Rickshaw Investments Ltd and Another v Nicolai Baron von Uexkull [2006] SGCA 39

Case Number : CA 30/2006, SUM 2929/2006

Decision Date : 03 November 2006

Tribunal/Court : Court of Appeal

Coram : Chan Sek Keong CJ; Andrew Phang Boon Leong JA

Counsel Name(s) : Cavinder Bull and Lim Gerui (Drew & Napier LLC) for the appellants; Leung Wing Wah and Lim Tiek Beng Jonathan (Sim & Wong LLC) for the respondent

Parties : Rickshaw Investments Ltd; Seabed Explorations GBR — Nicolai Baron von Uexkull

Conflict of Laws – Choice of law – Equity – Choice of law rules governing equitable claims – Whether claims in equity subject to automatic and blanket application of lex fori as lex causae

Conflict of Laws – Choice of law – Tort – Whether exception to application of double actionability rule existing – Whether such exception applicable to torts committed in Singapore

Conflict of Laws – Natural forum – Forum non conveniens – Respondent commencing action in Germany based on employment agreement – Appellants commencing claim in tort in Singapore – Whether appellants' claim amounting to illegitimate attempt to undermine jurisdiction clause and choice of law clause in employment agreement – Whether danger of conflicting judgments warranting stay of Singapore proceedings – Whether Singapore natural forum to hear dispute

3 November 2006 *Judgment reserved.*

Andrew Phang Boon Leong JA (delivering the judgment of the court):

Introduction

1 This is an appeal by Rickshaw Investments Limited ("the first appellant") and Seabed Explorations GBR ("the second appellant"), collectively known as "the appellants", against the decision of the judge below ("the Judge") that the appellants' action against one Nicolai Baron von Uexkull ("the respondent") be stayed on the ground of *forum non conveniens* (see *Rickshaw Investments Ltd v Nicolai Baron Von Uexkull* [2006] 2 SLR 850 ("the GD")).

2 Before us, counsel for the appellants made an application to adduce fresh evidence in the form of an affidavit filed by one Mahesh Narayan ("Narayan"). We allowed the application, pending the filing of the respondent's reply. The respondent filed its reply on 11 August 2006.

The facts

3 Sometime in 2001, the second appellant hired the respondent to market Tang dynasty artefacts ("the Tang Cargo") that had been salvaged from Indonesian waters. The respondent is a Singapore permanent resident, and was based in Singapore at the time. The second appellant orally appointed the respondent as a freelance marketing agent to find buyers in Singapore for the Tang Cargo. While the appellants contend that the respondent only marketed the Tang Cargo in Singapore, the respondent states that he marketed the Tang Cargo in various countries, including Singapore, Brunei, China, Hong Kong, Taiwan, Malaysia and the United States. The respondent was to be paid DM8,000 per month, in addition to any reimbursements for marketing expenses incurred, as well as a 4% commission of the sale price of the Tang Cargo.

4 The oral arrangement was terminated by the second appellant via a letter dated 28 August 2002, and was to take effect on 31 October 2002 ("the first termination letter"). On 1 December 2002, the second appellant revived the agency agreement. This was supposed to continue until 28 February 2003, but the respondent continued to act as the second appellant's agent even after this date. On 30 June 2003, the second appellant executed a document prepared by the respondent's lawyer which stated that the second appellant and the respondent had agreed on freelance employment ("the Employment Agreement"). The Employment Agreement contained a composite jurisdiction and choice of law clause, which read as follows:

> The Parties agree on German law for this contract and the competence of the German courts.

5 On 6 October 2003, the second appellant transferred its business, rights, assets, contract and engagements to the first appellant. The first appellant asked the respondent to cease all marketing activities on 31 March 2004. The first appellant finally terminated the respondent's services via a termination letter ("the second termination letter") on 9 June 2004.

6 The respondent commenced proceedings in Germany against the first appellant ("the German proceedings"). His claim was in contract, based on the Employment Agreement, and he sought:

(a) salary and expenses accruing to him from 2001 to 2003 amounting to €242,867.40;

(b) a declaration that the second termination letter did not terminate the agency; and

(c) disclosure of information about the sale of the Tang Cargo.

7 A statement of claim was filed on 8 September 2004 in the German court, and a statement of defence was filed on 21 November 2004. The parties attended court on 9 December 2004 and consent judgment was entered into for €151,700.10. To date, only partial payment has been made by the first appellant. On 28 April 2005, the German court heard the testimony of one witness, Mr Matthias Draeger, who was a partner of the second appellant. Mr Draeger is a German national residing in Germany. On 22 December 2005, the German court released a decision for parties to reply to pleadings and to schedule an oral hearing. The German judge held, *inter alia*, that because the plaintiff in that case (the respondent in the present case) disputed the evidence in the affidavit of one Mr Koh Seow Chuan ("Mr Koh"), who was the chief negotiator from the Singapore Tourism Board ("STB") for the Tang Cargo, Mr Koh's presence was required so that he could be questioned. The oral hearing before the German court was scheduled for 16 February 2006; it is not clear from the evidence before us whether the hearing went ahead. There is also a motion to dismiss the claim filed by the defendant in that case (the first appellant in the present case) which is still pending.

8 The appellants commenced the current action against the respondent in Singapore on 10 June 2005. The appellants have stated four causes of action ("the substantive actions"), as follows:

(a) conversion of 25 pieces of the Tang Cargo by the respondent;

(b) breach of the respondent's equitable duty of confidentiality towards the appellants;

(c) breach of the respondent's fiduciary duties as agent of the appellants; and

(d) deceit arising from the respondent's misrepresentations.

9 The respondent filed his memorandum of appearance in the Singapore proceedings on 27 July 2005 and subsequently made the current application for a stay on 8 August 2005.

10 It is at this point appropriate to summarise the facts surrounding the contentions made by the appellants in the substantive claims. According to the appellants, sometime in late 2002, the respondent represented to the second appellant that he had found an interested buyer for the Tang Cargo at a price of US$48m. This buyer was STB. On or about February 2003, in breach of his duties, the respondent falsely represented that STB was willing to purchase the Tang Cargo for US$48m. In fact, STB had not given such an indication. The second appellant relied on this to grant a two-month period of exclusivity to STB, during which time the second appellant agreed not to enter into commercial negotiations with any other party in respect of the Tang Cargo.

11 On 21 October 2003, after the second appellant had transferred its rights and business over to the first appellant, STB informed the first appellant that it had never agreed to purchase the Tang Cargo and had never agreed to a purchase price of US$48m. The respondent continued to state that STB had made such an offer, and that the latter's denial was merely a negotiation tactic. The appellants allege that on or about 10 May 2004, the respondent met with STB representatives and disclosed to them that the first appellant needed to conclude a sale urgently and was likely to conduct a public auction. However, if STB offered US$32m for the Tang Cargo, the first appellant would consider selling it to STB. The respondent further told STB to act as if the meeting had never taken place. The first appellant was unaware of this meeting. In August 2004, the first appellant and STB negotiated for the sale and purchase of the Tang Cargo. STB would not agree to any price above US$32m. As the first appellant was running short of funds, it was compelled to agree to the sale.

The approach

12 The governing principle in natural forum cases is that articulated in the seminal House of Lords decision of *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460 ("*Spiliada*"), which has been approved by the Singapore Court of Appeal on many occasions as being part of our local law (see, for example, the Singapore Court of Appeal decisions of *Brinkerhoff Maritime Drilling Corp v PT Airfast Services Indonesia* [1992] 2 SLR 776 ("*Brinkerhoff*") and *PT Hutan Domas Raya v Yue Xiu Enterprises (Holdings) Limited* [2001] 2 SLR 49).

