Murakami Takako (executrix of the estate of Takashi Murakami Suroso, deceased) v Wiryadi Louise Maria and Others
[2008] SGCA 44

Case Number : CA 59/2008

Decision Date : 12 November 2008

Tribunal/Court : Court of Appeal

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

Counsel Name(s) : Devinder Rai and Subramanian A Pillai (Acies Law Corporation) for the appellant; Andre Yeap SC, Adrian Wong and Darren Dominic Chan (Rajah & Tann LLP) for the respondents

Parties : Murakami Takako (executrix of the estate of Takashi Murakami Suroso, deceased) — Wiryadi Louise Maria; Ryuji Murakami; Bahari Sjamsjur; Ryuzo Murakami

Civil Procedure – Jurisdiction – Immovable properties situated abroad – Claim in equity – Whether Singapore court had jurisdiction

Conflict of Laws – Choice of jurisdiction – Forum non conveniens – Claim that immovable properties situated abroad held on trust – Whether Singapore court appropriate forum

12 November 2008 Judgment reserved.

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

Introduction

1 This is an appeal against the decision of the High Court judge ("the Judge") in which he disallowed, in part, the appellant's application to amend her statement of claim (see *Murakami Takako v Wiryadi Louis Maria* [2008] 3 SLR 198 ("the GD")). These proceedings are yet another chapter in the long history of litigation between the parties, the background of which we have previously set out in *Murakami Takako v Wiryadi Louise Maria* [2007] 4 SLR 565 ("*Murakami Takako*") at [3]–[5].

2 In these proceedings, the appellant, acting on behalf of the estate of her late father, Takashi Murakami Suroso ("the Testator"), applied to include certain amendments which would expand her claim to include the following:

(a) moneys contained in two bank accounts with Westpac Bank in Australia ("the moneys in the Australian bank accounts");

(b) five immovable properties and sale proceeds from three other immovable properties situated in Australia; and

(c) four immovable properties and sale proceeds from one other immovable property situated in Indonesia.

3 The Judge allowed only the amendments pertaining to the moneys in the Australian bank accounts. He held that the court had no jurisdiction over the claims to the specified foreign immovable properties ("the foreign immovable properties") and the sale proceeds from the other specified foreign immovable properties ("the other foreign properties"), and that, even if the court had jurisdiction, he would have declined to exercise it on the ground of *forum non conveniens*.

The issues on appeal

4 The respondents have not appealed against the decision of the Judge to allow the amendments pertaining to the moneys in the Australian bank accounts and their counsel has confirmed that they are content to rest with that decision. Therefore, the issues that arise for our consideration pertain only to whether the Judge rightly disallowed the amendments with regard to the foreign immovable properties and the sale proceeds from the other foreign properties.

5 The Judge held that the appellant's claims to the foreign immovable properties and the sale proceeds from the other foreign properties ("the Claims") were caught by the rule in *The British South Africa Company v The Companhia de Moçambique* [1893] AC 602 ("the *Moçambique* rule"), the effect of which is that the court has no jurisdiction to determine the title to, or the right to possession of, any immovable property situated outside the forum. The Judge considered one of the main exceptions to the *Moçambique* rule, *viz*, that jurisdiction could be assumed where the claim was in equity ("the personal equities exception"), and held that it did not apply on the facts of the present case.

6 In the words of a leading expert in the field (see Adrian Briggs, *Civil Jurisdiction and Judgments* (LLP, 4th Ed, 2005) at para 4.06), the *Moçambique* rule:

> ... reflects the practical fact that only at the *situs* of the land can there be an effective determination of title. Even if an English court [in these proceedings, a Singapore court] were to hear the case, and were to choose and apply the law which a court at the *situs* would itself have applied, it is probable that its judgment will be ignored at the *situs* as one coming from a court with no jurisdiction to adjudicate on the issue. Acceptance of this fact is the pragmatic reason why the court has no jurisdiction to try questions of disputed title to foreign land. And because the issue is one where the court has no jurisdiction over the subject-matter of the claim, the purported submission of the defendant to the jurisdiction of the court is irrelevant: what the court lacks is subject-matter jurisdiction, not personal jurisdiction.
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> …
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> [One] … exception [to the *Moçambique* rule] is ancient and equitable in origin. According to the principle laid down in *Penn* v. *Lord Baltimore* [(1750) 1 Ves Sen 444; 27 ER 1132], though a court may have no jurisdiction to try a question of title to the land, this does not affect its jurisdiction to adjudicate on and enforce a contract, or fiduciary or other equitable obligation, between and binding on the parties.

