allowing a defendant to elude the jurisdiction of the Singapore courts. This does not mean, however, that issues of foreign public policy are not potentially relevant considerations in determining whether proceedings should be stayed. It will depend on the facts and circumstances of the particular case, including the nature of the foreign public policy that is alleged.

56 This segues into our second observation. Under the *Spiliada* approach, the determination of whether a particular forum is clearly or distinctly more appropriate than another for the trial of a dispute is a fact-sensitive exercise requiring the court to consider all the circumstances of the case. The essential guide to identifying the natural forum is whether any of the connections point towards the jurisdiction in which the case may be tried more suitably for the interests of all the parties and for the ends of justice. This requires a careful exercise of judgment on the facts of each case. It is therefore incorrect as a matter of principle to say that the relevance of foreign public policy is a necessarily determinative factor in a stay application. Rather, it is one out of a host of potentially relevant factors, and the weight to be placed on it is a matter of judgment, to be exercised carefully having regard to the interests of the parties, the ends of justice and the demands of international comity.

(3) Illegality

57 The judge went on to consider the position on the basis that Singapore law applied to the dispute: GD (Suryo application) at [33]. In such a situation, Art 33 (being a rule of Indonesian law) would not have an obvious application to the dispute. The judge held that "Indonesian public policy considerations regarding the holding of Indonesian company shares on trust would,

nonetheless, still be pertinent, because it is part of *Singapore's public policy and desire for international comity* to respect the public policy of foreign and friendly states" [emphasis in original]. She referred to this court's decision in *Peh Teck Quee* in support of her approach and concluded, at [35], that "if Singapore law governs this transaction, it follows as a matter of Singapore law that it remains critical to determine the scope of Indonesian public policy concerns". Given that the Indonesian courts were better placed to decide this issue, she found that this was an additional reason in favour of a stay. We disagreed with this reasoning.

58 The decision in *Peh Teck Quee* did not, in our view, have any application in the circumstances before us. To explain why we need to go into the facts and reasoning of *Peh Teck Quee* in some detail. There, the respondents, the Singapore branch of a German bank, extended a loan facility to the appellant to purchase certain Malaysian shares. The governing law of the facility agreement was stated to be Singapore law. The appellant failed to repay any part of the debt and as a result the respondents cancelled the facility and demanded payment of all outstanding amounts. The appellant resisted, arguing that the facility agreement was illegal under two Malaysian statutes, and that even if the governing law of the agreement was Singapore law, it would be against Singapore's public policy to enforce a contract which was illegal and void under the law of a friendly country such as Malaysia. The appellant relied on several English authorities, including *Foster v Driscoll and others* [1929] 1 KB 470 ("*Foster*") and *Ralli Brothers v Compañia Naviera Sota y Aznar* [1920] 2 KB 287 ("*Ralli Bros*"). The High Court rejected the appellant's submissions.

59 On appeal, this court found (at [22]) that the facility agreement did not require the appellant to make repayment in Malaysia, and that accordingly the facility agreement was not illegal at the place of performance of the appellant's obligations. This was sufficient basis to reject the appellant's illegality argument. Nevertheless, the court went on to consider the appellant's reliance on the English authorities, beginning with *Ralli Bros*. *Ralli Bros* concerned a contract, governed by English law, between Spanish shippers and English charterers for the carriage of goods from Calcutta to Barcelona. Midway through the voyage, a Spanish law was enacted that rendered the freight payment rate that had been agreed illegal under Spanish law. The shippers brought an action in England for the balance freight due. The English Court of Appeal held that the shippers were not entitled to that sum because the contractual agreement on the payment rate had been made illegal by the law of the place of contractual performance, *ie*, Spain. Scrutton LJ held that England "should not … assist or sanction the breach of the laws of other independent states" (*Ralli Bros* at 304). The court in *Peh Teck Quee* held at [43] that *Ralli Bros* should be distinguished from the case before it, given that the place of performance of the appellant's obligations was Singapore rather than a foreign country (such as Malaysia).

60 The court turned to *Foster*, which involved a contract governed by English law for the supply and sale of whisky to be brought into the US, in breach of US prohibition laws at the time. The English Court of Appeal found that the contract was made for the express purpose of violating US law and refused to enforce the contract. Sankey LJ set out the principle that a contract "should and will be held invalid on account of illegality if the real object and intention of the parties necessitates them joining in an endeavour to perform in

a foreign and friendly country some act which is illegal by the law of such country" (*Foster* at 521). Restating this principle, the court in *Peh Teck Quee* held at [45] that "an agreement whose object to be attained is a breach of international comity will be regarded by the courts as being against public policy and void". On the facts of *Peh Teck Quee*, the court found that the principle in *Foster* was inapplicable because it was not the intention or in the contemplation of the parties when they entered into the facility agreement to carry out an adventure to break the laws of Malaysia (at [48]).

