Accent Delight International Ltd and another
v
Bouvier, Yves Charles Edgar and others

[2016] SGHC 40

High Court — Suit No 236 of 2015
Summonses No 1763 of 2015 and 1900 of 2015
Lai Siu Chiu SJ
18, 19, 25 August; 15, 16 September 2015; 24 February 2016

Conflict of laws — *Forum non conveniens*

17 March 2016 Judgment reserved.

Lai Siu Chiu SJ:

Introduction

1 Yves Charles Edgar Bouvier ("Bouvier") and Mei Investment Pte Ltd ("the second defendant") (hereinafter referred to collectively as "the two defendants") filed Summons No 1763 of 2015 ("Summons 1763") for a stay of proceedings of Suit No 236 of 2015 ("this Suit") commenced by Accent Delight International Ltd ("Accent") and Xitrans Finance Ltd ("Xitrans") (hereinafter referred to collectively as "the plaintiffs"). A similar application was taken out by the third defendant, Tania Rappo ("Rappo"), in Summons No 1900 of 2015 ("Summons 1900"). Both summonses (hereinafter referred to collectively as "the Summonses") were heard together by this court.

2 The Summonses were only two of many applications taken out by one or other of the parties since the writ for this Suit was filed on 12 March 2015.

Notably, the plaintiffs had on 12 March 2015 also applied for and were granted a worldwide Mareva injunction against the defendants in Summons No 1143 of 2015 ("Summons 1143").

3 The plaintiffs further applied in Summons 1143 for Bouvier to deliver up a painting by Mark Rothko known as *No. 6 Violet, vert et rouge* ("the Rothko painting"). Accent contended it had been overcharged by €60m for the Rothko painting as Bouvier had represented the price to be €140m whereas in his statements to the Monaco police, Bouvier had admitted the actual price was €80m. The court ordered the Rothko painting to be delivered up to the Sheriff for safekeeping pending the resolution of this Suit.

4 All three defendants applied to set aside the Mareva injunction which applications ("the setting aside applications") were dismissed. The two defendants as well as Rappo appealed to the Court of Appeal (in Civil Appeals Nos 80 and 81 of 2015 respectively) against the dismissal of the setting aside applications (by which time the Mareva injunction had been considerably varied and its scope reduced). All the defendants succeeded in their respective appeals. The appellate court discharged the injunction (see *Bouvier, Yves Charles Edgar and another v Accent Delight International Ltd and another and another appeal* [2015] 5 SLR 558 ("the CA decision").

5 Having succeeded in the Court of Appeal, all three defendants then proceeded to argue the Summonses which they had filed after the setting side applications.

6 As an aside, I should point out that in Hong Kong, the plaintiffs had also obtained an *ex parte* freezing order against the assets of the two defendants in support of the Mareva injunction in this Suit. The two defendants' application

to discharge that freezing order was dismissed on 19 June 2015 (see *Accent Delight International Ltd and Anor v Yves Bouvier & Anor* [2015] HKCU 1367).

7 Central to the dispute in this Suit are the relationships between Dmitriy Rybolovlev ("Rybolovlev") and Bouvier, between Rybolovlev and Rappo and between Bouvier and Rappo. Rybolovlev is a Russian oligarch and billionaire. The two plaintiffs are British Virgin Isles-incorporated companies wholly owned by family trusts set up by Rybolovlev under Cypriot law. Rybolovlev's two daughters are beneficiaries of the family trusts, which are the holding companies of the plaintiffs. Rybolovlev holds a power of attorney from the plaintiffs. In 2011 he took up residence in Monaco. Prior thereto, he lived in Geneva.

8 Bouvier (a permanent resident of Singapore after he moved here in 2009) is a Swiss national who operates an art-related storage facility in Singapore and elsewhere (known as Freeport) as well as a transport business in several parts of the world (including Geneva) through Geneva-incorporated Fine Art Natural Le Coultre SA (of which he is the majority shareholder and President). Bouvier became an art consultant to Rybolovlev after they were first introduced by Rappo in 2003 (at Bouvier's behest).

9 Between 2003 and 2014, Bouvier through his contacts was instrumental in sourcing and acquiring 37 valuable paintings (excluding the Rothko painting) and other artworks for Rybolovlev via private sales. Rybolovlev is neither conversant in English nor French. Transactions made on his and/or on behalf of the plaintiffs were carried out through his representative Mikhail Sazonov ("Sazonov"), who is the sole director of Xitrans. Emails and other forms of communication between Sazonov and Bouvier were usually conducted in

French. Sazonov resides in Geneva. When Rybolovlev first commenced his business relationship with Bouvier, his wife Elena Rybolovleva ("Elena") acted as his translator and he liaised with Bouvier through Rappo and/or Sazonov.

10 The second defendant is a Hong Kong company controlled by Bouvier and is the vehicle for the artwork sales he transacted and also to receive his payments.

11 Rappo is a Bulgarian national who resides in Monaco. Before the Monaco proceedings, she was a close family friend of Rybolovlev and is a godmother to his younger daughter. Bouvier moved to Singapore in 2009 but has taken up residence again in Geneva after the commencement of this Suit. Details of the three parties' relationship are set out in the CA decision at [13]–[26]. I will not rehash the facts behind the falling out between Rybolovlev and Bouvier except where necessary in the context of this decision.

12 By the court's reckoning, no less than fifty (usually voluminous) affidavits were filed by all parties concerned for the Summonses along with expert opinions on Monasque and Swiss law. In addition, foreign counsel for the parties also filed affidavits.

Summons 1763

13 I turn my attention first to Summons 1763 and set out the salient arguments raised by counsel for the two defendants Mr Edwin Tong ("Mr Tong"). Mr Tong *inter alia* argued that Rybolovlev was running parallel but similar court proceedings in Monaco and Singapore and it was an abuse of the court process to allow him to continue to do so. In both jurisdictions, the plaintiffs (or Accent in the case of Monaco) had alleged that Bouvier acted as the plaintiffs' agent in procuring the 37 artworks purchased by Rybolovlev.

Bouvier allegedly breached the fiduciary duties of such agency by fraudulently inflating the prices of the artworks with the knowing assistance of Rappo, who had also received some of the ill-gotten gains made by Bouvier therefrom.

14 Mr Tong argued that in any event, this was a case where the court should exercise its discretion/power under s 18 of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) ("the SCJA") read with paragraph 9 of the First Schedule – it should grant a limited stay at least until the Monaco proceedings are disposed of.

15 Further, Switzerland is clearly the more appropriate forum, applying the two-stage test in *Spiliada Maritime Corporation v Cansulex Ltd* [1987] 1 AC 460 ("*Spiliada*").

16 I shall now set out in greater detail the arguments of the two defendants.

(i) Lis alibi pendens

17 The two defendants alleged that Rybolovlev had instigated the Monaco authorities to file criminal proceedings against Bouvier on 9 January 2015 by lodging a complaint with the Monaco General Prosecutor ("the Prosecutor") alleging fraud. This caused the Prosecutor to initiate a preliminary investigation against Bouvier on 12 January 2015. On 24 February 2015, the Prosecutor requested the President of the Tribunal de Premiere in Monaco to designate an investigating judge to investigate alleged crimes relating to fraud from 2003 to 2015 and money laundering from 2005 to 2015 committed at the expense of the plaintiffs and Rybolovlev's older daughter, Ekaterina Rybolovleva ("Ekaterina"). The request was granted and one Lois Malbrancke ("Malbrancke") was appointed the investigating judge.

