IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2021] SGCA 72

Civil Appeal No 102 of 2020

Between

VKC

… *Appellant*

And

(1) VJZ
(2) VKA

… *Respondents*

In the matter of Originating Summons Probate No 3 of 2019 (Summons No 96 of 2020)

Between

VJZ and another

… *Applicants*

And

VZB and others

… *Respondents*

GROUNDS OF DECISION

[Civil Procedure] — [Injunctions] — [Anti-suit injunction]

TABLE OF CONTENTS

VKC
v
VJZ and another

[2021] SGCA 72

Court of Appeal — Civil Appeal No 102 of 2020
Judith Prakash JCA and Belinda Ang Saw Ean JAD
11 March 2021

29 July 2021

Belinda Ang Saw Ean JAD (delivering the grounds of decision of the court):

Introduction

1 Civil Appeal No 102/2020 ("CA 102/2020") was an appeal against the High Court Judge's (the "Judge") decision in *VJZ & another v VKB & others* [2020] SGHCF 11 (the "HC Judgment"), granting an anti-suit injunction against the appellant [VKC] (the "appellant"). The sole issue that arose in this appeal was whether the anti-suit injunction should have been granted. The appeal was dismissed with costs on 11 March 2021. We now publish our full grounds of decision.

2 This court upheld the Judge's grant of an anti-suit injunction to restrain proceedings that were brought by the appellant in Indonesia. However, with respect, we disagreed with the Judge on the main ground relied upon by him for the grant of an anti-suit injunction, and in particular with his conclusions that

the respondents were entitled to the benefit of an exclusive jurisdiction in a settlement agreement and that the proceedings in Indonesia constituted a breach of the exclusive jurisdiction clause. We upheld the grant of the anti-suit injunction because we found that the Indonesian proceedings were otherwise vexatious or oppressive. This ground was advanced by the respondents in this appeal relying, *inter alia*, on the Judge's view on natural forum and his finding that the Indonesian proceedings were vexatious and oppressive to them. This ground required us to be satisfied that Singapore was clearly the more appropriate forum and that it was necessary for the ends of justice to grant the anti-suit injunction taking into account considerations of comity, if necessary. As the categories of factors which indicate vexation or oppression are not closed, this court's consideration of other factors taken in the round will be explained in this decision. We will also discuss whether the appellant's conduct in instituting and continuing with litigation in Indonesia manifested bad faith.

Background to the anti-suit injunction application and the underlying dispute

3 The background facts and events leading to the anti-suit application are helpfully summarised in the HC Judgment. In brief, the appellant was one of 15 beneficiaries of an estate (the "Estate"), while the respondents, [VJZ] and [VKA] (collectively, the "respondents") were appointed as the joint and several administrators of the Estate (later varied to joint administrators) on 1 February 2018. The Grant of Letters of Administration was granted to the respondents on 25 April 2018 and issued on 26 July 2018.

4 The Estate was that of the deceased testator (the "Deceased") who passed away on 31 October 2012, leaving behind a last will and testament dated 24 November 1995 ("the 1995 Will"). Later, the Estate became embroiled in

the conflict amongst the beneficiaries who ended up suing in various jurisdictions such as Indonesia and Singapore.

5 As regards legal proceedings in Singapore, pursuant to an order of court dated 8 May 2017 and made in HCF/OSP 10/2016, the beneficiaries participated in mediation on 16 and 17 April 2018 and a mediation settlement was reached. All 15 beneficiaries duly executed a settlement agreement dated 18 April 2018 (the "2018 SA").

6 The provisions in the 2018 SA reflected the parties' understanding, arrangement and collective agreement as to the respondents' role in the administration of the Estate including their function, responsibilities and obligations in and about the distribution of the assets in the Estate together with the performance and discharge of the terms of the 2018 SA. For ease of reference, the Judge categorised the beneficiaries (apart from the 15th beneficiary which was a Singapore-incorporated company wholly owned by the Deceased prior to his death) into three groups: five of them including the appellant belong to "Family [A]"; another five belong to "Family [B]", and the rest were "unrepresented beneficiaries".

7 The 2018 SA provided for Singapore law and exclusive jurisdiction. In particular, cl 19 of the 2018 SA provides:[1]

> The Parties hereby submit to the exclusive jurisdiction of the Courts of Singapore. The Parties agree that in respect of all disputes, controversies, claims or disagreements arising out of or in connection with this Agreement, including but not limited to its existence, validity, breach and enforcement, shall be first submitted to mediation at the Singapore International Mediation Centre and the mediator shall be Mr [xxx]. The Parties further agree that only if the Parties have in good faith

[1] Appellant's Core Bundle ("ACB") at p 252.

> carried out the mediation and they have not been able to resolve their dispute, controversy, claim and/or disagreement, then, and in that event only, the Parties shall commence legal proceedings in Singapore.

8 Shortly after the 2018 SA was entered into, the respondents applied to court on 23 April 2019 vide Originating Summons Probate No 3 of 2019 ("OSP 3/2019") seeking several orders to give effect to their appointment and indemnification in relation to their administration of the Estate in accordance with the terms of the 2018 SA, and in respect of various terms in the 2018 SA to be performed and discharged by the respondents. On 13 August 2019, various orders of court which we identify as HCF/ORC 253/2019 ("ORC 253") were granted to the respondents. As the Judge rightly observed, as the respondents were non-parties to the 2018 SA, ORC 253 was the means by which they were able, and became compelled, to implement the 2018 SA. To illustrate, we set out a selection of orders covered by ORC 253 (for the avoidance of doubt, references to the "Administrators" in ORC 253 pertain to the respondents in this appeal, while references to the "respondents" in ORC 253 pertain to the beneficiaries of the Estate):

> 1. The [Administrators] shall as far as reasonably practicable administer the estate of [the Deceased] (the "Estate"), including any distributions of assets of the Estate to the beneficiaries of the Estate in all jurisdictions, including but not limited to Singapore, Malaysia, Indonesia, Hong Kong and the People's Republic of China (in a manner consistent with the laws of the respective jurisdictions), in accordance with the Settlement Agreement between the Respondents dated 18 April 2018 (the "**Settlement Agreement**"). Should the [Administrators] decide to depart from the Settlement Agreement, they shall notify the Respondents within 14 days of their decision to do so.
>
> 2. The [Administrators] shall be indemnified out of the Estate from any and all Losses which the [Administrators] may at any time and from time to time sustain, incur or suffer (whether to the Respondents or otherwise) by reason of the [Administrators] administering the Estate in accordance with the Settlement Agreement as set out in Order (1), provided that at all times the [Administrators] have acted in good faith in administering the

> Estate. "Losses" means all losses, liabilities, costs (including legal costs and experts' and consultants' fees), charges, expenses, actions, proceedings, claims and demands.
>
> 3. Following the distribution of the US$87,175,000.00 (the "Payment Sum") to the 1st to 5th Respondents in accordance with the Settlement Agreement, the 6th to 14th Respondent shall be wholly entitled to the remainder of the Estate in accordance with each of their relative entitlements under the Last Will of the Deceased dated 24 November 1995. The 15th Respondent shall not be entitled to any distribution of assets of the Estate.
>
> 4. The [Administrators] shall be at liberty to pay any part of the Payment Sum, as and when distributions are made, to the 1st Respondent and this shall constitute a good discharge of any obligations that the Administrators may have in relation to the Payment Sum to be paid to the 1st to 5th Respondents.
>
> …
>
> 13A. If the [Administrators] do not make any distributions of assets within six months from 1 August 2019, the [Administrators] will provide, within 14 days thereafter, reasons to the beneficiaries as to why no distributions were made, and if no distributions of assets are made in any subsequent six month period thereafter, the [Administrators] will provide, within 14 days from the end of the said period of six months, reasons to the beneficiaries as to why no distributions were made.
>
> [emphasis in original]

9 On 13 June 2019, the respondents published notices in two newspapers in Indonesia (the "Notices"). One of the Notices[2] was in English and the other in Indonesian. It was not disputed that the Notices contained the same content. The Notice in English reads:

> **NOTICE**
>
> [The Deceased] passed away on 31 October 2012. Pursuant to orders made by the High Court of the Republic of Singapore on 1 February 2018 and 19 March 2018, [VJZ] and [VKA], all care of [Firm and Firm's address] (the "**Administrators**") were appointed as the joint administrators of the Estate of [the Deceased] ("the **Estate**").

