Pacific Recreation Pte Ltd v S Y Technology Inc and Another Appeal
[2008] SGCA 1

Case Number : CA 136/2006, 137/2006

Decision Date : 16 January 2008

Tribunal/Court : Court of Appeal

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

Counsel Name(s) : Chia Ho Choon and Leow Yuan An Clara Vivien (KhattarWong) for the appellants; Foo Maw Shen and Ong Wei Chin (Yeo Wee Kiong Law Corporation) for the respondent

Parties : Pacific Recreation Pte Ltd — S Y Technology Inc

Companies – Winding up – Determining existence of substantial and bona fide dispute – Whether court could evaluate evidence – Applicable standard

Conflict of Laws – Choice of law – Contract – Deed without express choice of law clause – Whether there was implied choice of Singapore or Chinese law – Factors pointing away from implied choice of Chinese law but not towards Singapore law – Which law having closest and most real connection with contract – Applicable principles

Courts and Jurisdiction – Judges – Natural justice – Court deciding case on ground not raised by parties – Whether there was breach of audi alteram partem principle

Credit and Security – Guarantees and indemnities – Contracts of indemnity – Deed of indemnity as security for financial assistance under void contract – Whether indemnity's enforceability independent of underlying contract's validity

Evidence – Admissibility of evidence – Foreign law – Expert opinion – Requirements for expert report – Duties of foreign law expert – Duties of solicitor engaging foreign law expert – Order 40A rr 2, 3 Rules of Court (Cap 322, R 5, 2006 Rev Ed)

16 January 2008

V K Rajah JA (delivering the grounds of decision of the court):

1 S Y Technology Inc, the respondent in the present appeals ("the respondent"), applied to wind up Pacific Associates Pte Ltd ("PAPL") and Pacific Recreation Pte Ltd ("PRPL") in Companies Winding Up Nos 69 and 68 of 2006 respectively. These applications were granted by the court below: see *S Y Technology Inc v Pacific Recreation Pte Ltd* [2007] 2 SLR 756 ("the GD"). Both PAPL and PRPL appealed. We dismissed both appeals and now give our reasons. For the purposes of these grounds of decision, PAPL and PRPL will be collectively known as "the appellants".

Factual background

2 The appellants' managing director is Mr Lee Chong Ming ("Mr Lee"), who is currently resident in Canada. Mr Lee and the appellants owned shares in Laien Holdings Pte Ltd ("Laien") when it was first incorporated. Laien is the parent company of Shanghai Pacific Club Co Ltd ("Shanghai Pacific"), a company incorporated in the People's Republic of China.

3 Shanghai Pacific required additional financing for a project to develop a club in Shanghai ("the project"). Mr Lee approached Mr John Shih, the director and sole shareholder of the respondent, an

American company, and eventually obtained the required financial assistance for the project from the respondent.

4 On 21 January 2003, the respondent, Shanghai Pacific and Mr Lee entered into an agreement, drafted in Chinese, which spelt out the financing arrangements ("the 2003 contract"). The 2003 contract stipulated, *inter alia*, that:

(a) To facilitate the granting of a loan by the Shanghai branch of the Industrial and Commercial Bank of China ("ICBC Shanghai") in Chinese renminbi to Shanghai Pacific for the purpose of completing the project, the respondent would place US$6m with US Bank National Association ("the US Bank") and would procure standby letters of credit for that amount from the US Bank to ICBC Shanghai as security for the loan.

(b) To guarantee Shanghai Pacific's repayment of the loan from ICBC Shanghai, Mr Lee would pledge a total of 20 million shares in Laien ("the pledged shares") to the respondent. These shares were held by Mr Lee and the appellants in various proportions. The respondent was entitled to realise the rights under the pledged shares 30 days after Shanghai Pacific breached its repayment obligations.

(c) Any dispute arising from the 2003 contract was to be resolved by the parties through consultation, but, if such consultation failed, the dispute was to be referred to the China International Economic and Trade Arbitration Commission ("CIETAC") for resolution through arbitration.

5 Five supplementary agreements in Chinese ("the supplementary agreements") were subsequently entered into between the same three parties (*ie*, the respondent, Shanghai Pacific and Mr Lee). One of the supplementary agreements, dated 10 September 2003 ("the September 2003 supplementary agreement"), varied the 2003 contract to allow the respondent to provide financing by way of two standby letters of credit for the sums of US$4m and US$1m respectively ("the standby letters of credit"), in addition to a cash loan of US$1m, which was to be paid into an escrow account. It bears emphasis that the appellants were not parties to either the 2003 contract or the September 2003 supplementary agreement.

6 As security for the respondent's assistance, Mr Lee issued a letter of indemnity to the respondent dated 25 February 2003 stating, *inter alia*, that the respondent would be repaid prior to any other creditor of Laien. Later, a document entitled "DEED OF INDEMNITY" dated 22 September 2003 ("the Deed") was executed by the appellants and Mr Lee in favour of the respondent. The material terms of the Deed, which was in English, were as follows:

In consideration of your arranging for the issue of the standby letters of credit, we hereby jointly and severally agree and undertake as follows:-

1. we shall irrevocably and unconditionally continue with the pledge of our entire interest in [Laien] comprising 20,000,000 shares, to you as security for the Standby Letters of Credit and hereby further agree that you may at any time register such shares in your name;

2. we shall at all times keep you fully and effectively indemnified and hold you harmless from and against any and all liabilities, claims, damages, costs, charges and expenses to which you may be exposed or which you may incur, suffer, sustain or for which you may render yourself legally liable as a consequence of or in connection with the Standby Letters of Credit and against all actions, suits, proceedings, claims, demands of any nature

whatsoever which may be taken, made or threatened against you or incurred or become payable by you or which may arise directly or indirectly by reason of any act, deed, matter or thing done or permitted or omitted to be done by you in connection with the Standby Letters of Credit and all other costs, charges and expenses in connection therewith, including legal costs on a full indemnity basis;

3. we shall indemnify you against any liability and reimburse you in full for all costs and expenses incurred by you in defending any proceedings, whether civil or criminal in connection with the Standby Letters of Credit and whether or not judgement is given in your favour;

4. we shall procure that [Shanghai Pacific] and [Laien] shall not discharge any liabilities to any creditors unless and until the loans in relation to which the Standby Letters of Credit have been issued have been fully repaid and the Standby Letters of Credit have been discharged and that such creditors of [Laien] and/or [Shanghai Pacific] shall not institute any legal proceedings to recover any debt owing by [Laien] or [Shanghai Pacific], as the case may be, to them; and

5. we shall procure that [Shanghai Pacific] and [Laien] shall not incur any additional liabilities unless and until the loans in relation to which the Standby Letters of Credit have been issued have been fully repaid and the Standby Letters of Credit have been discharged.