18 Rybolovlev allegedly lured Bouvier to his Monaco residence on the pretext of discussing business with the latter. Bouvier was arrested by the Monaco police on 25 February 2015. Rappo was also questioned by the Monaco authorities on payments Bouvier had made to her in respect of the sale transactions to the plaintiffs.

19 Both Rybolovlev and Sazonov gave statements to the Monaco police wherein they alleged that Bouvier had acted as the plaintiffs' agent in the purchase of 37 artworks and had over-invoiced the plaintiffs. Bouvier was interviewed by the Monaco police between 25 and 27 February 2015. The plaintiffs and Ekaterina then applied to join the criminal proceedings as civil parties on 27 February 2015, alleging fraud in respect of the transactions in the artworks.

20 In his first appearance before Malbrancke, Bouvier was notified he was *inculpé* (which in French means being the subject of a criminal investigation) for:

(a) alleged fraud committed between 2013 and 2014 relating to three paintings purchased by Accent, *viz*, Leonardo da Vinci's "*Le Christ comme Salvator Mundi*", Paul Gauguin's "*Otahi*", and the Rothko painting (hereinafter referred to collectively as "the three artworks"); and

(b) alleged complicity in money-laundering between 2006 and 2015 to transfer from the accounts of the second defendant to Rappo the proceeds of fraudulent acts committed to the detriment of the plaintiffs.

21 Rappo was also notified that she was *inculpé* for money-laundering in Monaco between sometime in 2006 and 24 February 2015, for receiving funds

transferred by the second defendant from Bouvier which represented the proceeds from swindles committed to the detriment of the plaintiffs and Ekaterina.

22 The two defendants alleged that when Rybolovlev found out that Bouvier had been released by the Monaco authorities after being ordered to post a bond for €10m, he decided to explore other avenues to cause damage to Bouvier, and did so by commencing this Suit.

23 The two defendants submitted that this Suit duplicated the Monaco proceedings in that the same allegations made against them in Monaco were repeated in the plaintiffs' Statement of Claim here. The Statement of Claim against Bouvier alleged: (i) breach of fiduciary duties as agent of the plaintiffs relating to the acquisition of the 37 artworks; (ii) fraudulent misrepresentation and/or deceit by inflating the prices of the artworks and retaining the profits therefrom without the knowledge, consent or authority of the plaintiffs; (iii) breach of duty in retaining the Rothko painting, and (iv) wrongful retention of the sale proceeds of a painting by Toulouse Lautrec, *"Au Lt: Le Baiser"* ("the Toulouse Lautrec painting"), which Bouvier had sold on behalf of Accent but had refused to hand over the proceeds of over £10m.

24 The plaintiffs' claims against the second defendant are ancillary to their claims against Bouvier and it would not be necessary to address them separately.

25 In their submissions, the two defendants dealt at length with the issue of *lis alibi pendens* under two prongs:

(a) the doctrine of forum election; and

(b) the doctrine of *forum non conveniens*.

26 Relying on *Virsagi Management (S) Pte Ltd v Welltech Construction Pte Ltd* [2013] 4 SLR 1097 ("*Virsagi*"), *Koh Kay Yew v Inno-Pacific Holdings Ltd* [1997] 2 SLR(R) 148, and extracts from the treatise of Professor Yeo Tiong Min ("Prof Yeo") in *Halsbury's Laws of Singapore* vol 6(2) (LexisNexis, Reissue, 2013) ("*Halsbury's Laws*"), Mr Tong submitted the plaintiffs must elect either Monaco or Singapore for the plaintiffs' parallel claims against his clients.

27 The two defendants pointed out there were identity of parties and causes of action across the Monaco civil proceedings and this Suit. This was confirmed by the opinions of the parties' Monaco law experts, Richard Mullot ('Mullot") for the plaintiffs and Thomas Olivier Giaccardi ("Giaccardi") for the two defendants.

28 It would be appropriate at this juncture to point out some main differences between the opinions of Giaccardi and Mullot.

29 Mullot was of the view that the Monaco proceedings are limited as Bouvier has only been investigated for the offence of fraudulent acts committed between 2013 and 2014 in relation to the three artworks (at [20(a)] *supra*) due to the fact the sale proceeds were credited to Monaco bank accounts. Although Bouvier and Rappo faced charges for complicity in money-laundering for the period 2005 to 2015, Mullot opined that Malbrancke would have to rely on investigations/determinations in other jurisdictions to establish the potential underlying offences for fraud and complicity in money-laundering in respect of the other 34 artwork transactions.

30 Mullot opined that witnesses cannot be compelled to testify in Monasque criminal proceedings. While Malbrancke has the power to seize

documents located in Monaco, his power does not extend to documents outside Monaco.

31 Giaccardi disagreed with Mullot. He opined that the plaintiffs, having taken steps to file their civil claims with the criminal proceedings in Monaco as allowed under Article 3 of the Code of Criminal Procedure of 5 July 1963 (Monaco), were not only entitled to gain access to the case file but also to appeal and challenge various types of orders made by Malbrancke, be informed by Malbrancke about any "inculpation" in the course of investigation and require Malbrancke to hear/interrogate the civil parties or a witness and even order any party to disclose any supporting evidence which is useful to the investigation. Further, Giaccardi disagreed that the plaintiffs' civil claims in Monaco were limited to the three artworks (at [20(a)] *supra*).

32 Giaccardi referred to a letter dated 15 April 2015 from Malbrancke to Bouvier's Monaco lawyers requesting Bouvier to disclose documents and stating unequivocally that the Monaco courts would investigate offences of fraud in relation to all 37 artworks. Further, in order to investigate the charges of complicity in money laundering for the period 2006 to 2015, Malbrancke would have to investigate whether there was fraud during that period. Moreover, if Malbrancke were to discover new facts in the course of investigations, he could widen the scope.

33 Giaccardi deposed that Monaco courts do not recognise and apply the principle of *lis alibi pendens*. Consequently, Monaco courts will not stay pending proceedings in Monaco due to other pending similar proceedings in any other foreign country. He added that Monaco courts can enforce foreign judicial decisions through a procedure known as "*Exequatur*" which allows foreign

decisions to create legal effect in Monaco except where the foreign decision conflicts with a Monaco decision, as that would be against Monaco public order.

34 The possibility of conflicting judgments was another prong in Bouvier's arguments against allowing the plaintiffs to commence parallel proceedings in two jurisdictions. Bouvier complained it would be oppressive and vexatious on the part of the plaintiffs to put him through unnecessary time, expense and effort to defend himself more than once on substantially the same matter in two different jurisdictions (citing *Multi-Code Electronics Industries (M) Bhd and Another v Toh Chun Toh Gordon and Others* [2009] 1 SLR(R) 1000 at [38]).

35 I should also point out that the two legal experts were in disagreement over the meaning of the word "*inculpé*" in relation to the investigation against Bouvier. Mullot translated the word as "charge" whereas Giaccardi said the term under Monasque law meant "being placed under investigation". They were also in disagreement over the quantum of damages that the plaintiffs could recover in Monaco should the plaintiffs succeed in their civil claims against Bouvier.

36 Even if the plaintiffs elect to pursue their claims in Singapore and withdraw their civil claims in Monaco, Mr Tong contended that Singapore is still not the appropriate forum for this dispute. He drew the court's attention to the CA decision where the appellate court had opined (at [150] and [152]–[155]) that Swiss law would appear to be the applicable law for this dispute.

37 Once Bouvier had demonstrated a duplicity of actions in different jurisdictions (with the attendant risk of conflicting judgments as a result), the burden shifted to the plaintiffs to justify the continuance of concurrent proceedings by showing "very unusual circumstances" (see *Yusen Air & Sea*

Service (S) Pte Ltd v KLM Royal Dutch Airlines [1999] 2 SLR(R) 955 at [27]). The difference in the standard of proof (supposedly beyond a reasonable doubt in Monaco as against on a balance of probabilities in Singapore) is only a matter of procedure rather than substance.