61 From the discussion above, it is apparent that *Peh Teck Quee* was a case in which illegality in the place of performance was raised as a substantive defence to the claim. The appellant there aimed to nullify the respondent's claim under the facility agreement by arguing that the facility agreement itself should not be enforced given that it was illegal and void under Malaysian law. *Peh Teck Quee* was not a case in which illegality was relied on as a justification for a *stay of proceedings*. Therefore the judge's reasoning in S 349 was really based on an *extension* of the decision in *Peh Teck Quee* rather than a mere *application* of the approach set out therein. In our judgment, foreign illegality is generally a matter that should be considered when determining the substantive merits of the action. If the matter were to go to trial, it would conceivably be open to the S 349 defendants to argue that the alleged trust agreement is void for illegality and therefore should not be enforced. The success or failure of such an argument would depend, amongst other things, on: (i) the nature of the intended performance under the terms of the agreement; (ii) the place of performance of the agreement; and (iii) whether the law of the place of performance prohibits the intended performance. Adjudication on the merits of such an argument might also necessitate, in light of the difficulties identified in the court's

discussion in *Peh Teck Quee*, deeper consideration of the nature and scope of the principles in *Ralli Bros* and *Foster*. We did not think that the hearing of a stay application provided a suitable forum for decision on such issues. They could only be determined after a full hearing when all the relevant facts would have been found.

(4) The Indonesian litigation

62 As this court explained in *Virsagi Management (S) Pte Ltd v Welltech Construction Pte Ltd and another appeal* [2013] 4 SLR 1097 ("*Virsagi*") at [39], the existence of parallel proceedings, or *lis alibi pendens*, is a relevant factor in determining whether a particular jurisdiction is *forum non conveniens*. The relevance of parallel proceedings in this regard flows from the need to avoid the risk of conflicting judgments arising from concurrent proceedings. The court in *Virsagi*, citing *Halsbury's Laws of Singapore* vol 6(2) (LexisNexis, 2008) at para 75.094, held at [39]–[40] that the weight to be accorded to the existence of parallel proceedings will depend on the circumstances.

63 Two broad considerations were identified by the court. First, the degree of overlap of issues and parties is a relevant factor. In our view, this must be the case because the risk of inconsistent findings will generally correspond to the degree of overlap on such matters. Second, the stage which the respective sets of proceedings have reached would be an important consideration. However, the court in *Virsagi* noted that the fact that foreign proceedings are at an advanced stage may nevertheless be disregarded if those proceedings had been deliberately commenced at the insistence of the party seeking to rely on this as a factor in the stay proceedings. Indeed, little or no weight will be given to the

fact that there are foreign proceedings if they were commenced as a strategy to bolster the case of a foreign forum as being the most appropriate forum.

64 More generally, the risk of conflicting judgments arising from concurrent proceedings is not necessarily a decisive factor in determining whether a stay should be ordered: *Rickshaw* at [90]. The risk of conflicting judgments must be weighed against the other factors in the overall *forum non conveniens* analysis. As the court in *Virsagi* explained at [40], this is why concurrent foreign proceedings need not amount to strict *lis alibi pendens* – in the sense of absolute identity between parties and a high degree of similarity in relation to the issues – for them to "weigh into the analysis of appropriateness".

65 To support their argument on *lis alibi pendens*, the respondents referred to two sets of ongoing litigation in Indonesia. The first concerned claims brought by Suryo Tan and TGN against the SKP Companies, Southern Realty and other co-defendants in the District Court of South Jakarta, to wit:

> (a) Suit No 381: this was commenced on 20 June 2016 by Suryo Tan and TGN as plaintiffs against Bill Low, Nick Low, SKP and SKPP as defendants, and PTPG, Southern Realty and a notary public as co-defendants. The plaintiffs claimed, amongst other things, that the defendants had breached the Deeds by claiming: (i) in S 252, a right over the shares in PTPG; and (ii) in S 349, a right over the shares in TGN. The plaintiffs sought a declaration that the defendants were in breach of the Deeds and payment of damages, amongst other remedies.

(b) Suit No 271: this was commenced on 26 April 2016 by TGN against SKPP as defendant, and PTPG and a notary public as co-defendants. By asserting a right over the shares in PTPG in S 252, SKPP had breached the PTPG Deed. TGN sought, amongst other remedies, a declaration that SKPP had committed a breach of contract, that TGN had full proprietary rights over the shares in PTPG, and that SKPP's claim in S 252 was unlawful. TGN also required payment of damages by SKPP.

