Shafeeg bin Salim Talib And Another (administrators of the estate of Obeidillah bin Salim bin Talib, deceased) v Helmi bin Ali bin Salim bin Talib and Others
[2009] SGHC 180

Case Number : OS 1406/2008, SUM 1760/2009

Decision Date : 11 August 2009

Tribunal/Court : High Court

Coram : Francis Ng Yong Kiat AR

Counsel Name(s) : Andre Yeap SC, Kelvin Poon, Farrah Begum bte Abdul Salam and Aloysius Leng (AbrahamLow LLC) for the plaintiffs; Namazie Mirza Mohamed and Chua Boon Beng (Mallal & Namazie) for the fourth defendant

Parties : Shafeeg bin Salim Talib And Another (administrators of the estate of Obeidillah bin Salim bin Talib, deceased) — Helmi bin Ali bin Salim bin Talib; Ameen Ali Salim Talib; Saadeldeen Ali Salim Talib; Murtadha Ali Salim Talib

Civil Procedure

Probate and Administration

Conflict of Laws

11 August 2009 Judgment reserved.

Ng Yong Kiat, Francis AR:

1 This is an application by the fourth defendant in Originating Summons No 1406 of 2008 ("the OS") for the following orders:

(a) that the proceedings in the OS be set aside under O 2 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("ROC") on the grounds that the proceedings do not constitute an administration action within the meaning of O 80;

(b) that, further or in the alternative, the proceedings in the OS be stayed on the grounds of *forum non conveniens*; and

(c) that an order made by the Assistant Registrar ("AR") in Summons No 5534 of 2008 ("SUM 5534") that the plaintiffs' costs and disbursements of and incidental to SUM 5534 be paid from the fourth defendant's share of the estate of the late Obeidillah bin Salim bin Talib, deceased ("the costs order"), be set aside on the ground that it was made *ex parte* in respect of the fourth defendant.

The background facts leading up to the filing of the OS and the present application

2 The plaintiffs in the OS are the administrators of the estate of the late Obeidillah bin Salim bin Talib, deceased ("the deceased"), who died intestate on 5 May 2005, domiciled in Singapore. The four defendants in the OS are brothers and, being the sons of one of the deceased's brothers, are among the beneficiaries of the deceased's estate under Muslim law; the plaintiffs are not among the beneficiaries of the deceased's estate. The plaintiffs and defendants are on opposing sides in a decades-old family feud, the genesis of which is not material for purposes of the present application.

3 At the time of his death, the deceased held shares in an entity known as Al-Taleb Al Akaria. A total of 16 persons, comprising the mother of the deceased, the deceased, his then-living siblings and

the heir of a deceased sibling, established the entity on 27 July 1948 in Cairo, Egypt.

4 According to the fourth defendant, the entity is a "civil property company" under Egyptian law. In the English translation of documents produced by the fourth defendant, including an expert opinion on Egyptian law from an Egyptian lawyer, Mr Moataz Mohamed Al-Farash ("Mr Moataz"), and the document creating the entity, the entity is described as a "company". In the Preamble of the document creating the entity, deemed to be an integral part of the document by its First Article, it is written that the capital of the entity is divided into a hundred shares distributed among the 16 persons who established the entity, who are referred to in the document as "partners".

5 Although the entity is described in the plaintiffs' affidavits and submissions as a "partnership", it is also referred to as a "company" in the English translations of documents produced by the plaintiffs, which include an Egyptian court order and expert opinions on Egyptian law. As such, I will refer to the entity hereafter as "the company" and the document creating the company as the "foundation contract", after a phrase used in the English translation of the aforementioned Egyptian court order to describe this document.

6 According to Mr Moataz's expert opinion, the company is an independent legal entity under Egyptian law and owns assets. These include a building in Cairo, which is the company's main asset, and which generates profits for the company in the form of rent payable by tenants of the building.

7 The defendants were the company's "managers" (as described in the foundation contract) from 5 November 1986 until 31 October 2007, on which date they were removed as managers by the Egyptian court order referred to at [5] above. By the same court order, which was made in an action initiated by the second plaintiff and others against the defendants, a receiver was appointed to handle the affairs of the company. The making of this order and subsequent events in Egypt following the appointment of the receiver has led to a series of litigation in Egypt that will be referred to later in this judgment. Currently, the company is being managed by two new managers appointed on 15 May 2008, one of whom is the second plaintiff.

8 The company maintains a "Partners's Current Account" which, according to the company's audited accounts for 2005 ("the 2005 accounts"), held a credit balance of 133,891.190 Egyptian pounds (over S$34,600 at current rates) set aside for distribution to the deceased. As a partner of the company holding shares, the deceased was entitled by virtue of the Eighth and Ninth Articles of the foundation contract to receive, annually, the company's accounts and profits distributed by the company. The material portions of the Eighth and Ninth Articles of the foundation contract read as follows:

The Eighth Article

Decision that one has to return to partners.

The fiscal year is concluded on 31 of December of every year, with acknowledgment exclusively, that the accounts of the current term is from the date of this contract signature till on 31 December 1948, it evolves in the next year accounts. *Managers have to present the accounts of management within three next months at the end of the year. Partners have to review them and give their notices or ask for the review of the fixed documents for expenditure and have rights at the domicile of the company*. …

The Ninth Article

Distribution of profits between partners

After allocation of the reward of managers as per mentioned in the article No. 7 and after the deduction of all expenses and allocation of a sum of consumption, excluding maintenance, the completement of a percentage of 5% (five) per cent from the net income. *The net profits are distributed between partners with a percentage of their shares upon presenting accounts, denoted in article No. 8*.

[emphasis added]

It should be noted that the 2005 accounts were never presented by the defendants to the partners for approval as required by the Eighth Article of the foundation contract.

9 The plaintiffs contend that the sum of 133,891.190 Egyptian pounds due to the deceased (as reflected in the 2005 accounts) has not been distributed by the defendants and that the defendants have not presented the company's accounts for 2006 and 2007 for approval.[note: 1] Furthermore, the plaintiffs claim that after the defendants' removal as managers, they failed to hand over the property of the company, including its full accounts and monies in the "Partners's Current Account", to the receiver and currently remain in illegal possession of the same.[note: 2]

10 On 31 October 2008, the plaintiffs filed the OS against the defendants in their capacity as administrators of the deceased's estate. The OS is titled "In the Matter of the Estate of [the deceased] And In the Matter of Order 80 Rules of Court", and contains prayers seeking:

1. [that] the Defendants as the former managers of [the company] do produce to the Plaintiffs within 7 days of the Order made herein :-

    a. the audited accounts of [the company] ending 31st December 2006 and 31st December 2007 respectively;

    b. the documentary evidence of all payments by [the company] to the Estate of [the deceased] for his share in [the company] and receipts therefor during his lifetime from the date of the appointment of the Defendants as managers/directors of [the company] at end 1986 to May 2005;

2. [that] the Defendants as the former managers of [the company], do pay to the Plaintiffs within 7 days of the Order made herein, all credit balance due to the Estate of [the deceased], including the sum of Egyptian Pounds 133,324.287 as at 31st December 2005 standing to his credit as in the 2005 Accounts produced by the Defendants, plus interest at such rate as the Court thinks fit;

3. [that] the Defendants as the former managers do personally and severally pay the costs of and incidental to this application to the Estate of [the deceased], including the Plaintiffs' expenses incurred on this matter;

4. [that] until the Defendants have complied with the terms of the Orders to be made herein, no payment shall be made to the Defendants of their share in the Estate of [the deceased]; and

5. such other Orders that [the Court] may deem fit.

It should be noted that prayer 2 of the OS erroneously makes reference to the sum of 133,324.287 Egyptian pounds (instead of 133,891.190 Egyptian pounds). The sum of 133,324.287 Egyptian pounds appears from the 2005 accounts to be the share of profits due to one of the deceased's sisters. This error, however, is not material for purposes of the present proceedings.

11 By SUM 5534, the plaintiffs applied *ex parte* for substituted service of the OS and the supporting affidavit on the fourth defendant (who resides in Cairo) in Singapore by way of posting the same to the Singapore residential address of the first defendant. The fourth defendant was not represented in SUM 5534 but the first defendant was made a party to the proceedings, which were adjourned twice. Eventually, on 16 February 2009, an AR dismissed the plaintiffs' application for substituted service of the fourth defendant in Singapore after they confirmed that their case was that all the defendants were jointly and severally liable[note: 3] and that the action could proceed against the other three defendants without the fourth defendant. The AR ordered that the plaintiffs pay the first defendant's costs from the funds of the estate and, in relation to the plaintiffs' own costs, made the costs order that the fourth defendant is now seeking to set aside (see above at [1]). Following the dismissal of SUM 5534, the plaintiffs took no further steps to serve the OS on the fourth defendant.

12 In the meantime, the fourth defendant became aware on 8 February 2009 of the proceedings that had been commenced after receiving a letter from the plaintiffs' Egyptian lawyer in Cairo. The fourth defendant subsequently instructed solicitors in Singapore to obtain a copy of the OS and the plaintiffs' supporting affidavit from the solicitors acting for the other defendants who had been served in Singapore. On 15 April 2009, the fourth defendant filed the present application to have the proceedings against him set aside for irregularity pursuant to O 2 rr 1(2) and 2, or alternatively stayed on the basis of *forum non conveniens*, as well as to have the costs order set aside. It may be noted briefly that the fourth defendant did not apply for the proceedings to be set aside or stayed pursuant to O 28; this is presumably because the time for making an application to set aside or stay an OS under O 28 runs from the time of service and, as mentioned above, the OS was never served on the fourth defendant at any time.

The issues before the court

13 Having set out the background facts above, I will consider the following three issues before me:

(a) whether the OS fails to comply with O 80 such that there has been an irregularity and, if so, whether the proceedings should be set aside pursuant to O 2 rr 1(2) and 2;

(b) if there is no irregularity or only an irregularity that can be remedied, whether the proceedings should nevertheless be stayed on the ground of *forum non conveniens*; and

(c) whether the costs order should be set aside.

The first issue: non-compliance of the OS with O 80 and the consequences thereof

14 The first issue can be considered in terms of two sub-issues; first, whether the OS fails to comply with O 80 such that there is an irregularity and, secondly, whether the proceedings should be set aside if there is an irregularity. The second sub-issue will only become relevant if I find that there is an irregularity.