38 Although the second defendant was not a defendant in the Monaco proceedings, Mr Tong argued that it is clear that the plaintiffs' claims against the second defendant are ancillary to their claims against Bouvier. Consequently, it would still be appropriate and well within the court's discretion under s 18 of the SCJA to stay the Singapore proceedings against the second defendant. At the very least, the court should grant a limited stay of the Singapore proceedings until the Monaco proceedings have been concluded.

(ii) Forum non conveniens

39 The second prong of attack relied on by the two defendants was the doctrine of *forum non conveniens*. I deal first with their arguments and will if necessary address the arguments by Rappo that were in addition to and/or diverged from the arguments presented by the (other) two defendants.

The two defendants' arguments

40 Bouvier pointed out that in the initial period of his relationship with Rybolovlev, he and the plaintiffs signed agreements pertaining to 4 of the artworks purchased by the latter. Those agreements were governed by Swiss law. Therefore, Swiss law would govern the plaintiffs' claims in this Suit in respect of the remaining 33 artworks.

41 It was common ground between the parties' legal experts that unlike Singapore law, Swiss law does not grant proprietary remedies. Nonetheless, the

two defendants argued that Switzerland would clearly be the more appropriate forum for the plaintiffs' claims. They contended that the absence of tracing and constructive trust remedies under Swiss law was irrelevant – the court should not focus on the reliefs sought because that is a procedural issue which differs depending on the fora, citing *Virsagi* at [47]. Such claims could be re-characterised as contractual or tortious claims and litigated upon.

42 Citing passages (paras 75.090–75.095) from *Halsbury's Laws*, the two defendants put forward the following five factors as to why Switzerland is the more appropriate forum:

(a) personal connections;

(b) connections to events and transactions;

(c) governing law;

(d) other proceedings; and

(e) shape of the litigation.

43 The two defendants pointed out *inter alia* that none of the parties had any personal connections with Singapore, the purchase of the 37 artworks took place primarily in Switzerland and the initial 4 paintings bought by the plaintiffs were governed by agreements subject to Swiss law. The alleged agency that was created from 2003 onwards was therefore governed by Swiss law and applied to all 37 artworks acquired by the plaintiffs.

44 Moreover, material witnesses are not compellable to testify in Singapore but in Switzerland. These included Elena, Ekaterina, Sazonov and Yuri Bogdanov (a director of Rigmora Holdings Limited that provides administrative

and financial services management to the plaintiffs) ("Bogdanov"). Indeed, it was the common argument of all the defendants that these persons do not reside in Singapore and cannot be compelled to testify here. According to *Rickshaw Investments Ltd v Nicolai Baron von Uexkull* [2007] 1 SLR(R) 377 ("*Rickshaw*") at [19], there would be savings of time and resources if the trial is held in the forum in which the witnesses reside and where they are clearly compellable to testify. Mr Tong informed the court that the parties had also spent substantial sums just on translation services alone (of French newspaper articles and/or press releases as well as of Monasque legal documents into English).

45 Mr Tong submitted that when the second of the two-stage *Spiliada* test is applied, the burden is on the plaintiffs to show special circumstances why the Singapore proceedings should not be stayed. The *Spiliada* test has been consistently adopted and applied by our Court of Appeal; (see *inter alia Virsagi*, *Rickshaw*, *PT Hutan Domas Raya v Yue Xiu Enterprises (Holdings) Ltd and another* [2001] 1 SLR 104 and *JIO Minerals FZC and others v Mineral Enterprises Ltd* [2011] 1 SLR 391 ("*JIO Minerals*"). The appellate court has stated that in applying the *Spiliada* test, the ultimate question is where the case may more suitably be tried in the interests of all the parties and of the ends of justice (*Rickshaw* at [13]). Mr Tong also cited *Virsagi* and *Ram Parshotam Mittal v Portcullis Trustnet (Singapore) Pte Ltd and Others* [2014] 3 SLR 1337 ("*Ram Parshotam Mittal*") in support of his clients' position.

46 The two defendants contended they had discharged stage one of the *Spiliada* test in showing that this Suit's real and substantive connection is with Switzerland. The burden therefore shifted to the plaintiffs to discharge stage two of the test as to why justice requires that a stay should be refused.

47 At this juncture, I should point out that Bouvier had (at exhibit YB-59 of his 11th affidavit filed on 4 July 2015) furnished separate undertakings ("the Undertakings") dated 3 July 2015 to each of the plaintiffs in the following identical terms:

> This is to confirm that I recognise and accept the jurisdiction of the civil courts of Geneva, Switzerland in respect of any dispute in connection with the sale of works of art to [Accent][Xitrans] by … MEI INVESTMENT LTD and/or any related transactions.
>
> Yours sincerely,
>
> [signed]

Mr Tong submitted that the Undertakings are comprehensive and reinforce his clients' position that Switzerland is the appropriate forum for this Suit. Notably, the Undertakings did not mention either the Monaco proceedings or this Suit. Counsel also tendered to court a list of key connecting factors between this Suit and Switzerland. I have no doubt that the two defendants accepted the jurisdiction of the Geneva courts in the Undertakings to enable the Swiss courts to found jurisdiction for the plaintiffs' claim under Article 6 read with Article 5 of the Federal Act on Private International Law of 18 December 1987 (Switzerland) (*Loi fédérale sur le droit international privé du 18 décembre 1987*) ("PILA").

48 As an aside, I should add that in his last affidavit (14th) filed on 7 October 2015 for Summons 1763, Bouvier (in order to correct inaccurate allegations raised in court by the plaintiffs) disclosed that there are proceedings against him in France. On a criminal complaint lodged on 2 March 2015 by Spanish cubist painter Pablo Picasso's ("Picasso") step-daughter Hutin-Blay that 2 Picasso paintings sold by Bouvier to the plaintiffs were stolen from her, the French authorities commenced investigations against Bouvier for the offence of 'possession' of allegedly stolen articles. Accent joined the criminal proceedings

as a civil party on 9 April 2015. Bouvier was required to furnish to the French authorities a bond of €27m equivalent to the value of the two Picasso paintings. He was allowed to pay the amount by an initial instalment of €5m before end-2015 followed by the balance by mid-2016.

49 Mr Tong accused Rybolovlev of adopting an inconsistent stance depending on the exigencies of the situation. He disclosed that Rybolovlev and with Xitrans were sued by Elena in Originating Summons No 1635 of 2008 ("the OS"). In the OS, Elena applied for an injunction to restrain Rybolovlev from removing assets out of Singapore to the value of US$800m and these included 13 of the 37 artworks. Rybolovlev had in the OS filed a legal opinion by a Swiss lawyer Nedim Peter Vogt who stated that under Swiss law, ownership of the 13 paintings identified in the OS was transferred from the sellers (Bouvier) to Xitrans in accordance with certain provisions under the Civil Code of 10 December 1907 (cc 210) (Switzerland). Yet now, because it suits him to do so here, Rybolovlev contends that Swiss law is not applicable.

Summons 1900

Rappo's submissions

50 As the arguments presented by Rappo mirrored those of the two defendants, it would not be necessary to rehash them save where there is a divergence. I note however that Rappo's submissions do not go so far as to say that Switzerland is the more appropriate forum compared with Monaco. Essentially, her submissions were that Monaco is the appropriate forum. However, if the court does not accept that argument, then Rappo agreed Switzerland would be more appropriate than Singapore.

