Chan Chin Cheung v Chan Fatt Cheung and Others
[2009] SGCA 62

Case Number : CA 148/2008

Decision Date : 11 December 2009

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; Andrew Phang Boon Leong JA

Counsel Name(s) : Sarbit Singh Chopra and Cheryl Monterio (Lim & Lim) for the appellant; Lim Shack Keong and Loo Sai Fung (Drew & Napier LLC) for the respondents

Parties : Chan Chin Cheung — Chan Fatt Cheung; Chan See Chuen; Chan Chee Chiu

Civil Procedure – Stay of proceedings

11 December 2009 Judgment reserved.

Chao Hick Tin JA (delivering the judgment of the court):

Introduction

1 This is an appeal by Chan Chin Cheung ("the appellant") against a decision of the High Court Judge ("the Judge") made on 29 August 2008, wherein the Judge allowed the respondents' appeal (in RA 284 of 2008) and ordered, *inter alia*, a stay of the current Singapore proceedings pending the outcome of certain proceedings in Malaysia. The Singapore proceedings were instituted by the appellant to claim damages for alleged defamatory statements made by the respondents, as trustees of an estate, in their circulars issued to beneficiaries where they informed the latter of certain matters relating to the estate and which concerned the appellant. The Malaysian proceedings concerned, *inter alia*, allegations of the failure of the trustees to discharge their duty to the beneficiaries.

2 We turn now to set out the facts leading to these proceedings.

The facts

3 According to the appellant, he is the half brother of the first and second respondents (*ie*, Chan Fatt Cheung and Chan See Chuen). The third respondent, Chan Chee Chiu, is the son of another brother of the appellant named Chan Chor Cheung. The appellant and the respondents are beneficiaries under the will ("the Will") of their late father and grandfather, Chan Wing ("the deceased") who died on 27 February 1947. The estate comprised assets in Singapore, Malaysia and Hong Kong. At present, there are 16 beneficiaries to the estate and of these beneficiaries eight reside in Singapore, two in Malaysia, and the others elsewhere.

4 The respondents are the current trustees of the deceased's estate. The appellant was dissatisfied with the respondents' management of the estate and thus commenced three suits in Malaysia against the respondents as trustees of the deceased's estate (collectively "the Malaysian proceedings").

5 The dispute between the parties centered on the implementation of clause 14 of the Will which provided that the income of the deceased's estate, after paying certain expenses, was to be divided among his "sons and grandsons". After the death of the last survivor of the deceased's wives and

sons, the remainder of the estate was to be divided among the deceased's "grandsons" then living. On 1 May 2001, the appellant wrote to the respondents, requesting that they obtain DNA certification that all "grandsons" listed as beneficiaries were biological sons of their respective fathers. The respondents replied, stating that the legitimacy status of each grandson was to be determined based on the conventional legal method and not through DNA analysis, and they invited the appellant to share any special information as to why the DNA method was superior to the conventional method. On 25 May 2001, the appellant repeated his request to the respondents. The respondents, by a letter dated 10 June 2001, informed the appellant that the estate's lawyers had unanimously opined that for a grandson to qualify as a beneficiary under the Will, he had to be born to a son of the deceased and that son's legally wedded spouse. The respondents pointed out that they had previously rejected two claims by persons purporting to be grandsons of the deceased, and thus not entitled under the Will, on the basis that they did not satisfy this legal requirement. The respondents accordingly asked the appellant to disclose any legal documents which questioned the legitimacy of any of the twelve "grandsons".

6 On 1 March 2002, the appellant wrote to the respondents claiming that he had two sons who qualified as beneficiaries in their capacity of "grandsons" under the Will. The appellant enclosed DNA tests which confirmed that he was the biological father of the two boys. Their birth certificates also stated that they were born to the appellant and one Mdm Chan Ah Mooi. As far as the respondents were aware, the appellant was married to one Mdm Lee Moi Yin and from that marriage the appellant has two daughters but no son. The respondents thus informed the appellant that this was the first time that they had been told of the existence of the appellant's two sons, and requested that the appellant furnish the marriage certificate between himself and Mdm Chan Ah Mooi. The appellant did not do so, and instead, within two weeks of the respondents' request, chose to file a suit ("the first Malaysian suit").

7 In the first Malaysian suit, the appellant sued Chan Chak Cheung (who has since passed away) and the second respondent, claiming that they had failed to furnish him with information relating to the estate's accounts despite his requests. Accordingly, he asked for an account of the deceased's estate and for the conduct of an investigative audit.