---

2 ROA Vol III Part A at pp 35–36.

> TAKE NOTICE that assets of the Estate should not be dealt with in any manner whatsoever without proper sanction from the Administrators. If any person is aware of any dealings or have information in respect of assets belonging to the Estate, please inform the Administrators of the same at [email address] immediately.
>
> All creditors or next-of-kin interested in or having claims against the Estate should give particulars in writing their claims or interest to the above contact details.
>
> Dated this 13th day of June 2019
>
> **[VJZ] and [VKA]**
>
> **Joint Administrators**
>
> [emphasis in original]

10 The appellant commenced proceedings in Indonesia ("Indonesian Proceedings") in respect of these Notices. Based on documents annexed to the first respondent's affidavit filed in Summons 96 of 2020 ("SUM 96/2020"),[3] the Indonesian Proceedings appear to have been commenced on 15 August 2019. The appellant's counsel having conduct of the proceedings in Indonesia, Ms Sarmauli Simangunsong ("Ms Sarmauli"), affirmed in her affidavit filed in SUM 96/2020 that the appellant had a claim based on tort law as it applies in Indonesia.[4] The basis for this claim was that the respondents' act of publishing the Notices was "not only false and misleading", but also "directly affected [the appellant's] rights as a beneficiary of the Estate in Indonesia". According to the appellant's counsel, the respondents by inviting next-of-kin interested in or having claims against the Estate to contact the respondents could "potentially [open] the floodgates for more claimants who could possibly make a claim against the Estate under forced heirship laws in Indonesia".[5]

---

3 ROA Vol III Part A at p 12 para 14; p 54.

4 ROA Vol III Part A at p 209 at para 10.

5 ROA Vol III Part A at p 210 at para 12.

11 It transpired that at some point in 2019 the beneficiaries undertook further negotiations as to their rights and entitlements under the 2018 SA. These negotiations culminated in the beneficiaries entering into a new Inheritance Right Settlement Agreement ("IRSA") dated 13 December 2019. Counsel for the appellant, Mr Devinder Kumar s/o Ram Sakal Rai ("Mr Rai"), confirmed that he had not been instructed on the re-negotiations and that he was only notified of the IRSA a few days before it was entered into.[6]

12 We pause here to observe that a chronology of the events that had occurred from the time the appellant started the Indonesian Proceedings up to the time of execution of the IRSA would have been useful, seeing that the outcome of the re-negotiations materially changed what had been agreed to in the 2018 SA. Be that as it may, we note the existence of same and/or closely connected facts in the 2018 SA and the IRSA that would bear on the credibility of the appellant's claim in the Indonesian Proceedings, and her decision to press on with the proceedings in Indonesia after entering into the IRSA. We also note that the appellant's entitlement under the 1995 Will was changed twice, first by the 2018 SA and then again by the IRSA. These matters played a significant role in our analysis of whether an anti-suit injunction was warranted on the ground that the Indonesian Proceedings were, in the circumstances, vexatious or oppressive. Taken together with these matters, the inherent weakness of the claim was a relevant factor in the consideration of whether foreign proceedings were vexatious or oppressive. We elaborate on these matters below.

13 Returning to the background facts and procedural history, in Summons 10 of 2020 (filed on 15 January 2020) ("SUM 10/2020"), Family [A] and another beneficiary applied for, *inter alia*, a declaration that the 2018 SA had

---

6 Transcript (11 March 2021) at pp 23–25.

been cancelled and replaced by the IRSA.[7] They also applied for the respondents to be removed as administrators and for VKB (who is part of Family [A]) and another individual, an Indonesian national, to be appointed as new administrators. These orders were granted by the court in an order of court identified as ORC 212/2020 ("ORC 212") made on 3 August 2020. The upshot was that it was recognised that the IRSA had replaced the 2018 SA and that new administrators were appointed.

14 On 7 February 2020, the respondents were provided with a letter of request for international judicial assistance from the registrar for the Central Jakarta District Court for service of process dated 11 December 2019.[8] The respondents were summoned to attend a hearing which appears to have been scheduled for 19 March 2020.[9] It is not disputed that the respondents came to know of the Indonesian Proceedings only after that letter was served on them.

15 On 24 March 2020, the respondents filed their application for an anti-suit injunction to restrain the appellant from taking further steps in relation to the Indonesian Proceedings and any appeals and/or related proceedings arising therefrom.[10] As mentioned, the Judge granted the respondents' application.

Overview of the applicable principles for the grant of an anti-suit injunction

16 This judgment will discuss two main grounds which are usually put forward to justify granting an anti-suit injunction to restrain foreign

---

7 HCF/SUM 10/2020.

8 ROA Vol III Part A at p 29.

9 ROA Vol III Part A at p 33.

10 See HCF/SUM 96/2020.

proceedings. The first main ground is that the foreign proceedings constitute a breach of a jurisdiction clause in a contract between the parties. In a situation like this, an anti-suit injunction will be granted to restrain the offending party from pursuing foreign proceedings in breach of a jurisdiction clause unless there are strong reasons not to grant the injunction. This contractual basis for an anti-suit injunction would also include restraining foreign proceedings which have been commenced in breach of arbitration clauses.

17 An aspect of the first ground that was before the Judge was the extent to which a non-party to an agreement may claim the benefit of an exclusive jurisdiction clause to obtain an anti-suit injunction against a contracting party. Ordinarily, absent plain language to the contrary, the contracting parties are likely not to have intended to benefit nor prejudice non-contracting third parties by their contractual arrangements. In the Judge's view, however, the respondents were entitled to rely on cl 19 of the 2018 SA by virtue of s 2(1)(*b*) of the Contracts (Rights of Third Parties) Act (Cap 53B, 2002 Rev Ed) ("CRTPA"). We comment on the Judge's ruling below.

18 The second main ground is that the foreign proceedings are otherwise vexatious or oppressive. As summarised by the court in *Sun Travels & Tours Pvt Ltd v Hilton International Manage (Maldives) Pvt Ltd* [2019] 1 SLR 732, the factors to be considered by the court in deciding whether to grant an anti-suit injunction on this ground are (at [66]–[67]):

(a) whether the defendant is amenable to the jurisdiction of the Singapore court;

(b) whether Singapore is the natural forum for resolution of the dispute between the parties;

(c) whether the foreign proceedings would be vexatious or oppressive to the plaintiff if allowed to continue; and

(d) whether the anti-suit injunction would cause any injustice to the defendant by depriving the defendant of legitimate juridical advantages sought in the foreign proceedings.

As stressed in *Koh Kay Yew v Inno-Pacific Holdings Ltd* [1997] 2 SLR(R) 148 at [19], that Singapore is the natural and proper forum is a necessary condition that must be satisfied before an anti-suit injunction can be granted under this ground.

19 Whether there has been vexatious conduct involves an assessment and evaluation of a number of factors. The list of factors is not closed. To illustrate, the inherent weakness of a claim sought to be pursued in the foreign proceedings when taken together with other factors may be a relevant factor in considering whether the foreign proceedings are vexatious (see *Elektrim SA v Vivendi Holdings 1 Corporation* [2009] [2009] 2 All ER (Comm) 213 at [84] and [121]; *John Reginald Stott Kirkham and others v Trane US Inc and others* [2009] 4 SLR(R) 428 ("*Trane*") at [47]).