51 Unlike Bouvier, the charges for money-laundering against Rappo in Monaco related not only to three but 34 artworks for which she received commissions in Monaco from Bouvier. Counsel for Rappo Mr Kenneth Tan ("Mr Tan") repeated the arguments of Mr Tong that Rappo should not be made to face a multiplicity of proceedings both here and in Monaco. Mr Tan complained that Rybolovlev was acting oppressively against his client in making her face contemporaneous legal proceedings in Monaco and Singapore. If nothing else, a limited stay should be granted on the Singapore proceedings until the Monaco proceedings were concluded. Otherwise there was a great risk of conflicting judgments in the two jurisdictions. The plaintiffs should be made to elect one jurisdiction as a matter of case management, citing *Ram Parshotam Mittal* at [54].

52 Mr Tan alleged that his client was being used by Rybolovlev as a means to keep Bouvier in Monaco after the latter was released from prison on bail. Rybolovlev took advantage of the parallel proceedings procedure in Monaco and yet still came to Singapore to obtain a worldwide Mareva injunction against the defendants. Rybolovlev wanted, but should not be given, two bites of the cherry to the detriment of the defendants.

53 Mr Tan submitted that Monaco would be the appropriate forum as the witnesses for Rappo are compellable in Monaco but not in Singapore. These witnesses included asset managers from her investment advisers Monaco Asset Management as well as the officers from the Monaco branch of HSBC Bank, who had falsely informed the Monaco authorities that Rappo maintained several bank accounts jointly with Bouvier. As a result, Rappo lodged criminal complaints against Rybolovlev and two HSBC representatives in April and June 2015 respectively. Mr Tan added that the proceedings in Monaco are at an advanced stage as compared with this Suit. (However the court was later

informed by counsel for the plaintiffs that despite her professed preference for Monaco as the forum, Rappo (as well as Bouvier) had applied to the Court of Appeal in Monaco to strike out the proceedings there on the basis of lack of jurisdiction).

54 Rappo too had obtained a legal opinion on Monasque law from a Monaco lawyer, Yann Cyrille Lajoux ("Lajoux"), who had been given the opinions of both Mullot and Giaccardi for his views. Lajoux aligned himself with Giaccardi's interpretation of the word *inculpé* and opined that both Bouvier and Rappo were at the *inculpation* stage, namely, they had not yet been charged for any offence in Monaco.

55 Lajoux disagreed with Mullot (see [29] *supra*) that the Monaco investigations are limited to three of the 37 artworks; he said they covered all 37 artworks. He was also of the view that quasi-proprietary remedies are available in Monaco.

56 Like Bouvier (at [47] *supra*), Rappo tendered to the court two letters dated 27 August 2015 addressed to the plaintiffs separately and which state as follows:

> This is to confirm that I recognise and accept the jurisdiction of the civil courts of Geneva, Switzerland, in respect of any dispute in connection with the sale of works of art to [Accent Delight International Ltd][Xitrans Finance Ltd] by [MEI Investment Ltd][Arrow Fine Art LLC][The Eagle Overseas Co Ltd][Kinsride Finance Ltd][Art Family Pte Ltd] and/or any transactions related to Mr Yves BOUVIER.

There was no heading in her letters and no reference to this Suit. As with Bouvier, I see Rappo's move as her conscious compliance with Articles 5 and 6 of the PILA. For convenience, I shall refer to these two letters by Rappo also as "the Undertakings".

57 As an aside, the court notes that counsel spent an inordinate (and unnecessary) amount of time arguing (based on the views of their Monaco law experts) over the correct meaning of the word *inculpé* – whether Bouvier and/or Rappo have been charged for offences in Monaco or have only been placed under investigations. Regardless, the fact remains that Bouvier had to furnish a bond for €10m before he was released by the Monaco authorities in addition to which he was required to report once a month to the authorities there. Similarly, Rappo cannot leave Monaco without informing the Monasque authorities.

The plaintiffs' submissions

58 In support of the plaintiffs' submissions that this Suit should not be stayed, counsel for the plaintiffs Mr Alvin Yeo ("Mr Yeo") pointed to several factors that showed Singapore had the closest connection to this Suit. These are:

(a) the plaintiffs' claims in tort took place in Singapore;

(b) Bouvier conducts his business in Singapore;

(c) 22 of the 37 artwork transactions (60%) with a value of US$1.45b took place during 2009–2014 when Bouvier was based in Singapore, whereas only four artworks were transacted during 2003–2006 with a value of US$103.4m when Bouvier was based outside Singapore;

(d) Bouvier set up some 34 companies in Singapore (of which 22 are live companies);

(e) Bouvier is domiciled in and owns substantial assets in Singapore (including an immoveable property);

(f) the artworks acquired by Xitrans before 2009 were shipped to Singapore and stored at Bouvier's Freeport facility through his company Fine Art Singapore;

(g) the storage certificates issued to Bouvier contained a clause providing for the exclusive jurisdiction of Singapore courts and for Singapore law to be the governing law;

(h) Bouvier's email address has a Singapore domain and he has a Singapore mobile number;

(i) Bouvier issued from Singapore 19 invoices for his commission/fees for the artwork transactions, out of which only two were for services performed outside Singapore; and

(j) the Rothko painting is stored in Singapore.

59 The plaintiffs disagreed with the defendants' contention that Switzerland has the closest connection with this Suit. Mr Yeo pointed out that the agency of Bouvier could not have commenced in 2003 as Accent was only incorporated in 2010. Further, none of the payments for the artworks and Bouvier's fees were issued from Switzerland – they were mostly made from the plaintiffs' bank accounts in Cyprus and Luxembourg (with a few from London and Monaco). (It was the two defendants' contention the payments were made to Swiss bank accounts). He said it was irrelevant that the artworks moved through Bouvier's Geneva Freeport facility as that was for viewing purposes and/or in transit to Singapore.

60 According to *Rickshaw* at [17]–[19], the physical location of the witnesses is not as crucial as the compellability of third party witnesses. Mr Yeo

informed the court that Rybolovlev, Sazonov, Ekaterina and Bogdanov are all willing and able to come to Singapore to testify at the trial.

61 Mr Yeo contended this Suit centres on the following factual issues:

(a) whether Bouvier was acting as the plaintiffs' agent or as seller in his own right when he sold the artworks to the plaintiffs;

(b) whether Bouvier made various fraudulent representations to the plaintiffs in relation to the purchase prices of the artworks being supposedly the lowest obtainable when they were actually inflated; and

(c) whether Rappo knew or must have known that she was receiving tens of millions in commission from Bouvier as a result of the latter's breach of his fiduciary duties.

62 Given the significance of the disputed facts above, Mr Yeo argued that the testimony of third party witnesses/documents other than Bouvier and Rappo and the plaintiffs' representatives (Sazonov, Rybolovlev and Bogdanov) would likely not be material for the court's determination of this Suit. The documentation in Singapore included Bouvier's Blackberry device (on which his Singapore email account was configured) and which was wiped clean of all its data when he was questioned by the Monaco police. If it was done to destroy incriminating evidence, then the Singapore staff of Bouvier (if they were involved) would need to be subpoenaed.

63 Documents pertaining to Bouvier's communication with third parties for the artworks are likely to be stored in Singapore and are compellable by the Singapore court. It is unlikely the hard copies of the documents are in Geneva – Bouvier's Swiss companies were raided by police pursuant to a letter of

request for assistance by Monaco authorities. However it appears that the Swiss police did not find any documents in the raid. Otherwise, Malbrancke would not have ordered Bouvier on 15 April 2015 to produce documents relating to the artwork transactions. Bouvier had not honoured the earlier undertaking he gave to produce such documents when he first appeared on 28 February 2015 before the examining magistrate. (I should point out that in his 11th affidavit filed on 4 July 2015, Bouvier claimed he had made a mistake when he informed the Monaco police on 25/26 February 2015 that the documents were either in Singapore or Hong Kong; the documents are actually in Geneva).