8 In the second and third Malaysian suits, the appellant sought the removal of the respondents' as trustees, and an order that he and his two sons be appointed in their stead. The second Malaysian suit was instituted against Chan Chak Cheung and the second respondent on the basis that they were statutorily incapable of being trustees pursuant to s 40(1) of the Trustees Act 1949 (Malaysian Act). The third Malaysian suit was instituted by the appellant and his two sons, Chan Kam Yew and Chan Kam Ming (collectively "the appellant's sons") against the three respondents. The third Malaysian suit has been dismissed by the Malaysian court. The sons have since filed an appeal, and this appeal is understood to be pending.

9 After the respondents had filed their defence in the Malaysian proceedings, they periodically sent circulars to all the beneficiaries of the deceased's estate to update them on the developments in the Malaysian proceedings ("the circulars"). The appellant took objections to several statements in those circulars and instituted Suit 559 of 2007 ("the Singapore action") on 31 August 2007, alleging that the respondents had defamed him. The allegedly defamatory statements in the circulars were in the main the following:

> (a) [The appellant's] 2 alleged sons claimed to become "Beneficiaries of [the estate of Chan Wing] as well as for inheritance" – Shows greed, personal gain & ulterior motive. Both not qualified to be Beneficiaries.

(b) [The plaintiff's] mental instability is best defined in the Oxford Dictionary as, quote:-

1 "paranoia": – mental derangement with delusions of grandeur, persecution, etc, abnormal tendency to suspect & mistrust of others.

2 "schizophrenia" – mental disorder marked by disconnection between intellect, emotions etc & actions.

(c) It is to be noted that Suit S-22-799-2003 [second Malaysian suit] and Suit S1-24-1252-2005 [third Malaysian suit] are very similar in nature. Both had petitioned the Court to remove "serving Trustees" & to appoint [the appellant] or "his 2 alleged sons" to replace the removed Trustees.

(d) [The appellant] is both dishonest & untruthful.

(e) [The appellant] is most unsuitable to serve as a trustee of the [estate]. He had misappropriated money from both of our family companies; Chan Wing Holdings "CWH" in 1973 & from Happy Homes "HH" in 1974. [The appellant] only returned the money misappropriated from [the estate] in 1975 despite constant demands from Members of the Companies. Despite all demands, the money taken from HH was returned after he was sued in High Court, commercial Division in Suit C8 of 1983. Currently, [the appellant] is also sued for a debt, money allegedly owing by him to his niece in case S3-22-1124-2004.

The list of perjuries committed [the appellant] alone speaks volumes on his character and suitability to be a trustee.

(f) [The appellant] is malicious, vindictive & and is full of hatred.

(g) [The appellant] is consumed by greed, self interest, conflict of interest & contempt for all members of the family.

(h) [The appellant] contemptuously sponsored his 2 alleged sons to become beneficiaries of the [estate] & claimed inheritance knowing that they are not qualified to claim as such. When rebuffed, [the appellant] demands a DNA test for all grandsons & threatens. To take revenge, he filed 3 High Court Cases ("grand schemes") in anger & in rapid succession.

(i) [The appellant] is an unreliable witness and his word is worthless.

It should be noted that none of the words complained of by the appellant appear to concern his conduct in Singapore.

10 In their defence, the respondents admitted to making and publishing those statements in the circulars but pleaded justification in defence. The respondents argued that the ordinary and natural meaning of the words the appellant took issue with meant, *inter alia*, that the appellant had made false statements under oath; made false reports to the authorities; taken monies from two family companies without proper authorisation; and had commenced the Malaysian proceedings in bad faith (and in doing so, was motivated by personal interests). The respondents claim to have been justified in making those statements on the ground that they are true in substance and fact (see [9] and [10] of the respondents' defence filed in the present proceedings).

11 On 29 November 2007 the appellant made an application to the Kuala Lumpur High Court to stay

the first Malaysian suit pending the disposal of the Singapore action. In his supporting affidavit, he informed the Malaysian court that he would commence a fresh action in Singapore to have the same issues as those in the first Malaysian suit determined together with the Singapore action. He decided to proceed in this way because he thought that the Singapore action would be heard before the first Malaysian suit could be heard, and that the Singapore action was likely to bring into focus the same factual issues raised in the first Malaysian suit. In this regard, it is significant to note that while the appellant thought that the Malaysian court has "better jurisdiction" over the claim in the first Malaysian suit, but in order to "avoid duplicity, multiplicity and prejudice", he was constrained to having all his claims tried in Singapore. The second defendant in the first Malaysian suit (the first defendant having passed away), who is also the second respondent in this appeal, opposed the stay application of the appellant, which was subsequently dismissed by the Malaysian court on 6 March 2008.