20 Related to the question of whether or not the foreign proceedings are vexatious or oppressive would be the injustice that each party might suffer if the injunction were or were not granted. Consideration of a juridical advantage in the foreign forum would include the kind of remedy and its availability to the party bringing proceedings in the foreign jurisdiction based on the application of foreign law to the substance of the parties' dispute, rather than the law of the competing forum.

Preliminary comments

21 Having set out the relevant principles, we first explain why we decided that the Indonesian Proceedings were vexatious and oppressive and justified the grant of an anti-suit injunction. Thereafter we deal briefly with the question of whether the respondents could enforce cl 19 of the 2018 SA.

22 It is convenient to mention here that it was not disputed and, indeed, Mr Rai confirmed during the hearing, that the appellant is amenable to the jurisdiction of the Singapore court. This confirmation was rightly given seeing that the appellant had given her Singapore address as her place of residence in her affidavit filed to oppose the respondents' application even though the affidavit was affirmed in Indonesia. Further, the appellant is a Singapore citizen. Her Singapore National Registration Identity Card number is shown in the 2018 SA. We note that the respondents applied for an anti-suit injunction promptly and there was no suggestion that the Indonesian Proceedings had progressed beyond an early stage. The only document evidencing the commencement of the Indonesian Proceedings was a letter from Ms Sarmauli to the District Court of Jakarta dated 15 August 2019 informing the latter of the filing of the lawsuit against the respondents. On 7 February 2020, the respondents were provided with a letter from the Embassy of the Republic of Indonesia in Singapore enclosing a letter of request for international judicial assistance, summoning the respondents to attend a hearing scheduled for 19 March 2020 (see [14] above). On 24 March 2020, the respondents filed the application for an anti-suit injunction. As neither party raised delay and comity, these matters did not feature in arguments before the Judge or in this appeal.

23 In the interest of expediency and to avoid repetition, we will refer to the arguments of the respective parties and the relevant points in the course of addressing the issues in this appeal.

The foreign proceedings are otherwise vexatious or oppressive

24 As mentioned, to obtain an anti-suit injunction on this ground, it is necessary to establish that (a) Singapore is the natural forum and (b) the pursuit of the foreign proceedings is vexatious or oppressive. While the Judge decided to grant an anti-suit injunction on the basis that the respondents could rely on the exclusive jurisdiction clause (*ie*, cl 19), he considered whether there were strong reasons against the grant of the anti-suit injunction. In that connection the Judge made the following observations that merit consideration in this appeal. First, the Judge concluded that Singapore was the natural forum with which the alleged dispute (*ie*, the claim based in tort elaborated at [10] above) had the most real and substantial connection (we will adopt for convenience a shortened expression "the more appropriate forum"). Second, he held that the continuation of the Indonesian Proceedings would be vexatious and oppressive to the respondents. To the Judge, these two matters further strengthened the case for the grant of the anti-suit injunction.

Natural forum

25 We summarise the Judge's main reasons for concluding that Singapore was the more appropriate forum as follows:

(a) First, the shape of the litigation pointed to Singapore being the more appropriate forum. There were already ongoing proceedings in OSP 3/2019 which related to the respondents' administration of the Estate, and the Indonesian Proceedings could not be considered

separately from it. ORC 253 which was granted in OSP 3/2019 contained an order indemnifying the respondents from losses incurred by reason of their administration of the Estate in accordance with the 2018 SA.[11] The Judge found the indemnity order to be a relevant consideration as the respondents had published the Notices due to their appointment as administrators in Singapore and as part of their obligation to implement the 2018 SA. In addition, if the respondents' publication of the Notice had reduced the value of the Estate, all the beneficiaries should have been joined to the proceedings, but any joinder would have run into the problem of cl 19, in which the beneficiaries had agreed to submit their disputes to mediation and otherwise to legal proceedings in Singapore. Furthermore, the appellant's claims in the Indonesian Proceedings also touched on the 2018 SA since her argument was that her entitlement was affected by the publication of the Notices. The scope of her entitlement would entail an examination of the 1995 Will and the 2018 SA and how they interacted.

(b) Second, even though the publication and therefore the alleged tort occurred in Indonesia, the relevant events and transactions had a closer connection to Singapore. The respondents published the Notices in Indonesia because of their obligations under the 2018 SA, and the entire factual background of the Notices was derived from prior proceedings in Singapore and the 2018 SA.

(c) Third, although Indonesian law as the governing law of the tortious claim was a significant factor in favour of Indonesia, there were countervailing factors specific to this case that reduced the weight to be

---

11 HCF/ORC 253/2019 at cl 2.

given to the governing law factor. Questions relating to the interpretation of the 2018 SA would be governed by Singapore law, as provided under the governing law clause in cl 18 of the 2018 SA. Further, the beneficiaries would have envisioned that some of their prior disputes might be governed by Indonesian law but had nevertheless chosen to submit all the disputes relating to the 2018 SA to the Singapore courts.

26 A close examination of the parties' arguments showed that the parties had identified the following factors as significant to the analysis of whether Singapore or Indonesia is the natural and proper forum to determine the dispute: (a) connections to relevant events and transactions; (b) the place where the tort was committed and (c) the governing law of the dispute. We will examine each of the three factors in turn.

Connections to relevant events and transactions

27 It is clear from our earlier outline of the events leading to the application for the anti-suit injunction that the respondents' appointment to administer the Estate, as well as how this administration was going to take place in accordance with the 2018 SA, were rooted in proceedings in Singapore. The Estate has assets in multiple countries and cl 1 of the 2018 SA envisaged that the respondents would be appointed as administrators and/or executors of the Estate in all jurisdictions including Singapore and Indonesia. As the respondents were not parties to the 2018 SA, the provisions in the 2018 SA pertaining to the respondents' rights, obligations and responsibilities would have to be covered and implemented by a court order. Thus, the respondents filed OSP 3/2019 seeking orders to be entitled to administer the Estate, as well as other orders in relation to such administration. Paragraph 1 of ORC 253, which was granted in OSP 3/2019, stated that the respondents should as far as reasonably practicable

administer the Estate in accordance with the 2018 SA. ORC 253 also contained other orders including an indemnity order to cover the respondents' administration of the Estate in accordance with the terms of the 2018 SA. OSP 3/2019 was not only part of the backdrop but was a central feature in the dispute. OSP 3/2019 was filed on 23 April 2019 before the Indonesian Proceedings were filed on 15 August 2019. The proceedings in OSP 3/2019 were live at the time the Judge heard the anti-suit injunction application in SUM 96/2020 in June 2020. SUM 10/2020 (filed in OSP 3/2019) was pending and hence remained unresolved. The Judge made his orders on SUM 10/2020 in August 2020. We agreed with the Judge's observation that whilst OSP 3/2019 is not strictly *lis alibi pendens* in relation to the Indonesian Proceedings since OSP 3/2019 did not concern the torts alleged in those proceedings, OSP 3/2019 and the appellant's core complaints in the Indonesian Proceedings are inter-related. We therefore disagreed with Mr Rai that the Judge had erred in finding that the Indonesian Proceedings could not be considered independently from OSP 3/2019 and that ORC 253 did not arise out of the 2018 SA.