64 The plaintiffs dismissed as unmeritorious Rappo's contention that art expert witnesses are more readily available in Europe than in Singapore. There was no need for such experts (whom Rappo did not even identify) as this Suit touched on factual disputes. Mr Yeo pointed out that the plaintiffs' case was not for the difference between the prices paid and the actual market values of the artworks but *the difference between what the plaintiffs paid based on Bouvier's misrepresentation and the actual purchase price he paid* (emphasis mine).

65 In the absence of proprietary remedies under Swiss law, Mr Yeo argued that the Swiss courts would consider the law applicable to most of the plaintiffs' re-characterised claims to be Singapore law. He relied on Article 117 of PILA, cited in the first report of the plaintiffs' Swiss law expert Marc Abby Joory ("Joory"). Article 117 states:

> 1 Failing a choice of law, contracts are governed by the law of the state with which they have the closest connection.
>
> 2 Such a connection is deemed to exist with the state of the habitual residence of the party having to perform the characteristic obligation …
>
> 3 Characteristic obligation means in particular:

> …
>
> c in contracts of mandate, contracts for work and other contracts to perform services: *the service obligation*.

[emphasis mine]

The *service obligation* in this case would be Bouvier's services in sourcing for and informing the plaintiffs of an opportunity to acquire an artwork, negotiating on behalf of the plaintiffs the lowest possible price and advising the plaintiffs on the price of artworks. Joory was of the view that the applicable law for any contractual claim brought against Bouvier in Switzerland is Singapore law, the latter having to perform the *characteristic obligation* of the contracts and having been resident in Singapore since 2009.

66 Not surprisingly, the defendants' Swiss law expert, Professor Corinne Widmer Luchinger ("Prof Widmer") disagreed with Joory's opinion. Prof Widmer opined that the applicable law for the plaintiffs' claims is Swiss law. She relied on a Swiss Federal Court's decision in FCD 133 111 90 of 21 November 2006 ("the Swiss case") to support her view. She further relied on Article 6 of the PILA which states:

> In matters involving an economic interest, a court shall have jurisdiction if the defendant proceeds on the merits without reservation, unless such court declines jurisdiction to the extent permitted by Article 5, paragraph 3.

67 Article 5(3) of the PILA states:

> The court agreed upon may not decline its jurisdiction:
>
> (a) if one party has its domicile, its ordinary residence, or a business establishment in the canton of the Swiss court agreed upon, or
>
> (b) if, according to this Act, Swiss law governs the matter in dispute.

68 For the claims in tort, Mr Yeo relied on the following italicised extracts from Article 133 of the PILA:

> 2 Where the tortfeasor and the injured party do not have a habitual residence in the same state, *these claims are governed by the law of the state in which the tort was committed.* However, if the result occurred in another state, the law of such state applies if the tortfeasor should have foreseen that the result would occur there.
>
> 3 Notwithstanding the above, *when a tort breaches a legal relationship existing between the tortfeasor and the injured party, claims based on such tort are governed by the law applicable to the relationship.*
>
> [emphasis mine]

69 Mr Yeo submitted that given Bouvier's commission of the torts of fraudulent representation and deceit would also breach the agency relationship with his clients, which (the plaintiffs submit) is governed by Singapore law, it follows that the tort claims are also governed by Singapore law.

70 Mr Yeo pointed out that the Swiss case cited by Prof Widmer (at [66] *supra*) in fact supported the plaintiffs' position. The case involved a tortious claim for criminal mismanagement of assets. The Swiss Federal Court held that the place where the tort was committed was not the place where instructions were given in relation to the use/management of those assets: –

> the act of disposition and the injury to the assets took place in Switzerland at the time of their execution by the bank with which the [claimant] had opened the account, the management of which was assumed by the [defendants]

Mr Yeo further cited *UBS AG v Telesto Investments Ltd and others and another matter* [2011] 4 SLR 503 at [71], [75] and [80] where the court adopted a similar approach.

71 The plaintiffs submitted that Articles 127 and 128 of the PILA would apply to their claims for unjust enrichment.

(a) Article 127 on jurisdiction states:

> Swiss courts at the domicile or, in the absence of a domicile, at the habitual residence of the defendant have jurisdiction to entertain actions for unjust enrichment. Courts at the place of business in Switzerland have also jurisdiction to entertain actions pertaining to the operation of the place of business.

(b) Article 128 provides:

> 1 Claims for unjust enrichment are governed by the law which governs the legal relationship, either existing or assumed, on the basis on which the enrichment occurred.
>
> 2 Failing such relationship, these claims are governed by the law of the state in which the enrichment occurred; the parties may agree to apply the law of the forum.

72 Joory and Prof Widmer were in agreement that the plaintiffs' claims in tort for fraudulent misrepresentation and/or deceit as well as the equitable claims of breach of fiduciary duties, dishonest assistance and knowing receipt are not recognised in Switzerland.

The decision

73 I accept the submission of the two defendants that the common issue in the Monaco and Singapore proceedings is agency – did Bouvier act as the plaintiffs' agent in respect of the 37 artworks that he procured for them? I agree too that agency is at the heart of the *lis alibi pendens* issue raised here. However, in the midst of Mr Yeo's submissions, the plaintiffs had a change of heart – the court was informed that the plaintiffs would be prepared to discontinue their Monaco civil proceedings against the two defendants if the court ruled in their

favour, thereby rendering it unnecessary for the court to rule on the issue of *lis alibi pendens*.

74 It is common ground that the Monaco civil proceedings against Bouvier and Rappo hinge on Bouvier's conviction for criminal fraud in respect of the artwork transactions. The civil proceedings of the plaintiffs and Ekaterina in Monaco cannot proceed until the criminal proceedings are concluded and are dependent on the success of the latter. However, such factors are no longer relevant consideration in the light of the plaintiffs' willingness to drop their civil proceedings in Monaco should this court dismiss the Summonses.

75 It bears noting that the plaintiffs and Bouvier did not opt for a choice of law for their agency relationship – the plaintiffs' pleaded case is that the agency arose over a course of dealings that spanned more than 10 years. The defendants however contend that Swiss law governs the agency as evidenced in written agreements for the first 3 to 4 artwork transactions between the parties. Who is right?

76 To answer that question, I turn to Sazonov's 1st affidavit filed on 18 March 2015 in support of Summons 1143 for the Mareva injunction. I refer in particular to para 76 of this affidavit. There, Sazonov identified 16 artworks in relation to which the plaintiffs alleged that they had been overcharged by Bouvier. The initial 4 artworks covered by written agreements are *not* in the list. As the plaintiffs pointed out, Accent was not even incorporated until 2010 (at [59] *supra*). In this regard, Bouvier had argued that the contract dated 16 October 2006 for the painting *Mousquetaire a la pipe* by Picasso had been made subject to Swiss law. However, (as pointed out by the plaintiffs), Bouvier was not even a party to that contract which was between Xitrans and the second defendant.

77 It is my view therefore that the contracts relating to the initial 4 transactions are irrelevant to the later artwork transactions which are the subject matter of the plaintiffs' claims, as the latter took place between 2010 and 2014.

