Eleven Gesellschaft Zur Entwicklung Und Vermarktung Von Netzwerktechonologien MBH *v* Boxsentry Pte Ltd
[2014] SGHC 210

Case Number	: Suit No 677 of 2012 (Registrar's Appeal Nos 292 and 293 of 2013)
Decision Date	: 20 October 2014
Tribunal/Court	: High Court
Coram	: Tan Siong Thye J
Counsel Name(s)	: Sarbit Singh Chopra and Nur Rafizah bte Mohamed Abdul Gaffoor (Selvam LLC) for the appellant; Pateloo Eruthiyanathan Ashokan and Sheryl Cher (KhattarWong LLP) for the respondent.
Parties	: Eleven Gesellschaft Zur Entwicklung Und Vermarktung Von Netzwerktechonologien MBH — Boxsentry Pte Ltd

Conflict of laws – foreign judgments – enforcement

Conflict of laws – foreign judgments – defences

Civil procedure – jurisdiction – inherent

20 October 2014

Tan Siong Thye J:

Introduction

1 The appellant was Boxsentry Pte Ltd ("Boxsentry"), a Singapore-incorporated company, while the respondent was Eleven Gesellschaft Zur Entwicklung Und Vermarktung Von Netzwerktechonologien MBH ("Eleven"). They had entered into a Partner Agreement ("the PA") to integrate Eleven's "eXpurgate" spam filter and email categorisation service (collectively referred to as the "eXpurgate service") into Boxsentry's "RealMail" application. Under the PA, Boxsentry had guaranteed quarterly revenue payments for the first three years to Eleven for the use of the eXpurgate service.

2 Boxsentry made payment to Eleven for the first and second quarters of the first year. However, it failed to make payment for the third and fourth quarters of that year. Subsequently, Eleven sued Boxsentry in Berlin, Germany, and obtained a default judgment ("the Berlin default judgment") against Boxsentry as it had failed to respond to Eleven's claim. Subsequent events led Eleven to take out a Writ of Summons in Singapore so as to enforce the Berlin default judgment. In the meantime, Boxsentry took out a summons to stay the enforcement proceedings.

3 At the hearing below, the Assistant Registrar ("AR") granted Eleven's summary judgment application which would allow the enforcement of the Berlin default judgment in Singapore. The latter's stay application was dismissed. Boxsentry appealed against both the decisions.

4 I heard both Registrar's Appeal No 292 of 2013 ("RA 292") and Registrar's Appeal No 293 of 2013 ("RA 293"). In RA 292, Boxsentry appealed against the dismissal of the stay application by the AR. In RA 293, it appealed against the grant of summary judgment by the same AR. I dismissed both the appeals. [note: 1] Boxsentry is dissatisfied with my decisions and has appealed against them. I now

give my reasons for my decisions.

The facts

5 Boxsentry and Eleven were involved in the supply of information technology services. Central to this dispute was the PA entered into by them on 27 November 2007.

6 Under the terms of the PA, Boxsentry agreed to integrate Eleven's eXpurgate service into its "RealMail" application. The bundled application would then be sold to certain specified territories where Boxsentry operated in. [note: 2] Those territories were the Asia Pacific region and the Middle East. [note: 3] For the provision of its services, Eleven was guaranteed revenue payments under cl 5 of the PA for the first year, second year and third year. Clause 5 read as follows: [note: 4]

> **5. Guaranteed revenue / Committed Payments**
>
> (1) The Partner [Boxsentry] guarantees the following revenue to the Supplier [Eleven]:
>
> | | |
> |---|---|
> | First year (Nov 2007-Oct 2008) | 220k€ |
> | Second year (Nov 2008-Oct 2009) | 300k€ |
> | Third year (Nov 2009-Oct 2010) | 360k€ |

7 The terms of payment were contained in cl 6 of the PA which read as follows:

> **6. Terms of Payment**
>
> (1) Quarterly payment at the end of the quarter
>
> (2) For the first year the guaranteed revenue is paid as follows:
>
> | | |
> |---|---|
> | First quarter | 15k€ (5k€ in advance at the beginning of the quarter upon signing agreement) |
> | Second quarter | 25k€ |
> | Third quarter | 70k€ |
> | Fourth quarter | 110k€ |
>
> (3) Starting with the second year of business the guaranteed revenue is paid quarterly in equal shares.

As can be seen, the total sum payable to Eleven for the first year was €220,000. [note: 5]

Boxsentry's breach of the PA

8 Boxsentry had paid Eleven for the first and second quarters of the first year under the PA. Those payments were €15,000 and €25,000 respectively. [note: 6] However, Boxsentry failed to make payment for the third and fourth quarters. The facts below illustrate the sequence of events that

took place between Boxsentry and Eleven after the first and second quarter payments.

9 On 6 August 2008, Eleven sent an invoice for the third quarter payment to Boxsentry. The latter did not reply. [note: 7] Eleven subsequently sent an email to Boxsentry on 29 October 2008 to remind Boxsentry of its obligations to make payment for the third quarter within the next 14 days. [note: 8] Boxsentry eventually replied Eleven, stating that the eXpurgate service had not performed up to expectations. Boxsentry also alleged that this problem had been raised to Eleven on several occasions but to no avail. This had caused damage to Boxsentry's reputation. [note: 9] For that reason, Boxsentry rescinded the PA on the ground of misrepresentation. [note: 10]

10 On 20 November 2008, Eleven sent an email to Boxsentry, stating that there was no legal basis for a premature termination of the PA or a cessation of the business relationship between them. [note: 11] Eleven also demanded Boxsentry to make the payments for the third and fourth quarters. Boxsentry replied in its email dated 15 December 2008 that it would not make any further payment. [note: 12]

11 Under the PA, German law governed the PA and the parties had agreed to submit to the Berlin court's exclusive jurisdiction. [note: 13] On that basis, Eleven commenced legal action again Boxsentry in Berlin on 19 February 2009. Subsequently, German court documents were served on Boxsentry in Singapore informing it that legal proceedings had been commenced by Eleven against it.

12 Boxsentry ignored the Berlin legal proceedings. Accordingly, Berlin Regional Court issued the default judgment against Boxsentry. That judgment was served on Boxsentry but it continued to ignore the Berlin legal proceedings. When Eleven issued a letter of demand to enforce the default judgment in Singapore, Boxsentry again failed to respond.

The present proceedings

13 Exasperated, Eleven commenced the present proceedings in Singapore to enforce the Berlin default judgment under the common law. The Writ of Summons, together with the endorsed Statement of Claim, was served on Boxsentry, which finally entered its appearance on 24 August 2012. It filed its defence and counterclaim against Eleven on 12 September 2012. [note: 14] On 27 September 2012, Eleven filed an application for a stay of proceedings in relation to Boxsentry's counterclaim. The parties agreed to this application. Accordingly, the court granted the stay in relation to Boxsentry's counterclaim by consent on 22 October 2012. [note: 15]

14 On 23 November 2012, Eleven applied for summary judgment under O 14 r 1 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("ROC") in Summons No 6024 of 2012 ("SUM 6024") against Boxsentry. This was to enforce the Berlin default judgment. [note: 16] Boxsentry retaliated by commencing Civil Action Case No 98 O9/13 in Berlin to set aside the Berlin default judgment and to restrain Eleven from enforcing the Berlin default judgment ("the Berlin restrain action"). [note: 17] It also filed an application to stay the present action in Summons No 3974 of 2013 ("SUM 3974") pending the outcome of the Berlin proceedings. The AR granted Eleven its application for summary judgment and dismissed Boxsentry's application for a stay of proceedings. Boxsentry appealed against both his orders. [note: 18]

Boxsentry's restrain action in Berlin to prevent Eleven from enforcing the Berlin's default judgment in Singapore

15 Subsequently, the Berlin restrain action was heard in the Berlin High Court on 1 April 2014. The Berlin High Court ruled against Boxsentry on 13 May 2014. [note: 19] Boxsentry filed an appeal on 13 June 2014 ("the Berlin appeal"). In its appeal, Boxsentry sought to set aside the Berlin judgment as well as another default judgment (see [28(i)] and [43]) issued against it and also to transfer the case to be heard before the Senate. If it again failed in its action, Boxsentry then would ask for its case to be transferred to the Federal Supreme Court of Germany. [note: 20] Boxsentry informed me that the appeal would be heard in Berlin at the end of October 2014 or in early November 2014. [note: 21]

The issues before me

16 The issues on appeal were thus twofold:

(a) whether the present action should be stayed in the light of the concurrent Berlin proceedings; and

(b) whether I should grant summary judgment on the strength of the Berlin default judgment.