…

If and to the extent that any part or provision in this Letter of Indemnity is invalid, illegal or unenforceable, it shall not affect the validity, legality or enforceability of any other part or provision and this Letter of Indemnity shall be interpreted and construed to give it the fullest possible effect in law.

The Deed did not include a clause on the governing law.

7 Pursuant to the 2003 contract, through a memorandum of deposit and pledge dated 28 July 2003, Mr Lee and the appellants deposited the share certificates relating to the pledged shares with the respondent.

8 The loan of RMB7.85m from ICBC Shanghai to Shanghai Pacific was due and payable on 15 June 2004, and another loan of RMB30m was due and payable on 18 August 2004. Shanghai Pacific was unable to repay those loans. Consequently, on 25 June 2004 and 12 August 2004, ICBC Shanghai presented the US Bank with the requisite documents to draw down the US$1m and US$4m, respectively, due under the standby letters of credit. The respondent was then called upon to reimburse the US Bank the sum of US$5m. It complied with this request. This in turn led to the chain of events which culminated in the present proceedings.

9 On 24 April 2006, with a view to invoking s 254(2)(*a*) of the Companies Act (Cap 50, 2006 Rev Ed), the respondent's solicitors sent a letter of demand to the appellants pursuant to the Deed demanding from each of them payment of the total sum of US$4,623,999.97. This sum was the net amount paid by the respondent to the US Bank after taking into account the sum of US$404,435.57 which ICBC Shanghai returned, as well as the bank charges incurred by the respondent in connection with the financing arrangement.

10 The appellants failed to comply with the letter of demand, and on 9 June 2006 the respondent

initiated winding-up proceedings against the appellants. In the meantime, arbitration proceedings at CIETAC between the parties to the 2003 contract ("the CIETAC arbitration") were initiated by Mr Lee on 15 May 2006. In his request for arbitration, Mr Lee asserted that the 2003 contract was not legally binding as it had not been registered in accordance with Art 40 of a Chinese statute entitled "Interim Measures on the Management of Foreign Debts", and the obligations imposed on him and the appellants in respect of that contract (*ie*, their obligations under the Deed) had therefore been discharged. It should be noted that this particular Chinese provision was enacted only in April 2005, well after the 2003 contract and the Deed had been entered into and after ICBC Shanghai's calls on the standby letters of credit had been settled in full.

11 CIETAC accepted the request for arbitration on 15 May 2006. The following day, the appellants' solicitors in Singapore informed the respondent's solicitors that since the outcome of the CIETAC arbitration would have an impact on the appellants' liability under the Deed, it was "premature and inappropriate" for the respondent to pursue its purported claim under the Deed until after the CIETAC arbitration had been resolved. The appellants' solicitors further stated that, in their view, the letter of demand dated 24 April 2006 was "premature and any petition for winding up based on such Demand [would] be irregular".

The decision below

12 The judge in the court below ("the learned judge") did not agree with the appellants that there was a substantial and *bona fide* dispute as to whether they were liable to pay the respondent the amount demanded. She ordered the immediate winding up of the appellants.

13 In particular, the learned judge found that:

(a) The appellants did not deny that ICBC Shanghai had called upon the standby letters of credit and had received payment thereunder. They did not deny that the respondent had been obliged to make payment to the US Bank of the amounts drawn down under those letters of credit. The appellants also could not deny that the Deed *prima facie* obliged them to indemnify the respondent in respect of the latter's payment to the US Bank. The dispute thus turned on whether the Deed was unenforceable (see [14] of the GD ([1] *supra*)).

(b) Contrary to the appellants' submissions, for the purposes of determining the enforceability of the Deed, the governing law of the Deed was not Chinese law, but US law. (The appellants had argued that under Chinese law, the 2003 contract was void; thus, the Deed, which was likewise governed by Chinese law, was invalid as it had been entered into pursuant to the 2003 contract.) The respondent's submission that Singapore law was the governing law was also rejected (see [17]–[21] of the GD).

(c) Since there was no evidence on the requirements of US law, US law ought to be presumed to be the same as Singapore law (see the GD at [21]). Under Singapore law, the Deed, as an indemnity, was a primary obligation and a creditor could still recover the relevant losses in the event of the principal transaction (*ie*, the 2003 contract) being defective (see the GD at [22]–[24]).

(d) The CIETAC arbitration was irrelevant to the appellants' obligations under the Deed. The parties to that arbitration were the parties to the 2003 contract and not the appellants. The latter would not be affected by the outcome of the CIETAC arbitration if the Deed was not subject to Chinese law (see the GD at [25]).

(e) Despite the fact that the respondent had become the registered owner of the pledged shares, this did not mean that the respondent had to immediately give credit for the value of those shares when issuing its letter of demand. The documents showed that there had been actually no change in the beneficial ownership of the pledged shares and the pledge had not been enforced (see the GD at [26]).

The appeal

14 The appellants argued that there was a substantial and *bona fide* dispute in relation to three issues:

(a) the governing law of the Deed;

(b) the validity of the Deed under Chinese law; and

(c) whether the respondent was obliged to give the appellants credit for the pledged shares which it had registered in its name.

On the issue of governing law, the appellants contended that the choice was between Chinese law and Singapore law. The learned judge, it was submitted, should not have held that US law, instead, was the governing law since neither party had argued that that system of law was the applicable law. It was further asserted that, given the complete absence of any evidence of US law, the learned judge should not have presumed US law to be the same as Singapore law. As for the validity of the Deed under Chinese law, the two parties produced expert legal opinions from Chinese solicitors who took diametrically opposing views. The appellants' experts were of the view that the Deed was valid while the respondent's experts took the opposite view. The appellants also emphasised that the validity of the 2003 contract, which formed the basis for the Deed, was the subject of the CIETAC arbitration.

15 The appellants submitted that the learned judge had erred in delving into the merits of the dispute and concluding that the above issues were not substantial and *bona fide* disputes, particularly in the light of the complex factual matrix and the fact that there was no cross-examination of witnesses.

The applicable principles in respect of a winding-up application

16 The appellants argued that the learned judge had wrongly applied the discretionary principles relevant to the granting of a winding-up order. Case law, they argued, had clearly established that a winding-up petition was not an appropriate means of enforcing a disputed debt, and that it would be an abuse of the process of the court to allow a creditor to wind up a company on the basis of a disputed debt. It was also submitted that a winding-up court was generally not in the best position to adjudicate on the merits of a commercial dispute without a proper ventilation of the evidential disputes through a trial. The appellants further stressed that a winding-up order was often the "death knell" for a company and was a "draconian order" to make. Thus, a court should proceed cautiously in deciding whether to grant a winding-up application.

