**IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE**

**[2018] SGHC 87**

Suit No 202 of 2017
(Summons No 1709 of 2017)

Between

Lakshmi Anil Salgaocar

… *Plaintiff*

And

(1) Hadley James Chilton
(2) Laurent Keeble-Buckle
(3) Million Dragon Wealth Ltd

… *Defendants*

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# GROUNDS OF DECISION

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[Civil procedure] — [Service] — [Leave to serve out of jurisdiction]
[Civil procedure] — [Jurisdiction]
[Conflict of laws] — [Jurisdiction] — [*Forum non conveniens*]
[Companies] — [Incorporation of companies] — [Lifting corporate veil]

## TABLE OF CONTENTS

# Lakshmi Anil Salgaocar
# v
# Hadley James Chilton and others

**[2018] SGHC 87**

High Court — Suit No 202 of 2017 (Summons No 1709 of 2017)
Aedit Abdullah J
25 September 2017

16 April 2018

**Aedit Abdullah J:**

## Introduction

1 Summons No 1709 of 2017 is the first and second defendants' application to (a) set aside the leave granted in Summons No 1047 of 2017 to serve the writ for this suit out of jurisdiction; and (b) a declaration that all proceedings in the suit, including the *ex parte* injunction granted in Summons No 994 of 2017 ("the *ex parte* injunction") be set aside. After hearing the arguments of parties, I granted the application to set aside leave to serve out of jurisdiction and made no order on the application for a declaration that all proceedings in the suit, including the *ex parte* injunction be set aside.

2 The plaintiff has appealed against my decision to set aside leave to serve out of jurisdiction. While the appeal was filed specifically only against my finding that the more appropriate forum for the suit is the British Virgin Islands

("BVI"),[1] I considered it appropriate in this written grounds of decision to touch on the other aspects of service out of jurisdiction as well, particularly as there is some connection between the matters covered.

**Background**

3 The plaintiff is the widow of Anil Vassudeva Salgaocar ("AVS"), who in his lifetime was the sole shareholder and the sole director of the third defendant ("MDWL").[2] The plaintiff commenced the present suit in her capacity as a beneficiary of the estate of AVS ("the Estate"). MDWL has 22 wholly-owned subsidiaries, each of which owns a unit in the Newton Imperial development in Singapore. MDWL and its subsidiaries are incorporated in the BVI.[3]

4 The first and second defendants ("the receivers") are joint receivers of the third defendant, who were appointed on 27 July 2016 pursuant to an order of court issued by the Commercial Division of the Eastern Caribbean Supreme Court of the BVI ("BVI Court"), in an action ("BVI 101") commenced by one Shanmuga Rethenam s/o Rathakrishnan ("Shanmuga").[4] Shanmuga commenced BVI 101 to freeze the assets of MDWL and appoint receivers over the frozen assets, pending the determination his claim in a separate suit commenced in Singapore (Suit No 689 of 2016). BVI 101 has since been stayed until 31 July 2018 or further order, such stay being without prejudice to the receivers' powers.[5]

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1 Notice of Appeal dated 14 December 2017.

2 Defendants' written submissions dated 21 September 2017 ("Dfs' written submissions") at para 2.

3 Dfs' written submissions at para 7.

4 Dfs' written submissions at para 5.

5 The main dispute between the parties centres around the plaintiff's claim that the receivers were not entitled to carry out certain acts pursuant to the receivership.

6 On 8 September 2016, the plaintiff commenced Suit No 966 of 2016 ("Suit 966") to seek a declaration restraining the receivers from:

(a) Appointing a consultant, Vivek Sudarshan Khabya ("Vivek") in relation to MDWL and its 22 subsidiaries;

(b) Releasing or delivering the books and records of MDWL and its subsidiaries; and

(c) Demanding that the escrow moneys held by Haridass Ho & Partners ("HHP") be transferred into their accounts.

7 The plaintiff did not include a claim for damages when she commenced Suit 966. She subsequently sought to amend her statement of claim in Suit 966 to introduce new causes of actions against the defendants, including a claim for damages for breach of duty by the receivers. This application to amend the statement of claim was allowed in part only, pursuant to Order of Court 1763 of 2017 dated 24 February 2017. The plaintiff then proceeded to commence the present suit, *ie,* Suit No 202 of 2017 ("Suit 202") on 3 March 2017 with a reformulated claim, and discontinued Suit 966 on 12 April 2017.

8 In the present Suit 202, the plaintiff claims that the receivers breached a duty of care owed to the Estate by acting in bad faith by *inter alia* appointing Vivek as consultant, demanding rental income from the Newton Imperial apartments belonging to MDWL's subsidiaries, demanding that moneys held by

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[5] Dfs' written submissions at para 9.

HHP in escrow be transferred to their accounts, and demanding the release of the books and records of MDWL.[6]

9 On 6 March 2017, by way of Summons No 994 of 2017, the plaintiff sought and obtained an *ex parte* injunction restraining the receivers from, *inter alia*, obtaining payment for their fees and expenses and dealing with or disposing of the assets of MDWL.

10 On 9 March 2017, by way of Summons No 1047 of 2017, the plaintiff sought and obtained leave to serve the writ and statement of claim on the defendants out of jurisdiction, in the BVI.

11 On 23 May 2017, the defendants obtained by way of Originating Summons No 1074 of 2016 ("OS 1074/2016") recognition of the first and second defendants as receivers and their powers to be exercised with the leave of court, including to deal with the assets of MDWL and its subsidiaries, and to demand the books and records of MDWL.

12 The present application is the defendants' application to set aside the leave granted for service out of jurisdiction, the *ex parte* injunction and any other related proceedings in the suit, pursuant to O 12 r 7(1) and O 21 r 1 of the Rules of Court (Cap 322, R5, 2014 Rev Ed) ("Rules of Court").

13 Aside from Suit 689, Suit 966 and Suit 202, there have been other suits involving disputes over MDWL. The ultimate beneficial interest of the shareholding in MDWL has been asserted by one Jhaveri Darsan Jitendra ("Darsan") in a separate pending suit, Suit 821 of 2015, before the Singapore

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6 Plaintiff's written submissions dated 21 September 2017 ("Pf's written submissions") at paras 94–96

High Court ("Suit 821"), and in separate BVI proceedings, *ie*, BVI 83.[7] In addition, in Suit No 949 of 2016 ("Suit 949"), the plaintiff brought claims against Vivek for conspiracy, conversion, breach of fiduciary duty and breach of trust, alleging *inter alia* that Vivek had no authority to deal with the assets and income of MDWL or to manage its affairs. The plaintiff's claim in Suit 949 was struck out by the High Court in *Lakshmi Anil Salgaocar v Vivek Sudarshan Khabya* [2017] 4 SLR 1124 due to the plaintiff's lack of *locus standi* to make the claims therein.

## The plaintiff's case

### *Submission to jurisdiction*

14 According to the plaintiff, the defendants' failure to mount a jurisdictional challenge in Suit 966 made it disingenuous for the receivers to then claim that the court had no jurisdiction to hear Suit 202. If the court did not have jurisdiction as the defendants claimed, the issue of jurisdiction should have been raised from the outset, in Suit 966. The *bona fides* of the defendants' present jurisdictional objection was thus suspect.[8]

15 In addition, in applying for the recognition of the appointment of the receivers by the BVI Court in OS 1074/2016, the defendants had unequivocally submitted to the jurisdiction of the Singapore courts.[9]

16 Further, the plaintiff argued that the receivers, on the basis of their control of MDWL, had entered appearance on behalf of MDWL which is a

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7 Plaintiff's written submissions at paras 36–47, 26. Dfs' written submissions at paras 26–31.

8 Pf's written submissions at paras 82–84.

9 Pf's written submissions at paras 204–211.

nominal defendant in the present suit, and that this constituted submission to jurisdiction.[10] According to the plaintiff, the defendants invoked and disavowed Singapore law as it suited them.