78 Agency under Swiss law can only be formed through a contract. An agency contract under Swiss law comes in different forms under various articles of the Code of Obligations of 30 March 1911 (cc 220) (Switzerland), *viz*, mandates, commission contracts and commercial agency contracts. In her 2nd affidavit/report filed on 4 July 2015, Prof Widmer opined that the Swiss courts would not have automatic jurisdiction under Article 112(s) of the PILA because Bouvier is not ordinarily resident in Switzerland. However, as Bouvier, the second defendant and Rappo had specifically accepted the Swiss courts' jurisdiction by their Undertakings, the Swiss courts could assume jurisdiction under Article 113 of the PILA. That Article states:

> When the characteristic obligation of the contract must be performed in Switzerland, the action may also be brought before the Swiss court at the place of performance.

79 It seems to me to be quite clear from Prof Widmer's opinions that the Swiss courts in this case would have jurisdiction *not because* the connecting factors enumerated by Prof Yeo (at [42] *supra*) tip the scales in favour of Switzerland but because the two defendants (and Rappo as an alternative to Monaco) have chosen to accept Swiss jurisdiction

(i) Stage 1 of the Spiliada test

80 I turn now to the law and in particular the *Spiliada* test. It would be instructive at this juncture to quote a passage from the *Spiliada* case. At p 482, Lord Goff of Chieveley had this to say:

> The key to the solution of this problem lies, in my judgment, in the underlying fundamental principle. We have to consider

> where the case may be tried "suitably for the interests of all parties and for the ends of justice". Let me consider the application of that principle in relation to advantages which the plaintiff may derive from invoking the English jurisdiction. *Typical examples are: damages awarded on a higher scale; a more complete procedure of discovery; a power to award interest; a more generous limitation period. Now, as a general rule, I do not think that the court should be deterred from granting a stay of proceedings, or from exercising its discretion against granting leave under R.S.C. Ord 11, simply because the plaintiff will be deprived of such an advantage, provided that the court is satisfied that substantial justice will be done in the available appropriate forum.* Take for example, discovery. We know that there is a spectrum of systems of discovery applicable in various jurisdictions, ranging from the limited discovery available in civil law countries on the continent of Europe, to the very generous pre-trial oral discovery procedure applicable in the United States of America. Our procedure lies somewhere in the middle of this spectrum. No doubt each of these systems has its virtues and vices; but, generally speaking, I cannot see that, objectively, injustice can be said to have been done if a party is, in effect, compelled to accept one of these well-recognised systems applicable in the appropriate forum overseas …
>
> (emphasis mine)

81 Here, it is not a question of procedural issues being different under Swiss law (an example would be discovery opportunities) and the plaintiffs having to accept the difference if this Suit moves to Switzerland (as Mr Tong contended). Neither is it an issue of the plaintiffs being disadvantaged by the reliefs they seek, for example, that they would obtain a lesser amount of damages than what they would obtain from a Singapore court should they succeed in their claims in the Swiss courts. It went to the fundamental issue of whether the plaintiffs can pursue the majority of their substantive claims under Swiss law. I say they cannot.

82 My view that it is not a procedural issue is reinforced by Mr Tan's submissions for Rappo. Mr Tan had submitted that under Singapore private international law, proprietary claims are matters of substantive (not procedural) law, which fall to be governed by the *lex causae*. He cited the following passage

from *Dicey, Morris and Collins on The Conflict of Laws* (Sweet & Maxwell, 15th Ed, 2012) ("*Dicey, Morris and Collins*) (at para 7-016):

> Equitable doctrines may give rise to particular difficulties of classification in the conflict of laws, for example as to the classification of tracing … The better view is that it should be treated as substantive and governed by the law applicable to the claimant's cause of action.

83 The above view is shared by Prof Yeo who notes in his book, TM Yeo, *Choice of Law for Equitable Doctrines* (Oxford University Press, 2004) ("*Choice of Law for Equitable Doctrines*") at para 4.87 that:

> the constructive trust may be regarded as belonging to substantive law, even if the trust is labelled in domestic law as remedial.

Mr Tan added that Prof Yeo was of the view (at paras 4.101–4.103) that tracing is a rule of substantive law. Prof Yeo there said:

> [A]lthough it is a process of identification, tracing is not part of the law of evidence, rules of substantive law, not accounts of witnesses, are determinative of the location of title …

84 Given the authoritativeness of *Dicey, Morris and Collins* and *Choice of Law for Equitable Doctrines*, the court has no difficulty accepting that the equitable reliefs claimed by the plaintiffs are substantive law and not procedural issues. These are not available to the plaintiffs in Switzerland.

85 Mr Tong criticised Joory's opinion (and credentials) contending that the opinion of his clients' expert Prof Widmer should be accepted. While it is always difficult for a court to determine merely from the experts' reports (without the benefit of cross-examination) which of two legal opinions is to be preferred, a plain reading of the various Articles in the PILA cited by the parties would suggest that Joory's views are correct.

86 In any case, both Joory and Prof Widmer agreed that Swiss law is not available for the plaintiffs' claims in breach of fiduciary duties, deceit, fraudulent misrepresentation and knowing receipt. According to *Dicey, Morris and Collins* and *Choice of Law for Equitable Doctrines* and the common view of the two Swiss law experts, the plaintiffs' substantive claims for breach of fiduciary duties, constructive trust, fraudulent misrepresentation and conspiracy need to be re-characterised as claims in tort, contract and unjust enrichment under Swiss law. What if those claims cannot be so reclassified?

87 It would be appropriate now to relook the 5 criteria cited by Prof Yeo (at [42] *supra*).

88 Mr Tong had argued forcefully that Bouvier's personal connections all pointed to Switzerland and not Singapore. Mr Yeo on the other hand maintained that they pointed to Singapore. In this regard, I pay little regard to the fact that Bouvier decided to uproot himself from Singapore and move to Geneva soon after this Suit commenced. He may well have been habitually resident in Switzerland between 2003 and 2009 (as his counsel submits) but he is no longer resident there now. Bouvier is a permanent resident of Singapore and in the eyes of this court he remains a resident of Singapore regardless of his change of residence for strategic reasons, unless he gives up his permanent residency. If indeed the Swiss courts had automatic jurisdiction over him, Bouvier need not and would not have given the Undertakings to bring himself within Articles 5, 6 and 113 of the PILA.

89 Leaving aside the first four contracts, what factors connect the three defendants to Switzerland rather than Singapore? I note that payment for the 'overcharged' artworks listed in para 76 of Sazonov's 1st affidavit filed on 18 March 2015 were mostly made by the plaintiffs from their bank accounts in

Cyprus, Luxembourg and (infrequently) from their bank accounts in London and Monaco.

90 I accept the defendants' submission that it is immaterial that:

(a) Bouvier maintains an email address with a Singapore domain and exchanged emails with Sazonov therefrom;

(b) he has a Singapore registered hand-phone; and

(c) the storage receipts for the artworks were issued in Singapore.

However, neither can the defendants say that the three factors point to Switzerland as the natural forum.

91 The defendants had contended that negotiations and discussions took place through emails and telephone calls between Bouvier and Sazonov while meetings between Bouvier, Rybolevlov and Sazonov took place mainly in Geneva where Sazonov is based. Invoices issued by the second defendant to the plaintiffs for the artworks were generated in Geneva and emailed to Bouvier who then forwarded them in turn by email to Sazonov in Geneva. Certificates of deposit for storage of the artworks were prepared and signed in Geneva. Do these factors tilt the balance in favour of Swiss jurisdiction? In this era of instantaneous communication by telephone calls and emails using smartphones, I think not. Where the artworks are stored is irrelevant in the equation. I do not agree the contracts were concluded in Geneva merely because Sazonov exchanged telephone conversations and emails with Bouvier from his office there.