Distinction between evaluating the evidence and deciding the merits of the dispute

17 We broadly agreed with the principles laid out by the appellants as summarised in the preceding paragraph. However, that is not to say that a company can stave off a winding-up application merely by alleging that there is a substantial and *bona fide* dispute over the debt claimed by the applicant-

creditor. It is up to the court to evaluate whatever evidence the company has raised and come to a conclusion on whether the alleged dispute exists. *Walter Woon on Company Law* (Tan Cheng Han gen ed) (Sweet & Maxwell Asia, 3rd Ed, 2005) correctly notes at para 17.43 that:

> The court may decide whether there is a good, substantial and reasonable dispute. Even where the entire debt is disputed, the court can allow evidence to be adduced in order for it to determine whether the dispute is *bona fide*.

18 The above statement of principle is premised on the decision in *Chip Yew Brick Works Sdn Bhd v Chang Heer Enterprise Sdn Bhd* [1988] 2 MLJ 447, where the Malaysian Supreme Court observed at 448–449:

> Even where the whole amount of debt claimed is disputed, the court can allow evidence to be adduced to enable it to consider whether or not there was a *bona fide* dispute and the court is competent to go into the evidence to consider that question for the purpose ultimately of determining whether it should exercise the [winding-up] discretion: *Re Welsh Brick Industries Ltd* [[1946] 2 All ER 197].

19 We also found the following passage from Andrew R Keay, *McPherson's Law of Company Liquidation* (Sweet & Maxwell, 2001) at para 3.67, p 122 helpful:

> Whether or not there is a dispute on substantial grounds is a matter to be decided in each case. The dispute envisaged is one where there is a dispute which involves to a substantial extent disputed questions of fact which demand *viva voce* evidence. Of course, there must be evidence adduced which supports the contention of the company that there is a substantial dispute. The courts will be alive to the situation where a company seeks to raise a cloud of objections to a petition in order to claim that a debt is disputed if the objections are not able to be determined on affidavit evidence and without cross-examination.

In the light of the above authorities, we were of the view that it was certainly open to the learned judge to examine the evidence before her in order to determine whether there was a substantial and *bona fide* dispute as to the debt claimed by the respondent.

20 At the same time, it must be emphasised that there is no obvious dividing line demarcating when a court has moved from merely asking itself whether a substantial and *bona fide* dispute exists to actually deciding the dispute itself. In *Brinds Ltd v Offshore Oil NL (No 3)* (1985) 10 ACLR 419 ("*Brinds*"), the Privy Council agreed (at 424) with the following observations of Gibbs J in *In Re QBS Pty Ltd* [1967] Qd R 218 at 225:

> It seems to me that in every case it becomes necessary for the court to exercise its discretion as to how far it will allow the question whether or not the dispute is *bona fide* to be explored. In some cases it may be very easy to decide this question on the petition and affidavits in reply. In other cases however it may be difficult to determine whether or not the dispute is *bona fide* without determining the merits of the dispute itself. In some such cases convenience may require that the court decide the question whether or not a debt exists, but in other such cases it may appear better to allow that question to be determined in other proceedings before the petition for winding up is heard.

Brinds was a case where the company resisting winding up argued that the debt claimed by the creditor was due not on demand, but only after 12 months' notice. Extensive cross-examination was conducted before the trial court. The judge concluded that there was no *bona fide* dispute and

granted the winding-up petition. This decision was upheld by the Full Court of the Supreme Court of Victoria, and the company subsequently appealed to the Privy Council. The Privy Council held that it was "almost inevitable" (*Brinds* at 425), given the nature of the dispute and the course which the proceedings took, that the trial judge should have determined the question of whether the debt was repayable on demand or on 12 months' notice. The Privy Council affirmed the reasoning of the Full Court that it would have been a wrongful exercise of discretion for the trial judge to have stayed or dismissed the winding-up petition when all the evidence needed to decide the question of the due date for payment was already before him.

21 The present case was one of those, like *Brinds*, where deciding whether or not a substantial and *bona fide* dispute existed involved a decision on the merits of the dispute itself. There was a difference, of course, in that in *Brinds*, such a situation was brought about by the extensive and exhaustive cross-examination before the trial judge. The Full Court had noted that counsel for the company could not point to any evidence or potential evidence pertaining to the repayment date of the debt which had not already been produced (see *Brinds* at 424). In the instant case, the only substantial question was whether the governing law of the Deed was Chinese law or Singapore law. This was simply a matter of construing the relevant documents which were before the learned judge. We did not see how any further evidence, apart from the documents themselves, would have assisted the court. It was, in all the circumstances, appropriate that the learned judge, having heard arguments from both sides on the applicable governing law, then proceeded to decide the issue.

22 If a factual situation similar to that in *Brinds* were to arise in Singapore, it would always be open to the court to order an examination of witnesses if the court considered that necessary to gain a better grasp of the issue(s) in contention. That said, such an examination was unnecessary in the present case. The learned judge was entirely justified in proceeding to decide the issue in the way which she did.

The standard of proof

23 With regard to the applicable standard for determining the existence of a substantial and *bona fide* dispute, it was our view that the applicable standard was no more than that for resisting a summary judgment application, *ie*, the debtor-company need only raise triable issues in order to obtain a stay or dismissal of the winding-up application. We agreed with the approach adopted by the High Court in *De Montfort University v Stanford Training Systems Pte Ltd* [2006] 1 SLR 218 ("*De Montfort University*"), where the petitioning creditor contended that even if leave to defend were granted in summary judgment proceedings, the judge hearing the winding-up petition could still revisit the issue of whether there was a substantial and *bona fide* dispute. This submission was based on *Re Welsh Brick Industries, Ltd* [1946] 2 All ER 197, where Lord Greene MR said at 198:

> I cannot accept the proposition that, merely because unconditional leave to defend is given, that of itself must be taken as establishing that there is a *bona fide* dispute or that there is some substantial ground of defence. The fact that such an order is made is no doubt a matter which the winding-up court will take into consideration and to which the winding-up court will in due course pay respect, but I cannot regard it as in any way precluding a winding-up judge from going into the matter himself on the evidence before him and considering whether or not the dispute is a *bona fide* dispute, or, putting it in another way, whether or not there is some substantial ground for defending the action.

24 Tay Yong Kwang J rightly rejected the petitioning creditor's argument in *De Montfort University*. He held at [28]:

With respect, I would not have taken the path indicated by Lord Greene MR above [in *Re Welsh Brick Industries, Ltd*] if the issue had arisen squarely before me. I prefer the view that once unconditional leave has been granted to a defendant and the order stands, either because the plaintiff decides not to appeal or because the order is affirmed on appeal, another forum should not revisit and reopen the same issues. If unconditional leave to defend has been given to a defendant in a claim on a debt, surely that means that there is a *bona fide* or a genuine dispute. Of course, it does not mean that the defendant will probably succeed in his defence at the trial of the action. It merely means that his defence is not a frivolous one or, in the words of Chao [Hick Tin] JC in the case cited above [*Re Sanpete Building (S) Pte Ltd* [1989] SLR 164], the debt is "disputed on some substantial grounds". After all, the authority cited for proposition (a) above [*ie*, the proposition that a winding-up application should not be used as a means to enforce a debt which is disputed on some substantial grounds] was Jessel MR in *Re Great Britain Mutual Life Assurance Society* (1880) 16 Ch D 246 (at 253) where the judge said:

> [I]n my opinion, it is not sufficient for the Respondents, upon a petition of this kind, to say "We dispute the claim". They must bring forward a *prima facie* case which satisfies the Court that there is something which ought to be tried, either before the Court itself, or in an action, or by some other proceeding.