### *Good arguable case*

17 The plaintiff relied on three grounds under O 11 for leave to serve out of jurisdiction, *ie*, O 11 r 1(*b*), r 1(*f*) and r 1(*p*), submitted in the alternative to each other:

> **Cases in which service out of Singapore is permissible (O 11 r 1)**
>
> **1.** Provided that the originating process does not contain any claim mentioned in Order 70, Rule 3(1), service of an originating process out of Singapore is permissible with the leave of the Court if in the action —
>
> (*b*) an injunction is sought ordering the defendant to do or refrain from doing anything in Singapore (whether or not damages are also claimed in respect of a failure to do or the doing of that thing);
>
> …
>
> (*f*) (i) the claim is founded on a tort, wherever committed, which is constituted, at least in part, by an act or omission occurring in Singapore; or
>
> (ii) the claim is wholly or partly founded on, or is for the recovery of damages in respect of, damage suffered in Singapore caused by a tortious act or omission wherever occurring;
>
> …
>
> (*p*) the claim is founded on a cause of action arising in Singapore;

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[10] Pf's written submissions at paras 213–215.

18 The plaintiff argued that the elements of a tort were made out and that she had standing to bring the claim. According to the plaintiff, part of the acts committed by the defendants constituting the tort occurred in Singapore. This included appointing the consultant Vivek over the assets in Singapore, demanding subsidiaries' moneys from HHP which were held in Singapore, and demanding the books and records in Singapore. Therefore, there was a good arguable case that the plaintiff's claim falls within O 11 r 1(*f*)(i). In addition, part of the losses suffered occurred in Singapore, including legal costs in Singapore and unnecessary costs incurred by the receivers in following up with HHP and another law firm Netto & Magin LLC, therefore fulfilling the requirements of O 11 r 1(*f*)(ii ).[11] The requirements of O 11 r 1(*p*) were also fulfilled as there was a cause of action in Singapore, whether framed in equity or tort. There was a duty owed in Singapore which was breached in Singapore and caused loss and damage in Singapore.[12] The plaintiff also argued that she could rely on O 11 r 1(*b*) given that she had sought an *ex parte* interim injunction against the defendants in Singapore.[13]

***Forum non conveniens***

19 The plaintiff submitted that Singapore is the suitable forum for the dispute. She argued in essence that the central issues are not centred on the BVI, but that rather the dispute concerns the conduct and breach of duty by the receivers in Singapore. Further, key witnesses as well as the relevant assets are also located in Singapore. Singapore is also the appropriate forum because the BVI Court cannot effectively supervise the receivers' conduct in Singapore.[14]

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11 Pf's written submissions at paras 89–169.

12 Pf's written submissions at paras 170–188.

13 Pf's written submissions at paras 85–88.

***Full and frank disclosure***

20 The plaintiff also denied the defendants' claim that she had obtained leave to serve out of jurisdiction without making full and frank disclosure of material facts to the court. The plaintiff argued that there is no obligation to disclose what the applicant could not have reasonably known from proper inquiries, and that at the relevant time of the applications, there was nothing for the plaintiff to disclose in relation to Darsan's claims.[15] The plaintiff also denied having misled the court as to the true status of the proceedings in the BVI, since the meaning of the BVI orders was a matter of interpretation which the Singapore court was entitled to undertake on its own.[16] It was also not necessary for the plaintiff to make express disclosures on her partial failure to obtain leave to amend her statement of claim for Suit 966 as the suits were different.[17]

**The defendants' case**

***Submission to jurisdiction***

21 The defendants argued that they had not submitted to the jurisdiction of the Singapore court, despite their submission to jurisdiction in Suit 966. In Suit 966, the plaintiff had sought permanent injunctions restraining the receivers from demanding the books and records of MDWL, and from dealing with the assets of MDWL's subsidiaries in Singapore. The receivers had submitted to the court's jurisdiction in Suit 966 on the basis that it had the powers to carry out the very acts challenged under BVI law. By contrast, the plaintiff is claiming in Suit 202 that the receivers had breached their duties, and the defendants are

14 Pf's written submissions at paras 190–203.

15 Pf's written submissions at paras 36–47.

16 Pf's written submissions at paras 48–72.

17 Pf's written submissions at para 78.

of the view that Singapore is not the appropriate forum to deal with these claims.[18] The two suits are separate and it is not appropriate to transpose the submission to jurisdiction from one suit to the other.

22 Further, the defendants denied that their commencement of OS 1074/2016 to seek declarations recognising the appointment of the receivers amounted to a submission to the court's jurisdiction in this present suit. It was made clear by the defendants during the hearing for OS 1074/2016 that the declaration sought was not to be taken as submission to jurisdiction in Suit 202, and this express qualification was made equally clear in the court order granted.[19]

23 In addition, the defendants argued that their entry of appearance to contest the jurisdiction of the court also did not amount to a submission to jurisdiction, as was established in *Zoom Communications Ltd v Broadcast Solutions Pte Ltd* [2014] 4 SLR 500 ("*Zoom Communications"*).[20]

***Good arguable case***

24 The defendants submitted that the plaintiff was unable to satisfy any of the grounds under O 11 r 1 as she could not establish a good arguable cause of action in tort.[21] The plaintiff's claim of breach of duty of care by the receivers of MDWL did not have a good prospect of success. It was plain and obvious that no duty of care was owed by the receivers to the plaintiff or the Estate, and in any event, the receivers had not breached any such duty since they had

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18 Dfs' written submissions at para 45.

19 Dfs' written submissions at para 46.

20 Dfs' written submissions at para 47.

21 Dfs' written submissions at para 53.

exercised their powers within BVI law. In addition, the losses claimed by the plaintiff were losses suffered by MDWL and not by the plaintiff or the Estate. The plaintiff was hence prevented by the rule in *Foss v Harbottle* (1843) 67 ER 189 ("*Foss v Harbottle*") from seeking damages for the losses suffered by MDWL.[22]

25 The defendants further argued that the plaintiff failed to establish a good arguable case that her claim falls within one of the limbs under O 11 r 1 of the Rules of Court. The foundation of the plaintiff's claim is the plaintiff's dissatisfaction with the exercise of the powers and duties to take custody of the assets by the receivers. The plaintiff's allegations involve substantial and efficacious acts or omissions occurring in the BVI.[23] The place of the tort, if any, and damages suffered therefore occurred in the BVI not in Singapore. Therefore, O 11 r 1(*f*) and O 11 r 1(*p*) could not be relied on by the plaintiff to establish jurisdiction. In relation to O 11 r 1(*b*), injunctive relief was not part of the substantive relief claimed by the plaintiff and thus could not provide a basis for the jurisdiction of the Singapore courts.

***Forum non conveniens***

26 Even if the court found that the plaintiff had a good arguable case under O 11 r 1*(b*), r 1(*f*), or r 1(*p*), leave to serve the writ out of jurisdiction should be set aside on the basis that Singapore is *forum non conveniens*. BVI is the more appropriate forum to determine the dispute. The place of the tort if any was the BVI. The connecting factors, including the applicability of BVI law to the dispute, the location and compellability of key witnesses and evidence, point

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22 Dfs' written submissions at paras 55–80.

23 Dfs' written submissions at paras 84–102.

towards BVI being the appropriate forum to hear the dispute. In addition, there is also no prejudice to the plaintiff from having the dispute heard before the BVI courts rather than the Singapore courts. The plaintiff is entitled to join in the pending BVI proceedings and raise the same allegations made here.[24]

***Full and frank disclosure***

27 The defendants submitted that the plaintiff had obtained leave to serve the writ of summons out of jurisdiction without fulfilling her obligation to make full and frank disclosure of material facts to the court.

28 In particular, the plaintiff failed to mention that Darsan was claiming to be the ultimate beneficial owner of MDWL. This was a material fact that should have been disclosed as it was likely to affect the court's assessment of the plaintiff's *locus standi* in the present suit. The plaintiff had also actively misled the court by informing the court that BVI 101 had been discontinued when it had not. Further, the plaintiff failed to disclose to the court that Suit 202 was commenced to make the same claims that the plaintiff had failed to add by an amendment to the statement of claim in Suit 966.[25]

**Decision**

29 I set aside the service out of jurisdiction on a number of grounds, including absence of a good arguable case that grounds were made out under O 11, that there were insufficient merits, and that it was not shown that Singapore was the more appropriate forum.

