IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2022] SGHC 299

Suit No 968 of 2021 (Registrar's Appeal No 233 of 2022)

Between

Kuswandi Sudarga

… *Plaintiff*

And

Sutatno Sudarga

… *Defendant*

GROUNDS OF DECISION

[Civil Procedure — Service — Service out of jurisdiction]
[Conflict of laws — Natural forum]

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v
Sutatno Sudarga

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Chua Lee Ming J
24 August, 26 August 2022

30 November 2022

Chua Lee Ming J:

Introduction

1 This was an appeal by the defendant, Mr Sutatno Sudarga, against the Assistant Registrar's order dismissing his application to set aside an order granting the plaintiff, Mr Kuswandi Sudarga, leave to serve the writ of summons and statement of claim in this action against the defendant in Indonesia.

2 I dismissed the appeal for the reasons set out below.

Background facts

3 The plaintiff is the defendant's younger brother; both are Indonesian nationals. Their father, the late Mr Kusuma Sudarga ("Kusuma"), was the patriarch of the Sudarga family in Indonesia. The other members of the Sudarga

family are Kusuma's late wife, Mdm Rini Supiwati ("Rini"), elder daughter, Ms Laniwati Sudarga ("Laniwati") and younger daughter, Ms Renawati Sudarga ("Renawati").

4 Kusuma was initially in the business of sugar trading. In 1971, Kusuma set up a company in Indonesia, known as PT Asia Industri Ceramic, to manufacture ceramic tiles. The company was renamed PT Platinum Ceramics Industri ("PT PCI") in 2001. Kusuma placed moneys earned from the family businesses ("Spare Funds") in bank accounts in Indonesia. In the 1960s and 1970s, Kusuma started converting the Spare Funds to Singapore and US dollars and transferring the Spare Funds to bank accounts with BNP Paribas ("BNP") and Swiss Bank Corporation (now UBS AG) ("UBS") in Singapore.

5 In the late 1970s or early 1980s, Kusuma was diagnosed with diabetes and kidney complications. Prior to 20 December 1984, the shareholders of PT PCI were Kusuma (45%), Rini (30%) and the defendant (25%). On 20 December 1984, Kusuma restructured the shareholding of PT PCI such that Rini, the defendant, Laniwati and the plaintiff each held 25% of the share capital. Rini held the shares on behalf of Renawati as Renawati's mental faculties were mildly impaired.

6 On 9 February 1985, Kusuma passed away. As the eldest son, the defendant took over the overall management of the family's assets including the management of PT PCI and the Spare Funds. Kusuma's accounts with BNP and UBS in Singapore were closed and the Spare Funds in those accounts were transferred to the following new bank accounts in Singapore ("Defendant's Singapore Bank Accounts"):

(a) BNP account number 8008799 in the joint and several names of Rini, the defendant, Laniwati and the plaintiff. On or around

18 February 2011, this account was closed and the Spare Funds in it were transferred to BNP account number 8036292 in the name of Trans World International Ltd ("Trans World"), a British Virgin Islands company beneficially owned and/or controlled by the defendant;

(b) BNP account number 8012819 in the defendant's sole name;

(c) UBS account number 111082 in the joint and several names of the plaintiff and the defendant; and

(d) UBS account number 121349 in the defendant's sole name.

7 Spare Funds generated after Kusuma's death continued to be transferred to the Defendant's Singapore Bank Accounts and were also transferred to entities beneficially owned and/or controlled by the defendant. According to the plaintiff, the Spare Funds transferred to the Defendant's Singapore Bank Accounts and entities controlled by him totalled approximately US$90m. The defendant claimed that it was agreed and/or understood between the plaintiff and him that these moneys were for the defendant's personal use and/or expenditure.

8 On 29 February 1996, Rini, the defendant, Laniwati and the plaintiff transferred their respective PT PCI shares to companies, apparently for tax planning reasons:

(a) Rini transferred the 25% shareholding in PT PCI that she held on behalf of Renawati, to an Indonesian company known as PT Rini Surya Lestari ("PT RINI"). Rini held 99% of the share capital of PT RINI and Laniwati held the remaining 1%.

(b) The defendant transferred his 25% shareholding in PT PCI to an Indonesian company known as PT Cakrawala Terang Abadi ("PT CAK"). The defendant held 99% of the share capital in PT CAK and the plaintiff held the remaining 1%.

(c) Laniwati transferred her 25% shareholding in PT PCI to an Indonesian company known as PT Lani Citra Sejati ("PT LANI"). Laniwati held 99% of the share capital of PT LANI and Rini held the remaining 1%.

(d) The plaintiff transferred his 25% shareholding in PT PCI to an Indonesian company known as PT Kusuma Adijaya Sentosa ("PT KAS"). The plaintiff held 99% of the share capital in PT KAS and the defendant held the remaining 1%.

9 On or around 8 December 2004, PT RINI was transferred to the defendant (99%) and his ex-wife, Mdm Erriawati Tenggono (1%). According to the plaintiff, the defendant currently holds 98% of the share capital of PT RINI and his two sons each hold 1%.