12 Following the Malaysian court's dismissal of the appellant's stay application, on 25 April 2008, the respondents sought a stay of the present action. This application came before an Assistant Registrar ("the AR") who refused to grant a stay. However, on appeal, Lai Siu Chiu J reversed the AR's decision and granted a stay of the present action pending the outcome of the Malaysian proceedings.

Issues in this appeal

13 Two main issues are raised in this appeal:

(a) First, whether the respondents, having taken steps in the proceedings, are precluded from seeking a stay on the ground of *forum non conveniens*; and

(b) Second, whether the Judge has erred in principle in exercising her discretion to stay the present action pending the outcome of the Malaysian proceedings.

Whether the respondents, having taken steps in the proceedings, are precluded from seeking a stay on the ground of forum non conveniens

(a) Is the timeline set in O 12 r 7(2) absolute?

14 The appellant's first argument is that the respondents are precluded from seeking a stay on the ground of *forum non conveniens* because they have taken steps in the Singapore action. We should mention that at the hearing below, no reference to O 12 r 7(2) of the Rules of Court (Cap 322, R5, 2006 Rev Ed) ("ROC") was made. However, the appellant has now raised it before us and, as it is relevant, we will consider it. The said rule reads:

> Dispute as to jurisdiction, etc. (O. 12, r. 7)
>
> 7(2) A defendant who wishes to contend that the Court should not assume jurisdiction over the action on the ground that Singapore is not the proper forum for the dispute shall enter an appearance and, *within the time limited for serving a defence, apply to Court for an order staying the proceedings*. [emphasis added]

The appellant's argument in this connection is that the timeline prescribed in this rule is absolute and that the court has no discretion to extend the time period within which the respondents must make the stay application.

15 In our opinion, although a defendant is required to enter an appearance and to make an

application 'within the time limited for serving a defence', this timeline is not really as absolute as it appears on the face of it. The learned author of *Jeffrey Pinsler*, *Singapore Court Practice 2006* (LexisNexis, 2006) ("*Singapore Court Practice 2006*") commented at para 12/7/6, that "the court may extend the period for this purpose". Indeed, O 3 r 4(1) of the ROC provides that:

> Extension, etc., of time (O. 3, r. 4)
>
> 4(1) The Court may, on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorised by these Rules or by any judgment, order or direction, to do any act in any proceedings.

Order 3 r 4(2) further states that the court may extend any such period even if the application is "not made until after the expiration of that period".

16 We would further add that the view that the time limit set in O 12 r 7(2) is not absolute and can be extended, is consistent with recent case law. In *Wing Hak Man v Bio-Treat Technology Ltd* [2009] 1 SLR 446 ("*Wing Hak Man*"), the initial deadline for the defendant to file its stay application was 8 January 2009. However, the stay application was only filed on 9 January 2009 (after the period specified in O 12 r 7(2) had expired). Nevertheless, the High Court granted the defendant's oral application, at the hearing, to extend time on the basis that it had a reason for the late filing (the defendant was under the mistaken impression that the plaintiff had agreed to a one week extension for the filing of the defence), and that there was no real prejudice to the plaintiff.

17 The English equivalent to our O 12 r 7(1), which relates to challenging the jurisdiction of the court, was O 12 r 8 of their then Rules of the Supreme Court 1965 ("the English RSC 1965"). However, there was no English equivalent to our O 12 r 7(2), which was a provision we specially introduced following the decision of this court in *The Jian He* [2000] 1 SLR 8 ("*The Jian He*") (see *Singapore Court Practice 2006* at para 12/7/2). Under the then English O 12 r 8, the English courts had ruled that there was a discretion in the courts to extend time for filing a stay application (see *Mohammed v Bank of Kuwait and the Middle East KSC* [1996] 1 WLR 1483 ("*Bank of Kuwait*") at 1493). Evans LJ, who delivered the main judgment in *Bank of Kuwait*, specifically stated (at p 1493) that "very special grounds would have to be shown for any substantial extension to be allowed". It is of interest to note that Evans LJ left open the question as to whether their O 12 r 8 was the appropriate rule to apply if the application for a stay was on the ground of *forum non conveniens* (at 1492) which this court had answered in the negative in *The Jian He* in relation to our O 12 r 7(2). We would hasten to add that in the earlier case of *Williams & Glyn's Bank v Astro Dinamico Compania Naviera SA* [1984] 1 WLR 438, the House of Lords would appear to suggest that the then English O 12 r 8 could not apply to a stay application on the ground of *forum non conveniens* and that the court could resort to its statutory power. Similarly, this court in *The Jian He* did not rely on our O 12 r 7 but para 9 of the First Schedule to the Supreme Court of Judicature Act (Cap 322, 1999 Rev Ed) (at [46]).