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[24] Dfs' written submissions at paras 115–128.

[25] Dfs' written submissions at paras 21–43.

**Analysis**

***Legal framework for jurisdiction over foreign defendant***

30 Jurisdiction will be established over a foreign defendant if there is:

(a) Consent;

(b) Submission; or

(c) Valid service of originating process out of jurisdiction.

31 In relation to (c), the Court of Appeal in *Zoom Communications* set out the requirements of valid service as follows (at para [26]):

a) The plaintiff's claim must fall within one of the heads listed in O 11 r 1.

b) The plaintiff's claim must have a sufficient degree of merit.

c) Singapore must be the proper forum for the trial of the action.

32 In addition, where the requirements set out at [31] above are fulfilled, leave to serve out of jurisdiction may nevertheless be set aside where the plaintiff had failed to make full and frank disclosure of all the material facts when applying *ex parte* for leave (*Zoom Communications* at [28]).

33 Consent was not invoked in the present case. In arriving at my decision, I therefore analysed the following issues in turn:

(a) whether the defendants had submitted to jurisdiction;

(b) whether a good arguable case was made out by the plaintiff that her claim falls within one of the limbs under O 11 r 1;

(c) whether the plaintiff's claim had a sufficient degree of merit or in other words, if the plaintiff's claim involved a serious issue to be tried;

(d) whether Singapore is the proper forum for the dispute or is *forum non conveniens*; and

(e) whether there was a lack of full and frank disclosure by the plaintiff in obtaining leave to serve out of jurisdiction.

***Submission to jurisdiction***

34 In Suit 966, the defendants had not challenged the court's jurisdiction, and had filed their defence and opposed the plaintiff's application to amend her statement of claim. The plaintiff argued that there was thus no basis for the defendants to challenge jurisdiction in the present suit given the defendants' previous stance in Suit 966.[26] The defendants' argued that there was no submission given that the suits were separate.

35 I found that the defendants had not submitted to the jurisdiction of the Singapore courts in relation to the present suit. Submission to jurisdiction will be found where the relevant party challenging jurisdiction takes a step in the proceedings which is inconsistent with its position that the Singapore court lacks jurisdiction. The key consideration in this respect, according to *Zoom Communications* (at [33]), is whether the defendant has done anything which in

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[26] Pf's written submissions at paras 82–84.

the context and circumstances would be meaningful only if he has waived any objection to the Singapore court's jurisdiction.

36 I accepted the defendants' argument that their submission to jurisdiction in Suit 966 did not constitute submission to jurisdiction in the present suit. Where a defendant took a step in a previous suit which has since been discontinued, it would not be appropriate to infer that he has submitted to the jurisdiction of the Singapore courts in a separate fresh suit, notwithstanding that there may be some overlap in the parties and the subject matter of both suits.

37 The following extract from *Civil Jurisdiction and Judgments* (Informa Law, 6th Ed, 2015) by Professor Adrian Briggs (at para 2.86) is to my mind apt:

> It has been held that a defendant who … submits to the jurisdiction in respect of the claim set out in the writ does not necessarily submit to the jurisdiction in respect of other claims which, in the exercise of its procedural discretion, the court allows to be introduced by later amendment of the claim. One can see why this ought to be the answer: it would not appear obviously right that if a defendant enters an appearance in relation to a narrowly-drafted claim, he has no opportunity to re-consider his position if the claimant later seeks to add new claims, or if other parties seek to be added to the claim: to put it in homely terms, it does not seem right that a claimant should be allowed to use a sprat to catch a mackerel. On the other hand, a defendant does not have a right to pick and choose which claims in a writ he is prepared to submit to if he has no basis for, and does not make, a jurisdictional challenge … It may be that the best answer is that the court should exercise its rules of procedural law to [prevent] new claims to be added in such a way as to prevent the jurisdiction, originally established … being abused.

38 The plaintiff in this case had sought unsuccessfully to introduce new causes of action through an amendment to her statement of claim in Suit 966.[27]

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[27] Pf's summons for amendment dated 23 December 2016 under HC/SUM 6132/2016

She then withdrew Suit 966 and commenced Suit 202 to bring these same causes of action. Therefore, the nature of the claim under Suit 966 was different from that under Suit 202. In particular, in Suit 966, the plaintiff primarily sought declarations restraining the receivers from carrying out certain acts. When the plaintiff sought to amend the claim for Suit 966 to introduce *inter alia* a claim for damages for breaches of duties, the defendants had raised objections pertaining to the court's jurisdiction to hear the claims on the basis of *forum non conveniens*.[28] In the circumstances, it is unjustified to find that the defendants have submitted to the Singapore court's jurisdiction to determine Suit 202 by virtue of their previous submission in Suit 966.

39 In a similar vein, the commencement of OS 1074/2016 (to seek recognition of the appointment of the receivers) did not constitute submission to jurisdiction by the defendants. During the hearing for OS 1074/2016, the defendants stated that their application for recognition was not to be construed as a submission to jurisdiction. In my judgment, an express reservation of a right to challenge jurisdiction is immaterial if the step taken, in substance, constitutes a submission to jurisdiction. I did not think however that an application for recognition of foreign receivership (pursuant to common law principles outlined *inter alia* in *Beluga Chartering GmbH (in liquidation) and others v Beluga Projects (Singapore) Pte Ltd (in liquidation) and another (deugro (Singapore) Pte Ltd, non-party)* [2014] 2 SLR 815) can be said to amount to such a step. Unlike the filing of a counterclaim or defence, an application for the recognition of the appointment of foreign receivers is not premised on the Singapore courts

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read with HC/ORC 1763/2017 issued under HC/RA 29/2017.

[28] Defendants' skeletal submissions for Summons No 6131 and 6132 of 2016 under Suit 966 of 2016 dated 11 January 2017 at paras 56–67.

having jurisdiction over a dispute, which in this case concerns whether the receivers breached any duties owed.

40 As the learned author of *International Commercial Litigation* (Richard Fentiman, Oxford University Press, 2nd Ed, 2015) states at para 9.10(vi):

> A defendant, having acknowledged service of the claim, which applies to contest the court's jurisdiction, does not submit. Again, until a court exercises jurisdiction, a defendant which expressly maintains its continued challenge to the court's jurisdiction does not submit by making an application unrelated to the court's jurisdiction …

41 I also note that the order in OS 1074/2016 was granted without prejudice to any issues of jurisdiction potentially arising in Suit 202. The recognition of the receivers was subject to the following condition stipulated in the order:

> Such powers recognised in paragraphs (a) and (b) are not to be exercised without leave of Court pending the resolution of proceedings in Singapore in relation to the assets and documents covered by paragraphs (a) and (b), including for the avoidance of doubt HC/S 202/2017. This qualification of the powers recognised is not to be taken in itself as a submission by the Applicants to Singapore jurisdiction in respect of those proceedings.

42 I rejected also the plaintiff's claim that the first and second defendants' act of entering appearance on behalf of the third defendant constituted submission to jurisdiction. The law is clear that a defendant may enter an appearance and dispute the existence of the court's jurisdiction in any of the manners set out under O 12 r 7(1) of the Rules of Court, including through seeking the discharge of any order giving leave to serve originating process out of jurisdiction. This is apparent from the wording of O 12 r 7(1) itself and is also made clear in case law (see for instance, *Zoom Communications* at [27]). Therefore, the defendants' entry of appearance to challenge jurisdiction,

including the first and second defendants' entry of appearance on behalf of the third defendant, cannot be construed as a submission to jurisdiction.

***Good arguable case***

43 In my judgment, the plaintiff failed to make out a good arguable case that her claim falls within one of the limbs under O 11 r 1 of the Rules of Court.