92 With the greatest respect to Prof Widmer, a plain reading of the relevant articles (other than Article 6) in the PILA do *not* point to Swiss law as having jurisdiction.

(a) On the plaintiffs' contractual claims, I refer to:

(i) Article 112 – None of the parties are domiciled in Switzerland. In the absence of domicile and as the three defendants are not habitually resident in Switzerland, the Swiss courts have no jurisdiction;

(ii) Article 113 – Bouvier did not perform the characteristic obligation of the contracts in Switzerland so as to enable the Swiss courts to have jurisdiction;

(iii) Article 116 – It has no application to the artwork transactions as the parties did not choose a governing law let alone Swiss law; and

(iv) Article 117 – as none of the parties are habitually resident in Switzerland and absent a choice of law, it cannot be said that Swiss law is the law with which the parties have the closest connection.

(b) As for the plaintiffs' claims in tort, I refer to:

(i) Article 129 – the Swiss courts would not have jurisdiction as none of the defendants are domiciled or habitually resident in Switzerland nor did the acts of fraudulent misrepresentation or deceit occur there; and

(ii) Article 133 – neither the plaintiffs nor Bouvier or Rappo are habitually resident in Switzerland. The alternative method

for Swiss law to be the governing law (*ie* the tort was committed in Switzerland) is also not applicable. Failing the alternative, if the tort occurred in another state, then the law of such state applies, if the tortfeasor should have foreseen that the result would occur there.

(c) In regard to the plaintiffs' claims against Rappo for unjust enrichment, I refer to:

(i) Article 127 – the Swiss courts would not have jurisdiction as neither Bouvier nor Rappo are domiciled or habitually resident in Switzerland. Additionally, in the case of the second defendant, Swiss courts would not have jurisdiction as it does not have a place of business in Switzerland nor operations there.

93 The common thread running through all the provisions of the PILA that enable Swiss courts to have jurisdiction is either domicile or habitual residence of a defendant in Switzerland. This is absent in our case notwithstanding Bouvier's recent attempts to establish residence in Geneva.

94 It would be instructive at this stage to see what Court of Appeal said at [41] in *JIO Minerals* :

> The courts will generally consider the relevant connecting factors at *stage one* of the *Spiliada* test. Although the list of factors is obviously not closed and much will depend upon the precise factual matrix concerned, Prof Yeo Ting Min has furnished some helpful guidance as follows (see *Halsbury's Laws of Singapore* vol 6(2) LexisNexis 2009 ("*Halsbury's Laws of Singapore*") at para 75.090):
>
> > General connecting factors are considered at this stage. These include the locations of the parties, relevant witnesses, facts, and evidence, and the applicable law to

> the issues in dispute. As the search is for the forum that is prima facie clearly more appropriate to try the case, it is important to see what the case is about, and connections which have no or little bearing on adjudication of the issues in dispute between the parties will carry little weight. While there is a natural emphasis on the minimisation of expense and inconvenience of trial at this stage, it should be borne in mind that the true test is appropriateness.
>
> At this stage, differences in legal systems are generally ignored. In general, five types of connections may conveniently be identified, but they are not exhaustive.

The five types of connections are those set out by Prof Yeo (at [42] *supra*) and will not be repeated.

95 It bears noting that the court hearing this Suit will be dealing primarily with factual disputes. Expense-wise, it is of little consequence to the parties where the venue of the trial is as all parties have sufficient means to pursue or resist the claims as the case may be, in any country. Translation of documents is part and parcel of litigation. If this Suit moves to Switzerland, the parties would want to translate the documents/papers filed in this Suit into French with the attendant costs. From this court's experience, competent French interpreters are readily available in Singapore if Bouvier, Rappo and Sazonov choose not to testify in English. Rybolovlev will testify in Russian regardless of where the trial is held as he is neither conversant in French nor English.

96 As for the compellability of witnesses, it should also be borne in that the compellability of witnesses refers to non-party witnesses. In *CIMB Bank Bhd v Dresdner Kleinwort Ltd* [2008] 4 SLR 543, ("*CIMB*") where the Court of Appeal said at [69]:

> … location of witnesses is only really significant in relation to third party witnesses who are not in the employ of the party as it could give rise to issues of compellability …

97 The short answer to the defendants' submission that Tetiana Bersheda ("Bersheda"), the plaintiffs' Swiss counsel, is also a witness as she assisted Rybolovlev as a translator in his dealings with Bouvier is to be found in another extract from the same passage in *CIMB* at [69]; the appellate court said:

> Only witnesses whose evidence is potentially material and relevant to the issues in the action should be reckoned.

98 I do not see how Bersheda's purported role as an interpreter is relevant to the issues in this Suit. Neither do I see the need for any staff employed in Geneva by the plaintiffs or Rybolovlev (save for Sazonov) or Bouvier to be called as witnesses.

99 The defendants' submission regarding Elena's availability as a witness in Switzerland overlooks the fact that she was involved in acrimonious divorce proceedings against Rybolovlev in 2009 and took out related proceedings against his assets in Switzerland, Singapore and elsewhere. As I pointed out to Mr Tong, even if Elena is compellable as a witness for proceedings in Switzerland, she can make herself scarce from the country to avoid attending court. I cannot imagine that Elena will want to be a witness for any of the parties involved in this Suit.

100 In this regard, Bouvier and the second defendant have apparently overlooked what their own expert Prof Widmer said in her 2nd affidavit/report filed on 4 July 2015 when she discussed the compellability of witnesses. She had referred to the Federal Code of Civil Procedure of 19 December 2008 (cc 272) (Switzerland) ("Swiss CPC") and said:

> 80 I agree with Mr Joory that both the parties to the proceedings and third parties are under a *procedural* duty to cooperate in the taking of evidence, including a duty to produce documents. However, it is important to add that in addition to this procedural duty, parties to

> agency contracts are also under a *substantive* law duty to produce documents. I will elaborate on this below.
>
> 81 In contrast, neither the parties nor third parties have a general right to refuse to cooperate under Swiss law, as might be misunderstood from the Joory Opinion at paragraph 113.
>
> .....
>
> 83 The instances in which *a third party* is entitled to refuse to cooperate are set out in Articles 165-166 [of the [Swiss] CPC under the heading "Third parties' right of refusal". They provide as follows:
>
> "Art. 165 Absolute right to refuse
>
> 1 The following persons have the right to refuse to cooperate:
>
> a any person who is or was married to or cohabits with a party;
>
> b any person who has a child with a party;
>
> …

A plain reading of Article 165(a) and (b) of the Swiss CPC suggests that Elena can refuse to testify for or against her former husband in Switzerland.

101 In her 2nd affidavit/report filed on 4 July 2015, Prof Widmer had opined that if the plaintiffs' claim is based on a legal concept which is unknown to Swiss law, the court will, for the purpose of jurisdiction, consider which legal notion under Swiss law the claim comes closest to. With respect, this is a highly unsatisfactory state of affairs. Further, if the Swiss courts decide the plaintiffs' claims in accordance with Singapore law as could be the case according to Joory's opinion (or even according to Mr Tan and Mr Yeo), that would defeat the very purpose of granting a stay of this Suit.

(ii) Stage 2 of the Spiliada test.

102 Assuming *arguendo* that the defendants have satisfied stage 1 of the Spiliada test, the burden shifts to the plaintiffs (under stage 2) to show that a stay should nevertheless not be granted because of exceptional circumstances. In this regard, it is not in dispute that the plaintiffs' proprietary and equitable claims are not recognised under Swiss law. That would cause grave prejudice to the plaintiffs if this Suit is stayed in favour of Switzerland as the forum. At the risk of repetition, the plaintiffs' main claims against the first/second defendants (as reflected in the Statement of Claim [Amendment No 1] filed on 18 September 2015) were for:

(a) Loss and damages for breach of fiduciary duties;

(b) Liability to account as a constructive trustee;

(c) Tracing the benefits of the Toulouse Lautrec painting sums into any traceable product and claiming a beneficial interest or an equitable lien in the traceable product; and

(d) Conspiracy to injure and to defraud.