(c) Suit No 270: this was commenced on 26 April 2016 by TGN against SKPS as defendant, and PTSA and a notary public as co-defendants. TGN claimed that by asserting a right over the shares in PTSA in S 252, SKPS had breached the PTSA Deed. TGN sought, amongst other remedies, a declaration that SKPS had committed a breach of contract, that TGN had full proprietary rights over the shares in PTSA, and that SKPS's claim in S 252 was unlawful, as well as payment of damages by SKPS.

66 Second, a letter dated 20 June 2016 sent by certain Indonesian lawyers to counsel in Singapore disclosed three further separate actions in the District Court of South Jakarta. The first two were commenced by a company called PT Minerindo Lesteri. It sued the PT Companies alleging in each case that the term of office of certain named directors had expired, and seeking to obtain authority to convene an Extraordinary General Meeting of Shareholders of each company to change and appoint new members of its Boards of Directors and Commissioners. The third action was commenced by Nick Low purportedly for and on behalf of PTPG against PT Minerindo Lesteri and TGN, seeking to obtain authority to convene a third annual general meeting of shareholders so as

to approve PTPG's book for the year 2014, appoint an auditor for the company, increase the capital of the company and make alterations to the Articles of Association.

67 We begin with the actions taken by Suryo Tan and TGN. These actions were commenced on 26 April and 20 June 2016, *after* S 252 and S 349 had been filed (on 17 March and 8 April 2016 respectively). We found the respondents' argument that S 349 ought to be stayed on the basis of those proceedings distinctly unappealing, not only because those proceedings were commenced after the Singapore actions, but also because the defendants to the Singapore actions *themselves* had commenced those proceedings, seeking what was essentially the converse of what the plaintiffs in S 252 and S 349 had sought. By commencing those Indonesian actions, TGN and Suryo Tan had therefore done nothing more than to manufacture a set of concurrent proceedings. We reiterate the warning in *Virsagi* that little or no weight will be given to the existence of concurrent foreign proceedings if those proceedings are commenced for strategic reasons.

68 In relation to the Indonesian shareholder disputes, it was not apparent to us how the issues raised in those disputes were relevant to S 349. As mentioned at [63] above, the degree of overlap of issues and parties is an important consideration. On the evidence before us we were unable to discern a degree of overlap that would create a sufficient risk of conflicting judgments. The respondents simply suggested that "[the] outcome [of those shareholder disputes] and any issues to be determined therein would be materially affected by any contrary determination in Singapore as to shareholding status of TGN and ownership of the [PT Shares]". In our judgment, this submission was

misconceived. It was not sufficient to show that the outcome in one action would be "affected" by another. That was not the focus of the inquiry, and in any event this submission did not contain nearly enough specificity to satisfy us that there would be a risk of conflicting judgments. The onus lies squarely on the party seeking to rely on *lis alibi pendens* to particularise the specific issues on which the courts in both jurisdictions might reach inconsistent findings.

69 The judge found that "if one were to look at substance over form, Indonesia clearly had more real and substantial connections with the dispute than Singapore did". She was influenced by the fact that TGN has no business activities of its own and was incorporated only to hold the PT Shares, which were "the real underlying assets of interest": GD (Suryo application) at [20]. We have explained our view that it was wrong to focus on the assets held by TGN and ignore, firstly, that it was the shares in TGN itself that were at issue in Southern Realty's claim and, secondly, that the parties made a deliberate choice to constitute TGN, a Singapore company, to hold the PT Shares.

70 For these reasons, we disagreed with the judge's focus on the "real underlying assets" of the dispute, to the exclusion of the assets that were directly at issue in S 349.

Conclusion on CA 124

71 On completion of the first-stage analysis, we were satisfied that Singapore, rather than Indonesia, was the appropriate forum for the adjudication of Southern Realty's claims in S 349. This was because the significant connecting factors – in particular the subject matter and the governing law of Southern Realty's claims – were with Singapore rather than Indonesia. The

Indonesian connections were peripheral at best or artificially created at worst. This meant that the stay application brought by the S349 defendants should have been dismissed. This determination alone was sufficient to justify allowing Southern Realty's appeal in CA 124. There was no need for us to go on to the second stage of the analysis.

The stay application in S 252: the effect of the jurisdiction agreements

72 The stay application in S 252, which is the SKP Companies' suit against TGN, proceeded on a different legal basis than the application in S 349. This is because it involved the consideration of jurisdiction agreements, a vital component that was not present in S 349. The presence of an exclusive jurisdiction agreement turns the case around and puts the burden on the plaintiff (who resists a stay) to persuade the court why it should be permitted to resile from such an agreement.