18 Since April 1999 the English RSC 1965 have been replaced by the Civil Procedure Rules 1998 ("CPR"). In this regard, CPR Part 11 reads:

> Procedure for disputing the court's jurisdiction, CPR Part 11
>
> (1) A defendant who wishes to –
>
> (a) dispute the court's jurisdiction to try the claim; or

(b) argue that the court should not exercise its jurisdiction

may apply to the court for an order declaring that it has no such jurisdiction or should not exercise any jurisdiction which it may have.

…

(4) An application under this rule must –

(a) be made within 14 days after filing an acknowledgment of service;

19 Two things about CPR Part 11 should be noted. First, unlike the previous O 12 r 8, it expressly provides for the situation where an application for a stay is made even if the court's jurisdiction over the claim is not in dispute. Second, the timeline prescribed for an applicant to challenge the court's jurisdiction also apply to an application arguing that the court should refrain from exercising its jurisdiction. Therefore, the current rules of court of both Singapore and England now apply the same timelines for an application challenging the court's jurisdiction and an application arguing that the court should refrain from exercising its jurisdiction.

20 The learned authors of *Dicey, Morris & Collins*, *Conflict of Laws* (Sweet & Maxwell, 14th Ed, 2006) ("*Dicey & Morris*"), in commenting on CPR Part 11, opine as follows at para 12-038:

> CPR, Pt 11 now requires that an application for a stay, like a challenge to the jurisdiction of the court, be made within 14 days of the acknowledgement of service… If the defendant wishes to apply for a stay after the expiry of that period, the court has a discretion under CPR, r.3.1(2) to extend the time. In the case of an application for a stay of proceedings, where the grounds justifying the application for a stay may not emerge until some time after the defence has served, there is no reason to suppose that the court should be reluctant to extend the time to allow the application to be made.

21 We recognise and accept, and as was held in *United Engineers (Singapore) Pte Ltd v Lee Lip Hiong* [2004] SGHC 190, that the timelines in the ROC should not be extended by the court, or merely by the consent of the parties, if on a purposive interpretation of the relevant rule prescribing a particular time limit makes it necessary to conclude that the time limit was intended by the makers of the Rules to be absolute. But could the makers of the rule have intended to prohibit extensions of time even where the grounds justifying the application for a stay only emerged sometime after the defence has been served? In our view, the answer must be in the negative; an answer to the contrary would defy common sense. In any event, we see nothing in O 12 r 7(2) which suggests that the timeline laid down therein should be rigidly adhered to, whatever may be the circumstances. Of course, it is well nigh impossible to lay down any definite criteria as to the circumstances under which the court may consider granting a stay. Obviously, the longer the delay, the stronger or the more compelling the grounds that must be given to justify the granting of a stay. The following statement of Evans LJ in *Bank of Kuwait* at 1493 may provide some guidance:

> But in a case where an application was made long after the applicant had accepted or not objected to the exercise of the court's jurisdiction then, even if circumstances had changed, there would have to be shown very strong grounds as to why proceedings which had carried on thus far should then be stayed. One can think of examples where a defendant might apply for a stay long after proceedings began and after submitting to the jurisdiction of the court without qualification, if, for example, he found that he was no longer able to defend himself properly in this country although he could do so abroad.

22 The appellant relies on several cases to argue that an extension of time under O 3 r 4, even if permissible, cannot "cure" the fact that the respondents had already taken steps in the proceedings and submitted to the jurisdiction of the Singapore courts. With respect, this argument is off the mark because whether a litigant has *submitted* to the jurisdiction of the court is relevant only to an application for a stay under O 12 r 7(1), where the litigant is taking the position that the court has *no jurisdiction* to hear the case. In contrast, where the litigant applies for a stay under O 12 r 7(2) on the ground of *forum non conveniens*, he in fact *accepts the court's jurisdiction* and is not to be treated as disputing it (see *The Jian He* at [44]; and GP Selvam, *Singapore Civil Procedure 2007* (Sweet & Maxwell, 2007) ("*Singapore Civil Procedure 2007*") at para 12/7/4). The respondents have undoubtedly participated in the Singapore proceedings by filing their Defence. Although this would be a step in the proceeding that might disentitle them from contesting jurisdiction under O 12 r 7(1), this does not mean that they are barred from applying for a stay on the ground of *forum non conveniens*.

(b) Did the Judge err in her exercise of discretion to extend time?

23 The next question to be considered is whether the Judge erred in her exercise of discretion in extending time to enable the respondents to file the stay application. Her reason for exercising her discretion to extend time was because she accepted the respondents' submission that the Malaysian courts' ruling in March 2008 refusing the appellant's application for a stay of the Malaysian proceeding ("March 2008 ruling") finally settled the issue of where the trial of the Malaysian proceedings should take place, and this "changed the entire complexion of the case".