The application to stay enforcement of the Berlin default judgment

The AR's reasons for dismissing the stay application

17 At the hearing below, the AR dismissed Boxsentry's stay application. He held that while international comity was an important consideration, he had to consider two issues. First, whether Boxsentry's application to restrain Eleven from enforcing the Berlin default judgment in Singapore was *bona fide* and second, whether Eleven would be put through further delay and expense in recovering what it was rightfully entitled to. The AR was of the view that Boxsentry's actions appeared to be calculated to delay the current proceedings. Thus he did not grant a stay. [note: 22]

Boxsentry's submissions

18 Boxsentry's appeal was founded on two grounds. The first was based on s 18 of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) ("SCJA") read with para 9 of the First Schedule. The second was premised on the inherent jurisdiction of the court under O 92 r 4 of the ROC. [note: 23]

Boxsentry's case premised on the Supreme Court of Judicature Act

19 On its first submission, Boxsentry's case was that a stay of the present proceedings should be granted as: [note: 24]

(a) there would be a multiplicity of proceedings if the present proceedings were not stayed;

(b) there would be a risk of conflicting judgments if the present proceedings were not stayed as the Berlin appeal and the present proceedings involved the interpretation and enforceability of the Berlin default judgment;

(c) justice and fairness required that Eleven's cases be heard by the same forum; and

(d) Eleven had not adduced any evidence to show that it would suffer substantial justice if the action was stayed pending the outcome of the Berlin appeal. [note: 25]

20 Boxsentry submitted that a limited stay had been granted before, for example, in *Chan Chin Cheung v Chan Fatt Cheung and others* [2010] 1 SLR 1192 ("*Chan Chin Cheung*"). In *Chan Chin Cheung*, the Court of Appeal had granted a limited stay pending the outcome of the Malaysian proceedings as it would (at [46]):

(a) minimise the risk of conflicting judgments;

(b) enable the Singapore courts to have the benefit of the findings of the Malaysian courts;

(c) promote international comity; and

(d) prevent legal resources from being wasted.

Therefore on the strength of *Chan Chin Cheung*, Boxsentry submitted that a limited stay should be granted.

21 Boxsentry also submitted that neither the place where the legal action was first commenced nor the stage of any foreign proceedings was of any relevance to the stay application.

22 First, in *UBS AG v Telesto Investments Ltd and others and another matter* [2011] 4 SLR 503 at [133], the High Court held that the order in which the claims were brought in the competing jurisdictions was not to be given significant weight. [note: 26] It also did not matter whether the action was started locally first or in a foreign country: *Rickshaw Investments Ltd v Nicolai Baron von Uexkull* [2007] 1 SLR(R) 377 at [88]. [note: 27] Therefore, the fact that it had commenced the Berlin restrain action *only* after the present action was commenced was not important. The policy reason behind this was clear: a party should not be stopped from pursuing its claim in the appropriate forum just because an action had been commenced in another forum. [note: 28]

23 Second, whether the foreign proceedings were at a beginning or advanced stage was an irrelevant consideration. This was apparent from Belinda Ang Saw Ean J's judgment in *The Reecon Wolf* [2012] 2 SLR 289, in which a stay of proceedings in Singapore had been granted even though the Malaysian proceedings which were concurrent were not very advanced: at [47].

Boxsentry's case premised on the court's inherent jurisdiction

24 Alternatively, Boxsentry submitted that this court should grant it a stay based on its inherent jurisdiction to grant a temporary stay under O 92 r 4 of the ROC.

25 Boxsentry submitted that in *Shanghai Construction (Group) General Co. Singapore Branch v Tan Poo Seng* [2012] SGHCR 10 ("*Shanghai Construction*"), the High Court held that a stay would be ordered where there were "strong reasons" for doing so and where the benefits clearly outweighed any disadvantage to the plaintiff. An abuse of the court's process and the promotion of efficient dispute resolution were two situations which justified such a stay. [note: 29] Boxsentry's counsel added that *Shanghai Construction* was based on *Reichhold Norway ASA and another v Goldman Sachs International* [1999] 1 All ER 40 ("*Reichhold*") which had granted a stay on the basis of pending arbitration so that disputes could be efficiently resolved: see *Shanghai Construction* at [18]–[19]. He pointed out that *Reichhold* had since been accepted in other UK cases and most recently in *Isis Investments Ltd and Oscatello Investments Ltd and ors* [2013] EWHC 7. [note: 30]

26 Since the outcome of the Berlin appeal would have an impact on the present proceedings,

Boxsentry sought for a stay. Furthermore, there would be no prejudice to Eleven as the Berlin appeal would decide the very same claim and action it commenced in 2009. [note: 31] Boxsentry was also of the view that Eleven had been dilatory for delaying nearly three years before it decided to enforce the Berlin default judgment in Singapore. [note: 32]

Eleven's submissions

27 Eleven's response was that Boxsentry's application for a limited stay came almost a year after the present action was commenced by Eleven and two days before the hearing of SUM 6024 (application for summary judgment). This showed that Boxsentry had not been serious about its stay application and that Boxsentry had made the stay application in bad faith. [note: 33]

28 Eleven submitted that the grant of a limited stay was a matter fully within the court's discretion. First, the court should be slow to interfere with the AR's exercise of that discretion. [note: 34] Second, a stay should not be granted for the following reasons: [note: 35]

(a) Whether a foreign judgment should be enforced in Singapore was a matter for the Singapore courts to decide (*Owens Bank Ltd v Bracco and another* [1992] 2 AC 443).

(b) The present action was at a more advanced stage than the Berlin proceedings.

(c) The present action was commenced five months before Boxsentry's Berlin restrain action was commenced and there was no reason why Boxsentry could not have commenced the Berlin restrain action earlier.

(d) Dr Klaus Peter Rentsch ("Dr Klaus"), Eleven's legal expert on German law, had opined that first instance proceedings with respect to Boxsentry's Berlin restrain action would typically take between one year and 18 months while an appeal would take about another year to conclude. This would cause Eleven considerable delay to realise their judgment sum and could result in Boxsentry dissipating its assets.

(e) There would be no prejudice to Boxsentry as it could claim damages caused by the wrongful execution of the Berlin default judgment if it succeeded in the Berlin restrain action.

(f) Dr Klaus's evidence was that Boxsentry's action in Berlin was unlikely to succeed since it had known of its basis for alleging fraud against Eleven but chose to do nothing for a long time. Furthermore, Dr Christian Czychowski's ("Dr Czychowski") (Boxsentry's legal expert on German law) opinion was erroneous.

(g) The merits of the alleged fraud should not be considered by the Singapore courts since the material was already in existence and known to Boxsentry prior to the commencement of the Berlin legal proceedings.

(h) Boxsentry might become insolvent and that would prejudice Eleven's legal rights if a stay was granted.

(i) It would be unfair and unjust if a stay was granted as Boxsentry had chosen to do nothing for four years. Boxsentry had every opportunity to defend itself in Berlin or challenge the Berlin default judgment. It did not, and also ignored the second set of Berlin legal proceedings for further guaranteed revenue payments. This showed that it was not genuine about defending the

claims made by Eleven.

(j) The restraining proceedings brought in Berlin to stop the enforcement of the Berlin default judgment was brought in bad faith. It was brought solely to delay enforcement proceedings in Singapore from taking place.

My decision on the stay application

29 Both sides agreed that the court has jurisdiction and power to grant a stay of proceedings. This discretion had to be exercised judiciously and it was the exercise of this discretion that the parties disagreed upon.

The factors that the court should consider for a stay application

30 Paragraph 9 of the First Schedule to the SCJA is instructive on the factors that the court should consider in its exercise of its power to stay a proceeding:

Stay of proceedings

9. Power to dismiss or stay proceedings where the matter in question is res judicata between the parties, or where by reason of multiplicity of proceedings in any court or courts or by reason of a court in Singapore not being the appropriate forum the proceedings ought not to be continued.