*The law*

44 In order to obtain leave to serve originating process out of jurisdiction, a plaintiff must establish that it has a good arguable case that its claim falls under one of the grounds set out under O 11 r 1. All the elements of the ground(s) relied on must be established to the level of a good arguable case before the ground(s) may be successfully relied on as a basis of the court's jurisdiction (*Bradley Lomas Electrolok Ltd and another v Colt Ventilation East Asia Pte Ltd and others* [1999] 3 SLR(R) 1156 ("*Bradley Lomas"*) at [18]–[19]; *Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran* [1993] 3 WLR 756 ("*Seaconsar*") at 765–766).

45 The requirements of a "good arguable case" was stated as follows by the court in *Manharlal Trikamdas Mody and another v Sumikin Bussan International (HK) Ltd* [2014] 3 SLR 1161 ("*Manharlal*") at [93], citing *Singapore Civil Procedure 2013* (G P Selvam gen ed) (Sweet & Maxwell Asia, 2013) at para 11/1/8:

> A good arguable case is one that establishes 'facts from which an inference could clearly and properly be drawn' … This phrase has also been defined as where the applicant's case has a good prospect of success … They indicate that though the court will not at this stage require proof to its satisfaction, it will require something better than a mere *prima facie* case. The practice, where questions of fact are concerned, is to look

> primarily at the plaintiff's case and not to attempt to try dispute of fact on affidavit; it is of course open to the defendant to show that the evidence of the plaintiff is incomplete or plainly wrong. On *questions of law,* however, the court may go fully into the issues and will refuse leave if it considers that the plaintiff's case is *bound to fail.*
>
> [emphasis original]

46 In order to show a good arguable case to establish jurisdiction, it is not sufficient for the plaintiff to show that its claim has a prospect of success (*Manharlal* at [95]).

47 Once a plaintiff satisfies, in relation to jurisdiction, the requirement of "a good arguable case" that the claim falls within one of the grounds under O 11 r 1, the plaintiff must then show that there is a "serious question to be tried" on the merits of the claim (*Bradley Lomas* at [14] and [19]; *Goodwill Enterprise (Malaysia) Sdn Bhd v CT Nominees Ltd (in liquidation) and others* [1996] 1 SLR(R) 330 at [3]; *Seaconsar* at 767). Thus, the "serious question to be tried" standard is applicable to an examination of the merits of the plaintiff's claim. On the other hand, the "good arguable case" standard is the standard that has to be met by the plaintiff in establishing that the court has jurisdiction under one of the grounds under O 11 r 1. It is at this stage, *viz*, the stage of considering whether a good arguable case has been made out that the claim falls within one of the grounds under O 11 r 1, that questions about the *locus standi* of the plaintiff to make the claim, among other things, should be considered.

48 However, it is not always necessary to consider the question of whether there is a serious issue to be tried on the merits following a consideration of whether the plaintiff has established a good arguable case that its claim falls within one of the grounds under O 11 r 1. Depending on the ground(s) relied on under O 11 r 1, it may be that the requirement of a serious issue to be tried on the merits would have been proved once the higher standard of proof, *ie*, good

arguable case, required to establish jurisdiction is satisfied (*Bradley Lomas* at [19]; *Seaconsar* at 765). Therefore, even though the standard of "serious question to be tried" pertains to the merits of the claim while "good arguable case" pertains to the grounds under O 11 r 1, there may be some overlap between the court's consideration of the two matters.

49 In the present case, a number of issues arose in relation to whether the plaintiff had a good arguable case, namely whether the plaintiff possessed the standing to sue and whether leave to sue was required.

*Locus standi*

50 The plaintiff's statement of claim (amendment no. 1) stated that the plaintiff commenced the action

> as a beneficiary of the estate of AVS (the Estate) for her benefit and for the benefit of her 4 children, being all the other beneficiaries as defined by section 7 of the Intestate Succession Act (Cap 146). The Plaintiff is entitled to 50% of the Estate … The Plaintiff does not sue as residual legatees or in any representative capacity.

51 The plaintiff submitted that she had standing to make the claims alleged as the beneficiary of the Estate, the Estate being the sole shareholder of MDWL. She could not sue as the Estate because she had not obtained grant of letters of administration at the time the action was commenced.[29] Citing *Wong Moy v Soo Ah Choy* [1996] 3 SLR(R) 27 ("*Wong Moy*"), the plaintiff argued that a beneficiary of an estate is entitled to sue to protect and preserve the assets of that estate pending the extraction of grant of letters of administration.

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[29] Pf's reply skeletal submissions dated 25 September 2017 ("Pf's reply submissions") at para 4.

52 The plaintiff acknowledged that under the reflective loss principle, a shareholder may not sue for a company's losses. However, the plaintiff argued that in this case, reverse piercing of the corporate veil was permissible to allow the shareholder, *ie*, the Estate, to sue for MDWL's losses. Exceptions to the reflective loss principle were said to be applicable. First, the plaintiff was entitled to sue for MDWL's losses because MDWL was prevented from suing since it was subject to the control of receivers. If the plaintiff was not entitled to sue, there would be a lack of remedy against the receivers.[30] Second, the plaintiff, as the beneficiary of the shareholder of MDWL, was entitled to sue for the shareholder's own losses, separate from the losses incurred by MDWL.[31] It was argued in this regard that the Estate itself suffered losses separate from the losses of MDWL, including losses arising from legal costs incurred in BVI 101 and costs of steps taken to preserve the Estate's interests by reason of BVI 101.[32]

53 The defendants on the other hand argued that the plaintiff did not have the requisite *locus standi* to bring the claim. The plaintiff could not bring the action as a beneficiary of the Estate since she was claiming for damages suffered by MDWL as opposed to recovery of the assets of the Estate.[33] Even if the plaintiff had been granted the letters of administration at the time of the commencement of the action and was suing as a shareholder of the company for damages suffered by the company, this must be brought as a derivative action against the receivers and the procedural requirements of a derivative action must be met.[34] In relation to the plaintiff's claim that she had suffered personal losses

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30 Pf's written submissions at paras 137–139, 148, 150; Pf's further submissions at paras 4b, 12, 14bi, 16–20.

31 Pf's further submissions at paras 10b, 14bii, 21–22.

32 Pf's further submissions at para 22.

33 Dfs' reply submissions to Pf's further supplementary written submissions dated 16 October 2017 ("Dfs' reply submissions") at paras 5–15.

as the beneficiary of the sole shareholder, separate from the losses of MDWL, it was trite law that receivers owed no duty of care to shareholders when exercising their powers of receivership.[35]

54 In my judgment, the plaintiff lacked *locus standi* to bring the claim as the beneficiary of the Estate. The case of *Wong Moy* cited by the plaintiff, which stands for the proposition that a beneficiary could in certain circumstances institute an action to recover the assets of an unadministered estate, was inapplicable. Unlike the plaintiff in *Wong Moy*, the plaintiff in the present case sought to recover losses for alleged breaches of duties owed to MDWL, rather than to recover or protect the assets belonging to the deceased which were held on trust for the estate.

55 The plaintiff also invoked the principle of reverse piercing. In reverse piercing, it is the shareholder of the company as opposed to a third party such as a creditor or contractor that invites the court to disregard the separate legal personality of the company. In *Koh Kim Teck v Credit Suisse AG, Singapore Branch* [2015] SGHC 52 ("*Koh Kim Teck*"), I left the issue of whether reverse piercing was legally permissible open, and dismissed the defendant's application to strike out the statement of claim on the ground that it was an impermissible attempt at reverse piercing (see *Koh Kim Teck* at [63]). In *Koh Kim Teck*, the plaintiff brought a claim in tort against the defendant bank, alleging that the bank had breached its duty of care to him by failing to give him proper investment advice, resulting in losses incurred by him. Strictly speaking, the plaintiff was not the defendant's client as he had carried out his investments and banking with the defendant through a trust company which the plaintiff had

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34 Dfs' reply submissions at pars 27–31.