24 As noted in the passage of *Dicey & Morris* ([20] *supra*), where the grounds justifying the application for a stay only emerge some time after the time period specified for the service of the defence, there is "no reason to suppose that the court should be reluctant to extend time to allow the application to be made". It is undeniable that the March 2008 ruling finally determined where the first Malaysian suit would be heard, and this meant that an application to stay the Singapore action would be necessary to guard against multiplicity of proceedings. However, we must also point out that the respondents, upon being served with the papers relating to the Singapore action filed on 31 August 2007, would have realised that the appellant had instituted multiple proceedings in different jurisdictions. At that stage, the respondents did not appear to be concerned with the undesirability of multiple proceedings as they did not apply for a stay, but instead filed their Defence on 19 October 2007.

25 Admittedly, from the time the appellant filed his application to stay the first Malaysian suit, *ie* from 19 December 2007 onwards, there was genuine uncertainty as to where the first Malaysian suit would be heard. From that point onwards, it would certainly make no sense for the respondents to also file an application to stay the Singapore action (even if they had wanted, at that point, to do so) before the Malaysian court ruled on the appellant's stay application. Although a prudent respondent would probably have filed the stay application during the period between 31 August 2007 (when the Writ of Summons was filed) and 19 December 2007 (when the appellant filed its application to stay the first Malaysian suit), it bears noting what this court said in *The "Tokai Maru"* [1998] 3 SLR 105 at [23], that extensions pertaining to matters that touch upon the substantive merits of a party's case (and where it does not relate to the filing of notice of appeal out of time) should generally be granted unless the other party would suffer prejudice that could not be compensated by costs:

> The rules of civil procedure guide the courts and litigants towards the just resolution of the case and should of course be adhered to. Nonetheless, a litigant should not be deprived of his opportunity to dispute the plaintiff's claims and have a determination of the issues on the merits as a punishment for a breach of these rules unless the other party has been made to suffer

prejudice which cannot be compensated for by an appropriate order as to costs…

Save in special cases or exceptional circumstances, it can rarely be appropriate then, on an overall assessment of what justice requires, to deny a defendant an extension of time where the denial would have the effect of depriving him of his defence *because of a procedural default which, even if unjustified, has caused the plaintiff no prejudice for which he cannot be compensated by an award of costs*. [emphasis added]

26 There is nothing in the present case which suggested that the appellant would suffer prejudice if the court were to extend time to allow the respondents to file a stay application. Indeed, such an application by the respondents could be said to be consistent with what the appellant did in filing his unsuccessful stay application before the Malaysian court. The basis of the appellant's stay application was that the first Malaysian suit and the Singapore action were inextricably linked. Because of the close link, a stay of the Singapore action until the disposal of the Malaysian proceedings would ensure against the possibility of inconsistent findings. While it is true that the respondents could have filed a stay application much earlier, even before the appellant filed his application for a stay of the first Malaysian suit, we do not think that such a lapse should act as an absolute bar to their filing of the application later on, especially where, as stated earlier, no prejudice against the other party has been shown. In all the circumstances, we do not think that the Judge had improperly exercised her discretion in extending time.

2. Whether the Judge erred in exercising her discretion to stay this action pending the outcome of the Malaysian proceedings

27 It is well-established that in determining whether a stay should be ordered on the ground of *forum non conveniens*, the Singapore courts apply the two-stage test set out in *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460 ("the *Spiliada* test"). As held in *Rickshaw Investments Ltd v Nicolai Baron von Uexkull* [2007] 1 SLR 377 ("*Rickshaw Investments*") at [12] and [14], and more recently in *CIMB Bank Bhd v Dresdner Kleinwort Ltd* [2008] 4 SLR 543 ("*CIMB Bank*") at [26], the court has to first determine whether, *prima facie*, there is some other available forum in which it is more appropriate for the case to be tried. The burden of proving the existence of a more appropriate forum is on the defendant. If the court concludes that there is a more appropriate forum, it will ordinarily grant a stay unless there are circumstances by reason of which justice requires that a stay should nonetheless not be granted. In this connection, the court will consider all the circumstances of the case.

28 Furthermore, as the question of whether or not to grant a stay of proceedings involves an exercise of a judge's discretion, the appellate court will only review the Judge's exercise of his discretion. It will not exercise the discretion afresh and substitute its own discretion in place of the court below (see *CIMB Bank* at [84] and [85]).

29 For the purposes of determining, under the first stage of the *Spiliada* test, whether Malaysia is a more appropriate forum than Singapore to adjudicate on the Singapore action, the following factors are clearly germane:

(a) Singapore is the place in which the tort of defamation was committed since the alleged defamatory statements were published here.