The first sub-issue: whether there has been non-compliance with O 80

15 Counsel for the fourth defendant submitted that the reliefs prayed for in the OS do not fall within the scope of O 80 and that the OS therefore fails to comply with O 80, giving rise to an irregularity within the meaning of O 2 r 1(1). This provision states:

> **Non-compliance with Rules (O. 2, r. 1)**
>
> 1. —(1) Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been *a failure to comply with the requirements of these Rules, whether in respect of time, place, manner, form or content or in any other respect*, the *failure shall be treated as an irregularity* and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein.
>
> [emphasis added]

16 Counsel further submitted, relying on extracts from various English and Australian textbooks, that an administration action described in O 80 r 1 as "an action for the administration under the direction of the court of the estate of a deceased person or for the execution under the direction of the court of a trust" is meant to give assistance and protection to, *inter alia*, personal representatives who are administering an estate, as well as to protect those interested in the estate as creditors and beneficiaries.[note: 4]

17 It was contended by counsel that insofar as prayers 1 and 2 of the OS are concerned, such reliefs as sought therein cannot be granted in an administration action as there is no issue regarding the beneficiaries of the estate for the court to resolve and neither are the plaintiffs asking the court for protection in their administration of the estate. As for prayer 4, counsel submitted that even if this prayer can be said to relate to the administration of the estate by reason of the fourth defendant's interest as a beneficiary, it is so closely connected to prayers 1 and 2 as to be incapable of being validly granted on its own in an administration action.[note: 5]

18 Counsel for the plaintiffs did not address the textbook extracts relied on by the fourth

defendant but asserted that the entire subject matter of the OS is *prima facie* an administration action within the meaning of O 80. Counsel argued that there is no definition in the ROC as to what amounts to an "an action for the administration under the direction of the court of the estate of a deceased person" as stated in O 80 r 1, and submitted that the examples listed in O 80 rr 2(2) and 2(3) of the questions that a court can determine and the orders that the court can make in an administration action are not exhaustive. As such, although counsel did not refer me to any precedents where similar orders had been made in administration actions, he submitted that the examples in O 80 did not preclude the court from granting the relief sought in the main prayers of the OS, namely prayers 1, 2 and 4. In the final analysis, counsel for the plaintiffs contended that the OS is for an administration action as it is somehow related to and concerns the administration of the deceased's estate, and particularly a scenario where the plaintiffs, as administrators, are seeking to establish the deceased's entitlement to the funds of the company.[note: 6]

The court's findings on the first sub-issue

19 Order 80 is titled "Administration and Similar Actions" and provides as follows:

> **Interpretation (O. 80, r. 1)**
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> **1.** In this Order, "administration action" means an action for the administration under the direction of the Court of the estate of a deceased person or for the execution under the direction of the Court of a trust and "personal representatives" includes executors, administrators and trustees.
>
> **Determination of questions, etc., without administration (O. 80, r. 2)**
>
> **2.** —(1) An action may be brought for the determination of any question or for any relief which could be determined or granted, as the case may be, in an administration action and a claim need not be made in the action for the administration or execution under the direction of the Court of the estate or trust in connection with which the question arises or the relief is sought.
>
> (2) Without prejudice to the generality of paragraph (1), an action may be brought for the determination of any of the following questions:
>
> (a) any question arising in the administration of the estate of a deceased person or in the execution of a trust;
>
> (b) any question as to the composition of any class of persons having a claim against the estate of a deceased person or a beneficial interest in the estate of such a person or in any property subject to a trust;
>
> (c) any question as to the rights or interests of a person claiming to be a creditor of the estate of a deceased person or to be entitled under a will or on the intestacy of a deceased person or to be beneficially entitled under a trust.
>
> (3) Without prejudice to the generality of paragraph (1), an action may be brought for any of the following reliefs:
>
> (a) an order requiring a personal representative to furnish and, if necessary, verify accounts;

(b) an order requiring the payment into Court of money held by a person in his capacity as personal representative;

(c) an order directing a person to do or abstain from doing a particular act in his capacity as personal representative;

(d) an order approving any sale, purchase, compromise or other transaction by a person in his capacity as personal representative;

(e) an order directing any act to be done in the administration of the estate of a deceased person or in the execution of a trust which the Court could order to be done if the estate or trust were being administered or executed, as the case may be, under the direction of the Court.

Parties (O. 80, r. 3)

3. —(1) All the personal representatives to which an administration or such an action as is referred to in Rule 2 relates must be parties to the action, and where the action is brought by personal representatives, any of them who does not consent to being joined as a plaintiff must be made a defendant.

(2) Notwithstanding anything in Order 15, Rule 4 (2), and without prejudice to the powers of the Court under that Order, all the persons having a beneficial interest in or claim against the estate or having a beneficial interest under the trust, as the case may be, to which such an action as is mentioned in paragraph (1) relates need not be parties to the action; but the plaintiff may make such of those persons, whether all or any one or more of them, parties as, having regard to the nature of the relief or remedy claimed in the action, he thinks fit.

(3) Where, in proceedings under a judgment or order given or made in an action for the administration under the direction of the Court of the estate of a deceased person, a claim in respect of a debt or other liability is made against the estate by a person not a party to the action, no party other than the executors or administrators of the estate shall be entitled to appear in any proceedings relating to that claim without the leave of the Court, and the Court may direct or allow any other party to appear either in addition to, or in substitution for, the executors or administrators on such terms as to costs or otherwise as it thinks fit.

Grant of relief in action begun by originating summons (O. 80, r. 4)

4. In an administration action or such an action as is referred to in Rule 2, the Court may make any certificate or order and grant any relief to which the plaintiff may be entitled by reason of any breach of trust, wilful default or other misconduct of the defendant notwithstanding that the action was begun by originating summons, but the foregoing provision is without prejudice to the power of the Court to make an order under Order 28, Rule 8, in relation to the action.

Judgments and orders in administration actions (O. 80, r. 5)

5. —(1) A judgment or order for the administration or execution under the direction of the Court of an estate or trust need not be given or made unless in the opinion of the Court the

questions at issue between the parties cannot properly be determined otherwise than under such a judgment or order.

(2) Where an administration action is brought by a creditor of the estate of a deceased person or by a person claiming to be entitled under a will or on the intestacy of a deceased person or to be beneficially entitled under a trust, and the plaintiff alleges that no or insufficient accounts have been furnished by the personal representatives, as the case may be, then, without prejudice to its other powers, the Court may —

(a) order that proceedings in the action be stayed for a period specified in the order and that the personal representatives, shall within that period furnish the plaintiff with proper accounts;

(b) if necessary to prevent proceedings by other creditors or by other persons claiming to be entitled as aforesaid, give judgment or make an order for the administration of the estate to which the action relates and include therein an order that no proceedings are to be taken under the judgment or order, or under any particular account or inquiry directed, without the leave of the Judge in person.

Conduct of sale of trust property (O. 80, r. 6)

6. Where in an administration action an order is made for the sale of any property vested in personal representatives, those personal representatives shall have the conduct of the sale unless the Court otherwise directs.

20 While the ROC does not elaborate on what an administration action is beyond what is stated in O 80 r 1 and although there is a potentially wide scope of relief that can be obtained under O 80 r 2, the provisions of O 80 provide contextual clues which indicate that it is only *particular types* of relief and orders that can be obtained or made in an administration action. For instance, although O 80 r 2(1) provides that "any relief … which could be granted … in an administration action", the words "any relief" are qualified by the later words, which indicate that the court can grant only *particular* types of relief in an administration action.

21 Apart from stating that prayer 4 of the OS falls under O 80 r 2(2)(c), the plaintiffs did not specify which provision(s) of O 80 the orders in prayers 1 and 2 were being sought pursuant to. O 80 r 2(2) allows the court to make declarations in relation to questions that the court is asked to determine; the plaintiffs did not indicate that they were seeking declaratory relief of this nature in relation to prayers 1 and 2. As for O 80 r 2(3), although the orders listed therein that the court can make are not exhaustive, they are all directed at or affect personal representatives; they do not purport to direct other parties to perform acts, even where those acts may have an effect on the administration of the estate. The orders listed at O 80 r 2(3)(a)–(d) specifically refer to personal representatives and while the order listed at O 80 r 2(3)(e) does not expressly refer to personal representatives, the purpose of this order appears to be to allow the court to step into the shoes of personal representatives and order the performance of acts which could have been done by the personal representatives in their capacity as such. In *Neoh Ah Yan v Ong Leng Choo & Anor* [2008] 7 MLJ 151, Mohd Hishamudin J considered that the Malaysian equivalent of O 80 r 2(3)(e) (which is *in pari materia*) allowed the court to interfere in a case involving allegations of mismanagement and misconduct by the administrators of a deceased's estate, while in *Rachel Mei Ling Ong & Anor v Dato' Bruno Henry Almeida (as the executor for the estate of Ong Soon Hoe, deceased)* [1998] 6 MLJ 258, Kamalanathan Ratnam JC opined that the provision gives the court the general power to act in respect of an executor or trustee and was wide enough to give the court the power

to remove or substitute an executor or trustee from such capacity.

22 Apart from the wording of O 80 itself, the historical background to O 80 sheds light on the nature of what an administration action is and what powers the court has in dealing with such an action. It is noted in *Singapore Civil Procedure 2007* (G P Selvam chief ed) (Sweet & Maxwell Asia, 2007) ("*Singapore Civil Procedure 2007*") at para 80/0/2 that Order 80 is similar to O 85 of the English Rules of Supreme Court 1965 ("O 85 RSC") while in *Singapore Court Practice 2006* (Jeffrey Pinsler gen ed) (LexisNexis, 2006) ("*Singapore Court Practice 2006*") at para 80/1/1, the observation is made that apart from minor differences, O 85 RSC is *in pari materia* with O 80.