The nature and scope of the alleged exclusive jurisdiction agreements

73 From the outset, TGN took the position that Art 6 meant that each of the Deeds contained an exclusive jurisdiction agreement which covered the dispute in S 252 and therefore that the commencement of the action was a breach of such agreement. In this connection two questions arose for analysis: first, whether Art 6 was an exclusive jurisdiction agreement, and if so, secondly, whether the SKP Companies' claims fell within the scope of the jurisdiction agreement. Although the SKP Companies' submissions on both issues were rejected by the judge, the SKP Companies sought to reiterate those submissions on TGN's appeal, relying on O 57 r 9A(5) of the Rules of Court (Cap 322, R5, 2014 Rev Ed). We allowed the submissions to be made but ultimately found no merit in them.

74 On the first question, the judge held that Art 6 was an exclusive jurisdiction agreement. He observed (at [11]–[12] of GD (TGN application)) that this was the opinion of TGN's Indonesian law expert, Professor Hikmahanto Juwana. Given that the SKP Companies had not adduced any expert opinion to the contrary, the judge accepted Prof Juwana's view on this issue. We agreed with the judge's approach. The burden was clearly on the SKP Companies to adduce evidence of Indonesian law to rebut Prof Juwana's view, once the latter's opinion had been filed by TGN. They did not do so. From our review of the evidence, only one affidavit opinion of Mr Muhtar Ali (who was the Indonesian law expert of the SKP Companies), dated 2 June 2016, was filed prior to the judge's decision on 9 June 2016. Nothing in that opinion contained a view on whether Art 6 was an exclusive or non-exclusive jurisdiction agreement.

75 The SKP Companies also sought to cast doubt on Prof Juwana's reasoning. They claimed that Prof Juwana "merely recited Article 118 of the Indonesian Civil Procedure Code and Article 6, and then proceeded to conclude by inference that the 'effective result' of these two provisions is that the parties had submitted to the 'exclusive jurisdiction' of the District Court of South Jakarta." This was a considerable oversimplification of Prof Juwana's analysis. As Prof Juwana explained, in the ordinary course, Art 118(1) of the Indonesian Civil Procedure Code requires a civil claim to be submitted to the chairman of the district court in whose jurisdiction the defendant has its domicile. Under Art 118(4) of that Code, a law suit may alternatively be filed at the court where the defendant has *chosen* its domicile. Under Art 6, the SKP Companies and TGN agreed that "the common and permanent domicile" would be "the Registrar's office of the District Court of South Jakarta in Jakarta".

Accordingly, given that they had *chosen* a domicile, a law suit must be filed there and nowhere else. Prof Juwana's analysis appeared to us to be principled and reasonable, and, in the absence of any expert opinion rebutting that analysis, we did not find any evidence that would cast doubt on this view of Indonesian law.

76 Turning to the scope of the jurisdiction agreements, the judge found that the SKP Companies' claims in S 252 fell within the scope of Art 6: GD (TGN application) at [10]. He accepted TGN's argument that the SKP Companies' claim was "an assertion of ownership which challenged [TGN's] rights of ownership over the [PT Shares]", and reasoned that since the Deeds purported to transfer ownership of the PT Shares without interference from third parties claiming any rights to the same shares, the action "fell within the scope of the jurisdiction clauses in the Deeds".

77 The SKP Companies submitted that Art 6 was irrelevant to the claims brought in S 252. Those claims were based on an oral agreement to hold the PT Shares on trust, and that oral agreement was separate and distinct from the Deeds, which merely concerned the transfer of legal ownership of the PT Shares to TGN. Art 6 was concerned only with "the deed and all consequences as well as implementation thereof". It, therefore, did not encompass the dispute concerning TGN's agreement to hold the PT Shares on trust.

78 In our judgment, while this argument had some superficial attractiveness, it was ultimately based on too narrow a reading of the jurisdiction agreements. By Art 2 of the Deeds, the SKP Companies warranted that the PT Shares would be transferred free from the rights of any other party and other encumbrances. The SKP Companies claimed in S 252 that the transfer was,

in fact, subject to the retention of their beneficial rights in the PT Shares by way of a trust. There was accordingly an immediate and obvious inconsistency with the warranty in Art 2 that full and unqualified title to the shares would be transferred. We considered, therefore, that the SKP Companies' claim was in direct opposition to the assurance in Art 2 – it amounted in effect to a denial of the warranty given by the SKP Companies – and thus fell within the scope of the jurisdiction agreement constituted by Art 6. That article, in turn, was worded broadly enough to encompass disputes such as those in S 252.

