IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2020] SGCA 62

Civil Appeal No 26 of 2019 and Summons No 71 of 2019

Between

(1) Bidzina Ivanishvili
(2) Ekaterine Khvedelidze
(3) Tsotne Ivanishvili
(4) Gvantsa Ivanishvili
(5) Bera Ivanishvili

… *Appellants*

And

Credit Suisse Trust Limited

… *Respondent*

In the matter of Suit No 790 of 2017
(Registrar's Appeals Nos 229 of 2018 and 232 of 2018)

Between

(1) Bidzina Ivanishvili
(2) Ekaterine Khvedelidze
(3) Tsotne Ivanishvili
(4) Gvantsa Ivanishvili
(5) Bera Ivanishvili

… *Plaintiffs*

And

(1) Credit Suisse AG
(2) Credit Suisse Trust Limited

… *Defendants*

JUDGMENT

[Civil Procedure] — [Pleadings] — [Amendment]
[Conflict of Laws] — [Choice of jurisdiction] — [Exclusive]
[Conflict of Laws] — [Natural forum]

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Court of Appeal — Civil Appeal No 26 of 2019 and Summons No 71 of 2019
Sundaresh Menon CJ, Judith Prakash JA and Chao Hick Tin SJ
22 October 2019, 27 February 2020

3 July 2020 Judgment reserved.

Judith Prakash JA (delivering the judgment of the majority consisting of Sundaresh Menon CJ and herself):

Introduction

1 The first appellant, Mr Bidzina Ivanishvili ("Mr Ivanishvili"), holds dual nationality in France and Georgia. In 2005, he settled part of his personal wealth on the Mandalay Trust, a discretionary trust domiciled in Singapore. The trustee is the respondent, Credit Suisse Trust Ltd ("the Trustee"), a Singapore trust company. The beneficiaries of the Mandalay Trust are Mr Ivanishvili and the other appellants, his wife and children. The assets of the Mandalay Trust were managed and invested by the Geneva branch of Credit Suisse AG ("the Bank"), a bank incorporated and headquartered in Switzerland and having a branch in Singapore. The Bank and the Trustee operate independently, although they have the same ultimate holding company, Credit Suisse Group AG.

2 Towards the end of 2015, the appellants discovered that the Mandalay Trust had suffered tremendous losses which they allege had been hidden from them. The Bank subsequently filed a criminal complaint in Geneva against its employee, Mr Patrice Lescaudron ("Mr Lescaudron"), who was the portfolio manager of the Mandalay Trust at the time. Mr Lescaudron admitted to various forms of misconduct in relation to the Mandalay Trust, including the misappropriation of trust assets, and was eventually convicted in Switzerland on charges of embezzlement, misappropriation and forgery.

3 On 25 August 2017, the appellants commenced HC/S 790/2017 ("Suit 790") in Singapore against the Bank and the Trustee. The appellants sought to make the Bank and the Trustee liable for, *inter alia*, the loss sustained by the Mandalay Trust. Both the Bank and the Trustee applied to stay Suit 790 on the ground that Switzerland was the more appropriate forum. An Assistant Registrar ("the AR") granted their applications. The appellants' appeals against the decision to stay Suit 790 were dismissed by the High Court Judge ("the Judge") for the reasons given in *Ivanishvili, Bidzina and others v Credit Suisse AG and another* [2019] SGHC 6 ("the Judgment"). The appellants then filed further appeals to this court. Subsequently, however, the appellants withdrew their appeal against the stay in respect of their action against the Bank. Further, on 21 June 2019, they discontinued the proceedings in Suit 790 against the Bank, leaving the Trustee as the sole defendant. The appellants continued to pursue their appeal against the stay of Suit 790 in respect of the Trustee. To this end, they applied in CA/SUM 71/2019 ("SUM 71") to amend their Statement of Claim so as to reflect the ambit of their new case, which was against the Trustee only, limited to alleged breaches of the Trustee's duties in relation to the Mandalay Trust.

4 It is not seriously disputed that SUM 71 constitutes part of a broader recalibration by the appellants of their claims in Suit 790 so as to improve their chances of persuading this court to overturn the stay of the action. By proceeding only against the Trustee, the appellants seek to present their claims as being fundamentally rooted in Singapore, strengthening their case that Singapore is the appropriate forum. There are therefore two key issues in the present appeal: first, whether the appellants' amendments in SUM 71 are permissible; and second, whether Singapore is the appropriate forum for Suit 790 on the basis of the claims as the appellants now wish to frame them.

Background

The parties and their relationships

5 Mr Ivanishvili became a customer of the Bank in Switzerland in 2004. It is his case that sometime in December 2004, the Bank's representatives approached him with an offer to provide private wealth management services to him and his family. The Bank's advice was that he should set up a trust to be administered by the Trustee in Singapore. Mr Ivanishvili accepted this advice. The Mandalay Trust was then established by the Trustee pursuant to a declaration of trust dated 7 March 2005. The trust deed of the Mandalay Trust ("the Trust Deed") contained a clause providing for the trust to be governed by Singapore law, and for the Singapore courts to be its forum of administration ("cl 2(a)").

6 In March 2005, Mr Ivanishvili settled some US$1.1bn on the Mandalay Trust. Half of this sum was held in an account ("the Soothsayer account") with the Bank's Singapore branch in the name of a Bahamian company, Soothsayer Ltd ("Soothsayer"), and the other half was held in accounts ("the Meadowsweet

accounts") with the Bank's Geneva branch in the name of a BVI company, Meadowsweet Assets Ltd ("Meadowsweet"). Both these companies were wholly owned and controlled by the Trustee. The sums held in the Soothsayer account were gradually repatriated by Mr Ivanishvili to accounts at the Bank in Switzerland. The Soothsayer account was closed in 2014.

7 The Trustee delegated its asset management and investment powers under the Mandalay Trust to the Bank pursuant to discretionary portfolio management agreements with Soothsayer and Meadowsweet. The Bank therefore managed the assets in the Mandalay Trust ("the Trust assets") and provided investment reports detailing their performance to the Trustee ("the Investment Reports"). It is also undisputed that the Bank performed these tasks primarily at its Geneva branch. Mr Ivanishvili's relationship manager at the Bank was, initially, Ms Daria Mihaesco ("Ms Mihaesco"). Mr Lescaudron took over as the relationship manager in August 2006.

8 Mr Ivanishvili frequently communicated directly with Mr Lescaudron on the management of the Trust assets, either personally or through his representative Mr George Bachiashvili ("Mr Bachiashvili"). Pursuant to cl 10(b) of the Trust Deed, Mr Ivanishvili had the right to choose an investment manager to make decisions in relation to the investment of the Trust assets. Initially, Mr Ivanishvili appointed himself as investment manager. Subsequently, in December 2013, he also appointed Mr Bachiashvili as investment manager.

9 Besides the Mandalay Trust, Mr Ivanishvili's relationship with the Bank and its associates also extended to numerous other accounts and offshore structures, many of which have also given rise to disputes:

(a) Mr Ivanishvili held accounts with the Bank in his own name, as well as in the name of Wellminstone SA, a BVI company of which he was the ultimate beneficial owner ("the Wellminstone accounts").

(b) An account was held with the Bank by Sandcay Investment Limited ("Sandcay"), under the Green Vals Trust. Mr Ivanishvili transferred assets of more than US$210m to this account in early 2015. The beneficiaries of the Green Vals Trust are the appellants. The current trustee of the Green Vals Trust is Credit Suisse Trust Limited (New Zealand), a subsidiary of Credit Suisse Trust AG.

(c) An account with Credit Suisse Life (Bermuda) Ltd ("CS Life") held investments made on a premium of US$480m paid for a life insurance policy obtained by Meadowsweet, as well as another life insurance policy obtained by Sandcay ("the CS Life policies").

10 On 5 July 2013, the Trustee amended the Trust Deed by way of a Deed of Amendment and Restatement ("the Amended Trust Deed"). The validity of the Amended Trust Deed is one of the issues in Suit 790.

The discovery of Mr Lescaudron's wrongdoing

11 According to Mr Ivanishvili, Mr Lescaudron sent him and Mr Bachiashvili regular reports summarising the performance of Mr Ivanishvili's investments, including the Trust assets, together with spreadsheets setting out the current value of each of Mr Ivanishvili's accounts ("the Direct Reports"). The Direct Reports were distinct from the Investment Reports from the Bank, which were made available to the Trustee.

12 In September and October 2015, the Bank made margin calls totalling US$45.89m on the accounts within the Mandalay Trust. Following one of the margin calls, another representative of the Bank sent Mr Ivanishvili copies of some of the Investment Reports. Mr Ivanishvili claims that this was the first time he had seen these Investment Reports, and having compared them with the Direct Reports from Mr Lescaudron, he realised that the value of the Trust assets as reported by Mr Lescaudron was very different from the reality. According to Mr Ivanishvili, the Investment Reports showed that from 31 December 2014 to 25 September 2015 the value of the Trust assets had declined from US$697.68m to US$437.8m; on the other hand, the Direct Reports from Mr Lescaudron in this period showed an upward trend in the value of the Trust assets.

13 The other accounts with the Bank which belonged to Mr Ivanishvili had also suffered similar previously undisclosed losses. In this regard, on 2 April 2015, Mr Lescaudron sent a presentation on behalf of the Bank to Mr Bachiashvili ("the Presentation"), stating that the Bank held a total of US$1.04bn in all the trusts set up by Mr Ivanishvili, including US$439m in the Mandalay Trust, when according to Mr Ivanishvili's calculations the true value of the Trust assets at the time would have been around US$326.9m. Mr Ivanishvili alleged that the incorrect figures from the Presentation were then repeated to him by representatives of the Trustee at discussions and meetings in the subsequent months. According to Mr Ivanishvili, as a result of these representations by the Bank and the Trustee, he was persuaded to transfer further assets from other banks to be managed and invested by the Bank.

The foreign proceedings

Criminal proceedings in Switzerland

14 In December 2015, the Bank made a criminal complaint against Mr Lescaudron in Switzerland for offences relating to assets under his management. Similar criminal complaints were also made by, *inter alia*, Mr Ivanishvili and Meadowsweet. Criminal charges were brought against Mr Lescaudron, and following a trial in the Swiss Correctional Court, Mr Lescaudron was convicted on 9 February 2018 on charges of embezzlement, misappropriation and forgery. Mr Lescaudron was sentenced to five years' imprisonment, and his assets ordered to be confiscated and applied towards compensating the victims of his fraud. However, the extent of such recovery, if any, has not been made known in the present proceedings. Appeals against the court's decision by the Bank, Mr Lescaudron, and other customers are said to be pending. The progress and outcome of such appeals has not been made known in the present proceedings.

Civil proceedings in Switzerland, New Zealand and Bermuda

15 The appellants entered into representation agreements in order to allow them to act on behalf of Meadowsweet to sue the Bank for any losses suffered by the Mandalay Trust, or to sue CS Life in Bermuda for the same, as well as to act on behalf of Sandcay to bring claims in relation to losses suffered by the Green Vals Trust.

16 The appellants have not filed any civil suit against the Bank or the Trustee in Switzerland, nor did Mr Ivanishvili file any civil claim in the criminal proceedings against Mr Lescaudron. The appellants have told us that they are willing to confirm that they will not bring any proceedings in Switzerland

(either in their own names or on behalf of Meadowsweet or Soothsayer) against the Bank in respect of losses caused to the Mandalay Trust until the conclusion of Suit 790 (other than protective steps to guard against the expiry of limitation periods).

17 The appellants commenced a claim in New Zealand against the Bank and the current and former trustees of the Green Vals Trust on 7 August 2017, in respect of the losses suffered by that trust. The New Zealand High Court held that Switzerland was the appropriate forum for the case to be tried. The appellants say that they have decided not to appeal against the decision of the New Zealand High Court.

18 The appellants, Meadowsweet and Sandcay commenced a claim in Bermuda against CS Life on 17 August 2017 in respect of the losses suffered by the CS Life policies as a result of CS Life's conduct. These proceedings have not been stayed. Although the CS Life policy obtained by Meadowsweet is a part of the Mandalay Trust and therefore also the subject of Suit 790, the appellants have undertaken to give credit in Suit 790 for any recovery obtained in Bermuda, and not to seek double recovery.

The proceedings in Singapore and the decision below

19 The existing Statement of Claim in Suit 790 is framed against both the Bank and the Trustee.

(a) Against the Trustee, the appellants alleged that:

(i) The Trustee failed to review or monitor the management of the Trust assets, and also committed other breaches of its duties of skill and care in its stewardship of the Mandalay Trust.

(ii) The Trustee acted *ultra vires* by executing the Amended Trust Deed for improper reasons.

(iii) By repeating and not correcting the incorrect figures in the Presentation (see [13] above), the Trustee had made negligent misrepresentations to Mr Ivanishvili.

(b) Against the Bank, the appellants alleged that:

(i) The Bank failed to act honestly and in good faith in relation to the Mandalay Trust, or in compliance with the Trust Deed and the Trustees Act (Cap 337, 2005 Rev Ed), by allowing various acts of wrongdoing, acting for its own benefit, and failing to make appropriate investment decisions.

(ii) The Bank breached its duty of care in tort to the appellants.

(iii) The Bank made fraudulent misrepresentations to Mr Ivanishvili regarding the value of the Mandalay Trust.

20 Neither the Bank nor the Trustee filed a defence in Suit 790. Instead, they each filed an application for a stay of the proceedings. As we have noted, the AR granted the stay on the basis that Switzerland was the more appropriate forum and this decision was upheld by the Judge on appeal.

21 The first issue considered by the Judge was whether the Bank and the Trustee had accepted the exclusive jurisdiction of the Singapore courts in respect of disputes with the appellants. She held that forum administration clauses like cl 2(a) were relevant for some kinds of disputes arising out of the trust, but did not serve as an exclusive jurisdiction clause for *all* disputes relating

to the trust (the Judgment at [28] and [43]–[44]). This was particularly true of the disputes in Suit 790 between the appellants and the Bank – cl 2(a) could not in any way be said to bind the Bank, and the allegations in the Statement of Claim went beyond the Mandalay Trust and included Mr Ivanishvili's personal accounts and the Wellminstone accounts (the Judgment at [44]–[46]). In this connection, the Judge pointed out that there was a different contractual exclusive jurisdiction clause which was binding as between Mr Ivanishvili and the Bank, stipulating Geneva as the exclusive forum, but this was likewise not dispositive as the other appellants were not privy to this clause (the Judgment at [47]–[54]).

22 The Judge therefore went on to consider the two-stage test from *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460 ("*Spiliada*") in order to determine the appropriate forum. At the first stage, the Judge held that the governing law of the dispute was not determinative, since the trust-related claims were governed by Singapore law, while the negligence and misrepresentation claims were governed by Swiss law (the Judgment at [55]–[58]). The location of the evidence and the ease of trial, on the other hand, were found to point firmly in favour of Switzerland: the oral testimony of Mr Lescaudron was critical to the defendants' defence, but he was non-compellable in Singapore, as were the other European witnesses who were not or were no longer linked to the Bank; likewise, Swiss documents may not be available in Singapore proceedings due to Swiss banking secrecy laws (the Judgment at [59]–[64]). Finally, the "shape of the litigation" was found to point in favour of Switzerland, as the claims and remedies pleaded were essentially focused on the entirety of the Bank's conduct in its banking relationship with Mr Ivanishvili, which was the subject of the contractual exclusive jurisdiction clause in favour of Geneva (the Judgment at [69]–[70]).

23 Turning to the second stage of the *Spiliada* test, the Judge found that there were no reasons of justice militating against a stay. In particular, the loss of juridical advantages by bringing the claims in Switzerland was not sufficient to constitute a denial of justice (the Judgment at [74]). It was also inappropriate to order a stay only in respect of the claims against the Bank, because the Trustee's conduct could only be properly understood in the context of the Bank's conduct (the Judgment at [78]). The Judge accordingly dismissed the appeals.

