Sarawak Timber Industry Development Corp and another *v* Asia Pulp & Paper Co Ltd [2013] SGHC 243

Case Number	: Originating Summons No 1075 of 2012 (Registrar's Appeal No 109 of 2013)
Decision Date	: 13 November 2013
Tribunal/Court	: High Court
Coram	: Judith Prakash J
Counsel Name(s)	: Wendy Lin and Benjamin Fong (WongPartnership LLP) for the appellants; Adrian Tan, Raymond Lam and Mohan Gopalan (Drew & Napier LLC) for the respondent.
Parties	: Sarawak Timber Industry Development Corp and another — Asia Pulp & Paper Co Ltd

Enforcement – Reciprocal Enforcement of Commonwealth Judgments Act

13 November 2013 Judgment reserved.

Judith Prakash J:

Introduction

1 This matter came before me as an appeal against the decision in Summons No 6372 of 2012 ("SUM 6372"). Asia Pulp & Paper Company Limited ("APP") had successfully applied by SUM 6372 to set aside the decision of the Assistant Registrar ("AR") to register an order made by a Malaysian Court under the Reciprocal Enforcement of Commonwealth Judgments Act (Cap 264, 1985 Rev Ed) ("the Act"). The appellants before me, the parties who applied to register the order, are Sarawak Timber Industry Development Corporation ("STIDC") and State Financial Secretary Incorporated ("SFS").

Background

2 On 20 September 2002, the High Court in Sabah and Sarawak, Malaysia ("Sarawak HC") made a winding up order in respect of a Malaysian company, Borneo Pulp & Paper Sdn Bhd ("BPP") and appointed a liquidator ("the Liquidator"). APP, a Singapore company, STDIC, and SFS were shareholders of BPP at that time.

3 About a year later, on 5 December 2003, the Liquidator applied for leave from the Sarawak HC to make a call on APP in the sum of RM117m in respect of unpaid share capital in BPP ("the SIC application"). On 25 August 2005, the Liquidator issued a report on the status of the liquidation of BPP ("Final Report"). The SIC application had not yet been heard at this time.

4 In the Final Report, the Liquidator reported that all of the creditors of BPP had been paid in full. The Liquidator also reported that on collection of all assets (including calls on contributories), there would be a surplus of RM41,821,029 which would be returned to the contributories. APP's share of this surplus would amount to RM25,092,617. The Liquidator noted that a debt of RM75,035,515 was due and owing from BPP to APP. As a result, a total amount of RM100,176,132 would have to be credited to APP in the final analysis.

5 Subsequently, the Liquidator took the view that the liquidation process could be hastened if

the total sum payable to APP was set off from the sum which was to be called from APP, with the balance of approximately RM16.8m payable by APP ("the Balance Payment") to be made payable to STDIC and SFS who were also entitled to the return of capital. The Balance Payment would be split between STDIC and SFS according to their respective shareholdings in BPP. Accordingly, the Liquidator filed a Notice of Motion on 30 August 2005 ("the NOM") seeking orders from the Sarawak HC to that effect.

6 In the event, the SIC application and the NOM were heard together on 31 May 2007 and decided on the same day as well. In respect of the SIC application, the Sarawak HC granted the Liquidator leave to make a call on APP for the amount of RM117m. The Liquidator had in fact sought a number of orders which were listed by the Sarawak HC in its judgment ("the SIC Judgment"):

> (1) that the said liquidator of [BPP] be at liberty to make a call on [APP] … for the total amount of RM117,000,000.00;
>
> (2) that in the event of failure by APP to settle the amount of RM117 million (*sic*), the liquidator is at liberty to charge APP interest at the rate of four centum per annum from the date of judgment to date of payment;
>
> (3) such further or other orders be made or given as this Honourable Court deem just; and
>
> (4) costs of and occasioned by this application be provided for.

The SIC Judgement also stated the grounds of the Liquidator's application:

> The grounds of this application are that:
>
> (a) the call is to satisfy the debts and liabilities of [BPP] …; and
>
> (b) to facilitate the adjustment of rights of the Contributories of [BPP] amongst themselves (APP being the only remaining contributory that has yet to pay its liability in respect of unpaid shares).