28 At the time the Notices were published in Indonesia, the respondents had not yet been appointed as administrators by the Indonesian courts. By agreeing to the 2018 SA, all 15 beneficiaries had agreed that the respondents should have the authority to administer the Estate in "all jurisdictions" where the Estate's assets were located, but curiously, in this regard, Family [A] was said to be uncooperative and the respondents' efforts to seek formal appointment in Indonesia "did not go smoothly".[12] The formal mechanics of seeking court appointment as administrators to enable the respondents to administer the Estate in any particular jurisdiction was a separate matter from the authority conferred

12 Respondent's Case at para 5.

on them by the 2018 SA. Thus, the lack of appointment of the respondents as administrators in Indonesia at the time the Notices were published was not critical. The respondents did not appear to be at a stage of the administration of the Estate that required them to be duly appointed by the Indonesian courts before taking the next step in the administration of the Estate in Indonesia. The respondents' responsibilities included marshalling the Estate's assets with a view to distributing the agreed sum of US$87,175,000 to Family [A]. It was in that context that the respondents published the Notices. In the Respondents' Case, the respondents explained that the Notices were published in good faith to prevent any dissipation of assets. Further, the timing of the publication could not be faulted seeing that it was then close to seven years since the death of the testator.

29 As pointed out by the Judge and by the respondents, based on the first respondent's explanation, Family [B] had, through their solicitors, urged the respondents to "make a public announcement that the [respondents] are the lawful administrators/ executors of the Estate in Singapore, Indonesia and all other jurisdictions such that all dealings in respect of the assets of the Estate must go through [the respondents] and not the beneficiaries of the Estate". This suggestion was made by Family [B] out of concern that members of Family [A] might have been dissipating assets.[13] There was no hint that in taking up the suggestion and in publishing the Notices, the respondents were siding with one family. We also note the first respondent's affidavit evidence that the respondents had published substantially the same notices in Singapore without any objection from the appellant.[14] We accept the respondents' explanation that the publication of the Notices in Indonesia was in performance of the

13 Respondents' Supplemental Core Bundle at pp 15–16.

14 ROA Vol III Part A at p 14 para 21; pp 147–150.

respondents' obligations as agreed to by the beneficiaries in the 2018 SA. All in all, it is undeniable that the subject matter of the alleged tort has strong links to the 2018 SA and the entitlement of the other beneficiaries like Family [B]. The subject matter of the Indonesian Proceedings cannot be treated independently from OSP 3/2019 and ORC 253.

Place of the tort

30 It is common ground that the alleged tort was committed in Indonesia in that the Notices were published in Indonesia. Nevertheless, we agree with the Judge and the respondents that for the reasons stated above, the relevant events and transactions had a closer connection to Singapore. In our view, the evidence presented was of sufficient weight to render the place of the tort a neutral factor. From another perspective, it could be concluded that the circumstances in the present case reduced the significance of the place of the tort in the determination of the natural forum.

Governing law of the dispute

31 Having regard to our earlier conclusion that the Notices and the subject matter of the Indonesian Proceedings are connected to the 2018 SA, we agreed with the Judge that it was not solely Indonesian law that applied to the subject matter of the Indonesian Proceedings, as Singapore law governed the interpretation of the 2018 SA. The question of whether the respondents had acted wrongfully in publishing the Notices would encompass questions of both Indonesian and Singapore law.

32 Specifically, the governing law of key aspects in the dispute could rightly be said to be Singapore law, even if the applicable tort law in question is Indonesian law. First, the appellant's claim in the Indonesian Proceedings is for

her entitlement under the 1995 Will,[15] but there is a question of whether such entitlement still subsists given what she agreed to in the 2018 SA. The appellant had reorganised her rights as a beneficiary under the 1995 Will by entering into the 2018 SA, and thereafter into the IRSA. Clause 7 of the 2018 SA provides that the 2018 SA was intended to be in full and final settlement of all disputes the beneficiaries had with each other. Article 7 of the IRSA states that the heirs agree that the IRSA superseded all existing agreements regarding the distribution of the inheritance. To reach a conclusion on whether the appellant has any entitlement under the 1995 Will, the court would have to interpret the 2018 SA first. The governing law of the 2018 SA is Singapore law (as provided in cl 18). However, as alluded to at [11] above, it was via ORC 212 in SUM 10/2020 that the IRSA replaced the 2018 SA and the new administrators were appointed.[16] The Singapore court would be the more appropriate court to determine whether the appellant even had any entitlement subsisting under the 1995 Will at the point when she commenced the Indonesian Proceedings. This is crucial as her entitlement under the 1995 Will was the fundamental basis of her claims in those proceedings.

33 Second, the respondents' act of publishing the Notices could not be separated from their obligations under the 2018 SA and ORC 253. The interpretation of the 2018 SA would therefore be necessary to determine whether they had committed any wrongful act. Clause 1 of the 2018 SA provides that the respondents would be the administrators/ executors of the Estate in all jurisdictions, and that the beneficiaries would do all things necessary to appoint and recognise the respondents as the administrators/ executors of the Estate. Para 1 of ORC 253 in turn provides that the respondents

---

15 ROA Vol III Part A at p 54.

16 See HCF/ORC 212/2020.

would as far as reasonably practicable administer the Estate, in accordance with the 2018 SA (see [8] above). A key issue that could arise in the proceedings was whether the publication of the Notices, and in particular, inviting creditors or next-of-kin to state their claims if any to the Estate, was an act that the respondents were entitled to do within and in discharge of their obligations as administrators, having been so appointed under ORC 253 which gave effect to the 2018 SA. As stated, the 2018 SA is governed by Singapore law.

34 For these reasons, the governing law of the key aspects of the dispute would in fact be Singapore law. We therefore agreed that Singapore is the natural forum, given that it is the more appropriate forum in which the dispute over the Notices should be brought.

Vexatious or oppressive to the respondents and injustice to the appellant

35 We next turn to consider whether the appellant's conduct in litigating in Indonesia was vexatious or oppressive. The countervailing consideration was whether an anti-suit injunction would deprive the appellant of a legitimate juridical advantage to a greater extent than the oppression caused to the respondents. We now summarise the parties' respective arguments.

36 Counsel for the respondents, Mr Paul Ong Min-Tse ("Mr Ong") submitted that the Indonesian Proceedings were entirely devoid of merit or were otherwise hopeless, based on the points made in the affidavit filed by their Indonesian counsel, Mr Erie Hotman Tobing ("Mr Tobing's affidavit"). In particular, the appellant had failed to establish the loss that was required for her claim to have any basis. Mr Ong also argued that the Indonesian court lacked jurisdiction to hear the subject matter in the Indonesian Proceedings. Finally, Mr Ong adopted the Judge's finding that the continuation of the Indonesian

Proceedings was the appellant's attempt to get around the 2018 SA in that she appeared to be seeking to enforce, indirectly, her entitlement under the 1995 Will rather than the agreed share that Family [A] would receive under the 2018 SA. Mr Ong described the appellant's overall conduct created by the issue of the Indonesian Proceedings in the face of circumventing the 2018 SA as evidence of bad faith.

37 The appellant refuted Mr Ong's accusations. She contended that the Judge had erred in finding that the appellant was attempting to get around the 2018 SA. She had commenced the Indonesian Proceedings in accordance with legal advice. Besides, her position was that the respondents in publishing the Notices had acted in their private capacity, meaning that the matter would fall outside the 2018 SA. The appellant submitted that the grant of an anti-suit injunction would cause injustice to the appellant as she would be left without any relief or remedy. According to the appellant, her claim in tort in the Indonesian Proceedings was not actionable in Singapore under the double-actionability rule.

38 On double-actionability, Mr Ong submitted that the appellant had not proven that the Indonesian Proceedings were only actionable in Indonesia and not justiciable under Singapore law. There would likely be a similar cause of action for negligence under Singapore law, on the basis of a duty of care to the beneficiaries to avoid any misstatement, or misrepresentation. Even if there were no similar cause(s) of action in Singapore, the appellant could sue in Singapore as she could avail herself of the exception to the double actionability rule which provides that a claim in tort may be brought in Singapore even if one of the limbs of the rule was not satisfied.