The present appeal

24 Since the decision of the Judge, the case has undergone a sea-change: the appellants have decided to pursue Suit 790 against the Trustee alone, and have irrevocably discontinued their claim against the Bank. The appellants therefore only pursue their appeal against the Judge's decision to stay proceedings against the Trustee.

25 The appellants also brought SUM 71, applying to amend the Statement of Claim to reflect their new focus in Suit 790. Beyond reflecting the discontinuance of the claims against the Bank, the amended Statement of Claim sought to be introduced by SUM 71 ("the amended SOC") also discards the claim against the Trustee for negligent misrepresentation (see [19(a)(iii)] above). The appellants further explain that the amended SOC updates the pleadings to reflect developments since the Statement of Claim was served, and to improve its clarity. Since the merits of SUM 71 are closely tied to the merits of the substantive appeal, we directed that SUM 71 be heard together with the substantive appeal.

The appellants' submissions

26 The appellants submit that SUM 71 should be allowed, as the amended SOC would allow the court to determine the real issues between the parties, and would not cause any prejudice to the Trustee that could not be compensated by costs at this early stage of Suit 790. They argue that SUM 71 is not an abuse of process, as it is permissible to amend pleadings on appeal to save a claim stayed by the lower court, especially when the amendments simply discontinue parts of the claim; and that SUM 71 is also properly brought before the Court of Appeal instead of the High Court.

27 Turning to the substantive appeal, the appellants submit that cl 2(a) is an exclusive jurisdiction clause in favour of the Singapore courts and governs the present dispute, such that strong cause is needed for a stay. In the alternative, even if it is a non-exclusive jurisdiction clause, the same conclusion would follow since Singapore was still the forum named in the clause. The appellants submit that the Trustee has not shown strong cause for a stay. In the alternative, even if cl 2(a) is not applicable such that the *Spiliada* test applies, the connecting factors of governing law, the connections of the parties and events, the location of the evidence, and the shape of the litigation all point in favour of Singapore being *forum conveniens*.

The Trustee's submissions

28 The Trustee submits that SUM 71 is futile and should be dismissed because the appeal would still be without merit even if it were allowed. It further contends that SUM 71 is an abuse of process because it fundamentally changes the appellants' position maintained before the AR and the Judge, and constitutes an impermissible attempt to circumvent the high threshold for appellate

intervention. The Trustee also observes that the appellants' amended SOC involves a reformulation of some of the claims which have been retained, contrary to the appellants' characterisation of these claims as being unchanged.

29 As for the substantive appeal, the Trustee submits that cl 2(a) simply provides for the Singapore courts to be the forum for the administration of the Mandalay Trust; hostile litigation in relation to the trust is not within its scope. The Trustee argues that even if cl 2(a) is a jurisdiction clause, on its true construction it would be a non-exclusive jurisdiction clause to which the "strong cause" test would not apply. The Trustee submits that under the *Spiliada* test, the connecting factors point in favour of Switzerland as the clearly more appropriate forum: what is relevant is that the material events took place in Switzerland, that crucial witnesses and documents would only be available in Switzerland, that the shape of the litigation points to Switzerland, and that there is a risk of fragmentation of proceedings if proceedings continue in Singapore. In the alternative, the Trustee argues that even if the "strong cause" test applies, the stay would still be justified because only a trial in Switzerland would allow it a fair chance at establishing its defence.

The further affidavits

30 The outline of the parties' arguments set out above suggests that if SUM 71 were allowed, the appeal would turn on two key issues: the effect of cl 2(a), and the availability of evidence if the dispute were to be tried in Singapore as opposed to in Switzerland. At the initial hearing of the appeal on 22 October 2019 ("the first hearing"), it became clear to us that the Trustee's case as conceived at that point revolved primarily around the impermissibility of SUM 71. If, however, we allowed SUM 71 and went on to consider the merits

of the substantive appeal on the basis of the amended SOC, the Trustee appeared to take the position that it would *not* state precisely what evidence it would need for its defence which was unavailable in Singapore. Dr Stanley Lai SC ("Dr Lai"), who appeared for the Trustee at the first hearing, submitted that the Trustee was not required to do so, as it was not obliged to disclose its defence at this early stage.

31 We offered an adjournment of the hearing to enable the Trustee to consider whether it needed to supplement its existing evidence on the availability of witnesses and documents in Singapore. This was because, in our view, the issues were not as clear-cut as the Trustee appeared to believe. For one thing, since the appellants had in fact discontinued their claims against the Bank in Suit 790, the substantive merits of the appeal did not turn solely on the court allowing the amended SOC in SUM 71. Moreover, for the reasons we discuss below, the fact that the Trustee was not obliged to disclose its defence in an application for a stay of the proceedings did not mean that it would necessarily be in its interests not to do so, given the case the appellants were now running and the state of the evidence before us. In the event, we granted an adjournment for the Trustee to consider whether it should file a further affidavit. In our order granting the adjournment, we indicated that any affidavit which was filed ought to address:

> … [T]he question of how the case would remain closely connected to Switzerland, and of the evidence that would only be available there, on the footing that the appellant was permitted to proceed on the basis of having dropped its claims against the Bank.

32 Pursuant to our directions, the Trustee filed an affidavit dated 2 December 2019 ("the Trustee's affidavit") and the appellants filed a reply affidavit on 20 December 2019 ("the appellants' reply affidavit"). We heard

oral submissions from the parties on these affidavits on 27 February 2020 ("the second hearing").

33 In substance, the Trustee's affidavit sets out potential defences it would run in relation to the claims in the amended SOC, linking these to the potential witnesses and documents which, for the most part, had already been identified in the cause papers filed at first instance. The appellants' reply affidavit likewise consists primarily of submissions, seeking to rebut the Trustee's contentions as to the necessity and non-availability of specific witnesses and documents. We discuss these affidavits in greater detail below, when we turn to consider the availability of evidence.

Whether the amendment of the Statement of Claim should be allowed

34 We begin our analysis by considering what the appellants hope to achieve through SUM 71. The editors of *Halsbury's Laws of Singapore* vol 6(2) (LexisNexis Singapore, 2020) comment at para 75.095 that when it comes to the determination of the appropriate forum for a suit to be tried, "the plaintiff may, by carefully selecting the parameters of the pleadings, be able to control to some extent at least the range of factors to be considered by the court". This freedom of choice for the plaintiff to frame its cause of action in order to fall within the jurisdiction of their preferred forum is well demonstrated by the decision of this court in *Rickshaw Investments Ltd and another v Nicolai Baron von Uexkull* [2007] 1 SLR(R) 377 ("*Rickshaw Investments*"). In that case, the plaintiffs framed their claim in tort so as to avoid the governing law clause in the applicable contract, which provided for the exclusive jurisdiction of the German courts. The court held that this was permissible:

> 47 … [A]bsent bad faith on the part of the appellants, we see no reason why they should be denied the freedom of choice to frame their causes of action in the way they have. …
>
> 48 *We are of the view that the appellants had the right to avail themselves of the cause of action that was most advantageous to them,* inter alia*, in the light of choice of law considerations*. Given the way they were framed, their claims must be treated as claims in tort, and the fact that the respondent's actions arose from his contract becomes irrelevant for the purposes of characterising the issues involved. …
>
> [emphasis added]

35 It is therefore clear that there can be no contention that the *contents* of the amended SOC are themselves objectionable in so far as the amended SOC seeks to dissect the dispute, as it was originally conceived, in such a way as to reduce the significance of any connecting factors to Switzerland in favour of connecting factors pointing towards Singapore. Although the Trustee does not advance any argument to the contrary *per se*, this is an important starting point for our analysis of SUM 71. To the extent that the Trustee seeks to cast the amended SOC as an attempt to present a "blinkered perspective" of the true dispute, or to "rely selectively" on the findings of the Judge, these are not relevant considerations.

36 In the present case, a further significant consideration is that SUM 71 essentially seeks to recast the pleadings to reflect the discontinuance of the claims against the Bank. The notice of discontinuance of Suit 790 against the Bank was filed by the appellants on 21 June 2019. By virtue of O 21 r 2(1) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed), service of this notice on the Bank effected the discontinuance of the action without the leave of the court being required, since no defence had then been filed. No complaint was made against this step, nor can one be. As this court held in *Rex International Holding*

Ltd and another v Gulf Hibiscus Ltd [2019] 2 SLR 682 ("*Gulf Hibiscus (No 2)*") at [9]:

> … A claimant has the right to choose its cause of action and to sue the party it wishes to sue, in whichever forum it wishes, subject only to any applicable legal constraint, such as an arbitration agreement … . While this is not an absolute right, it is nonetheless a fundamental one. Its derogation should only be countenanced if the facts properly give rise to other higher-order concerns that warrant such derogation.

37 To the extent that the amendment of the Statement of Claim is required to reflect the result of the discontinuance of the action against the Bank, we find it difficult, *prima facie*, to see any reason to prevent such an amendment from being made. Since the discontinuance of the action is a *fait accompli*, refusing to allow the necessary amendments to be made to the Statement of Claim would only serve to impede our analysis of the issues. There is also nothing objectionable to amendments being made to the pleadings to reflect developments since the commencement of Suit 790. This leaves to be considered two categories of amendments in the amended SOC: the discarding of the negligent misrepresentation claim against the Trustee and what the Trustee characterises as reformulations of some of the claims against it to remove certain references to the Bank.

38 As to the discarding of the negligent misrepresentation claim, the Trustee points out that this claim has been reformulated as a claim for breach of trust for the Trustee's failure to account accurately to the appellants for the value of the Trust assets. Other claims the Trustee points to as having been reformulated include the deletion of the claim that the Trustee had failed to exercise skill and care in delegating its asset management powers to the Bank, despite the fact that the Bank's regulatory and compliance function was inadequate. However, other limbs of the claim that the Trustee had failed to

exercise skill and care in delegating its powers to the Bank still remain in the amended SOC – such as the Trustee's alleged failure to take into account the 'D' rating obtained by Mr Lescaudron's team during an internal audit by the Bank. In truth, these amendments are relatively minor tweaks in the overall scheme of the amended SOC, which is clearly aimed at the redirection of Suit 790 away from the alleged wrongdoing of the Bank and towards the alleged wrongdoing of the Trustee. The greater part of this redirection is the removal of the claims against the Bank, consequent to the discontinuance of the action against the Bank; but another part is the removal of other pleadings which the appellants may consider to unduly implicate matters which transpired in Switzerland.

39 Instead, the focus of the inquiry must be on what the Trustee contends is the belated nature of the application to amend, being an application to the Court of Appeal after the filing of a second appeal against the stay ordered by the AR.

40 It is well-established that an appellate court has the discretion to allow amendments to the pleadings if doing so would allow the real issue in controversy between the parties to be determined: see *Review Publishing Co Ltd and another v Lee Hsien Loong and another appeal* [2010] 1 SLR 52 at [110]–[113]. On the other hand, such amendments would not be allowed if allowing them would not be just in all the circumstances – in particular, if the amendments would cause any prejudice to the other party which cannot be compensated in costs.

41 In *Gulf Hibiscus Ltd v Rex International Holding Ltd and another* [2017] SGHC 210 ("*Gulf Hibiscus (No 1)*"), the High Court applied this test to a

situation closely analogous to the present one. In that case, the plaintiff sought to amend its pleadings on appeal from an Assistant Registrar's decision by dropping parts of its pleaded case, so as to avoid a stay of the proceedings in favour of arbitration. The court allowed the amendments, holding that they did not amount to an attempt to revisit a decided matter (at [44]). The court also pointed out that since there had been no trial or evidential hearing, there was no prejudice in the form of requiring testimony to be run through again. It is notable that in *Gulf Hibiscus (No 1)*, the Assistant Registrar had specifically asked the plaintiff whether it wished to amend its pleadings; the application to do so before the High Court was therefore particularly belated, but this was not found to be a ground on which to reject the amendments (at [46] and [48]). The correctness of the principles pertaining to the amendment of pleadings applied in *Gulf Hibiscus (No 1)* was not doubted when this court subsequently had the opportunity to deal with this litigation in *Gulf Hibiscus (No 2)* ([36] *supra*).

42 The appellants further rely on the decision of the Court of Appeal of England and Wales in *Islington London Borough Council v Uckac and another* [2006] 1 WLR 1303 ("*Uckac*"). In *Uckac*, the plaintiff local authority brought proceedings for the repossession of premises from a tenant on the basis that the tenancy had been granted due to reliance on fraudulent misrepresentations. The claim was dismissed at first instance on the basis of a ruling on preliminary issues which held, *inter alia*, that the statutory regime precluded the rescission of the tenancy. Before the appellate court, the plaintiff sought to amend its particulars of claim to plead in the alternative that the grant of the tenancy was null and void *ab initio* (see *Uckac* at [36]). This was effectively an attempt to bypass the issue on which the first instance judge had ruled against the plaintiff by amending the pleadings to bring a claim on a different basis. The appellate court upheld the ruling on preliminary issues but allowed the amendment of the

pleadings. The court was not impressed by the submission that the amendment application should have been made in the lower court (at [38]). Instead, it held that to require the plaintiff to start afresh in those circumstances would merely cause additional expense and delay (at [39]).

43 *Gulf Hibiscus (No 1)* and *Uckac* share the common feature that the proceedings in question were still at an early stage when they reached the appellate court. When the matter has not gone for trial and no evidence has been taken, it will be rare that an amendment of the pleadings will cause prejudice that cannot be compensated in costs. The fact that the amendment is for the purpose of strengthening the appellant's prospects on appeal in the light of the rulings made by the court below will not in itself render the application an abuse of process. The Trustee's assertion that allowing such an amendment would allow the appellants to "unfairly impugn" the Judge's decision below is misconceived: the fact that the appeal is allowed by virtue of an amendment of the pleadings clearly does not amount to a criticism of the Judge, before whom the pleadings were different in material aspects.

44 On the other hand, the Trustee seeks to rely on the decision of the Court of Appeal of England and Wales in *Sharab v Al-Saud* [2009] 2 Lloyd's Rep 160 ("*Sharab*"). In *Sharab*, the appellant resisted an application for leave for service out of jurisdiction on the basis that the matter should be heard in Libya instead. It was only after the hearing of the appeal that the appellant informed the appellate court, by way of e-mail, that he undertook to submit to the jurisdiction of the Libyan courts (see *Sharab* at [45]). The court declined to accept this undertaking on the basis that the appellant should not be allowed to "reverse, so late in the day, a tactical position deliberately adopted for the purposes of the proceedings below *and the appeal*" [emphasis added] (at [52(iv)]). In *Rappo,*

Tania v Accent Delight International Ltd and another and another appeal [2017] 2 SLR 265 ("*Rappo*") at [100], this court discussed *Sharab* and made it clear that the case did not stand for the broad proposition that such an undertaking could not be given on appeal; instead, it was the lateness of the manoeuvre in the particular circumstances of *Sharab* that caused the court to reject the undertaking – not least the fact that the appeal had already been heard. *Sharab* therefore does not help the Trustee.

45 At the first hearing, Dr Lai further cited the decision of this court in *Sunbreeze Group Investments Ltd and others v Sim Chye Hock Ron* [2018] 2 SLR 1242 ("*Sunbreeze*"). In *Sunbreeze*, the appellants, who were the defendants in a suit, commenced third-party proceedings against the respondent for a contribution or indemnity. The respondent successfully applied to the High Court for the third-party proceedings to be struck out. The appellants appealed against the striking out order, and also filed an application before this court to amend their third-party statement of claim. This court dismissed the amendment application. It explained that the application should have been made before the High Court at first instance, and that the proposed amendments were impermissible because they would have introduced two new causes of action, requiring this court to effectively decide material parts of the striking out application as a first instance court (at [26]–[30]). We should note that this sets the circumstances in *Sunbreeze* apart from those in *Uckac*, in which the appellate court was not required to make any substantive ruling on the amended pleadings after it allowed the amendments (see *Uckac* at [41]).