It is also relevant to note that before the Sarawak HC, APP challenged the SIC application on various grounds, including allegedly defective service of the SIC application, and on the basis that the SIC application was made in bad faith.

7 In the SIC Judgment, after the Sarawak HC rejected all of APP's objections, it considered the merits of the Liquidator's request for leave to make the call, and held:

> In the result I find that the Liquidator's application is properly made in the performance of his duties as Liquidator. There being no committee of inspection in this case, I grant the Liquidator leave to make the call as prayed for. I also order that in the event of failure by APP to settle the amount of RM117 million within 30 days of the call issued by the Liquidator, the Liquidator is at liberty to charge APP interest at the rate of four centum per annum from the date of judgment to date of payment. The Liquidator's costs of this application is to be taxed and paid by APP.

8 As for the NOM, the Sarawak HC made the following order ("the NOM Order"):

> … IT IS ORDERED that the prayers in the motion dated 30.8.2005 are hereby granted in consequence of this Honourable Court granting leave for the liquidator of Borneo Pulp & Paper Sdn Bhd to make a call on Asia Pulp & Paper Company Ltd for the sum of RM117,000,000.00 under the

Summons in Chambers dated 5.12.2003 in this matter as follows:-

(1) that leave be and is hereby granted for the liquidator to make a call on the unpaid capital of Borneo Pulp & Paper Sdn Bhd for the sum of RM117,000,000.00 with the consequential directions and/or orders that:-

(a) for the purposes of adjusting [BPP's] contributories' rights, the sum of RM117,000,000 be set off against a notional sum of RM100,176,132;

(b) that the rights of enforcement of the balance of RM16,823,868 be wholly and absolutely assigned to Borneo Pulp & Paper Sdn Bhd's other contributories [STDIC and SFS] respectively in the following proportions:-

Contributory	**Amount (RM)**
STDIC	12,641,765
SFS	4,182,103

(2) the liquidation costs and expenses as well as the Liquidator's remuneration as stated in the Statement of Accounts attached as Appendix 3 to the Liquidator's Final Report dated 25.8.2005 be approved;

(3) that consequent to the directions given on prayers (1) and (2) above, the said Liquidator be released and discharged and/or [BPP] be dissolved; and

(4) that subsequent to the order for release and/or dissolution, the books and records of the Company be destroyed within three (3) months from the date of such release and/or dissolution.

It can be seen from the language of the NOM Order that it was made in consequence of the SIC Judgment.

9 On 16 August 2007, the Liquidator served a call on APP for the sum of RM117m. APP did not make (and has not since made) any payment to STDIC and SFS as required under paragraph 1(b) of the NOM Order. Instead, it appealed against the Sarawak HC's decisions on the SIC application and NOM. Its appeal was subsequently dismissed by the Malaysian Court of Appeal ("Malaysian CA").

10 On 15 November 2012, STDIC and SFS commenced Originating Summons No 1075 of 2012 ("OS 1075") in Singapore to enforce their right to payment under paragraph 1(b) by applying to have the whole of paragraph (1) of the NOM Order registered under s 3(1) of the Act. There are three orders in paragraph (1) of the NOM Order which I shall refer to collectively as the "Relevant Order".

The AR's decision

11 On 15 November 2012, the AR granted orders in terms of OS 1075 which had been heard *ex parte*. APP then applied on 11 December 2012 to set aside the AR's decision. The AR heard the matter and set aside her order granting registration of the Relevant Order, primarily on the ground that the

Relevant Order was not a judgment for a sum of money. Although APP's liability to pay crystallised at the time the call was made, the Relevant Order preceded the call. As such, the Relevant Order, at the time of its issuance, did not contain an order for a sum to be payable. The AR rejected APP's submission that STDIC and SFS should have applied for an extension of time to apply for registration. She found they had provided acceptable reasons why the registration application was taken out only after the expiration of the 12-month time period set out in s 3(1) of the Act.

Issues

12 On the appeal by STDIC and SFS against the setting aside of the registration order, the parties focused their submissions on the following issues:

(a) whether the Relevant Order is capable of registration, *ie*, whether it is for a sum of money; and

(b) whether it was too late for STDIC and SFS to apply to register the Relevant Order.