39 We begin with Mr Ong's contention that the Indonesian court lacked jurisdiction to hear the subject matter in the Indonesian Proceedings. The respondents relied on Mr Tobing's affidavit, where he opined that the applicable Indonesian law was set out in article 118 of the *Herziene Inlandsch Reglement* ("HIR"), an Indonesian legislation, which provides that the claim should be filed in the defendant's domicile.[17] This was in contrast to the position taken by the appellant's Indonesian counsel Ms Sarmauli, who opined that the Indonesian court is the court with jurisdiction because: (i) the claim is based on a tort committed by the respondents in Indonesia and pursuant to article 18 of the *Algemene Bepalingen*, another Indonesian legislation, an action for a wrong will be decided by a court according to the law of the country of place where the wrongful action was taken; and (ii) a substantial portion of the assets is within Indonesia.[18] The respondents submitted that the determinative factor in assessing the most appropriate jurisdiction was article 118 of the HIR, whereas the appellant submitted that such a position was "absurd".

40 We note that the Indonesian courts had issued a summons for the respondents to appear, and there was no evidence that they doubted their jurisdiction to hear the appellant's claim. In any case, it was not necessary for this court to take a view on the disputed issue of the jurisdiction of the Indonesian courts since, like the Judge, we were able to proceed on the assumption that the Indonesian court does have jurisdiction to hear the proceedings.

41 Mr Ong's other arguments brought up two key factors namely, that (a) the Indonesian Proceedings were hopeless as they were bound to fail and (b)

---

17 ROA Vol III Part A at p 170, para 20.

18 ACB at p 213.

there was bad faith in the appellant's institution and continuation of the foreign proceedings. This was because she had bound herself to a chosen forum in the 2018 SA and, broadly, the tort claim was within the ambit or subject matter of the 2018 SA. If those factors were made out, then conceivably they could fall within one or more of the situations described in *Trane.* In *Trane*, this court observed at [47] that the following situations could amount to vexation or oppression: where a party is subjected to oppressive procedures in the foreign court; bad faith in the institution of the foreign proceedings; commencing the foreign proceedings for no good reason; commencing proceedings that are bound to fail; and extreme inconvenience caused by the foreign proceedings. This court held that vexation or oppression would only be found in situations where the conduct of the party bringing the foreign proceedings was "unconscionable". We will examine each key factor in turn.

Indonesian Proceedings were hopeless as they were bound to fail

42 In considering the respondents' arguments about the weakness of the appellant's case in the Indonesian Proceedings, we accepted that it was a factor to be taken into account together with more weighty factors in deciding whether the appellant's conduct was unconscionable. We were mindful that we should not be taken to have decided that the Indonesian Proceedings were based on a hopeless claim or one that was doomed to failure.

43 Even where it is plain and obvious on its face that a case is bound to fail, it would still be prudent not to solely rely on pleas that the foreign proceedings are doomed to failure. Instead, the court should also look elsewhere for evidence of unconscionability arising from the conduct of the appellant, comprising her commencement of the Indonesian Proceedings and continuing with the same despite the emergence of new circumstances, as was the case here. In this

connection, the countervailing consideration as to whether the appellant had a juridical advantage in the Indonesian court was relevant. Taking all the matters together, we were of the view that the alleged juridical advantage can be said to be cynically created. As such, we did not consider there to be any legitimate advantage. Let us elaborate.

44 We begin with the assertion by Ms Sarmauli in her affidavit that the appellant's loss was sustained as a result of the Notices issued by the respondents. Ms Sarmauli's affidavit stated (at [11]) that the following acts could amount to a tort in Indonesia: (i) an act which violates one's subjective rights; (ii) an act which is against the legal obligations of the offender; (iii) an act which is against social norms; and (iv) an act which is against public values.[19] The heads of damage which Ms Sarmauli identified at [14] and [15] of her affidavit are: (i) material loss sustained by the appellant in having to engage an attorney and/or legal counsel; and (ii) immaterial loss as a result of the publication of the Notices which "threatened the existence and diminution of her subjective rights" based on the 1995 Will, which represented 5% of the estimated value of the Estate and amounted to not less than two hundred billion rupiah.[20] In contrast, Mr Tobing's affidavit states that the appellant had failed to establish that her claim in the Indonesian proceedings involved losses that were actual and real. First, he said that legal counsel's fees are not part of damages that could be recovered from the opposing party in a court proceeding. Second, the appellant had not provided any basis for her calculation of the immaterial losses. More importantly, her alleged loss would not qualify as immaterial damages as the same could "only be granted in certain unlawful/tort claims which result in death, serious injury, or humiliation". Taking the appellant's

19 ROA Vol III Part A at pp 209–210.

20 ROA Vol III Part A at pp 210.

contention of immaterial loss on its face, it is clear that the Indonesian Proceedings did not fall into any of those categories.[21] We noted that there was nothing in Ms Sarmauli's affidavit which contradicted this statement of law on the recognised heads of immaterial loss under Indonesian law.

45 In any case, Ms Sarmauli's assertion did not make sense in light of the evidence before this court. What was being threatened and how would her rights be diminished? At the time the Indonesian Proceedings were commenced, the appellant's right was to a share of a sum of US$87,175,000 under the 2018 SA and there was no evidence that any prospective beneficiary had come forward to make claims against the Estate, or that her share would be threatened or diminished by the Notices. Under the 2018 SA, Family [A] was to be paid a lump sum of US$87,175,000 from the Estate first before Family [B] would be paid. Thus, it would be Family [B] and not Family [A] who would more likely be exposed to the losses occasioned by the publication of the Notices, assuming that it was wrongful. Be that as it may, for the sake of argument, if the Indonesian Proceedings were brought on the basis that the appellant considered that there was a risk to the distribution of her share of the US$87,175,000, in that she would receive less as the settlement amount might be reduced, it is crucial to note that she then went on to renegotiate her entitlement under the 2018 SA of her own volition.

46 After the commencement of the Indonesian Proceedings, at which point the 2018 SA was in force, the appellant entered into the IRSA. It is of particular significance that the entitlement of Family [A] (of which the appellant is part) to the Estate under the IRSA (see [11] above) had entirely changed from their entitlement under the 2018 SA. In contrast to the arrangement under the 2018

---

21 ROA Vol III Part A at p 167–169.

SA, the IRSA provides for the reverse situation whereby Family [B] would be first entitled to a payout from the Estate of an agreed amount much more than the payout to Family [A] under the 2018 SA. There is no further provision for Family [A] under the IRSA, and it would therefore appear that thereafter Family [A] would be paid the remainder of the Estate in accordance with the 1995 Will.

47 As Mr Ong pointed out, the appellant had not provided any evidence whatsoever that resembles loss occasioned to her as a result of the publication of the Notices. It appears that in switching her agreed rights under the 2018 SA by entering into the IRSA, she did not anticipate that any significant depletion of moneys from the Estate would arise from such publication. Based on the evidence before this court and the allegations that she herself had made, it appeared that there was no basis for her claim in Indonesia even if it was the appropriate forum on the basis that her tortious claim was grounded in Indonesian law.

48 The appellant's conduct in entering into the IRSA would be inexplicable if she had genuinely believed that the publication of the Notices had resulted in the surfacing of claims against the Estate by prospective beneficiaries that would affect her entitlement under the 1995 Will. If the Indonesian Proceedings were *bona fide* and for her claim to have any basis, she must herself have suffered loss, in that her entitlement to the Estate would have been or could be impacted. The logical implication would be that she believed claims arising from the publication of the Notices would result in there being insufficient moneys to satisfy Family [A]'s entitlement to US$87,175,000 under the 2018 SA. That apparent belief is entirely inconsistent with her act of negotiating with the other beneficiaries to enter into the terms of the IRSA, superseding those of the 2018 SA, which required Family [B] to be paid out from the Estate before Family [A] would receive any moneys at all from the Estate. Further, the amount

to be paid to Family [B] was very much more than US$87,175,000. The fact that the appellant agreed to the IRSA suggested that she believed that she would still be able to get moneys from the Estate after Family [B] had received its share. This in turn reveals that her claim in the Indonesian proceedings was fanciful; it was cynically created and pursued. The appellant is one of several beneficiaries under Family [A]. It is telling that none of the other beneficiaries, whether belonging to Family [A] or Family [B] or the unrepresented beneficiaries, had taken issue with the publication of the Notices or brought suit against the respondents.