13 In *Brinkerhoff*, Chao Hick Tin J (as he then was), delivering the judgment of the court, observed as follows (at 784, [35]):

> Lord Goff, who delivered the judgment of the House [in the *Spiliada* case], to which the other four Law Lords agreed, restated the law (and in so restating, took into account the Scottish authorities as well) which is summarized in the third cumulative supplement to *Dicey & Morris on Conflict of Laws* (11th Ed) at para[s] 393–395 as follows:
>
> > (a) the basic principle is that a stay will only be granted on the ground of forum non conveniens where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, ie in which the case may be tried more suitably for the interest of all the parties and the ends of justice;
> >
> > (b) the legal burden of proof is on the defendant, but the evidential burden will rest on the party who asserts the existence of a relevant factor;
> >
> > (c) the burden is on the defendant to show both that England is not the natural or

appropriate forum, and also that there is another available forum which is clearly or distinctly more appropriate than the English forum;

(d) the court will look to see what factors there are which point to the direction of another forum, as being the forum with which the action has the most real and substantial connection, eg factors affecting convenience or expense (such as availability of witnesses), the law governing the transaction, and the places where the parties reside or carry on business;

(e) if at that stage the court concludes that there is no other available forum which is clearly more appropriate it will ordinarily refuse a stay;

(f) if there is another forum which prima facie is clearly more appropriate the court will ordinarily grant a stay unless there are circumstances by reason of which justice requires that a stay should not be granted, and, in this inquiry the court will consider all the circumstances of the case. But the mere fact that the plaintiff has a legitimate personal or juridical advantage in proceeding in England is not decisive; regard must be had to the interests of all the parties and the ends of justice.

14 In a similar vein, in the Singapore Court of Appeal decision of *Eng Liat Kiang v Eng Bak Hern* [1995] 3 SLR 97, L P Thean JA, delivering the judgment of the court, summarised the *Spiliada* test as follows (at 103, [20]):

> A stay will only be granted on the ground of forum non conveniens, where the court is satisfied that there is some other available and appropriate forum for the trial of the action. The burden of proof rests on the defendant, and the burden is not just to show that Singapore is not the natural or appropriate forum but to establish that there is another available forum which is clearly or distinctly more appropriate than the Singapore forum. The natural forum is that with which the action has the most real and substantial connection, and the court will consider what factors there are which point in that direction. If the court concludes at that stage that there is no other available forum which is clearly more appropriate for the trial of the action, it will ordinarily refuse a stay. If, however, the court concludes at that stage that there is some other available forum which prima facie is clearly more appropriate for the trial of the action it will ordinarily grant a stay, unless there are circumstances by reason of which justice requires that a stay should nevertheless be refused. The court in this respect will consider all the circumstances of the case.

Under *Spiliada*, the first issue that must be determined is whether, *prima facie*, there is some other available forum which is more appropriate for the case to be tried ("Stage One"). At this stage, the legal burden is on the defendant. If the court concludes that there is a more appropriate forum, the court will ordinarily grant a stay unless there are circumstances by reason of which justice requires that a stay should nonetheless not be granted ("Stage Two").

15 Under Stage One, we considered the following factors in order to determine if Singapore is the appropriate forum for the present proceedings:

(a) general connecting factors;

(b) the jurisdiction in which the tort occurred;

(c) choice of law, *ie*, whether the choice of law clause in the contract was exclusive, and if not, which law should be applied to the claims in tort and equity; and

(d) the effect of the concurrent proceedings in Germany.

Before undertaking the consideration of these factors, we pause to note that the process is not a mechanical one. As V K Rajah J aptly put it in the Singapore High Court decision of *Peters Roger May v Pinder Lillian Gek Lian* [2006] 2 SLR 381 at [20]:

> A court has to take into account an entire multitude of factors in balancing the competing interests. The weightage accorded to a particular factor varies in different cases and the ultimate appraisal ought to reflect the exigencies dictated by the factual matrix. Copious citations of precedents and *dicta* are usually of little assistance and may in reality serve to cloud rather than elucidate the applicable principles.

Stage One

General connecting factors

16 The appellants contend that this court should have regard to the fact that the respondent was employed in Singapore and that his work and assets are in Singapore. Furthermore, the constituent elements of the alleged tortious acts, such as the misrepresentations made and the acts of conversion, were committed in Singapore, as were the alleged breaches of fiduciary duty.

17 Additionally, according to the appellants, the main dispute centres on issues of fact. Two key issues of fact have to be dealt with – first, whether there had been a secret meeting between the respondent and STB and second, whether the respondent revealed to STB that the first appellant was willing to sell the Tang Cargo for US$32m. The evidence pertaining to these issues is in Singapore. For example, witnesses from the STB are located in Singapore. With the availability of tele-conferencing, consideration of where the witnesses reside should focus on the compellability of third party witnesses. The respondent has not produced evidence that these witnesses can be compelled to testify in a German court. In *Oriental Insurance Co Ltd v Bhavani Stores Pte Ltd* [1998] 1 SLR 253 ("*Oriental Insurance*"), the Court of Appeal reversed the High Court's decision regarding a similar stay application on the grounds that the High Court judge had not placed enough weight on the location of the witnesses. Indeed, the importance of witnesses personally testifying was recognised by the German judge in his judgment, released on 22 December 2005, where the judge stated that Mr Koh was required to personally testify. This was despite the fact that Mr Koh had already filed an affidavit in the German courts.

18 The crux of the respondent's arguments, on the other hand, was that the appellants had not proved that the third party witnesses were not willing to co-operate by travelling to Germany. Further, even if witnesses from Singapore could not travel to Germany, evidence could be taken via video-conferencing.

19 In our view, the importance of the location and the compellability of the witnesses depends on whether the main disputes revolve around questions of fact. If they do and, for example, the judge's assessment of a witness's credibility is crucial, then the location of the witnesses takes on greater significance because there would be savings of time and resources if the trial is held in the forum in which the witnesses reside and where they are *clearly* compellable to testify. Such an approach is supported by the decision in *Oriental Insurance* ([17] *supra*), where this court held that the location of the witnesses was "critical" as the dispute involved questions of fact.

20 The significance of questions of fact in the proceedings commenced in Singapore, in turn, depends on the nature of the causes of action pleaded by the appellants. Beginning first with the

claim in conversion, the requisite elements were discussed in *Faith Maritime Co Ltd v Feoso (Singapore) Pte Ltd* [2002] 4 SLR 716 (at [114]), as follows:

> As for conversion, *Clerk and Lindsell on Torts* (18th Ed, 2000) states at para 14-03 that, 'The essence of conversion lies in the unlawful appropriation of another's chattel, whether for the defendant's own benefit or that of a third party'. Paragraph 14-25 states that, 'Mere unpermitted possession … is not a conversion … But there will be conversion if there is some detention consciously adverse to the rights of the owner, such as assertion of a lien that does not exist'. Naturally, the possession or retention must be wrongful before there can be conversion.

21 The elements of the tort of deceit were summarised by the Singapore Court of Appeal decision of *Kea Holdings Pte Ltd v Gan Boon Hock* [2000] 3 SLR 129, as follows (at [37]):

> The tort of deceit consists of the wilful making of a false statement with the intent that the plaintiff shall act in reliance upon it and with the result that he does so act and suffers damage in consequence. This damage must be proved by the plaintiff; *Diamond v Bank of London and Montreal* [1979] QB 333.

22 With regard to the equitable duty of confidentiality owed by the respondent to his former employers, the general propositions of law were set out in the House of Lords decision of *Prince Jefri Bolkiah v KPMG* [1999] 2 AC 222, as follows (at 235):

> Whether founded on contract or equity, the duty to preserve confidentiality is unqualified. It is a duty to keep the information confidential, not merely to take all reasonable steps to do so. Moreover, it is not merely a duty not to communicate the information to a third party. It is a duty not to misuse it, that is to say, without the consent of the former client to make any use of it or to cause any use to be made of it by others otherwise than for his benefit.

23 Having set out the relevant elements of each cause of action, we are of the view that each cause of action is at least to some degree dependent upon a determination of the respondent's precise actions and the events that occurred between the respondent and STB. These factual issues are likely to be in contention between the appellants and the respondent, and it is likely that there will be a considerable reliance on witness testimony so as to establish the version of events posited by each party. It follows from this that the location of the witnesses from STB, who are in Singapore, is a significant factor in favour of Singapore being the more appropriate forum. In particular, the action in deceit and breach of confidentiality would require evidence from the parties that the respondent allegedly made the false statements to. This would include Mr Koh and one Mrs Pamelia Lee ("Mrs Lee"), a senior director of STB, both of whom are based in Singapore. Given the likelihood of the appellants' claims raising a significant number of disputed factual issues, the location of witnesses should be attributed significant weight when assessing the appropriateness of Singapore as a forum for the dispute. It is trite law that a court, when engaging in the enquiry under Stage One, can and should attribute *differing* weight to each connecting factor depending on the nature of the particular dispute. This was recognised in the Singapore High Court decision of *Andre Ravindran S Arul v Tunku Ibrahim Ismail bin Sultan Iskandar Al-Haj* [2001] SGHC 209, where Choo Han Teck JC (as he then was) held (at [8]) that:

> The determination of the appropriate forum is not an exercise carried out merely by adding the sum total of all the relevant connecting factors. The court has to apportion a value to each factor and consider its place in the overall picture.