Analysis

Application of the Act to Malaysian court judgments

13 Although not immediately apparent from the wording of the provisions of the Act, the Act extends to judgments from the superior courts of Malaysia. The subsidiary legislation under the Act, the Reciprocal Enforcement of Commonwealth Judgments (Extension) (Consolidation) Notification (G N No S 151/1925, 1999 Rev Ed), declares that the Act is extended to judgments obtained in the superior courts of the Commonwealth specified in the Schedule. Malaysia is listed as one of the countries in the Schedule. It was common ground that the Sarawak HC is a superior court of Malaysia.

Whether the Relevant Order is for a sum of money

14 The type of judgments and orders which may be registered under the Act is defined by s 2(1) of the Act as:

> … any judgment *or order* given or made by a court in any civil proceedings, whether before or after the passing of this Act, whereby *any sum of money is made payable*, and includes an award in proceedings on an arbitration if the award has, in pursuance of the law in force in the place where it was made, become enforceable in the same manner as a judgment given by a court in that place … [emphasis added]

It was common ground that a contributory's liability is a debt due but not payable until such time as a call is made to enforce the liability. In other words, *until* a call is made, there is no sum which shall be payable by the contributory. It was also common ground that the making of a call by the Liquidator required leave of the court.

15 It was also clear that the liability of a contributory for unpaid shares is *payable* when a call is made. This is established by s 215 of the Malaysian Companies Act 1965 (1973 Rev Ed):

> 215. The liability of a contributory shall create a debt accruing from him at the time when his liability commenced *but* ***payable*** *at the times when* ***calls are made*** *for enforcing the liability*. [emphasis added in italics and bold italics]

The legal experts engaged by the parties to provide expert testimony on Malaysian law – Mr Lambert Rasa-Ratnam ("Mr Rasa-Ratnam") for APP and Mr Leong Wai Hong ("Mr Leong") for STDIC and SFS – were in agreement on this point.

16 The making of a call by a liquidator is in turn governed by Rule 74 of the Malaysian Companies (Winding Up) Rules 1972 ("Malaysia Winding Up Rules") which reads:

> (1) An application to the Court for leave to make any call for a purpose authorised by the Act, shall be made by summons …
>
> (2) The copy of the summons served on each contributory shall contain a statement of the amount claimed as due from that contributory.
>
> (3) Upon the hearing of the summons the Court may in Form 48 grant leave to the liquidator to make the call and also order the payment by the contributories respectively of the amounts due in respect of the call within a time to be named in the order.

It is worth noting that provisions similar to the above can also be found in the Singapore Companies Act (Cap 50, 2006 Rev Ed) and Companies (Winding Up) Rules (Cap 50, R 1, 2006 Rev Ed).

17 The main question is this: does paragraph 1(b) of the Relevant Order impose on APP an obligation to pay a sum of money to STDIC and SFS? The answer to this question lies in the interpretation of the key phrase in paragraph 1(b), *viz*, "rights of enforcement" (see [8] above).

Rights of enforcement

18 Counsel for APP, Mr Adrian Tan ("Mr Tan"), drew attention to the fact that under Rule 74 of the Malaysia Winding Up Rules, if the court wishes to order payment by a contributory after granting leave to the liquidator to make a call, the court can do so by Form 48. Mr Tan stressed that Form 48 is an important form because it ends with the words:

> And it is ordered that each such contributory do, on or before the day of …, 19 …, pay to the (Official Receiver and) liquidator of the company, the amount which will be due from him or her in respect of such call.

Since the NOM Order – and by extension the Relevant Order – did not contain these words, it can be inferred that the Sarawak HC had not intended to and did not order the payment of any call.

19 With respect, that is not convincing. The fact that the court order did not mirror the language in the statutory form does not mean that no order for payment was made. On its plain wording, Rule 74(3) does not state that the court can *only* order payment under Form 48, and not through or under any other means. Indeed, Mr Rasa-Ratnam did not go as far as to urge that any order for payment pursuant to an order granting leave to make a call *must* be made in Form 48.