Bad faith in continuing with litigation in Indonesia

49 There is no evidence before the court as to when negotiations for the IRSA commenced. However, it is clear that the appellant had chosen to continue with the Indonesian Proceedings and maintain her position that she would have suffered loss as a result of the publication of the Notices even after she had entered into the IRSA in December 2019. In light of the change in Family [A]'s entitlement under the IRSA, her conduct in insisting on the continuation of the Indonesian Proceedings is unconscionable. If the change in Family [A]'s entitlement under the IRSA coheres with her contention that the Notices caused unknown beneficiaries to come forward to make claims against the Estate thereby diminishing her entitlement under the 1995 Will, we consider her changed entitlement under the IRSA a new circumstance of her own creation. In doing so, she must have knowingly put herself in a new position created to complain about a violation she was previously not exposed to under the 2018 SA. In this sense, her complaint is not *bona fide*, in that any loss she allegedly suffered would have come after entering into the IRSA and could not have been related to the publication of the Notices. The continuation of the Indonesian Proceedings in light of the new circumstance (*ie*, the IRSA), particularly

following the grant of ORC 212[22] that gave effect to the substitution of the IRSA for the 2018 SA and the appointment of new administrators to replace the respondents, all in all pointed to bad faith on the part of the appellant.

50 Separately, as the Judge noted, the appellant did not disclose to the Indonesian court that she had entered into the 2018 SA, much less file a copy of the 2018 SA. She merely proceeded on the basis of her entitlement under the 1995 Will. The appellant's representation to the Indonesian court gave the impression that she was entitled to 5% of the Estate under the 1995 Will.[23] By doing so, the appellant was circumventing the substantive agreement reached in the 2018 SA (and later, the IRSA) by claiming for her initial entitlement under the 1995 Will. The assertion in her letter to the District Court of Jakarta that the respondents had violated her subjective rights as the legal beneficiary named in the 1995 Will was untrue in light of the facts as this court knows them and of which the appellant was fully aware. It cannot be disputed that the letter gave the misleading impression that she was still entitled to those rights under the 1995 Will. The appellant's submission that this issue is for the Indonesian court to decide misses the point, and more so given that the true state of affairs was not even before the Indonesian court as a direct result of the appellant's lack of disclosure. Given that her rights under the 1995 Will had been altered by the 2018 SA, it was incumbent on the appellant to place these facts before the Indonesian court. Her failure to do so further suggested that the Indonesian Proceedings had not been pursued in good faith and were vexatious and oppressive.

---

22 See ORC 212/2020 dated 3 August 2020.

23 ROA Vol III Part A at p 55.

Loss of juridical advantage and injustice to the appellant

51 We turn to the appellant's submission that it would nevertheless be unjust for an anti-suit injunction to be granted (*Trane* at [53], citing *Dicey, Morris & Collins on The Conflict of Laws* vol 1 (Sir Lawrence Collins gen ed) (Sweet & Maxwell, 14th Ed, 2006) at para 12-073). We rejected it for two reasons. First, we did not agree with the appellant's argument that she would suffer material injustice if the anti-suit injunction were granted. We have already highlighted the material flaws in her case. Following from the first point, the second reason for this court to uphold the grant of the anti-suit injunction was that there could be no legitimate juridical advantage to speak of. The argument that the appellant had a juridical advantage in the Indonesian court in relation to the substance of the parties' dispute which was unavailable to her under Singapore law was a hollow one. As highlighted earlier, the juridical advantage can be said to be hopelessly and cynically invoked and pursued. Having arrived at that conclusion, we did not have to entertain arguments on the double actionability rule.

Conclusion on vexatious and oppressive conduct

52 For the reasons stated, we upheld the continuation of the anti-suit injunction against the appellant.

Whether the respondents could enforce cl 19

53 We now turn to the Judge's decision to grant an anti-suit injunction to the respondents who were not parties to the 2018 SA. As noted above, we do not agree with the Judge's reasoning in relation to the issue of whether the respondents could enforce cl 19 by virtue of s 2 of the CRTPA.

54 The dispute as framed by the parties turned on whether cl 19 was a term of the 2018 SA which purported to confer a benefit on the respondents within the meaning of s 2(1)(*b*) of the CRTPA. However, both parties had omitted to address the Judge on the anterior question of whether cl 19 as an exclusive jurisdiction clause even came within the remit of the CRTPA. In our view, the CRTPA does not permit a non-party to a contract to avail itself of the terms of an exclusive jurisdiction clause in that contract, unless the contract itself expressly provides to the contrary.

55 We set out the Judge's reasoning which was as follows:

(a) The respondents were entitled to enforce cl 19 of the 2018 SA by virtue of s 2(1)(*b*) of the CRTPA, as the clause purports to benefit the respondents, such that they could obtain an anti-suit injunction.

(i) The plain and ordinary meaning of cl 19 of the SA was inconclusive as to whether it purported to benefit the respondents (HC Judgment at [40]). However, considering the 2018 SA as a whole, the beneficiaries had agreed to submit all matters relating to the 2018 SA to the exclusive jurisdiction of the Singapore courts. It could be seen from the text and context of the 2018 SA that the beneficiaries clearly envisaged that the respondents would be the ones bringing the agreement into effect, particularly with reference to cll 2, 3 and 5 (HC Judgment at [41]–[45]).

(ii) The conflicts amongst the beneficiaries could not be neatly demarcated from the conflicts involving the respondents, given the centrality of the respondents to the operation of the 2018 SA. As such, the beneficiaries must have intended to bind

themselves not to commence proceedings against the respondents in any other jurisdiction for matters falling within cl 19 (HC Judgment at [46]– [49]).

(b) As the Indonesian Proceedings fell within the scope of cl 19, an anti-suit injunction should be granted unless there was strong reason not to so as to give effect to the contractual agreement in the 2018 SA.

56 As stated, cl 19 is an exclusive jurisdiction clause and the real question is whether such a clause is one that falls within the ambit of the CRTPA. The Judge's reasoning did not address this question because the parties themselves did not make submissions on it.

57 The genesis of ss 2(1)(*b*) and 2(2) is found in ss 1(1)(*b*) and 1(2) of the Contracts (Rights of Third Parties) Act 1999 (c 31) (UK) (the "UK Act") (see *CLASS Medical Centre Pte Ltd v Ng Boon Ching* [2010] 2 SLR 386 at [30]; *Singapore Parliamentary Debates, Official Report* (5 October 2001) vol 73 at col 2186); as such, UK authorities are relevant to the interpretation of s 2(1)(*b*) of the CRTPA. Sections 2(1) and 2(2) of the CRTPA are *in pari materia* with ss 1(1) and 1(2) of the UK Act. For reference, ss 2(1) and 2(2) of the CRTPA provide:

> 2.— (1) Subject to the provisions of this Act, a person who is not a party to a contract (referred to in this Act as a third party) may, in his own right, enforce a term of the contract if —
>
> (a) the contract expressly provides that he may; or
>
> (b) subject to subsection (2), the term purports to confer a benefit on him.
>
> (2) Subsection (1)(b) shall not apply if, on a proper construction of the contract, it appears that the parties did not intend the term to be enforceable by the third party.