The importance of the witnesses from STB was, in fact, implicitly acknowledged by the Judge, who

noted (at [28] of the GD) that:

> As regards the plaintiffs' allegation of breach of equitable and fiduciary duties and deceit, the plaintiffs asserted, *inter alia*, that [the respondent] had withheld information from his principal and had also disclosed price-sensitive information to the Singapore Tourism Board ("STB"), which was the eventual buyer of the Tang cargo.

24 Ultimately, however, the Judge found that the location of the witnesses was not an important factor. The Judge stated (at [57] of the GD):

> As regards the point that witnesses like Mr Koh and Mrs Lee are not compellable to attend in Germany or would also have to fly to Germany, I noted that the German court had already sought the attendance of Mr Koh with regard to [the respondent's] claims. If he chooses not to fly there, it does not mean all is lost for the plaintiffs because there should be avenues for his evidence to be taken in Singapore. Mr Bull did not suggest that such avenues are absent and I reiterate that Rickshaw itself had envisaged that allegations of [the respondent's] misconduct be heard by a German court, although this was in the context of their defence to [the respondent's] claims.

25 With respect, we disagree with the Judge, as we find that the location of the witnesses is an important factor to be considered, and the fact that key witnesses are located in Singapore is a factor that points towards Singapore being the most natural forum to hear the substantive disputes. The assessment of the respective witnesses' credibility is also crucial – especially in so far as the claim for fraudulent misrepresentation or deceit is concerned. Indeed, in so far as the claims for breach of fiduciary duty and breach of confidence are concerned, the principal witnesses (as we have already noted at [23] above) are located in Singapore. It is significant, in our view, that they are *clearly* compellable to testify in the Singapore proceedings, whereas this is not the case in so far as the German proceedings are concerned.

26 The location and compellability of the relevant witnesses were also key issues in dispute in the affidavit of Narayan, a director of the first appellant, that was admitted as fresh evidence, and in the respondent's skeletal submissions in reply to the fresh evidence adduced. Annexed to Narayan's affidavit were the submissions of the respondent's German counsel to the German court ("the German submissions").

27 According to the appellants, the German submissions revealed that the respondent had taken the position before the German court that the court should hear key witnesses such as Mr Koh, Mrs Lee and one Ms Tania Wolff in person. This would give these witnesses the opportunity to prove their credibility. The appellants used this contradiction to cast doubts on the respondent's credibility and, more importantly, to show that even the respondent had acknowledged the importance of the physical presence of the key witnesses in court.

28 In reply, the respondent pointed out, firstly, that the first appellant had requested that the German court dismiss the respondent's claim based on the briefs filed and the evidence that was already before the German court. The first appellant was therefore acknowledging that it was unnecessary for the witnesses to give evidence for the disposal of the proceedings. Secondly, under the German Code of Procedure, evidence could be taken from witnesses residing abroad either by way of written statements or before a German consul. Thirdly, there was no suggestion that any of the first appellant's witnesses were unco-operative or unwilling to travel to Germany. Fourthly, documentary evidence from the witnesses residing in Singapore could easily be produced in Germany.

29 In our view, the fresh evidence and attendant reply submissions did not significantly add to the evidence that was already before this court. However, it did reveal that the German court was of the similar view that the assessment of the credibility of the witnesses was important, and that their physical presence in the court hearing the matter was therefore desirable. We do not make too much of the fact that the first appellant had tried to dispose of the respondent's claim in Germany based on the evidence that was *already* before the German court. This could have been the result of a legal strategy that was taken precisely because the first appellant's German counsel realised that there could be difficulty in compelling the key witnesses to attend court proceedings in Germany. In any event, this evidence confirmed our view that the location and the compellability of the witnesses were important to the effective adjudication of the substantive actions between the appellants and the respondent.

30 Turning next to the jurisdictional connections of the parties involved, we note that the first appellant was incorporated in the Cayman Islands. The first appellant has two directors – Narayan and one Tilman Walterfang ("Walterfang"), a German national who is resident in New Zealand. The first appellant uses its related Singapore registered company, Seabed Explorations Pte Ltd, as a vehicle for its Singapore operations. The second appellant is a German partnership. Walterfang is one of the partners. The other partner, Draeger, is a German national who resides in Germany. However, the second appellant has transferred all of its assets to the first appellant and is only joined as a party to ensure that all the parties are before the court.

31 The respondent is a German citizen who currently resides in Germany. He is a permanent resident of Singapore and he was resident in Singapore at the time the alleged tortious acts and equitable breaches took place. The respondent has a bank account with the Development Bank of Singapore. Further, it is significant that the second appellant had initially hired the respondent as its agent because the respondent had represented that he had connections in Singapore.

32 In addition, the German submissions, which were adduced as fresh evidence before this court, stated (at p 8) as follows:

> [The respondent] was born in Japan and grew up in Japan and Singapore. To date he has spent a total of [approximately] 22 years of his life in Singapore where he is still resident today. ...
>
> …
>
> [The respondent's] family had good business relations in Eastern and South-East Asia, particularly in Singapore.

In the respondent's reply skeletal submissions on further evidence, he only sought to clarify that he is now residing in Germany. The rest of the statement quoted above remains undisputed.

33 In April 2003, the first appellant hired a Singapore-registered company, Davka Pte Ltd ("Davka"), to assist in the respondent's negotiations with STB. Davka was hired at the respondent's request. Although Davka is not a party to the proceedings, the fact that it is located and operates in Singapore further cements the notion that the respondent had contacts in, and ties to, Singapore.

34 Hence, having considered the circumstances of the case, we are of the view that the above connecting factors point towards Singapore as the appropriate forum to hear the substantive actions.

Whether the natural and most appropriate forum is that in which the tort occurred

35 At the trial below, the appellants relied on the case of *Cordoba Shipping Co Ltd v National State Bank, Elizabeth, New Jersey (The Albaforth)* [1984] 2 Lloyd's Rep 91 ("*Albaforth*"), which states that the place where a tort occurred is *prima facie* the natural forum for determining the claim. According to the appellants, the *Albaforth* principle illustrates the application of the more general *Spiliada* principles to a particular fact situation (here, where a tort has occurred within the jurisdiction). This principle was accepted by the House of Lords in *Berezovsky v Michaels* [2000] 1 WLR 1004 ("*Berezovsky*") as well as by the English High Court in *Caltex Singapore Pte Ltd v BP Shipping Ltd* [1996] 1 Lloyd's Rep 286 and *The Xin Yang and An Kang Jiang* [1996] 2 Lloyd's Rep 217 ("*The Xin Yang*"), and has been applied locally by the Singapore High Court in the case of *Evergreen International SA v Volkswagen Group Singapore Pte Ltd* [2004] 2 SLR 457. The appellants contended that all the elements of the respondent's alleged tortious acts occurred in Singapore, and therefore that the *Albaforth* principle should be given its full weight. Following from this, the appellants submitted that since the tort claims should be heard in Singapore, it made sense that the claims in equity should be heard in Singapore as well, so that the claims could be heard together.

36 The respondent dealt with these arguments by submitting that the strength of the *Albaforth* principle depends on the facts of every case: *The Forum Craftsman* [1985] 1 Lloyd's Rep 291. The strength of the presumption in every case turns upon the likely issues in dispute: *The Xin Yang*. This is consistent with the approach in *Spiliada* of determining the best forum to decide the case in the interests of the parties and to achieve the ends of justice. In the present case, an analysis of the alleged causes of action would not be either simple or clear. At the hearing before us, the appellants made the cogent rebuttal that *The Forum Craftsman* was distinguishable as Ackner LJ had made it clear that the *Albaforth* principle did not apply to torts that were committed on moving vehicles such as ships and aeroplanes, which was not the case here.