20 Moreover, the Liquidator was not, through the SIC application *and* the NOM seeking payment for *himself qua* liquidator as would be the normal course of events. The essence of the Liquidator's intentions as embodied in the SIC application and the NOM, as noted by the Sarawak Court (see [6]–[7] above) was:

> (a) in respect of the SIC application, to facilitate the adjustment of rights of the contributories "amongst themselves"; and

(b) in respect of the NOM, in consequence of the court's grant of leave to the Liquidator to make the call in the SIC application, to assign the rights of enforcement to the other contributories.

21 The fact that the NOM Order was made as a consequence of the orders made in the SIC Judgment is critical. A better appreciation of the background leading to the NOM Order will illustrate the impossibility of divorcing the two applications. In his affidavit filed in support of the NOM, the Liquidator explained:

> 8. I state that the application for leave to make a call on APP for the sum of RM 117,000,000 [the SIC application] is not fixed for decision …
>
> 9. As highlighted in my Final Report, there are uncertainties as to whether APP will be able to make full payment on its liability …
>
> 10. Therefore, *and so as* ***not to needless (sic) protract the liquidation*** *of [BPP] further, I pray that this Honourable Court make directions for the grant of the [SIC application] with* ***subsequent*** *directions for the following*:
>
> (a) for the purposes of adjusting [BPP's] contributories rights, the sum of RM117,000,000 be set off against a notional sum of RM100,176,132 as set out in paragraph 25 of my Final Report …
>
> (b) that the ***rights of enforcement of the balance RM16,823,868*** *be wholly and absolutely assigned* to [BPP's] other contributories [*ie* STDIC and SFS] respectively *in the proportions attributable* ***as payable*** *to them* as set out in paragraph 25 of my Final Report …
>
> 11. Consequently and with reference to my Final Report, I state that upon such directions being given, there will not be any outstanding matters in [BPP's] liquidation.
>
> …
>
> [emphasis added in italics and bold italics]

22 Ostensibly, paragraphs 10(a) and (b) of the Liquidator's affidavit are substantially similar to paragraphs 1(a) and (b) of the Relevant Order. That is not a coincidence. The entire point of this exercise is beyond doubt. The Liquidator wanted to expedite the remainder of the winding up process. At this stage, the Liquidator had already addressed BPP's creditors in full, leaving only the position and rights of the contributories as the outstanding issue. At the heart of this was the unpaid capital owed by APP and the return of capital to the contributories. In the normal course of events, before BPP could be dissolved and the Liquidator discharged, the Liquidator would have to (a) apply for leave to make the call against APP; (b) make the call and wait for APP to make payment or take steps to enforce payment if it is not forthcoming; (c) pay APP the amount owed to it by BPP (see [3] above); (d) return the remaining surplus to all the contributories in accordance with their rights and interests in the company; and (e) take the necessary steps to dissolve the BPP.

23 The expedited route envisaged and taken by the Liquidator was to merge these five steps into the SIC application and the NOM. In one fell swoop, he would (a) ask for leave to make the call; (b) ask for a set off of the amount owed by BPP to APP (including the surplus amount payable to APP as a contributory) from the amount under the call payable to BPP which would produce a surplus in favour of BPP; (c) return the surplus capital to STDIC and SFS by assigning BPP's right to payment of the surplus amount to them; and (d) take the necessary steps to dissolve the BPP. In giving the

orders which it did, the Sarawak HC had effectively sanctioned the scheme conceived by the Liquidator. The Liquidator wanted to conclude the liquidation and extricate himself from this process which began in 2002. That the Sarawak HC discharged the Liquidator from his duties and dissolved BPP in paragraph 3 of the NOM Order is telling.

24 Apart from the Liquidator's affidavit filed in support of the NOM, the Liquidator's Final Report also evinces the same intention, *viz*, that the Liquidator's plan moving forward was to conclude the liquidation as efficiently as possible by assigning BPP's right to the Balance Payment to STDIC and SFS. The Final Report stated (at paras 29 and 30):