23 In this regard, I find the commentary at pp 821 – 822 of *Williams, Mortimer and Sunnocks on Executors, Administrators and Probate* (J H G Sunnucks, J G Ross Martyn & K M Garnett gen eds) (Stevens & Sons, 17th edition of *Williams on Executors* and 5th edition of *Mortimer on Probate*, 1993) ("*Williams, Mortimer and Sunnocks*") on the origins of O 85 RSC, an authority that was cited by counsel for the fourth defendant, to be a particularly illuminating elucidation on the scope and ambit of an administration action:

Where problems or disputes arise in the course of administration as between creditors, beneficiaries or representatives, the court will normally be approached by writ or originating summons for the purpose of resolving the difficulties and getting the estate properly administered. Such proceedings are known as administration proceedings and are to be distinguished from litigation adverse to the estate in which the personal representatives are involved as plaintiffs or defendants representing the deceased. The latter proceedings will invariably be contentious, whereas the former will often take the form of a non-contentious application for the guidance or decision of the court on matters which cannot be decided by agreement because, for instance, some of the persons concerned are under disability or missing. A representative is always entitled to the guidance of the court in matters of difficulty and will normally be protected in costs both in obtaining such guidance and in its implementation.

The procedure and its history

Procedure is governed by Order 85, which defines an "administration action" as an action for the administration under the direction of the court of the estate of a deceased person or for the execution of a trust. When the relief needed is less than a general order for the administration of the whole estate such an order need not be asked for and the court can and will normally decide questions or grant the relief needed without an order for administration by virtue of rules 2 and 5 of Order 85. However, *there is no jurisdiction under this procedure to decide questions which could not have been decided in an administration action*.

When the Court of Chancery first developed its jurisdiction in the administration of estates, it proceeded by taking over the administration of the whole estate and making a general administration order. In many cases, neither the plaintiff nor any other party needed such an order, but merely wanted the *determination by the court of a specific question which had arisen in the administration of the estate, for example a question as to the rights of a particular beneficiary; or the grant of specific relief, such as an order requiring the representatives to do a particular act*. A practice therefore grew up whereby such a plaintiff started an action for general administration, raised the particular point by his pleadings, obtained a determination or order on that point and then stayed further proceedings in the action. Rules of Court subsequently made express provision for the determination of specific questions and the grant of specific relief, and rule 2 of Order 85 is their successor.

[emphasis added]

24 The above commentary indicates that an administration action is not meant for personal representatives to collect in assets for the estate but to provide guidance to personal representatives in the performance of their duties or protection to beneficiaries and creditors against the actions of personal representatives. Accordingly, the court can, under O 80 r 2(2), determine questions concerning the duties of personal representatives in managing the deceased's estate as well as the rights and interests of creditors and beneficiaries. The court can also make orders under O 80 r 2(3) orders that compel the personal representatives to perform certain acts or enjoin them from doing so.

25 That an administration action is not meant for personal representatives to collect in assets for the estate is illustrated by the case of *In re Royle* (1890) ChD 18 ("*Re Royle*"), a case cited in the

above commentary from *Williams, Mortimer and Sunnocks* for the proposition that the court has no jurisdiction under the procedure in O 85 RSC to decide questions which could not have been decided in an administration action. In this case, the testator handed a sum of £171 15*s* to his wife while he was on his deathbed. The wife placed the money in a bank while the testator was still alive. After the testator's death, one of his executors brought an administration action by originating summons against the wife and the other executor to determine whether the money given to the wife formed part of the testator's estate at the time of his death. Kekewich J decided that the wife had not established that the testator had made a gift to her and made an order declaring that the money formed part of the testator's personal estate at his death.

26 The wife and the other executor appealed against Kekewich J's decision on, *inter alia*, the basis that the court had no jurisdiction to try a case like this on the originating summons. The Court of Appeal proceeded to determine the question of whether a gift had been made to the wife on its merits after parties specifically consented to the Court of Appeal's doing so. After deciding that a gift had been made to the wife, Cotton LJ, with whom Bowen LJ and Fry LJ agreed, stated at 21 that:

> Mr. Justice Kekewich dealt with this originating summons as giving him jurisdiction to decide adversely to the widow that she was not entitled to this sum of money, but that it belonged to her husband's estate. *The summons gave him jurisdiction to decide points relating to the administration of the estate, questions arising between legatees and the executor. This is not a question between the executor and a legatee as such, but a question between the executor and a person who holds money which he alleges to belong to the estate of the testator, and which she alleges to be her own*. In an administration suit the regular course would have been, after directing accounts of the personal estate, to add a special inquiry whether this sum of money had been given to the widow. She then, if she thought fit, could come in and say, "I submit to the jurisdiction, and am willing to have the question tried under this inquiry as if an action had been brought against me." But if she did not do so, there would be no jurisdiction to decide adversely against her in the administration action, that she was not entitled to the money. She has submitted to the jurisdiction before us, and we have therefore decided the case on the merits.
>
> [emphasis added]

27 In the light of the foregoing, I am of the view that the relief sought by prayers 1 and 2 is not such as can be obtained in an administration action within the meaning of O 80. According to counsel for the plaintiffs, prayer 1(a) seeks to enforce the deceased's entitlement under the Eighth Article of the foundation contract to see the company's accounts; prayer 1(b) actually goes even further than what the foundation contract provides for by seeking documentary records, spanning nearly two decades, of past distribution of profits to the deceased. As for prayer 2, counsel submitted that the plaintiffs are trying to compel the defendants to pay over the sum of money shown in the 2005 accounts which is due to the deceased pursuant to the Ninth Article of the foundation contract and which they are allegedly retaining wrongfully. Though the issues raised by prayers 1 and 2 are not those that the court can determine in an administration action, I am of the view that such issues can be determined in what has been described in *Williams, Mortimer and Sunnocks* as "litigation adverse to the estate in which the personal representatives are involved as plaintiffs … representing the deceased" (see [23] above). It should also be noted that in *Re Royle*, the Court of Appeal considered that the question as to whether the money belonged to the estate or the wife should ordinarily have been determined in an action brought against the wife or by way of a special inquiry in the administration action that the wife would have to consent to before the court would have jurisdiction to decide the issue.

28 As for prayer 4, the plaintiffs described this as a prayer for "an order permitting [the plaintiffs] to withhold making distributions to the [d]efendants until they comply with the other orders sought in the [OS]".[note: 7] I agree with the plaintiffs that O 80 appears to allow them to ask for this prayer in an administration action; specifically, they may be able to do so pursuant to either O 80 r 2(2)(c) or O 80 r 2(3)(d). However, I agree with the fourth defendant that the relief in prayer 4 is so closely connected with prayers 1 and 2 that it is incapable of standing on its own in an administration action.

29 Accordingly, having heard the arguments of both parties, I have reached the conclusion that there has been a failure to comply with O 80 because although the OS purports to have been brought as an administration action under O 80, the relief sought by prayers 1 and 2 of the OS is not such as can be granted by the court in an administration action; further, while relief of the type in prayer 4 can ordinarily be granted under O 80, prayer 4 is so closely connected with prayers 1 and 2 that it cannot be granted in its present form. In other words, there is a mismatch between the label used to describe the action (*ie* an administration action under O 80) and what the action is in substance. I thus find that there is an irregularity within the meaning of O 2 r 1(1).

The second sub-issue: whether the proceedings ought to be set aside

30 Having decided that there is an irregularity, the next question that arises is whether the proceedings should be set aside pursuant to O 2 rr 1(2) and 2, which provide:

> **Non-compliance with Rules (O. 2, r. 1)**
>
> **1**. —(1)…
>
> (2) Subject to paragraph (3), the Court may, on the ground that there has been such a failure as is mentioned in paragraph (1), and on such terms as to costs or otherwise as it thinks just, set aside either wholly or in part the proceedings in which the failure occurred, any step taken in those proceedings or any document, judgment or order therein or exercise its powers under these Rules to allow such amendments (if any) to be made and to make such order (if any) dealing with the proceedings generally as it thinks fit.
>
> …
>
> **Application to set aside for irregularity (O. 2, r. 2)**
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> **2**. —(1) An application to set aside for irregularity any proceedings, any step taken in any proceedings or any documents, judgment or order therein shall not be allowed unless it is made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity.
>
> (2) An application under this Rule may be made by summons and the grounds of objection must be stated in the summons or supporting affidavit.

In the present case, the plaintiffs do not dispute the fact that the fourth defendant's application to set aside for irregularity was made within a reasonable time and before the fourth defendant had taken any fresh step after becoming aware of the irregularity.

31 Being cognisant of the fact that O 2 r 1(2) also allows irregularity to be cured, counsel for the fourth defendant advanced three arguments as to why the OS should be set aside instead of being allowed to survive in an amended form.

32 The first argument is essentially that if the OS is converted into a normal OS by deleting the reference to O 80 in its title, it will become apparent that the plaintiffs have no *locus standi* in their capacity as administrators to bring such an action. Counsel submitted that the plaintiffs had commenced proceedings under O 80 so as to get around this problem. Counsel contended that the fact of the OS having been commenced under O 80 therefore amounts to a fundamental and serious irregularity, as contemplated in *Kuah Kok Kim v Chong Lee Leong Seng Co* [1991] SLR 122 ("*Kuah Kok Kim*"), which cannot be remedied.

33 Counsel's key contention, relying on Mr Moataz's expert opinion, is that the rights that the plaintiffs are seeking to enforce do not accrue to them at all. Counsel submitted that while the personal representatives of a deceased person would ordinarily have to claim foreign assets in the place where such assets are located, personal representatives are not recognised by Egyptian law, under which the deceased's interest in the company's shares devolves to his legal heirs directly. Counsel submitted that the deceased's legal heirs would have to obtain an inheritance order from an Egyptian court and register the same with the company so that the ownership of the shares therein can be updated and that an Egyptian court had already made such an order on 28 January 2008 (it is not disputed that the plaintiffs are not named as legal heirs in the order). Thus, only the deceased's legal heirs, and not the deceased's personal representatives are recognised as shareholders of the company for purposes of exercising rights under the shares, including receiving profits and the company's accounts. Counsel submitted that the plaintiffs should be well aware of this position since the second plaintiff had applied for such an order in Egypt to be registered as a shareholder of the company in place of his late mother.[note: 8]

34 Counsel's second argument is that the fourth defendant would suffer substantial injustice if the OS is allowed to proceed because the plaintiffs are prosecuting the OS only to vex and frustrate the defendants as part of the ongoing family feud and to find an excuse to delay distributing the defendants' share of the deceased's estate. Counsel referred to para 26-026 of *Dicey, Morris and Collins on The Conflict of Laws* (Sir Lawrence Collins gen ed) (Sweet & Maxwell, 14th Ed, 2006) ("*Dicey, Morris and Collins*") to make the proposition that the plaintiffs are not obliged to collect the deceased's shares in the company and can simply let the deceased's shares vest in his legal heirs since there are enough assets in Singapore to pay the deceased's debts; it was contended that the plaintiffs' decision to commence the action despite not having to do so showed their true motivations.[note: 9]

35 Counsel's third argument is that the proceedings should be set aside because the irregularity is made more serious by this being a clear case of "patent abuse of process" and "general lack of *bona fides*" on the part of the plaintiffs. To demonstrate this, counsel submitted that the plaintiffs had misrepresented to the court in SUM 5534 that they did not know the fourth defendant's whereabouts and had an ulterior motive in applying for substituted service in Singapore instead of applying for leave to serve the OS on the fourth defendant out of jurisdiction pursuant to O 11, namely to avoid having to satisfy the court in an O 11 application that Singapore is the most appropriate forum for determination of the plaintiffs' claim against the defendants.[note: 10] Counsel also submitted that by obtaining the costs order, the plaintiffs had forced the fourth defendant into filing the present application since the fourth defendant would also have to apply to set aside the OS in order to challenge the costs order.