35 Dfs' reply submissions at paras 32–37.

set up for this purpose. The plaintiff thus claimed that the company was his *alter ego* in its dealings with the defendant. I found in that case that the issue of reverse piercing involved a point of law which merited serious argument. A conclusive determination on the permissibility of reverse piercing was thus not required for the disposal of that striking out application.

56 The present case is distinguishable from *Koh Kim Teck.* What was relied upon by the plaintiff here was that MDWL was the *alter ego* of the *deceased*. Even if the claim was brought by the plaintiff in her capacity as administrator of the Estate and therefore *qua* shareholder of MDWL (which it was not), the defect in standing would not be remedied. This was since any claim as expressed in the pleadings was in respect of a duty, if it existed, owed to the company, and not in this context to the shareholder. Unlike *Koh Kim Teck*, where the defendant had provided banking advice directly to the plaintiff, there could be no assertion of a direct duty owed by the receivers to the shareholder by way of any representation or assumption of responsibility towards the shareholder. There was, as argued by the defendants, nothing specifically pleaded that would support the assertion that there was any such representation or assumption of responsibility to the plaintiff. The pleadings as they stood, and for which leave to serve out of jurisdiction was granted, thus did not adequately show any obligation that could arise if reverse piercing were indeed permitted. Any losses suffered by MDWL could not be claimed by the plaintiff in her capacity as a shareholder through the Estate. The plaintiff's claim thus infringed the rule in *Foss v Harbottle*. There were remedies for the recovery of losses, if any, suffered by the MDWL which did not require the piercing of the corporate veil.

57 Thus on the pleadings as they stood, even if reverse piercing were permissible, it was insufficiently asserted in the present case as to allow service

out of jurisdiction. Therefore, as in *Koh Kim Teck,* no conclusive determination on reverse piercing had to be made in arriving at the decision for this case. I do note however that between my oral decision for this matter and the issuing of these full grounds of decision, there has been the emergence of case law rejecting the doctrine of reverse piercing (see *Jhaveri Darsan Jitendra and others v Salgaocar Anil Vassudeva and others* [2018] SGHC 24 at [51]–[75]).

58 The plaintiff's lack of *locus standi* to bring the claim undermined her ability to establish a good arguable case under any of the heads under O 11 r 1.

*Grounds under O 11 r 1*

59 The plaintiff submitted that a good arguable case had been made out that her claim falls within one of the limbs under O 11 r 1. The grounds under O 11 r 1 invoked by the plaintiff were O 11 r 1(*b*), r 1(*f*) and r 1(*p*):

> **Cases in which service out of Singapore is permissible (O. 11 r. 1)**
>
> **1.** Provided that the originating process does not contain any claim mentioned in Order 70, Rule 3(1), service of an originating process out of Singapore is permissible with the leave of the Court if in the action —
>
> (*b*) an injunction is sought ordering the defendant to do or refrain from doing anything in Singapore (whether or not damages are also claimed in respect of a failure to do or the doing of that thing);
>
> …
>
> (*f*) (i) the claim is founded on a tort, wherever committed, which is constituted, at least in part, by an act or omission occurring in Singapore; or
>
> (ii) the claim is wholly or partly founded on, or is for the recovery of damages in respect of, damage suffered in Singapore caused by a tortious act or omission wherever occurring;

> …
>
> (*p*) the claim is founded on a cause of action arising in Singapore;

O 11 r 1(*b*)

60 The plaintiff argued that O 11 r 1(*b*) was fulfilled since she had sought and obtained the *ex parte* injunction, and because she had invoked causes of action against the receivers independent of the interim injunctive relief sought.[36] The defendants submitted on the other hand that for leave to be granted under O 11 r 1(*b*), the plaintiff had to show that the injunction was a genuine part of the substantive relief sought, and that there was a reasonable prospect of the injunction being granted. The *ex parte* injunction granted on 6 March 2017 was not obtained as part of the substantive relief sought by the plaintiff as the plaintiff had not included a claim for any permanent injunctive relief in her statement of claim for Suit 202.[37]

61 It is settled law that leave to serve out of jurisdiction will not be granted under O 11 r 1(*b*) unless the injunction forms part of the substantive relief sought by the plaintiff: *Siskina (owners of cargo lately laden on board) and others v Distos Compania Naviera S.A.* [1979] 1 AC 210 ("*The Siskina*"). In other words, an interim injunction is not itself a cause of action and cannot, without a pre-existing cause of action, found jurisdiction under O 11 r 1(*b*). The Court of Appeal has in *Karaha Bodas Co LLC v Pertamina Energy Trading Ltd and another appeal* [2006] 1 SLR(R) endorsed the holding in *The Siskina* which it expressed at [37] as follows:

> The House held that in order for a plaintiff to avail himself of this provision, the injunction sought in the action had to be

[36] Pf's written submissions at paras 85–88.

[37] Dfs' written submissions at paras 81–83.

> part of the substantive relief to which the plaintiff's cause of action entitled him and could not be only an interlocutory injunction that was not founded on a substantive cause of action in respect of which the relief was not sought in England.

62 Therefore, to avail itself of O 11 r 1(*b*), any injunction sought had to be part of the substantive relief claimed by the plaintiff. In addition, contrary to the suggestion of the plaintiff, this does mean that a plaintiff may successfully rely on this ground where it had causes of action independent from the interim restrain. Instead, to rely on this ground, the act which the plaintiff sought to restrain the foreign defendant from doing under O 11 r 1(*b*) must amount to "an invasion of some legal or equitable right belonging to the plaintiff in this country and enforceable here by a final judgment for an injunction" (*The Siskina* at 256). An interim injunction to preserve the state of affairs pending final resolution of the dispute is thus insufficient.

63 In this case no order to do or refrain from doing anything in Singapore was sought by the plaintiff as a substantive relief arising from the causes of action alleged. The substantive relief sought by the plaintiff was limited to indemnity, recovery of sums, damages and costs. The plaintiff thus could not rely on O 11 r (1)(*b*) to establish jurisdiction.

O 11 r 1(*f*)

64 In order to establish jurisdiction under O 11 r 1(*f*)(i), a plaintiff must establish a good arguable case of (a) the existence of his cause of action in tort; and (b) the commission of an act or omission in Singapore by the foreign defendant constituting at least part of the tort (*Bradley Lomas* at [19]).

65 Given my finding on *locus standi* above, the plaintiff failed to establish a good arguable case of the existence of her cause of action in tort, and

requirement (a) was not fulfilled. Therefore, O 11 r 1(*f*)(i) was not established even if some of the acts which were alleged to constitute a breach of duty might have occurred in Singapore, *eg*, the appointment of Vivek, and alleged wrongful demand of books and records.

66 O 11 r 1(*f*)(ii) was not fulfilled for the same reason, *ie*, the plaintiff's lack of *locus standi*. In addition, in my judgment, any damages incurred were not incurred in Singapore. This is given that in her statement of claim (amendment no. 1), the plaintiff sought damages "arising in the BVI in relation to BVI Claim 101", and damages for losses (be it arising from diminution in share value, or fees and expenses incurred by the receivers appointed under BVI law) suffered by MDWL, a BVI-incorporated company. These losses were to my mind incurred in the BVI. Likewise, the claim for legal fees incurred in Singapore was not sufficient to fulfil O 11 r 1(*f*)(ii), as that would invariably allow service out of jurisdiction in all cases where leave to serve out of jurisdiction is sought.

O 11 r 1(*p*)

67 Given that the plaintiff lacked *locus standi* to bring the claim, she was unable to establish a good arguable case that she had a cause of action against the defendants and that the cause of action arose in Singapore. The plaintiff thus was unable to successfully rely on O 11 r 1(*p*).