> 29. The Liquidator has realized so much of the property of [BPP] as can in his opinion be realized and save for the *adjustment of rights as between the contributories* set out above, there are no outstanding matter (*sic*) in relation to the liquidation of [BPP].
>
> 30. The *completion* of the liquidation is now subject to the following necessary order from Court:-
>
> (a) an order in respect of the *adjustment of contributories' rights and thereafter assignment of rights of enforcement*;
>
> (b) an order for release and discharge of the Liquidator and dissolution of [BPP];
>
> (c) an order for the approval of the remuneration, cost of solicitors and expenses of the Liquidator of [BPP] as set out in Appendix 3 hereto;
>
> (d) an order for the books and papers of [BPP] to be destroyed within three (3) months of the date of the Liquidator's release and discharge.
>
> [emphasis added]

25 Against this background, the flaw in Mr Tan's argument on the importance of Form 48 becomes apparent. The SIC Judgment and the NOM Order did not use Form 48 – and indeed could not have done so – because the Liquidator was not seeking payment to *himself* which would have been the consequence of using Form 48. The order which the Liquidator wanted, and which the Sarawak HC granted, was that the Balance Payment shall be made to STDIC and SFS. This was necessary for the Liquidator to achieve his objective of being discharged and concluding the liquidation. The Sarawak HC recognised this.

26 The complexion of the case becomes even clearer if the facts are tweaked slightly. Had the Liquidator not asked for his right to the Balance Payment to be assigned to STDIC and SFS, *ie*, to take the longer, more tortuous five step route described above at [22], paragraph 1(b) of the Relevant Order would have been worded differently. More specifically, the paragraph would, in all probability (though one cannot be sure) have been reworded to allow the Liquidator to claim the Balance Payment from APP. It would probably have used the language in Form 48. If that happened, there is no doubt that the Balance Payment would be *payable* as a sum of money to the Liquidator. As mentioned earlier, this was a point agreed to by both experts.

27 Mr Tan had an alternative argument. He emphasised repeatedly that the SIC Judgment and the NOM Order were, at best, orders granting leave to make a call which would not, without more, give rise to an obligation to make payment. The argument here is that quite apart from not using Form 48, the language in the SIC Order to "settle the RM117,000,000" is not an order for payment. Relying on

Mr Rasa-Ratnam, Mr Tan further submitted that on the authority of *In re Peter Lalor Home Building Co-operative Society Limited (in liquidation; Tuckman v Dunlop* [1958] VR 165 ("*In re Peter Lalor*"), making a call only creates a debt that is payable. Recovery of the same can only be enforced by a new action and not by any process of execution.

28 With respect, Mr Tan's arguments on both counts are misconceived. First, neither in Mr Rasa-Ratnam's opinions nor in Mr Tan's written submissions were there pinpoint references to the holdings in *In re Peter Lalor* which they claimed supported APP's case. The issue in that case was whether the liquidators of a society which was being wound up were time-barred from making the call, given that the society had, six years prior to liquidation, made a similar call. The court held (at 32–33) that when a call of unpaid capital is made by a liquidator in winding up proceedings, a new cause of action based on the provisions arises. This new cause of action was quite distinct from the cause of action which arose when the society itself made the call of the same capital. Hence, the liquidators were not time-barred from making the call. *In re Peter Lalor* is therefore not relevant to the present case.

29 Second and more importantly, Mr Tan's argument is inconsistent with the regime under Form 48. If it is possible for the court to order payment of a sum of money together with the granting of leave to make the call, which is the basis of his earlier alternative argument that the Relevant Order did not contain the words in Form 48, then it should follow that even outside of Form 48, it is open to the court to order payment of a sum of money together with the granting of leave to make a call. Before me, it was not suggested that the only means of making a contributory liable for payment was by way of Form 48 and nothing else, and that the Sarawak HC had erred in that regard. Even if there had been such a suggestion, the fact that APP's appeal was dismissed by the Malaysian CA militates heavily against a Singapore court finding in favour of the suggestion.

30 The question comes back to whether the phrase "rights of enforcement" includes an order for APP to make payment of the Balance Payment to STDIC and SFS, which in turn depends on whether the phrase "APP to settle the amount of RM117 million" in the SIC Judgment is an order for APP to make payment to the Liquidator. In the context of the scheme conceived by the Liquidator and approved by the Sarawak Court (see [20]–[24] above), it would be consistent to interpret "APP to settle the RM117,000,000" as replicating the effect of Form 48, *viz*, giving the Liquidator a right to a sum payable, which would then be applied to set off the sum owing to APP, with the outstanding balance payable by APP to the Liquidator being the "rights of enforcement" under the Relevant Order assigned to STDIC and SFS. The phrase "rights of enforcement" is therefore not inconsistent with an order for payment of a sum of money.