79 In addition, we considered it unlikely in the extreme that the parties intended to have courts in two different jurisdictions hear such closely related disputes. That would not be a plausible inference especially in the absence of any evidence that the parties intended this to be the case. *Halsbury's* at para 75.113 observes that a generous approach is taken in determining the scope of jurisdiction agreements, especially in commercial contracts, on the assumption that commercial parties generally desire a "one-stop solution" to all their disputes. In *Fiona Trust & Holding Corporation and others v Privalov and others* [2007] UKHL 40, Lord Hoffmann in the English House of Lords expressed the view (at [13]) that the construction of an arbitration clause should start from the assumption that rational businessmen are likely to have intended that any dispute arising out of their relationship should be decided by the same tribunal. This court has repeatedly endorsed this approach in the context of arbitration agreements. In our judgment, this is an approach that ought also to be adopted in construing the scope of jurisdiction agreements entered into by businessmen who are presumed to be acting as rational commercial parties.

Strong cause against a stay of proceedings

80 In *Amerco Timbers Pte Ltd v Chatsworth Timber Corp Pte Ltd* [1977–1978] SLR(R) 112 ("*Amerco Timbers*"), this court held that when a contract contains an exclusive jurisdiction clause, while the court is not bound to grant a stay of proceedings brought in breach of that clause, the plaintiff bears the burden of showing exceptional circumstances amounting to strong cause in order to successfully resist the defendant's stay application. Thus, having held that Art 6 constituted an exclusive jurisdiction agreement, and that the SKP Companies' claims in S 252 fell within the scope of that agreement, the judge turned to the question of whether the SKP Companies were nevertheless able to show that there was strong cause as to why the proceedings should not be stayed in favour of Indonesian jurisdiction.

81 The SKP Companies' main argument was that the concept of trusts is not recognised by Indonesian law and they would therefore have no effective avenue to seek recourse against TGN if left to pursue their claims in Indonesia. The judge found that TGN's expert implicitly agreed with the SKP Companies' expert that Art 33 could prohibit the trust claim. He therefore concluded at [20] that it was "questionable whether the [SKP Companies] would be able to bring their trust claim in Indonesia". In addition, the judge decided at [22] that it was "clearly arguable that Singapore law governed the trust", relying on the fact that TGN was incorporated in Singapore for the specific purpose of holding the PT Shares on trust for the SKP Companies. He reasoned that it could thus be inferred that the law of the place of incorporation of TGN was intended as the governing law of the trust.

82 The judge concluded at [23] that the SKP Companies had shown sufficiently strong cause against the grant of a stay. If left to pursue their claim in Indonesia, they would be prejudiced by the fact that their trust claim was not likely to be recognised. The judge likened this to compelling a plaintiff to sue in a foreign court where he would be faced with a time bar which was not applicable in Singapore. Given that a time bar could constitute strong cause under the approach stated in *Amerco Timbers*, he found that there was no reason why the SKP Companies' situation would not satisfy the requirement. He therefore "could not see how granting a stay in these circumstances would bring about a just result or meet the ends of justice".

The approach under Amerco Timbers

83 In *Amerco Timbers*, this court set out the general rule regarding the observance of exclusive jurisdiction agreements and also discussed the factors which would justify disregarding them. The judgment states at [11]:

> 11 The law concerning an application for a stay is clear. Where a plaintiff sues in Singapore in breach of an agreement to submit their disputes to a foreign court, and the defendant applies to a stay, the Singapore court, assuming the claim to be otherwise within its jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not. The court in exercising its discretion should grant the stay and give effect to the agreement between the parties unless strong cause is shown by the plaintiff for not doing so. To put it in other words the plaintiff must show exceptional circumstances amounting to strong cause for him to succeed in resisting an application for a stay by the defendant. In exercising its discretion the court should take into account all the circumstances of the particular case. In particular, the court may have regard to the following matters, where they arise:
>
> (a) In what country the evidence on the issues of fact is situated or more readily available, and the effect of that on the relative convenience and expense of trial as between the Singapore and foreign courts.

> (b) Whether the law of the foreign court applies and, if so, whether it differs from Singapore law in any material respects.
>
> (c) With what country either party is connected and, if so, how closely.
>
> (d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages.
>
> (e) Whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would:
>
> (i) be deprived of security for their claim;
>
> (ii) be unable to enforce any judgment obtained;
>
> (iii) be faced with a time bar not applicable here; or
>
> (iv) for political, racial, religious or other reasons be unlikely to get a fair trial.