This appears to me to be entirely consistent with saying that the respondents in that case must be able to persuade the court to grant [them] leave to defend the claim. Similarly, if the petitioner (who is the defendant in Suit 432/2005) is granted leave to defend in an O 14 application taken out by the respondent (the plaintiff in that suit), that merely means that the matters raised by the respondent in that suit should proceed to trial. It certainly does not follow that those matters are frivolous.

25 We also found the recent decision of this court in *Metalform Asia Pte Ltd v Holland Leedon Pte Ltd* [2007] 2 SLR 268 ("*Metalform Asia*") to be of some relevance. In that case, which involved an undisputed debt, this court rejected the creditor's submission that where a debtor-company alleged that it had a cross-claim based on substantial grounds, the company had to show that the creditor's winding-up petition was "bound to fail" (at [60]) before the court would issue an injunction restraining the filing of the petition. It was held, instead, that, in such cases, the company need only show that there was "a likelihood that [the petition] may fail" (at [77]) or that the petition was "unlikely to succeed" (at [87]). The reason for this was stated as follows, at [82]:

> In our view, we do not think that [the factors which favour allowing a creditor to present a winding-up petition] outweigh the policy consideration that the commercial viability of a company should not be put in jeopardy by the premature presentation of a winding-up petition against it where it has a serious cross-claim based on substantial grounds. Such a petition may adversely affect the reputation and the business of the company and may also set in motion a process that may create cross-defaults or cut the company off from further sources of financing, thereby exacerbating its financial condition. *So long as the court is satisfied that on the evidence there is a distinct possibility that the cross-claim may exceed the undisputed debt, it should give the company the opportunity to prove its claim rather than to allow a winding-up petition to be filed, with all the normal consequences attendant upon the filing of such a petition.* Businesses that have a chance of recovery should not be pushed into a state that makes it difficult for them to recover. [emphasis added]

The situation in *Metalform Asia* differed from that in the present case in that in the former, the court was considering whether to grant an injunction *before* the issuance of a winding-up petition, whereas in the latter, the question was whether a winding-up application which had already been filed ought

to be stayed or dismissed. However, even in a case such as the present, the courts should not be quick to condemn viable companies which have plausible responses to claims made against them. Thus, this court noted at [87] of *Metalform Asia* that:

> This standard of proof [*ie*, the "bound to fail" test] is also inconsistent with the standard that is applicable where the application is to stay the petition after it has been filed. The standard of proof in a stay application founded on a serious cross-claim on substantial grounds is that the petition is unlikely to succeed or that it is likely that the court will hold over the petition in order to allow the cross-claim to be determined first. There is no particular reason why the standard of proof should be higher in the first case [*ie*, in an application to restrain the filing of a winding-up petition] than in the second case [*ie*, in a stay application]. Moreover, it is ironic that in the second case, irreparable damage might well have been done to the company by the filing of the petition, and yet the standard of proof in staying the petition is lower than the "bound to fail" standard. We therefore conclude that it is inappropriate to apply the "bound to fail" test in cross-claim cases.

Both the strength of the company's cross-claim and the strength of the case raised by the company to dispute the debt can provide grounds for a court to prevent a winding-up application from proceeding any further, or to dismiss it entirely. The tests for both of the situations discussed in the passage quoted above thus necessarily mirror each other.

26 We kept in mind these principles as we evaluated the appellants' arguments. However, for the reasons given below (at [38]–[45] and [50]–[51]), we concluded that the appellants did not even meet the low threshold of showing that there were triable issues in this case.

The governing law of the Deed

The learned judge's findings

27 Turning, first, to the findings on the governing law of the Deed in the court below, the learned judge, upon applying Singapore conflict of laws principles, had held that US law was the governing law of the Deed. Her decision was grounded on the following reasons:

> (a) Chinese law was not the governing law. This was because the Deed was drafted in English, while the 2003 contract and the supplementary agreements were drafted in Chinese. While those documents had an express choice of law clause stating that Chinese law was to be the governing law, the Deed was silent on this point. The Deed would have to be enforced outside China as the appellants were Singapore companies and Mr Lee was a Canadian resident. In addition, the legal concepts embodied in the Deed, such as those of a deed and of an indemnity, were unknown in Chinese law (see the GD at [18]).
>
> (b) Singapore law was also not the governing law. The only direct connection between the Deed and Singapore was the nationality of the appellants as Singapore companies. Although the Deed would have to be enforced in Singapore against the appellants, it would be enforced in Canada *vis-à-vis* Mr Lee. The appellants' place of incorporation was thus not determinative of the applicable governing law (see the GD at [21]).
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> (c) The respondent (the beneficiary of the Deed) was incorporated in the US. The issuer of the standby letters of credit (the US Bank) was likewise located in the US, and that was also where Mr Lee had his citizenship. The currency of the obligations contained in the Deed was the US dollar. Furthermore, the respondent's obligation to the US Bank, which was the subject of the

Deed, must have been governed either by US law generally or by the law of a particular American state (see the GD at [21]).

Having found that US law was the governing law, the learned judge held (*ibid*) that as there had been no proof of the content of US law on the validity and construction of deeds of indemnity, she would presume that US law was similar to Singapore law in this respect.

US law as the governing law

28 We did not agree with the learned judge's determination of the governing law of the Deed. It is important to note that none of the parties ever submitted to the learned judge that US law could be the governing law. The choice before her was between Singapore law and Chinese law. It came as something of a surprise to the parties when the learned judge rejected both their submissions and unilaterally identified what she thought was the most appropriate governing law. In our view, a judge should not determine such an issue without allowing the parties an opportunity to address the court on the appropriateness of such a conclusion.