7 Although a vigorous assault was made on the *Moçambique* rule in the House of Lords decision of *Hesperides Hotels Ltd v Muftizade* [1979] AC 508, the rule (as well as its exceptions, including the personal equities exception) was ultimately affirmed in that case (notwithstanding the court's acknowledgment of the various critiques of the rule itself). Indeed, Lord Wilberforce was of the view that the nature of the *Moçambique* rule was such that any possible reform would need to be effected via legislation instead of judicial decision (see *id* at 537).

8 It is important to note – particularly in the context of the present proceedings and for reasons that will become apparent in the course of this judgment – that the *Moçambique* rule is one of *subject-matter jurisdiction*.

9 It is equally important to note that the *Moçambique* rule and the personal equities exception are part of Singapore law (see the decision of this court in *Eng Liat Kiang v Eng Bak Hern* [1995] 3 SLR 97 ("*Eng Liat Kiang*") at 100–103, [11]–[19], where the *Moçambique* rule was assumed

to be (as also noted in the preceding paragraph) one relating to *jurisdiction*). The court, therefore, generally has no jurisdiction over claims to foreign immovable properties except for, *inter alia*, claims in equity with respect to equitable obligations. In this case, the Claims lie in equity; they are trust claims. It follows that the personal equities exception *prima facie* applies and the court has jurisdiction over the Claims. The crux of this appeal is therefore twofold, namely:

(a) whether the Judge correctly found that the court did not have jurisdiction over the Claims; and

(b) if the court indeed has jurisdiction, whether the Judge rightly declined to exercise it on the ground of *forum non conveniens*.

10 In addressing these issues, the court's jurisdiction over the foreign immovable properties and the sale proceeds from the other foreign properties will be considered together. We do not agree with counsel for the appellant that the claims to the sale proceeds from the other foreign properties are no different from the claim relating to the moneys in the Australian bank accounts. This argument ignores the different legal bases of the respective claims.

11 The basis of the appellant's claim to the moneys in the Australian bank accounts is the assertion that those were funds provided by the Testator. On the other hand, the success of the claims to the sale proceeds from the other foreign properties rests on the appellant demonstrating the Testator's interest, if any, in the other foreign properties before they were sold. This is because any interest which the Testator had in the said sale proceeds would have flowed from an interest in the other foreign properties. Therefore, in adjudicating on the claims to the sale proceeds from the other foreign properties, the court would necessarily have to consider the Testator's interest in those properties. This, in turn, raises the question of jurisdiction over those properties. We will therefore deal with the foreign immovable properties and the sale proceeds from the other foreign properties together.

The requirements for the assumption of equitable jurisdiction

12 The Judge held that the court could not assume equitable jurisdiction for two reasons. First, the dispute was not sufficiently connected to the forum so as to warrant equity's assistance. Second, the Judge commented, by way of *obiter dicta*, that it was also arguable that the appellant's equity had already been extinguished by the *lex situs*. We will consider these reasons in turn.

Is a sufficient connection between the dispute and the forum a prerequisite to the assumption of equitable jurisdiction?

13 In support of the proposition that a sufficient connection between the forum and the dispute was required before the court could assume equitable jurisdiction, the Judge relied (see the GD at [24]) on an extract from R W White's article, "Equitable Obligations in Private International Law: The Choice of Law" (1986) 11 Syd LR 92 ("White's article") at 106, which was cited at para 1.18 of T M Yeo, *Choice of Law for Equitable Doctrines* (Oxford University Press, 2004) ("Yeo's book"), the leading work in the field. The above extract from White's article reads as follows:

> A defendant could not reasonably be expected to conform to the principles of English equity if his connection with England were as tenuous as mere presence at the time of service. It seems that instead of applying choice of law rules to a dispute the Court insisted that there be a sufficient connection between the parties or the cause of action and England.