46 In our judgment, the circumstances in *Sunbreeze* were materially different from those in the present case. First, whereas the court in *Sunbreeze* (at [26]) found no reason for the amendment application not to have been

brought before the High Court, it was not unreasonable in the present case for SUM 71 to have been brought before this court in the first instance. As we have pointed out, the main purpose of SUM 71 was to reflect the discontinuance of the action against the Bank. However, this occurred some months after the filing of the present appeal. By this point, Suit 790 had already been stayed, and the only pending proceedings were before this court. Second, unlike in *Sunbreeze*, the amended SOC in the present case involves the deletion, rather than addition, of causes of action. The removal of those causes of action was necessitated by the discontinuance of the action against the Bank and this court cannot ignore the consequences of the discontinuance even if we were to reject the application to amend. Third, we would add that the nature of the appellate court's analysis in an appeal against a striking out order is not entirely comparable to the task before us. Our present task involves applying a single well-established set of legal principles to a limited body of facts at a high level of generality, a task which an appellate court is readily equipped to engage in.

47 Finally, we address the Trustee's accusation that the appellants deliberately delayed bringing SUM 71 to deprive the Trustee of the opportunity to adequately respond to the amended SOC. In this regard, the Trustee complains that the draft of the amended SOC was only provided to it three working days before its respondent's case was due to be filed on 3 June 2019, and that SUM 71 was only eventually filed on 24 June 2019. On the other hand, we observe that in the appellants' case filed on 29 April 2019, the appellants stated plainly that they had "decided not to pursue the claims against the Bank in Singapore" and would be amending the Statement of Claim to "pursue only the breach of trust claims against the Trustee". With respect, we therefore do not agree that the Trustee had inadequate notice of the appellants' intention to amend their pleadings. The Trustee's solicitors could have sought an extension

of the deadline to file the respondent's case but did not do so. We do not consider real prejudice to have been occasioned to the Trustee in this regard, much less any prejudice that cannot be fully compensated in costs.

48 In our judgment, the amended SOC serves to allow the real issues before us in the present appeal to be properly tried – namely, the application of the law on natural forum and choice of jurisdiction to Suit 790 following the discontinuance of the claims against the Bank. SUM 71 must be allowed and so we proceed on the basis that the amended SOC constitutes the pleadings in Suit 790.

Whether Suit 790 should be stayed

49 The substantive appeal turns, as we have mentioned above, on two key issues: first, the effect of cl 2(a), and whether it amounts to an exclusive jurisdiction clause applying to the claims in Suit 790 based on the amended SOC; and second, whether there was evidence that was important for the Trustee's defence which would be available in proceedings in Switzerland but not in Singapore. These issues correspond to the two threads of the analysis that the court must undertake in the present case: first, the applicable test for granting the stay – whether the applicant must show strong cause, or merely that there is a more appropriate forum under the *Spiliada* test; and second, the application of the relevant test, which would require a consideration of the factors particular to the present case.

Whether cl 2(a) amounts to an exclusive jurisdiction clause applying to the claims in Suit 790

50 While the focus of the arguments was on cl 2(a), it is important for the task of construction to examine clauses as a whole and in context. We therefore set out cl 2 of the Trust Deed in full below:

> **PROPER LAW AND POWER TO CHANGE PROPER LAW**
>
> 2. (a) This Declaration is established under the laws of the Republic of Singapore and subject to any change in the Proper Law duly made according to the powers and provisions hereinafter declared the Proper Law shall be the law of the said Republic of Singapore and ***the Courts of the Republic of Singapore shall be the forum for the administration hereof***.
>
> (b) *The Trustees may at any time* or times and from time to time during the Trust Period *by deed declare that the Proper Law shall from the date of such deed or from such other date* as is specified therein or upon the occurrence of such circumstances as are specified therein *be the law of some other jurisdiction* (not being a jurisdiction under the law of which (i) any of the trusts, powers and provisions herein declared and contained would not be enforceable or capable of being exercised and taking effect or (ii) this Declaration would be capable of being revoked) *and that the forum for the administration thereof shall thenceforth be the courts of that jurisdiction* but subject to the power conferred by this clause and until any further declaration be made hereunder and the Trustees shall have power so often as any such declaration as aforesaid shall be made to make such consequential alterations or additions in or to the trusts, powers and provisions hereof as the Trustees may consider necessary or desirable to ensure that the trusts powers and provisions hereof shall (mutatis mutandis) be as valid and effective as they are under the laws of the Republic of Singapore.
>
> [emphasis added in italics and bold italics]

"Proper Law" is in turn defined in cl 1(i) of the Trust Deed ("cl 1(i)") as follows:

> "Proper Law" means the law to the *exclusive jurisdiction* of which the rights of all parties and the construction and effect of each and every provision hereof are subject and by which such rights

> construction and effect are construed and regulated. [emphasis added]

The corresponding provisions in the Amended Trust Deed are in identical terms to those set out above.

51 It would be noted that cl 2 deals with two situations. The first sub-clause, cl 2(a), prescribes the initial proper law of the Mandalay Trust upon establishment as the law of Singapore and the Singapore courts as the "forum for the administration" of the trust. Then, cl 2(b) grants the Trustee the power to change the proper law at its discretion and provides that if it does so, the courts of the jurisdiction of the new proper law would become the "forum for the administration" of the trust. It is apparent from the case authorities that we discuss below that this type of clause giving a trustee power to change the proper law of a trust and the forum for administration is fairly commonly found in trust documents drafted in major Commonwealth jurisdictions providing trust services to wealthy individuals. It is the "forum for the administration" portion of the clause that we are particularly concerned with here.

52 Not surprisingly, there have been several cases across the Commonwealth where the courts have been called upon to determine the meaning of the term "forum for the administration" in trust deed clauses similar to cl 2 here. We will call them "forum for administration clauses" for convenience, although the language and structure of such clauses are not uniform. Numerous authorities were cited by the parties both before us and to the Judge: see the Judgment at [32]–[41]. They reveal that two closely related questions are raised by a forum for administration clause: first, whether the clause is intended to confer jurisdiction on a court (whether exclusively or otherwise); and second, the scope of the clause and therefore the kinds of

disputes it applies to. On one end of the spectrum, some forum for administration clauses have been interpreted as not being concerned with the jurisdiction of the courts at all, but instead as merely referring to the place where the affairs of the trust are to be run: see, *eg*, *Crociani and others v Crociani and others (Princess Camilla de Bourbon des Deux Siciles intervening)* 17 ITELR 624 ("*Crociani (PC)*") at [19]. On the other end, other forum for administration clauses have been found to function as exclusive jurisdiction clauses applicable both to questions regarding the administration of the trust and to contentious disputes relating to the trust: see, *eg*, *Re a Trust* 16 ITELR 195 ("*Re a Trust*") at [66] and [68].

53 We reiterate, however, that forum for administration clauses are not uniform: they differ in both language and structure. There is no special rule of construction that applies to the interpretation of such clauses, and everything must therefore depend on how the particular clause is framed and the context in which it appears: see *Koonmen v Bender and others* 6 ITELR 568 ("*Koonmen*") at [45]; and *Re a Trust* at [60].

54 This point is well-illustrated by the 2014 decision of the Privy Council (on appeal from Jersey) in *Crociani (PC)*. The trust deed in this case had two relevant provisions (see *Crociani (PC)* at [7]). Clause 15 provided:

> Except as herein provided, the validity and construction of this Agreement and each trust thereby created shall be governed by the law of the Commonwealth of The Bahamas which shall be the forum for the administration thereof.

Clause 12 provided that new trustees could be appointed upon the original trustees' resignation, upon which:

> … the Trust Fund shall continue to be held upon the trusts hereof but subject to and governed by the law of the country of

> residence or incorporation of such new Trustee or Trustees and thereafter the rights of all persons and the construction and effect of each and every provision hereof shall be subject to the exclusive jurisdiction of and construed only according to the law of the said country which shall become the forum for the administration of the trusts hereunder …

55 At the time the trust was established in 1987, there were two lay trustees and a Bahamian professional trust company. Thereafter, there were a number of changes of the professional trustee and, in consequence, to the proper law of the trust. In January 1992 a Jersey company was appointed as professional trustee and the proper law became the law of Jersey. In 1999, a Guernsey trustee was appointed and the proper law became that of Guernsey. In 2007, another Jersey company became the trustee and the proper law went back to being Jersey law. In February 2012, both the lay and professional trustees ("the 2007 trustees") purported to retire and appoint a professional trustee in Mauritius in their stead. Some beneficiaries of the trust subsequently brought proceedings in Jersey alleging breaches of trust by the 2007 trustees and challenging the validity of the appointment of the Mauritian trustee.

56 The defendants contended that as a result of the appointment of the Mauritian trustee, cl 12 conferred exclusive jurisdiction on the courts of Mauritius. The Jersey courts disagreed and held that they had jurisdiction (see *Edoarda Crociani and others v Cristiana Crociani and others* [2014] JCA 089 ("*Crociani (JCA)*")). The defendants then appealed to the Privy Council. In *Crociani (PC)* the Privy Council held cl 12 not to be a jurisdiction clause at all. Lord Neuberger of Abbotsbury, giving the decision of the court, acknowledged that the expression "forum of administration" *could* refer to the court which is to enforce the trust, but declined to hold that this expression had such a well-established technical significance that it necessarily held this meaning (at [17]). An equally plausible meaning of the term "forum" was that it referred to

"a place for any purpose", and the term "administration" could simply refer to the running of the trust (at [18]).

57 Lord Neuberger gave a number of reasons in favour of this broader understanding of "forum": first, it was used in that sense in at least one contemporaneous precedent; second, there were other references to "courts" in the trust deed, and no other reference to "forum" (at [18]); and third, the fact that cl 12 stipulated for the "said country" to "become the forum for the administration of the trusts" was notable, because if the intention were to designate the courts of that country as the forum of administration, then it could be expected that the draftsman would have referred specifically to the *courts* of the "said country" (at [20]). Lord Neuberger also observed an oddity caused by interpreting the portions of cl 12 excerpted above as a jurisdiction clause: another part of cl 12 allowed the new trustees to reinstate the original governing law of the trust, but there was no provision to allow the original forum for administration to likewise be reinstated (at [21]). On the other hand, it was reasonable for cl 12 to stipulate the place for the running of the trust – for example, to clarify its tax status (at [19]).

58 Clause 2(a) in the present case, on the other hand, notably refers specifically to "the *Courts* … of Singapore" [emphasis added] being the forum for the administration of the Mandalay Trust (see [50] above). The Judge did not consider this point to be decisive. She held that Lord Neuberger's reasoning about the specification of the courts of a country being the forum for administration, which we have referred to above, was merely a comment about the lack of this specification in the trust deed at hand; it was not meant to say that the presence of such a reference would necessarily constitute the forum for administration clause an exclusive jurisdiction clause (the Judgment at [35]).

59 It is no doubt correct that the court in *Crociani (PC)* eschewed any special significance being placed on particular phraseology, but this does not mean that the use of certain words cannot be given their ordinary significance. On the contrary, the specific reference to the courts of Singapore in cl 2(a) immediately distinguishes the present case from *Crociani (PC)*, since it is implausible to read cl 2(a) to be stipulating the *courts* of Singapore as the place where the Mandalay Trust was to be *run* on a day-to-day basis. It more likely means that the courts of Singapore will, at the least, be the appropriate forum to go to when court assistance is required for the running of the Mandalay Trust. At the same time, none of the features which were considered to point *away* from the forum for administration clause being a jurisdiction clause in *Crociani (PC)* exists in the Trust Deed in the present case. In *Crociani (PC)* both cl 12 and cl 15 referred to a country being the "forum for the administration". There was no reference to "courts" at all, whereas in both parts of cl 2 here the reference to "forum for the administration" is tied up with a reference to the courts. Under cl 2(b), when the governing law changes, the relevant court changes too, to the courts of the jurisdiction of the proper law. This parallel change makes sense in that the courts of a particular jurisdiction are the best placed to interpret the laws of that jurisdiction as they apply to the affairs of a trust governed by those laws. In our view, the intention of the draftsman in indicating the courts of the jurisdiction of the proper law to be the forum for administration, was to make crystal clear that if any legal question arose in the running of the Mandalay Trust, that question should be resolved by the courts of the jurisdiction of the proper law at the time the question arose.

60 As such, we have no hesitation in concluding that on the proper construction of cl 2, one of the functions of both cll 2(a) and 2(b) *is* to be a jurisdiction clause. The next question is whether as a jurisdiction clause, cl 2(a),

or cl 2(b) for that matter, operates solely in relation to matters which relate to the administration of the trust – for example, matters of interpretation of the trust deed or the trustee's powers – or applies also to disputes between the trustee and beneficiaries. We now turn to consider the relevant authorities on this issue.

61 We start with the 2002 decision of the Jersey Court of Appeal in *Koonmen* ([53] *supra*). There, the plaintiff had brought a claim in Jersey against a number of defendants for, *inter alia*, breach of trust. Two of the defendants applied to set aside service of the proceedings on them out of jurisdiction, and two other defendants applied for a stay of the proceedings on the grounds of *forum non conveniens*. The relevant issue before the court on both applications was whether the more appropriate forum was Jersey, or Anguilla, which was also the jurisdiction of the governing law and of the trustee's incorporation (see *Koonmen* at [32]). The trust deed contained the following provisions (see *Koonmen* at [44]):

(a) Clause 1(i)(k), which provided:

> The "Proper Law" means the law to the exclusive jurisdiction of which the rights of all parties and the construction and effect of each and every provision of this Settlement shall from time to time be subject and by which such rights construction and effect shall be construed and regulated.

(b) Clause 2, which provided:

> **PROPER LAW**
>
> This Settlement is established under the laws of Anguilla and subject and without prejudice to any transfer of the administration of the trusts hereof to any change in the Proper Law and to any change in the law of interpretation of this Settlement duly made according to the powers and provisions hereinafter declared the

> Proper Law shall be the law of Anguilla which said Island shall be the forum for the administration thereof.

(c) Clause 14, which provided the trustees with the power to change the governing law of the trust, with the consequence that upon such change, under cl 14(i)(b) "The forum for the administration thereof shall thenceforth be the courts of that state or territory".

62 The Jersey Court of Appeal granted both applications, reversing the decision of the first instance court. Its principal basis for doing so was that the court below had failed to appreciate the significance of cl 2 of the trust deed as stipulating Anguilla as the forum for the resolution of disputes relating to the trust (see *Koonmen* at [43] and [58]). It held that if a clause in a deed provided for an agreed choice of forum, the court would override that agreed choice of forum only in exceptional cases (at [49] and [61]). Rokison JA, delivering the judgment of the court, recognised that the effect of such provisions in a trust deed was a matter of construction, with no special rule of construction applicable (at [45]). In the construction exercise, he looked at the trust deed as a whole and construed cl 2 in the light of cll 1(i)(k) and 14 (at [47]). Rokison JA found the language of cl 1(i)(k) "somewhat confusing", as "[t]he concept of a reference to the exclusive jurisdiction of a system of law is obscure" (at [46]). However, he considered that it was most likely intended to refer to the jurisdiction of the relevant court, particularly in the light of the reference in cl 2 to the forum for the administration of the trust. Although the court in *Koonmen* did not expressly consider the *scope* of the conferral of jurisdiction, it clearly considered it to extend to the claims in the proceedings, including the breach of trust claims against the current trustee.