58 The aim of the CRTPA is to enable the carrying out of the intention of contracting parties to confer *benefits* on third parties (*Singapore Parliamentary Debates, Official Report* (5 October 2001) vol 73 at col 2186). This can also be seen clearly from s 2(1)(*b*) of the CRTPA, which refers to the conferring of a *benefit* upon a third party.

59 The CRTPA is silent on whether the statute would apply to exclusive jurisdiction clauses. In contrast, s 9 of the CRTPA expressly applies where a third party seeks to enforce a contractual term and the contracting parties have agreed that disputes in relation to that term are subject to an arbitration agreement. In that case, the third party is treated as a party to the arbitration agreement for the purposes of the Arbitration Act (Cap 10) and International Arbitration Act (Cap 143A) and the third party is also bound to make any claim in relation to that term by means of arbitration proceedings. The silence in the CRTPA with regard to exclusive jurisdiction clauses calls to mind the canon of construction *expresssio unius est exclusio alterius* (the mention of one thing implies the exclusion of the other). The statutory silence here is deliberate because Parliament made a conscious determination to exclude exclusive jurisdiction clauses from the ambit of s 2(1)(*b*) of the CRTPA. At this juncture, we point out that the UK Act similarly addresses only arbitration clauses in s 8 of the UK Act, and has no provision dealing with jurisdiction clauses.

60 It is clear from our review of the legislative history of the UK Act that exclusive jurisdiction clauses and arbitration agreements differ from the usual category of terms that fall under s 1(1)(*b*) of the UK Act. An arbitration clause in s 8 of the UK Act is a procedural right; it is not a substantive right that falls under s 1(1)(*b*). By the same token, an exclusive jurisdiction clause is not a substantive right within the meaning of s 2(1)(*b*) of the CRTPA. In relation to arbitration agreements, the UK Act provides at s 8:

> 8.– (1) Where—
>
> > (a) a right under section 1 to enforce a term ("the substantive term") is subject to a term providing for the submission of disputes to arbitration ("the arbitration agreement"), and
> >
> > (b) the arbitration agreement is an agreement in writing for the purposes of Part I of the Arbitration Act 1996,
>
> the third party shall be treated for the purposes of that Act as a party to the arbitration agreement as regards disputes between himself and the promisor relating to the enforcement of the substantive term by the third party.
>
> (2) Where—
>
> > (a) a third party has a right under section 1 to enforce a term providing for one or more descriptions of dispute between the third party and the promisor to be submitted to arbitration ("the arbitration agreement"),
> >
> > (b) the arbitration agreement is an agreement in writing for the purposes of Part I of the Arbitration Act 1996, and
> >
> > (c) the third party does not fall to be treated under subsection (1) as a party to the arbitration agreement,
>
> the third party shall, if he exercises the right, be treated for the purposes of that Act as a party to the arbitration agreement in relation to the matter with respect to which the right is exercised, and be treated as having been so immediately before the exercise of the right.

61 In *Fortress Value Recovery Fund I LLC v Blue Skye Special Opportunities Fund LP* [2013] 1 WLR 3466 ("*Fortress*"), the appellants, Mr Cerchione ("C") and Mr D'Avanco ("D"), were the managers of an investment structure, which was regulated by a deed of limited partnership ("partnership deed"). C and D were not parties to the partnership deed, but the terms of the deed purported to confer rights upon them. Clause 17.11 in the partnership deed required any dispute concerning the deed to be settled by arbitration; whilst cl 17.2.1 was an exclusion clause. When claims were later brought against C and

D, they applied for a stay of those claims in favour of arbitration, arguing that they were entitled to rely on the arbitration clause pursuant to the UK Act. They argued that the dispute had to be resolved by arbitration because they would be relying on the exclusion clause in their defence to the claims, and their right to rely on that clause was subject to the dispute being arbitrated.

62 Tomlinson LJ, who delivered the leading judgment of the court, drew a distinction between a situation where proceedings were being *brought* by C and D, as opposed to when they were *defending* such claims. His Lordship opined that s 8(1) of the UK Act applies only to disputes relating to the enforcement of the particular substantive term of which the third party has the benefit. Where a third party *brings* proceedings to enforce a substantive right conferred on him under the contract, he would be bound by the requirement to bring the dispute to arbitration (at [29]–[30]). But very clear language would be required to find that the right of a third party to avail himself of the defence of an exclusion clause is subject to the dispute being brought in arbitration (at [36]). Separately, s 8(2) also did not assist C and D. The subsection would only be applicable where the contract on its true construction gives a third party a right to arbitrate, but cl 17.11 was not such a clause (at [31]).

63 Drawing from the explanatory notes to s 8 of the UK Act (cited at [69] below), Toulson LJ, agreeing with Tomlinson LJ, opined that s 8(1) of the UK Act envisages a situation where a contract contains a promise by the promisor ("P") to confer a conditional benefit on a third party ("T"), that being an enforceable *substantive* right, subject to a *procedural condition* that T may enforce it only by arbitration. In such a case, T would be treated as a party to the arbitration agreement in relation to the enforcement of the said benefit (at [42]). Toulson LJ explained s 8(2) as follows. The situation envisaged in the subsection is one where a term of the contract gives a unilateral right to T to

require that a dispute with P of an identified description (*eg* a claim in tort) be submitted to arbitration (at [44]). Section 8(2) therefore allows for P to give T an enforceable *procedural* right (at [45]). Toulson LJ rejected C and D's argument that they were entitled to a stay of proceedings on the basis that they could only advance the contractual defence in arbitration proceedings, as that would convert the procedural qualification of a substantive right given to them by the contract into a positive procedural right (at [53]).

64 What is of note from *Fortress* is that s 8(1) of the UK Act sets out a *procedural* qualification to the enforcement of a *substantive* right. Thus, the party seeking to rely on s 8 has to show that it has such a substantive right to enforce. The position is similar under the CRTPA, as s 9 of the CRTPA refers to the enforcement of "a right under section 2". For reference, we set out s 9 of the CRPTA:

> 9. –(1) Where –
>
> (a) *a right under section 2 to enforce a term* (referred to in this section as the substantive term) is subject to a term providing for the submission of disputes to arbitration (referred to in this section as the arbitration agreement); and
>
> (b) the arbitration agreement is an agreement in writing for the purposes of the Arbitration Act (Cap. 10) or Part II of the International Arbitration Act (Cap. 143A),
>
> the third party shall be treated for the purposes of the Arbitration Act or the International Arbitration Act, as the case may be, as a party to the arbitration agreement as regards disputes between himself and the promisor relating to the enforcement of the substantive term by the third party.
>
> (2) Where –
>
> (a) *a third party has a right under section 2* to enforce a term providing for one or more descriptions of dispute between the third party and the promisor to be submitted to arbitration (referred to in this section as the arbitration agreement);

> (b) the arbitration agreement is an agreement in writing for the purposes of the Arbitration Act or Part II of the International Arbitration Act; and
>
> (c) the third party does not fall to be treated under subsection (1) as a party to the arbitration agreement,
>
> the third party shall, if he exercises the right, be treated for the purposes of the Arbitration Act (Cap. 10) or the International Arbitration Act (Cap. 143A), as the case may be, as a party to the arbitration agreement in relation to the matter with respect to which the right is exercised, and be treated as having been so immediately before the exercise of the right.
>
> [emphasis added]

65 Thus, even if jurisdiction clauses had been provided for in the manner that arbitration clauses are, the CRTPA would nevertheless not assist the respondents. There is no *substantive* right to speak of here. Like C and D in *Fortress* seeking a stay of proceedings *against* them on the basis of the arbitration clause in the partnership deed, the respondents in this case, having been sued in Indonesia, seek an injunction against the appellant in relation to the Indonesian Proceedings by relying on cl 19. We assume, for the sake of argument, that the 2018 SA could be said to have conferred a substantive right on the respondents subject to the requirements stipulated under cl 19. However, even then in a situation where proceedings were brought *against* them, they would not have had a right to insist on the claims being brought in a particular jurisdiction. Allowing them to do so would be enabling them to enforce a *procedural* right, which would only be available to them if a clause conferred upon them an enforceable *substantive* right, akin to the application of s 9(1) of the CRTPA (in the context of arbitration). No such clause conferring upon the respondents a substantive right existed in the 2018 SA.