37 In our view, a close reading of *Albaforth* and *Berezovksy* does indeed support the appellants' contention that, as a general rule, the place where a tort occurred is *prima facie* the natural forum for determining the claim. Lord Steyn's judgment in *Berezovsky* sought to accommodate the *Albaforth* principle within the traditional *Spiliada* formulation. His Lordship opined that while Lord Goff of Chieveley's analysis in *Spiliada* sought to explore and explain the legal principles and provide guidance, it did not examine exhaustively the classes of cases that could arise in practice. The principle contained in *Albaforth*, on the other hand, was concerned with "practical problems at a much lower level of generality" (*Berezovsky* at 1014). His Lordship also suggested that there was a very fine distinction between a *prima facie* position, *ie*, considering the place where the tort occurred as the *prima facie* natural forum, and treating the same factor as a weighty circumstance pointing towards a particular forum.

38 The *Albaforth* principle was also confirmed in *The Xin Yang*, where Clarke J emphasised that the place where the tort occurred is of some significance as a pointer towards the natural forum, even if the parties have limited connection with that jurisdiction. Importantly, however, Clarke J's approach suggests that the result reached by applying the *Albaforth* principle is only one of the factors to be considered in the *Spiliada* balancing exercise.

39 In our opinion, the principle articulated in *Albaforth* is logical and sound, and should be applied in Singapore. As Robert Goff LJ (as he then was) stated in *Albaforth* (at 96):

> [W]here it is held that a Court has jurisdiction on the basis that an alleged tort has been committed within the jurisdiction of the Court, the test which has been satisfied in order to reach that conclusion is one founded on the basis that the Court, so having jurisdiction, is the most appropriate Court to try the claim, where it is manifestly just and reasonable that the defendant should answer for his wrongdoing. This being so, it must usually be difficult in any particular case

to resist the conclusion that a Court which has jurisdiction on that basis must also be the natural forum for the trial of the action. If the substance of an alleged tort is committed within a certain jurisdiction, it is not easy to imagine what other facts could displace the conclusion that the Courts of that jurisdiction are the natural forum.

40 However, we must emphasise that the result that is arrived at through the application of the *Albaforth* principle is only the *prima facie* position and/or a weighty factor pointing in favour of that jurisdiction. Applying this to the present case, the fact that the respondent's alleged torts were committed in Singapore does point towards Singapore as being the natural forum to hear the dispute, but this is only one of the factors to be taken into account in the overall analysis, albeit a significant one.

41 We do note, however, that the respondent did suggest that, in so far at least as the tort of fraudulent misrepresentation or deceit was concerned, this may not have in fact been committed (if at all) in Singapore. However, as we point out below (at [72]), such an argument was, with respect, unclear – especially in terms of specific detail. We deal, in fact, with this particular argument in the context of the issue of choice of law below (at [72]).

Choice of law

Introduction

42 Choice of law issues are relevant even to a question of jurisdiction. The relevance of choice of law considerations in a *jurisdictional* enquiry regarding the "natural forum" lies in the general proposition that where a dispute is governed by a foreign *lex causae*, the forum would be less adept in applying this law than the courts of the jurisdiction from which the *lex causae* originates. While it is true that the courts of a country (for example, Singapore courts) can apply the laws of another country (for example, German law) to a dispute, there will clearly be savings in time and resources if a court applies the law of its own jurisdiction to the substantive dispute. Hence, choice of law considerations can be a significant factor in determining the appropriate forum to hear a dispute.

43 Choice of law questions raise a related issue regarding a party's evidential burden to plead foreign law. In *Goh Chok Tong v Tang Liang Hong* [1997] 2 SLR 641, Lai Kew Chai J pointed pertinently to *the need for foreign law to be pleaded*, and held that if foreign law was not in fact pleaded, it would be presumed to be the same as the relevant position under Singapore law (see generally at [77]–[84], and especially at [79]): see also *Ertel Bieber and Company v Rio Tinto Company, Limited* [1918] AC 260 at 294–295. Where this evidentiary presumption can be invoked, the applicability of a foreign *lex causae* under choice of law rules may therefore be reduced in significance since the forum is unlikely to have difficulty applying a foreign law which is (assumed to be) identical to the *lex fori*. In this regard, however, a number of cases suggest that a court may, despite a party's failure to adduce proof of foreign law, have regard to the fact that the principles in the foreign jurisdiction concerned will, in all likelihood, differ from the *lex fori* in some respects (see, for example, the Singapore High Court decision of *PT Jaya Putra Kundur Indah v Guthrie Overseas Investments Pte Ltd* [1996] SGHC 285 at [44] ("*PT Jaya*")). Hence, in the present case, the mere factum of a foreign *lex causae*, *ie*, German law, may be accorded due weight *despite* the respondent's failure to adduce evidence regarding the content of this law.

44 In the present proceedings, the appellants' arguments relating to choice of law can be briefly summarised as such: The choice of law provision in the Employment Agreement was not exclusive and pertained only to questions arising from the employment contract. Hence, the Judge should have applied common law choice of law principles. These principles would have led to the conclusion that

Singapore law should be applied. The existence of the Employment Agreement did not detract from the applicability of these general principles. Before us, the respondent did not dispute that the choice of law clause is non-exclusive. Instead, he focused his arguments on the choice of law rules that should apply.

The relevance (if any) of the Employment Agreement

45 A crucial consideration that weighed with the Judge was what he perceived to be the appellants' attempt to avoid the governing law provision in the Employment Agreement ("the governing law provision"). As he put it (at [42] of the GD):

> … I did not think it was sufficient for Mr Bull to rely on the principle that it was for the plaintiffs to choose whether to sue in contract or tort. The real issue was whether the plaintiffs can avoid the governing law provision in the 30 June 2003 agreement by couching their causes of action outside of contract even though the duties allegedly owed by [the respondent] arose from his contractual appointment and the alleged breaches arose in the course of his performance of his contractual obligations.

46 This concern was reiterated by the Judge a little later on in the judgment (see the GD at [45]).

47 With respect, however, absent 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. This has in fact been made clear in the case law. It is, for example, established law that the mere presence of a contractual relationship does not in itself preclude the existence of an *independent* duty of care in tort: see the leading House of Lords decision of *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 as well as the decision of this court in *The Jian He* [2000] 1 SLR 8 at [26]. Liability can exist concurrently in tort and contract, and provided that the latter does not expressly limit or exclude the former, a plaintiff is free to choose whichever is more advantageous to him: see *Midland Bank Trust Co Ltd v Hett, Stubbs & Kemp* [1979] Ch 384.

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. It is certainly the case that the respondent's actions were carried out in the course of his employment and in the course of performing his contractual obligations. Indeed, his actions probably also constituted breaches of implied terms of the employment contract. However, even while this is true, his actions incurred *tortious* liability that existed independently of, and concurrently with, his *contractual* obligations and breaches thereof. In other words, although the allegedly tortious acts were committed in the course of the respondent's employment *in fact*, the acts had a separate *legal* existence from his contractual obligations and breaches thereof. In this regard, we also note the following observations by Robert Goff LJ (as he then was) (and with whom both Oliver and Waller LJJ agreed) in the English Court of Appeal decision of *Coupland v Arabian Gulf Oil Co* [1983] 1 WLR 1136 at 1153 (significantly, Goff LJ was also to deliver the leading judgment (as Lord Goff of Chieveley) in *Henderson v Merrett Syndicates Ltd*:

> The plaintiff can advance his claim, as he wishes, either in contract or in tort; and no doubt he will, acting on advice, advance the claim on the basis which is most advantageous to him. It appears that he is likely to proceed primarily on the basis of his claim in tort [as opposed to contract], for reasons which I suspect are connected with the assessment of damages.

49 However, this is not to state that the governing law provision is necessarily irrelevant since the appellants' *other* claims may, for choice of law purposes, nevertheless be characterised as issues arising in the realm of contract. As we shall see, where the appellants' cause of action in *equity* is concerned, the issue arises as to whether or not, *assuming* that equity does not constitute (in and of itself) an *independent* category with its own choice of law rules, the choice of law rules relating to *contract* should be invoked instead for, *ex hypothesi*, one would not be able to characterise the respective causes of action by reference to equity. In *such* a situation, the Employment Agreement in general and the governing law provision in particular would be relevant since, unlike their claims against the respondent in tort, the appellants' claims against the respondent in equity ought to be *characterised differently*. But this is a quite different situation compared to the bare proposition that litigants such as the appellants are *ipso facto* prevented from framing their respective causes of action the way they did (here, in tort) merely because by doing so, they would be avoiding the governing law provision.