31 In *Sterling Pharmaceuticals Pty Ltd v Boots & Co (Aust) Pty Ltd* (1992) 34 FCR 287 ("*Sterling Pharmaceuticals*") at [15], Lockhart J listed several factors that the court should consider in an application for a stay:

(a) which proceeding was commenced first;

(b) whether the termination of one proceeding is likely to have an impact on the other;

(c) the public interest;

(d) the undesirability of two courts competing to see which of them determines common facts first;

(e) consideration of witness circumstances;

(f) whether work done on pleadings, particulars, discovery, interrogatories and preparation might be wasted;

(g) the undesirability of a substantial waste of time and effort if it became a common practice to bring actions in two courts involving substantially the same issues;

(h) how far advanced the proceedings are in each court;

(i) the interest of the law in striving against allowing multiplicity of proceedings in relation to similar issues; and

(j) generally balancing the advantages and disadvantages to each party.

32 The factors listed in *Sterling Pharmaceuticals* are useful guides that can be applied for any case where there is an application for a stay of proceedings. In *Bella Products Pty Ltd v Creative Designs International Ltd* [2009] FCA 868 at [23], the Federal Court of Australia endorsed the factors listed by *Sterling Pharmaceuticals*. It held that it was undesirable that there were two courts determining the same dispute (see also *Chan Chin Cheung* at [46]) and practical considerations based on common sense and fairness should dictate which action should proceed first. The implication was that simultaneous proceedings in two jurisdictions did not necessarily mean that a stay would be granted as of right. The decision for a stay application must fundamentally depend on whether it is fair to the parties. Thus the parties' conduct was important.

The conduct of Boxsentry and Eleven

33 I agreed with Eleven that to grant the stay would be to condone Boxsentry's intention to prolong and drag the proceedings. Boxsentry's sole intention was to deny Eleven of the payments sought by abusing the court's procedural rules. The stay was sought by Boxsentry in order to defer its payment obligation to Eleven for as long as it could. Such conduct was unacceptable. I shall now trace the chronology of events to support my finding.

(I) Boxsentry failed to make the third quarter payment

34 The parties entered into the PA on 27 November 2007. The first and second quarter payments for the first year were duly paid for. It was only when Eleven chased Boxsentry for the third quarter payment of €70,000 that the latter refused to make any payment. This sum was larger than the combined total of the two previous payments.

35 Eleven first sent Boxsentry the invoice for €70,000 on 6 August 2008. Boxsentry did not respond. Subsequently, after more than two months, Eleven sent to Boxsentry on 29 October 2008 a reminder that the third quarter payment was due. On 30 October 2008, Boxsentry refused to make payment and alleged that the eXpurgate service did not serve its purpose.

36 When it became evident that Boxsentry was not going to pay for the third and fourth quarter under the PA, Eleven commenced legal action on 19 February 2009 in Berlin as stipulated under the PA. This was about three months after Boxsentry first indicated that it would not make the third quarter payment on 30 October 2008.

(II) The Berlin proceedings

37 Eleven commenced the Berlin legal proceedings against Boxsentry on 19 February 2009. [note: 36] It claimed the following sums: [note: 37]

(a) €180,000, the sum being the outstanding due from Boxsentry to Eleven under the PA as guaranteed revenue payments for the first year;

(b) interest at a rate of 8 percentage points above the base rate from 15 December 2008; and

(c) costs of the Berlin action.

The subsequent facts will reveal how Boxsentry had abused the procedural rules of the Berlin and Singapore courts to its own advantage. As a result Boxsentry had in *substance* obtained a stay from the numerous adjournments and delays which were previously granted to it.

(A) The Berlin's court documents were served on Boxsentry in Singapore

38 Boxsentry's registered business address was in Singapore. The Berlin Regional Court had sent a letter dated 19 May 2009 to the Registrar of the Singapore Supreme Court ("the Registrar"). It requested that the Berlin Statement of Claim ("the Berlin SOC") and a judicial order dated 19 March 2009 issued by the Berlin Regional Court in the Berlin legal proceedings ("the Berlin Judicial Order") be served on Boxsentry in accordance with local procedures. [note: 38] Pursuant to this request, the Berlin SOC and the Berlin Judicial Order were personally served on Boxsentry at its registered office on 29 July 2009 via a process server of the Singapore Supreme Court. [note: 39] The effected service was then communicated to the Berlin Regional Court via the Embassy of the Federal Republic of Germany in Singapore. A Ministry of Foreign Affairs letter also confirmed that the said documents had been served on Boxsentry. [note: 40]

39 A perusal of the Berlin Judicial Order showed that if Boxsentry did not respond, the Berlin court was at liberty to enter a default judgment against it. The Berlin Judicial Order read as follows:

> In the event that you fail to have the lawyer to be appointed to indicate within the set deadline of four weeks your intention of defence against the Claim, *the court may – upon request by the Claimant – issue a judgment by default, without an oral hearing*. In such event, you will have to bear the court fees and all costs necessarily incurred by the adverse party (Sec 91 ZPO). Based on this judgment of default, the Claimant is entitled to institute a compulsory execution into your assets, without having to provide a security (Sec. 708 No. 2 ZPO).
>
> *The court requested that you reply to the Statement of Claim in writing. This Statement of Reply must be received by the court on the last day of the set deadline, at the latest, and contain any and all means of defence. In case you miss the deadline for the reply and fail to state an important reason for such failure, you are normally barred from fending off the claim, and risk losing this case just because of having missed this deadline.*
>
> [emphasis added]

(B) The Berlin default judgement was issued against Boxsentry

40 Despite receiving the Berlin Judicial Order, Boxsentry failed to enter a defence in Berlin. Since it did not do so, the Berlin default judgment was entered into on 27 October 2009. It ordered the following:

> (a) Boxsentry was to pay Eleven €180,000 plus interest at a rate of 8 percentage points above the base rate as of 15 February 2008, which amounted to €59,229 as at 18 November 2012 and which would continue to accumulate until the date of full payment. [note: 41]
>
> (b) Boxsentry was to pay €8,561.34 as the costs of the Berlin legal proceedings plus interest at the rate of 5 percentage points above the applicable base rate as of 30 April 2010, which amounted to €770.79 as at 18 November 2012 and which would continue to accumulate until the date of full payment. [note: 42]
>
> (c) The Berlin default judgment was to be provisionally enforceable.

From the foregoing, the total claim against Boxsentry was €248,561.13 as at 18 November 2012.

Boxsentry could object to the Berlin default judgment within four weeks from the date of service of the Berlin default judgment..

(C) The Berlin's default judgment was served on Boxsentry in Singapore

41 After the Berlin default judgment was issued, the Berlin Regional Court sent a letter to request the Registrar of the Supreme Court of Singapore to serve Boxsentry the following documents: [note: 43]

(a) the Berlin default judgment; and

(b) the Notes of Objection to allow Boxsentry to lodge its objection against the judgment in the "form prescribed by [Singapore] laws".

The Registrar was also requested to send the Certificate of Service to the Berlin Regional Court. [note: 44]

42 The Berlin default judgment together with the Notes of Objection were served personally on Boxsentry on 9 February 2010 and the Berlin Regional Court was informed of this through a letter dated 5 March 2010. [note: 45]

43 As an aside, I noted that there was another set of Berlin proceedings commenced on 1 December 2011 and a second Berlin default judgment was obtained on 8 October 2012. [note: 46] However, those proceedings were irrelevant to the present action.

(D) Boxsentry failed to file an objection to the Berlin default judgment

44 The Notes of Objection that were sent to Boxsentry stated that Boxsentry could file an objection to the Berlin default judgment within four weeks from the date of service of the Berlin default judgment. The objection should have contained its arguments and defences. The Notes further mentioned that if the objection was filed outside the stated timeline, it would be inadmissible and be dismissed. Boxsentry, however, had the right to apply for an extension of time to file its arguments and defences if certain conditions were met. The court would allow for the extension provided that the action would not be delayed or the delay was reasonable. [note: 47] Boxsentry did not file any objection to the Berlin default judgment. [note: 48]

(III) Boxsentry repeatedly ignored Eleven's requests for payment

45 Boxsentry continued to ignore the Berlin legal proceedings and the Berlin default judgment despite being informed. Consequently, Eleven engaged Singapore lawyers to issue a letter of demand dated 24 June 2010 to Boxsentry's registered office. Boxsentry was requested to make payment of the sums due under the Berlin default judgment within seven days from the date of the letter. [note: 49] The letter of demand had a translated copy of the Berlin default judgment. Boxsentry failed to respond to the letter of demand. When Eleven's Singapore solicitors sent a second letter of demand dated 20 July 2010 to Boxsentry's registered office, this was again to no avail.