66 We next turn to the legislative history of the CRTPA. The question of whether the benefit of jurisdiction clauses and arbitration clauses should be conferred upon third parties was addressed in Law Commission Report No 242

in relation to the UK Act (see United Kingdom, *Privity of Contract: Contracts for the Benefit of Third Parties* ("Law Commission Report")).The eventual recommendation was for these clauses to fall outside the proposed reforms. This recommendation was made on the basis that "such agreements cannot operate satisfactorily unless any entitlement of the third party to enforce the arbitration agreement carries with it a duty on the third party to submit to arbitration (or to comply with the jurisdiction agreement)". This was incompatible with the proposed reforms which were concerned with the conferring of rights and benefits on third parties but not with the imposition of duties and burdens (at para 14.15).

67 When the bill was first introduced in the House of Lords, it did not contain any provision as to jurisdiction or arbitration clauses. Eventually, s 8 of the UK Act was introduced by way of Government amendment at the Report Stage in the house of Commons in October 1999 (see *Nisshin Shipping Co Ltd v Cleaves & Co Ltd* [2003] EWHC 2602 (Comm) at [36], referencing Andrew Burrows, "The Contracts (Right of Third Parties) Act 1999 and its Implications for Commercial Contracts" [2000] LMCLQ 540). As such, the Law Commission Report would not aid in the interpretation of s 8 and we look instead to the explanatory notes to the UK Act.

68 It is apparent that the UK Act both (i) specifically confers on third parties the benefit of being able to enforce arbitration agreements, despite the concerns stated in the Law Commission Report; and (ii) is silent on exclusive jurisdiction clauses.

69 The explanatory notes to s 8 of the UK Act state (at para 34):

> 34 Subsection (1) deals with what is likely to be the most common situation. The third party's substantive right (for

> example, to payment by the promisor) is conferred subject to disputes being referred to arbitration (see section 1(4)). This section is based on a "conditional benefit" approach. It ensures that a third party who wishes to take action to enforce his substantive right is not only able to enforce effectively his right to arbitrate, but is also "bound" to enforce his right by arbitration (so that, for example, a stay of proceedings can be ordered against him under section 9 of the Arbitration Act 1996). This approach is analogous to that applied to assignees who may be prevented from unconscionably taking a substantive benefit free of its procedural burden (see, for example, *DVA v Voest Alpine, The Jaybola* [1997] 2 Lloyd's Rep 279). "Disputes …. Relating to the enforcement of the substantive term by the third party" is intended to have a wide ambit and to include disputes between the third party (who wishes to enforce the term) and the promisor as to the validity, interpretation, existence or performance of the term; the third party's entitlement to enforce the term; the jurisdiction of the arbitral tribunal; or the recognition and enforcement of an arbitration award. *But to avoid imposing a "pure" burden on the third party, it does not cover, for example, a separate dispute in relation to a tort claim by the promisor against the third party for damages.*
>
> 35. Subsection (2) is likely to be of rarer application. It deals with situations where the third party is given a right to arbitrate under section 1 but the "conditional benefit" approach underpinning subsection (1) is inapplicable. For example, where the contracting parties give the third party a unilateral right to arbitrate or a right to arbitrate a dispute other than one concerning a right conferred on the third party under section (1). *To avoid imposing a pure burden on the third party (in a situation where, for example, the contracting parties give the third party a right to arbitrate a tort claim made by the promisor against the third party) the subsection requires the third party to have chosen to exercise the right.* The timing point at the end of the subsection is designed to ensure that a third party who chooses to exercise his right to go to arbitration by, for example, applying for a stay of proceedings under section 9 of the Arbitration Act 1996, can do so. Under section 9 of the Arbitration Act 1996, the right to apply for a stay of proceedings can only be exercised by someone who is already a party to the arbitration agreement.
>
> [emphasis added]

70 Section 9 of the CRTPA is materially similar to s 8 of the UK Act, and the explanatory notes would therefore also be helpful as a reference point.

Unlike in respect of arbitration agreements, there is no sub-section conferring the benefit of exclusive jurisdiction clauses on third parties. As alluded to above in our discussion of *Fortress*, s 8(1) relates to a situation where the benefit of a contractual term is conferred on a third party to the contract, the exercise of which benefit is subject to a procedural qualification to do so by arbitration. Section 8(2) relates to a different situation in which the right to arbitrate is conferred on the third party. The explanatory notes thus make it clear as to how arbitration clauses are meant to fall within the scope of the UK Act, but make no mention of jurisdiction clauses. The same analysis would apply to the CRTPA. More crucially, the legislative history of the UK Act (upon which the CRPTA was modelled) shows a *specific omission* to address the issue of exclusive jurisdiction clauses, following extensive discussion of the difficulties surrounding it. In contrast, provisions were specifically drafted in the UK Act and the CRTPA to address the issue of arbitration clauses.

71 Finally, we considered the Hong Kong Contracts (Rights of Third Parties) Ordinance (Cap 623) (HK) ("Hong Kong Ordinance"). In the consultation paper (September 2005) prepared by the Law Reform Commission of Hong Kong, the Commission considered the positions taken by the UK and Singapore in relation to arbitration agreements and exclusive jurisdiction clauses. It considered that both jurisdictions did not provide specifically for exclusive jurisdiction clauses. The Commission considered that it would be undesirable to leave the issue in relation to exclusive jurisdiction clauses open. The Hong Kong Ordinance therefore explicitly addresses the application of the ordinance to exclusive jurisdiction clauses (at s 13). Whilst not determinative, the approach taken in Hong Kong further supports our conclusion that the absence in the CRTPA of any section dealing with exclusive jurisdiction clauses indicates that third parties cannot rely on the CRTPA to enforce such clauses.

72 Our analysis and conclusion that the s 2(1)(*b*) of the CRTPA does not apply to exclusive jurisdiction clauses is thus borne out by the policy intention behind the drafting of the CRTPA, as well as the legislative history of the UK Act. If parties desire to address the issue when drafting a prospective contract, the legal solution may, arguably, reside in either s 2(1)(*a*) or s 2(3) of the CRTPA.

73 Besides the CRTPA, there appears to be another route whereby a non-party may seek to invoke the exercise of the court's equitable jurisdiction as explained in *Hai Jiang 1401 Pte Ltd v Singapore Technologies Marine Ltd* [2020] 4 SLR 1014 ("*Hai Jiang 1401*") at [81]. We say no more since the Judge did not deal with *Hai Jiang 1401.* Neither was the decision fully ventilated in this appeal. As Quentin Loh J (as he then was) observed, this is a complex and developing area of anti-suit injunction law that tests the boundaries of the effect of exclusive forum clauses on non-parties.

Conclusion

74 We dismissed the appeal on 11 March 2021 for the reasons set out in detail above. At the conclusion of the hearing, we ordered costs fixed at $25,000 to be paid by the appellant to the respondents. The usual consequential orders applied.

Judith Prakash
Justice of the Court of Appeal

Belinda Ang Saw Ean
Justice of the Appellate Division

Devinder Kumar s/o Ram Sakal Rai and Leong Wen Jia Nicholas
(ACIES Law Corporation) for the appellant;
Ong Min-Tse Paul, Afzal Ali and Marrissa Miralini Karuna
(Allen & Gledhill LLP) for the respondents.