10 Sometime between 2009 and 2010, Laniwati agreed to relinquish her 25% shareholding in PT PCI to the plaintiff and defendant for US$25m. Between March and May 2010, the plaintiff and defendant paid US$25m to Laniwati. On or around 19 June 2010, Laniwati procured the transfer of PT LANI's 25% shareholding in PT PCI to PT KAS (the plaintiff's company) and PT CAK (the defendant's company) in the ratio of 40:60. With these transfers, all of the shares in PT PCI were held by the plaintiff (35%) and the defendant (65%).

11 According to the plaintiff, the defendant proposed to set up two trusts for the plaintiff's and defendant's families respectively, and to transfer 65% of the Spare Funds in the Defendant's Singapore Bank Accounts to the trust for the defendant's family and 35% to the trust for the plaintiff's family.

12 According to the plaintiff, the defendant set up The Maharani Trust in Jersey in April 2010 for the benefit of the plaintiff's family. The defendant set up The Next Generation Trust, also in Jersey, for the benefit of the defendant's family.

13 By way of a separate letter (which was undated but was received on 27 April 2010), the defendant instructed BNP Paribas Jersey Nominee Company Ltd to transfer 65 shares in Trans World to the trustee of The Next Generation Trust and 35 shares in Trans World to the trustee of The Maharani Trust. As stated at [6(a)] above, on or around 18 February 2011, BNP account number 8008799 (held in the joint and several names of Rini, the defendant, Laniwati and the plaintiff) was closed and the Spare Funds in it were transferred to BNP account number 8036292 in the name of Trans World.

14 In December 2018, the plaintiff discovered that the defendant had closed UBS account number 111082, which was in the joint and several names of the plaintiff and the defendant (see [6(c)] above), and had transferred all the assets in the account to UBS account number 121349 in the defendant's sole name.

15 On 4 March 2021, in response to the plaintiff's queries, the trustee of The Maharani Trust informed the plaintiff that the trust had been terminated in September 2016. According to the plaintiff, only the defendant could have terminated the trust without the plaintiff's knowledge. As the settlor, the defendant had the power under the Instrument of Trust to revoke the trust with

the result that the trust assets would be held on trust for the defendant or other individuals specified in the instrument of revocation.

The procedural history

16 On 26 November 2021, the plaintiff commenced the present proceedings against the defendant. In his statement of claim, the plaintiff pleaded that it was agreed between the plaintiff and the defendant that:

> (a) the plaintiff's and defendant's respective beneficial interests in PT PCI's shares and the Spare Funds were in the ratio of 35% to 65%;
>
> (b) the defendant would set up trusts for the benefit of each of their families and the defendant would transfer the Spare Funds in the Defendant's Singapore Bank Accounts to the trusts in accordance with the plaintiff's and defendant's respective beneficial interests of 35% and 65%; and
>
> (c) all of the Spare Funds would continue to be beneficially owned by the plaintiff and defendant in the ratio of 35% to 65%.

17 The plaintiff claimed that he was entitled to 35% of the Spare Funds that were transferred to the Defendant's Singapore Bank Accounts under the following alternative heads of claim – resulting trust, express trust, common intention constructive trust, proprietary estoppel and unjust enrichment.

18 On 18 January 2022, the plaintiff obtained an order granting him leave to serve the writ of summons and statement of claim on the defendant in Indonesia (the "Leave Order"). Service was effected on the defendant in Indonesia on 16 February 2022.

19 On 13 April 2022, the defendant filed HC/SUM 1437/2022 ("SUM 1437") in which he applied to set aside the Leave Order, pursuant to O 12 r 7(1) of the Rules of Court (2014 Rev Ed) (the "ROC"). SUM 1437 was heard before the Assistant Registrar ("AR") on 15 June 2022. On 5 July 2022, the AR dismissed the application.

20 On 18 July 2022, the defendant filed his notice of appeal against the AR's decision. I heard the appeal on 24 August 2022 and dismissed it on 26 August 2022.

The law

21 The requirements for valid service out of jurisdiction are well established, namely:

(a) the plaintiff's claim must come within one of the heads of claim in O 11 r 1 of the ROC;

(b) the plaintiff's claim must have a sufficient degree of merit, and

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

See *Zoom Communications Ltd v Broadcast Solutions Pte Ltd* [2014] 4 SLR 500 ("*Zoom Communications*") at [26].

22 Where a defendant applies to set aside an order for service out of jurisdiction, the burden remains on the plaintiff to demonstrate that the three requirements set out above are satisfied: *Zoom Communications* at [71], [72] and [75].

23 The standard to which the plaintiff must discharge the burden that one of the heads of claim in O 11 is made out is that of a "good arguable case": *Li Shengwu v Attorney-General* [2019] 1 SLR 1081 ("*Li Shengwu*") at [163].

24 The standard at which the court assesses the merit of a claim is no more than that the evidence should disclose that there is a serious issue to be tried: *Li Shengwu* at [164].

25 It is generally accepted that the test in *Spiliada Maritime Corporation v Cansulex Ltd (The Spiliada)* [1987] AC 460 ("*Spiliada*") applies to applications for leave to serve the originating process out of jurisdiction (in which the plaintiff must show that Singapore is the proper forum) and to applications for stay of proceedings (in which the defendant must show that Singapore is not the proper forum): *Zoom Communications* at [70].