(IV) Boxsentry sought repeated adjournments in the Singapore proceedings

46 When Eleven commenced legal proceedings in Singapore, Boxsentry sought to delay the matter.

It applied for numerous adjournments for various reasons, including (a) that the court should wait for developments in the Berlin courts; and (b) that they were exploring the possibility of a settlement. The appeal against the AR's decisions was first fixed for hearing on 17 October 2013. Parties sought an adjournment to settle the matter. This was granted. Thereafter, several adjournments were granted for parties to attempt to settle the matter.

47 Eventually, the case came before me again on 22 April 2014. Boxsentry sought an adjournment to await the outcome of its action to set aside the Berlin default judgment. Eleven objected to the adjournment but since the Berlin court would release its decision on 13 May 2014, I allowed the matter to be adjourned. As matters transpired, Boxsentry lost its case in Berlin.

48 After Boxsentry had lost its case in Berlin, I heard the matter fully on 22 August 2014. I was not prepared to adjourn this case further pending the outcome of the Boxsentry's appeal to the Supreme Court of Berlin. Therefore, Boxsentry had *in substance* obtained a partial stay of about ten months. I was of the firm view that the matter should not be delayed any further.

My observations regarding Boxsentry's conduct

49 Boxsentry had thus calculated its strategy to delay the enforcement of the third and fourth quarter payments. Additionally, I also find that it had been nonchalant, that it had brought the stay application in bad faith and its allegation against Eleven was a sham.

(I) Boxsentry was nonchalant

50 Boxsentry's attitude towards Eleven's efforts to seek redress through legal proceedings in Singapore and Germany was nonchalant. The narration of the events above clearly revealed that Boxsentry had been properly served with the Berlin SOC, which contained a notice for it to attend the Berlin proceedings. It chose not to do so and failed to enter an appearance in Berlin. When Boxsentry was notified of the Berlin default judgment, again it chose not to exercise its right to object despite being informed about its right to do so. Every due process to defend itself was accorded to Boxsentry.

51 When the two letters of demand were subsequently sent out by Eleven's solicitors, Boxsentry chose not to reply. It was only when Eleven took out legal proceedings to enforce the Berlin default judgment in Singapore that Boxsentry suddenly sprang into action. It contested the present proceedings. Boxsentry filed an appeal in Berlin to restrain the enforcement of both the Berlin default judgments in Singapore and to set aside both the Berlin default judgments. The last minute actions of Boxsentry indicated its tactics to effect a delay when it was faced with a real threat that it would be compelled to pay Eleven the sums sought. Such conduct was extremely unbecoming.

(II) Boxsentry's stay application was brought in bad faith

52 Next, I found that Boxsentry had brought the stay application in bad faith. The cases cited by Boxsentry to support its stay application were not of much assistance. The party who sought a stay in those cases could hardly be described as dilatory. In the present case, the resistance started from the time when Eleven sought payment from Boxsentry for the third quarter payment on 6 August 2008 and Boxsentry ignored that invoice. Since then, it had been refusing and challenging payments due to Eleven for the last six years.

53 Boxsentry's conduct clearly revealed an intention to deprive Eleven of its legal rights. Its actions were calculated to deny Eleven of its third and fourth quarter payments under the PA.

Therefore, its application was brought in bad faith.

(III) Boxsentry's complaint that the eXpurgate service was unusable lacked bona fides

54 Boxsentry also alleged that it had previously raised to Eleven the matter regarding the unsuitability of the eXpurgate service. Thereafter, Boxsentry terminated the PA. On 20 November 2008 Eleven informed Boxsentry via email that it had no legal basis to rescind the PA. Was Boxsentry's allegation that the eXpurgate service was unfit for its purpose a genuine and legitimate basis to refuse payment and rescind the PA?

55 Prior to the signing of the PA on 27 November 2007 Boxsentry tested the eXpurgate service for free under License No 150727 granted by Eleven. A copy of the graph showing the number of emails scanned and classified (as spam or legitimate email) by eXpurgate service showed that Boxsentry started using the eXpurgate service since 16 April 2007. This was approximately seven months before the signing of the PA. During this period, Boxsentry had the opportunity to test eXpurgate service without charge. Boxsentry must have been satisfied with eXpurgate service otherwise it would not have signed the PA on 27 November 2007. Moreover, Boxsentry made the first and second quarter payment to Eleven without any reservations. Suddenly, when Eleven chased Boxsentry for the third quarter payment of €70,000 the latter refused to pay, alleged that eXpurgate service could not be used for the first time and rescinded the PA on the ground of Eleven's misrepresentation.

56 Moreover, Boxsentry later made the first and second quarter payment to Eleven without any reservations. It was only when Eleven chased Boxsentry for the third quarter payment of €70,000 that the latter refused to pay, alleged that eXpurgate service could not be used for the first time and rescinded the PA on the ground of Eleven's misrepresentation. On the above facts, the allegation made by Boxsentry appeared to be a sham.

Boxsentry's interests vs Eleven's interests

57 I was aware of the undesirability of multiple proceedings in multiple jurisdictions and the undesirability of each court competing to be the first to find on common facts. However, balancing the interests of Eleven and Boxsentry, the former would be greatly prejudiced by any continued delay of the Singapore proceedings which were caused by Boxsentry's calculated attempts to effect delays. Boxsentry had been given numerous opportunities to defend its rights in Germany. It consciously chose to ignore them. When the legal action came to its door step in Singapore, it decided to frustrate Eleven through its actions in Berlin. Under such circumstances, it was clear to me that Eleven's interests had to be preferred and I could not grant a stay application.

58 Subsequent to the events above, I noted that the Berlin court had heard Boxsentry's application to restrain the Singapore proceedings and had dismissed its application on 13 May 2014. Boxsentry had filed an appeal on 13 June 2014 with the Supreme Court of Berlin against the dismissal.

59 Thus far, the Boxsentry's legal action to stop Eleven's enforcement of the judgment debt has been unsuccessful. The outcome of Boxsentry's appeal in Berlin is still pending, but having regard to the prejudice already suffered by Eleven, I took the view that the latest developments in the Berlin proceedings could not justify the grant of a stay.

Inherent jurisdiction

60 Boxsentry's second submission was based on the exercise of my inherent jurisdiction to grant a stay. It was made pursuant to O 92 r 4 of the ROC, which reads:

Inherent powers of Court (O. 92, r. 4)

(1) For the avoidance of doubt it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

61 I was again of the view that it would be unfair to grant the stay under the court's inherent jurisdiction. As observed by Asst Prof Goh Yihan in his article "The Inherent Jurisdiction and Inherent Powers of the Singapore Courts: Rethinking the Limits of their Exercise" [2011] SJLS 178 at p 207, the inherent jurisdiction of the court is meant to ensure that the court has the proper authority to deal effectively with an abuse of its process or the compromise of justice through written law. This is also the position in *Heng Joo See v Ho Pol Ling* [1993] 2 SLR(R) 763 where Punch Coomaraswamy J held at [24]–[25] that:

> 24 Master Jacob describes the inherent [power] "as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them".
>
> 25 He classifies cases in which this inherent power may be used by the summary powers of the court as falling into these four categories:
>
> (a) proceedings which involve a deception on the court, or are fictitious or constitute a mere sham;
>
> (b) *proceedings where the process of the court is not being fairly or honestly used but is employed for some ulterior or improper purpose or in an improper way*;
>
> (c) proceedings which are manifestly groundless or without foundation or which serve no useful purpose;
>
> (d) *multiple or successive proceedings which cause or are likely to cause improper vexation or oppression*.
>
> [emphasis added]

62 In my view, this case fell within the second and fourth categories listed by Coomaraswamy J. Exercising my inherent jurisdiction in favour of Boxsentry would have meant that I condoned Boxsentry's lackadaisical conduct. As mentioned at [57] of this judgment, it would further prejudice Eleven, which had conscientiously complied with the laws of Singapore and Germany in claiming against Boxsentry.

Eleven was not dilatory in its pursue of its claim

63 Boxsentry alleged that Eleven was dilatory in its conduct when it was pursuing its claim. This was totally baseless as Eleven had been pursuing its claim conscientiously through lawful means. It was Boxsentry that had placed obstacles in Eleven's way and made it difficult for Eleven to seek legal redress. In fact, it was my view that through its actions, Boxsentry had *in effect* obtained a partial stay against Eleven (see [48] above). When I balanced the rights and interests of Boxsentry and Eleven, my finding was that on the basis of fairness and justice, this appeal against the stay of the

proceedings had to be dismissed.