63 The appellants further rely on the decision of the Supreme Court of British Columbia in its 2003 decision in *Green and another v Jernigan and others* 6 ITELR 330 ("*Green*"). However, in *Green*, in addition to a forum for administration clause which referred to "the Island of Nevis", the trust deed also contained a governing law clause which ended by stating that the parties "submit to the jurisdiction of the High Court of St. Christopher and Nevis … in respect of all disputes which may arise in respect of this deed" (see *Green* at [34]–[35]). Given the clarity of the submission to jurisdiction in respect of "all disputes", it is not surprising that the court held that the trust deed conferred exclusive jurisdiction on the courts of Nevis, although the court also held that the reference to "forum for the administration" of the trust was intended as an exclusive jurisdiction clause (at [40]–[41]). We therefore do not consider *Green* to be of much assistance in the present case.

64 *Koonmen*, meanwhile, has been the subject of forceful criticism. Prof Paul Matthews ("Prof Matthews"), in an article entitled "What is a trust jurisdiction clause?" (2003) Jersey Law Review 232 ("Matthews"), took issue with the analysis in *Koonmen* of the terms "exclusive jurisdiction" (in cl 1(i)(k)) and "forum for … administration" (in cl 2). In relation to the former, Prof Matthews suggested that "exclusive jurisdiction" was more plausibly a clarification of the governing law (at para 20):

> … Clauses using the wording found in clause 1 have been used by trusts draftsmen, for many years, to indicate the law to which reference is to be made – and *exclusively* to be made – to ascertain the effects of the trust and the rights of the parties involved. The "jurisdiction" referred to is not (as a litigation or arbitration lawyer might think) the jurisdiction or competence of the forum, but instead (as a non contentious trusts draftsman would have considered) the jurisdiction, meaning "scope" or "province of application", *of the law itself*. It answers the question, *Which* law governs *what* aspects of the trust? And the answer given here is, *all* aspects of this trust, including the

> rights of the parties, are subject to the law identified as the proper law. … [emphasis in original]

65 We note that a similar view was subsequently taken by the Privy Council in *Crociani (PC)*. Discussing the provision in cl 12 for the trust deed, upon a change in the trustees, to be subject to the "exclusive jurisdiction" of the new country where the trust was to be administered, Lord Neuberger held that this was intended to stipulate that the same law governed all issues concerning the trust deed (at [23]). This was a meaningful precaution because it avoided the risk of dépeçage – by which different aspects of a trust could become subject to different governing laws (see *Crociani (PC)* at [23]–[24]).

66 As for the forum for administration clause in *Koonmen*, Prof Matthews took the view that this referred to matters which fell within the scope of an administration action (Matthews at paras 21–22):

> … The *administration* referred to here is not intended to include contentious breach of trust litigation. On the contrary, it is concerned with aspects of the administration of the trust which, for one reason or another, require the assistance of the court. These might well include trustees seeking to clarify the true construction of the trust terms … , or trustees seeking a direction as to whether they might safely distribute assets when there are contingent claims from third parties still in the air, whether they should disclose trust documents or information to beneficiaries, or whether they should take or defend legal action against third parties (so called "*Beddoe*" applications). … This is the "domestic jurisdiction" of the Chancery Court, which under the old Rules of the Supreme Court 1965 in England was represented by the provisions of Order 85. The predecessor of that Order itself was introduced in order to avoid the need in every case to have a full action to administer the trust – a so-called "administration action". …
>
> Hence, the phrase "forum for administration" referred directly back to the nineteenth century (and earlier) idea of the court which would take on the administration of the trust if need be. The most usual forum for that, of course, was the forum of the proper law. So strictly there was no need to state the forum for administration. And it is doubtful that selecting a different

> forum from that of the proper law could require the trustees to seek directions *only* from the nominated court. But such an administration action was in effect procedural rather than substantive. **It was a means of dealing with matters of administration and construction. It was not – could not be – used to deal with breach of trust issues, characteristic of the kind of hostile trust litigation for which an exclusive jurisdiction clause might be needed.** …
>
> [emphasis in original in italics; emphasis added in bold]

67 The analysis in Matthews has proven influential in subsequent case law. In the 2009 decision of the Grand Court of the Cayman Islands in *Helmsman Ltd and another v Bank of New York Trust Company (Cayman) Ltd* 13 ITELR 177 ("*Helmsman*"), Henderson J considered that there was "much to be said" (at [10]) for Prof Matthews's analysis, and suggested that it was probably correct (at [14]). *Helmsman* involved a trust deed with the following forum for administration clause (see *Helmsman* at [3]):

> The forum for the administration of this settlement shall (subject and without prejudice to any change made under the power conferred by para. 5 of the Second Schedule in the forum and administration of this settlement) be the courts of England and Wales.

68 Ultimately, however, Henderson J did not consider it necessary to conclusively decide this issue, as the forum for administration of the trust had been changed by the trustees under the relevant provisions to the Cayman Islands one day before the writ in the action was issued, and there could not therefore be said to be a jurisdiction clause in favour of the English courts in any event (at [13]–[15]).

69 The analysis in Matthews was likewise relied upon by the Jersey Court of Appeal when it heard *Crociani (JCA)* ([56] *supra*), the decision that subsequently went on appeal to the Privy Council (see [54] above). The Jersey

Court of Appeal found that cl 12 of the trust deed (which we have set out at [54] above) only had the effect of facilitating changes in the governing law of the trust (at [95]). In doing so, the court rejected two contentions on the construction of cl 12 advanced by the appellants: that the reference to "forum for the administration" made the Mauritian courts the only forum in which disputes between the trustees and the beneficiaries could be resolved after the appointment of the Mauritian trustee, and that the reference to "exclusive jurisdiction" also had the same effect (see *Crociani (JCA)* at [65]). On both fronts, the Jersey Court of Appeal expressly disapproved the reasoning in *Koonmen*, which had been decided 12 years earlier by the same court, along similar lines as those set out in Matthews (*Crociani (JCA)* at [79]–[83]):

> (a) The court held that "forum for the administration" ought to be understood in the light of the boundary between "matters of administration" and "hostile claims" that has long existed (at [92]).
>
> (b) The court provided numerous reasons why, in context, "exclusive jurisdiction" should be read as referring to the governing law and not matters of jurisdiction. For present purposes, the most salient are (at [66]):
>
> > (i) "[E]xclusive jurisdiction" in context confirms that a single system of law will apply to the rights of all persons under the trust, since both the phrases "exclusive jurisdiction" and "construed only according to" attach to the phrase "the law of the said country". [The appellants'] contrary reading requires at least the insertion of commas after the words "exclusive jurisdiction of" and before the words "the said country" which are absent …
> >
> > …
> >
> > (iii) [T]he declaration which it is envisaged the ex-Trustees should make is concerned only with a change

> in the proper law and the consequences of such declaration then spelt out should logically reflect the envisaged declaration. …
>
> …
>
> (vi) If [the appellants] were correct in their construction of both phrases "exclusive jurisdiction" and "forum for the administration" one or [the] other would be otiose. [The respondents'] construction avoids such duplication: each phrase has a distinct role i.e. "Exclusive jurisdiction" means that the proper law of the Trustee's country of residence or incorporation applies to all aspects of the Trust. "Forum for the Administration" means that the Trust will be administered in that country and the Courts of that country will exercise their supervisory jurisdiction over it.
>
> (vii) That the concept of "exclusive jurisdiction" can apply to the reach of a particular system of law rather than the place where disputes under such law must be resolved is vouched for by the observations [in Matthews (see [64] above)] …
>
> [emphasis in original omitted]

70 On the other hand, a different conclusion was reached by the Supreme Court of Bermuda in its 2012 decision in *Re a Trust* ([52] *supra*). In this case, cl 18.1 of the trust deed provided (see *Re a Trust* at [47]):

> Except as otherwise provided, the interpretation and validity of the provisions of this Trust and all questions relating to the management, administration, investment, distribution and the perpetuity period applicable to this Trust shall be governed by the laws of Bermuda and the forum for the administration of this Trust shall be the courts of Bermuda.

71 The settlor of the trust sought, *inter alia*, an injunction against one of the beneficiaries ("D9") in respect of his threat to bring proceedings outside Bermuda to compel the trustee to disclose information about the trust assets. The trustee supported the injunction, on the basis that cl 18.1 was an exclusive jurisdiction clause. It is worth noting that D9 appeared not to have contested this

point at the hearing, although he did so in written submissions (see *Re a Trust* at [48]).

72 Kawaley CJ considered the case law, including *Koonmen*, *Green* ([63] *supra*) and *Helmsman*, as well as Matthews, before turning to decide the case on the basis of the particular language of the trust deed (at [60]). He held that the "mandatory language" of cl 18.1, and the combination of the selection of Bermudian law as the governing law and Bermuda as the forum for administration "naturally suggest[s] exclusivity", placing emphasis on the use of the word "shall" in cl 18.1 (at [62]). Kawaley CJ went on to say, at [64]:

> The express choice of a governing law for a trust must accordingly always be an exclusive one as it signifies the domicile of the relevant trust. A trust can only have one domicile. It follows that the combination of a Bermuda governing law clause and a Bermuda forum for administration clause points towards the draftsman's intent that the courts of Bermuda should exclusively determine matters relating to the administration of the trust. This is probably why Rokison JA in [*Koonmen*], also analysing a clause selecting a single governing law and administrative forum for a trust, rightly considered that the absence of the word 'exclusive' (or indeed the inclusion of the phrase 'exclusive jurisdiction' in the definition of 'Governing Law') did not matter. The choice of Bermuda law as the governing law of the trust combined with the designation of Bermuda as the forum for administration of a trust will ordinarily signify both (a) the exclusive selection of Bermuda as the domicile of the trust, and (b) the exclusive selection of Bermuda as the forum the courts of which will supervise the administration of the trust.

73 Having therefore disagreed with the view that the term "forum for the administration" signified those non-contentious actions which fell within the scope of an administration action, Kawaley CJ had to consider the proper scope of cl 18.1. He took the view that obvious examples of claims not falling within such a clause included claims brought by trustees against strangers to the trust to recover trust property and "other claims which clearly have no connection

with the administration of the trust" (at [67]). In contrast, Kawaley CJ rejected the submission that cl 18.1 did not encompass a claim for breach of trust (at [68]). Instead, he suggested that "[t]he better view is that a modern draftsman using the term[] 'administration' in a trust forum clause does not have in mind now rare administration actions", but is instead "merely seeking to signify the administration of a trust in a general sense by the domiciliary courts of the trust" (at [69]). It should be noted, however, that Kawaley CJ's view that a breach of trust fell within the scope of a "forum for administration" clause was *obiter*, since *Re a Trust* concerned an application for the disclosure of information relating to the trust, which clearly seeks the exercise of the court's inherent jurisdiction to supervise the administration of trusts (*Re a Trust* at [69]–[70]).

74 A final point which is worth mentioning is the ambit of the administration action. According to Prof Matthews, an administration action could not historically be used to commence hostile trust litigation, such as claims for breach of trust (see Matthews at para 22, quoted at [66] above). On the other hand, in Lynton Tucker, Nicholas le Poidevin and James Brightwell, *Lewin on Trusts* (Sweet & Maxwell, 19th Ed, 2015) at para 11–055, the authors take the contrary view, saying that the scope of an administration action "has always extended to remedying a breach of trust".

75 We do not consider it necessary in the present case to conclusively determine the scope of an administration action, either historically, or in our current law. In our judgment, there is no legal rule limiting the meaning of the phrase "forum for [the] administration" to an administration action in the traditional sense. As pointed out by Lord Neuberger, this language has no established technical significance (see *Crociani (PC)* at [17], discussed at [56] above). Neither the view that the phrase refers to the *place* of administration of

the trust (taken in *Crociani (PC)*, *Crociani (JCA)* and *Helmsman*), nor the view that it refers to the *court*'s administration of the trust (taken in *Koonmen*, *Green* and *Re a Trust*), turns necessarily on the presence or absence of a connection between "forum for the administration" and the administration action.

76 In the final analysis, we are persuaded by the *Crociani* line of cases and Prof Matthew's reasoning that the term "forum for the administration" is intended to refer to the court or jurisdiction which would settle questions arising in the day to day administration of the trust, and to denote the supervisory and authorising court for actions the trustee might need to take which were not specifically covered by the trust deed or where its terms were ambiguous. Even the addition of a specific reference to "courts" in such a forum for administration clause as in the present case does not change its essential character. In our judgment, such clauses are not intended to function as exclusive jurisdiction clauses for the settlement of disputes between trustees and beneficiaries. We are cognisant that cll 1(i) and 2 of the Trust Deed governing the Mandalay Trust are in their structure and method of expression much more similar to the equivalent clauses considered in *Koonmen* than to those in the *Crociani* litigation. However, we prefer the reasoning in the *Crociani* cases, which is no less applicable to the present case since the broader context and purpose of the trust arrangements there is the same as in the present case.

77 In construing cl 2 of the Trust Deed, it is to us significant that the main purpose of trust deeds of its ilk is to set out the framework of the trust and in particular to delineate the responsibilities and rights of the trustee for the time being in its management. It is usually the trustee who drafts the trust deed (and practically always in the case of professional trustees) and specifies the terms on which it is willing to undertake the onerous duties of a trustee. The trustee

will therefore be careful to specify the law under which those obligations are to be carried out. It is likely that in considering the choice of law the trustee will be guided by the system of law that it is most familiar with and that generally governs the way it carries out its business as a trustee: it needs to know what the law prescribes as its duties. In making the choice, the trustee will, accordingly, be focussing on the running of the trust rather than on potential disputes with beneficiaries over future breaches of trust. By way of parenthesis, the evidence in the present case suggests that Mr Ivanishvili had little or no involvement in the selection of Singapore as the original domicile for the Mandalay Trust.

78 In the settlement of a trust there is little of the negotiation between parties with different interests that ordinarily takes place in pre-contractual discussions. Whilst there will be a settlor who may have some input, generally the beneficiaries have no say at all in the setting up of the trust. Indeed, in many cases the beneficiaries do not even exist at the time of the settlement of the trust. The trust deed is not a contract between two parties with obligations on both sides – rather, it is a unilateral undertaking by the trustee, and in our view this difference must play a part when we consider whether the intention of the drafters was to impose a mandatory jurisdiction clause for the resolution of contentious disputes regarding allegations of breach of trust.

79 It is also important to have due regard to the fact that the proper law of the Mandalay Trust was not fixed for all time upon the settlement of the trust but could change with a change of trustee. When a trust like the Mandalay Trust is established, from the beginning it is anticipated that any subsequent trustee may be incorporated or carry on business in a different jurisdiction from that of the original trustee, and that in order to obtain the services of the subsequent trustee the proper law of the trust would have to change. Once the proper law

changed it would make no sense for the questions arising in respect of the running of the trust to continue to be referred to the courts of the jurisdiction governing the previous trustee. We are in this regard in agreement with the analysis of the Jersey Court of Appeal in *Crociani (JCA)* (see [69] above) that the phrase "exclusive jurisdiction" as it appears in cl 1(i) here must be construed as meaning that the proper law of the trust (from time to time) applies to all aspects of the Mandalay Trust, and the specification of the courts of Singapore (under cl 2(a)) or of any other jurisdiction (under cl 2(b)) as the "forum for the administration" was intended to implicate such courts as the supervisory court for general administration rather than designate them as the courts for the settlement of contentious disputes between the trustee and the beneficiaries.

80 For the reasons given above, we hold that the appellants cannot rely on cl 2(a) to subject the Trustee to the jurisdiction of the courts of Singapore as the only courts to determine their claims as set out in the amended SOC. Instead, the issue of where the dispute should properly be tried will have to be determined by the doctrine of *forum non conveniens*.