31 Indeed, Ms Wendy Lin ("Ms Lin"), counsel for STDIC and SFS, asked a pertinent question which Mr Tan did not deal with – what could the Sarawak HC have been contemplating or intending if "rights of enforcement" in paragraph 1(b) did not mean the right assigned to STDIC and SFS to collect their respective payments? The only way out of this quandary for Mr Tan is to suggest that the Sarawak HC had made a null assignment; it had assigned a right which did not exist. Compelling reasons must be present before a Singapore court should construe a judgment of a friendly foreign nation as being a nullity. With respect, the present facts do not disclose such reasons.

32 Finally, Mr Rasa-Ratnam suggested that what was assigned was "the rights to enforce the call, if it was made but not paid". In his view, that entailed STDIC and SFS suing upon the debt payable by APP in Malaysia. If they obtained a favourable judgment, they could either enforce it in Malaysia or register it in Commonwealth countries. Perhaps STDIC and SFS could have taken that approach. However, it is unclear from Mr Rasa-Ratnam's opinion why enforcement should be limited to commencing an action upon the outstanding payment. The statutory right of the liquidator to make calls on unpaid capital is generally regarded as an *alternative* to an action at law against the

contributories for the same liability: Andrew Keay, *McPherson's Law of Company Liquidation* (Sweet & Maxwell, 2nd Ed, 2009) at paras 10.022–10.023. Therefore, if the Liquidator had already sought, obtained approval and made the call, it would seem a duplication to require STDIC and SFS being assignees of the Liquidator's right to payment under that call to then commence an action for the same liability.

Rule 77 in the Malaysia Winding Up Rules

33 For completeness, it may be necessary to flag out a peculiar provision in the Malaysia Winding Up Rules. It has been established that the power to make a call is granted by the court pursuant to Rule 74, and that Rule 74(3) states that the court may order payment by the contributory of the amount due (see [18] above). At the same time, there appears to be another provision which governs the enforcement of payment by the contributory after a call has been made. Rule 77 states:

> The *payment of the amount due* from each contributory *on a call* ***may*** be *enforced* by order of the Court in Form 54, to be made in Chambers on summons supported by an affidavit by the *liquidator* in Form 53. [emphasis added in italics and bold italics]

34 Rule 77 is interesting because it suggests a number of things. First, that it only applies when payment is already due from the contributory. Second, notwithstanding that payment is already due, the rule provides the liquidator with a specific means of enforcing that payment, without limiting the liquidator to that means as the permissive word "may" suggests. Third, the liquidator's affidavit in support of the enforcement application which is to be made in Form 53, contains the following paragraphs:

> 1. None of the contributories of the said company … have paid or caused to be paid the sums set opposite their respective names … which sums are the amounts *now due from them respectively under the call of [amount ordered under the call] per share, duly made under the Companies Act … dated the [day of the call]*.
>
> 2. The respective amounts or sums set opposite the names of such contributories … are the true amounts *due and owing* by such contributories respectively in respect of the said call.
>
> [emphasis added]

The words in Form 53 make clear that when the call is made, the sums claimed under the call are already "due", and that the application is taken out because the contributory has not "paid" the sums which are due.

35 Last but not least, the court's order upon an application in Rule 77 may be enforced by Form 54 which reads:

> **ORDER FOR PAYMENT OF CALL DUE FROM A CONTRIBUTORY**
>
> Upon the application of the liquidator … it is ordered that [the contributory] … do, on or before the day of … pay to the liquidator of the said company at his office … the sum of … such sum [or sums] being the amount [or amounts] due from the said [contributory] … in respect of the call of [amount ordered under the call] per share duly made, dated the [day of the call].
>
> …