84 As this court further explained in *Golden Shore Transportation Pte Ltd v UCO Bank and another appeal* [2004] 1 SLR(R) 6 at [33], the burden to show strong cause rests with the plaintiff because he should *prima facie* be held to his contractual commitment to have all similar disputes decided in the agreed forum. In *The Vishva Apurva* [1992] 1 SLR(R) 912 at [22], this court explained that in deciding whether to exercise its discretion to refuse a stay of proceedings, the court should not simply undertake a balancing exercise. The court in such a situation is not being asked to decide which forum is the more convenient one, but rather why the plaintiff should be permitted to be relieved of its contractual obligation to sue in the agreed forum. Indeed, the exercise undertaken by the court in this regard is akin to that undertaken in the second stage of the *Spiliada* analysis.

85 We observe that *Amerco Timbers* did not prescribe a closed list of matters which were relevant for the court's consideration when exercising its discretion. This is clear from the court's explanation that it should "take into

account all the circumstances of the particular case", and "[i]n particular … have regard to" the list of matters identified. The factors that it identified were therefore of general but not universal relevance and importance. This is in consistent with the approach taken in a number of other cases. For instance, in *The "Eastern Trust"* [1994] 2 SLR(R) 511 at [8], Lai Kew Chai J held that the court's discretion in deciding whether to grant a stay would not be properly exercised unless all relevant circumstances were taken into account. In *The "Hyundai Fortune"* [2004] 4 SLR(R) 548 ("*The Hyundai Fortune*"), this court held at [30] that "an exercise in determining strong cause, which will necessarily involve an evaluation of the differing factors, cannot be the subject of rigid rules or classification". Indeed, at [24] the same judgment noted that the weight to be accorded to each relevant factor was also a matter entirely within the court's discretion and not something "amenable to precise definition".

(1) Governing law

86 We turn first to consider the governing law of the SKP Companies' claim against TGN. We have described the approach to be taken in determining the governing law of a trust above. In the absence of an express choice of law, the search is for the parties' implied choice of governing law, and if that cannot be found then the governing law is that to which the trust has the closest connection.

87 We held that the judge was correct to find that Singapore law governed the alleged agreement for TGN to hold the PT Shares on trust. We make two points in this regard. First, the parties' choice of corporate structure pointed toward an implied choice of Singapore law. The parties decided not only to incorporate a special purpose vehicle for the purpose of holding the PT Shares,

but also deliberately chose Singapore as the jurisdiction in which the company would be constituted. We found it highly implausible that the parties would have intended to create a company incorporated under the laws of Singapore for the sole purpose of holding the PT Shares, but intended at the same time that such holding should be governed by the laws of another jurisdiction.

88 Second, and crucially, it was almost inconceivable that the parties would have chosen a law that did not contain the concept of trusts to govern their trust agreement. Such a suggestion seemed to us to be bordering on the absurd. We observed that the experts were substantially in agreement that Indonesian law, as a civil law system, did not recognise causes of action in equity. Ms Susandarini, who was the SKP Companies' Indonesian law expert, explained in her affidavit that Indonesian law did not fully recognise the concept of trusts, and referred to the prohibition under Art 33 on holding shares in a limited liability company for and on behalf of another party. Along similar lines, Mr Ali noted that Indonesian law did not contain a concept of trusts similar to those in the alleged trust arrangement between the SKP Companies and TGN. However, Prof Juwana, TGN's expert, stated that he did "not agree that the concept of trust or beneficial ownership in the Indonesian law context is not fully recognised", without providing any elaboration. All he went on to say was that "whether or not [Art 33] applies to the arrangement between the parties and whether or not it falls within the prohibition under [Art 33] is very much dependent on the facts of the case, including and in particular the agreements contained in the [Deeds]". The judge did not find this satisfactory. Nor did we. Prof Juwana's pronouncements consisted of nothing more than a mere denial of the assertion that Indonesian law does not fully recognise the concept of trusts

together with the unhelpful statement that whether Art 33 applied to the alleged trust agreement was a matter that depended on the facts of the case.

89 In the circumstances, we agreed with the judge that the governing law of the alleged trust agreement was Singapore law. We did not consider that the parties would have intended to apply a governing law that – at least on the evidence before us – would not even recognise the type of rights and obligations sought to be conferred and imposed through the alleged trust agreement.

(2) Prejudice to the plaintiffs

90 We have explained our view that *Amerco Timbers* does not contain a closed list of relevant matters. For the same reason, we do not think that the court in *Amerco Timbers* intended to set out an exhaustive list of factors that would result in prejudice to the plaintiff who seeks to resist a stay of proceedings despite the exclusive jurisdiction agreement.