The connecting factors analysis

81 In the light of our conclusion on the nature of cl 2(a), the *Spiliada* test governs the application for the stay of Suit 790. As this court explained in *Rickshaw Investments* ([34] *supra*) at [14], the first stage of the test is whether there is some other available forum which is more appropriate for the case to be tried, and if the court concludes that there is a more appropriate forum, a stay will ordinarily be granted unless under the second stage of the test the court finds that there are circumstances by reason of which justice requires that a stay should nonetheless not be granted.

82 In particular, at the first stage, the burden is on the applicant for the stay to show that there is another forum which is "clearly or distinctly more appropriate" than Singapore (see *CIMB Bank Bhd v Dresdner Kleinwort Ltd* [2008] 4 SLR(R) 543 ("*Dresdner Klienwort*") at [26]). At this stage, the court considers the connecting factors that link the dispute with the competing jurisdictions. As this court explained in *Rappo* ([44] *supra*) at [71], the connecting factors typically considered include:

> … [F]irst, the personal connections of the parties and the witnesses; second, the connections to relevant events and transactions; third, the applicable law to the dispute; fourth, the existence of proceedings elsewhere (that is, *lis alibi pendens*); and fifth, the "shape of the litigation", which is shorthand for the manner in which the claim and the defence have been pleaded. …

83 Furthermore, as *Rappo* goes on to explain, the court should be astute to consider which factors are likely to be material to the fair determination of the dispute, and it should ascribe greater weight to those, based on the circumstances of the case. "For instance, in disputes involving well-heeled parties who have a high degree of mobility … the current domicile of the parties may be of little legal significance" (*Rappo* at [71]). This observation applies equally to the present case.

The availability of witnesses

84 As this court held in *Rickshaw Investments* at [19], the location and compellability of witnesses in the competing jurisdictions can be of great importance where the disputes revolve around questions of fact. The question is whether there is a forum where such witnesses are *clearly* compellable to testify. The mere fact that the witnesses will have to travel in order to testify will not in itself be a significant connecting factor, given the possibility of giving evidence

by video conferencing (see also *Dresdner Klienwort* at [69]), and considering the likely resources of the parties involved in the present dispute. As such, the question should be focused on third-party witnesses not in the employ of any of the parties to Suit 790, since these are the witnesses the parties may not be able to persuade to give evidence voluntarily in the absence of their compellability (see also *Lakshmi Anil Salgaocar v Jhaveri Darsan Jitendra* [2019] 2 SLR 372 ("*Salgaocar*") at [73]).

85 To properly appreciate the significance of this connecting factor in the present case, it is necessary for us to start by considering what evidence would likely be needed in relation to the claims maintained in the amended SOC, which are all against the Trustee for breach of trust. We begin by outlining the claims briefly. It is alleged that:

(a) The Trustee breached its duties of skill and care in delegating the management of the Trust assets to the Bank:

(i) by failing to conduct due diligence as to the suitability of Mr Lescaudron or his team to manage the Trust assets; and

(ii) by agreeing terms with the Bank which allowed the Bank to ignore the Trustee and Mr Ivanishvili's instructions.

(b) The Trustee failed to notice and/or prevent, in relation to the Trust assets:

(i) misappropriation;

(ii) unauthorised, imprudent or unsuitable investments, such as over-leveraging or overconcentration in specific stocks;

(iii) fraudulent transactions at an under- or over-value; and

(iv) a failure to follow Mr Ivanishvili's investment instructions.

(c) The Trustee failed to properly review or monitor the investment of the Trust assets by the Bank and/or by CS Life, contrary to s 41M of the Trustees Act, by:

(i) failing to assess whether investment guidelines were complied with, and whether to intervene to vary the investments; and

(ii) failing to review figures provided by the Bank (such as in the Presentation) against the Investment Reports (see [7] and [13] above).

(d) The Trustee failed to account accurately to the appellants for the value of the Trust assets, such as by not correcting the Presentation, and failed to alert them to the significant diminution in value of the Trust assets.

(e) The Trustee acted *ultra vires* and for improper purposes by executing the Amended Trust Deed.

86 When analysing the claims, the focus should not lie mainly on the evidence the plaintiffs (the appellants in the present case) need to establish their

allegations. Since it is the plaintiffs who wish to pursue their claims in Singapore, the court in entertaining the defendant's application for a stay would not usually be overly concerned with the availability of evidence for the *plaintiff*'s case. It is instead the potential prejudice to the *defendant* in running its defence that is likely to be significant for the purposes of this analysis. It was for this reason that we invited Dr Lai to consider whether the Trustee ought to file an affidavit to explain precisely how it would be hampered in its defence in Singapore.

87 As Lord Neuberger aptly put it in *VTB Capital plc v Nutritek International Corpn and others* [2013] 2 AC 337 ("*VTB Capital*") (in a passage endorsed by Lord Mance at [73], Lord Clarke of Stone-cum-Ebony at [228], and Lord Reed at [240]; see also [36] and [39] *per* Lord Mance):

> 90 … As a matter of principle, a defendant is entitled to keep his powder dry: he can simply put the claimant to proof of its case. In general at least, that is true at any point of the proceedings. The mere fact that the defendant is challenging jurisdiction does not somehow impose a duty on him to specify his case. …
>
> 91 However, *if the defendant chooses to say nothing, then it would be quite appropriate for the court to proceed on the basis that there is no more (and no less) to the proceedings than will be involved in the claimant making, or trying to make, out its case.* Of course, in many instances, the defendant will be able to say that, although he has not submitted a draft statement of case, or produced a witness statement, setting out the details of his case, its nature is clear from correspondence, common sense, or even submissions. Consistent with my observations on the first point, I would not want to encourage a defendant to go into great detail as to his case in a long document with many exhibits, but *if he is wholly reticent about his case, he can have no complaint if the court does not take into account what points he may make, or evidence he may call, at any trial.* I agree with Lord Clarke JSC that a defendant could exhibit draft points of defence, but in many cases, it may be disproportionate to expect him to incur the costs of doing so before it has been decided whether the claim is to proceed at all.

[emphasis added]

We entirely agree. In considering the evidence the defendant would need, the court is entitled to draw appropriate inferences based on such information as is available about the nature of the defendant's case. The relevance of certain witnesses or documents to the likely defence may be obvious in many instances. The defendant can hardly complain, however, if as a result of its reticence the court does not address its mind to a particular defence or case theory the defendant wishes to pursue. This is all the more so where, as in the present case, there are overlapping potential sources of information, in the form of both oral testimony and documentary evidence, which speak to the points of contention. Furthermore, the evidence needed may well be different on the basis of the amended SOC compared with the situation before the Judge and the AR, since the contours of the case have changed. A defendant seeking to persuade the court to grant a stay in these circumstances should carefully consider the level of detail which is needed to explain what evidence it needs which would be unavailable in proceedings in Singapore.

88 In the present case, all of the claims in the amended SOC are against the Trustee for breach of various duties as trustee. The first port of call in any such claim must be the actions, omissions and state of knowledge of the trustee, since this will serve as the foundation for any finding of breach. The conduct or knowledge of third parties will often play an ancillary role in such allegations. This point underscores the importance of the defendant trustee providing some indication of what evidence it would require for its defence against such claims.

89 It can fairly be said that the claims in the amended SOC are centred on the suggestion that had the Trustee been fully diligent in its duties, it would have discovered that something was amiss in relation to the Mandalay Trust. This is

the substance of the claims set out at [85(b)]–[85(d)] above. For example, it is alleged that had the Trustee reviewed the Investment Reports and other financial documents in its possession, it would have noticed a significant diminution in the value of the Mandalay Trust starting from the end of 2013; the implication is that some of these losses were so significant the Trustee could not have simply ignored them. Moreover, the appellants assert that had the Trustee reviewed the financial documents in its possession, it would have been placed on alert that the Presentation dramatically overstated the value of the Mandalay Trust in March 2015. Mr Cavinder Bull SC ("Mr Bull"), the appellants' counsel, submitted that these red flags would have caused the Trustee to raise the alarm with the Bank and/or Mr Ivanishvili as required by its duties as trustee, with the result that Mr Lescaudron's misdeeds would have come to light much earlier. That these allegations lie at the heart of the appellants' claims against the Trustee can also be seen from the fact that they are the most closely connected to the actual loss suffered by the appellants in the Mandalay Trust (see [85(b)] above); if the allegations are established, this may allow the appellants to fully recover the losses sustained by the Mandalay Trust.

90 We are aware that in the minority judgment by Chao Hick Tin SJ at [135]–[136] below, some doubt is expressed as to the correctness of the appellants' assertion that a breach of trust can be established in a situation where the Trustee was largely passive and mainly engaged in reviewing reports from the Bank while it was the beneficiary, Mr Ivanishvili, who interacted with the Bank and Mr Lescaudron on the investment decisions, largely without reference to the Trustee. That may be so. At this stage, however, the relative strength or weakness of the appellants' case is, in our view, irrelevant. In this appeal the court is not dealing with the merits of the appellants' claims. The appellants will

have to make their case in fact and in law and if in the end their case theory is weak or unpersuasive, they will lose.

91 For its part, the Trustee argues that the underlying issues have not changed just because the claims against the Bank have been abandoned. As such, the Trustee's arguments are predicated upon the notion that establishing the appellants' allegations against the Trustee requires proof of wrongdoing on the part of the *Bank*; the Trustee therefore argues that it must be allowed to call Mr Lescaudron and other employees of the Bank to explore whether the Bank was implicated in any wrongdoing. It is clear to us that this argument is founded upon a mistaken premise. The appellants' case is that the Trustee failed to uncover the existence of wrongdoing in relation to the Trust assets, when this would not have happened had the Trustee done its duty. The wrongdoing in question was that of Mr Lescaudron; any wrongdoing on the part of the Bank fades into the background on the appellants' case as pleaded in the amended SOC.

92 Whereas the Judge had observed that Mr Lescaudron's admissions that there was wrongdoing *by the Bank* were not the subject of findings by the Swiss Correctional Court in Mr Lescaudron's trial and would not be binding on the Bank (the Judgment at [61]), the position is entirely different so far as Mr Lescaudron's own wrongdoing is concerned. The Swiss Correctional Court had found, on the basis of Mr Lescaudron's own admissions, that he had misappropriated funds from the Meadowsweet accounts by falsifying Mr Ivanishvili's signature, bought securities under the Meadowsweet accounts at above market price, and over-concentrated Mr Ivanishvili's investments without his knowledge, particularly in a company known as Raptor Pharmaceuticals Inc whose share price later collapsed. Further admissions of

wrongdoing by Mr Lescaudron along these lines are also documented in the notes of hearings conducted by the Geneva Public Prosecutor which are in evidence in Suit 790. These findings and admissions correspond closely to the appellants' allegations of wrongdoing in the management of the assets which the Trustee had failed to discover (see [85(b)] above). Assuming, without deciding, that these materials are admissible in proceedings in Singapore even if Mr Lescaudron himself cannot be compelled to testify, all that remains to be established in relation to these claims against the Trustee would be the Trustee's failure to act. The Trustee has not suggested that evidence of its own acts or omissions would not be available in proceedings in Singapore.

93 The Trustee further asserts, however, that it will challenge the notion that it could have detected Mr Lescaudron's "concealed fraud" which went undetected by the Bank for many years. Without wishing to pre-empt any argument on the merits of the point and particularly in relation to what the Trustee was or was not required to do, in our view, this contention may not assist it. The Trustee's duty is to raise the alarm and take steps to safeguard the Trust assets once it has discovered irregularities; it does not have to go so far as to itself investigate Mr Lescaudron. Thus, on the basis of the material currently before us, this point seems to be overstated. In any event, the available evidence does not suggest that Mr Lescaudron's wrongdoing was particularly sophisticated. Based on the material before the Swiss Correctional Court, Mr Lescaudron's *modus operandi* involved such steps as changing the numbers in the Direct Reports sent to Mr Ivanishvili, and forging Mr Ivanishvili's signature on transfer forms by "copying and pasting". These irregularities would have come to light once the various reports were compared with each other, and once Mr Ivanishvili started scrutinising the records of the transactions (as he did eventually). In this connection, Mr Bull also stressed that there was no

suggestion that anyone else at the Bank was a party to Mr Lescaudron's fraud, with the result that the raising of the alarm with the Bank would have resulted in a prompt investigation.

94 Furthermore, the Trustee's affidavit is conspicuously silent on *what* evidence it requires to show the concealed nature of Mr Lescaudron's fraud. Since this was precisely the purpose of this affidavit, the Trustee cannot be surprised if little weight is placed on assertions about the unavailability of evidence if it does not provide any indication of what evidence (such as the identities and approximate roles of witnesses) it needs. Admittedly, the high likelihood of there being relevant witnesses who are non-compellable in Singapore would in principle be a factor pointing away from Singapore as the appropriate forum, even if such witnesses have not actually been identified: see *MAN Diesel & Turbo SE and another v IM Skaugen SE and another* [2020] 1 SLR 327 ("*MAN Diesel*") at [148]. We accept that it would be wrong to ascribe *no* weight to this factor, especially if there are no other connecting factors in favour of Singapore – as was the case in *MAN Diesel* (see *MAN Diesel* at [140]–[150]). However, the connecting factors must be analysed in the round. In the present case, we do not think the mere possibility of the Trustee wishing to call witnesses who are only compellable in Switzerland can be determinative in the *forum non conveniens* analysis.

95 The Trustee submits that its defence further requires the following evidence from witnesses who are not compellable in Singapore:

(a) The Trustee states that it intends to explore the fact that Mr Ivanishvili and Mr Bachiashvili communicated directly with Mr Lescaudron in their capacities as investment managers of the

Mandalay Trust. It is said that Mr Ivanishvili and Mr Bachiashvili's direct involvement in the investment of the Trust assets could amount to a defence for the Trustee so far as the mismanagement of those assets is concerned. This, of course, is fundamentally a legal question governed by Singapore law. Although the Trustee does not make the point clear, it presumably intends to explore with Mr Lescaudron precisely which of the transactions involving the Mandalay Trust were authorised directly by Mr Ivanishvili or Mr Bachiashvili, so that it is not limited to accepting the appellants' version of events. However, to the extent that Mr Lescaudron's own admissions in the Swiss criminal proceedings establish that numerous transactions were in fact unauthorised, the importance of covering this ground again in oral testimony is questionable. Nevertheless, since the amended SOC does not specify precisely which transactions are being impugned as unauthorised, it is not possible to determine conclusively whether Mr Lescaudron's admissions are exhaustive in this regard. As the Trustee accepts, it may also be able to rely on the records maintained by the Bank, including e-mails and call logs, to explore this issue (the availability of which we discuss at [98]–[103] below). We therefore accept that Mr Lescaudron's oral testimony may have some, albeit limited, relevance here.

(b) The Trustee states that it intends to lead evidence from those present at the Presentation and the subsequent discussions, including Mr Lescaudron. However, the Presentation and these discussions were also said to have been attended by Ms Josephine Novoa-Sampaoli ("Ms Novoa-Sampaoli"), a Geneva-based employee of Credit Suisse Trust AG, the Trustee's parent company. In this regard, it is in fact the evidence of the Trustee's employees that is relevant, because the

allegation is that the Trustee should have realised that the Presentation was incorrect (see [85(c)(ii)] and [85(d)] above). It is not disputed that Ms Novoa-Sampaoli was acting as the Trustee's representative at all relevant times. Since the Trustee has been silent on the availability of Ms Novoa-Sampaoli, we assume that it is able to secure her attendance in Singapore for the purpose of giving evidence.