36 While there are certain differences in the wording of Form 54 and Form 48, the two are undoubtedly similar. Both are orders for payment of certain sums – Form 48 is for amounts which *will be due* in respect of the call; Form 54 is for amounts which *are due* in respect of the call. Unfortunately, neither Mr Leong nor Mr Rasa-Ratnam shed much light on the interaction between the two forms. Be that as it may, the role of the Singapore court is not to construe foreign statutes which may or may not be applicable. The Singapore court's sole function is to determine whether the foreign judgment before it makes a sum of money payable. That is, strictly speaking, a matter of construing the judgment and what, from the Singapore court's perspective, the foreign court intended and did, and not a matter of construing the relevant applicable foreign legislation. In the light of the foregoing background and explanations as to why the SIC application and the NOM were framed as such in the Sarawak HC (see [19]–[26], [30]–[31] above), I hold that the Sarawak HC had intended by the Relevant Order to confer on STDIC and SFS the right to enforce the Balance Payment against APP. In these circumstances, the Singapore court should find the Relevant Order to be a judgment or order by which a sum of money is made payable.

The AR's justification for refusing to enforce

37 The final point which requires consideration is the AR's basis for refusing enforcement. Her quarrel with the Relevant Order was that at the time of issuance, it required a further action to be done, namely, the making of the call by the Liquidator. The difficulty with the AR's reasoning is that her very reasoning would also preclude the enforcement of a Form 48 order, for the very same reason that at the time of issuance of the Form 48 order, the liquidator would invariably not have made a call.

38 Assume for the moment that no assignment had taken place, and that the Liquidator had sought and received leave to make the call *and be paid* "on or before" a specific date, as provided for in Form 48. It stands to reason that the right to payment had arisen from the specific date stated in Form 48, and that a judgment giving effect to Form 48 would be enforceable as a money judgment.

Whether it is too late for STDIC and SFS to apply for registration

39 Section 3(1) of the Act provides that the judgment creditor may apply to the High Court "at any time within 12 months after the date of the judgment, or such longer period as may be allowed by the Court, to have the judgment registered in the Court". There is no question that STDIC and SFS are "late" in the sense that more than 12 months have elapsed since the NOM Order was made. However, it is equally beyond doubt that the mere expiry of the 12-month period does not preclude the registration of foreign judgment under the Act. The correct approach to take when faced with a late application to register a foreign judgment under the Act is set out in the Court of Appeal's decision in *Westacre Investments Inc v The State-Owned Company Yugoimport SDPR (also known as Jugoimport-SDPR)* [2009] 2 SLR(R) 166 ("*Westacre*") at [24]:

> In our view, when faced with a late RECJA application involving a delay which is not insubstantial (as in the present case, where there was a lapse of approximately six years and seven months from the date of the English Judgment before the Appellant applied to have that judgment registered in Singapore), it is plainly incumbent on the court to consider *all the circumstances of the case* - as mandated by s 3(1) of the RECJA – in determining whether it would be just and convenient to enforce the Commonwealth judgment in Singapore. This includes – but is not limited to – considering whether the delay has caused prejudice to the judgment debtor. Other factors which the court should take into account are (*inter alia*):
>
> (a) whether the judgment creditor can give a reasonable explanation for its delay in applying to

register the Commonwealth judgment;

(b) whether the judgment creditor has been reasonably diligent in seeking to enforce the Commonwealth judgment; and

(c) whether the judgment debtor has been obstructive.

In short, the question which the court must determine is: Where do the interests of justice lie, having regard to the factual matrix of the case?

40 In the light of *Westacre*, Mr Tan rightly acknowledged that the court may allow registration even after the expiry of the 12-month period if it would be just and convenient to allow registration. He contended that it was not just and convenient in the present case to allow registration as STDIC and SFS have not substantiated their claim that their ability to enforce against APP was due to difficulties in obtaining information about APP's financial position, including whether APP had assets in Singapore.

41 Ms Lin submitted that STDIC and SFS had legitimate reasons for their delay in registering the Relevant Order:

(a) APP had appealed against the Sarawak HC's decision on both the SIC application and the NOM. This appeal was only heard and dismissed by the Malaysian CA on 29 November 2010. APP then had one month, *viz*, 29 December 2010, to appeal against the appellate court's decision.

(b) Thereafter, STDIC and SFS were unsure if APP had sufficient assets globally – and not just in Singapore – which they could enforce against as there was little publicly available information about APP's assets.