1 4 This short extract from White's article does, at first blush, appear to suggest that, in England, the courts of equity would only assume jurisdiction where the dispute was sufficiently connected to the forum. With respect, however, this extract must be read in the context of White's article as a whole. When so read, it becomes clear that the learned author was referring in the extract set out in the preceding paragraph to the strict jurisdictional rules of the Court of Chancery which held sway in England *prior to* 1873. White sought to explain how these old jurisdictional rules also functioned as a *proxy* for choice of law analysis in the past. Put simply, the net result was a *conflation* of the rules of jurisdiction on the one hand and those relating to the choice of law on the other. The main issue before us in the present appeal is whether or not the old jurisdictional rules just referred to *continue to apply today.* The related issue as to whether or not there ought to be a conflation of jurisdictional rules and choice of law rules will (as we shall see) figure prominently when we consider the case law that was relied upon by the Judge.

15 In so far as the former issue mentioned at the end of the preceding paragraph is concerned, White recognised – correctly, in our view – that, with the enactment of the Judicature Act 1873 (c 66) (UK) (as well as subsequent developments), the strict jurisdictional rules applied by the Court of Chancery, which required a sufficient connection between the dispute and the forum, were *abandoned*, there having been a fusion of the administration of justice by both the courts of common law and the Court of Chancery. The learned author explains this (very significant) development as follows (see White's article ([13] *supra*) at 104–105):

> ... The concept of jurisdiction applicable in the Court of Chancery was not based on mere presence and service, but upon a sufficient connection being shown between the dispute and the forum. That connection existed if the defendant were resident or domiciled in England, the cause of action arose there, or the subject matter of the dispute was situated there.
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> The Court would not adjudicate upon foreign disputes not so connected with England. It was a natural refinement of this concept of jurisdiction that if it were inappropriate to decide the case in England and there was a competent tribunal to decide it in the natural foreign forum, the requisites of jurisdiction would be held to be lacking even though there was a connection with England (for example [the] defendant's residence in England) which in other cases would suffice to found jurisdiction in the Court of Chancery. The reluctance to deal with foreign disputes produced in *Doss v. Secretary of State for India* [(1874–75) LR 19 Eq 509] a liberal doctrine of *forum conveniens* which was part of the concept of jurisdiction and which did not depend on a distinction between the existence of jurisdiction and the discretion to exercise it. *On the passing of the Judicature Act 1873 the principles on which the Court of Chancery and the Courts of Law exercised jurisdiction were different. The Judicature Act 1873 did not itself resolve this difference, but it would have been manifestly inconvenient if the English Court had exercised jurisdiction on principles which varied according to whether the cause of action was legal or equitable. The problem was resolved in favour of the common law principles without discussion.*
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> …
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> *Since the Judicature Act 1873 it has been uniformly held that mere presence suffices to found jurisdiction. None of the English cases has concerned an equitable cause of action. Nonetheless they have been decided in the belief that the principle of jurisdiction based on mere presence is a fundamental rule that applies to the entire jurisdiction of the English High Court.* ...
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> [emphasis added]

16 Therefore, in England, *post*-1873, the jurisdiction of the courts of common law and that of

the courts of equity were placed on an equal basis. Presence, submission or service of a writ or other originating process out of jurisdiction in accordance with the prevailing civil procedure rules was thenceforth sufficient for the courts to assume jurisdiction. *There was no longer any requirement that there had to be a sufficient connection between the dispute and the forum before the court could assume equitable as well as common law jurisdiction.* This is also the position in Singapore today (see s 16 of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) ("SCJA")).

17 Once the court assumes equitable jurisdiction on any of the bases set out in s 16 of the SCJA, it can act *in personam* against the defendant. The court can consider the personal equities exception and would (provided the exception is established on the facts before it) be free to issue an order which may indirectly affect foreign land. As has been observed in a leading textbook (see Sir Peter North & J J Fawcett, *Cheshire and North's Private International Law* (LexisNexis UK, 13th Ed, 1999) at p 377):

> The primary essential is that the defendant should be subject to the general jurisdiction of the court. This jurisdiction, as we have seen, is founded on his presence in England, but as regards the power to pronounce a decree in personam against him it is equally well founded by service of a claim form under Order 11 [of the Rules of the Supreme Court (UK)]. Once the court is thus empowered to take cognizance of the matter, the doctrine that equity acts in personam may be freely and effectively applied. A decree may be issued which, though personal in form, will indirectly affect land abroad.

18 Hence, with respect, the Judge was wrong to require that a sufficient connection between the dispute and the forum be established before equitable jurisdiction could be assumed by the court. This represented the position taken by the Court of Chancery *prior to* 1873, which has long been *abandoned* even in England itself and which certainly does not represent the position in Singapore today.