26 As the Court of Appeal explained in *Rappo, Tania v Accent Delight International Ltd and another and another appeal* [2017] 2 SLR 265 ("*Rappo*") at [68]–[72], the *Spiliada* test involves two stages:

> (a) First, the court considers whether, *prima facie*, there is some other available forum which is more appropriate for the case to be tried ("Stage One"). Under Stage One, the court searches for those incidences (or connections) that have the most relevant and substantial associations with the dispute. Factors that may be considered include (i) the personal connections of the parties and witnesses; (ii) connections to relevant events and transactions; (iii) the applicable law to the dispute; (iv) the existence of proceedings elsewhere; and (v) the shape of the litigation. The process is not mechanical; a court has to take into account an entire multitude of factors in balancing the competing interests: see also

Rickshaw Investments Ltd and another v Nicolai Baron von Uexkull [2007] 1 SLR(R) 377 ("*Rickshaw*") at [15].

(b) Second, if the court concludes that there is a more appropriate forum, then the court will ordinarily grant a stay unless there are circumstances by reason of which justice requires that a stay should nonetheless not be granted ("Stage Two").

It must be borne in mind that in *Rappo*, the question before the court was whether the proceedings should be stayed on the ground of *forum non conveniens*.

27 In the context of an application for leave to serve out of jurisdiction, the plaintiff bears the burden of demonstrating that Singapore is, on balance, the more appropriate forum; Singapore would be the more appropriate forum if it has the most real and substantial connection with the disputes raised: *Oro Negro Drilling Pte Ltd and others v Integradora de Servicios Petroleros Oro Negro SAPI de CV and others and another appeal (Jesus Angel Guerra Mendez, non-party)* [2020] 1 SLR 226 ("*Oro Negro*") at [80(b)] and [80(c)].

28 It is also settled law that since the application for leave to serve out of jurisdiction is made *ex parte*, the applicant must make full and frank disclosure of all matters within his knowledge which might be material even if they are prejudicial to his claim: *The "Vasiliy Golovnin"* [2008] 4 SLR(R) 994 at [83].

The defendant's case in the hearing before the AR

29 Before the AR, the defendant contended that the Leave Order should be set aside on the grounds that the plaintiff had failed to (a) show serious issues to be tried on the merits of the claims; (b) discharge his burden of showing that

Singapore was the more appropriate forum; and (c) make full and frank disclosure of material facts in his *ex parte* application.

30 The AR rejected all of the defendant's contentions.

The defendant's case in this appeal

31 In this appeal, the defendant accepted that the Spare Funds which form the basis of the plaintiff's claims came from PT PCI. The defendant's *sole* contention was that the plaintiff had failed to discharge his burden of showing that Singapore was the more appropriate forum. It was not disputed that Indonesia was an *available* forum. The defendant contended that Indonesia was the more appropriate forum.

32 The defendant submitted that:

(a) Under Stage One of the *Spiliada* test, the plaintiff had to show that Singapore is the more appropriate forum; it was not enough that Singapore and Indonesia are equally appropriate forums.

(b) Singapore was not the more appropriate forum.

(c) Stage Two of the *Spiliada* test does not apply to an application for leave to serve out of jurisdiction and even if it did, the threshold in Stage Two was not met in this case.

33 The plaintiff submitted that:

(a) Under Stage One of the *Spiliada* test, it was not necessary for him to show that Singapore was a more appropriate forum; it was

sufficient that Singapore was at least comparatively equal to the other potential forums.

(b) In any event, Singapore was the more appropriate forum.

(c) Stage Two of the *Spiliada* test applies to an application for leave to serve out of jurisdiction and justice required the case to be heard in Singapore.

The issues

34 The issues before me were:

(a) Whether Stage One of the *Spiliada* test requires Singapore to be the more appropriate forum rather than just a comparatively equal forum?

(b) Whether Singapore was the more appropriate forum in any event?

(c) Whether Stage Two of the *Spiliada* test applies to an application for leave to serve out of jurisdiction, and if it does, whether leave should be granted under Stage Two in this case?

Whether Stage One of the *Spiliada* test required Singapore to be the more appropriate forum rather than just a comparatively equal forum

35 The defendant submitted that the following passages by the Court of Appeal in *Oro Negro* at [80] showed that the correct test is whether Singapore is the *more appropriate* forum:

> 80 The applicable legal principles for determining whether Singapore was the more appropriate forum for the purposes of service out were well established, and could be summarised as follows:

> (a) The question whether Singapore was the **more appropriate forum** for the action only arises for determination if the court was first satisfied that there was at least another available forum …
>
> (b) The appellants (as the plaintiffs in OS 126) bore the burden of demonstrating that Singapore was, on balance, the ***more appropriate* forum** … In this regard, it was strictly irrelevant whether Singapore was the more appropriate forum 'by a hair or by a mile' (*Siemens AG* at [8]).
>
> (c) … Singapore would be the **more appropriate forum** if it had the most real and substantial connection with the disputes raised …
>
> (d) In the event that Singapore was not the **more appropriate forum**, it was an open question whether the second stage of the *Spiliada* test was applicable in the context of leave applications for service outside jurisdiction …
>
> [emphasis in original in italics; emphasis added in bold]

36 The plaintiff, on the other hand, relied on *JIO Minerals FZC and others v Mineral Enterprises Ltd* [2011] 1 SLR 391 ("*JIO Minerals*") in which the Court of Appeal said at [53]:

> 53 … the defendant must, under the first limb of the test in the *Spiliada*, establish that there is *another* available forum which is clearly or distinctly more appropriate than Singapore. … However, as this court pointed out in *CIMB Bank* ([38] *supra* at [26]; also reproduced above at [38]), 'it is not enough just to show that Singapore is not the natural or appropriate forum' … The defendant must, as we have already noted, go *further* and establish that there is *another* available forum which is c*learly or distinctly more appropriate than Singapore* (see also the decision of this court in *Siemens AG v Holdrich Investment Ltd* [2010] 3 SLR 1007 at [4] ('*Siemens AG*')). Hence, notwithstanding the fact that there might be few – or even *no* – substantive connecting factors in relation to *Singapore*, this does *not necessarily* mean that the defendant would have discharged the burden that is placed upon it under the first limb of the test in the *Spiliada* … Indeed, in so far as this particular issue is concerned, the following summary by Prof Yeo is particularly helpful (see *Halsbury's Laws of Singapore* ([41] *supra* at para 75.089), appropriately entitled 'Relativity of Natural Forum'):

> The principle of the natural forum does not seek to identify *the* most clearly appropriate forum in the absolute sense. The search is for *a* natural forum, not *the* natural forum. Four implications follow.
>
> Firstly, there may be cases where no forum can be said to be comparatively more appropriate than any other. In such a case, stay will not be granted because it cannot be shown that there is another forum that is clearly more appropriate. Similarly, in a service out of jurisdiction case, it cannot be rebutted that Singapore is the proper forum to hear the case. The Singapore court will exercise its jurisdiction in such cases, even if it means multiplicity of proceedings.
>
> …

[emphasis in original in italics]

37 The plaintiff submitted that his burden was to establish that Singapore is one of multiple forums which are comparatively equal, not that it is more appropriate than any other forum. If Singapore was comparatively equal to the other available forum, it followed that the other available forum could not be more appropriate than Singapore. The plaintiff relied, in particular, on the passage in *Halsbury's Laws of Singapore* vol 6(2) (LexisNexis, 2009) ("*Halsbury's Laws of Singapore*") at para 75.089 (referred to in *JIO Minerals* – see [36] above) to the effect that, in a service out of jurisdiction case, it cannot be rebutted that Singapore is the proper forum if no forum can be said to be comparatively more appropriate than any other.

38 It seemed to me that in an application for leave to serve out of jurisdiction, the plaintiff has to show that Singapore is the *more appropriate* forum. As the defendant pointed out, *Oro Negro* involved an application for leave to serve out of jurisdiction whereas *JIO Minerals* involved a stay application on the ground of *forum non conveniens*. Both cases should be read in their respective contexts. An important point to note is that the burden of proof is different.

39 In a stay application on the ground of *forum non conveniens*, the defendant must persuade the court to exercise its discretion to stay proceedings in which jurisdiction over the defendant has been established. It is logical that in such a case, the defendant must show that there is another forum that is more appropriate than Singapore. If the defendant is unable to do so, there would be insufficient reason to stay the proceedings which have been properly commenced in Singapore. This also means that if the available competing forums are equally appropriate, the defendant has failed to discharge his burden and the Singapore court would retain its jurisdiction over the case.

40 In contrast, in an application for leave to serve out of jurisdiction, the plaintiff must persuade the court to exercise its discretion to assert jurisdiction over a defendant who is outside the territory. It stands to reason that in such a case, the plaintiff must demonstrate that either there is no other available forum, or if there is, that Singapore is the more appropriate forum. Merely showing that Singapore is a comparatively equally appropriate forum would not be sufficient reason for the court to exercise its discretion to assert jurisdiction over a defendant who is outside the territory. It also follows that if the available competing forums are equally appropriate, the plaintiff would have failed to discharge his burden and the Singapore court would *not* exercise jurisdiction over the case.

41 For the above reasons, I respectfully disagreed with the statement in *Halsbury's Laws of Singapore* to the effect that in an application for leave to serve out of jurisdiction, Singapore is the proper forum if no forum can be said to be comparatively more appropriate than the other (as cited in *JIO Minerals* at [53]; see [36] above).

42 Nevertheless, it was strictly speaking not necessary for me to decide this specific issue because, as will be seen below, I concluded that Singapore was the more appropriate forum in any event.

Whether Singapore was the more appropriate forum

Neutral factors

Plaintiff's case was founded on agreements made in Indonesia

43 The defendant submitted that Indonesia was the more appropriate forum because the plaintiff's pleaded case was founded on alleged agreements between the plaintiff and the defendant (see [16] above) that took place in Indonesia.

44 I disagreed with the defendant. In my view, this was a neutral factor. The relevance of connecting factors was in pointing to the appropriateness or otherwise of a forum. In this case, the nub of the dispute pertained to whether the parties intended to create some sort of trust over the Spare Funds that were transferred to Singapore. The mere fact that the alleged agreements relating to the plaintiff's and defendant's 35:65 interests were made in Indonesia did not explain why Indonesia was therefore the more appropriate forum.

Availability of witnesses

45 I agreed with the AR's conclusion that the factor relating to availability of witnesses was a neutral factor.

46 First, although the defendant was resident in Indonesia, he was a Singapore permanent resident with businesses and properties in Singapore and

he would come to Singapore fairly regularly. In any event, both countries are relatively near to each other.