The summary judgment application

64 This part of my judgment will deal with the remaining appeal against the AR who had granted a summary judgment to Eleven to enforce its Berlin default judgment. I had also dismissed Boxsentry's appeal for the reasons that follow.

The AR's reasons for granting summary judgment to Eleven

65 The AR below agreed to grant Eleven summary judgment on the strength of the Berlin default judgment. He accepted the evidence provided by Dr Klaus that there was proper service of the Berlin SOC, the Berlin Judicial Order, and the Berlin default judgment under German law. The AR was also of the view that the Berlin default judgment was final and conclusive between the parties. [note: 50]

66 At the hearing below, Boxsentry had raised the fraud exception and sought to deny the enforcement of the Berlin default judgment. It alleged that the Berlin default judgment was obtained fraudulently as the eXpurgate service was defective and that fact had not been raised to the Berlin court. This was denied by Eleven.

67 The AR held that the allegation was contained in emails which were in Boxsentry's possession when the Berlin legal proceedings were commenced. Boxsentry could have produced them if it had chosen to respond to the Berlin legal proceedings. Therefore the emails did not constitute fresh evidence and the fraud exception could not stand. [note: 51] Since Boxsentry did not raise the public policy exception and had also abandoned its argument on the breach of natural justice exception, the AR held that the Berlin default judgment was recognisable and enforceable at common law. Therefore, he granted Eleven's application for summary judgment. [note: 52]

Boxsentry's submissions

68 On appeal, Boxsentry's case was that Eleven had not proven that it was entitled to summary judgment. This was because there were triable issues that would be more suitably determined at trial. Alternatively, there was a considerable degree of complexity and detail which went against Eleven's case for summary judgment. Lastly, the present proceedings ought to be adjourned pending the Berlin appeal. [note: 53]

Triable issues were present

69 Boxsentry submitted that the following triable issues arose for determination.

(I) The Berlin default judgment was not final and conclusive on the merits

70 First, Boxsentry submitted that the Berlin default judgment could not be final and conclusive on its merits. This was because it was obtained as a default judgment and no arguments had presented on the merits of Eleven's claim. Second, the Berlin court had not made findings on the merits of the case. [note: 54]

71 For the above two reasons, Boxsentry submitted that the present case was distinguishable from *Hong Pian Tee v Les Placements Germain Gauthier Inc* [2002] 1 SLR(R) 515 ("*Hong Pian Tee*") and *Bellezza Club Japan Co Ltd v Matsumura Akihiko and others* [2010] 3 SLR 342 ("*Bellezza*") as those

cases did not deal with the enforcement of default judgments. [note: 55] Those were also the reasons why Eleven could not assert that the matter ought not to be re-litigated since it had never been litigated in the first place. [note: 56]

(II) The Berlin default judgment had been procured by fraud

72 Boxsentry next submitted that the Berlin default judgment had been procured by fraud. According to Dr Czychowski, Eleven had failed to give full and frank disclosure of the background facts in obtaining the Berlin default judgment. Eleven had also suppressed facts in order to obtain the Berlin default judgment against Boxsentry. Those actions constituted fraud under German law. [note: 57]

73 Additionally, Boxsentry submitted that Eleven had erred in its interpretation of *Hong Pian Tee* and *Bellezza*. In its view, Eleven had taken the position that allegations of fraud must be based on evidence which arose subsequent to the grant of the foreign judgment. However Boxsentry submitted that the approach was wrong. In its view, those cases indicated that foreign judgments could be challenged on the ground of fraud when: [note: 58]

(a) fresh evidence was uncovered;

(b) the defendant had failed to uncover the fresh evidence earlier despite his reasonable diligence in doing so; and

(c) the fresh evidence would have made a difference in the eventual outcome of the case.

On that basis, Boxsentry submitted that it was not seeking to introduce the same evidence of fraud presented in the Berlin Regional Court but rather, it was the first time that it was presenting such evidence. Therefore, the Singapore court was not precluded from making a finding that the Berlin default judgment was tainted by fraud. [note: 59]

74 Third, Boxsentry submitted that it had recently uncovered a new piece of evidence which could not have been obtained previously even with reasonable diligence. Boxsentry further submitted that an adjournment ought to be granted at the very least pending the Berlin appeal.

(III) The Berlin default judgment had been obtained in breach of natural justice

75 Boxsentry submitted that the Berlin default judgment was obtained in breach of natural justice as Boxsentry did not have the opportunity to present its case. Additionally, the court papers had been served improperly and that constituted one of the restrictions on the registration of Commonwealth judgments in s 3(2)(*c*) of the Reciprocal Enforcement of Commonwealth Judgments Act (Cap 264, 1985 Rev Ed) ("RECJA"). In Boxsentry's view, that restriction should similarly apply to the recognition and enforcement of foreign judgments under the common law. [note: 60]

Complex and conflicting issues of fact were present

76 Boxsentry's next submission on appeal was that there were complex and conflicting issues of fact which militated against the grant of summary judgment. Instead, since there were complex and conflicting issues of fact, unconditional leave to defend the action should have been granted. [note: 61] First, Boxsentry submitted that the "sheer length and volume of the affidavits filed by the parties

speak of the complex issues of fact involved". The issues related to the PA, its breach and the service of the documents in the Berlin legal proceedings. [note: 62]

77 Second, it was Boxsentry's position that there were defects in the eXpurgate service. It alleged that the defects were caused by Eleven after the PA was signed which rendered the eXpurgate service unfit for use. [note: 63] Whilst it was true that Boxsentry had tested the eXpurgate service before signing the PA, Eleven had total control over the eXpurgate service and it could change the algorithms or methodology at any time. Therefore, the testing of the service was irrelevant if it could be changed so readily. [note: 64]

Eleven's submissions

The Berlin default judgment is final and conclusive

78 Eleven responded by submitting that the Berlin default judgment had satisfied the criteria for enforcement under the common law. It was undisputed that the Berlin default judgment was a foreign judgment given *in personam* by a court of competent jurisdiction and for a definite sum of money. [note: 65] It was final and conclusive, notwithstanding the fact that it was a default judgment. This would be compliant with the guidelines in *Bellezza* which had adopted the following test for determining finality (at [14]):

> The test of finality is the treatment of the judgment by the foreign tribunal as *res judicata*. 'In order to establish that [a final and conclusive] judgment has been pronounced, it must be shown that in the court by which it was pronounced, it conclusively, finally, and forever established the existence of the debt of which it is sought to be made conclusive evidence in this country, so as to make it *res judicata* between the parties.' *A foreign judgment which is liable to be abrogated or varied by the court which pronounced it is not a final judgment*. [emphasis added]

79 Default judgments have been held to be final and conclusive (*Vanquelin v Bouard* (1863) 15 CB (NS) 341). But to determine the issue of finality, it is necessary to have regard to evidence of foreign law: *Carl Zeiss Siftung v Rayner & Keeler Ltd (No 2)* [1967] 1 AC 853 at 919. Dr Klaus's evidence was that the Berlin default judgment was final and conclusive. His evidence had not been challenged on this point. [note: 66]

The exceptions to the enforcement of the Berlin default judgment did not apply

80 Eleven also submitted that none of the three exceptions to enforcement of the Berlin default judgment applied. The public policy exception had not been relied on while the breach of natural justice exception was neither pursued in the affidavits which were filed in respect of SUM 6024 nor at the hearing below. The main contention was with regards to the fraud exception, which Boxsentry submitted should apply to bar enforcement (see above at [72]). [note: 67]

(I) The requirements in *Hong Pian Tee* had not been met

81 Eleven submitted that this court should not consider the merits of Boxsentry's fraud allegations. *Hong Pian Tee* was clear that an allegation of intrinsic fraud should not be entertained when the evidence was available to the parties at the time of the earlier foreign proceedings. Since the evidence that Boxsentry was relying on had existed when the Berlin legal proceedings were commenced, the fraud allegations should not be entertained as Boxsentry had made a conscious

choice not to defend the Berlin action. [note: 68]

82 Second, Eleven submitted that it had not suppressed any facts in obtaining the Berlin default judgment. It had been upfront with the Berlin Regional Court as it had stated in the Berlin SOC that Boxsentry had previously alleged that there were defects in the eXpurgate service. [note: 69]

83 Third, the AR had found that the material was unlikely to make any difference to the outcome of the Berlin proceedings as they merely reflected isolated incidences of the eXpurgate service's failure. [note: 70] Therefore Boxsentry's allegation of fraud was baseless and unsustainable.