29 In this regard, the case of *Rex v Paddington and St Marylebone Rent Tribunal, Ex parte Bell London & Provincial Properties Ld* [1949] 1 KB 666 is instructive. In that case, a local authority referred to a rent tribunal a number of tenancy contracts relating to flats in a building owned by the applicant. The particulars of some of these cases contained a number of irregularities which, according to the applicant, went to the root of the tribunal's jurisdiction. For instance, the names of the lessees of the flats were wrong in some cases, and all the flats were shown as being furnished regardless of whether or not they were let with furniture. The tribunal visited the flats and came to the opinion that the height of the flats was too low for modern standards. On this last basis, the tribunal decided to lower the rent of eight of the flats. The height of the flats was not referred to at all at the hearing before the tribunal and the applicant did not have any opportunity to deal with it. The applicant sought, *inter alia*, an order of *certiorari* to quash the tribunal's decision. Lord Goddard CJ of the Divisional Court said at 682–683:

> It is no part of the duty of this court to review a finding of fact by the tribunal, though it is certainly remarkable that it should be found that flats of this description, erected, as we were informed, very shortly before the late war, and the plans of which must have been passed and approved by the London County Council, do not conform to present-day standards, when it is notorious that the building of this class of flats has not been allowed since the war. *But not a word was said by anybody during the hearing, or at any time before the decision was given, as to this being a ground for reduction of rent. It has, in fact, taken the advisers of the applicants entirely by surprise, and surely in common fairness, if this was to be considered by the tribunal they ought to have given the applicants some opportunity of dealing with it*. That this could ever have been in the minds of the borough council in referring these matters is, of course, impossible to suppose, and as we have already said, not a single word was said by the representative of the borough council as to any of the grounds on which the tribunal was invited to act.
>
> In our opinion, to take into account a matter of this kind, of which no sort of intimation had been given to the applicants, brings this case exactly within the decision of the House of Lords in *Board of Education v. Rice and others* [[1911] AC 179], the judgments in which are so well known that we need not set them out. On that ground alone, we think that the eight determinations in this case, even if the reference were unobjectionable, would have to be quashed.
>
> [emphasis added]

30 The basic principle is that a court or tribunal which decides a case on a basis that has not been raised or contemplated by the parties may have committed a breach of natural justice in relation to the affected party's right to be heard. In such a situation, the affected party has been deprived of its opportunity to be heard or to address the issues upon which the case was decided.

31 In this vein, we would also like to refer to our recent decision in *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR 86 ("*Soh Beng Tee*"), which elaborates on the above principle in the context of arbitration proceedings. In *Soh Beng Tee*, one of the parties claimed that the arbitrator had decided the case on an issue which had not been submitted for arbitration. This was allegedly, among other things, a breach of natural justice in that the affected party had been deprived of its right to be heard. Although we found that the issue concerned had indeed been alive before the arbitrator, we held at [41] that:

> In addition, even if we were to determine that the issue of whether time was at large was not truly alive during the arbitration, that *per se* would not be sufficient to inexorably lead to the conclusion that the Arbitrator had *necessarily* failed to adhere to the rules of natural justice in denying [the affected party] an occasion to present its contentions on the issue. It is frequently a matter of degree as to how unexpected the impugned decision is, such that it can persuasively be said that the parties were truly deprived of an opportunity to argue it. As helpfully summarised in Sir Michael J Mustill & Stewart C Boyd, *The Law and Practice of Commercial Arbitration in England* (Butterworths, 2nd Ed, 1989) ("*Commercial Arbitration*") at p 312:
>
> > If the arbitrator decides the case on a point which he has *invented* for himself, he *creates surprise* and deprives the parties of their right to address full arguments on the base which they have to answer. Similarly, if he receives evidence outside the course of the oral hearing, he breaks the rule that a party is entitled to know about and test the evidence led against him. [emphasis added]
>
> [emphasis in original]

32 The natural justice principle of *audi alteram partem* as it applies to arbitrators is discussed at [42]–[58] of *Soh Beng Tee*. The same principles apply to any court or tribunal. The important point to note is that we are not suggesting that a court is hogtied by the issues canvassed before it such that it is unable to make reasonable inferences of fact, or that a court cannot make a finding that the just solution lies somewhere between the extreme positions taken by parties. The emphasis of this aspect of natural justice is on the opportunities given to parties to address the determinative issue(s) in a matter. Reasonable inferences, findings of fact or lines of argument adopted by the court, even though not specifically addressed by the parties, are entirely acceptable.

33 The situation in the instant case was one where the learned judge arrived at a finding of fact which was not reasonable either as a matter of inference or from the arguments made before her. This was especially so because of the operation of the conflict of laws principle, often known as the "presumption of similarity", whereby if there is no or insufficient proof of the foreign law, the court assumes that the foreign law is the same as the local law. The presumption had a rather startling effect in the present case, as the learned judge effectively applied Singapore law principles to the Deed (on the basis that US law was presumed to be similar to Singapore law) even though, paradoxically, she had earlier rejected the suggestion that the Deed was governed by Singapore law (see [27] above). This particular result could not have been contemplated by the parties, who would reasonably have expected the learned judge to choose between the two systems of laws placed before her – namely, Singapore law and Chinese law. The reasonable expectation would be that if the learned judge chose to apply Singapore law, it would be because she found that to be the law with

which the Deed had the closest and most real connection. Crucially, the appellants had no opportunity to raise arguments as to why US law was not the applicable law or, alternatively, whether US law also supported their interpretation of the Deed.

34 In such circumstances, if the learned judge had found neither Chinese law nor Singapore law to be satisfactory alternatives, she ought to have invited the parties to make further submissions on whether US law was the governing law, and, if so, what the applicable principles under US law were. This would have assuaged the appellants' legitimate concern that they had been deprived of their right to be heard on a decisive issue.

Singapore law as the governing law

35 However, in our view, the above procedural flaw did not inevitably mean that the learned judge's decision ought to be set aside. We concluded, after viewing the relevant documents, that the governing law of the Deed, as between Chinese law and Singapore law, was indeed Singapore law as contended by the respondent. We decided in favour of Singapore law for the reasons set out below.

36 In *Overseas Union Insurance Ltd v Turegum Insurance Co* [2001] 3 SLR 330 ("*OUI v Turegum Insurance*") at [82], it was pointed out that:

> There are three stages in determining the governing law of a contract. The first stage is to examine the contract itself to determine whether it states expressly what the governing law should be. In the absence of an express provision one moves to the second stage which is to see whether the intention of the parties as to the governing law can be inferred from the circumstances. If this cannot be done, the third stage is to determine with which system of law the contract has its most close and real connection. That system would be taken, objectively, as the governing or proper law of the contract. See *Las Vegas Hilton Corp v Khoo Teng Hock Sunny* [1997] 1 SLR 341 and *Dicey & Morris on The Conflict of Laws* (11th Ed) at Rule 180.