*Leave to sue*

68 The plaintiff had not obtained leave from the BVI Court that appointed the receivers before commencing action in Singapore against the receivers. She denied that leave of the BVI Court was required before a suit could be commenced against the receivers in Singapore, submitting that such a

requirement was not supported by authority.[38] The defendants on the other hand argued that leave of the BVI Court that appointed the receivers should be obtained before any suit against them may be commenced, given that the receivers are a neutral party who should be protected from unmeritorious legal proceedings.[39]

69 In *Excalibur Group Pte Ltd v Goh Boon Kok* [2012] 2 SLR 999 ("*Excalibur Group*"), the court held that leave of court was required before a suit may be commenced against a liquidator. The court found that a requirement for leave would ensure that frivolous claims are filtered out to avoid unnecessary and expensive legal proceedings when the main focus of a company and its liquidators once winding-up had commenced should be to prevent the fragmentation of its assets and ensure creditors' interests are protected (at [28]–[29]). In England, leave of court is required in order to sue a receiver (see *In re Maidstone Palace of Varieties, Limited* [1909] 2 Ch 283 ("*re Maidstone*")). I agreed with the reasoning in *Excalibur Group* and *re Maidstone* and was of the view that the same approach of obtaining leave from the court which appointed the receivers should be applied in circumstances such as the present, where an action is sought to be commenced in a foreign court.

70 The plaintiff argued that *re Maidstone* and *Excalibur Group* stood for the proposition that leave of court was required to commence an action within the same jurisdiction, but that the same proposition did not and should not extend to the commencement of an action in a foreign jurisdiction. I had difficulties finding a rationale for this position. Such a distinction is unjustifiable given that the appointing court has an interest in protecting

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38 Pf's further submissions at paras 56–57.

39 Dfs' reply submissions at para 50–51.

receivers from having to defend frivolous litigation, whether locally or elsewhere.

71 Further, contrary to the submissions of the plaintiff, a requirement for leave to sue in such circumstances does not result in the BVI Court being able to confer jurisdiction on the Singapore courts. The effect of a denial or grant of leave by a foreign appointing court on the jurisdiction of the Singapore courts is a separate matter. While the denial or grant of leave by a foreign appointing court to commence action in Singapore is itself not determinative of the Singapore court's jurisdiction to hear the matter, it may be taken into consideration in the Singapore court's assessment of whether the plaintiff has established a good arguable case under O 11 r 1 and if Singapore is the appropriate forum for the suit.

72 Given my findings above on the defects in the plaintiff's claim in terms of standing, there were sufficient grounds to set aside the leave to serve out of jurisdiction without having to consider the effect of the absence of leave obtained from the BVI Court to commence action in Singapore. Nevertheless, I found that the absence of leave obtained from the BVI Court was another factor in favour of setting aside the leave for service out of jurisdiction.

***Serious issue to be tried***

73 Having found that the plaintiff lacked *locus standi* and could not establish a good arguable case under O 11 r 1(*f*) and r 1(*p*), it was unnecessary to consider separately whether there was a serious issue to be tried on the merits given that the plaintiff had failed the higher standard of proof required to establish jurisdiction (see *Bradley Lomas* at [18]–[19]). Given my findings above, there was no serious issue to be tried on the merits. I should add however,

that as the Court of Appeal noted in *Bradley Lomas* at [20], the evidence required to establish jurisdiction under certain limbs of O 11 r 1 such as O 11 r (1)(*a*) may not involve an examination of the merits of the claim. In such circumstances, where the relevant jurisdictional limb is fulfilled, a separate examination of whether the claim involves a serious issue to be tried on the merits would still be required.

### ***Forum non conveniens***

74 Aside from establishing a good arguable case under O 11 r 1, a plaintiff seeking to serve originating process out of jurisdiction must also satisfy the court that Singapore is the proper forum for the dispute.

*Parties' submissions*

75 The plaintiff argued that the central issues are not centred in the BVI and that Singapore is the proper forum for the dispute. The dispute concerns whether the defendants had acted in excess of authority and in bad faith in Singapore. The relevant witnesses for the dispute are in Singapore not in the BVI. These witnesses are the persons against whom wrongful demands were made by the receivers, including HHP and the Singapore Land Authority. Vivek, whom the receivers appointed to work in Singapore, would also be a relevant witness.[40] In addition, MDWL's assets are located in Singapore. This includes the Newton Imperial apartments and corresponding rental income.[41] Further, the acts which the plaintiff relies on as constituting her cause of action for breach all occurred in Singapore, not the BVI.[42] The plaintiff also argued that the BVI Court would

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40 Pf's written submissions at paras 197–199.

41 Pf's written submissions at paras 200–202.

42 Pf's written submissions at para 203.

not be able to restrain the receivers from actions in Singapore, or that any action taken would be too late. This was since a separate action would have to be commenced in Singapore in order to enforce any order issued by the BVI Court.[43]

76 The defendants on the other hand argued that BVI is the more appropriate forum to determine the dispute. The substance of the plaintiff's allegations predominantly occurred in the BVI. In addition, the various connecting factors point to the BVI being the appropriate forum, as the substantive dispute required the determination of BVI law, especially in relation to the receivers' conduct of the receivership. Further, proceedings are already underway in the BVI which the plaintiff is entitled to join so as to raise the allegations made here, and there are also other related proceedings pending before the BVI Court. In addition, the key witnesses, namely the receivers and the plaintiff reside outside Singapore, and the only insubstantial nexus is that the assets of MDWL and its subsidiaries are in Singapore. The plaintiff's concern that she did not have standing to sue in BVI was inoperative now that she has been granted letters of administration and may take the necessary steps to join the Estate as a party to the BVI proceedings.[44] Furthermore, as the plaintiff had already been involved in BVI 101, and the BVI Court had indicated that it wished to hear from the plaintiff, the plaintiff would likely be able to join as a party.

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43 Pf's further submissions at paras 40–43, 49.

44 Dfs' written submissions at paras 123–128.

*The law*

77 The test applicable in Singapore for *forum non conveniens* is that laid down in the landmark UK case of *Spiliada Maritime Corporation v Cansulex Ltd* [1987] 1 AC 460 ("*Spiliada* test") (see *JIO Minerals FZC v Mineral Enterprises Ltd* [2011] 1 SLR 391 ("*JIO Minerals*"); *Humpuss Sea Transport Pte Ltd (in compulsory liquidation) v PT Humpuss Intermoda Transportasi TBK and another* [2016] 5 SLR 1322). The *Spiliada* test involves two stages.

78 First, the court determines if there is some other available and more appropriate forum, aside from the Singapore court, for the trial of the action ("stage one"). At stage one, the court considers the relevant connecting factors such as the location of the parties, connection to events and transactions, and applicable law to the dispute, in order to identify the natural forum for the dispute, *ie*, the forum which has the most real and substantial connection with the dispute (*JIO Minerals* at [41]–[42]).

79 The court then considers at stage two, whether there are circumstances by reason of which justice requires that the Singapore court ought to hear the matter notwithstanding that Singapore is not the *prima facie* natural forum ("stage two"). Thus at stage two, the court is concerned over whether justice to the parties can be delivered in the natural (foreign) forum though the court ought not to pass judgment on the competence of the judiciary of a foreign country (*JIO Minerals* at [43]).

80 In addition, the substance of the *Spiliada* test, the objective of which is to determine the forum which is clearly more appropriate for the trial, does not differ whether the court is considering a stay application or an application to set aside leave to serve out of jurisdiction (*Zoom Communications* at [77]). The

burden of proof however differs depending on the nature of the application. Where leave is granted to serve originating process out of jurisdiction, and the defendant seeks to set aside such leave, the burden lies on the plaintiff to establish that Singapore is the more appropriate forum (see *Zoom Communications* at [71]; *Oriental Insurance Co Ltd v Bhavani Stores Pte Ltd* [1997] 3 SLR(R) 363 at [16]).

81 Further, it bears noting that the inquiry as to the appropriate forum for the dispute is not to be taken in an overly mechanical manner. As V K Rajah J explained in *Peters Roger May v Pinder Lillian Gek Lian* [2006] 2 SLR(R) 381 at [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. Copious citations of precedents and dicta are usually of little assistance and may in reality serve to cloud rather than elucidate the applicable principles.