36 In response to the fourth defendant's submissions, counsel for the plaintiffs confirmed that the plaintiffs were claiming from the defendants the documents and assets that the estate "is entitled to by *it being a partner in the [company]*", partners of the company having rights under Egyptian law

and the company's articles of incorporation to review its documents and receive profits.[note: 11] Counsel submitted that based on the actual holding in *Kuah Kok Kim*, any irregularity in the OS can be remedied because even if the court finds that the OS is not for an administration action, the court can easily remedy this irregularity by deleting the words "In the Matter of Order 80 Rules of Court" from the title of the OS and making a corresponding order that the proceedings carry on forthwith with the OS as amended.[note: 12] In further arguments before me, counsel also suggested that if the court is of the view that prayer 4, but not the other prayers, is for relief obtainable under O 80, the title of the OS can be amended to state that the OS is "also" in the matter of O 80 to make clear that there is a distinction between relief that is sought under O 80 and relief that is not.

37 The plaintiffs tendered their own expert opinion from Mr Ra'fat Rashad ("Mr Ra'fat") which states that Mr Moataz's expert opinion is incorrect and which also suggests that Singapore courts, as the courts of the place of the deceased's domicile, are "competent to prove the heirs, wills and inheritance liquidation".[note: 13] Counsel also referred to para 7-002 of *Dicey, Morris and Collins* for the proposition that procedural matters are governed by the *lex fori*, a principle that has been accepted in *Star Cruise Services Ltd v Overseas Union Bank Ltd* [1999] 3 SLR 412. Counsel submitted that as questions of *locus standi* are questions of procedure, these should be determined according to Singapore law, under which plaintiffs have standing to institute these proceedings because they are the administrators of the estate.

38 Counsel further submitted that the fourth defendant had not shown that he would suffer any prejudice even if the action had been wrongly instituted. Finally, in response to the reference to para 26-026 of *Dicey, Morris and Collins* by counsel for the fourth defendant, it was argued that regardless of whether there are sufficient assets in Singapore to pay the debts of the deceased, the plaintiffs have the prerogative as administrators to institute proceedings for the benefit of the estate and cannot therefore be said to have hidden motivations for bringing the action.

The court's findings on the second sub-issue

39 I will first deal with the second and third arguments raised by the fourth defendant, which essentially relate to the issues of prejudice and the aggravation of the seriousness of the irregularity.

40 I agree with the plaintiffs' submission that the fourth defendant has not shown clearly that he will suffer prejudice or substantial injustice if the OS is not set aside for irregularity. It is the prerogative of a plaintiff to serve an originating process on a party he wishes to proceed against and the plaintiffs in this case never served the OS on the fourth defendant. Accordingly, the fourth defendant would not have been part of the proceedings, which could have proceeded without him. Even if he was aggrieved at the costs order, he could have taken out separate proceedings under O 80 to determine whether the plaintiffs should be allowed to act upon the order since it directly affects his interest as a beneficiary of the deceased's estate, or filed an application to have the costs order set aside with an express reservation that he was not submitting to the court's jurisdiction to determine whether the court has jurisdiction to hear the OS. Instead, the fourth defendant chose to enter the fray by filing the present application to have the OS set aside or stayed.

41 For the same reasons, I am also of the view that the fourth defendant cannot complain about "patent abuse of process" or "general lack of bona fides" on the part of the plaintiffs that aggravates the seriousness of the irregularity. Whatever the plaintiffs' reasons for not applying under O 11, they failed to serve the OS on the fourth defendant and would not have been able to prosecute the OS against him in the normal course of events.

42 That said, the Court of Appeal has recognised in *The Melati* [2004] 4 SLR 7 at [27], citing the dicta of Lloyd LJ in *The Goldean Mariner* [1990] 2 Lloyd's Rep 215 with approval, that in deciding whether to set aside proceedings for irregularity, absence of prejudice is by no means conclusive in favour of a plaintiff and that even though there may be no prejudice, a mistake may not be an irregularity fit to be cured under O 2 r 1.

43 Returning to the fourth defendant's first argument, I am of the view that counsel's contention that the plaintiffs have no *locus standi* to bring the present proceedings merits further consideration. Before doing so, I will first deal with *Kuah Kok Kim*, since both parties relied on this case in support of their respective positions.

44 In *Kuah Kok Kim*, the appellants, minority shareholders of the respondent company, commenced proceedings to wind-up the respondent by way of a winding-up petition pursuant to the Company (Winding-Up) Rules. The respondent succeeded in having the petition struck out on the basis that proceedings ought to have been commenced by way of original petition under O 88 of the Rules of the Supreme Court 1970 ("O 88"). The Court of Appeal held that while proceedings ought indeed to have been commenced by petition under O 88, the only defect was that the petition bore the title of a companies winding-up petition. The Court of Appeal considered that *there had only been a failure to comply with a procedural requirement* and that while this was an irregularity, it was not so fundamental or serious that the discretion to remedy the same under O 2 r 1 ought not to be exercised. Accordingly, the Court of Appeal allowed the appeal against striking out and ordered that the title of the petition and all cause papers be amended to state that the petition was an original petition.

45 The plaintiffs are essentially seeking particular forms of substantive relief in an action that they have called an administration action. In substance, however, the action is not an administration action since most of the relief prayed for is not of the sort that can be obtained in an administration action. On one level, it may therefore be said that like in *Kuah Kok Kim*, there has only been a failure to comply with a procedural requirement occasioned by the plaintiffs wrongly calling the OS an administration action and wrongly referring to O 80 in the title of the OS and that, therefore, it is only the title of the OS that needs to be amended in order for the OS to proceed. However, the fourth defendant's argument is essentially that *Kuah Kok Kim* is distinguishable because even though the title of the petition was amended in that case, this did not change the fact that the minority shareholders had the standing to initiate the winding-up proceedings that formed the subject matter of the petition, whereas the plaintiffs in this case do not have standing to commence this action. As such, the capacity in which the plaintiffs purport to have commenced the action requires closer scrutiny.

46 To recap, the plaintiffs' submission is that *by virtue of their appointment as administrators of the deceased's estate*, they can exercise the rights that the deceased had as a partner in the company against the defendants. The plaintiffs also rely on Mr Ra'fat's expert opinion which states that a Singapore court is "competent to prove the heirs, wills and inheritance liquidation", and further assert that they have *locus standi* under Singapore law to bring these proceedings because they are administrators.

47 On the other hand, the fourth defendant's submission is that the plaintiffs are not entitled to institute the OS to enforce the rights attached to the deceased's shares as the question of who can enforce these rights depends on Egyptian law and under Egyptian law, only the deceased's lawful heirs, and not his personal representatives, can deal with the shares. The fourth defendant relies on Mr Moataz's expert opinion to make these points; the plaintiffs have not challenged this aspect of Mr Moataz's expert opinion except by a bare assertion in Mr Ra'fat's expert opinion that it is erroneous.

48 To ascertain which argument is correct, I start by considering the principle cited by the plaintiffs that questions of *locus standi* are questions of procedure to be determined by the *lex fori*. As noted earlier, counsel for the plaintiffs made reference to para 7-002 of *Dicey, Morris and Collins*, which states:

> The principle that procedure is governed by the *lex fori* is of general application and universally admitted. In a body of Rules such as those contained in this book, which state the principles enforced by an English court, the maxim that procedure is governed by the *lex fori* means in effect that it is governed by the ordinary law of England without any reference to any foreign law whatever. Thus the English court will always apply its own rules of procedure, and will, moreover, refuse to apply any foreign rule which in its view is procedural. In deciding whether a foreign rule is procedural, the court refers to the foreign law in order to determine whether the rule is of such a nature as to be procedural in the English sense.

49 Paragraph 7-002 of *Dicey, Morris and Collins* forms part of the commentary to Rule 17 of *Dicey, Morris and Collins* which states that "[a]ll matters of procedure are governed by the domestic law of the country to which the court wherein any legal proceedings are taken belong (*lex fori*)". While the general principle cited by the plaintiffs has been accepted by our courts, a later portion of the same commentary to Rule 17 indicates that it is not the case that the *lex causae* has no role in determining who the proper parties to proceedings are. In this regard, paras 7-011–70-12 of *Dicey, Morris and Collins* state:

> **(2) Parties**. In determining who are the proper parties to proceedings, the first question is whether the claimant or defendant is the sort of person or body that can be made a party to litigation. This is a question for the *lex fori*. Thus proceedings could not be commenced in England in the name of a dead man, even though this was possible by the *lex causae*.
>
> Assuming that a claimant is capable of suing in the above sense, *the next question is whether he is the proper claimant in the particular action before the court. Clearly he is not if by the lex causae the right which he is seeking to enforce did not vest in him but in someone else*. If the right is vested in him, further problems may arise from rules of the *lex causae* or the *lex fori* to the effect that the claimant may not sue in his own name or in his own name alone, but must sue in the name of some third party or in the name of himself or of a third party jointly. …
>
> [emphasis added]

50 Both the plaintiffs and the fourth defendant agree that the *lex causae* governing the dispute in this case is the law of Egypt. That must be correct. The company was created in Egypt and its legal nature is determined by the law of Egypt. In this connection, paras 30R-009–30-011 of *Dicey, Morris and Collins* state:

RULE 161 – The existence or dissolution of a foreign corporation duly created or dissolved under the law of a foreign country is recognised in England.