42 Ms Lin also submitted that in any event, APP has not suffered any prejudice by reason of the delay. In *Westacre*, the Court of Appeal stated (at [37]) that the judgment debtor may establish prejudice if it can show that "it has changed its position as a result of or has been misled by the judgment creditor's inaction over a long period of time". Ms Lin submitted that APP has not even alleged that it has changed its position in consequence of the fact that STDIC and SFS had not sought to register the Relevant Order in Singapore either within 12 months of the NOM Order or the Malaysian CA's dismissal of APP's appeal. APP therefore has not demonstrated prejudice which would militate against registration.

43 On the one hand, it is difficult to see how STDIC and SFS have demonstrated that they had been reasonably diligent in seeking enforcement. The considerations set out in *Westacre* are (at [29]):

It is also important to bear in mind that the diligence of the judgment creditor should ordinarily be examined at two distinct levels: first, its efforts in enforcing the Commonwealth judgment in the primary jurisdiction where the judgment debtor's assets might be located; and, second (and more particularly), its endeavours to uncover those of the judgment debtor's assets which are or might be located in Singapore. If a judgment creditor is able to demonstrate reasonable diligence on both levels, a court would almost invariably be more inclined to allow rather than dismiss a late RECJA application. It would also be right to say that, typically, where the judgment creditor has been reasonably diligent in seeking to enforce a Commonwealth judgment, it would be difficult for the judgment debtor to establish prejudice arising from the judgment creditor's delay in applying to register that judgment under the RECJA *per se*, especially if the judgment debtor has been

trying to hide its assets from the judgment creditor.

44 Although STDIC and SFS asserted that they faced difficulty in obtaining information about APP's financial position, they have not shown in what way it was difficult, and the steps which they took nevertheless to try and uncover APP's assets either in Malaysia or Singapore. The only evidence which they adduced was three newspaper articles on APP's restructuring plans. This is also not a case where of APP having taken steps to "hide its assets" (*Westacre* at [29]) from STDIC and SFS. Indeed, no such allegation has been made.

45 On the other hand, APP has also not shown how it has been prejudiced by this late application for registration and enforcement. They have only made a bare assertion to that effect. This is a far cry from *Duer v Frazer* [2001] 1 WLR 919 ("*Duer*") where an order for execution of the judgment was only sought 16 years elapsed from the date of judgment. The court rejected the order which would have required the respondent to leave his house or surrender his possessions on the grounds that such a long time had passed and the respondent was now old and not in the best of health. *Duer* was cited in *Westacre* (at [34]) as an example of a situation in which a judgment debtor may rely on prejudice to resist late registration of a judgment.

46 On the whole and on balance, the interest of justice is probably tilted in favour of registration. The delay of approximately one year after the expiry of the 12-month time period while long is not inordinate. Moreover, although STDIC and SFS have not been as conscientious in seeking to locate APP's assets in Singapore as they could have been, it is fairly well-known that APP has been trying to restructure its huge debts. In 2002, an application in the Singapore courts was made by APP's creditors to place APP under judicial management. Amongst the observations made by the High Court and Court of Appeal when the matter went on appeal was that APP was insolvent to the tune of USD7bn, and that APP did not own any significant tangible assets or have any operations in Singapore: *Deutsche Bank AG and another v Asia Pulp & Paper Co Ltd* [2003] 2 SLR(R) 320 (CA) at [6]; [2002] SGHC 257 (HC) at [2]. Although that was some eight years ago, it would have taken time for APP to restructure its business and even then, without knowledge of any assets in Singapore, it would not have made sense for STDIC and SFS to take steps to enforce the NOM Order in Singapore. Even if STDIC and SFS could have done more, as the court in *Westacre* observed, "in the final analysis, the judgment creditor's lack of diligence in pursuing enforcement *should not usually in itself* be a reason for the court to dismiss a late RECJA application" [emphasis added]. In the absence of any strong prejudice, the Singapore court should give effect to the spirit of the Act which, as the Long Title states, is to "facilitate the reciprocal enforcement of judgments".

Conclusion

47 For the reasons given above, I allow the appeal of STDIC and SFS and re-instate the registration of the Relevant Order in the terms originally made. I will hear the parties on costs here and below.