(c) The Trustee states that it intends to adduce evidence from one Ms Perevalova, a Switzerland-based employee of the Bank, as she was the one who first approached Mr Ivanishvili regarding the Amended Trust Deed. However, it is not clear how the Bank's conduct in relation to the Amended Trust Deed is relevant, since it is in fact the Trustee which executed the Amended Trust Deed, and the Trustee's knowledge and intentions which are at issue in the appellants' allegations (see [85(e)] above). In any event, the Trustee states that those involved in the discussions pertaining to the Amended Trust Deed were Ms Perevalova, Ms Novoa-Sampaoli, and another representative from Credit Suisse Trust AG. It would be the evidence of those representing the Trustee at these discussions, such as Ms Novoa-Sampaoli, that would be far more relevant to this issue.

(d) In the Trustee's affidavit, it alluded to the involvement of Ms Daria Mihaesco ("Ms Mihaesco") in relation to the appointment of Mr Lescaudron as her successor as Mr Ivanishvili's relationship manager. It did not, however, state that it intended to call her as a witness. In its subsequent written submissions, the Trustee asserted that Ms Mihaesco is a relevant witness in relation to the *establishment* of the Mandalay Trust (which was considerably before the appointment of

Mr Lescaudron). Mr Toby Landau QC ("Mr Landau"), who appeared for the Trustee at the second hearing, did not include Ms Mihaesco in his review of the relevant witnesses in his oral submissions. We therefore say nothing more about her potential role as a witness.

(e) Mr Landau also sought to rely upon requests made by the appellants to the Geneva Public Prosecutor for interviews to be conducted with various employees of the Bank and the Trustee during the investigations against Mr Lescaudron. Some of these names were raised for the first time in Mr Landau's oral submissions, and did not feature either in the Trustee's affidavit or its written submissions. It is not clear to us that these witnesses would be needed by the Trustee solely because the appellants were also interested in their evidence during Mr Lescaudron's prosecution.

96 A further point of contention between the parties is the possibility of taking evidence from witnesses based in Switzerland for the purposes of proceedings in Singapore by obtaining judicial assistance from the Swiss courts. Although there is no doubt that the judicial assistance process is a relatively more cumbersome means of obtaining evidence, the evidence from Dr Leonardo Cereghetti ("Dr Cereghetti"), the Bank's expert on Swiss Law, suggests that it may nevertheless be possible to conduct cross-examination of a witness in judicial assistance proceedings in Switzerland, albeit subject to the Swiss judge remaining in control of the questioning. The appellants further submit that even if their claims were brought in Switzerland, Mr Lescaudron may still refuse to testify – for example, by invoking the privilege against self-incrimination. Indeed, it is precisely because of the multitude of considerations raised by the issue of the availability of evidence in cross-border litigation that

this issue is but *one* of the connecting factors in the *forum non conveniens* analysis, and not an absolute bar. Ultimately, the court will usually be prepared to assume that despite the possible arrangements and accommodations, it would *typically* be easier to secure the evidence of witnesses in the jurisdiction where they are located. All else being equal, this would be a factor pointing in favour of that jurisdiction, but its weight will depend on the circumstances of each case.

97 In the present case, we are unable to agree with the Trustee that the availability of witnesses is a *strong* factor pointing towards Switzerland as the appropriate forum. The key witness who may be unavailable to the Trustee in proceedings in Singapore is Mr Lescaudron, and in our judgment the importance of securing his oral testimony in Suit 790 as it is now pleaded is overstated. Instead, we assess the availability of witnesses as a weak factor in favour of the Trustee's position.

The availability of documents

98 Normally, the considerations regarding the availability of witnesses do not readily apply to documents, since documentary evidence is easily transportable between jurisdictions (see *John Reginald Stott Kirkham and others v Trane US Inc and others* [2009] 4 SLR(R) 428 at [40]). However, as with the compellability of witnesses, it is possible for the location of documents to become a relevant factor if the disclosure of these documents can only easily be obtained in proceedings in one of the competing jurisdictions. In the present case, the Trustee asserts that this is the case for documents in the Bank's possession as these documents are subject to Swiss banking secrecy laws, and only a Swiss court can order their disclosure. The Trustee relies on a footnote in the report prepared by Dr Cereghetti to the effect that it would be easier to

obtain such an order from a Swiss court in relation to Swiss proceedings than for foreign proceedings.

99 According to the Trustee, it would require the following categories of documents from the Bank, which are protected by Swiss banking secrecy laws:

(a) communications surrounding the setting up of the Mandalay Trust, which would shed light on the pre-existing relationship between Mr Ivanishvili and the Bank (see [85(a)] above);

(b) internal documents regarding the performance of Mr Lescaudron and his team (see [85(a)(i)] above);

(c) communications by Mr Ivanishvili or Mr Bachiashvili in their capacities as investment manager with the Bank (see [95(a)] above); and

(d) documents relating to the transactions in the Trust assets and the instructions received by the Bank.

100 The appellants' primary contention in relation to these documents in the Bank's possession is based on a distinction which they say must be drawn between third parties and the account-holder itself so far as Swiss banking secrecy laws are concerned. They rely on the report by their expert on Swiss law, Prof Lorenz Droese, which mentions, in parentheses, that a banking secret protects not the bank, but its clients. Mr Bull therefore submits that since Meadowsweet and Soothsayer are the account-holders with the Bank, and these companies are fully within the control of the Trustee, the Bank's documents in relation to these accounts would not be protected from disclosure by any banking secrecy law if they are sought through Meadowsweet and Soothsayer.

101 Mr Bull further contends that the correspondence between the Trustee and the Bank shows that the Trustee itself had taken the position that it was entitled to documents from the Bank. He cites an e-mail sent by the Trustee to the Bank in November 2015 following the margin calls made by the Bank, in which the Trustee requested documentation of communications between the Bank and Mr Ivanishvili from 2014 onwards. The Trustee, acting through Soothsayer, had also written to the Bank (at its Singapore branch) in December 2015, seeking extensive documentation in the Bank's possession relating to the Soothsayer account and the transactions therein. Corresponding with the appellants' English solicitors in December 2016, the Trustee's lawyers had characterised the Bank's response to these inquiries as "unhelpful", adding that the Trustee "is continuing to make efforts to obtain the documents".

102 Mr Landau, in turn, relied on this correspondence to suggest that the Trustee was *unable* to obtain documents from the Bank. We do not think this is the correct inference to draw. In a further reply to the appellants' solicitors on 6 January 2017, the Trustee's lawyers wrote that the Bank had raised issues with "the format of the request", and that it had "quoted substantial charges for the retrieval of the documents and records". Contrary to Mr Landau's submission, this did not suggest that the Trustee could not obtain the documents from the Bank. Indeed, if the Bank had eventually rejected the Trustee's request outright or provided reasons to think that it could not disclose the documents requested, we would expect the Trustee to have made this clear. As we pointed out to Mr Landau at the second hearing, this was the very purpose for which we granted the adjournment at the first hearing, and we had specified in our directions for the adjournment that such matters ought to be addressed in the affidavit to be filed by the Trustee. We therefore place little weight on the

Trustee's submission that it would not be able to obtain documents needed for its defence from the Bank in relation to the accounts under the Mandalay Trust.

103 Before leaving this point, we observe that both parties rely solely on parenthetical observations in the expert reports to support their respective cases in relation to the availability of documents. This is obviously less than satisfactory. The fact that the availability of documentary evidence was not directly canvassed in the expert evidence filed for the purposes of the present application for a stay is, in our view, further emblematic of the weight that should be ascribed to this factor. The parties, and especially the Trustee, evidently did not consider it to be a crucial point until relatively late in the day.

The shape of the litigation

104 The "shape of the litigation" refers to "the manner in which the claim and the defence have been pleaded" (*Rappo* ([44] *supra*) at [71]). As we explained at [34] above, the plaintiff can seek to influence the shape of the litigation as perceived by the court by the careful framing of its pleadings. As we have also alluded to above, the shape of the litigation in the present case is very much tied to the appellants' efforts to excise the involvement of the Bank as much as possible from Suit 790. In our judgment, these efforts have been successful to a substantial extent, such that the Bank no longer plays a primary role in the material allegations in the amended SOC.

105 In contrast, the Trustee submits that the Judge's findings on the location of the "theatre of action" of the overall dispute remain unchanged (referring to the conclusion in the Judgment at [79]). With respect, we do not see how this can be the case. The Judge found, on the basis of Suit 790 as it was originally pleaded, that "the trust relationship was ancillary to the banking relationship"

(the Judgment at [67]); this was because the allegations expanded beyond the scope of the Mandalay Trust to other assets managed by the Bank through claims for misrepresentation and negligence (at [68]). The Judge therefore considered the misrepresentation narrative to be "the premise of the entire statement of claim" (at [70]). Since the claims are now limited to the Mandalay Trust, and confined to the Trustee's breach of duties *qua* trustee, it can no longer be said on any account that the trust relationship was ancillary to the banking relationship. That would be to misstate the obligations of the Trustee, which are to be assessed first and foremost from the perspective of what *it* knew or did (or did not do). The fact that similar facts or events may still be *relevant* should not be mistaken for the conclusion that the shape of the litigation remains the same. In our judgment, and on the facts of the present case seen against the backdrop of the amended SOC, the shape of the litigation is ultimately that of a claim for breach of trust against a trustee carrying out its duties in Singapore.

The governing law

106 In contrast with the factors relating to the availability of evidence, which at most point weakly towards Switzerland being the appropriate forum, the governing law of the present dispute is a significant factor pointing in favour of trying Suit 790 in Singapore. There can be no doubt that cl 2(a) read together with cl 1(i) is a choice of law clause stipulating Singapore law as the law governing the Mandalay Trust and the rights of all parties under the Trust Deed, notwithstanding any controversy as to its other effects. There has been no change of trustee or governing law since the establishment of the Mandalay Trust, and so cl 2(a) remains the applicable provision on the governing law. As a result, all the claims against the Trustee under the amended SOC are governed by Singapore law. As this court stated in *Rappo* at [74], the governing law of

the relationship between the parties is not only a relevant consideration in general, but a particularly significant consideration where it arises explicitly from choice of law clauses.

107 We consider the Trustee's reliance on the decision in *Salgaocar* ([84] *supra*) at [56]–[58] for the contrary proposition to be misconceived. In *Salgaocar*, this court endorsed the observations in *Dicey, Morris & Collins on the Conflict of Laws* vol 1 (Lord Collins of Mapesbury gen ed) (Sweet & Maxwell, 15th Ed, 2012) at para 12–034 that:

> If the legal issues are straightforward, or if the competing fora have domestic laws which are substantially similar, the identity of the governing law will be a factor of rather little significance. But if the legal issues are complex, or the legal systems very different, the general principle that a court applies its own law more reliably than does a foreign court will help to point to the more appropriate forum …

108 Both of the considerations cited in this passage point to the governing law being a significant factor in the present case. The Trustee's liability for the various claims will engage substantial and potentially complex questions of law – especially those claims pertaining to its alleged duties under s 41M of the Trustees Act (see [85(c)] above), which, as Mr Landau made clear in his oral submissions, the Trustee will strenuously deny as a matter of law. Among the questions to be addressed is whether, as a matter of law, the Trustee was entitled to take a purely passive position and simply review reports from the Bank while leaving investment decisions to one of the beneficiaries. Further, as a matter of law, if Mr Ivanishvili did not in fact keep the Trustee informed of his dealings and communications with the Bank and Mr Lescaudron, can he hold the Trustee liable for Mr Lescaudron's defaults? And even if the Trustee is able on that basis to deny liability to Mr Ivanishvili, how would that affect its liability to the other beneficiaries?

109 We also note that the Trustee has put in issue the recoverability of the loss sustained by the Mandalay Trust, which engages a further set of legal issues.

110 There is no doubt that the Singapore courts are the most well-placed to decide issues of Singapore trust law, and the Swiss courts, operating in a civil law jurisdiction with no substantive doctrine of trusts, would be far less familiar with these issues.

111 Indeed, it has been recognised that the governing law is particularly significant so far as trusts are concerned. In *Gomez and others v Gomez-Monche Vives and others* [2009] Ch 245 at [64], commenting on the application of a rule which provided that the domicile of a trust was the system of law with which it had its closest connection, Lawrence Collins LJ said (at [64]):

> *The connection between a trust and its proper law is in every sense real and close.* A trust is not like a commercial contract where it is only necessary to consider the content of the applicable law in exceptional circumstances. Trustees in particular have to be intimately aware of their responsibilities under the general law applicable to the trust. They may have to know whether they can lawfully accumulate income. Resort to the law governing the trust is central to their responsibilities. … [emphasis added]

The risk of overlapping proceedings

112 Finally, the Trustee contends that there is a risk of conflicting findings and double recovery owing to overlapping proceedings in other jurisdictions. In addition to the proceedings referred to at [14]–[18] above, the Trustee further suggests that despite the discontinuance of the claims against the Bank in Singapore and in New Zealand, and the appellants' confirmation that they will not bring proceedings against the Bank in Switzerland in relation to the

Mandalay Trust until the conclusion of Suit 790, the appellants "presumably" intend to seek recourse in Switzerland against the Bank in relation to Mr Ivanishvili's personal accounts, the Wellminstone accounts, and the Green Vals Trust. The Trustee contends that this is "foreshadowed" by the representation agreements.

113 In deciding whether the risk of overlapping proceedings in multiple jurisdictions poses a significant factor in the *forum non conveniens* analysis, the first port of call is the identity of the parties and the causes of action and issues concerned: see *Virsagi Management (S) Pte Ltd v Welltech Construction Pte Ltd and another appeal* [2013] 4 SLR 1097 at [38] and [47]. In the present case, we have not been pointed to any pending foreign proceedings involving the Trustee. We are also not convinced that there are sufficiently significant overlaps in the causes of action and issues so far as the other foreign proceedings involving the appellants and the Bank and its associates are concerned:

(a) The Bermuda proceedings specifically concern the conduct of CS Life. Although there is a degree of overlap in *subject-matter*, since the CS Life policy obtained by Meadowsweet is a part of the Mandalay Trust, there are ample safeguards against double recovery, especially considering the appellants' express undertaking in this regard (see [18] above). Indeed, there has been no contention that the Bermuda proceedings should also be heard in Switzerland (see the Judgment at [23]).

(b) There is no real issue of potential conflict with findings in the Swiss criminal proceedings against Mr Lescaudron; if anything, it would be desirable for them to be finally concluded so that any relevant conclusions in respect of Mr Lescaudron may be taken into account in

Suit 790. In this regard, there is reason to believe that the appeals in the Swiss criminal proceedings will be concluded soon, if they have not been already.

(c) We decline the Trustee's invitation to speculate about the timing and content of any proceedings the appellants may wish to bring against the Bank in Switzerland pertaining to matters other than the Mandalay Trust. The fact of the matter is that such proceedings have not even been commenced. Further, since those matters will not involve the Mandalay Trust, the Trustee's conduct will not be at issue, and the presumptive connection of those matters with Suit 790 will not necessarily be a close one.

114 Even if it would be optimal to hear all the proceedings regarding how the appellants' wealth was managed in a single forum, this is not the standard to which the *forum non conveniens* analysis aspires. Indeed, that may not be possible given the complexity of the present dispute: for example, no attempt has been made to consolidate the Bermuda proceedings in Switzerland. Instead, the analysis focuses more practically on the degree of impact any overlapping proceedings would have on the justice of the case, such as the possibility of conflicting findings of fact. As the foregoing discussion shows, we do not consider this to be a sufficiently real possibility in the present case.

Conclusion on the appropriate forum

115 Looking at the connecting factors in their totality, the availability of evidence is only a weak point in favour of Switzerland being the appropriate forum, whereas the shape of the litigation and the governing law both point in favour of Singapore, and the risk of overlapping proceedings is a neutral factor.

As such, at the first stage of the *Spiliada* test, Singapore would be the more appropriate forum for Suit 790. In the light of our analysis above, we also see no further circumstances by reason of which justice would require a stay at the second stage of the *Spiliada* test. Therefore, the Trustee has failed to make out its case for a stay of Suit 790 as it now stands.