47 Second, whether the forum was Indonesia or Singapore, evidence from foreign witnesses was at least arguably relevant. The plaintiff claimed that the relationship managers of BNP and UBS at the material time would be relevant witnesses and both were resident in Singapore. The defendant claimed that evidence may be required from one or more of the other Sudarga family members or one or more of the employees of the family businesses, all of whom were resident in Indonesia. In any event, as I have noted above, both countries are relatively near to each other.

48 Third, neither Indonesian nor Singapore courts can compel foreign witnesses to give evidence.

49 Fourth, a Singapore court could compel witnesses in Singapore to testify whereas it was at least doubtful before me whether an Indonesian court would compel witnesses in Indonesia. The evidence before me showed that Indonesian courts generally do not exercise their power to compel witnesses. The plaintiff submitted that this pointed to Singapore as the more appropriate forum. I disagreed with the plaintiff. There was nothing to suggest that the relevant witnesses in Singapore would not be likely to testify in a Singapore court and would have to be compelled to do so. As for witnesses in Indonesia, the plaintiff did not say that he required witnesses from Indonesia. Further, the plaintiff took the position that the defendant's witnesses from Indonesia were not relevant.

Factors pointing to Singapore as the more appropriate forum

Parties chose Singapore as destination for, and management of, Spare Funds

50 The parties had chosen Singapore as the destination for the Spare Funds and the management of the Spare Funds. Even on the defendant's case, the Spare Funds were transferred to the Defendant's Singapore Bank Accounts on his instructions and subsequently managed using Singapore banks and/or financial institutions.[1] The defendant also did not dispute the fact that he had received transfers of Spare Funds in his Singapore Bank Accounts on numerous occasions, from as early as 1997.[2] I agreed with the AR that this was a weighty factor. It evidenced an intention to deliberately move the Spare Funds from Indonesia to Singapore, and consequently an intention that disputes over these funds should be dealt with in Singapore.

51 I also agreed with the plaintiff that the Defendant's Singapore Bank Accounts were not a mere temporary staging post. The undisputed fact that there were funds in Singapore confirmed this.

52 The defendant pointed out that the plaintiff's case was that the Spare Funds were to be transferred to The Maharani Trust and The Next Generation Trust (collectively, the "Trusts"), both of which were Jersey trusts. In my view, the intended transfer to the Trusts did not mean that the funds had to be transferred to Jersey. The plaintiff's case was that the Trusts were set up pursuant to a proposal by the defendant (which the plaintiff agreed to), and the Trusts were managed in Singapore. Transferring the funds to the Trusts did not

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1 Defendant's 2nd affidavit dated 8 June 2022, paras 13(b) and 15; Plaintiff's Written Submissions for HC/RA 233/2022 at para 102(a).

2 Statement of Claim at Annex A to E; Defendant's 1st affidavit dated 13 April 2022, para 17(c).

therefore mean that the funds had to leave Singapore. The fact that the parties may subsequently decide to use those funds and transfer them elsewhere was a different matter.

Governing law

53 The defendant submitted that this case involved only disputes of facts in which the governing law was of little weight in determining whether Singapore was the proper forum. The defendant relied on *Lakshmi Anil Salgaocar v Jhaveri Darsan Jitendra* [2019] 2 SLR 372 ("*Lakshmi*") in which the court said at [55] that one of the reasons why the governing law was of limited relevance was that the key issues in dispute were factual and not legal in nature.

54 I disagreed with the defendant. In my view, the defendant's reliance on *Lakshmi* was misplaced. The court's statement had to be read in context. First, the court had found that there was no suggestion that the courts in the two available forums (British Virgin Islands and Singapore) would apply different principles. In the present case, Singapore law recognised trust claims whereas Indonesian law did not. Second, I agreed with the plaintiff that his trust claims raised questions of mixed law and fact. In my view, the law governing the plaintiff's claims was a relevant factor for consideration in this case.

55 Next, I agreed with the AR that the governing law of the plaintiff's claims pointed to Singapore as the more appropriate forum.

56 With respect to the plaintiff's claim in unjust enrichment, the Court of Appeal held in *Thahir Kartika Ratna v PT Pertambangan Minyak dan Gas Bumi Negara (Pertamina)* [1994] 3 SLR(R) 312 ("*Thahir Kartika Ratna*") at [29], citing *Dicey & Morris on the Conflict of Laws* (Sweet & Maxwell, 12th Ed, 1993), that in a claim in unjust enrichment, the obligation to restore the benefit

of an enrichment obtained at another person's expense is governed by the proper law of the obligation:

(a) If the obligation arises in connection with a contract, the proper law of the obligation is the proper law of the contract.

(b) If the obligation arises in connection with a transaction concerning an immovable property, its proper law is the law of the country where the immovable property is situated.

(c) If the obligation arises in any other circumstances, its proper law is the law of the country where the enrichment occurs.

57 In the present case, the proper law of the plaintiff's claim in unjust enrichment pointed to Singapore law because the enrichment occurred in Singapore where the Spare Funds were received.