(II) Boxsentry's receipt of bad legal advice was a bare allegation and irrelevant

84 Eleven submitted that Boxsentry's allegation that it did not respond to Eleven's actions in Berlin because of bad legal advice was a bare assertion. Boxsentry had neither waived legal advice privilege nor shown evidence to support its allegation. [note: 71] The receipt of wrong legal advice was a matter between Boxsentry and its lawyers. It should not affect Eleven's rights. [note: 72] If it was true that Boxsentry received wrong legal advice, Boxsentry would not have remained silent for nearly three years. [note: 73] Therefore the fraud exception did not apply.

(III) Boxsentry's allegation of the eXpurgate software's defectiveness was baseless

85 Finally, Eleven submitted that Boxsentry's allegation with respect to the defectiveness of the eXpurgate's software had no merit for the following reasons: [note: 74]

(a) Boxsentry had not produced any evidence of the alleged defects in the eXpurgate service. Its allegation of defects and fraud rested on one isolated incident in which Eleven acknowledged there was misclassification. There was no evidence that other customers had been affected by the misclassifications of emails by the eXpurgate service. Almost six months after the PA's commencement, Boxsentry sent an email to thank Eleven for its support. No mention was made about the eXpurgate service being defective.

(b) There was no concealment of facts by Eleven as it had raised the issue of the PA's termination and the allegation of defects in the eXpurgate service by Boxsentry in the Berlin SOC, which was sent to Boxsentry.

(c) Boxsentry paid for first and second quarters of the first year without any protest, objection and/or qualification. It also did not demand a refund of the payments made or bring a counterclaim for them.

(d) There was a gap of more than two months between the time that Eleven first asked for the third quarter payment and the point at which Boxsentry sought to terminate the PA. If the service was truly defective, it would have raised them earlier.

(e) Boxsentry tested the eXpurgate service for about seven months prior to signing the PA. It would not have entered into the PA if it was as defective as it said it was. It continued to use the eXpurgate service for about one year and eight months after it purportedly terminated the PA.

(f) Boxsentry did not respond when Eleven tried to find out what the defects were. Furthermore the allegations of Boxsentry were inconsistent with the evidence tendered.

Boxsentry alleged that there were defects from the inception of the PA but it had only tendered evidence showing misclassified emails arising from 2 October 2008 or later.

(g) Boxsentry did not raise any issues with respect to the eXpurgate service when Eleven commenced the Berlin legal proceedings. It also did not raise any issues after the Berlin default judgment was entered against it despite having been personally served with the judgment.

86 Therefore Boxsentry's allegation of fraud was baseless and unsustainable.

My decision on the summary judgment application

87 In my judgment, the Berlin default judgment had not been procured by fraud. Therefore, Boxsentry's appeal must be dismissed. Before giving the reasons for my decision, I shall first deal with the burden of proof required in an application for summary judgment.

The burden of proof for a summary judgement

88 The parties agreed that the burden of proof was on Eleven to prove on a *prima facie* basis before the court would grant it a summary judgment in the enforcement of the foreign judgment. Boxsentry only had to show that it had a fair or reasonable chance that there was a real or *bona fide* defence: *Associated Development Pte Ltd v Loong Sie Kiong Gerald* [2009] 4 SLR(R) 389 at [22]. Thus Boxsentry had to show that there was a triable issue or the need for certain apposite issues to be determined at trial: *Tulip Furniture Enterprise Pte Ltd v Roberto Building Material Pte Ltd* [1997] SGHC 114 at [7].

89 In the context of the enforcement of foreign judgments at common law, it is trite law that the foreign judgment must be final and conclusive on the merits of the case. *Hong Pian Tee* set this out well at [12]:

> … [I]t is settled law that a foreign judgment *in personam* given by a foreign court of competent jurisdiction may be enforced by an action for the amount due under it so long as the foreign judgment is final and conclusive as between the same parties. The foreign judgment is conclusive as to any matter thereby adjudicated upon and cannot be impeached for any error, whether of fact or of law: *Godard v Gray* (1870) LR 6 QB 139. *In respect of such an action, an application for summary judgment may be made on the ground that the defendant has no defence to the claim*: *Grant v Easton* (1883) 13 QBD 302. The local court will only refrain from enforcing a foreign judgment if it is shown that the plaintiff procured it by fraud, or if its enforcement would be contrary to public policy or if the proceedings in which the judgment was obtained were opposed to natural justice … [emphasis added]

Having established the legal position with respect to summary judgments in the context of enforcing foreign judgments, I shall proceed to examine the appeal brought by Boxsentry and assess whether it was meritorious.

There was no breach of natural justice

90 Boxsentry in its written submissions submitted that there was a breach of natural justice if there was no hearing on the merits or improper service of the court documents. However, it did not pursue this argument at the hearing before me. [note: 75] Nevertheless, I found that there was no breach of natural justice as the relevant legal documents had been properly and correctly served on Boxsentry. It was Boxsentry that chose not to respond and sat on its legal rights. Therefore that

allegation was without merit.

The Berlin default judgment was final and conclusive

91 The parties' disagreement as to the final and binding nature of the Berlin default judgment was more apparent than real. It centred on the fact that it was a default judgment which was not granted on the merits of the case. Boxsentry's position was that because the merits of the case were not tried, the judgment was not final and binding on Boxsentry. Thus it could not be enforced in Singapore (see [69] above). Eleven's position was that the judgment had fulfilled the criteria as set out *Bellezza* and hence, enforceable (see [79] above).

92 In my view, the Berlin default judgment was final and binding on Boxsentry. The test for finality and conclusiveness was not whether the decision was made on the merits of the case but on whether it could be reopened by the court that granted the judgment. Boxsentry's contention was not supported by the local jurisprudence. Default judgments have been recognised as final and conclusive, even though the merits of the case had not been examined. As commented in *Halsbury's Laws of Singapore* vol 6(2) (Butterworths Asia, 2013 Reissue) ("*Halsbury's Laws of Singapore*") at paras 75.157–75.158:

> The judgment must be final and conclusive under the law of its originating jurisdiction; the judgment must be *res judicata* between the parties under that law, ie, it must make a final determination of rights between the parties. A judgment is not final and conclusive in this sense if it can be re-opened by the same tribunal, or if the tribunal can alter its terms, or of there is another body, not being an appellate or supervisory body, that can override the decision of the tribunal. …
>
> …
>
> *A default judgment can be final and conclusive, even though it may be liable to be set aside in the same court, so long as it satisfies the general test of finality. Finality of a default judgment is tested by its effect under the law of the originating jurisdiction, so that it is necessary to determine the effect of the default judgment under the foreign law*. If it has been given the effect of finality until set aside, it will be regarded as a final and conclusive judgment, but if it is subsequently set aside in the foreign jurisdiction, that can be a ground for setting aside a summary judgment made in the enforcing forum entirely on the basis of the foreign judgment. …
>
> [emphasis added]

93 Eleven's expert on German law, Dr Klaus, stated that the Berlin default judgment was final and conclusive as to the merits. His view was that under ss 276 and 331 para 3 of the *Zivilprozessordnung* ("ZPO"), the Berlin Regional Court was able and entitled to issue a default judgment without an oral hearing after the time period for Boxsentry to file its defence had lapsed. [note: 76] Under s 338 and 339 of the ZPO, Boxsentry was granted four weeks to object to the Berlin default judgment, during which the Berlin default judgment would only be provisionally enforceable. [note: 77] It failed to do so, and thus, the judgment became final and conclusive which could be enforced. [note: 78]

94 Dr Czychowski disagreed on the basis that in Germany, a plaintiff was fraudulent if he had pleaded wrong or incomplete facts before the defendant had time to respond. [note: 79] Therefore the Berlin default judgment was unenforceable in Germany and should not be enforced in Singapore.

95 In my view, there was no real dispute as to the judgment's finality. Dr Klaus and Dr Czychowski both agreed that Berlin default judgment was final and conclusive. The only difference was that Dr Czychowski opined that fraud would vitiate enforceability of the judgement. In this case there was no evidence of fraud by Eleven when it obtained the Berlin default judgment. I shall elaborate in greater details when I deal with the issue of fraud below. Thus this allegation also had no real merit and I was satisfied that the Berlin default judgment was final, conclusive and binding on Boxsentry.