(b) Singapore law is the applicable law of the tort.

(c) The majority of the likely witnesses, the beneficiaries to whom the circulars were

distributed, reside in Singapore.

(d) The deceased's estate office (and the documentation stored within the office) is located in Singapore.

(e) There is a risk of conflicting judgments if the Singapore action and the Malaysian proceedings were allowed to proceed concurrently.

30 We will consider these factors in turn.

(a) The jurisdiction in which the tort had occurred

31 As a general rule, the place in which a tort had occurred is *prima facie* the natural forum for determining the claim (see *Rickshaw Investments* at [37] to [40]). As the tort of defamation was alleged to have been committed in Singapore, Singapore is *prima facie* the natural forum for determining the claim. This being only the *prima facie* position, however, it will be necessary to consider and weigh this factor against the other factors.

(b) The choice of law

32 That the applicable law of the tort is Singapore law points to Singapore as the more appropriate forum. In this regard, it was held in *CIMB Bank* at [63] that there would undoubtedly be savings of time and resources if a court were to apply the law of its own jurisdiction to the substantive dispute:

> The reason why, in the consideration of the question of *forum non conveniens*, the issue of applicable law is a relevant factor is because where a dispute is governed by a foreign law, the forum will be less adept in applying that law than the courts of the country of that law, and there could be savings in time and resources in litigating the dispute in the forum of the applicable law.

33 The weight attached to this factor, however, is reduced since the appellant has not adduced any evidence as to how Malaysia's law of defamation (particularly with regard to the defence of justification) differs from Singapore. Although it was held in *Rickshaw Investments* (at [43]) that the court could, despite a party's failure to adduce proof of the foreign law, have regard to the fact that the principles in the foreign jurisdiction would, in all likelihood, differ from Singapore, this *prima facie* rule cannot apply where a known common law country, such as Malaysia, is concerned. This court is entitled to take judicial notice of the fact that Singapore and Malaysia share a common legal heritage. There is nothing to indicate that Malaysia's law on defamation is substantially different from Singapore law. Hence, there is nothing to suggest that if a Malaysian court were to adjudicate on the matter, it would be far less adept in applying Singapore's law of defamation. Accordingly, in our view, this choice of law factor which points to Singapore as the more appropriate forum is not critical.

(c) The availability of witnesses

34 On the point of availability of witnesses, the appellant points out that the majority of the likely witnesses, the beneficiaries to whom the circulars were distributed, reside in Singapore. Eight of the beneficiaries reside in Singapore while only two reside in Malaysia (including the appellant). The others reside elsewhere. Thus, the appellant contends, on the authority of *Rickshaw Investments* and *Good Earth Agricultural Co Ltd v Novus International Pte Ltd* [2008] 2 SLR 711 ("*Good Earth*"), that because the Singapore action raises a significant number of disputed factual issues which determination could be decisively influenced by the credibility of the witnesses, the location of the majority of the witnesses is an important factor pointing to Singapore as the more appropriate forum.

35 While it may be true as a general proposition that the location of witnesses is an important factor in cases involving a significant number of disputed factual issues, the statements in *Rickshaw Investments* and *Good Earth* must be viewed in their context. In *Rickshaw Investments* and *Good Earth*, the applications were for a stay of proceedings in favour of proceedings in Germany and Hong Kong respectively. The same considerations do not apply with equal weight when the application is for a stay of proceedings in favour of Malaysian proceedings. As correctly pointed out in *Ismail bin Sukardi v Kamal bin Ikhwan* [2008] SGHC 191 at [26]:

> Malaysia and Singapore are neighbouring states and travel time between the two countries should pose no real challenge for witnesses from either side.

36 Further, as the Judge noted at [43] of her GD, s 4(1) of the Evidence (Civil Proceedings in Other Jurisdictions) Act (Cap 98, 1985 Rev Ed) ("*Evidence (Civil Proceedings in Other Jurisdictions) Act*") provides that:

> Power of High Court to give effect to application for evidence.
>
> 4(1) Subject to this section, the High Court shall have power, on any such application as is mentioned in section 3, by order to make such provision for obtaining evidence in Singapore as may appear to the High Court to be appropriate for the purpose of giving effect to the request in pursuance of which the application is made; and any such order may require a person specified therein to take such steps as the High Court may consider appropriate for that purpose.
>
> 4(2) Without prejudice to the generality of subsection (1) but subject to this section, an order under this section may, in particular, make provision
>
> (a) for the examination of witnesses, either orally or in writing;

Therefore, the witnesses in Singapore could be compelled to give evidence for any civil proceedings commenced by the appellant in Malaysia. In the light of this, in our opinion, the Judge was correct to hold that the location of witnesses was not a critical factor.