19 We should also deal with a related point which was referred to briefly above (at [14]) as this will (as we shall see) aid us in assessing the case law that was relied upon by the Judge in arriving at the conclusion that a sufficient connection between the dispute and the forum was required before equitable jurisdiction could be assumed by the court. This point is that the Court of Chancery not only assumed jurisdiction according to a strict rule prior to 1873, but also did so (as White perceptively argues) as the result of a reluctance to apply *choice of law* rules to the dispute at hand (see White's article ([13] *supra*) at 106 and the extracts from Yeo's book ([13] *supra*) set out below). With respect, the Court of Chancery's stance no longer represents the modern approach under which issues of jurisdiction and issues of choice of law are treated by the courts as being conceptually as well as practically distinct. Indeed, as just alluded to, the failure to distinguish between these two distinct issues gives us a clue as to why the case law (in particular, the English Court of Appeal decision of *Lightning v Lightning Electrical Contractors Limited* [1998] EWHC Admin 431 ("*Lightning*")) *appeared* to support the Judge's view that there had to be a sufficient connection between the dispute and the forum before equitable jurisdiction could be assumed by the court. Before we turn our attention briefly to such case law, the following pertinent observation by Prof Yeo should be noted (see Yeo's book at para 1.19):

> While there may have been a historical link between jurisdiction and choice of law in the Chancery court, *in the modern context there is insufficient justification for linking jurisdiction and choice of law for equitable doctrines* … [emphasis added]

The learned author proceeded to give six persuasive reasons for the above observation, including the following (*id* at paras 1.23 and 1.25):

1.23 ... [T]he historical context is important. In tracing the historical development of English conflict of laws, Sack [A N Sack, "Conflict of Laws in the History of the English Law" in *Law: A Century of Progress 1835–1935* (A Reppy ed) (Oxford University Press, 1937) vol 3 at p 342] noted the widespread use of jurisdiction as an early technique to limit the application of the law of the forum, *before* choice of law rules were developed. The *underdeveloped* rules for choice of law in respect of equitable doctrines must be borne in mind when considering the practice of the eighteenth-century courts.

…

1.25 ... [C]hanges of jurisdiction rules brought about by the Judicature Act 1873 put the jurisdiction of the courts of common law and equity *on an equal basis*. The broad bases upon which jurisdiction can be assumed today make application of the law of the forum even more unreasonable. Any slender links that existed between the Chancery court's exercise of jurisdiction and the question of choice of law have *now been broken*.

[emphasis added]

In this regard, we must respectfully disagree with the English High Court decision of *R Griggs Group Ltd v Evans* [2005] Ch 153 in so far as it suggests (especially at [110]) that the personal equities exception to the *Moçambique* rule is one which relates to choice of law instead of jurisdiction, although it might be argued that the learned judge in that case was involved *only* in a choice of law analysis (as opposed to the issue of jurisdiction).

20 Turning, now, to *Lightning*, the Judge, with respect, relied wrongly on this case as support for his view that there had to be a sufficient connection between the dispute and the forum before the court could assume equitable jurisdiction. In *Lightning*, the court assumed equitable jurisdiction and applied English law to determine a trust claim to Scottish property. While the facts of that case disclosed, in *fact*, a close connection between the dispute and the forum, such a connection went only to the choice of law analysis and *not* to the issue of jurisdiction. The crucial passage in the judgment of Peter Gibson LJ (with whom Henry and Millett LJJ agreed) occurs at [23], and reads as follows:

Mr Lord [counsel for the defendant] said that these authorities [*ie*, the authorities considered at [18]–[22] of *Lightning*] go only to the question of jurisdiction and do not go to the question of the applicable law. But, for my part, whilst that may be correct, it seems to me implicit that the English court not unnaturally regarded English law as applicable to the relationship between the parties before it in the absence of any event governed by the lex situs destructive of the equitable interest being asserted.

21 We can, in fact, do no better than to adopt Prof Yeo's perceptive observations on *Lightning* in general and the observations of Peter Gibson LJ (*id* at [23]) in particular, as follows (see Yeo's book ([13] *supra*) at para 1.17):

Moreover, just because a court applied English law ***after assuming jurisdiction*** does not mean that it follows as a matter of law that English law was applicable. In *Lightning v Lightning Electrical Contractors Ltd*, Peter Gibson LJ, said of the jurisdiction cases:

[Counsel] said that these authorities go only to the question of jurisdiction and do not go to the question of the applicable law. But, … whilst that may be correct, it seems to me implicit that *the English court not unnaturally regarded English law as applicable to the relationship*

between the parties before it in the absence of any event governed by the *lex situs* destructive of the equitable interest being asserted. (Emphasis added.)