COMMENT

The principle in the Rule. Whether an entity exists as a matter of law must, in principle, depend upon the law of the country under which it was formed. That law will determine whether the entity has a separate legal existence. The law of that country will determine the legal nature of the entity so created, e.g. whether the entity is a corporation or partnership, and if the latter, the legal incidents which attach to it.

It is well established that a corporation duly created in a foreign country is to be recognised as a corporation in England, and accordingly foreign corporations can both sue and be sued in their corporate capacity in the courts. …

The evidence adduced by the fourth defendant as to the nature and characteristics of the company under Egyptian law (see above at [4], [6]), which was not challenged by the plaintiffs, shows that the company is a corporation with its place of incorporation in Egypt, notwithstanding the use of terms like "managers" and "partners" instead of "directors" and "shareholders" in the English translations of the documents that were tendered in evidence. The rights that the plaintiffs seek to exercise by the OS are part of the bundle of rights and obligations that make up the deceased's shares in the company, which are assets that would be regarded under Singapore law as being situate in Egypt, the place of incorporation and the place where the shares are registered (see *Macmillan Inc v Bishopgate Trust (No.3)* [1995] 1 WLR 978 at 991).

51 In addition, para 30-024 of *Dicey, Morris & Collins*, which counsel for the fourth defendant referred to, states:

> Internal management. English courts have been reluctant to intervene in domestic issues between members of a foreign corporation. In particular, they will not normally seek to control the exercise of discretionary powers which are given to officers of a foreign corporation by its constitution. In such cases and *in other matters involving the internal management of a foreign corporation the English court will give considerable weight to the court of the country of incorporation as the appropriate forum*, though in light of the development of the doctrine of *forum non conveniens* the jurisdiction of the latter court should not be regarded as exclusive. The principle of [the rule which states that all matters concerning the constitution of a corporation are governed by the law of the place of incorporation] has been increasingly accepted by the authorities. The cases at least establish that *the law of the place of incorporation determines the composition and powers of the various organs of the corporation, whether directors have been validly appointed, the nature and extent of the duties owed by the directors to the corporation, who are the corporation's officials authorised to act on its behalf, the extent of an individual member's liability for the debts or engagements of the corporation, the ability of the corporation to make a distribution to its members, and the validity of a transfer of assets and liabilities by way of universal succession on amalgamation with another corporation*. It seems, also, that the right of a shareholder to bring a derivative action in respect of wrongs done to a corporation is, in a case containing a foreign element, a matter of substance not procedure and is governed, accordingly, by the law of the place of incorporation, notwithstanding that, for purely English domestic purposes, the right has been regarded as a procedural device. *A member's contract of membership is governed by the same system*, although this would seem to be by reason of an implied choice of that system as the governing law of the contract rather than as a consequence of an automatic reference.
>
> [emphasis added]

Apart from the fact that the rights that the plaintiffs seek to exercise are conferred by the foundation contract, which is itself governed by Egyptian law, the defendants' conduct that the plaintiffs complain of relates to the internal management of the company during their tenure as managers of the company. All these factors point to the law of Egypt as the *lex causae*.

52 The fourth defendant's evidence shows that under the *lex causae*, the shares, and therefore the rights under the shares that are sought to be enforced by the OS, vest in the deceased's lawful heirs and not the plaintiffs. The plaintiffs have not shown otherwise. In fact, Mr Ra'fat's expert opinion states, as pointed out by the fourth defendant, that the company's former managers should, before the appointment of the receiver, have paid what was not distributed to the deceased to his heirs. While there is a subsequent paragraph in Mr Ra'fat's expert opinion that appears to contradict his earlier statement by stating that the former managers should have paid what was due to "the deserved heirs *or to their lawful representatives 'assigned trustees in accordance with the Singapore court sentence'*", the English translation of the original expert opinion which is in Arabic has been disputed by the fourth defendant, who asserts that the Arabic text of the expert opinion refers to payment to the lawful guardians of any heirs who are minors.[note: 14] In any event, the plaintiffs did not show that the phrase "assigned trustees in accordance with the Singapore court sentence" in Mr Ra'fat's expert opinion refers to personal representatives such as administrators.

53 The evidence that the parties have placed before me thus shows that the rights that the plaintiffs seek to enforce are vested in the deceased's lawful heirs and it is for them, and not the plaintiffs, to exercise these rights. Accordingly, I am of the view that the fourth defendant has

succeeded in establishing, based on the evidence before me, that the plaintiffs have no *locus standi* to bring a normal OS seeking relief based on the rights attached to the shares.

54 I note in passing that in the English decision of *Konamaneni and others v Rolls Royce Industrial Power (India) Ltd and others* [2002] 1 WLR 1269, a case which was referred to in para 30-024 of *Dicey, Morris and Collins* ([51] *supra*), Lawrence Collins J considered (*obiter* at [48]–[50]) that the rights of shareholders of a foreign company, including the right to sue derivatively in England, should be determined by the law of the place of incorporation as a matter of substance and not procedure. No evidence was placed before me as to whether Egyptian law allows shareholders to commence an action based on rights attached to their shares such as the one that the plaintiffs have commenced. As this point was not argued before me, I express no firm view on it and have not taken it into account in reaching my conclusion above.

55 Apart from assessing the parties' arguments based on the *lex causae*, the plaintiffs' claim that they have standing can also be analysed in the alternative from the perspective of their appointment as administrators. Although the deceased was domiciled in Singapore and the plaintiffs have been validly appointed administrators under a Singapore grant, the question arises as to what effect this grant has in relation to the shares, which are *foreign assets*. The position in England is set out at para 26-022 of *Dicey, Morris and Collins*, which states:

> (1) All property of the deceased, whether it consists of movables or immovables (apart from the special case of settled land) which at the time of his death is locally situate in England, vests in the English personal representative. It is not necessary that he should have reduced the property into possession. *On the other hand, assets outside England do not vest in an English personal representative by virtue of his grant. Whether or not he is entitled to recover them is a matter for the law of the country in which he is situate.* There are certain dicta to the effect that an English grant, at any rate when the deceased was domiciled in England, "extends" to all his movables wherever situate. But these dicta, it is submitted, will be found on analysis to be concerned with one or other of two rather different propositions. The first is that an English personal representative who actually obtains possession of foreign assets is accountable for them in England as if they had formed a part of the English estate. The second is that if the deceased died domiciled in England, the English personal representative has in most countries a "generally recognised claim" to a local grant.
>
> [emphasis added]

56 A similar view is set out at para 53-02 of *Williams, Mortimer and Sunnocks on Executors, Administrators and Probate* (John Ross Martyn & Nicholas Caddick gen eds) (Sweet & Maxwell, 19th edition of *Williams on Executors* and 7th edition of *Mortimer on Probate*, 2008):

> **Vesting of assets**
>
> Property of the deceased (whether movable or immovable) which at the time of death is situate in England, vests in the English representative on death or in the case of administrators on grant. However, assets outside England do not automatically vest in the English representative.

It is also stated at para 49-30 of the above textbook that:

Recovery of foreign assets

When a person has received a grant of probate or letters of administration in England he is entitled (so far as the English courts are concerned), if not obliged to take legitimate steps "to recover any property of the deceased wherever situate". For such assets as he receives or, but for his default, would have received, he will, no doubt, be held liable.

The English grant, however, cannot of itself give him any authority to collect foreign assets, or to compel payment or delivery thereof to him. Whether he is able to obtain possession of foreign assets must depend upon the law of the foreign country, which may of course involve a *renvoi* back to English law. There is no general duty on a executor where foreign assets are specifically bequeathed to procure such assets for the beneficiary.

[emphasis added]

57 The above points are made even more emphatically, and in a context closer to the facts of the present case, at para 9.12 of a more recent work, *Probate Disputes and Remedies* (Dawn Goodman *et al* eds) (Jordans, 2nd Ed, 2008):

9.12 Section 25 of the Administration of Estates Act 1925 imposes a general duty on personal representatives to 'collect and get in the real and personal estate of the deceased and administer it according to law'. However:

(1) As regards foreign assets the English grant will be effective only insofar as these assets are brought to England before anyone has acquired good title in the country of situs.

(2) The English grant may assist the English executors to institute succession proceedings abroad (especially in common law countries, eg USA) but civil law and *Islamic jurisdictions do not recognise the concept of executorship in its English sense and the estate will usually vest in the heir direct. The English executors may therefore be unable to take any effective steps to acquire title to the foreign assets*.

[emphasis added]

58 The common law position with regard to foreign assets as set out above does not appear to be inconsistent with anything in the Probate and Administration Act (Cap 251, 2000 Rev Ed). If this position also applies in the case of a Singapore grant, the shares being foreign assets do not vest in the plaintiffs as administrators by virtue of the grant and the plaintiffs would ordinarily have to take steps in the place where the shares are located to deal with the shares. This was the point made by the fourth defendant in his submissions, which the excerpts above appear to support; the excerpts also support the fourth defendant's evidence, which the plaintiffs have not challenged, that the plaintiffs cannot in fact take any steps in Egypt to have the shares vest in them. Accordingly, since the shares vest in the deceased's legal heirs, only they have the standing to institute proceedings based on the rights attached to the shares. This is the same conclusion that I reached above by applying an analysis based on the *lex causae* of the dispute.

59 In the circumstances. I am of the view that the fourth defendant has established that the

plaintiffs do not have *locus standi* to institute these proceedings as a normal OS to seek relief based on the rights attached to the shares. For this reason, deleting the reference to O 80 in the title of the OS or amending the title to state that it is "also" in the matter of O 80 to 'cure' the irregularity does not assist the plaintiffs. It would also not be feasible to amend the OS by deleting prayers 1 and 2 of the OS and allow the OS to continue purely as an administration action for prayer 4 because this prayer, as noted above, is contingent on prayers 1 and 2 being granted in the first place and cannot stand on its own. As such, I am of the view that the OS should be set aside as against the fourth defendant for irregularity. While I was not referred to any case where an OS has been set aside in similar circumstances, I note that in *Karaha Bodas Co LLC v Pertamina Energy Trading Ltd and another appeal* [2006] 1 SLR 112, an OS was set aside on the basis that the plaintiff had no *locus standi* to ask for a declaration.