(d) Location of the estate office

37 In our view, the location of the deceased's estate office was also not a critical factor as the appellant can have recourse to s 4(2) of the *Evidence (Civil Proceedings in Other Jurisdictions) Act*, which provides that:

> Power of High Court to give effect to application for evidence.
>
> 4(2) Without prejudice to the generality of subsection (1) but subject to this section, an order under this section may, in particular, make provision
>
> …
>
> (b) for the production of documents;
>
> (c) for the inspection, photographing, preservation, custody or detention of any property;
>
> (d) for the taking of samples of any property and the carrying out of any experiments on or with any property;

38 In this connection, the following comment in *Good Earth* at [23] is germane:

> We did not attach any weight to either party's claim about the appropriate forum in terms of the location of documents. As the Judge observed (the GD at [34]), this was a consideration that could be dealt with by an appropriate order for costs and disbursements. We did not see how the location of documents could be a weighty factor when even the location of witnesses overseas would not pose a problem.

39 In the circumstances, we again think that the Judge was entitled to reach the conclusion that the location of the deceased's estate office (and the documentation stored within) was a neutral factor.

(e) Risk of conflicting judgments

40 The main reason why the Judge considered Malaysia to be the more appropriate forum was her finding, at [41] of her GD, that:

> It is noted that although this claim is the tort of defamation, *its genesis was the Estate and the facts were similar to, if not the same, as those pleaded in the Malaysian proceedings* launched by the plaintiff. To quote from the appellate court's decision in *Good Earth* (see [46] *infra*), this suit was *effectively a continuation of the parties' dispute arising directly from the Malaysian proceedings* and the plaintiff's obvious unhappiness over the defendants' refusal (as trustees) to recognise the sons born outside wedlock as beneficiaries of the Estate. [emphasis added]

41 In the present case, the causes of action in respect of the first Malaysian suit and the Singapore action are distinct. The former seeks reliefs against the trustees of an estate for failing to properly discharge their duties to beneficiaries. The latter is for defamation by the trustees. While the causes of action are different, it is clear that the Malaysian proceedings and the Singapore action have their genesis in the same ongoing dispute between the appellant and the trustees over the respondents' administration of the deceased's estate. The Malaysian proceedings were commenced by the appellant because he was dissatisfied with the respondents' administration of the deceased's estate. Since the respondents felt that the Malaysian proceedings were launched in bad faith (because of the appellant's unhappiness over their refusal to recognise his sons born outside wedlock as beneficiaries), they made several allegations against the appellant in circulars sent to all beneficiaries updating them on the Malaysian proceedings. The allegations in these circulars formed the basis of the Singapore action for defamation. Hence, the background and factual matrix of the two actions are substantially similar, if not identical.

42 In relation to the Singapore action, as there is no dispute on the question of publication, there remain essentially two issues for the court's consideration: first, the court has to determine the true meanings of the allegedly defamatory statements. Second, the court has to decide whether those statements are substantially true (see *Aaron v Cheong Yip Seng* [1996] 1 SLR 623 at 641; *Oei Hong Leong v Ban Song Long David* [2005] 1 SLR 277 at [94]). Understandably, the appellant and the respondents have pleaded different defamatory meanings to the statements. As observed in *Evans on Defamation in Singapore and Malaysia* (LexisNexis, 3rd Ed, 2008) at p 96, the respondents are not obliged to justify the alleged defamatory meaning put forward by the appellant as long as they clearly plead the different defamatory meanings they seek to justify:

> Obviously, a defendant to a defamation action is not obliged to ascribe a meaning to the words in issue, for…, the plaintiff must establish the defamatory meaning of the words. However, if a defendant pleads justification, then he must show in his pleadings the meaning which he seeks to

justify. The defendant is obliged to plead justification in a way which makes it clear the meaning he seeks to justify. In situations where the defendant puts forth a defamatory meaning different from that pleaded by the plaintiff, and which he seeks to justify, he must clearly and unequivocally plead the meaning which he seeks to justify.

43 Notwithstanding the subtle differences in nuance attributed by the parties to the statements complained of, it seems to us that the following are the main allegations which the respondents must substantiate in order to succeed in their defence of justification:

(a) Did the appellant start the Malaysian proceedings in bad faith and was he motivated by personal interests (out of greed and for revenge)?

(b) Has the appellant perjured himself by making false statements under oath in the Malaysian proceedings as well as making false reports to various authorities?

(c) Did the appellant take monies belonging to two family companies (Malaysian companies) without proper authorisation?

(d) Has the appellant caused unnecessary loss to the deceased's estate by instituting the various suits in Malaysia?