37 As there was no express provision in the Deed for a governing law (*ie*, the first stage was inapplicable), we moved on to the second stage. In *Las Vegas Hilton Corporation v Khoo Teng Hock Sunny* [1997] 1 SLR 341 ("*Las Vegas Hilton*"), Chao Hick Tin J succinctly summarised (at [39]) the factors to be considered at the second stage, as follows:

> In some cases it may be possible to infer a common intention as to the proper law of the contract. Some of the circumstances/factors upon which such an inference may be drawn are: if [the contracting parties] agree that the courts of a given country shall have jurisdiction in any matter arising out of a contract: *Re United Railways of Havana and Regla Warehouses Ltd* [1960] Ch 52; if they agree that arbitration shall take place in a given country: *Hamlyn v Talisker Distillery* [1894] AC 202; the language or terminology used in the contract: *Pilkington v Harrison* [1937] Ch 574; the form of the documents involved in the transaction: *Chamberlain v Napier* (1880) 15 Ch D 614; a connection with a preceding transaction: *The Njegos* [1936] P 90; the currency of the contract or the currency for payment: *The Assunzione* [1954] P 150 and *Re United Railway[s] of Havana*, supra; the places of residence or business of the parties: *Keiner v Keiner* [1952] 1 All ER 643; the commercial purpose of the transaction: *Re United Railway[s] of Havana*, supra.

38 In the instant case, the language of the Deed was English. As correctly pointed out by the learned judge, this contrasted with the 2003 contract and the supplementary agreements, which were in Chinese. This was a factor which pointed away from Chinese law being the governing law of the Deed. On the other hand, Singapore is hardly the only country having English as its principal

language of commerce, so this factor alone did not point strongly towards Singapore law as the governing law. As English is the *lingua franca* of international business, the use of that language in an international commercial contract is not strongly indicative of any choice of law. As *Dicey and Morris on The Conflict of Laws* (Lawrence Collins gen ed) (Stevens & Sons Limited, 11th Ed, 1987) vol 2 ("*Dicey & Morris*") states at p 1185:

> In certain cases a very cautious inference may also be drawn from the use of a particular language, *e.g.* if a charterparty referring to a German ship is drawn up in English, but the use of the English language, especially in maritime contracts, is common even where the contract has no connection with any English speaking country and is not intended to be governed by the law of any such country, and consequently, will rarely permit a conclusion as to an implied choice of law, even where that choice does not lie between the very different legal systems of the many nations that share the English language.

39 The purpose of the Deed and its connection with the other documents were somewhat ambiguous. The direct underlying obligation which the Deed was to secure was the appellants' and Mr Lee's liability to indemnify the respondent in respect of, *inter alia*, any costs and expenses which it might incur as a result of the standby letters of credit. More generally, the Deed was one part of a larger transaction which had the ultimate aim that, as the judge put it at [17] of the GD, "a Chinese bank … would make a loan in Chinese currency to a Chinese company to develop a club in China". We were of the view that, of these two objectives of the Deed, the direct underlying obligation which this document was to secure was of greater importance in determining its governing law. However, we also noted that nothing in the purpose of the Deed pointed unequivocally to Singapore.

40 The learned judge had held that the 2003 contract and the supplementary agreements contained express choice of law clauses in favour of Chinese law whereas the Deed did not (see [27] above). With respect, none of these documents actually contained express choice of law clauses. The 2003 contract and the September 2003 supplementary agreement contained arbitration clauses in favour of CIETAC, and the supplementary agreements had clauses which stated that where there was no inconsistency between these agreements and the 2003 contract, the latter would prevail. An arbitration clause or a choice of forum clause is, of course, not the same thing as an express choice of law clause. However, we accept that where a contract specifies a particular forum, the parties can be assumed to have intended that forum to apply the *lex fori* in the absence of any indication to the contrary (see *Dicey & Morris* at pp 1182–1183). Thus, the presence of the arbitral forum clauses in favour of CIETAC in the 2003 contract and the supplementary agreements, accompanied by the absence of a similar provision in the Deed, lent some support to the inference that the Deed was not intended to be governed by Chinese law. However, this factor alone did not allow us to draw the inference that Singapore law was intended to be the governing law.

41 The learned judge regarded the fact that the Deed contained two legal concepts which were not recognised under Chinese law – namely, that of a deed and an indemnity – as "important" to her determination (see [18] of the GD). It was not disputed that the deed was a common law concept, and that Chinese law apparently did not distinguish between an indemnity and a guarantee. The learned judge went on to say at [20] that:

> [T]he parties must have intended the Deed to be valid when they signed it and therefore they could not have intended it to be governed by a system of law that did not recognise such documents or the concept of indemnity.

We did not agree that just because Chinese law did not recognise the legal concepts of a deed and an indemnity, the Deed would thereby be invalid under Chinese law. That was not the position taken

by the parties, and there was no evidence to that effect. Rather, as the appellants pointed out, the Deed was to take effect merely as a contract of indemnity. However, we did accept that the use of the above legal concepts supported the inference that Chinese law was not the governing law of the Deed, for why would parties intentionally use forms and terms inapposite to the governing law of the contract? In *Amin Rasheed Shipping Corporation v Kuwait Insurance Co* [1984] AC 50 ("*Amin Rasheed*"), for instance, the contract in question was a contract of marine insurance. Lord Diplock thought it relevant that at the time of contracting, Kuwait did not have any indigenous law of marine insurance. His Lordship noted that the contract used juristic concepts of marine insurance which were peculiar to that area of law. Lord Diplock also considered it relevant that the contract was in a particular form which was only understandable with reference to the Marine Insurance Act 1906 (c 41) (UK).

42 However, equally, while the concepts of a deed and an indemnity are recognised in Singapore, these concepts are also recognised in all other common law jurisdictions, so it could not be said that an intention to choose Singapore law in particular as the governing law could be unequivocally inferred from this. Lord Wilberforce in *Amin Rasheed*, though in agreement with Lord Diplock that the proper law of the contract in that case was English law, took the view that the particular form of the contract being considered had become so internationalised that one could not draw any conclusion on the proper law of the contract without considering other factors. We saw the force of this logic and regarded it as being eminently applicable in the instant case, where the legal concepts in question were hardly unique to our jurisprudence. By itself, the use of these two legal concepts could only point away from Chinese law, but not inexorably towards Singapore law, as the governing law of the Deed.

43 We now deal briefly with some other features of the Deed. The Deed was executed in Canada. However, the place of contracting is generally not important in determining the governing law of a contract, except, perhaps, where the contract is to be performed in that country: *Chatenay v The Brazilian Submarine Telegraph Company, Limited* [1891] 1 QB 79. The principle would equally apply to the place of execution of a deed. In this particular instance, it was clear to us that the Deed bore no particular relation to Canada other than that being Mr Lee's place of residence.

44 The currency in use by the Deed was the US dollar. One may occasionally infer that parties intend a contract to be governed by the law of the country in whose currency the sums due under the contract are payable. But, again, the US dollar is often the currency of choice in international transactions, even when there is nothing in particular to connect the transaction to the US. Like the English language (see [38] above), the universality of the US dollar undermines any inferential value which one might obtain from it.