The Berlin default judgment was not obtained by fraud

96 One of the most important issues was whether the Berlin default judgment was obtained by fraud. If there was fraud, the Berlin default judgment would not be enforced nor would it be a suitable case for summary judgment.

(I) Fraud and foreign judgments

97 The issue of fraud for the purposes of resisting the recognition and enforcement of foreign judgments was discussed in the Court of Appeal case of *Hong Pian Tee*. In that case, the Court of Appeal departed from the traditional English position in *Abouloff v Oppenheimer & Co* (1882) 10 QBD 295 ("*Abouloff*") and instead, adopted the Canadian-Australian approach laid down in *Jacobs v Beaver* (1908) 17 OLR 496 ("*Jacobs*") and *Keele v Findley* (1990) 21 NSWLR 444. As the facts of *Hong Pian Tee* are similar to the present case, it is helpful to examine them in greater detail.

98 In *Hong Pian Tee*, the respondent had commenced an action against the appellant in Canada and the appellant had been held liable. Later, the respondent sought to enforce the Canadian judgment in Singapore and it obtained a summary judgment from Choo Han Teck JC (as he then was). Dissatisfied with the outcome, the appellant appealed against Choo JC's decision and the issue on appeal was whether the Canadian judgment was obtained by fraud or not. In dismissing the appeal, Chao Hick Tin JA held that the English approach in *Abouloff* was undesirable in that it encouraged endless litigation (at [27]). He therefore restricted the fraud exception to the following circumstances (at [30]):

> … [W]here an allegation of fraud had been considered and adjudicated upon by a competent foreign court, the foreign judgment may be challenged on the ground of fraud only where fresh evidence has come to light which reasonable diligence on the part of the defendant would not have uncovered and the fresh evidence would have been likely to make a difference in the eventual result of the case. …

99 The approach adopted by *Hong Pian Tee* differentiated between *extrinsic* and *intrinsic* fraud. If the former was being alleged, it would not be subject to the same stringent safeguards as the latter, where the claimant must show that the evidence was (a) newly discovered in that it could not have been obtained with reasonable diligence at trial; and (b) so material that its production at the trial would have affected the result: at [19].

100 The parties were at odds as to what constitutes *extrinsic* and *intrinsic* fraud. Eleven opined that Boxsentry's case was built on intrinsic fraud as Boxsentry had submitted that Eleven had failed to give full and frank disclosure of the background facts of the case to the Berlin court. [note: 80] Having heard the evidence and the law, my finding was that the fraud sought to be raised by Boxsentry appeared to be extrinsic rather than intrinsic.

(II) Boxsentry alleged extrinsic fraud and not intrinsic fraud

101 The Court of Appeal in *Hong Pian Tee* at [21] discussed intrinsic and extrinsic fraud as held in *Jacobs*. Intrinsic fraud related to fraud which was "collateral or extraneous, and not merely the fraud which is imputed from alleged false statements made at the trial, which were met by counter-statements by the other side, and the whole adjudicated upon by the Court and so passed on into the limb of estoppel by the judgment" (see *Jacobs* at 505) while extrinsic fraud was described as "situations where the judgment went against the defendant by fraud of the judgment creditor, *eg*, where the defendant had never been served, or the suit had been undefended without the defendant's default, or the defendant had been fraudulently persuaded or deceived to allow the judgment to go by default, or some other fraud to the defendant's prejudice committed or allowed in the proceedings of the foreign court": *Halsbury's Laws of Singapore* at para 75.228. *Dicey, Morris & Collins on the Conflict of Laws* (Lord Collins of Mapesbury gen ed) (Sweet & Maxwell, 15th Ed, 2012) at p 727 further gives examples of what is meant by extrinsic fraud: "…whether the fraud is extrinsic, e.g., consists in bribing witnesses, or intrinsic, e.g., consists in giving or procuring of perjured or forged evidence."

102 The Supreme Court of Canada has also described the distinction as between fraud going to the jurisdiction of the court (extrinsic fraud) and fraud going to the merits of the judgment (intrinsic fraud): *Beals v Saldanha* [2003] 3 SCR 416 ("*Beals*") at [51]. In its view:

> 51 It is simpler to say that fraud going to jurisdiction can always be raised before a domestic court to challenge the judgment. On the other hand, the merits of a foreign judgment can be challenged for fraud only where the allegations are new and not the subject of prior adjudication. Where material facts not previously discoverable arise that potentially challenge the evidence that was before the foreign court, the domestic court can decline recognition of the judgment.

103 It is therefore evident that the distinction between intrinsic and extrinsic fraud has been drawn along the lines of whether the fraud took place within or outside the trial. This distinction can be attributed to the history of English legal development. Traditionally, common law courts would only treat a judgment as void for fraud based on collusion and other extrinsic fraud, ignoring the evidence given at trial. The courts of equity however were more willing to examine whether judgments were obtained by false evidence: D M Gordon, "Fraud or New Evidence as Grounds for Actions to Set Aside Judgments–I" (1961) 77 LQR 358 at p 366 and D M Gordon, "Fraud or New Evidence as Grounds for Actions to Set Aside Judgments–II" (1961) 77 LQR 533 ("Fraud or New Evidence II") at p 533. The following passage from Fraud or New Evidence II at p 555 provides a good analysis as to the practical differences between alleging extrinsic and intrinsic fraud:

> One important factor in fraud actions is whether the fraud set up is extrinsic, or is false evidence that produced the judgment. In all cases, the plaintiff must begin by producing his new evidence, and by showing that this is newly-discovered and not discoverable before by exercise of diligence. Unless this new evidence is strong and convincing, the court may dismiss the action at once. …
>
> In a case of extrinsic fraud, such as *bribery of a solicitor, counsel or witnesses, or collusion with a representative party to the prejudice of beneficial interests*, even though the principle is accepted that fraud to be remediable must be shown to have brought about the judgment attacked, the court may well dispose of the case on a hearing in which the fact of the fraud is the only point tried, and on making a finding of fraud the court goes no further, but reverses the judgment attacked. In such an event, the court restores the parties to their original positions before the first judgment, without prejudice to the right of the loser to try for another judgment in a fresh action, if he sees fit. This means that the court presumes that the fraud proved contributed to the judgment reversed; in most cases of extrinsic fraud it would be impossible to

trace the connecting links between the fraud and the judgment following, even if the same judge sat without a jury in both trials.

But this course could rarely, if ever, be appropriate in a review based on intrinsic fraud, and particularly perjury. As James LJ has pointed out, in most contested actions a certain amount of perjury goes on, perhaps on both sides, the judge knowing that some person or persons must be lying; and because on review some particular piece of evidence on the first trial appears to have been false, it does not follow that the judgment should be presumed to have been produced by it. So in general review calls for a hearing in which both the old and the new evidence is weighed together.

[emphasis added]

104 In my view, Boxsentry's fraud allegation was premised on Eleven's failure to give full and frank disclosure of the background facts to the Berlin Regional Court. This was purportedly done so that the Berlin default judgment could be obtained unfairly against Boxsentry. It appeared to be an allegation of extrinsic fraud and not intrinsic fraud since it was an allegation that Eleven fraudulently sought to mislead the Berlin court.

(III) There was no extrinsic fraud on the facts

105 I found that there was no extrinsic fraud. There was nothing to suggest that Eleven had sought to deceive the Berlin courts. The evidence showed that Eleven had stated in the Berlin SOC that Boxsentry had made allegations regarding the eXpurgate service. [note: 81] Eleven had annexed to the Berlin SOC its email dated 20 November 2008 to Boxsentry and the latter's email to Eleven dated 15 December 2008. Those emails related to the termination of the PA and Boxsentry dissatisfaction of eXpurgate service. If Eleven had the intention to deceive the Berlin Regional Court, what was the point of saying that and hurting its own chances of succeeding in the German action? Eleven mentioned those facts as it was honest with the Berlin court. I thus hold that the allegation of extrinsic fraud made by Boxsentry was without merit.

106 I noted as well that in the Berlin Regional Court's decision rendered on 13 May 2014, the court had held that Eleven had disclosed all the facts relating to the allegations of the eXpurgate service being defective. Therefore its allegation that the Berlin default judgment was procured by fraud was groundless. The Berlin court had also found that there were no circumstances which would lead to the enforcement of the Berlin default judgment being contrary to public policy. Thus I found that the present proceedings were merely desperate and weak attempts to set aside a valid and legitimate judgment.