50 We pause here to note, parenthetically, that, in so far as the *German proceedings* are concerned, even taking the respondent's case at its highest, the *German* court would *necessarily* have to take into account *the allegations of misconduct against the respondent – which allegations constitute the very pith and marrow of the Singapore proceedings* mounted by the appellants against the respondent, and which are in fact the focus of the present proceedings. In other words, the *fundamental legal and factual substratum* of the appellants'defence in the *German* proceedings comprises the allegations of misconduct against the respondent. If these allegations are proved, then the appellants would be exonerated in so far as the German proceedings are concerned (bearing in mind that the alleged wrongful termination of the Employment Agreement constitutes the main thrust of the German proceedings, one of the remaining two claims having been largely satisfied, with the final claim being (in effect) a request for information). The contrary result would of course obtain if the allegations are not in fact proved. That this ought – and, indeed, would – be the situation is acknowledged by counsel for the respondent, Mr Leung Wing Wah, himself (see the GD at [33] and [34]). So it seems to us, without even speculating what the German court might do (which is impermissible in any event), that our decision on the relevant choice of law principles that would govern the respective claims of the appellants in the Singapore proceedings would be of at least *some* relevance to the German court – based on principles of comity, if nothing else. *More importantly*, it seems to us clear that the German court would also take into account the findings of *fact* of the Singapore court, particularly since the factual context – at least, as we shall see, in so far as the action in conversion is concerned – took place in Singapore.

51 Returning to the issues at hand, we turn now to consider what the relevant principles of choice of law are with respect to the various claims brought by the appellants against the respondent in the present (Singapore) proceedings.

The claims in tort

GENERAL PRINCIPLES

52 Turning, first, to the claims in *tort*, there are in fact two separate causes of action pleaded. One is in *conversion*, the other for *fraudulent misrepresentation or deceit*.

53 On a *general* level, however, the principles which obtain with regard to the issue of the choice of law in tort in the Singapore context are clear. These are embodied in the "double actionability rule". Put simply, this rule states that in order for a tort to be actionable in Singapore, the alleged wrong must be actionable not only under the law of the forum (the *lex fori*) but also under the law of the place where the wrong was in fact committed (the *lex loci delicti*). In other words,

both these limbs must be satisfied.

54 As Prof Adrian Briggs pointed out helpfully, the original rule centred on the former limb only (*viz*, relating to the *lex fori*) as "[n]o doubt the historical reason for such a view was the closeness between torts and criminal wrongs, in that both involved breaches of duties not voluntarily undertaken, and in such cases the forum's own standards of justice should prevail" (see Adrian Briggs, "Tort in the Conflict of Laws" (1989) 105 LQR 359 at 359). This view was, as the learned author points out (*ibid*), later modified by the House of Lords in *Boys v Chaplin* [1971] AC 356 to include the second limb (*viz*, relating to the *lex loci delicti*). Such an approach, modifying the bias towards parochialism in general and the *lex fori* in particular, was adopted more than three decades ago. Such an underlying spirit is, of course, even more needful today.

55 The oft-cited starting point is the English decision of *Phillips v Eyre* (1870) LR 6 QB 1, where Willes J observed thus (at 28–29):

> As a general rule, in order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled. First, the wrong must be of such a character that it would have been actionable if committed in England; … Secondly, the act must not have been justifiable by the law of the place where it was done.

56 The "modern" starting point, however, is the House of Lords decision in *Boys v Chaplin* ([54] *supra*). Although it confirmed the "double actionability rule", a close perusal of the various judgments delivered is, with respect, apt to lead to at least a modicum of uncertainty. An excellent summary of the various judgments (and accompanying differences) can be found in Yeo Tiong Min, "Tort Choice of Law Beyond the *Red Sea*: Whither the *Lex Fori*?" (1997) 1 Sing J Int'l & Comp L 91 at 92–93. The various complications need not detain us, as there is a subsequent Hong Kong Privy Council decision which helped to clarify the position, particularly with regard to the ambit of the "double actionability rule": see *Red Sea Insurance Co Ltd v Bouygues SA* [1995] 1 AC 190 ("the *Red Sea* case"). The *Red Sea* case has been held by this court to be the law in Singapore: see *Parno v SC Marine Pte Ltd* [1999] 4 SLR 579 at [36], citing and applying the Singapore High Court decision in *Goh Chok Tong v Tang Liang Hong* ([43] *supra*). What the *Red Sea* case now establishes is that the "double actionability rule" applies, but subject to the exception (first laid down by Lord Wilberforce in *Boys v Chaplin* (at 391)) that, under certain circumstances, the tort might nevertheless be actionable in Singapore even though one of the limbs (mentioned at [53] above) is not satisfied. Indeed, in *Boys v Chaplin* itself, the second limb (relating to actionability under the *lex loci delicti*) was not satisfied. What the *Red Sea* case effected was a symmetry which also recognised the operation of the exception even when the second limb (relating to actionability under the *lex fori*) had not been satisfied (Prof Adrian Briggs aptly terms the resultant rule as "one of double actionability subject to double flexibility": see Adrian Briggs, "*The Halley*: Holed, but Still Afloat?" (1995) 111 LQR 18 at 21). Such an approach is, of course, consistent with the tenets of globalisation and internationalisation that now accompany the central idea of comity (together with the corresponding need to eschew parochialism). Indeed, the decision in the *Red Sea* case paves the way for the *lex causae* of a tort to be the law of a *third* jurisdiction (other than the *lex fori* or the *lex loci delicti*), which has the most significant relationship with the occurrence and with the parties.

57 The central difficulty with such an exception, however, is that an overly liberal application of it might lead, in effect, to an emasculation or even *de facto* abolition of the "double actionability rule" and may, in the worst case scenario, result in a "proper law of the tort" approach instead (*cf* also Briggs ([56] *supra* at 20)). This is the perennial danger when exceptions are made to existing rules. Yet, such exceptions are both inevitable and (more importantly) necessary, lest an ossified set of rules result, which will invariably lead to injustice and unfairness. For example, if the parties and other

connecting factors have nothing to do with the place where the tort was actually committed (*ie*, that that place merely happened to be fortuitous), then it would appear both just and fair to hold that the fact that the second limb of the "double actionability rule" (that the wrong also be actionable under the *lex loci delicti*) is not satisfied should not prejudice the plaintiff's claim. Indeed, what is sauce for the goose is sauce for the gander. Hence, by the same token, if the same scenario obtains, but in relation to the *lex fori* instead, then it would also appear both just and fair to hold that the fact that the first limb of the "double actionability rule" (that the wrong also be actionable under the *lex fori*) is not satisfied should (equally) not prejudice the plaintiff's claim. Indeed, where the parties and other connecting factors have nothing to do with either the place where the action is brought (here, Singapore) and the place where the wrong was committed, a *third* possible law might govern the action concerned (as alluded to at the end of the preceding paragraph). The overriding consideration is that a just result be achieved.

58 Nevertheless, in order that the exception might not "overwhelm" the rule (here, the "double actionability rule"), it is imperative that the exception be strictly applied. It is perhaps less than useful to state that this will depend on the precise facts of the case at hand, but there does not, in our view, appear to be any better way of stating the parameters of the exception. As one learned commentator aptly put it, "[t]he scope of the exception to the 'general rule' to which their Lordships have had resort in the *Red Sea* … case *cannot be defined with pedantic precision*" [emphasis added] (see P B Carter, "Choice of Law in Tort: The Role of the *Lex Fori*" [1995] CLJ 38 at 39). The important point is, rather, one of *attitude*. In other words, the Singapore courts must not be quick to apply the exception unless the *lex fori* and/or the *lex loci delicti* are purely fortuitous and the application of either or both limbs of the "double actionability rule" would result in injustice and unfairness. The Singapore courts – indeed, any court in any jurisdiction – would, in our view, be well-equipped to analyse any given fact situation based on these criteria.

59 The more difficult question that arises, however, is whether or not a *local tort* (*ie*, a tort committed (here) in *Singapore*) would be subject to this exception. Indeed, at a threshold level, it might be asked whether a local tort ought to be subject to the "double actionability rule" in the first place. In this last-mentioned regard, it might be argued that this is a moot point since, even if the "double actionability rule" applies, there would *not* be a *practical* difference since both the *lex fori* and the *lex loci delicti* would be the *same* (*ie*, *Singapore* law). This being the case, the rule would be satisfied in any event (reference may also be made, in this regard, to the English decisions in *Szalatnay-Stacho v Fink* [1947] KB 1 and *Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc* [1990] 1 QB 391 ("*Metall und Rohstoff*")). The more pertinent question, perhaps, is whether or not the *exception* to the "double actionability rule" (most fully articulated, as we have seen, in the *Red Sea* case) applies even in the context of a *local tort*.