60 Although I have decided to set aside the OS, I should make it clear that this does not preclude the plaintiffs from instituting proceedings against the fourth defendant for the same relief either in their capacity as administrators, if they can subsequently show that under the *lex causae* or otherwise, the deceased's shares or the rights under these shares that they seek to enforce are vested in them as administrators, or in some other capacity.

61 In the event that I am wrong in making the above finding that the plaintiffs lack *locus standi*, the OS cannot nevertheless proceed in its present form and would have to be amended. In such a case, I would have ordered that the OS be amended by deleting the words "And In the Matter of Order 80 Rules of Court" from the title as well as prayer 4, so that it simply becomes a normal OS. Prayer 4 should be deleted because, apart from the fact that the matters a court would have to consider in an administration action under O 80 may be very different from those that would arise in contentious litigation commenced by the personal representatives of an estate, the question that lies at the heart of prayer 4 of the OS only arises for determination if the fourth defendant is actually found liable in relation to the other prayers in the first place. If the plaintiffs eventually succeed on issues of liability, it is always open for them to commence an administration action and seek whatever order or declaration they require.

The second issue: whether the proceedings should be stayed on the ground of *forum non conveniens*

62 As I have decided that the proceedings should be set aside, it is technically unnecessary to go into the second issue. However, as parties canvassed arguments for and against a stay on the ground of *forum non conveniens* before me, I will consider the issue of whether the proceedings against the fourth defendant should be stayed if the OS is not set aside.

63 The legal principles in this area are well settled and are not in dispute. Under the first stage of the two-stage test propounded in *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460 ("the *Spiliada* test"), which has been adopted by our courts in numerous cases, a defendant seeking a stay must show not only that that Singapore is not the natural or appropriate forum for trial but also that there is another available forum that is clearly or distinctly more appropriate than Singapore. If the court considers at the end of stage one that there is no other available forum clearly or distinctly more appropriate than Singapore, it will ordinarily refuse a stay. On the other hand, if the court is of the view that there is some other available forum that *prima facie* is clearly or distinctly more appropriate than Singapore, a stay will ordinarily be granted unless the plaintiff can establish circumstances by reason of which justice requires that a stay should nevertheless be refused. This is stage two of the *Spiliada* test and the court will, at this stage, consider all the circumstances of the case, including circumstances going beyond those taken into account when considering connecting factors with other jurisdictions.

Stage one of the Spiliada test

64 In making his case for a stay, the fourth defendant contends that Egypt is clearly and distinctly a more appropriate forum whereas the plaintiffs argue that Singapore is the appropriate forum and that even if it is not, there are more than sufficient reasons why the claim should be heard in Singapore.[note: 15] A number of connecting factors have been raised by the parties. Before considering these connecting factors, I note that the Court of Appeal has, in *CIMB Bank Bhd v Dresdner Kleinwort Ltd* [2008] 4 SLR 543 ("*CIMB Bank Bhd*"), recognised that at the end of the day, weighing the various connecting factors is not a numbers game and that it is the legal significance of the factors in order to achieve the ends of justice which would be decisive.

Convenience and expense

65 Counsel for the fourth defendant submitted that the fact that all the shareholder agreements, accounts, records and other documents relating to the company are located in Cairo points to Egypt being the more natural and appropriate forum for determining the dispute.[note: 16] In reply, counsel for the plaintiffs contended that there is already ample evidence before the court, as contained in the affidavits filed by the plaintiffs and defendants, and that, there is therefore no need to have recourse to other documents located in Egypt.

66 While counsel for the fourth defendant made reference to the various documents mentioned above, he did not elaborate on what their contents are or how they would be relevant for the determination of the dispute between the parties. What appear to be the key documents needed for this purpose, namely the foundation contract and the 2005 accounts, are already before the court and it has not been shown that substantial expense would be incurred or that time would be wasted in obtaining other documents from Egypt if the OS is heard in Singapore. In the circumstances, I regard the location of the company's documents as a neutral factor.

The applicable law governing the dispute

67 Counsel for the fourth defendant submitted that Egyptian law governs the dispute between the parties and has been applied for the past 60 years to resolve disputes between the company's shareholders. Counsel submitted that the reliefs claimed by the plaintiffs are typically those that are found in a dispute between a shareholder and a corporate entity and that as the corporate entity in this case is in Egypt, the law of the place of incorporation governs all matters concerning its constitution.[note: 17]

68 In addition, counsel repeated the argument that under Egyptian law, the plaintiffs have no standing to institute the present proceedings and that only the deceased's heirs are entitled to the monies and accounts demanded by the plaintiffs. Counsel also relied on Mr Moataz's expert opinion to argue that under Egyptian law, the defendants can only account to the receiver for the monies and accounts. In essence, counsel's contention was that Egyptian courts would be more adept at applying Egyptian law to the issues in the OS.[note: 18]

69 Counsel for the plaintiffs submitted in reply that even if Egyptian law governs the dispute, there is already evidence on the relevant aspects of such law before the court as found in the affidavits filed in the proceedings.[note: 19] Counsel also made the point that, in any event, there is no dispute under Egyptian law that the deceased is entitled to at least the amount reflected in the 2005 accounts and is also entitled to the company's accounts because this is clearly stated in the foundation contract. Counsel also asserted that the plaintiffs have standing under Singapore law to

bring the action.[note: 20]

70 In this case, parties are not really in dispute as to the fact that the substantive law governing the dispute is Egyptian law, given that the company was created and managed in Egypt. While counsel for the plaintiffs submitted that there is no issue as to what the rights in the foundation contract entitle partners to even if Egyptian law is the *lex causae*, the fourth defendant has put forward various explanations for the non-compliance with the foundation contract and the effect of these explanations on the question of liability would depend on Egyptian law. In addition, there may be other unresolved issues that would depend on Egyptian law to resolve, such as whether shareholders have the right to bring an action such as the present one. None of these issues are addressed in the expert opinions on Egyptian law that have already been filed.

71 I also note that in *Rickshaw Investments Ltd and another v Nicolai Baron von Uexkull* [2007] 1 SLR 377, the Court of Appeal noted, at 42, that choice of law considerations can be a significant factor in determining the appropriate forum to hear a dispute as there will clearly be savings in time and resources if a court applies the law of its own jurisdiction to the substantive dispute. The Court of Appeal also noted, at 43, that even where a party has failed to adduce evidence of foreign law, the mere factum of a foreign *lex causae* may be accorded due weight despite a failure to adduce evidence regarding the content of this law.

72 In *CIMB Bank Bhd*, the Court of Appeal considered that the applicable law factor would not be of much significance even though the applicable law was English law, by reason of the fact that the laws of England and Singapore in relation to unjust enrichment were similar if not identical. In this case, however, the plaintiffs did not show such similarity and in fact appear to have conceded that the laws and procedures in Egypt are different from those in Singapore.[note: 21] Furthermore, given the different working languages of both countries, it does not appear to be the case that Singapore courts would be able to apply Egyptian law without the aid of experts and translators, unlike the situation in *CIMB Bank Bhd* where the Court of Appeal considered that Singapore courts would be able to apply English law without the aid of foreign experts.

73 Taking into account all of the foregoing matters as well as the fact that the orders sought would affect assets belonging to an Egyptian company which in all probability are located in Egypt, no evidence being led to the contrary, my conclusion is that the applicable law is a factor that points to Egypt as the more appropriate forum.

Ongoing proceedings in Egypt

74 Counsel for the fourth defendant contended that the existence of three sets of ongoing proceedings in Egypt that are related to matters raised in the OS is another factor that points to Egypt as the more appropriate and natural forum. These proceedings concern an appeal against the order removing the defendants as managers, an action by the plaintiffs against the defendants and the receiver for termination of the receivership and the appointment of new managers and, finally, an action by the defendants to dispute the propriety of amendments to the foundation contract and the appointment of new managers on 15 May 2008.[note: 22]

75 Counsel for the plaintiffs argued that the ongoing proceedings in Egypt are irrelevant to the subject matter of the OS as they only deal with the issue of who the proper managers of the company are, as well as the interpretation of the foundation contract and amendments thereto relating to the defendants' removal as managers. Counsel submitted that these proceedings do not concern the issue of whether the plaintiffs are entitled to demand from the defendants the sum due

to the deceased and the company's documents and that therefore, the existence of these proceedings does not show that Egypt is a more appropriate forum.[note: 23]

76 I agree with the plaintiffs that the ongoing proceedings in Egypt do not appear to be relevant to the subject matter of the OS. The outcome of these proceedings will not change the fact that the defendants did not act in accordance with the foundation contract or affect the issue of who can exercise rights under the shares. While the Court of Appeal in *Rickshaw* accepted that weight could be accorded to the fact that there are concurrent foreign proceedings if there is a risk of conflicting judgments, there does not appear to be an overlap of facts and issues between the Egyptian proceedings and those in this OS such as to give rise to the risk of conflicting judgments, unlike in *Rickshaw* where there was an overlap of facts and issues between ongoing proceedings in Germany and those in Singapore. As such, I am of the view that the existence of the Egyptian proceedings is a neutral factor.

Enforceability

77 Counsel for the plaintiffs submitted that Singapore is the only jurisdiction that can issue effective orders against the *first to third defendants* who are domiciled and located in Singapore and who are allegedly in control over the company's documents and assets.[note: 24] Counsel also suggested that these documents and assets are in fact in Singapore.

78 The present application is by the fourth defendant for a *stay of proceedings as against him*. Unlike the other defendants, the fourth defendant does not reside in Singapore. Further, as pointed out by counsel for the fourth defendant, the plaintiffs adduced no evidence to show that the assets that the plaintiffs are seeking delivery of are even located in Singapore. In the circumstances, I treat enforceability as a neutral factor in considering whether the proceedings against the fourth defendant should be stayed.

Exercise of discretion

79 Having weighed the various connecting factors raised by the parties, I am of the view that while most of the factors are neutral, one factor, namely, that of the applicable law, clearly points to Egypt as being the more appropriate forum for the dispute between the plaintiffs and the fourth defendant to be tried. It is noted at para 12-029 of *Dicey, Morris and Collins* that "[i]n cases concerned with the internal management of foreign companies, there is a strong tendency to see the place of incorporation as the natural forum"; in the circumstances, I find that the fourth defendant has established that Egypt is clearly and distinctly a more appropriate forum than Singapore for the trial of the action against him.