(e) Did the appellant, knowing full well that his sons did not qualify under the Will, try to use them to gain a greater share of the estate?

(f) Has the appellant sought to obtain control over the deceased's estate and its assets?

(g) Was the appellant ruthless, paranoid and schizophrenic?

44 It is evident that for the Singapore court to reach a conclusion on these issues it will have to traverse much of the grounds that will need to be considered in the Malaysian proceedings. Therefore, although the causes of action in the Singapore action and the Malaysian proceedings are different, the basic premises upon which the two actions are founded are to all practical intents and purposes very much the same. The Judge could hardly be said to be wrong in characterising the Singapore action as a continuation of the Malaysian proceedings. In the light of the considerable overlap in the issues to be determined, there is a real risk of conflicting judgments if the Singapore action and the Malaysian proceedings were allowed to proceed concurrently.

45 It is settled law that the risk of concurrent proceedings leading to conflicting judgments (falling short of a *lis alibi pendens* which on its own would, without more, justify the granting of a stay except in very unusual circumstances) is a factor to be taken into account in the *Spiliada test* (see *Rickshaw Investments* at [90]; and *Yusen Air & Sea Service (S) Pte Ltd v KLM Royal Dutch Airlines* [1999] 4 SLR 21 at [16])). Hence, we agree with the Judge that this risk of conflicting judgments is a factor which supports the granting of a stay.

46 In the final analysis, all that remains are two competing factors for our consideration: first, the fact that the alleged tort had occurred in Singapore; and second, the risk of conflicting judgments if the Singapore action and the Malaysian proceedings were allowed to proceed concurrently. In a normal case concerning an application for a stay on the ground of *forum non conveniens*, in evaluating the competing factors, the court will usually arrive at a decision as to whether to grant a stay or refuse to do so. Here the Judge refused to adopt the either/or approach and instead preferred to grant a limited stay, pending the outcome of the Malaysian proceedings. This, in our view, was a

sensible and practical decision. It must be borne in mind that the primary factor which points to Malaysia as the more appropriate forum (the risk of conflicting judgments) is not an immutable factor. It is a factor which will in course of time, be rendered neutral if the Singapore action is heard only *after* the disposal of the Malaysian proceedings. In this way, the Singapore courts will have the benefit of the findings of the Malaysian court and although not bound by those findings, would be able to minimise the risk of conflicting judgments. The limited stay thus ensures that the courts of the two countries will not go on their separate and independent ways, with the attendant risk of inconsistent findings. The stay thus promotes international comity. In fact, in granting the limited stay, the Judge was also able to avoid treating the evaluation of the competing factors as a zero-sum game. We would add that another way of viewing the limited stay order is that it provides a solution which overcomes the problem of the risk of conflicting judgments and which, at the same time, gives effect to the factor pointing to Singapore as the more appropriate forum (*ie*, that the tort had occurred in Singapore). The limited stay order would also ensure that the work done in relation to the Singapore action would not go to waste.

Conclusion

47 In conclusion, we would like to make one further observation in relation to the limited stay order made by the Judge which, for the reasons above, we are affirming. This order is not strictly a decision which requires the application of the principles of *forum non conveniens*. Here we would quote the words of Lord Goff in *Spiliada* (at 476):

> The basic principle is that a stay will only be granted on the ground of forum non conveniens where the court is satisfied that there is some other available forum, having competent jurisdiction, *which is the appropriate forum for the trial of the action* i.e. in which the case may be tried more suitably for the interests of all the parties and the ends of justice. [*emphasis added*]

The application made by the respondents prayed that the Singapore action be stayed so that a fresh action could be instituted by the appellant and be heard in the Malaysian court, which was the more appropriate forum to hear the cause (i.e. the subject matter of the Singapore action). However, in the course of submission before the Judge, counsel for the respondents indicated that a limited stay in the terms of the order made by the Judge was an alternative order which would be acceptable. The point which we are driving at is that, for the limited stay order which the Judge made, the balancing exercise, which was required to be carried out in accordance with the *Spiliada* stage one test to determine whether Singapore or Malaysia is the more appropriate forum, would not strictly be necessary. Under s 18 of the Supreme Court of Judicature Act and para 9 of the First Schedule thereto, or alternatively under the inherent jurisdiction of the court, the court has the full discretion, for sufficient reasons, to stay any proceedings before it until whatever appropriate conditions are met. In the present case, for the reasons set out above, a stay in the limited term ordered by the Judge is amply justified. In short, the point we would underscore is that for the court to make the limited stay order, there is really no need to traverse the principles governing *forum non conveniens*.

48 In the result, we dismiss this appeal with costs and the usual consequential orders.