60 The point appears to have been left open in a leading work, although it appears, in the final analysis, to *lean against* the application of the exception in the context of a local tort (see Sir Peter North & J J Fawcett, *Cheshire and North's Private International Law* (Butterworths, 13th Ed, 1999) at pp 613–614). The learned authors do in fact consider the *Red Sea* case, but point out (see *ibid*):

> In the Privy Council in the *Red Sea* case there is no mention at all of the position in relation to torts committed in England. This case was concerned, in effect, with the displacement of English law by that of the foreign law of the place where the tort was committed and not with the displacement of the English law of the place where the tort was committed by a foreign law.

61 However, it is then admitted that (see p 614):

> *Arguably, though*, the decision [in the *Red Sea* case] *raises a question mark* over the position in

respect of torts committed in England in that it accepts for the first time that a flexible exception may lead to the displacement of English law by a foreign law. [emphasis added]

62 Nevertheless, the learned authors conclude thus (see *ibid*):

Nonetheless, it must remain doubtful whether an exception would ever be held to operate in the situation where a tort is committed in England. [emphasis added]

63 The views expressed in the preceding paragraph notwithstanding, the need to ensure that the requirements of comity are observed and the corresponding need to avoid unwarranted parochialism would appear to suggest that the exception ought to apply, even in the context of local torts. In this regard, we note that one learned scholar (see Yeo ([56] *supra*) at 110–111) has expressed the view that:

Before [the] *Red Sea* [case] … given the paramountcy of the *lex fori* … the *lex fori* rule for local torts made some sense. Since the *lex fori* coincided with the *lex loci delicti*, and it was not yet possible to have an exception to the application of the *lex fori*, it was only sensible to short-circuit the process in favour of a simple *lex fori* rule. … However, the only justification for reserving such inhibitions to torts committed within the jurisdiction can be forum preference, and any dimunition of the present role of the *lex fori* may shed some needed light in this area. Once the inhibitions are openly confronted, the dichotomy of treatment between local and foreign torts will prove difficult to justify.

In other words, it might, in certain exceptional circumstances, be possible for a law *other than Singapore law* to apply, even in the case of a local tort. Although the *Red Sea* case did not *in fact* relate to a situation involving a local tort, the *general principles* contained therein would, in our view, apply equally in the context of local torts. In particular, the rationale underlying the exception in so far as *foreign* torts are concerned (brief illustrations of which have been given at [55] above) would, in our view, apply *equally* (as a matter of both principle and logic) to *local* torts as well. We have in mind, in particular, the situation where the fact that the tort has been committed in Singapore is a *wholly fortuitous happenstance* that has nothing whatsoever to do with every other aspect of the case concerned. In such a situation, it would seem to us to be neither just nor fair to insist that the exception should be excluded and that Singapore law should apply. In this regard, we do not see any distinction in either logic or principle between the situation concerning a foreign tort and that concerning a local tort.

64 It is true that there is authority which suggests that where a *local* tort is concerned, the "double actionability rule" does not apply and that the *lex fori* would, presumably, apply instead (see, for example, *Metall und Rohstoff* ([59] *supra*), especially at 445–447 as well as the Supreme Court of Canada decision of *Interprovincial Co-operatives Ltd v The Queen in Right of Manitoba* (1975) 53 DLR (3d) 321 at 339–340). As just mentioned, however, such an approach militates not only against both principle and logic but also against considerations of comity as well. Most importantly, however, and as already argued above, such an approach could, on occasion, lead to actual injustice – especially where (as already mentioned) the fact that the tort was committed in Singapore was *purely fortuitous*. Indeed, a blanket and blatant predilection for the *lex fori* is no longer sustainable – especially during present times. It also bears repeating that in the *ordinary* course of events, application of the "double actionability rule" to *local* torts will not in fact result in any difference from both practical as well as conceptual points of view (see also [59] above). In any event, even if the focus is on the *lex fori*, an *exception* ought, as already argued above, to be made for situations where the fact that the tort was committed in Singapore was purely fortuitous. If so, then there would be very little difference (if any) in substance between that particular approach and the application of the

"double actionability rule".

65 Our only concern was whether or not an *even stricter* approach ought to be taken in applying the exception to *local* torts compared to *foreign* torts. On further reflection, we do not see why this ought to be the case. This follows from the general reasoning canvassed in the last part of the preceding paragraph. Indeed, to apply the exception in a stricter fashion to local torts (as opposed to foreign torts) would in fact undermine the general need for comity which is an integral part of the jurisprudence relating to the conflict of laws. But we need to underscore one point: The exception to the "double actionability rule" is precisely that and must be applied only when the factual matrix as well as the justice and fairness of the case warrant it. A liberal approach must be eschewed, lest the structure and integrity of the "double actionability rule" be undermined or (worse still) destroyed. Whatever the relative merits (or otherwise) of the "double actionability rule", it is still the law in Singapore. Indeed, a wise and judicious application of the exception in appropriate cases will ensure that the retention of the "double actionability rule" does not place the Singapore courts in a less advantageous position compared to other jurisdictions, such as the United Kingdom where the law has been reformed. The following wise counsel by Lord Wilberforce in *Boys v Chaplin* ([54] *supra* at 391) bears repeating:

> It [the exception] will not be invoked in every case or even, probably, in many cases. The general rule must apply unless clear and satisfying grounds are shown why it should be departed from and what solution, derived from what other rule, should be preferred. [emphasis added]

66 The above observations were, not surprisingly, reiterated in the *Red Sea* case ([56] *supra* at 206). In any event, any abolition or reform of the "double actionability rule" is, if at all, a subject for *legislative* reform. Reference may be made, in this particular regard, to the Report of the Law Reform Committee of the Singapore Academy of Law entitled *Reform of the Choice of Law Rule Relating to Torts* (31 March 2003) where, with the exception of claims in defamation, it was recommended that the requirement for actionability by the law of the forum (*viz*, the *lex fori*) be abrogated and that the choice of law rule be the law where the act was done (*viz*, the *lex loci delicti*) *and* that *a flexible exception* to the choice of law rule may be invoked in exceptional circumstances, allowing the court to apply the law of a country that is significantly connected with the tort (a preference for this approach was also expressed by Woo Bih Li J in the Singapore High Court decision of *Ang Ming Chuang v Singapore Airlines Ltd* [2005] 1 SLR 409 at [50]). We would only pause to observe that, in *practical* terms, the flexibility accorded by the wise and judicious use of the *flexible exception* to the "double actionability rule" ensures that the court concerned would, nevertheless, be able to achieve a just and fair result in the meantime even if the law is not reformed.

67 It would be appropriate to turn now to the application of the principles considered in this part of the judgment to the respective heads of claim the appellants have raised in the tortious context.

THE CLAIM IN CONVERSION

68 Turning, first, to the appellants' claim in conversion, there is no doubt that the *lex fori* is Singapore law. It seems to us also clear that, having regard to the facts of the present case in general and the location of the 25 pieces of the Tang Cargo alleged to have been converted by the respondent in particular, that the *lex loci delicti* is also Singapore law. To all intents and purposes, therefore, the *lex causae* for the claim in conversion would appear to *prima facie* be Singapore law exclusively.

69 However, Mr Leung argued that the respondent would be relying on a *defence* that had its source in the Employment Agreement, which is governed by German law (*cf* also *Coupland v Arabian*

Gulf Oil Co ([48] *supra*) at 1153). This alleged defence is, however, both vague and unclear. No specific term of the Employment Agreement was referred to. The argument against Singapore being the natural forum by reason of the need to apply a foreign *lex causae* would therefore appear to be of negligible significance.

70 We are also of the view that the exception to the "double actionability rule" does not apply in the context of the present claim. Indeed, as we have already observed, most of the relevant connecting factors relate to Singapore (as opposed to Germany).

THE CLAIM FOR FRAUDULENT MISREPRESENTATION OR DECEIT

71 Turning, next, to the appellants' claim based on the tort of fraudulent misrepresentation or deceit, it is first of all clear that the *lex fori* for this claim would be Singapore law.