Stage two of the Spiliada test

80 Having found that Egypt is *prima facie* the more appropriate forum, I now turn to consider whether the plaintiffs have established circumstances by reason of which justice requires that a stay should nevertheless be refused.

81 I have already noted how the plaintiffs have taken the position that the laws and civil procedure in Egypt are different from those in Singapore (see above at [72]). This point was made to support their contention that even if Egypt is found to be a more appropriate forum, justice requires that the action against the fourth defendant be heard in Singapore and not in Egypt. This concession as to the differences between the applicable laws actually supports the observations I have made regarding the applicable law as being a connecting factor pointing to Egypt as the more appropriate

forum, and does not show that the justice of the case requires the action to be heard in Singapore.

82 Counsel for the plaintiffs also submitted that the fact that the other three defendants have not applied for a stay of the Singapore proceedings in favour of Egypt but have actively participated in the Singapore proceedings by filing substantial affidavits is a factor in favour of Singapore as the more appropriate forum.[note: 25] The effect of closely-related actions against multiple defendants in different jurisdictions on stay applications was considered by our Court of Appeal in *PT Hutan Domas Raya v Yue Xiu Enterprises (Holdings) Limited & Anor* [2001] 2 SLR 49 ("*PT Hutan Domas Raya*").

83 In *PT Hutan Domas Raya*, the respondents commenced an action for the recovery of certain debts against an Indonesian company, PT Hutan, and one Kho Teng Kwee @ Alex Korompis ("Kho"), a Singapore permanent resident who was PT Hutan's president and chief executive. PT Hutan later applied for a stay of proceedings on the ground of *forum non conveniens* and succeeded before an AR. On appeal, Judith Prakash J reversed the AR's decision and discharged the stay order, *inter alia*, on the basis that, while Indonesia was *prima facie* the more appropriate forum, a stay would give rise to the real prospect of conflicting outcomes in Singapore and Indonesian courts on the main issues in the trial due to the similarities of the actions against PT Hutan and Kho. PT Hutan appealed to the Court of Appeal against Prakash J's decision. In dismissing the appeal, Chao Hick Tin JA made the following observations at [24]–[27]:

24 Having examined the grounds of judgment of the court below it is clear that the judge had not erred in principle. She had correctly applied the two-stage approach enunciated by Lord Goff in *The Spiliada*. While recognising that *prima facie* Indonesia is the more appropriate forum, she nevertheless for good reasons felt that this was a case where a stay should still be refused. Her main reason was a possibility of conflict of decisions if the two actions, which are so closely related, are to be tried in different jurisdictions and her secondary reason was that it would be convenient and less expensive if both actions were to be tried in the same forum. There are thus personal and juridical advantages to the plaintiffs-respondents in having both actions tried in Singapore.

25 The conclusion reached by Prakash J is wholly in line with the opinion expressed by the authors of *Dicey & Morris*, *The Conflict of Laws* Vol 1 (13th Ed, 2000) at para 12-027:

> The case for a stay may also be overcome if to grant it would adversely affect the efficient conduct of litigation: in a case with multiple defendants, *if the result of one defendant's obtaining a stay would be to force the claimant to bring his claim in two separate sets of proceedings, with the possible further consequence of inconsistent conclusions being reached by the two courts, it will not generally serve the interests of justice to order a stay*. [emphasis added]

26 In *The El Amria* [1981] 2 Lloyd's Rep 119 at 128, Brandon LJ put it in even stronger terms as to the undesirability of two actions raising common issues being tried in two jurisdictions:

> I do not regard it merely as convenient that two actions, in which many of the same issues fall to be determined, should be tried together; *rather that I regard it as a potential disaster from a legal point of view if they were not, because of risk inherent in separate trials, one in Egypt and the other in England, that the same issues might be determined differently in the two countries*. [emphasis added]

27 It is clear to us that in exercising her discretion to refuse a stay, the judge had taken into consideration all relevant circumstances, including the fact that the two memoranda and the two guarantees are governed by Indonesian law. She recognised that "as a rule, Singapore courts prefer not to rule on issues of foreign law." But having weighed the special circumstances of this case, she felt the ends of justice would be better served if the actions against PT Hutan and Kho could be disposed of in the same forum. There would be no new issues to be disposed of in Indonesia. As the judge had not erred in principle, there is no basis for us to interfere in the exercise of her discretion. Indeed, we would have decided the same way.

84 It can therefore be seen that in *PT Hutan Domas Raya*, a crucial consideration in deciding that the proceedings should not be stayed was the risk of conflicting decisions in Singapore and Indonesia if a stay had been ordered. However, there are at least two aspects in which the factual matrix in the instant case is very different from that in *PT Hutan Domas Raya*. First, unlike in *PT Hutan Domas Raya* where both defendants were properly served by the plaintiff, the plaintiffs never served the OS on the fourth defendant and were originally prepared to proceed in Singapore only against the other defendants since it is their case that all the defendants are jointly and severally liable. A stay of proceedings against the fourth defendant therefore does not change this status quo as far as the plaintiffs are concerned. Secondly, the plaintiffs have not challenged the fourth defendant's evidence that they will not be able to institute proceedings in Egypt in any event as a matter of substantive

Egyptian law; as such, it can be said that the risk of conflicting decisions caused by a stay is not as real as in *PT Hutan Domas Raya*.

85 Counsel for the plaintiffs also asked me to question the fourth defendant's motive in trying to stay proceedings and the defendants' refusal to co-operate with the receiver appointed by the Egyptian court order, as well as the defendants' long list of allegedly dishonest dealings, including some which reached the attention of Chan Sek Keong J (as he then was) in *Yusof bin Ahmad v Hong Kong Bank Trustees (Singapore) Ltd* [1989] SLR 410.[note: 26] The allegations as to the fourth defendant's motive lack specificity just as the fourth defendant's allegations about the plaintiffs' lack of *bona fides* in commencing these proceedings. Insofar as the defendants are allegedly in non-compliance with the Egyptian court order, there ought to be recourse in Egypt to contempt proceedings or their equivalent and the plaintiffs have not shown otherwise. I also do not see how the comments made about the defendants by the High Court in an older case entirely unrelated to the present one can have a bearing on the question of whether these proceedings should be stayed against the fourth defendant.

86 I am thus of the view that the plaintiffs have not discharged the burden upon them in stage two of the *Spiliada* test to show that justice requires that the action against the fourth defendant be nevertheless heard in Singapore.

Conclusion in relation to the second issue

87 In view of the above conclusions, even if I am wrong in holding that the OS should not be set aside, I would have ordered that the proceedings against the fourth defendant be stayed on the ground of *forum non conveniens*.

The third issue: whether the costs order made in SUM 5534 should be set aside

88 The third and final issue that I have to consider is whether the costs order made in SUM 5534 on 16 February 2009 should be set aside. The background leading up to the making of the costs order has already been set out (see above at [11]).

89 The fourth defendant's application is made pursuant to O 32 r 6, which simply states that the court may set aside an order made *ex parte*. As noted in *Singapore Civil Procedure 2007* at para 32/6/7, it is necessary in the interest of justice to allow the party who has not been heard to object to the order if he wishes, especially since the court hearing an *ex parte* application usually relies entirely on the applicant's affidavits and the other party has not had an opportunity to be heard. O 32 r 6 is wide enough to cover an order for costs made *ex parte* such as the costs order in this case; further, as recognised in para 32/6/7 the White Book, the power to set aside an *ex parte* order also includes the power to vary such an order.

90 Counsel for fourth defendant submitted that that the plaintiffs had at all times, and even before taking out SUM 5534, been aware that they could serve the fourth defendant in Cairo, Egypt, at the address 171 Mohd Farid Street ("the Mohd Farid Street address"), which is also the address of the building owned by the company. As evidence of this, the counsel pointed to the fact that the plaintiffs' Egyptian lawyer had previously served numerous processes related to actions in respect of the company, one of which was commenced by the plaintiffs and others, on the fourth defendant at the Mohd Farid Street address.[note: 27] The fourth defendant produced a copy of a notice dated 1 September 2008 (along with a translation) as an example of how he had previously been served at the Mohd Farid Street address.[note: 28] Counsel therefore submitted that the plaintiffs had

misrepresented to the court in SUM 5534 that they were unable to reach the fourth defendant and did not know how to contact him.

91 Counsel further contended that the court had no jurisdiction to make the costs order as against the fourth defendant because the plaintiffs had not been granted leave to serve the OS on the fourth defendant out of jurisdiction.[note: 29] Finally, counsel argued that the costs order should be set aside because the plaintiffs had abused the process of the court by applying for substituted service on the fourth defendant at the first defendant's address instead of applying to serve the OS out of jurisdiction under O 11 when they must have known at the time the OS was issued that the fourth defendant lived in Cairo, given that they had inscribed on the OS that the fourth defendant's address was *in Cairo* but was unknown.[note: 30]

92 In response, counsel for the plaintiffs submitted that the fourth defendant's application to set aside the costs order was without basis and should fail as the only ground relied on by the fourth defendant was that the plaintiffs had allegedly been aware at all times that the OS could be served on the fourth defendant at the Mohd Farid Street address. Counsel submitted that this was not the case because the plaintiffs had only learned from the first defendant that the fourth defendant could be served at the Mohd Farid Street address *only after* SUM 5534 had been filed in December 2008.[note: 31] The plaintiffs also made reference to the fact that the receiver had difficulty locating the fourth defendant.[note: 32]

The court's findings on the third issue

93 Although the plaintiffs were unsuccessful in obtaining an order for substituted service in SUM 5534, they were nevertheless granted an indemnity for their own costs of this unsuccessful application. In this regard, O 59 r 6(2) states:

> **Restriction of discretion to order costs (O. 59, r. 6)**
>
> **6**. —(1) …
>
> (2) Where a person is or has been a party to any proceedings in the capacity of trustee, personal representative or mortgagee, he shall, unless the Court otherwise orders, be entitled to the costs of those proceedings, in so far as they are not recovered from or paid by any other person, out of the fund held by the trustee or personal representative or out of the mortgaged property, as the case may be; and the Court may otherwise order only on the ground that the trustee, personal representative or mortgagee has acted unreasonably or, in the case of trustee or personal representative, has in substance acted for his own benefit rather than for the benefit of the fund.