The emphasized words show ***a separate choice of law analysis*** focusing on the law governing the relationship of the parties, which usually happened to be English law.

[emphasis added in bold italics]

Indeed, this interpretation of *Lightning* underlies the analysis by another writer who argues that equitable obligations should not automatically be governed by the *lex fori* as such (see generally Adeline Chong, "The Common Law Choice of Law Rules for Resulting and Constructive Trusts" (2005) 54 ICLQ 855 at 863–866).

22 Hence, the close connection between the dispute and the forum went only to the analysis of choice of law, and not jurisdiction, in *Lightning*. The same is true of *Webb v Webb* [1991] 1 WLR 1410, to which the Judge also referred. Consequently, the lack of a sufficient connection between the dispute and the forum is not, in our view, a bar to the assumption of equitable *jurisdiction* by the court.

Has the appellant's equity been extinguished by the lex situs?

23 As we mentioned earlier (at [12] above), the Judge also observed, by way of *obiter dicta*, that it was arguable that the appellant's equity had already been extinguished by the *lex situs*. He was of the view that it was common ground between the parties that the communal property doctrine in Indonesian law was subject to the exception that spouses had full entitlement to properties acquired as gifts. The Judge thus observed that, if the first respondent had received the foreign properties as gifts, she would be fully entitled to those properties under Indonesian law.

24 With respect, we are unable to agree with these observations. Even if the *lex situs* did apply for the purposes of determining whether the appellant's equity had been extinguished (which issue we need not decide), no evidence of Indonesian law was adduced in the court below to support the Judge's finding. The appellant also vehemently denied that it was common ground between the parties that, under Indonesian law, spouses were fully entitled to properties acquired as gifts. As such, although we recognise that the Judge's comments were strictly *obiter*, we find that there simply is no basis on the evidence to support these comments.

The issue of *forum non conveniens*

25 The next issue that arises for our consideration is whether, although our courts do have jurisdiction over the Claims, we ought nevertheless to decline to exercise jurisdiction on the basis of *forum non conveniens*. We have previously stated that the relevant test in this regard is to determine whether there is a clearly or distinctly more appropriate forum than Singapore which meets the ends of justice, having regard to the interests of the parties (see the decision of this court in *Murakami Takako* ([1] *supra*) at [49]).

26 It has been firmly established that the principles laid down in *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460 ("*Spiliada*") apply (see, for example, the decisions of this court in *Brinkerhoff Maritime Drilling Corp v PT Airfast Services Indonesia* [1992] 2 SLR 776, *Oriental Insurance Co Ltd v Bhavani Stores Pte Ltd* [1998] 1 SLR 253, *PT Hutan Domas Raya v Yue Xiu Enterprises (Holdings) Limited* [2001] 2 SLR 49, *Rickshaw Investments Ltd v Nicolai Baron von Uexkull* [2007] 1 SLR 377 ("*Rickshaw*") at [12] and *CIMB Bank Bhd v Dresdner Kleinwort Ltd* [2008] SGCA 36

("*CIMB*") at [25]). The principles set out in *Spiliada* were recently summarised in *CIMB* (at [26]) as follows:

> The gist of these principles is that, under the doctrine of *forum non conveniens*, a stay will only be granted where the court is satisfied that there is some other available and more appropriate forum for the trial of the action. The burden of establishing this rests on the defendant and it is not enough just to show that Singapore is not the natural or appropriate forum. The defendant must also establish that there is another available forum which is clearly or distinctly more appropriate than Singapore. The natural forum is one with which the action has the most real and substantial connection. In this regard, the factors which the court will take into consideration include not only factors affecting convenience or expense (such as the availability of witnesses) but also other factors such as the law governing the transaction and the places where the parties respectively reside or carry on business. If the court concludes, at this stage of the inquiry ("stage one of the *Spiliada* test"), 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, at this stage, it concludes 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. In this connection, the court will consider all the circumstances of the case. For this second stage [of the] inquiry ("stage two of the *Spiliada* test["]), the legal burden is on the plaintiff to establish the existence of those special circumstances.