72 However, Mr Leung argued that (contrary to counsel for the appellants, Mr Cavinder Bull's, assertion) the *lex loci delicti* was not Singapore law as the alleged misrepresentations were actionable where they had been received and that they had been received in either Germany or New Zealand, and not in Singapore (*cf* the English Court of Appeal decision of *Diamond v Bank of London and Montreal Ltd* [1979] QB 333 at 345–346). However, the fact of the matter was that it was not clear, on the pleadings, *where* the alleged misrepresentations were in fact received. This is not surprising in view of the fact that only the appellants' statement of claim is available. The respondent had, not surprisingly, applied for a stay without filing a defence. On this fact alone, we are inclined to the view that the respondent's argument in this regard, whilst ingenious, is rather speculative. Further, as with the claim in conversion, the respondent has not adduced any evidence as to why the exception to the "double actionability rule" should apply in the context of the present proceedings. Hence, both limbs of the "double actionability rule" apply.

CONCLUSION

73 It is clear, from the analysis above, that the governing law for both the appellants' claims (in conversion and for fraudulent misrepresentation or deceit) is Singapore law. Indeed, the "double actionability rule" has been satisfied in respect of both claims and the exception to that rule does not apply on the facts of the present proceedings.

The claims in equity

74 Turning, next, to the claims in *equity*, these, too, comprise two separate causes of action. One is for *breach of confidence*, the other for *breach of fiduciary duties*.

75 We note, at the outset, that the principles relating to choice of law with regard to claims in equity are not entirely clear. We are therefore especially grateful to have the benefit of the views of the leading expert in the field in Singapore (and, indeed, the Commonwealth) as embodied in a very scholarly volume which, if we may say so, has justly received widespread praise: see T M Yeo, *Choice of Law for Equitable Doctrines* (Oxford University Press, 2004) ("*Yeo*"). Indeed, this is the seminal work in the field in the Commonwealth and is based on the author's doctoral thesis completed at Oxford University (a summary of his main theses can be found in Tiong Min Yeo, "Choice of Law for Equity" in ch 7 of *Equity in Commercial Law* (Simone Degeling & James Edelman eds) (Law Book Co, 2005)). There is in fact little by way of direct authority in this particular area of the law and the learned author does rely much on first principles. His views are therefore especially valuable in the circumstances.

76 It used to be thought that the *lex causae* for claims in equity would generally be the *lex fori* (in these proceedings, Singapore law). The central insight of Prof Yeo's book (referred to in the preceding paragraph) is the suggestion of a more nuanced approach. Put simply, there would not, *ipso facto*, be an automatic and blanket application of the *lex fori* in any and every situation of this nature. Instead, the nature and origins of the equitable obligations concerned would need to be closely examined in the context of their respective factual matrices. In our view, such an approach is undoubtedly sound. The adoption of the *lex fori* as the *lex causae* for *all* issues arising in equity would fail to recognise the disparate doctrines and causes of action arising in equity. Such an approach would be no different from a suggestion that all common law claims, whether arising in contract, tort, or otherwise, should be governed by the *lex fori*.

77 With these preliminary – and perhaps slightly oversimplified – remarks which do not do justice to the work just considered, we turn now to consider the specific issues presently before us. Indeed, as it turns out, both equitable causes of action framed by the appellant in the Singapore proceedings (*viz*, the alleged breach of fiduciary duties as well as breach of confidence) raise common issues.

78 The first common issue stems from the fact that both causes of action could each arise from a variety of possible bases (see *Yeo* ([75] *supra*)). For example, a breach of fiduciary duty could arise from a contract or, alternatively, could arise from a voluntary undertaking that is not, strictly speaking, contractual in nature. Indeed, the nature and sources of fiduciary duties are so varied that no single set of principles governs this area of law (see generally, for example, L S Sealy, "Fiduciary Relationships" [1962] CLJ 69 and, by the same author, "Some Principles of Fiduciary Obligation" [1963] CLJ 119 and "Fiduciary Obligations, Forty Years On" (1995) 9 JCL 37; as well as the oft-cited Australian High Court decision of *Hospital Products Limited v United States Surgical Corporation* (1984) 156 CLR 41 ("*Hospital Products*"), especially at 68–69 and 141–142). The actual legal position would depend very much on the particular factual context. This is perhaps why Prof Yeo observes that "there is general agreement that the existence and content of fiduciary duties are situation-specific" (see *Yeo* at para 7.26). To exacerbate matters, there are legal systems that do not recognise the concept of fiduciary duty (at least not specifically in the context of civil law systems, as to which, see *Yeo* at para 7.34). And even within jurisdictions that do recognise such a concept, there also arise differences of views from the perspective of content (see *Yeo* at para 7.24).

79 In a similar vein, the learned author also observes that "[t]he theoretical basis of the claim [for breach of confidence] is unclear" and "has been argued variously to be based on contract, tort, breach of fiduciary duty, restitution, trusts, or property" (see *Yeo* at para 7.73). This is within the common law context. The situation in the civil law context is described by the learned author as being "served by the law of contract and wrongs, and sometimes the criminal law" (see *ibid*; see also *id* at para 7.74). There are also further possible complications introduced as a result of the difficulties inherent within the process of *characterisation* of the specific issue or issues that arise from the facts at hand (see, albeit not in the context of equity, the oft-cited English High Court decision of *Macmillan Inc v Bishopsgate Investment Trust Plc (No 3)* [1995] 1 WLR 978; affirmed on different grounds by the English Court of Appeal in *Macmillan Inc v Bishopsgate Investment Trust Plc (No 3)* [1996] 1 WLR 387, analysed incisively in *Yeo* at paras 3.12–3.20 and Adrian Briggs in "Decisions of British Courts During 1996 Involving Questions of Public or Private International Law" (1996) 67 BYIL 537 at 605–606).

80 The possible – and different – bases as well as sources for both a breach of fiduciary duty and a breach of confidence (both within the common law and civil law jurisdictions alike) themselves suggest that Prof Yeo is correct in arguing that a blanket rule to the effect that the *lex fori* would always apply is inappropriate (*cf* the Singapore High Court decision of *Sumitomo Bank Ltd v Kartika Ratna Thahir* [1993] 1 SLR 735 at 787–791, [140]–[172]; affirmed in *Kartika Ratna Thahir v*

PT Pertambangan Minyak dan Gas Bumi Negara (Pertamina) [1994] 3 SLR 257, especially at 272, [37] as well as the Malaysian High Court decision of *Bank Bumiputra Malaysia Bhd v Lorrain Esme Osman* [1987] 1 MLJ 502 at 506 and the Australian Federal Court decision of *Paramasivam v Flynn* (1998) 160 ALR 203, especially at 215–217 (which embodies a slight variation in approach); but *cf*, in turn, the perceptive analysis of Prof Yeo (see *Yeo* ([75] *supra*) at paras 7.68–7.70 and 7.65, and, by the same author, "Choice of Law for Fiduciary Duties" (1999) 115 LQR 571, respectively). A blanket rule is also undesirable inasmuch as it tends to undermine considerations of comity that are an integral part of the theory as well as practice of the conflict of laws nowadays. However, that having been said, it is equally important that one does not slide towards the other extreme either – where the choice of law is not governed by any rules or principles but is premised on what is, in effect, mere arbitrary choice. To do so would undermine the very precept underlying the conflict of laws, which is premised on the formulation of choice of law rules which distil the critical connecting factor in a given area of substantive law. Underlying Prof Yeo's central thesis in his work is the premise that the concept of equity is *not* a separate and distinct category in itself (see, for example, *Yeo* at paras 2.14–2.15 and 3.22). Hence, it is important to ascertain the foundational sources from which equitable rights and remedies arise – which would include, *inter alia*, established categories such as contract and tort. Indeed, it has been held that contractual terms may even authorise what would otherwise constitute a breach of fiduciary duty (see, for example, the Supreme Court of Canada decision of *Molchan v Omega Oil & Gas Ltd* (1988) 47 DLR (4th) 481, especially at 492 and *Hospital Products* ([78] *supra*) at 102), although the converse does not follow (see, for example, the United States Court of Appeals (Fifth Circuit) decision of *The Deauville Corporation v Federated Department Stores, Inc* 756 F 2d 1183 (1985) at 1194 as well as *Hospital Products Limited* at 97; and applied in the Bermudan Privy Council decision of *Horace Brenton Kelly v Margot Cooper* [1993] AC 205 at 215)). However, there can be no fixed rules as such. For example, the view to the effect that equitable wrongs could be subsumed under tort instead has been criticised (convincingly, in our view) by a learned author, not least because of the very nature (including the variety and complexity) of the choice of law rules for tort across Commonwealth jurisdictions (see Laurette Barnard, "Choice of Law in Equitable Wrongs: A Comparative Analysis" [1992] CLJ 474, especially at 500–503).