94 Under O 59 r 6(2), the court has the discretion, where a personal representative has acted unreasonably or in substance for his own benefit rather than the benefit of the fund, to order that the default position not apply such that the personal representatives will not be entitled to any indemnity "out of the fund" for their own costs, or only entitled to a partial indemnity. In *Rajabali Jumabhoy & Ors v Ameerali R Jumabhoy & Ors (No 2)* [1998] 2 SLR 489 ("*Rajabali Jumabhoy*"), the Court of Appeal, in considering the scope of O 59 r 6(2), cited the following passage from *Re Jones; Christmas v Jones* [1897] 2 Ch 190 ("*Re Jones*") at 197–198 with approval:

A man who fulfils the difficult duties of an administrator, executor or trustee is, in common sense and common justice, entitled to be recouped to the very last penny everything that he has expended properly — that is to say, without impropriety — in his character of administrator, executor or trustee; and the question I have to consider is whether the costs which are here claimed by the administrator have been incurred by him without impropriety in that character. Mr Jenkins says the administrator has made a claim against the estate which he is unable to support: that he claims as an outsider, and that if he were an outsider he would have come in as an ordinary creditor, and as regards these costs he ought to fail and to pay the costs with which otherwise the estate will be saddled. But if the costs are not those of an outsider, but are costs incident to the performance of his duty as administrator, then an entirely different rule obtains, and I have only to consider whether he has incurred these costs properly, that is, without impropriety. What is the meaning of that? Of course, if an action is brought for the purpose of making the executor or administrator liable for breach of trust, and he has been found guilty of a breach of trust, and costs have been incurred in resisting the action, it is only right that, when those costs have been ascertained, the executor or administrator should pay them as part of the penalty for the breach of trust. Again, if an executor brings in claims strictly in his character of executor, which the court can see from the evidence, documentary or arising out of cross-examination, or otherwise, or by a sort of intuitive process, or by a general view of the case, are not honestly brought forward, then the court, notwithstanding the general rule, may fairly deprive the executor of his costs; and, if he is convicted of dishonesty, may, I have no doubt, order the executor to pay the costs so incurred. And again, *apart from dishonesty, the court may, in my opinion, visit the executor with costs, or deprive him of his costs, where the claim is of a monstrous character, that is, one which no reasonable man could say ought to have been put forward. Even though the executor may have believed it, and a solicitor may have prepared the case and counsel may have argued it; in such a case the court has quite sufficient power to deprive the executor of his costs, or even to make him pay the costs he has occasioned to the estat*e. But subject to these limitations there is no doubt that the general rule prevails, and that, even though an executor makes a mistake, even though he endeavours to charge against the estate items which the law does not allow him to charge, or where the endeavour to prove them has been defeated with costs, still he may have his costs if they have been incurred without impropriety or fraud, or if they do not partake of that monstrosity to which I have alluded.

[emphasis added]

95 It is clear from the above passage that the unreasonable conduct referred to in O 59 r 6(2) includes unreasonable conduct on the part of personal representatives in commencing and conducting proceedings. In essence, the fourth defendant contends that the plaintiffs had acted unreasonably in taking out SUM 5534 instead of applying for service out of jurisdiction under O 11 despite knowing that the fourth defendant lives in Cairo and the address on which he could be served.

96 The plaintiffs did not adduce any evidence in these proceedings to dispute the fourth defendant's claims that they had been using the Mohd Farid Street address for service of processes relating to proceedings in Egypt even before SUM 5534 (and even the OS) was filed. In the circumstances, I am unable to accept the plaintiffs' claim that they found out that the fourth defendant could be served at the Mohd Farid Street address only after SUM 5534 had been filed. In any event, as pointed out by the fourth defendant, the inscription on the OS indicates that the plaintiffs knew, at least, that the fourth defendant lived in Cairo at the time the OS was filed. In either case, the plaintiffs should have applied under O 11 for leave to serve the fourth defendant out

of jurisdiction; even if the plaintiffs did not know the fourth defendant's precise location in Cairo for purposes of personal service and even if the receiver did not manage to meet the fourth defendant, the plaintiffs could have applied for *substituted service out of jurisdiction*: see O 11 r 3(1) and *Singapore Civil Procedure 2007* at para 11/2/4 and para 62/5/8.

97 The plaintiffs proceeded to file SUM 5534 to obtain an order for substituted service of the fourth defendant *within Singapore* on the basis that the fourth defendant had to be served for the plaintiffs' application to be able to proceed for hearing.[note: 33] They did not explain why even substituted service out of jurisdiction was not feasible and eventually conceded that the hearing could just proceed without the fourth defendant because it was their case that all the defendants were jointly and severally liable anyway. Viewed in this light, the application in SUM 5534 was unnecessary in the first place. Also, even if the plaintiffs' had indeed been made aware of the fourth defendant's address in Cairo only after SUM 5534 had been filed, they could have proceeded to withdraw the application and applied to serve the fourth defendant out of jurisdiction. Instead, they persisted with the application in SUM 5534, which was eventually dismissed after two adjournments.

98 Although the fourth defendant has alleged that the plaintiffs had an ulterior motive in not applying for leave to serve out of jurisdiction under O 11, there does not appear to be enough evidence to establish such a motive. Nevertheless, I am of the view that the evidence produced by the fourth defendant shows that the plaintiffs had acted unreasonably in filing and proceeding with the application for substituted service of the fourth defendant within Singapore in SUM 5534 without showing clearly why they could not serve the fourth defendant out of jurisdiction whether personally or by way of substituted service.

99 Apart from what I have stated above, I also doubt whether the form of the costs order is in keeping with the purpose of O 59 r 6(2). As will be apparent from *Re Jones*, the principle behind the restriction on ordering costs in O 59 r 6(2) is that if the personal representatives have acted for the benefit of the estate, they should be entitled to an indemnity from *the estate* for their costs. A plain reading of O 59 r 6(2) indicates that the default position is that the personal representatives are entitled to costs "out of the fund" held by them. The words "out of the fund" mean the fund *as a whole* so that costs will in effect be borne by all the beneficiaries who stand to benefit from the actions of the personal representatives. No provision is made for the court to order that costs are to come out of a particular beneficiary's share of the estate. This is unsurprising as O 59 r 6(2) is meant to protect personal representatives in carrying out their duties, not to penalise a defendant in proceedings initiated by personal representatives, who also happens to be a beneficiary. In effect, the costs order means that the fourth defendant alone, out of all the beneficiaries of the estate, bears the plaintiffs' full costs of the unusual and unsuccessful attempt to effect service on him. That does not seem right.

100 This brings me to the question of the appropriate order that I should make. In *Rajabali Jumabhoy*, the Court of Appeal considered that the respondent trustees had been guilty of unreasonable conduct in defending a claim brought against them by mounting multiple defences, some of which had no merit and incurred additional costs and expenses. Even so, the Court of Appeal did not wholly depart from the general rule in O 59 r 6(2) but ordered that only 50% of the trustees' costs that were not recovered from the appellants be indemnified out of the funds of the settlement. While the nature of the unreasonable conduct is different in the instant case, I cannot say that it is worse than the unreasonable conduct of the trustees in *Rajabali Jumabhoy*.

101 In the circumstances, the costs order made on 16 February 2009 should be varied by ordering that the plaintiffs be indemnified out of the estate for only 50% of their costs and disbursements of and incidental to SUM 5534. For avoidance of doubt, the indemnity is to come from the estate as a

whole and not specifically from the fourth defendant's share thereof.

Conclusion

102 For all of the reasons given above, I order that the OS be set aside for irregularity as against the fourth defendant and that the costs order of 16 February 2009 in SUM 5534 be varied to state that the plaintiffs be indemnified out of the estate for only 50% of their costs and disbursements of and incidental to SUM 5534.

103 I will now hear the parties on costs.

[note: 1]Plaintiffs' first joint affidavit at [23].

[note: 2]Plaintiffs' first joint affidavit at [16], [22]; fifth joint affidavit at [9].

[note: 3]Plaintiffs' first joint affidavit at [5]; third joint affidavit at [11].

[note: 4]Fourth defendant's written submissions at [33] – [36].

[note: 5]Fourth defendant's written submissions at [37] – [41].

[note: 6]Plaintiffs' skeletal submissions at [13] – [17].

[note: 7]Plaintiffs' skeletal submissions at [15].

[note: 8]Fourth defendant's written submissions at [21] – [27], [42] – [48].

[note: 9]Fourth defendant's written submissions at [49] – [51].

[note: 10]Fourth defendant's written submissions at [52] – [53], [81] – [85].

[note: 11]Plaintiffs' skeletal submissions at [10].

[note: 12]Plaintiffs' skeletal submissions at [20].

[note: 13]Plaintiffs' fifth joint affidavit at p 27.

[note: 14]Fourth defendant's written submissions at [24]; second affidavit at [25].

[note: 15]Plaintiffs' skeletal submissions at [26].

[note: 16]Fourth defendant's written submissions at [57] – [58].

[note: 17]Fourth defendant's written submissions at [59] – [61].

[note: 18]Fourth defendant's written submissions at [62], [64], [68].

[note: 19]Plaintiffs' skeletal submissions at [32].

[note: 20]Plaintiffs' skeletal submissions at [37] – [39], [46].

[note: 21]Plaintiffs' fifth joint affidavit at [45].

[note: 22]Fourth defendant's written submissions at [67].

[note: 23]Plaintiffs' skeletal submissions at [33] – [34].

[note: 24]Plaintiffs' skeletal submissions at [28] – [29].

[note: 25]Plaintiffs' skeletal submissions at [27].

[note: 26]Plaintiffs' skeletal submissions at [41] – [45].

[note: 27]Fourth defendant's written submissions at [73] – [77].

[note: 28]Fourth defendant's first affidavit at [45] – [46].

[note: 29]Fourth defendant's written submissions at [81].

[note: 30]Fourth defendant's written submissions at [80] – [85].

[note: 31]Plaintiffs' skeletal submissions at [50] – [55].

[note: 32]Plaintiffs'sixth joint affidavit at [7] – [9].

[note: 33]Plaintiffs' second joint affidavit at [11].