None of the above claims are recognised under Swiss law.

103 As for Rappo, the plaintiffs' claims against her were for dishonest assistance or knowing receipt and conspiracy to defraud. If this Suit is stayed, the plaintiffs cannot mount their claims against Rappo under Swiss law either unless the same are re-characterised as claims in tort or contract or unjust enrichment (on which I had earlier expressed my reservations).

104 I am cognisant of the fact that in the CA decision at [35] the appellate court had opined that Switzerland may be the appropriate forum for this Suit. In the course of his submissions (on 16 September 2015), Mr Yeo had explained that he made no submissions on jurisdiction before the Court of Appeal because that issue was not the subject of appeal. It was only when the Chief Justice asked Mr Tong "what about proprietary injunctions" that Mr Tong replied that Swiss law applies and Swiss law does not recognise proprietary injunctions and hence, there was no serious issue to be tried. Mr Yeo surmised that was why at [152]–[153] of the CA decision, the comment was made that the governing law may be Swiss law.

105 Staying this Suit would not be a matter of case management like *Ram Parshotam Mittal* as there would not be parallel proceedings in Monaco – the plaintiffs are prepared to drop their civil claims there if required by this court as a condition for not granting a stay.

106 Mr Tan had argued that if the appropriate *lex loci* is Swiss law, then Swiss law is the *lex causae*. If that is the case, he said the plaintiffs' proprietary claims and remedies recognised under Singapore law as substantive law would not be available to the plaintiffs even if they choose to proceed in Singapore.

107 Mr Tong had also argued that if the *lex loci* is Swiss law, then the place of the torts of misrepresentation and conspiracy is Switzerland. The problem again is that the plaintiffs may not have these causes of action available to them in Switzerland.

108 I turn next to Prof Yeo's remaining three criteria. These can be easily disposed of:

(a) governing law – this is inconclusive because of my earlier observations that the parties did not choose a governing law;

(b) other proceedings – this is academic in the light of the plaintiffs' willingness to withdraw their civil proceedings in Monaco if no stay is granted; and

(c) shape of the litigation – neither the Monaco proceedings nor this Suit have progressed very much, the former because of the criminal proceedings (and Bouvier's/Rappo's attempt to strike out the proceedings) while the latter's lack of progress has been the hearing of these Summonses and the appeals to the Court of Appeal.

109 An unusual feature of this Suit is the fact that the defendants are not in agreement on which other forum is more appropriate for this Suit. I had commented to counsel that Bouvier and Rappo are akin to Siamese twins. They cannot be parted and go their separate ways – Bouvier and the second defendant cannot litigate in Switzerland while Rappo contests the civil proceedings in Monaca; all three defendants must move in tandem for this Suit. Citing *JIO Minerals* at [53], Mr Tong and Mr Tan submitted that this court only has to determine if Singapore is the appropriate forum. In excerpt from *JIO Minerals*, the appellate court quoted Prof Yeo from *Halsbury's Laws* at para 75.089 where he said:

> Thirdly, the defendant may show that two (or more) fora are clearly more appropriate than Singapore, without having to identify one of them specifically as *the* most appropriate forum.

Both counsel submitted the court does not have to go further to decide which of the alternative fora, *viz*, Monaco or Switzerland is more appropriate than Singapore.

110 In any event I entertain considerable doubt that Rappo genuinely wishes to litigate in Monaco in the light of her attempt to strike out the Monasque proceedings (see [53] *supra*). Indeed, her Monaco legal counsel Frank Michel (in his affidavit filed on 19 May 2015) had opined that the Monaco courts have no jurisdiction against Rappo as the alleged offences of money-laundering were not committed in Monaco. Further, if her allegation that Rybolovlev wields great powers/influence is to be believed, why would she want to litigate in Monaco?

The Singapore International Commercial Court ("the SICC")

111 I am of the view that the perceived advantages (to the defendants) or disadvantages (to the plaintiffs) of Switzerland being the forum will be levelled out if this Suit remains in Singapore but is transferred to the SICC.

112 In this regard, the court had requested submissions from all three parties on the suitability of transferring this Suit to the SICC. The submissions were filed on 24 February 2016.

113 Both Mr Tong and Mr Tan on behalf of Bouvier and the third defendant respectively opposed the transfer of this Suit to the SICC on the basis *inter alia* that it was premature; the possibility of transfer can only arise for consideration after arguments had been tendered and after this court had decided the Summonses against the defendants.

114 It was further contended that O 110 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("ROC") would not be applicable because the High Court should not apply the private international rules of the SICC to determine the stay application. Moreover, the possibility of a transfer to the SICC should not be a

factor this court should take into account under either stage 1 or stage 2 of the *Spiliada* test.

115 The plaintiffs on the other hand submitted that this Suit is most appropriate to transfer to the SICC as it fulfilled the requisite requirements under O 110 r 12(4) read with O 110 r 7(1)(a) and (c) of the ROC.

116 I disagree with the defendants' position, and am of the view that this Suit should be transferred to the SICC. Such a transfer offers all the advantages and none of the disadvantages to the plaintiffs or the defendants that were raised in their submissions. The international judges who sit on the SICC are not only eminent and very able but some hail from countries that have civil law systems. In addition, one of them (Justice Dominique T Hascher of the Supreme Judicial Court in France) is equally fluent in French and English. Consequently, the court would urge all parties to relook the provisions of O 110 of the ROC and agree to a transfer of this Suit to the SICC.

Conclusion

117 In the result I make the following orders:

(a) Summons 1763:

(i) Prayer 2 is dismissed;

(ii) Under prayer 1, the first and second defendants are to file and serve their defence (and counterclaim if any) within 14 days of the date of these grounds of decision; and

(iii) Costs of application to the plaintiffs to be taxed unless otherwise agreed.

(b) Summons 1900:

(i) Prayer 1 is dismissed;

(ii) Prayer 2 is dismissed; and

(iii) Costs to the plaintiffs to be taxed unless otherwise agreed.

(c) As a condition of a stay not being granted, the plaintiffs (including Ekaterina) are required to discontinue their civil proceedings in Monaco and, if requested by any of the defendants, undertake to procure the timely attendance as witnesses in Singapore of Sazonov, Rybolovlev, Bogdanov, Ekaterina as well as Bersheda (the plaintiffs' Swiss lawyer). The order for court attendance excludes Elena as the defendants cannot be better off under Singapore law than under Swiss law. Elena would not be compellable as a witness in Switzerland because of Article 165 of the Swiss CPC.

118 Given the dismissal of the Summonses and in the event the parties fail to agree on the transfer to the SICC, the two defendants and Rappo are given another opportunity to present full arguments to this court (on a date to be fixed by the Registrar) as to why this Suit should not be transferred to the SICC pursuant to O 110 r 12(4)(b)(ii) of the ROC.

Lai Siu Chiu
Senior Judge

Alvin Yeo SC, Monica Chong, Wendy Lin & Chan Xiao Wei (Wong Partnership LLP) for the plaintiffs

Edwin Tong SC, Kristy Tan, Peh Aik Hin & Leong Yi-Ming (Allen & Gledhill LLP) for the first and second defendants

Kenneth Tan SC (instructed), Paul Seah, Calvin Liang & Rachel Chin (Tan Kok Quan Partnership) for the third defendant