81 Returning to Prof Yeo's thesis, whilst his premise (*viz*, to ascertain the foundational sources from which equitable rights and remedies arise) is not unpersuasive (particularly if we have regard to the discussion above), we would *not* go so far as to endorse the proposition that equitable concepts and doctrines are *always* dependent on other established categories (because, as the modern law of restitution illustrates, the law itself never ceases to develop). We would, however, accept the more *limited* proposition to the effect that where equitable duties (here, in relation to both breach of fiduciary duty and breach of confidence) arise from a factual matrix where the legal foundation is premised on an independent established category such as contract or tort, the appropriate principle in so far as the choice of law is concerned ought to be centred on the established category concerned. We would also leave open the possibility that future legal developments might result in equitable obligations constituting a separate established category in so far as choice of law is concerned (and *cf*, in this regard, Robert Stevens, "Choice of Law for Equity: Is it Possible?" in ch 8 of *Equity in Commercial Law* ([75] *supra*)).

82 With that more limited and modest proposition in mind, we turn now to consider the alleged breaches in the instant proceedings.

83 It is clear, in our view, that the content of the claims centring around the allegations of breach of fiduciary duty as well as breach of confidence *arise from the Employment Agreement itself* – or, more specifically, from the relationship established therein. It is true that there is a persuasive argument (at least from the perspective of Singapore law) to the effect that these duties are really to be *implied* (in law) from the relationship between the contracting parties themselves. It is

established law that it is an implied term of an employment contract that an employee owes his or her employer a duty of good faith and fidelity (see the oft-cited English decisions of *Robb v Green* [1895] 2 QB 315 and *Hivac Limited v Park Royal Scientific Instruments Limited* [1946] Ch 169). However, it is equally true that, in the context of the *conflict of laws*, one ought not to view the situation through the lenses of domestic (here, contract) law since (as is the case here) the governing law of the contract is in fact German law. If so, it would appear that the alleged breach of fiduciary duty as well as the alleged breach of confidence, having (on *these facts*) their *root source* in *the Employment Agreement*, the governing choice of law rules ought to be based on those governing this particular *contract* (in this instance, *German law*; see also generally *Yeo* ([75] *supra*) at paras 7.30–7.31, 7.39–7.45, 7.49, 7.75, 7.77 and 7.82 (interestingly and parenthetically, though, Prof Yeo is of the view that, "[o]utside the relationship context, breach of confidence should be characterized as a tort for choice of law purposes": see *id* at para 8.77)).

84 However, we would pause to observe that whilst the appellants' actions for both breach of fiduciary duty as well as for breach of confidence are to be governed by the choice of law principles relating to *contract* (in this instance, *German law*), the more pertinent inquiry is, in the context of *these* particular proceedings, a *factual* one in general and what transpired with regard to the respondent's dealings with the STB in particular (see also *Oriental Insurance* ([17] *supra*) at [40]). In this regard, we are thrown back, as it were, to the testimony not only of the respondent but (and more importantly) of Mr Koh and Mrs Lee as well. Looked at in this light, the focus (as we have already seen at [25] above) is on *Singapore.*

Conclusion

85 In our view, given the fact that *Singapore* law ought to be the governing law with regard to the appellants' claims in tort and that *German* law ought to be the governing law with regard to the appellants' claims in equity, we are of the view that choice of law considerations are, on the whole and at best, a *neutral* factor in the *Spiliada* balancing exercise.

The effect of concurrent proceedings in Germany

86 There was, on the facts of the present proceedings, clearly no *lis alibi pendens* involved. The more pertinent issue relates to the legal effect (if any) of there being concurrent proceedings in Germany.

87 It should first be noted that, in principle, it does not matter whether the action was *first* commenced in Singapore or abroad. In the English High Court decision of *The Coral Isis* [1986] 1 Lloyd's Rep 413, Sheen J stated (at 417):

> In a case, such as this one, in which there is more than one appropriate forum, but no natural forum I do not regard a mere accident of time in the commencement of a suit as necessarily decisive of the question: in which Court should this action proceed?

88 Taking into account which action started first would encourage parties to start actions in their forums as quickly as possible, whether the claim has a good chance of success or not. Such a practice clearly should not be encouraged. Further, even though the action was first commenced in Germany, Germany may not be the most appropriate forum for the substantive hearing.

89 We also note that the German proceedings have not reached an advanced stage. Although the hearing has begun, the parties have only attended court on three occasions and only one witness has been heard. There has been consent judgment for part of the claim, pursuant to which the first

appellant has paid €69,970. However, this judgment was for claims made by the respondent that were not disputed by the appellants as the respondent had furnished supporting documents to substantiate his claim. The bulk of the respondent's claims, including his claim for commission as well as for the balance of his salary and expenses, have not been fully heard. The partial judgment states that the German judge has also deferred an order as to costs until his final decision.

90 However, although the German proceedings are not at an advanced stage, there is nevertheless an overlap of both facts as well as issues between the German proceedings on the one hand and the Singapore proceedings on the other – particularly in so far as the issue of the respondent's alleged misconduct is concerned. In the circumstances, there is a risk of conflicting judgments, at least in so far as some issues are concerned. However, whilst this is a factor that must be taken into account, it is not decisive (bearing in mind that the concurrent proceedings in Singapore and Germany were respectively commenced by the appellants *and* the respondent, as opposed to a *lis alibi pendens*: see *PT Jaya* ([43] *supra*) at [56]). The danger of conflicting judgments must be weighed against the other factors in the *Spiliada* enquiry and we have seen that, hitherto, the various factors point towards Singapore as being the most appropriate forum to hear the case. The relevant factors, when considered in their totality, strongly militate against any suggestion that the German courts would be "clearly more appropriate" than the Singapore courts.

Stage Two

Does justice require that a stay be refused?

91 In the light of our conclusion with regard to Stage One, it is, strictly speaking, unnecessary for us to consider Stage Two as such. We do so, however, for the sake of completeness. In this regard, Mr Bull argued that granting the respondent a stay of the *Singapore* proceedings would result in the appellants' loss of a legitimate juridical advantage which would (in turn) result in injustice to them. He argued that this was due to the non-compellability of key witnesses (in particular, Mr Koh and Mrs Lee) if the proceedings were held in Germany instead.

92 This particular argument was attractive at first blush, not least because, as we have noted above (at [90]), the main focus of the German proceedings would be on the allegations of misconduct on the part of the respondent in general and what transpired between the appellants and STB in particular. In this last-mentioned regard, the testimony of Mr Koh and Mrs Lee would be particularly significant. However, we are of the view that the appellants did not, in the final analysis, establish to our satisfaction that such a juridical advantage would in fact be lost simply because there was no clear evidence that the key witnesses would in fact be non-compellable pursuant to German law. What *was* clear was that these witnesses *would* be compellable under *Singapore* law. However, this would relate more to the question of connecting factors under Stage One – which we have found in favour of the appellants not only in so far as this factor is concerned but with regard to the issue of connecting factors generally. On a more general level, because the respective burdens of proof with regard to Stage One and Stage Two are different, the court should be alert to situations of overlap between these two stages (*cf* Briggs ([79] *supra*) at 587–589).

Conclusion

93 Taking all the relevant factors into account, we are of the view that the appellants' action in the Singapore courts against the respondent ought *not* to be stayed. The connecting factors clearly point to Singapore as being the appropriate forum for the hearing of the substantive issues concerned. It is also clear that Singapore is the most natural and appropriate forum to hear the claims in tort. The issue of choice of law appears, as we have noted, to be neutral and, although there is a

risk of conflicting decisions by the Singapore and German courts, this factor does not weigh decisively in the respondent's favour, having regard to the other factors.

94 In the circumstances, therefore, we allow the appeal with costs, with the usual consequential orders to follow.