27 At the first stage of the analysis delineated in the above passage, the relevant factors are, *inter alia*, the general connecting factors and the choice of law (see *Rickshaw* at [15]). In the court below, the Judge was of the view that, as there was (in his view) a requirement that there be a sufficient connection between the dispute and the forum before the court could assume equitable jurisdiction, the *lex fori* (here, Singapore law) ought to apply – notwithstanding the fact that the decision of this court in *Eng Liat Kiang* ([9] *supra*) appeared to be authority to the contrary (see the GD at [39]–[40]). He nevertheless proceeded to hold that, in the light of the decision of this court in *Rickshaw*, the application of the *lex fori* in the context of the present proceedings would be unsuitable (see the GD at [41]).

28 We have, in fact, held above (at [18] and [22]) that there need not be a sufficient connection between the dispute and the forum before the court can assume equitable jurisdiction. In any event, we have also held above (at [19]) that the issue of jurisdiction is separate and distinct from that relating to the choice of law. More importantly, as Prof Yeo has very persuasively argued, the court can still proceed to engage in a choice of law analysis and apply a law other than the *lex fori* even after it has assumed equitable jurisdiction. We have previously endorsed Prof Yeo's view in *Rickshaw*, as follows (*id* at [75]–[76]):

> 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*.
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> [emphasis in original]

We also noted above (at [27]) that the Judge had, in any event, followed the above approach in *Rickshaw*.

29 In these proceedings, the viability or otherwise of the Claims ultimately rests on whether or not the Testator had an interest in the foreign immovable properties as well as the other foreign properties (collectively referred to as "the disputed foreign properties"), and this falls to be determined by the Testator's *lex domicilii*, which was Indonesian law. The question that arises for our consideration then is whether, given that the *lex causae* is Indonesian law, Indonesia is a clearly or distinctly more appropriate forum than Singapore for the adjudication of the Claims.

30 The appellant's claim that the Testator had an interest in the entire share of the disputed foreign properties requires the court to consider whether, under Indonesian law, those properties were excepted from being regarded as common marital assets such that the Testator had full entitlement to them. The matter is further complicated by the first respondent's counter-allegation that, on the contrary, she was fully entitled to the disputed foreign properties as gifts. These are issues which require a careful consideration of the scope of the communal property doctrine in Indonesian law. In addition, the appellant has also alleged a failure on the part of the first respondent to disclose to the Indonesian courts the disputed foreign properties as marital assets. The effect of such non-disclosure may or may not bring with it certain legal consequences under Indonesian law. In sum, the complexities raised by the Claims are, in our view, better dealt with by the Indonesian courts.

31 There are also other general connecting factors pointing to Indonesia as the clearly or distinctly more appropriate forum. Both the Testator and the first respondent were resident and married in Indonesia, and the present dispute arose out of ancillary proceedings in a divorce action commenced there as well. Further, the appellant had previously brought a claim relating to those of the disputed foreign properties situated in Indonesia ("the Indonesian properties") before the South Jakarta District Court. Her prior claim was dismissed merely on the ground of procedural defects (see *Takako Murakami v Louise Maria Wiryadi* Judgment No 924/Pdt.G/2006/PN.Jak.Sel. (3 October 2007) (unreported)). In particular, she failed to include, as parties to the action, the third parties in whose names the Indonesian properties were registered. Since the appellant's claim to the Indonesian properties has yet to be adjudicated on its merits, the appellant is not precluded from bringing another claim in Indonesia to those properties.

32 In so far as those of the disputed foreign properties situated in Australia ("the Australian properties") are concerned, the appellant also previously brought claims in the Supreme Court of New South Wales. Gzell J, in *Murakami v Wiryadi* [2006] NSWSC 1354 ("*Murakami*"), stayed those proceedings on the ground of *forum non conveniens*. The learned judge applied the Australian

approach to *forum non conveniens* as set out in the Australian High Court decisions of *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197 ("*Oceanic Sun Line*"), *Voth v Manildra Flour Mills Proprietary Limited* (1990) 171 CLR 538 ("*Voth*"), *Henry v Henry* (1996) 185 CLR 571 and *CSR Limited v Cigna Insurance Australia Limited* (1997) 189 CLR 345 to the effect that the court may stay or dismiss proceedings if, having regard to the circumstances of the case and the availability of the foreign tribunal, the forum is clearly inappropriate for the determination of the dispute (reference may similarly be made to the (also) Australian High Court decision of *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491).