Conclusion

116 In consequence, we allow the application in SUM 71 and the appeal as a whole. In relation to SUM 71, we make the following specific orders:

(a) The appellants shall file and serve the amended SOC on the Trustee within seven days of the date hereof; and

(b) The Trustee shall file and serve its defence within 14 days of service of the amended SOC.

117 In relation to the appeal proper, we set aside the order staying Suit 790 made below but we do not interfere with the Judge's orders as to the costs below since the Judge's decision was made when the case had a different aspect. As far as the costs of SUM 71 and the appeal proper are concerned, parties shall file written submissions limited to eight pages each within 14 days.

Sundaresh Menon
Chief Justice

Judith Prakash
Judge of Appeal

Chao Hick Tin SJ (dissenting):

Introduction

118 I agree with the judgment of Prakash JA (for the majority) except for the part relating to the issue of *forum non conveniens* and the application of the *Spiliada* principles. The facts of the case are set out in her judgment and it is unnecessary for me to repeat them except to restate such facts which I think are necessary to enable the reader to better understand this minority opinion.

119 Towards late 2004, Mr Bidzina Ivanishvili ("Mr Ivanishvili"), the first plaintiff, was approached by representatives of the Geneva branch of Credit Suisse AG ("the Bank") offering him wealth management services. He became a customer of the Bank. A little later, on the advice of the Bank officers there, he agreed to set up a trust in Singapore, known as the Mandalay Trust ("the Trust"), with the defendant ("the Trustee", which is the respondent in this appeal) being appointed the Trustee. The Declaration of Trust ("Trust Deed") was executed by the Trustee in Singapore on 7 March 2005. The Trust Deed expressly stated that it is governed by Singapore law.

120 The Bank and the Trustee are related in the sense that both have the same holding company, Credit Suisse Group AG. A Bahamian company, Soothsayer Ltd, was also established by the Trustee to hold certain assets of the Trust. It would appear that assets of Mr Ivanishvili were already placed with the Bank prior to them being brought under the umbrella of the Trust. The Trustee also stated that "there was never, at the relevant time, any contractual relationship between [the Trustee], as trustee of the Mandalay Trust, and [the Bank] in relation to the assets held under the Mandalay Trust".

121 Mr Ivanishvili resides in Georgia. The other plaintiffs (Mr Ivanishvili's wife and their children) reside either in Georgia or the United States. I refer to them collectively as "the Plaintiffs". As a condition before transferring assets to be managed under the Trust, Mr Ivanishvili reserved unto himself the right to appoint an investment manager or adviser for making investment decisions relating to the assets of the Trust. Since the inception of the Trust in 2005, Mr Ivanishvili himself has been its investment manager/adviser. He was constantly in touch with the Bank officers. He would give oral and written instructions to Bank officers without copying the Trustee. In 2013, he further appointed Mr Bachiashvili to be an investment manager/adviser of the Trust. Mr Bachiashvili also resides in Georgia.

122 Under the terms of the Trust, the Trustee had the discretion to appoint such appropriate institution to invest the funds of the Trust as the Trustee deemed fit. However, that specific term notwithstanding, it was clear, and not in question, that right from the beginning the Trust was set up with the aim of having the Geneva branch of the Bank undertake the investment functions on behalf of the Trustee. To this end, the Bank continued to exercise the function of investing Mr Ivanishvili's funds after they were transferred to the Trust.

123 In July 2013, the Trustee executed a Deed of Amendment and Restatement ("DAR") in respect of the Trust. The validity of this document is a matter of some dispute as Mr Ivanishvili alleged that the terms of the amendments as set out in the DAR went beyond the scope of what he had been told and to which he had agreed. On the Plaintiffs' case, what transpired was that an employee of the Bank, one Ms Perevalova, approached Mr Bachiashvili in relation to the signing of the DAR together with a draft letter from Mr Ivanishvili to the Bank stating that he agreed to the changes. In addition, two

other persons were also involved in the process, Ms Novoa-Sampaoli (an employee of Credit Suisse Trust AG, the Trustee's parent company) and Mr Anthony Viegas-Haws (a representative of the Bank's Zurich Branch). Eventually Mr Ivanishvili signed the letter of agreement. These witnesses are all located in Switzerland. The Plaintiffs are asking that the DAR be declared void.

124 In 2006, one Patrice Lescaudron ("Mr Lescaudron") became Mr Ivanishvili's Relationship Manager at the Bank. It is common ground that direct reports on the investment of the Trust funds were sent by the Relationship Manager to Mr Ivanishvili. The Bank also periodically submitted Investment Reports to the Trustee. At least annually, the Trustee would submit a consolidated report to the Plaintiffs. Up to August 2015, Mr Ivanishvili had no complaint against the Bank or Mr Lescaudron; nor did he allege that the reports of Mr Lescaudron contained any falsehood.

125 In September/October 2015, the Bank issued margin calls upon Mr Ivanishvili in relation to the investment of the Trust assets. Mr Ivanishvili alleged that following these calls he discovered irregularities in the accounts of the Trust and a significant reduction in the value of the Trust assets. He claimed that these losses arose from the misconduct of Mr Lescaudron. He alleged that the direct reports from the Bank contained falsehoods. He also said that in 2014 and 2015, the Bank officers made a number of representations to him where they had misrepresented the values of the Trust assets. In particular, he averred that representatives of the Trustee were present at a presentation to him by the Bank in 2015 where such misrepresentations were made. In the result, he claimed that the Trustee had not exercised proper oversight over the investments effected by the Bank and failed to diligently scrutinise the reports presented by

the Bank, and that if the Trustee had discharged its responsibilities with diligence, it would have discovered the wrongdoings of the Bank and/or its officer(s) and the irregularities in the accounts of the Trust much earlier.

126 It would be seen from what has been stated (see [121] above) that right from the establishment of the Trust, Mr Ivanishvili was a very hands-on investor. He would liaise and discuss directly with the Bank officer(s), and give instructions to them. It would appear that his written instructions were not copied to the Trustee, which essentially played a passive role.

127 On account of the losses which the Trust had allegedly suffered, in August 2017 the Plaintiffs commenced the present action in the Singapore High Court against both the Bank and the Trustee. The claim against the Bank was based on its being an agent of the Trustee, a constructive trustee, a *trustee de son tort* and also for misrepresentations which were made by Mr Lescaudron and other Bank officers. The claim against the Trustee was based on its failure to review and/or monitor the state of the Trust assets.

128 In November 2017, the Bank and the Trustee filed applications for a stay of the action in favour of Switzerland on the ground of *forum non conveniens*. Both the Bank and the Trustee have undertaken to submit to the jurisdiction of the courts of Switzerland in the event that the court here were to grant the stay they requested.

129 In the meantime, in December 2015, the Bank lodged a criminal complaint in Geneva, Switzerland against Mr Lescaudron. In February 2018, on the basis of his admissions, Mr Lescaudron was convicted of embezzlement, misappropriation and forgery and was sentenced to five years' imprisonment.

He was also ordered to pay damages to the Bank of more than US$130m. Mr Lescaudron was, however, acquitted of certain other charges. It would seem that some appeals are still pending before the Swiss criminal courts.

Change of stance

130 At this juncture, I would like to underscore an important change of stance made by the Plaintiffs. After the High Court ruled in favour of the Bank and the Trustee in respect of their stay applications, the Plaintiffs further appealed against that decision to this court. Before the appeal was due to be heard, but after the Cases of the parties had been filed in relation to the appeal, the Plaintiffs applied to amend their Statement of Claim, whereupon they dropped their claim against the Bank completely and proceeded only against the Trustee. A formal notice of withdrawal against the Bank was also filed by the Plaintiffs on 21 June 2019. I acknowledge that a plaintiff is generally entitled at any time to withdraw its action against any party. Under the proposed amended Statement of Claim, the Plaintiffs' claim against the Trustee is on account of the latter's failure to adequately review/monitor the investment of the Trust assets undertaken by the Bank and thus allowing the Trust to suffer loss.

131 While this may seem like a clever tactical move on the part of the Plaintiffs with a view to overcoming the stay order of the High Court, the ultimate question which must weigh heavily on this court is whether the Trustee, as the sole defendant, will be prejudiced in defending the case it has to meet without being able to elicit the full facts as to how each item of loss occurred and the roles of Mr Ivanishvili and/or Mr Bachiashvili in relation to that item, including their instructions to the Bank. As it cannot be disputed that all the alleged losses occurred in Switzerland, *prima facie*, the Swiss courts should be

the natural forum to hear claims in relation thereto. On this, the parties argue in opposite directions, with the Plaintiffs contending that liability of the Trustee could be determined by the trial court without having to look at the acts and omissions of the Bank or its officers and deciding their faults. In the affidavit filed on behalf of the Plaintiffs on 20 December 2019, it is stated that "[t]here is no need for the Singapore Court to determine whether the diminution in value, or misreporting, or over-exposure, was a result of any impropriety on the part of the Bank", pointing to fluctuations in the values of the Trust assets as examples. The Plaintiffs seem to be suggesting that the fault of the Trustee could be determined just by looking at the regular Investment Reports from the Bank and market prices. The Trustee contends otherwise, emphasising that the Trustee's liability could only arise if there was either fraud or mismanagement of the funds of the Trust on the part of the Bank or its officers which caused loss. In addition, it must also be shown that the Trustee was at fault for not discovering the fraud or mismanagement earlier. In other words, what the Trustee is saying is that, as the alleged losses occurred in Geneva, it is not possible for a court elsewhere to determine the Trustee's liability without having a full picture as to how each item of loss occurred and the roles which Mr Ivanishvili, Mr Bachiashvili and Mr Lescaudron had played in relation to it. The full picture can only be conveniently obtained in Switzerland.

Real and substantial connection

132 At this juncture it is necessary to note that in making their claims against the Trustee, the Plaintiffs allege, *inter alia*, the following failures on the part of the Trustee:

(a) Failing to exercise care and skill in delegating its assets management and/or investment powers to the Bank.

(b) Failing to note that the Bank's Relationship Manager (Mr Lescaudron) was inexperienced, had no professional financial background or track record of successful investment; and that in the years 2008/2009 and/or 2011, the team led by Mr Lescaudron had received a "D" performance rating in the Bank's internal audit.

(c) Failing to undertake "due diligence as to the suitability of the Bank as the primary investor of the Trust Fund, whether prior to its selection or during its continuing retainer for that purpose".

(d) Failing to review the Investment Reports and/or monitor the performance of the Trust assets; had the Trustee done so, it would have noticed the significant diminution in the value of the Trust assets.

(e) Failing to check the figures used by the Bank officers in their presentation to Mr Ivanishvili.

(f) Failing to note that the Trust had a significant exposure to the shares of Raptor Pharmaceuticals Inc ("Raptor shares").

(g) Failing to safeguard the Trust assets from being misappropriated to the tune of US$15,988,610, €22,420,175 and £352,460, which sums were later repaid by the Bank.

133 While it is true that the Trustee is located in Singapore, and the Trust is governed by Singapore law, the critical question is with which jurisdiction the **substance** of the dispute has the most real and substantial connection. The High Court Judge ("the Judge") in her judgment ([2019] SGHC 6) at [58] remarked that "on the facts of the present case the governing law of the trust is not the fundamental factor in considering the *forum conveniens*". I agree with that view,

while recognising that in the proposed amended Statement of Claim there is a significant change from the factual matrix before the Judge, in that no claim is made against the Bank.

134 Mr Ivanishvili said in his affidavit that the trial in this action "will not require evidence of the underlying fraud since Mr Lescaudron has admitted almost all of the charges against him". I note that in the appellants' further skeletal arguments filed by the Plaintiffs on 28 January 2020, they make the assertion that "following discontinuance of the claims against the Bank, the Bank's wrongdoing is no longer at issue in these proceedings. Instead the Suit is focused entirely on the wrongdoing of the Trustee." The Plaintiffs further contend that "the [Plaintiffs] seek to hold the Trustee liable for its own defaults, not the defaults of the Bank. This will require examination of the Trustee's conduct, not the Bank's." They further submit that "[i]t is indisputable that the Courts are capable of determining breach of trust claims against trustees without the need to first determine civil or criminal liability (or impropriety) of their agents." The Plaintiffs also assert that the Trustee could hardly challenge the admissions of Mr Lescaudron made at the criminal trial.

135 With respect, I feel that the Plaintiffs have adopted a blinkered view of the situation. The fact that the Plaintiffs do not wish to sue the Bank does not mean that what was done or omitted to be done by the Bank officer(s) in relation to the Trust assets, and the instructions given by Mr Ivanishvili or Mr Bachiashvili, cease to be relevant in determining whether the Trustee had failed to act with due diligence. In relation to each item of loss, the court needs to look at the entire situation surrounding that loss in order to be able to fairly decide whether the Trustee was at fault. What is clear is that by the Plaintiffs choosing not to sue the Bank, all it means is that the court need not pronounce

judgment against the Bank even if the Bank were to be at fault. That choice of the Plaintiffs can in no way render the acts and omissions of the Bank and its officers, and the role of Mr Ivanishvili, irrelevant in determining the fault(s) of the Trustee. They were all connected. On the Plaintiffs' position, they seem to be saying that just by looking at the figures in the Investment Reports and the relevant market prices at the time, the Trustee, if it had exercised due diligence, would be able to tell whether there was anything wrong with the account, and it ought then to have raised the alarm.

136 I have serious reservations about this assertion. As it appears to me, to prove a case against the Trustee in respect of any specific loss, the Plaintiffs must first show that they had suffered that loss in the hands of the Bank. Without that loss, there would have been no basis to even sue the Trustee. Theoretical breaches by the Bank or Trustee which caused no loss are not actionable. Interestingly, in the original Statement of Claim as well as in the proposed amended Statement of Claim, the reliefs prayed for are for certain declaratory reliefs and for damages to be assessed. I do not think this is the sort of case where general reliefs would be appropriate, as the circumstances pertaining to each item of loss are not identical. Based on the allegations made in the proposed amended Statement of Claim, it seems to me that the losses to the Trust assets which the Plaintiffs complained of could arise from numerous circumstances, as the proposed amended Statement of Claim does not descend into specific instances of loss. Thus I can understand the difficulties faced by the Trustee in making its responses relating to witnesses and documents. I note that the proposed amended Statement of Claim does refer to several sums which the Trust had lost and which the Bank had restored to the Trust. But those are not all that the Plaintiffs are claiming against the Trustee. Considering the proposed amended Statement of Claim in the round, there are certainly two

broad categories of causes of loss and possibly a third. First, there are those instances where there was fraud on the part of Mr Lescaudron and where he showed an intent to cheat the Trust of its assets. Second, there are those instances where the Bank entered into transactions on behalf of the Trust without authorisation and caused loss. Third, and this is only a possibility, as the proposed amended Statement of Claim does not go into specifics, there may have been other lapses on the part of the Bank or its officers which caused losses to the Trust.