45 Finally, the place of enforcement of the Deed could, at first blush, be either Singapore, as the appellants' country of incorporation, or Canada, as Mr Lee's place of residence (see [27] above). However, we noted that the respondent's assertion, that the particular objective of the Deed was to provide additional security for enforcement in *Singapore* of the appellants' obligations, was never challenged by the appellants.

46 After taking into account the various considerations outlined above (at [38]–[45]), while we found it clear that Chinese law was not the intended governing law of the Deed, we were initially diffident about concluding that Singapore law was intended by the parties to be the governing law. What should the court do when it is faced with a multiplicity of factors, each pointing to a different governing law?

47 At this juncture, the proper approach would be to move on to the third stage of the test

outlined in *OUI v Turegum Insurance* ([36] *supra*). It is not always the case that the parties' intention as to governing law can be realistically inferred and it is better in such instances to acknowledge that it may be a fruitless and artificial exercise to embark on the second stage of the test. *OUI v Turegum Insurance* and *Las Vegas Hilton* ([37] *supra*) were both cases where the court held that the parties did not address their minds to the question of which law was to govern the contract (*ie*, the first stage did not apply). In the former case, the parties had acted entirely through brokers, and the plaintiff had not even seen many of the documents in question for years, if at all. In the latter case, the contract was an alleged oral agreement. In such circumstances, the respective courts found it more productive to move straight to the third stage. To bypass the second stage is not as significant a step as it seems in that the same factors as those considered at the second stage would often have to be addressed when one seeks, at the third stage, to determine the law which has the closest and most real connection with the contract. Indeed, in *Sinotani Pacific Pte Ltd v Agricultural Bank of China* [1999] 4 SLR 34, this court moved straight from the first stage to the third stage; see also Chao Hick Tin J's comments in *Shaikh Faisal v Swan Hunter Singapore Pte Ltd* [1995] 1 SLR 394 at 402–403, [39]. There have even been persuasive suggestions that it is better to do away with the second stage altogether and apply the third stage straightaway in all cases where there is no express choice of law clause such that the first stage does not apply (see P M North & J J Fawcett, *Cheshire and North: Private International Law* (Butterworths, 11th Ed, 1987) at pp 461–462).

48 The difference between the second stage and the third stage lies not in the factors to be taken into consideration, but in the weight which is to be accorded to these factors. It is worth emphasising that the aim of the third stage is not to divine any "intent" of the parties, but to consider, on balance, which law has the most connection with the contract in question and the circumstances surrounding the inception of that contract. It is a pragmatic exercise acknowledging that parties do not always have a governing law in mind when they enter into contracts. Equal weight ought to be placed on all factors, even those which would not, under the second stage, have been strongly inferential of any intention as to the governing law.

49 When one has ascribed the proper weightage to the relevant factors, the next step would be that enunciated in *Las Vegas Hilton* at [40] (namely, the third stage). In that case, Chao J went on to cite (at [42]) the following passage from *The Assunzione* [1954] P 150 at 179 by Singleton LJ:

> [O]ne must look at all the circumstances and seek to find what just and reasonable persons ought to have intended if they had thought about the matter at the time when they made the contract. If they had thought that they were likely to have a dispute, I hope it may be said that just and reasonable persons would like the dispute determined in the most convenient way and in accordance with business efficacy.

We agreed with Chao J's observation in *Las Vegas Hilton* at [44] that the "closest and most real connection" test (*id* at [40]) was the same as the objective test of the reasonable man adopted in *The Assunzione*.

50 On analysis of the factors discussed earlier (at [38]–[45] above), we concluded that Singapore law bore a closer and more real connection to the Deed as compared to Chinese law. The factors pointing away from Chinese law far exceeded those which pointed away from Singapore law. For the reasons which we mentioned earlier in relation to the right to be heard, we did not consider whether US law or Canadian law would be a proper candidate. Thus, despite adopting an altogether different approach from the learned judge, we held that the law to be applied in interpreting the Deed was Singapore law. It applied not as a default law, as found by the learned judge (see [27] above), but, rather, directly through established conflict of laws principles.

Validity of the Deed under its governing law

51 The rest of the learned judge's conclusions flowed naturally and ineluctably once it was determined that Singapore law was the governing law of the Deed. We affirmed [22]–[25] of the GD in relation to the nature and the validity of the Deed. In summary, we agreed that the language of the Deed unequivocally pointed to it being an indemnity rather than a guarantee. The validity and the enforceability of the Deed, as an indemnity, were entirely separate from the validity of the 2003 contract. Therefore, the CIETAC arbitration, which did not involve the appellants, was irrelevant to their liability to indemnify the respondent in respect of the US$4,623,999.97 which the latter had incurred (see [9] above).

Expert legal opinions on foreign law

52 Although it was not necessary for us to refer to the Chinese legal opinions tendered by the parties to reach the above conclusion, we felt that it was necessary to make certain observations on the use of expert evidence to "prove" the content of foreign law. This would assist solicitors who seek to adduce in evidence expert legal opinions on foreign law issues. The importance of such expert opinions is likely to grow as Singapore becomes a centre for international commercial litigation. When local solicitors engage the services of experts on foreign law, it is crucial that the local solicitors provide the necessary guidance to these experts as to how their opinions should be drafted so that they manifest the experts' independence and credibility.

53 In the instant case, the appellants produced three letters containing the legal advice of a Chinese law firm, Shanghai Bo En Law Office ("Shanghai Bo En"), dated 27 July 2006, 12 October 2006 and 1 November 2006, respectively, which were exhibited in Mr Lee's affidavits. The respondent adduced an affidavit by Mr George Q Fu ("Mr Fu"), a lawyer from another Chinese law firm, Watson & Band Law Offices ("Watson & Band"), filed on 18 September 2006. It also exhibited a letter from Watson & Band dated 27 October 2006. Both parties' expert legal opinions left much to be desired.

Proof of foreign law

54 Foreign law is an issue of fact which must be proved. Such proof can be adduced in two ways:

(a) by directly adducing raw sources of foreign law as evidence; or

(b) by adducing the opinion of an expert in foreign law.

Adducing raw sources of foreign law

55 In England, raw sources of foreign law can generally be adduced only as part of an expert's evidence and not on their own. *Dicey, Morris and Collins on The Conflict of Laws* (Lawrence Collins gen ed) (Sweet & Maxwell, 14th Ed, 2006) vol 1 states at para 9-013 that:

> It is now well settled that foreign law must, in general, be proved by expert evidence. Foreign law cannot be proved merely by putting the text of a foreign enactment before the court, nor merely by citing foreign decisions or books of authority. Such materials can only be brought before the court as part of the evidence of an expert witness, since without his assistance the court cannot evaluate or interpret them.