58 The defendant relied on *Arab Monetary Fund v Hashim and others* [1996] 1 Lloyd's Rep 589 ("*Arab Monetary Fund*"). In that case, the English Court of Appeal held that the applicable law to govern the recovery of a bribe received by an employee in Switzerland was that of Abu Dhabi. This was because Abu Dhabi law governed the employment relationship and it was in Abu Dhabi that the building contract in question was awarded to the briber as a result of the employee's dishonest abuse of his relationship with his employer.

59 In my view, *Arab Monetary Fund* was distinguishable. In that case, the obligation to restore the benefit of the unjust enrichment arose in connection with the employment contract, which was governed by Abu Dhabi law. It was no surprise that the law applicable to the recovery of the bribe was held to be Abu Dhabi law (see [56(a)] above). In any event, the court was clearly

influenced by the fact that the relationship between the employee and employer was governed by Abu Dhabi law as was the relationship under the building contract obtained through the bribe, and that it was in Abu Dhabi that the dishonest abuse occurred (at 597 col 2). In the present case, there was no relevant relationship between the parties that was governed by Indonesian law.

60 With respect to the plaintiff's claim based on an express trust, the evidence pointed to the parties having impliedly chosen Singapore law. The plaintiff relied on *Trisuryo Garuda Nusa Pte Ltd v SKP Pradiksi (North) Sdn Bhd and another and another appeal* [2017] 2 SLR 814 ("*Trisuryo*").

61 *Trisuryo* concerned a dispute over the ownership of shares in a special purpose vehicle (the "SPV") set up in Singapore to hold shares in two Indonesian companies. Two Malaysian companies (the "Transferor") transferred shares in the Indonesian companies to the SPV, pursuant to deeds for the sale and purchase of the shares. The Transferor claimed that the SPV held the shares in the Indonesian companies on trust for them. The SPV claimed that it had purchased the shares. The SPV applied to stay the proceedings in Singapore in favour of Indonesia; one of the grounds was that Indonesia was the proper forum. The SPV's application was dismissed by the High Court and its appeal was dismissed by the Court of Appeal.

62 The Court of Appeal found (at [87]–[88]) that Singapore law governed the alleged trust agreement because (a) the parties' choice of corporate structure pointed towards an implied choice of Singapore law; and (b) it was almost inconceivable that the parties would have chosen a law that did not contain the concept of trusts to govern their trust agreement.

63 I agreed with the plaintiff that the present case was analogous to *Trisuryo*. In *Trisuryo*, the parties set up the SPV in Singapore to hold the shares. In the present case, the parties chose to transfer the Spare Funds to Singapore and to manage the Spare Funds in Singapore. The alleged trust in the present case would not be recognised under Indonesian law. Just as in *Trisuryo*, it was inconceivable in the present case that the parties would have chosen Indonesian law to govern their alleged trust agreement.

64 With respect to the plaintiff's claims based on resulting trust and common intention constructive trust, there seemed to be uncertainty as to the applicable choice of law rules relating to constructive and resulting trusts: *Dicey, Morris and Collins on the Conflict of Laws* vol 1 (Lord Collins of Mapesbury gen ed) (Sweet & Maxwell, 15th Ed, 2012) at para 29-076.

65 The plaintiff referred to Adeline Chong, "The Common Law Choice of Law Rules for Resulting and Constructive Trusts" (2005) 54(4) ICLQ 855 ("Choice of Law Rules"), in which the author identified the following alternative approaches:

(a) applying the law of the forum;

(b) applying the choice of law rule for unjust enrichment;

(c) applying the law most closely connected to the trust; or

(d) applying the property choice of law rules which would typically be the *lex situs*.

66 In *Rickshaw,* the Court of Appeal rejected the automatic application of the law of the forum, noting that it was necessary to closely examine the nature and origins of the equitable obligations in the context of their respective factual

matrices (at [75]–[76]). In *Thahir Kartika Ratna*, the Court of Appeal applied the choice of law rule for unjust enrichment to a constructive trust claim (at [48]). In *Perry, Tamar and another v Esculier, Bonnet Servane Michele Thais and another* [2022] 4 SLR 243 ("*Tamar Perry*"), the Singapore International Commercial Court applied the law most closely connected to the putative resulting and constructive trusts (at [108]–[110]). The court in *Tamar Perry* was not referred to and did not cite *Thahir Kartika Ratna*. However, in Choice of Law Rules, the author rejected the approach of adopting the law with the closest connection.

67 It was not necessary for me to decide which choice of law rules should apply to resulting and constructive trusts. I agreed with the AR that each of the alternative approaches pointed to Singapore law. The law of the forum was self-evident. As discussed earlier, the law applicable to the unjust enrichment claim pointed to Singapore law. The law most closely connected to the alleged trusts also pointed to Singapore law; the subject-matter of the trusts (*ie*, the Spare Funds) was in Singapore and the Spare Funds were managed in Singapore. The *lex situs* also pointed to Singapore law since the funds were in Singapore.

68 With respect to the plaintiff's claim based on proprietary estoppel, I agreed with the AR's conclusion that whether the test was the *lex situs* (as submitted by the plaintiff) or the law with the closest connection (as submitted by the defendant), the governing law pointed to Singapore law.

Power to order disclosure of documents

69 It was common ground that a Singapore court could order disclosure of documents whereas an Indonesian court could not. This was relevant with respect to disclosure of documents in the parties' control as well as documents in third parties' control.