137 I will now briefly consider each of the categories, beginning with the losses caused by the fraud of Mr Lescaudron. It is critical to bear in mind the fact that Mr Ivanishvili (and later Mr Bachiashvili too) is said to have dealt directly with the Bank officers. He talked to them. He gave instructions to them. However, he did not necessarily copy the Trustee on his written instructions to the Bank officers. Obviously, when Mr Lescaudron set his mind to cheat the Trust, he would have planned it out to avoid being found out by either the internal checks of the Bank or anyone else. While Mr Lescaudron had pleaded guilty to some charges of forgery and misappropriation in Switzerland, and the Bank had restored some of such losses of the Trust Fund (see [132(g)] above), it does not follow that the Trustee must therefore be liable for whatever losses not restored by the Bank. As mentioned earlier, to prevent detection or discovery of his criminal deeds, Mr Lescaudron was most likely to have taken steps to cover his tracks. That could be a reason why the Trustee did not detect any wrongdoing. There could be other reasons. True, in the criminal proceedings in Switzerland, some mention was made of his *modus operandi*. Those were clearly unilateral admissions on his part. Can one confidently say that he would have disclosed everything that he did in that regard, when there was no cross-examination? There is an assertion that the measures adopted by

Mr Lescaudron were not particularly sophisticated. This indeed begs the question. Further, was it true that he was a lone operator? It is not impossible that he did not want to expose any others. All such questions require thorough scrutiny. It says a lot that the Bank's internal checks also did not detect any irregularity and did not raise any alarm. So for any court to hold that the Trustee was in breach of its duty of care and is liable for the Trust's loss, the entire circumstances surrounding that loss must be gone into thoroughly before fault can be placed on the Trustee (and the extent thereof determined). Therefore, in my opinion, it would be wholly fanciful thinking on the part of the Plaintiffs to assert that by merely carefully examining the Investment Reports, the Trustee would be able to sense something amiss with the accounts, bearing especially in mind that Mr Ivanishvili was dealing directly with the Bank officers, including Mr Lescaudron. It goes without saying that a trial in Switzerland would be in a better position to ensure that the full facts would be presented to the court, both in regard to witnesses and documentary evidence.

138 Next I will consider the second category of losses. Here, not knowing the specific losses which the Plaintiffs are referring to, there is no way in which anyone can even contemplate how and what to respond. If there were written communications, we will need to examine their contents. Was it a question of misunderstanding or was it a case of deliberate non-compliance? If the latter, did it amount to fraud? If the instructions were oral, evidence will be critical. Possible issues to consider include ascertaining whether the non-compliance was due to miscommunication or misunderstanding. How would the Trustee be able to know all this since it was not involved in those discussions between Mr Ivanishvili and the Bank officer(s)? How would the Trustee be able, by just looking at the Investment Reports, to know that a particular investment was made without authorisation? I raise all these to emphasise the point that there

would be many factual issues that a court needs to go into before it could find that there was an unauthorised transaction. Moreover, to hold the Trustee liable and responsible in such a case, there must be sufficient knowledge of the relevant facts on the part of the Trustee. In short, there will be a need to examine the words and conduct of all relevant individuals – Mr Ivanishvili, Mr Bachiashvili and the Bank officer(s). I struggle to understand how by merely looking at the Investment Reports, any trustee exercising reasonable diligence would be able to hold that a transaction was entered into without authorisation. To determine there was such a lapse, the court must have before it all the factual circumstances. In this regard, all the witnesses and documents required to enable the court to make that determination will be in Switzerland or Georgia, and certainly not in Singapore.

139 The third category of claims would involve losses incurred due to the negligence of the Bank or its officers (other than those covered by the first and second categories of losses). As it is more likely that there would be no agreement on the alleged negligence, a trial would be inevitable. Again, the question to be asked is whether a reasonably diligent trustee can, by merely looking at the Investment Reports, tell that there was negligence somewhere and that an investigation ought to be commenced. Mr Ivanishvili has alleged that Mr Lescaudron had perpetuated his fraud over a long period (see [142] below). In that case, how was it that Mr Ivanishvili only realised that there could be irregularities when margin calls were made on him? In any event, issues of negligence are very fact-sensitive. The line is often difficult to draw. I recognise that there could be instances where because of specific features, the figures in an Investment Report could raise some queries in the mind of a diligent trustee. That said, what the sort of circumstances would be where a set of figures would inform a reasonably diligent trustee that something might be amiss would vary

from one instance to another. We cannot generalise. Most importantly for our purposes here, I would repeat that the Plaintiffs have yet to identify the instances where losses of this category have been suffered by the Trust due to the negligence of the Trustee. Indeed, the Plaintiffs have yet to identify any specific instance of loss, even in relation to the first two categories of claim. Ultimately, what is important is that the Trustee should be accorded the full facilities to defend itself and the trial should be held at a venue where both witnesses and documentary evidence are conveniently available. In this particular case, this is what I think the court should be concerned with: due process for the Trustee.

140 From the last few paragraphs it would be seen that the claims of the present action are very closely linked to Switzerland. That was surely not something outside the expectations of the Plaintiffs. Mr Ivanishvili was clearly dealing with the Bank officers at Geneva and had wanted that arrangement to continue. His personal accounts were also there. He wanted the Bank at Geneva to invest for him. The setting up of a trust in Singapore was a suggestion made to him by the Bank officers in Geneva. Rather than making unwarranted assumptions or speculations, the court should let those officers explain why the suggestion was made, and the objects behind that suggestion.

141 I will now turn to consider briefly the allegations relating to the Raptor shares. The Trustee in its affidavit highlighted the change to the pleadings made by the Plaintiffs in relation to these shares. In the original Statement of Claim, the allegation was that the Trustee had accumulated Raptor shares without authority. In the proposed amended Statement of Claim, the allegation is that the Trustee caused the Trust to have "significant exposure to Raptor shares". Quite apart from the fact that an explanation must be given by the Plaintiffs for the change in this aspect of the pleadings, the defaults of the Trustee complained

of in the two pleadings are in substance different. Obviously, the exact instructions given by Mr Ivanishvili and/or Mr Bachiashvili in relation to the purchase of the Raptor shares will need to be ascertained, as well as the risk assessment given by the Bank officer(s) in relation thereto. Moreover, what is "significant exposure"? The people most able to offer any evidence on this are in Switzerland. Mr Ivanishvili and Mr Bachiashvili are from Georgia and that is also closer to Switzerland. If they are willing to travel to Singapore, there can be no reason for them to say it will be less convenient for them to travel to Switzerland.

142 Next, I move to consider the general allegation made against the Trustee in relation to the appointment of Mr Lescaudron as his Relationship Manager (see [132(b)] above). Evidence would again need to come from Switzerland to show the basis upon which the Bank made the appointment, having regard to Mr Lescaudron's experience, *etc*. Interestingly, it is pertinent to note that Mr Lescaudron was in charge of Mr Ivanishvili's and the Trust's accounts from 2006 and for some nine years there was no complaint, since Mr Ivanishvili only complained to the Bank about the mismanagement of his assets in September 2015. How was it that Mr Lescaudron only became incompetent or inexperienced after these many years? During that nine-year period, Mr Ivanishvili would have interacted extensively with Mr Lescaudron. In this regard, I note that Mr Ivanishvili has said in his affidavit that the criminal conduct of Mr Lescaudron took place "on such a large scale and over such a long period of time". If the wrongdoing had indeed stretched over a long period, how was it that Mr Ivanishvili could not sense earlier that Mr Lescaudron was incompetent and inexperienced, and did not raise the alarm earlier? These are questions of fact and the answers must come from Switzerland, and of course also from Mr Ivanishvili himself. Like in many other issues raised above, the

Trustee would be seriously disadvantaged, if the trial were to be held in Singapore.

143 There is an allegation that Mr Lescaudron's team (the Russia desk) was marked down to a "D" rating in the Bank's internal audit in certain years prior to 2013. On this, his supervisor(s) in Geneva will have to explain. In view of his admissions to some cheating and misappropriation charges, that is proof that Mr Lescaudron had at some point turned crooked. Investigations will be needed to show at which point he turned that way. Would it be reasonable to make the Trustee responsible for the criminal acts of Mr Lescaudron who operated at a distance ten thousand kilometres away without full investigation, and bearing in mind that Mr Ivanishvili had wanted the Bank in Geneva to perform the investment function of the Trust on behalf of the Trustee (see [122] above)?

144 I would stress that the duty on the part of the Trustee was to exercise reasonable diligence. Hindsight is not the correct test to apply. I accept that the position could have been somewhat different if Mr Ivanishvili had not dealt directly with the Bank officers and if his directions to the Bank had always been through the Trustee. It is of interest to note that it was from 2013 that Mr Ivanishvili had appointed Mr Bachiashvili as an investment manager/advisor in relation to the investment of the Trust assets. That covered part of the period in respect of which the Plaintiffs' complaints relate. So the role of Mr Bachiashvili in his dealings with the Bank officers also becomes relevant.

145 It would be noted that, as pleaded, the Bank did make partial repayment to the Plaintiffs (see [132(g)] above). How these sums were arrived at requires scrutiny of the Bank records. Equally pertinent is the fact that as mentioned at

[129] above, the criminal court in Switzerland had ordered Mr Lescaudron to compensate the Bank to the tune of more than US$130m. The total amount which the Bank had reimbursed to the Trust as listed in [132(g)] was very much less than US$130m. Indeed, the judgment of the Swiss criminal court shows that the fraudulent acts of Mr Lescaudron affected not only the Trust assets but also the assets of other clients of the Bank and other assets of Mr Ivanishvili not brought under the Trust. These would again require further examination. Whether Swiss banking secrecy law would come into play in this regard is a question which can only be answered when the specifics are known.

146 At [123] above, reference was made to the DAR (the Deed of Amendment and Restatement). While this DAR was executed by the Trustee in Singapore, which is not denied, what is important is the question of whether Mr Ivanishvili had agreed to the amendments proposed. The witnesses which the Trustee will call for this purpose are located in Switzerland. Of course, Mr Ivanishvili and Mr Bachiashvili will be relevant witnesses but they are located in Georgia, not Singapore. On the relief claimed for this issue, there cannot be any gainsay that Switzerland is the more appropriate forum.

Application of the *Spiliada* test

147 Under the principles set out in *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460 ("*Spiliada*"), there are two stages in this exercise. First, the court has to determine whether, *prima facie*, there is some other available forum in which it is more appropriate for the case to be tried. In this regard, the burden is on the defendant to show that there is such a more appropriate forum. Upon this burden being discharged, the court will ordinarily grant a stay unless in the circumstances of the case justice demands that a stay

should nevertheless not be granted (this is the second stage). What factors are germane for consideration under the first stage will vary from case to case depending on the nature of the case and the circumstances prevailing.

148 It is beyond dispute that the centre stage, on which all the most relevant actions (or omissions) which gave rise to the present claim against the Trustee had occurred, was Switzerland. That was the explicit choice of the Plaintiffs represented by Mr Ivanishvili. No matter how hard the Plaintiffs may seek to avoid having to refer to the events which occurred in Switzerland, there is no way that can be achieved unless the Plaintiffs could say that their claim against the Trustee has nothing to do with the wrongdoings or omissions on the part of the Bank in Geneva, Switzerland. The fact of the matter is that they cannot. At the hearing before this court, this very question was put to counsel for the Plaintiffs and instead of answering it, he side-stepped it.

149 It is undisputable that the contentious parts of the claims in the action have the most real connection with Switzerland. Detailed evidence must be adduced to show what happened in Geneva. Witness evidence would be inevitable. Internal bank records or documents would also be required to be produced. Only when the full facts relating to the fraud or lapses of the Bank and its officer(s) on each item of loss are before the court, will it be possible to determine the fault of the Trustee. The acts or omissions of the Trustee cannot be viewed in isolation or in the abstract.

150 Moreover, one important person whose evidence is absolutely essential to understand what happened to the accounts, and why the alleged losses occurred, is Mr Lescaudron. As far as the court is aware, he is in Switzerland. The trial court will need to know how things happened, how fraud was

perpetrated, what steps Mr Lescaudron took to cover his tracks, and what he did or did not do in relation to the losses. The trial court will need to hear from the internal audit unit at the Bank as well as the Bank officers who were overseeing Mr Lescaudron's work as to why they failed to detect his wrongdoings. Even if Mr Lescaudron were now no longer under incarceration in Switzerland, he cannot be compelled to come to Singapore to testify. And it cannot be disputed that what Mr Lescaudron will be able to tell the court will be vital. Of course, no one will be able to say if he will, even now, tell the whole truth. But with thorough and focused examination in a court of law, there is at least a better chance that he will. The circumstances surrounding each item of loss must be scrutinised with the utmost care and thoroughness, bearing also particularly in mind the precise roles which Mr Ivanishvili and Mr Bachiashvili played in relation to that loss.

151 The Plaintiffs seem to be saying that because Mr Lescaudron pleaded guilty to certain criminal charges in Switzerland, there is no longer any need to go deeper into the precise wrongdoing. Nothing could be further from the truth. A guilty plea merely indicates that the person charged has admitted to the offence. In the civil action as set out in the proposed amended Statement of Claim, the Plaintiffs' claim is against the Trustee. The detailed facts surrounding Mr Lescaudron's wrongdoings might not have been adduced before the Swiss criminal court (like the situation in Singapore where only a summary is given and the facts are only stated in broad terms). Details would be crucial in determining liability in a civil claim. To reiterate – cross-examination of Mr Lescaudron would be critical to ascertaining the true state of affairs and what preventive measures he really took in order to cover his tracks. Such preventive measures will be pertinent in determining whether the Trustee had exercised due diligence in reviewing the Investment Reports.

152 Let me recapitulate. The Plaintiffs' withdrawal of their claim against the Bank cannot alter the fact that the Trustee's defence will be very much linked to what happened at the Bank in Geneva. All the material events occurred there and most of the people involved, plus the relevant documentary evidence, are also located there. In the light of the fact that Mr Ivanishvili dealt directly with the Bank at Geneva, it is ludicrous to suggest that a downward change of figures in the monthly report relating to an investment can *per se* indicate wrongdoing. Evidence is needed to explain. A reduction in the figures could be due to measures taken to cut losses to which Mr Ivanishvili and/or Mr Bachiashvili had agreed. The people most involved were, and are, in Switzerland and Georgia. Expert evidence will only be helpful if it is based on facts. In as much as the full facts as to how any loss occurred must be fully presented before the trial court, they must also be before the experts if the opinions rendered by the experts are to be of any value.

153 The events that happened, or did not happen, in Singapore were really secondary in nature. Mr Ivanishvili even said that he "[did] not understand that there will be a great deal of evidence required from the Trustee". Looking at the fact situation I entirely agree with him. This is because the role of the Trustee in Singapore had been passive. What the Trustee would be able to say in its defence will largely depend on what Mr Ivanishvili says in court and on the evidence of the people most involved at the Bank, in Switzerland.

154 For myself, I have no hesitation in holding, on an overall assessment of the relevant facts and issues of the case, that the action has greater connection with Switzerland than with Singapore and that the balance tilts in favour of Switzerland by a significant margin. I agree that on a stay application, the pertinent question is not the relative merits of the parties' cases, but rather with

which jurisdiction the dispute has the closest connection. The only factor favouring Singapore is the governing law. There is no assertion that there will be any particularly great difficulties in applying Singapore law in a Swiss court. Moreover, even if I should be wrong in this assessment that Singapore is the natural forum, then applying stage two of the *Spiliada* test, which asks whether there are circumstances by reason of justice why the court should still rule in favour of Switzerland, what the Judge said at [78] of her judgment is just as pertinent (even though the case before her was different as the Bank was a defendant then):

> … *The Trustee's conduct may only be properly understood in the context of its, and Mr Ivanishvili's, relationship with the Bank and the Bank's conduct in its delegated trust responsibilities.* It would better suit the ends of justice for a Geneva court to apply Singapore trust law in the context of an appropriately developed factual matrix. … [emphasis added]

155 Moreover, as no action has yet been commenced in Switzerland, if for whatever reason there is a need, the Trustee can always bring in the Bank as a third party there. And if a third party procedure is not available in the Swiss legal system, it is always open to the Trustee to initiate a fresh action against the Bank there and apply to have this new action be heard together with the action in which the Trustee is being sued by the Plaintiffs.

156 For the reasons above, I am of the view that Switzerland is the natural forum, and thus the more convenient forum, to hear the claims of the Plaintiffs. In the result I would maintain the stay which was upheld by the court below and refuse the application to amend the Statement of Claim as it would serve no purpose. However, my colleagues who are in the majority hold a different view.

Chao Hick Tin
Senior Judge

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