33 Although the test applied in the Australian context to the issue of *forum non conveniens* is quite different from that set out in *Spiliada* ([26] *supra*), there would (on most occasions) be no difference in the actual result arrived at by the court (see, for example, *Oceanic Sun Line* at 251–252 (*per* Deane J) and 265–266 (*per* Gaudron J), *Voth* at 558 (*per* Mason CJ and Deane, Dawson and Gaudron JJ), *Eng Liat Kiang* ([9] *supra*) at 104, [23] and Peter Brereton, "*Forum Non Conveniens* in Australia: A Case Note on *Voth* v. *Manildra Flour Mills*" (1991) 40 ICLQ 895 at 897–898; *cf*, however, *Civil Jurisdiction and Judgments* ([6] *supra*) at para 4.20 (reference may also be made to Richard Garnett, "Stay of Proceedings in Australia: A 'Clearly Inappropriate' Test?" (1999) 23 Melb Univ L Rev 30)). That having been said, it is important to guard against simply equating the two tests because (if nothing else) their respective points of emphasis are quite different (see, for example, *Voth* at 558 *per* Mason CJ and Deane, Dawson and Gaudron JJ; the learned judges, however, also observed that, in applying the test under Australian law, "the discussion by Lord Goff in *Spiliada* of relevant 'connecting factors' and 'a legitimate personal or juridical advantage' provide[d] valuable assistance" (*id* at 564–565) – observations which were also cited and applied by Gzell J in *Murakami* at [39]).

34 While we have previously rejected the Australian approach to *forum non conveniens* in favour of the test in *Spiliada*, which calls for a determination of whether there is another forum which is clearly or distinctly more appropriate than Singapore (see, for example, the decision of this court in *Eng Liat Kiang* at 105, [26]), Gzell J's observations in *Murakami* ([32] *supra*) are nevertheless helpful. This is because the factors which the learned judge considered would apply with equal force in the context of the doctrine of *forum non conveniens* as set out in *Spiliada*. In particular, Gzell J noted that (see *Murakami* at [45]):

> The connecting factors ... do not favour New South Wales against Indonesia. [The appellant] is not resident in New South Wales and [the first respondent] and [the fourth respondent] do not live in Australia. The events [which are] the subject of complaint are just as much centred in Indonesia where the non-disclosure of the New South Wales assets is alleged to have occurred as in New South Wales where the assets were acquired.

The learned judge also noted (*id* at [46]), just as we have (see [29] above), that the *lex causae* was Indonesian law. He further commented (at [47] of *Murakami*) that:

> If matters are to be determined in the New South Wales court expert evidence will be required. If the issues are to be determined in the Indonesian courts there is no need for experts.

Indeed, Gzell J was of the view (*id* at [52]) that "it [was] in the interests of the parties that a proper resolution of the issues be made in proceedings to be commenced in Indonesia".

35 The factors and the arguments considered by Gzell J in the preceding paragraph, although analysed in the context of the Australian approach to *forum non conveniens*, apply equally in the context of the approach of this court as embodied in *Spiliada* ([26] *supra*). Indeed, there is a considerable overlap between the factors and the arguments considered by Gzell J in *Murakami* and

those discussed above in the context of the present proceedings. There is, in fact, good reason to believe that this is one instance where there would be no difference in result regardless of whether the Australian approach or the approach in *Spiliada* is adopted (see also above at [33]).

36 On the point of enforceability of judgments, we also note that, if indeed the appellant obtains a favourable judgment in Indonesia, the judgment would undoubtedly be enforceable with regard to the Indonesian properties. As for the Australian properties, an Indonesian judgment is also likely to be enforceable in Australia, given Gzell J's recognition that it is appropriate for the Indonesian courts to address the appellant's claim. These are important practical considerations which we cannot ignore.

37 In summary, the general connecting factors and the choice of law considerations point to Indonesia as constituting the clearly or distinctly more appropriate forum (as compared to Singapore) for the trial of the issues concerned. For that reason, although our courts have jurisdiction over the Claims, we should not exercise jurisdiction.

Conclusion

38 Based, therefore, on the conclusion which we have arrived at with regard to the issue of *forum non conveniens*, we dismiss the appeal with costs and affirm the Judge's decision to disallow the appellant's application to include the Claims in her statement of claim. The usual consequential orders are to follow.