*My decision*

82 I concluded that it was not shown that Singapore is the more appropriate forum, and that in fact it is the BVI that is more appropriate. The *prima facie* natural forum under stage one is the BVI. It was also not established, in relation to stage two, that justice requires that the Singapore courts ought to hear the matter.

83 I considered that the connecting factors point in favour of BVI as being the natural forum for the dispute.

84 Key aspects of the claim made by the plaintiff were as follows:

(a) That a duty of care was owed by the receivers to the Estate;[45]

(b) That there was a breach of the duty of care owed by the receivers given that they had acted in bad faith or in excess of authority by, amongst others, carrying out the following acts in Singapore:

(i) appointing Vivek as a consultant in Singapore;[46]

(ii) failing to verify if assets in Singapore had been dissipated;[47]

(iii) wrongfully demanding rent, books and records in Singapore;[48] and

(iv) wrongfully interfering in the affairs of MDWL and its subsidiaries;[49] and

(c) That the breach of duty of care resulted in losses suffered by the plaintiff.[50]

85 The thrust of the plaintiff's claim to my mind concerned whether or not the receivers had properly discharged their duties as receivers. The plaintiff argued that the acts which constituted the tort committed by the defendants took place in Singapore, *ie*, that the place of the tort was Singapore. However, all of the acts alleged were traceable to and carried out in the course of the receivership. Given that the receivers were appointed by the BVI Court in

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45 Pf's statement of claim (amendment no. 1) at paras 21–22.

46 Pf's statement of claim (amendment no. 1) at paras 25–31.

47 Pf's statement of claim (amendment no. 1) at paras 45–52.

48 Pf's statement of claim (amendment no. 1) at paras 32–44.

49 Pf's statement of claim (amendment no. 1) at para 59.

50 Pf's statement of claim (amendment no. 1) at 60–63.

relation to a BVI-incorporated company, BVI was both the place giving rise to the tort and the place in which damages if any were incurred.

86 I accept that receivers appointed under one jurisdiction may indeed owe duties in tort, or contract for that matter, in another jurisdiction. However, where matters go to the office and performance of the functions of that office, and such office is created under foreign law, particularly if that creation is by order of court, it is generally more appropriate for any dispute on the duties owed by the receivers to be made in such a forum. In the English case of *re Maidstone*, the court held that the proper remedy for a party aggrieved by the conduct of a receiver was to commence an action in the court in which the receiver was appointed. The following passage from *re Maidstone* (at p 286), is to my mind persuasive:

> In this case the applicant is a receiver appointed by this Court in a debenture-holders' action, and by virtue of that appointment he has had the management of the theatre known as the Maidstone Palace of Varieties. In the course of that management he made use of certain plant which is claimed by the respondent company as their property. They say that he had no right to use it … It appears to me that a dispute of that kind is one which … the Court will deal with itself, and that it will not allow its officer to be subject to an action in another Court with reference to his conduct in the discharge of the duties of his office, whether right or wrong. The proper remedy for any one aggrieved by his conduct is to apply to this Court in the action in which he was appointed. If any wrong has been done by the officer, the Court will no doubt see that justice is done, but no one has a right to sue such an officer in another Court without the sanction of this Court.

87 While the relevant non-appointing court in *re Maidstone* was not a foreign court, I am of the view that the same principle is applicable where the aggrieved party seeks to commence an action in a foreign court for alleged misconduct of a receiver.

88 In addition, since the duties owed to the Estate and conduct of the receivers are put into question, I was satisfied that the applicable law is the law of the BVI. The centre of the dispute is really a question of the proper discharge of the receivers' duties. While the plaintiff referred to activities or actions in Singapore, there is little role for Singapore law to apply here as the conduct of the receivers and scope of the duties owed by the receivers are to be measured against the law applicable to the receivership, *ie*, BVI law.

89 The fact that property in Singapore was involved did not point to Singapore being the more appropriate forum. The nub of the complaint was not about the assets as such but the conduct of the receivership. Title or possession was not in direct issue; thus Singapore land law was not engaged.

90 As for the witnesses, the weight of this factor to my mind is much less than it might have been in the past given the possibility of remote testimony. But in any event, while there may no doubt be witnesses in Singapore, the scope of the dispute would primarily centre on the conduct of the receivers themselves and the plaintiff, who were not witnesses located in Singapore. Witnesses in Singapore are likely to play only a supporting role.

91 It could certainly be argued that a comparison of the general connecting factors between the proposed forums would result in a neutral conclusion on which is the more appropriate forum, given the greater ease of travel and the possibility of remote testimony, as well as availability of experts of foreign law today. But this does not assist the plaintiff here as she had to show that Singapore is the more appropriate forum. For the foregoing reasons, I found that in fact BVI is the more appropriate forum for the dispute.

92 In relation to stage two of the *Spiliada* test, there are no special circumstances which require the Singapore courts to hear the matter notwithstanding that BVI is the natural forum for the dispute. The plaintiff, having been granted letters of administration in Singapore, can join the Estate as a party to BVI 101 and any related BVI proceedings. In relation to the plaintiff's submission that having the dispute heard in the BVI would result in protracted litigation given that enforcement proceedings would have to be commenced in Singapore for any injunction issued by the BVI courts to be operative in Singapore, I was not satisfied that this was a special circumstance requiring the Singapore courts to hear the matter. The need to commence enforcement proceedings in addition to the main proceedings is a normal occurrence to be expected in all disputes involving cross-border transactions, or disputants domiciled in different jurisdictions. Therefore, this factor alone cannot tip the scale in favour of the Singapore courts hearing the matter in cases where the connecting factors point to the other (foreign) forum as being the natural forum for the dispute.

***Full and frank disclosure***

*Parties' submissions*

93 The defendants submitted that the plaintiff had obtained leave from this court to serve the writ of summons out of jurisdiction without fulfilling her obligation to make full and frank disclosure of material facts to the court. The plaintiff ought to have disclosed to the court that Darsan claims to be the ultimate beneficial owner of MDWL, and that there is presently a suit pending, *ie*, Suit 821, to determine his claim. That beneficial ownership of MDWL was being challenged by Darsan should have been brought to the attention of the court, given that it influences the plaintiff's *locus standi* to commence the present suit.[51]

94 Second, the defendants argued that the plaintiff had actively misled the Singapore courts through her representation to the court that the BVI proceedings had been discontinued since 31 January 2017, when this was not the case. The BVI Court has stated unequivocally that the proceedings in BVI have not been discontinued and the plaintiff was aware or ought to have been aware of the proper status of the BVI proceedings.[52] This information should have been disclosed as it was relevant towards this court's assessment of whether BVI was the more appropriate forum to hear the dispute.

95 Third, the plaintiff failed to disclose to the court that the present suit was commenced to proceed on causes of action that the plaintiff had unsuccessfully attempted to add in Suit 966. Such information was material in assessing whether the plaintiff had a claim that was of a sufficient degree of merit.[53]

96 The plaintiff on the other hand argued that there was no absence of full and frank disclosure. In relation to the defendants' claim that the plaintiff ought to have disclosed to the court that Darsan was claiming to be the ultimate beneficial owner of MDWL, Darson had not made such a claim at the time when the present suit was commenced on 3 March 2017, when the *ex parte* injunction was obtained on 6 March 2017, or when the order granting leave to serve out of jurisdiction was issued on 9 March 2017. Further, Suit 821 concerns AVS's claim against Darsan for the return of other assets to AVS, and not the single share in MDWL which Darsan had already transferred to AVS. Darsan had not disputed the transfer of the MDWL share to AVS or made a positive claim for

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51 Dfs' written submissions at paras 26–31.

52 Dfs' written submissions at paras 32–36.

53 Dfs' written submissions at paras 42–43.

the share. It was only on 15 May 2017 that Darsan commenced an action in BVI claiming title to the MDWL share.