91 In our judgment, the SKP Companies would be irretrievably prejudiced were they left to pursue their action for breach of trust against TGN in Indonesia. They would, in all likelihood, be unable to obtain a remedy for the alleged breach of trust. This would not be the result of any lack of substantive merit in their claim (a matter on which we make no judgment), but because the Indonesian courts would find that the claim had no legal basis given the nature of the right sought to be enforced. The SKP Companies would therefore be shut out from seeking relief altogether.

92 We noted that the judge sought to compare the difficulties that the SKP Companies faced to those of a plaintiff facing a time bar which was

applicable in the foreign court but not in Singapore. On the facts of this case, we were satisfied that there were sufficient grounds to constitute strong cause without the aid of that analogy.

(3) Illegality and public policy

93 A substantial part of TGN's arguments on appeal concerned the illegality of the trust agreement under Art 33 and the principle that the court should generally decline to enforce obligations created for the purpose of performing an illegal act in a foreign country. TGN referred to *Eng Liat Kiang* in support of its argument. TGN's submission in this regard was intended to rebut the judge's finding that there was strong cause, though TGN did not make it clear how this submission was relevant to the approach set out in *Amerco Timbers*.

94 We have explained our views on *Eng Liat Kiang* and the relevance of foreign public policy in an application for a stay of proceedings. We have also commented on *Peh Teck Quee* and the relevance of foreign illegality in stay proceedings. In brief, we did not think that the SKP Companies' claim could properly be likened to the appellant's claim in *Eng Liat Kiang*, given that Singapore law applied to the present dispute and the facts of this case were also much more closely tied to Singapore than they were in *Eng Liat Kiang*. As we have explained, *Eng Liat Kiang* did not involve any prospect that the foreign court would not recognise or give effect to the appellant's trust claim, unlike the present case. In relation to the issue of foreign illegality, we noted that *Peh Teck Quee* was not a case that involved an application for a stay of proceedings (whether on the basis of a jurisdiction agreement or on *forum non conveniens* grounds). Rather, foreign illegality was raised as a substantive defence to the

claim. It would therefore represent a marked extension in the law as stated in *Peh Teck Quee* were foreign illegality to provide grounds for a stay. In our judgment, arguments concerning breaches of the law of the place of performance should not be determined at the stage where the court considers jurisdictional objections. These are matters that ought properly to be canvassed at the hearing of the merits of the claim. We have explained these points above in the context of our decision on the stay application in S 349.

95 More broadly, if TGN's argument were to be accepted, this would mean that Singapore can never be an appropriate jurisdiction to hear claims involving the holding of Indonesian shares on trust even though the alleged trustee is a Singaporean citizen or company. A plaintiff seeking to hold a Singaporean trustee to account would, if the alleged trust assets were shares in an Indonesian company, therefore have to bring his claim in Indonesia where his claim would, in all likelihood, fail at first instance. This is untenable. Singapore law recognises trusts and allows Singaporean individuals and companies to act as trustees. It would be invidious for the Singapore courts to refuse their aid to parties who have structured their transactions in Singapore on the basis of Singapore law solely because the assets affected by the trust are foreign assets.

96 The judge noted in a postscript to his grounds of decision that he was referred to the English Court of Appeal's decision in *Akers and others v Samba Financial Group* [2015] 2 WLR 1281 ("*Akers (CA)*") at the hearing of TGN's application for leave to appeal. The liquidators of Saad Investments Co Ltd ("SICL"), a Cayman Islands company, brought an action against Samba Financial Group ("Samba"), claiming that Samba had received certain shares in Saudi Arabian banks which had been held on trust for SICL by one Mr Al-

Sanea. Shortly after SICL went into liquidation, Mr Al-Sanea had transferred the shares to Samba in discharge of his personal liabilities to Samba. Samba applied to stay SICL's claim, arguing that the Saudi Arabian shares had not in fact been held by Mr Al-Sanea on trust for SICL because Saudi Arabian law applied to the trust claims and under Saudi Arabian law the division of legal and beneficial interests in shares would not be recognised. In the English Court of Appeal, Vos LJ remarked at [35] that "[t]here must be large numbers of trusts established under the laws of common law jurisdictions, onshore or offshore, that comprise registered shares in civil law countries amongst their assets". He also noted counsel's objection that it would be remarkable if all those trusts were to be held to be ineffective. The English Court of Appeal eventually found that Cayman Islands law governed the transfer of the beneficial interest effected by Mr Al-Sanea's declarations of trust, applying the Hague Convention on the Law Applicable to Trusts and on their Recognition (to which Singapore is not a signatory).