70 The plaintiff submitted that documents from the banks in Singapore would be relevant as they would show how the parties treated the funds in Singapore, and the circumstances surrounding the transfer of Trans World shares in a 35:65 ratio to The Maharani Trust and The Next Generation Trust. Such documents would include (a) file notes taken by the manager or relationship manager relating to the setting up or closure of the Defendant's Singapore Bank Accounts, as well as the setting up and/or management of the Trusts; and (b) the defendant's answers to the banks' questions as part of the banks' anti-money laundering compliance processes. I agreed with the plaintiff that these documents would be relevant.

71 The defendant submitted that compellability of document disclosure was a factor that was relevant only at Stage Two of the *Spiliada* test. I disagreed with the defendant. The fact that documents were conveniently located within a jurisdiction would not be meaningful if disclosure could not be compelled. In *Ivanishvili, Bidzina and others v Credit Suisse Trust Ltd* [2020] 2 SLR 638 ("*Ivanishvili*"), the Court of Appeal also considered compellability of document disclosure under Stage One of the *Spiliada* test (at [98]–[102]).

72 In addition, the Court of Appeal in *Rickshaw* expressed the view that the compellability of witnesses "would relate more to the question of connecting factors under Stage One" (at [92]). Subsequently, in *JIO Minerals,* the Court of Appeal considered the compellability of witnesses under Stage One of the *Spiliada* test (at [63] and [71]–[74]), although the court also acknowledged that it could be a relevant factor under Stage Two (at [63]). I did not see any reason why compellability of document disclosure should be treated differently from compellability of witnesses. This view is supported by *Ivanishvili* where the Court of Appeal said at [98], "as with the compellability of witnesses, it is possible for the location of documents to become a relevant factor if the

disclosure of these documents can only easily be obtained in proceedings in one of the competing jurisdictions".

73 Given that compellability of document disclosure was possible in Singapore but not in Indonesia, this factor clearly pointed to Singapore as the more appropriate forum.

Stage One of the Spiliada test – conclusion

74 The above analysis under Stage One of the *Spiliada* test led me to the conclusion that Singapore was clearly the more appropriate forum.

Stage Two of the *Spiliada* test

75 Stage Two of the *Spiliada* test comes into play only if a Singapore court is persuaded under Stage One to make the order to stay proceedings in Singapore (in the case of a stay application on *forum non conveniens* grounds), or if the court is *not* persuaded to grant leave to serve out of jurisdiction. Under Stage Two, the court may refuse to make the order staying proceedings in Singapore (despite there being some other more appropriate forum than Singapore) or may grant leave to serve out of jurisdiction (despite Singapore not being the more appropriate forum). Whilst the consideration under Stage One is the appropriateness of the forum based on a multitude of factors (including, *eg*, general connecting factors and governing law), under Stage Two, the consideration is that of justice.

76 The defendant submitted that Stage Two of the *Spiliada* test does not apply to an application for leave to serve out of jurisdiction. The defendant relied on *Konamaneni and others v Rolls Royce Industrial Power (India) Ltd and others* [2002] 1 WLR 1269 ("*Konamaneni*") and *Allenger, Shiona (trustee-*

in-bankruptcy of the estate of Pelletier, Richard Paul Joseph) v Pelletier, Olga and another [2022] 3 SLR 353 ("*Allenger*").

77 In *Konamaneni*, the Chancery Division of the English High Court set aside an order granting the claimants permission to serve the proceedings on the defendant out of jurisdiction. The court held that the claimants had failed to show clearly that England was the appropriate forum for the claim. The court also held that Stage Two of the *Spiliada* test had no application in a case involving service out of jurisdiction. The court said (at [175]–[176]):

> 175 In a case involving service out of the jurisdiction under CPR r 6.20 the burden is on the claimants to show that England is clearly the more appropriate forum, and if they do not discharge that burden, that is the end of the matter and there is no room (as there is in the case of staying of actions) for the English court to retain jurisdiction if the claimant shows that it would be unjust for him to be deprived of a remedy on the ground that, in the words of Lord Goff in *Connelly v RTZ Corpn plc* [1998] AC 854, 873 'substantial justice cannot be done in the appropriate forum'.
>
> 176 I have expressed the view (above, paragraph 59) that in the context of service out of the jurisdiction there is room only for such an argument if the injustice in what would otherwise be the appropriate forum is such that it cannot be regarded as an 'available forum'. In such a case it might be argued that England is clearly the more appropriate forum, because there is no effective alternative. …

78 The question of whether Stage Two of the *Spiliada* test applies to an application for leave to serve out of jurisdiction was left open in *Oro Negro* (at [80(d)]; see [35] above).

79 In *Allenger*, the High Court agreed with *Konamaneni* and reasoned as follows (at [158]):

> 158 … The inquiry that the court undertakes at the stage of the stay application is quite distinct from the inquiry for leave for service outside jurisdiction. In applications for stay on the grounds of *forum non conveniens*, the defendant accepts the

> court's jurisdiction, but is asking the court to exercise its discretion to decline exercise of jurisdiction. Similar to my observations above at [134], however, in an application for leave for service outside of jurisdiction, the court is concerned with the logically anterior question whether it even has jurisdiction in the first place (see *Zoom Communications* ([95] *supra*) at [32]). It would be difficult to see how the court can have such broad discretion to allow a party to litigate in Singapore when its jurisdiction has yet to be established. That is why an argument on injustice still has to be targeted towards the issue as to where the appropriate forum lies.