97 The plaintiff also denied having misrepresented the effect of the BVI order to the Singapore court. The plaintiff argued that the meaning of the BVI orders was a matter of interpretation which the Singapore court was entitled to undertake on its own. The plaintiff did not know and had no reason to believe that the BVI proceedings were not discontinued on 31 March 2017 when no application to extend the stay of the BVI proceedings was filed by that date. In addition, the defendants had not been fully transparent in sharing the information on the BVI proceedings with the plaintiff and could not subsequently assert that the plaintiff failed to make full and frank disclosure to the court.[54]

98 With respect to the defendants' claim that the plaintiff should have disclosed to the court that Suit 202 concerned the same claims that the plaintiff had attempted to add by amending the statement of claim in Suit 966, and that the plaintiff's amendment application was refused as disclosing no reasonable cause of action, the plaintiff argued that such an allegation was without basis as Suit 202 was different from Suit 966 and the information was not material in the application for leave to serve out of jurisdiction.[55]

*The law*

99 It is well established that a plaintiff has a duty of full and frank disclosure in an *ex parte* application for leave to serve out of jurisdiction, and that failure to properly discharge this duty is a ground for setting aside any such leave

54 Pf's written submissions at paras 48–68.

55 Pf's written submissions at paras 73–79.

granted (see *Manharlal*; *Transniko Pte Ltd v Communication Technology Sdn Bhd* [1995] 3 SLR(R) 941 ("*Transniko*"); *Lam Soon (Thailand) v Transpac Capital* [1998] SGHC 328). In *Manharlal,* the court stated the following in relation to the duty to make full and frank disclosure (at [78]):

> Given the *ex parte* nature of the application, the applicant *must* place *all* material facts before the court can be so satisfied. It goes without saying that this includes facts which are unfavourable to the applicant's case because the duty to make full and frank disclosure is not merely a matter of fairness between the parties to the action but it is a duty that is owed to the court. It is driven by the need for the court to satisfy itself that the case is a *proper* one for service out of jurisdiction.
>
> [emphasis original]

100 The duty to make full and frank disclosure is an onerous one and a party may be found to have failed to discharge such duty even if it had not acted in bad faith. As the court noted in *Transniko* at [11]—[12],

> 11 Where an *ex parte* application for leave to serve a writ out of jurisdiction was made, the applicant is under a duty to make full and frank disclosure of all matters material to the application. We need only to refer to the most recent of the cases on this point cited by counsel for the defendants, the English Court of Appeal's decision in *Trafalgar Tours Ltd v Alan James Henry* [1990] 2 Lloyd's Rep 298, where Purchas LJ (with whom Nourse LJ and Beldam LJ concurred) said (at 308) that:
>
> > there is a heavy duty upon those applying *ex parte* under RSC O 11, r 1 for leave to serve a writ out of the jurisdiction … to make full and frank disclosure.

> 12 The duty on the applicant is onerous, and if he fails to discharge it, the leave granted may be set aside even if the non-disclosure is innocent. In *Lazard Brothers and Company v Midland Bank, Limited* [1933] AC 289, Lord Wright held (at 306–307) that although the failure in that case was not tainted with the slightest suggestion of bad faith, 'The court has a discretion to set aside an order made *ex parte* when the applicant has failed to make sufficient or candid disclosure.'

101 In determining what must be disclosed by the applicant, the applicable test is the objective test of materiality, which asks whether the facts in question are matters that the court would likely take into consideration in making its decision on the *ex parte* application (*Zoom Communications* at [68]; *The "Vasiliy Golovnin"* [2008] 4 SLR(R) 994 ("*Vasiliy Golovnin*") at [86]). What is material and should be disclosed is essentially a matter of common sense and would depend on the facts and circumstances of each case (*Vasiliy Golovnin* at [88]). As the Court of Appeal noted in *Vasiliy Golovnin* at [88], citing *Commercial Injunctions* (Steven Gee, Sweet & Maxwell, 5th Ed, 2004), the duty of disclosure involves striking a right balance between competing considerations:

> It is often a difficult exercise to settle a suitable affidavit which achieves the *right balance* between full and fair disclosure and a far too detailed description of the facts, with perhaps too much generosity towards the defendant. The duty of disclosure does not require the applicant to describe his case or the factual background in minute detail, nor does it require him to search for possible but unlikely defences.
>
> [emphasis original]

*My decision*

102 Turning to the facts of this case, considered as a whole, I did not find that any lack of disclosure or misinformation on the part of the plaintiff was so material as to warrant a setting aside of the leave to serve out of jurisdiction on this ground.

103 The defendants took particular issue with the following paragraph from the plaintiff's statement of claim, which they said deliberately misled the court on the status of the proceedings in the BVI:

> The BVI Order of 29.11.16 stayed proceedings in BVI Claim until 31.1.17 to give parties liberty to apply. It provided that Shanmuga was granted permission to discontinue the claim after the expiry of the stay. There was no application for a stay nor was there any application for an extension of time to apply for a stay. BVI Claim 101 was therefore discontinued after 31.1.17.

104 To my mind the above-quoted paragraph of the statement of claim did not show that the plaintiff had deliberately misled the court knowing that the true status of the BVI proceedings was otherwise. I was satisfied that the plaintiff's assertion of the discontinuance of the BVI claim in the above-quoted section of the statement of claim was an expression of her own opinion on the status of the proceedings based on her interpretation of the relevant BVI order, though I note that it would have been prudent for the plaintiff to have made that qualification more clearly.

105 In relation to the defendants' submission that the plaintiff should have disclosed the claim made by Darsan in Suit 821 to the beneficial interest in MDWL, it was not shown that Darsan's claim to the beneficial interest was within the knowledge of the plaintiff at the time she commenced this action. I was of the view that in any event, this was not a material fact which had to be expressly disclosed during the *ex parte* application. Neither was I satisfied that the plaintiff's lack of express reference in the *ex parte* application to her partial failed attempt to amend the statement of claim for Suit 966 was so material as to cause leave to be set aside on grounds of non-disclosure.

106 Therefore, in my judgment, leave granted to serve out of jurisdiction should not be denied on the ground of lack of full and frank disclosure.

However, this was immaterial to the outcome of this application given my findings above that there were other grounds for setting aside the leave to serve out of jurisdiction.

**Other issues**

*Letter from the BVI Court*

107 During the hearing for this matter, the defendants referred to a letter of request that was said to have been sent by the BVI Court addressed to the Supreme Court of Singapore, which sought the assistance of the Singapore courts to, amongst others, recognise the appointment and powers of the receivers of MDWL. However, as it turned out, this BVI letter had not been sent out by the BVI Court, at least at the point of the hearing before me.[56] In any event, I did not consider the contents of the letter in determining this case.

*Further arguments after hearing*

108 After the oral hearing, and pending my reserved decision, the plaintiff sent in further arguments without seeking leave to do so beforehand. Notwithstanding that, I asked the defendants to respond. These further arguments have been considered and incorporated in these grounds of decision.

109 However, I should make clear that this does not absolve the plaintiff from the obligation to ask for leave. As I have reiterated in *Re: Zetta Jet Pte Ltd and Others* [2018] SGHC 16, once oral arguments have concluded, it is a matter of courtesy at the very least to ask for leave to send in further arguments. In addition, courts would be disinclined to allow further arguments after oral

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[56] Dfs' letter to court dated 22 November 2017.

hearings save when good reasons are established, as there must be finality to the process.

**Conclusion**

110 Having regard to the foregoing, I set aside leave to serve the writ on the defendants out of jurisdiction. I made no order on the application for a declaration that all proceedings in the suit, including the *ex parte* injunction, be set aside. Given that the *ex parte* injunction was the subject of a separate application under Summons No 994 of 2017, I was satisfied that it should be determined under that application, given that it is a separate mater from the setting aside of leave to serve out of jurisdiction.

111 Costs of $10,000 excluding disbursements were granted to the defendants, with disbursements to be determined.

Aedit Abdullah
Judge

Kanapathi Pillai Nirumalan, Liew Teck Huat and Anand George
(Niru & Co LLC) for the plaintiff;
Melvin See Hsien Huei and Yeow Guan Wei Joel
(Dentons Rodyk & Davidson LLP) for the defendants.