97 The UK Supreme Court recently delivered its judgment on Samba's appeal against the Court of Appeal's decision, in *Akers and others v Samba Financial Group* [2017] AC 424 ("*Akers (SC)*"). Lord Mance, delivering the principal judgment of the court, affirmed at [21]–[22] that as a matter of common law, a common law trust can exist in respect of shares even though the *lex situs* of the shares (Saudi Arabian law in that case) does not recognise equitable proprietary interests and may not give any effect at all to a common law trust. Thus, as between Mr Al-Sanea and SICL, Mr Al-Sanea could not deny the validity or effect of the trusts simply because Saudi Arabian law did not recognise the trusts as giving rise to equitable proprietary interests. After a review of various English authorities, Lord Mance surmised at [34] that "in the

eyes of English law, a trust may be created, exist and be enforceable in respect of assets located in a jurisdiction, the law of which does not recognise trusts in any form". Along similar lines, Lord Sumption explained in a concurring judgment (at [85]) that where a person assumes the liabilities of a trustee under an instrument governed by a law which recognises the concept of trusts, that instrument remains effective to create personal rights against the trustee, even though the *lex situs* does not similarly recognise the concept. The UK Supreme Court eventually allowed the appeal on the basis that there was no disposition of property in breach of the Insolvency Act 1986 (c 45) (UK), as all that Mr Al-Sanea had done was to transfer his legal interest in the shares, while the equitable interest (which was SICL's property) remained with SICL.

98 Although the approach taken by Samba in *Akers (CA)* and *Akers (SC)* to advance its stay application was not quite the same as that adopted by TGN in the present case – TGN did not seek a stay on the basis that the trust claim was bound to fail under its proper law, but on the ground that the court should not assist a litigant to commit an act that is illegal under the law of its place of performance – those decisions are broadly relevant because they illustrate the importance of ascertaining the proper law of the trust agreement and the equitable rights that are sought to be enforced. They also demonstrate the practical distinction between adjudication and enforcement. If the SKP Companies eventually succeed in establishing an equitable interest in the PT Shares, they may face insurmountable hurdles in seeking to enforce a judgment to this effect in Indonesia, because Indonesian law and public policy may well forbid such enforcement. But that is no reason for a Singapore court to shut them out at this stage and deny them the possibility of vindication under

the law that governs the alleged agreement to hold the PT Shares on trust, that is, Singapore law.

Conclusion on the issue

99 In light of the above, we agreed with the judge that there was strong cause amounting to exceptional circumstances which justified refusing TGN's application for a stay of proceedings, despite the existence of applicable exclusive jurisdiction agreements in the Deeds.

100 We think it important to emphasise that this was an exceptional case which warranted, on its facts, the conclusion that we drew. It was an exceptional case because the SKP Companies would, at least on the evidence before us, simply not have been able to obtain any remedy in the foreign court by virtue of the nature of their claim. The prejudice that they would have suffered were a stay to be granted was clear and compelling. We reiterate the observation in *The Hyundai Fortune* that whether strong cause exists in any given case is a matter that must be carefully assessed according to the particular facts of the case, having regard to the relevant factors for consideration and attributing a suitable amount of weight to each of those factors. The assessment "cannot be the subject of rigid rules or classification".

Forum non conveniens

101 The judge disposed summarily of TGN's argument that Singapore was *forum non conveniens*, finding that Indonesia was neither an available nor an appropriate forum for the dispute given that the SKP Companies' trust claim would not likely be recognised by the Indonesian courts. As TGN did not satisfy

the first stage of the *forum non conveniens* analysis, its argument in this regard could not succeed.

102 We agreed with the judge's conclusion. Indonesia was not an appropriate forum for the determination of the claim, given our findings that Singapore law rather than Indonesian law governed the claim, that the dispute involved the holding of shares by a Singapore company that was constituted for this very purpose, and that there were other substantial connections to Singapore. Indeed, having found that there was strong cause to refuse to enforce the exclusive jurisdiction agreement, even if under stage one of the *Spiliada* analysis, Indonesia had been the more appropriate forum, we would, logically, be compelled to hold at the second stage that the ends of justice required the claim to be decided in Singapore.

Conclusion

103 For the abovementioned reasons, we allowed Southern Realty's appeal in CA 124 and dismissed TGN's appeal in CA 112. The result was that both S 349 and S 252 were allowed to proceed.

Sundaresh Menon	Judith Prakash	Tay Yong Kwang
Chief Justice	Judge of Appeal	Judge of Appeal

Chew Ming Hsien Rebecca and Chew Xiang (Rajah & Tann Singapore LLP) for the appellant in CA 112/2016 and for the respondents in CA 124/2016;

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