80 I respectfully disagreed with *Konamaneni* and *Allenger*. Both cases suggest that in service out of jurisdiction cases, asserting jurisdiction under Stage One of the *Spiliada* test has greater legitimacy than under Stage Two. This assumes that each of the two stages has a different foundational basis. However, the *Spiliada* test is about identifying the appropriate forum and at its core, its foundational basis is that of justice. As Lord Goff of Chieveley explained in *Spiliada* (at 476C) with reference to a stay on the ground of *forum non conveniens*, the appropriate forum for the trial of the action is the forum "in which the case may be tried more suitably for the interests of all the parties and the ends of justice".

81 Lord Goff of Chieveley subsequently referred to both service out of jurisdiction cases and stay of proceedings cases and said (at 480G):

> … It seems to me inevitable that the question in both groups of cases must be, at bottom, … to identify the forum in which the case can be suitably tried *for the interests of all the parties and for the ends of justice*. …
>
> [emphasis added]

82 In *Rappo*, the Court of Appeal reiterated the same point, stating (at [72]):

> 72 Ultimately, the lodestar for a court tasked with identifying the natural forum is whether any of the connections point towards a jurisdiction in which the case may be 'tried more suitably for the interests of all the parties and for the ends of justice', to use the words of Lord Goff of Chieveley in *Spiliada*

> at 476. This lies at the heart of the *forum non conveniens* analysis …

83 The Stage One and Stage Two tests are part of the same *Spiliada* test and provide the means to identify the forum in which a case can be suitably tried for the interests of all the parties and for the ends of justice. Stage One considers connecting factors with available forums whilst Stage Two considers *all circumstances* including circumstances that go beyond those considered under Stage One (*Spiliada* at 478D). However, the ends of justice lie at the heart of each of the Stage One and Stage Two tests. It seemed to me therefore that, in principle, there was no reason to exclude the Stage Two test in service out of jurisdiction cases.

84 Further, the concern in *Allenger* about the court's "broad discretion" under Stage Two may have been overstated. It should be noted that, independent of the *Spiliada* test, leave to serve out of jurisdiction can be granted only if the claim falls within at least one of the limbs set out in O 11 r 1 of the ROC. In such a case, it may be said that the claimant has established the existence of a ground of jurisdiction: see Richard Fentiman, *International Commercial Litigation* (Oxford University Press, 2010) at para 12.28.

85 Finally, it also seemed to me to be unacceptable that the court should deny a plaintiff access to it where the circumstances are such that justice requires that he should be given access even though the defendant is outside the territory.

86 It seemed to me therefore that Stage Two of the *Spiliada* test applies to an application for leave to serve out of jurisdiction. It also seemed to me that on the facts in this case, justice required that leave be granted under Stage Two. The funds were in Singapore, the Trusts were managed in Singapore, there was

a strong inference that the parties had intended Singapore law to apply to any disputes arising out of the Spare Funds, and there was no prejudice to the defendant that warranted leave not being granted.

87 Nevertheless, strictly speaking, it was again not necessary for me to decide this issue since I had concluded that leave to serve out of jurisdiction had been properly granted under Stage One of the *Spiliada* test.

88 For completeness, I note that in *Shen Sophie v Xia Wei Ping and others* [2022] SGHC 206 ("*Shen Sophie*"), a judgment that was issued after I decided this appeal, the court also took the view that Stage Two of the *Spiliada* test applies to applications for leave to serve out of jurisdiction. The court said (at [133]):

> 133 I accept Professor Yeo's argument that, as a matter of principle, and subject to procedural constraints arising from burden of proof that give rise to some technical distinction in application, the *Spiliada* test should apply in the same way in both service within and service outside jurisdiction (see Yeo Tiong Min, 'Exit, Stage 2, for the Plaintiff in Service out of Jurisdiction?' (2021) 33 SAcLJ 1237). As he explains, there are two normative justifications for this. First, access to justice is 'an important consideration' in both service in Singapore cases and service out of Singapore cases. This consideration justifies the Singapore court hearing a case even though it is not the *prima facie* natural forum, if it is shown that substantial justice would otherwise be denied. Second, the *Spiliada* test requires an 'even-handed treatment of the plaintiff and the defendant'. More broadly, Professor Yeo points out that 'the modern global trend in common law systems is to enlarge the scope of extraterritorial jurisdiction, subject to control by the natural forum doctrine', and any asymmetric application of the *Spiliada* test would thus require justification beyond mere procedural constraints.

Conclusion

89 For the reasons stated above, I dismissed the appeal. I ordered the defendant to pay costs of the appeal fixed at S$15,000 plus disbursements to be fixed by me if not agreed.

Chua Lee Ming
Judge of the High Court

Hing Shan Shan Blossom, Kwek Choon Yeow Julian, Tan Yi Yin Amy and Lu En Hui Sarah (Drew & Napier LLC) for the plaintiff;
Jaikanth Shankar, Fong Cheng Yee David, Tan Ruo Yu, Tanmanjit Singh Sidhu s/o Karam Jeet Singh and Seong Hall Ee Waverly (Davinder Singh Chambers LLC) for the defendant.