(IV) There was no intrinsic fraud on the facts

107 I earlier held at [100] that the fraud raised by Boxsentry was in fact extrinsic fraud. But if it was intrinsic fraud, Boxsentry would have needed to show me that new evidence had surfaced since the Berlin default judgment. I noted that in *Beals*, the Supreme Court of Canada had held that:

53 Although *Jacobs*, supra, was a contested foreign action, the test used is equally applicable to default judgments. *Where the foreign default proceedings are not inherently unfair, failing to defend the action, by itself, should prohibit the defendant from claiming that any of the evidence adduced or steps taken in the foreign proceedings was evidence of fraud just discovered. But if there is evidence of fraud before the foreign court that could not have been discovered by reasonable diligence, that will justify a domestic court's refusal to enforce the*

judgment. [emphasis added]

108 Fraud or New Evidence II at p 538 also commented that:

> Perjury at a trial could in a sense be called intrinsic fraud, and perhaps other perjury, as in giving discovery, could be called extrinsic. But it seems more than doubtful whether any such distinctions have value. What the reviewing court is concerned with are the questions: *How strong is the probability that such perjury produced the judgment given? How strong is the probability that the evidence of perjury will convince the second court?* [emphasis added]

109 I was unconvinced that new evidence had surfaced. The new evidence sought to be relied upon was a brochure produced by Eleven. The brochure claimed that it was technically impossible to be 100% accurate in categorising spam. That was allegedly contrary to what Eleven had said in its contractual negotiations with Boxsentry. [note: 82] The latter also claimed that it could not obtain the brochure with "reasonable diligence" prior to the present action. I found that hard to believe. If it was a brochure, it would have been made easily available by Eleven to the world since it would have been used by Eleven for marketing purposes.

The merits of the substantive action were irrelevant

110 Lastly, I found that Boxsentry's submission that there were complex and conflicting facts to be decided was irrelevant to the grant of summary judgment. The case before me was not one on the merits, but one for the enforcement of a foreign decision. The parties had agreed in the PA to the exclusive jurisdiction of the Berlin courts and the application of German law to govern the PA (at [10] above). As such, the presence of complex and conflicting facts was not an issue to be determined by the Singapore court and I had no intention to usurp the position of the Berlin courts in determining factual issues such as the quality of the eXpurgate service.

Conclusion

111 In conclusion, I was of the view that RA 292 and RA 293 were unmeritorious. Accordingly, I dismissed both the appeals and ordered Boxsentry to pay Eleven the following:

(a) fixed costs of $5,000 for both appeals;

(b) $1,000 for the adjournment; and

(c) reasonable disbursements.

112 I further ordered Boxsentry to pay fixed costs of $5,000 for both RAs plus reasonable disbursements.

[note: 1] Minute sheet dated 22 August 2013.

[note: 2] Respondent plaintiff's bundle of documents and affidavits ("PBOD") at Tab 2, p 46.

[note: 3] PBOD at Tab 2, p 47.

[note: 4] PBOD at Tab 2, p 48.

[note: 5] PBOD at Tab 2, p 4, para 7.

[note: 6] PBOD at Tab 2, p 12, para 27.

[note: 7] PBOA at Tab 2, p 12, para 28.

[note: 8] PBOA at Tab 2, p 12, para 30.

[note: 9] PBOA at Tab 2, p 13 at para 31.

[note: 10] PBOA at Tab 2, p 13, at para 31.

[note: 11] PBOA at Tab 2, p 14 at para 32.

[note: 12] PBOA at Tab 2, p 14 at para 33.

[note: 13] PBOA at Tab 2, p 50.

[note: 14] PBOA at Tab 2, p 28 at paras 62 – 63.

[note: 15] PBOA at Tab 2, p 29 at para 65.

[note: 16] Respondent plaintiff's chronology of events, s/n 32.

[note: 17] Respondent plaintiff's chronology of events, s/n 33; defendant's written submissions for RA 293/2013 at para 18.

[note: 18] PBOA at Tab 14.

[note: 19] Letter from GSK Stockmann (Singapore) Pte Ltd dated 21 April 2014; see certified translation of the judgment of the Regional Court of Berlin.

[note: 20] Letter from Selvam LLC dated 21 August 2014 at para 1(f).

[note: 21] Minute sheet dated 22 August 2014.

[note: 22] Minute sheet dated 14 August 2013.

[note: 23] Df's written submissions for RA 292/2013 at paras 29 and 50.

[note: 24] Df's written submissions for RA 292/2013 at para 28.

[note: 25] Df's written submissions for RA 292/2013 at para 28.

[note: 26] Df's written submissions for RA 292/2013 at para 45.

[note: 27] Df's written submissions for RA 292/2013 at para 46.

[note: 28] Df's written submissions for RA 292/2013 at para 47.

[note: 29] Df's written submissions for RA 292/2013 at para 52.

[note: 30] Df's written submissions for RA 292/2013 at para 57.

[note: 31] Df's written submissions for RA 292/2013 at para 59.

[note: 32] Df's written submissions for RA 292/2013 at para 60.

[note: 33] Respondent pf's skeletal arguments at para 55.

[note: 34] Respondent pf's skeletal arguments at para 56.

[note: 35] Respondent pf's skeletal arguments at para 59.

[note: 36] PBOA at Tab 2, p 17 at para 38.

[note: 37] PBOA at Tab 2, p 17 at para 39.

[note: 38] PBOA at Tab 2, pp 17 – 18 at para 40.

[note: 39] PBOA at Tab 2, p 19 at para 42.

[note: 40] PBOA at Tab 2, p 20 at para 43.

[note: 41] PBOA at Tab 2, p 22 at para 47.

[note: 42] PBOA at Tab 2, p 22 at paras 48–49.

[note: 43] PBOA at Tab 2, pp 23 – 24 at para 51.

[note: 44] PBOA at Tab 2, pp 23 – 24 at para 51.

[note: 45] PBOA at Tab 2, p 25 at para 54.

[note: 46] Respondent plaintiff's chronology of events, s/n 21.

[note: 47] PBOA at Tab 2, pp 25 – 26 at para 55.

[note: 48] PBOA at Tab 2, p 26 at para 57.

[note: 49] PBOA at Tab 2, p 27 at para 59.

[note: 50] Minute sheet dated 14 August 2013.

[note: 51] Minute sheet dated 14 August 2013.

[note: 52] Minute sheet dated 14 August 2013.

[note: 53] Df's written submissions for RA 293/2013 at para 22.

[note: 54] Df's written submissions for RA 293/2013 at para 33.

[note: 55] Df's written submissions for RA 293/2013 at para 34.

[note: 56] Df's written submissions for RA 293/2013 at para 35.

[note: 57] Df's written submissions for RA 293/2013 at para 37.

[note: 58] Df's written submissions for RA 293/2013 at para 38.

[note: 59] Df's written submissions for RA 293/2013 at para 39.

[note: 60] Df's written submissions for RA 293/2013 at para 44.

[note: 61] Df's written submissions for RA 293/2013 at para 45.

[note: 62] Df's written submissions for RA 293/2013 at para 46.

[note: 63] Df's written submissions for RA 293/2013 at para 47.

[note: 64] Df's written submissions for RA 293/2013 at para 48.

[note: 65] Respondent pf's skeletal arguments at para 30.

[note: 66] Respondent pf's skeletal arguments at para 34.

[note: 67] Respondent pf's skeletal arguments at paras 36 – 37.

[note: 68] Respondent pf's skeletal arguments at para 42.

[note: 69] Respondent pf's skeletal arguments at para 52.

[note: 70] Respondent pf's skeletal arguments at para 44.

[note: 71] Respondent pf's skeletal arguments at para 45.

[note: 72] Respondent pf's skeletal arguments at para 48.

[note: 73] Respondent pf's skeletal arguments at para 46.

[note: 74] Respondent pf's skeletal arguments at para 50.

[note: 75] Minute sheet dated 22 August 2014.

[note: 76] PBOD at Tab 3, p 11 at para 11.

[note: 77] PBOD at Tab 3, p 14 at para 17.

[note: 78] PBOD at Tab 3, p 17 at para 23.

[note: 79] PBOD at Tab 7, p 4 at para 10.

[note: 80] Respondent pf's skeletal arguments at para 38.

[note: 81] PBOD at Tab 2, p 132.

[note: 82] Df's written submissions for RA 293/2013 at p 16.