In this regard, the position in Singapore, Malaysia and India is very different. In these jurisdictions, certain raw sources of foreign law can be adduced despite not being part of a foreign law expert's

evidence. In *Wong Kai Woon v Wong Kong Hom* [2000] SGHC 176 ("*Wong Kai Woon*"), a textbook on Chinese marriage laws and customs prevailing in old China was sought to be admitted in order to prove that a dead testator's son had validly married a "secondary wife" in China such that the son of that marriage was entitled to a share of the testator's estate under customary Chinese law. Chan Seng Onn JC held (at [53]) that the textbook was admissible under ss 32(*d*) and 62(2) of the Evidence Act (Cap 97, 1997 Rev Ed) ("the Act"). Section 32(*d*) of the Act deals with the admissibility of the opinion of any person with regard to, among other things, "any public right or custom". Section 62(2) of the Act, which is important for our present purposes, states:

> The opinions of experts expressed in any treatise commonly offered for sale and the grounds on which such opinions are held may be proved by the production of such treatise if the author is dead or cannot be found or has become incapable of giving evidence or cannot be called as a witness without an amount of delay or expense which the court regards as unreasonable.

56 In *Wong Kai Woon*, the authors of the textbook in question were dead and thus Chan JC concluded that s 62(2) of the Act was satisfied. It is important to note that not all treatises would be admissible under s 62(2) of the Act; the requirements of that subsection must first be fulfilled. It is also worth noting that "the grounds on which such opinions are held" (*per* s 62(2) of the Act) are also admissible. Relying on this provision, Chan JC held at [53] that the Chinese court decisions or legal codes having the effect of law, on which the authors had based their opinion, were likewise admissible under this subsection.

57 It should be noted that the above court decisions and legal codes could also have been admitted under s 40 of the Act. That section states:

> When the court has to form an opinion as to a law of any country, any statement of the law contained in a book purporting to be printed or published under the authority of the government of the country, and to contain any such law, and any report of a ruling of the courts of the country contained in a book purporting to be a report of the rulings, is relevant.

As Chan JC explained in *Wong Kai Woon* at [54]:

> Foreign court decisions extracted from publications of law reports, translated into English, may also be cited as evidence of the foreign law. Similarly, books published under the authority of the foreign government stating authoritatively the foreign law or foreign statutory law may be tendered into court, together with the translation, as evidence of that foreign law.

58 Section 40 of the Act should also be read in conjunction with ss 86 and 88 of the Act, which stipulate:

> **Presumption as to collections of laws and reports of decisions**
>
> **86.** The court shall presume the genuineness of every book purporting —
>
> (*a*) to be printed or published under the authority of the government of any country and to contain any of the laws of that country; or
>
> (*b*) to contain reports of decisions of the courts of such country.
>
> **Presumption as to certified copies of foreign judicial records**

88. The court may presume that any document purporting to be a certified copy of any judicial record of any country not forming part of the Commonwealth is genuine and accurate if the document purports to be certified in any manner which is certified by any representative of the President or of Her Britannic Majesty in or for such country to be the manner commonly in use in that country for the certification of copies of judicial records.

Sir John Woodroffe & Syed Amir Ali's Law of Evidence (Sripada Venkata Joga Rao ed) (Butterworths, 17th Ed, 2001), in commenting on the equivalent sections in the Indian Evidence Act of 1872, notes at vol II, p 2169:

> A judgment of the highest tribunal of that foreign country is the best evidence to adjudicate what the law there is. … The effect of this section [*ie*, s 38 of the Indian Evidence Act, which is equivalent to s 40 of the Act] and s 84 [equivalent to s 86 of the Act] is that the court may take judicial notice of a publication containing a foreign law, if it is issued under the authority of the foreign government concerned, and may accept the law, as set out in such publication, as a law in force in the particular foreign country at the relevant time.

59 For the sake of completeness, we should also point out s 59(1)(*b*) of the Act, which states that the Singapore courts shall take judicial notice of "all Acts passed or hereafter to be passed by the legislature of any territory within the Commonwealth". Furthermore, under s 59(2) of the Act, our courts can "resort for [their] aid to appropriate books or documents of reference" when dealing with such Acts.

60 What then should a court do with the evidence admitted under the preceding sections of the Act? Particularly in cases where the raw sources of foreign law come from jurisdictions different from our own, or where the foreign statute in question has no equivalent in our own legislation, or where the issue is of great complexity or the subject of controversy in its native jurisdiction, it would be very difficult for our courts to competently interpret on their own such raw sources of foreign law. As rightly pointed out by Chan JC in *Wong Kai Woon* at [55]:

> [A]s a matter of prudence, it is still advisable to have an expert to assist the court in their interpretation and application because certain apparently simple words or phrases when translated may well bear special meaning under the foreign law. The foreign court decision relied on might have been overturned. The foreign statute may have been abrogated by subsequent legislation. The authors might not have been particularly clear in their exposition.

Even if raw sources of foreign law are admissible under the preceding sections, it does not mean that the courts are obliged to accord these sources any evidentiary weight. It is preferable that solicitors provide expert opinions on foreign law whenever possible.

Adducing expert opinions on foreign law

61 The admissibility of expert opinions on foreign law is governed by s 47 of the Act, which states:

> **Opinions of experts**
>
> **47.**—(1) When the court has to form an opinion upon a point of foreign law or of science or art, or as to the identity or genuineness of handwriting or finger impressions, the opinions upon that point of persons specially skilled in such foreign law, science or art, or in questions as to the identity or genuineness of handwriting or finger impressions, are relevant facts.

(2) Such persons are called experts.

(1) Manner in which expert evidence should be given

62 The general rule is that "[a]ll facts [including foreign law], except the contents of documents" may be proved by oral evidence (see s 61 of the Act). Section 62(2) of the Act, as discussed above at [55]–[56], constitutes an exception to the rule that such oral evidence must be direct. As pointed out in *Ong Jane Rebecca v Lim Lie Hoa* [2003] SGHC 126 ("*Ong Jane Rebecca*") at [36], generally, a written opinion of an expert may be proved without calling the expert to give oral evidence only if the requirements of s 62(2) of the Act are satisfied.

63 Order 40A r 3(1) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("the Rules") is also relevant in this context. It states:

> Unless the Court otherwise directs, expert evidence is to be given in a written report signed by the expert and exhibited in an affidavit sworn to or affirmed by him testifying that the report exhibited is his and that he accepts full responsibility for the report.

64 The parties in the instant case failed to observe this requirement, with the exception of Mr Fu's affidavit on behalf of the respondent (see [53] above). If a party has previously sought the opinion of a foreign law expert and has obtained such an opinion in some private correspondence, in order for that correspondence to be admitted, it must be contained in an affidavit of *the expert himself* and not the party to whom the opinion was addressed. In addition, there are certain other requirements which the expert's report must fulfil. The opinions rendered by an expert to his client may not necessarily comply with these requirements, and, in such cases, the responsible party should be directed to render a specially prepared expert's report. One obvious benefit of having the expert give his evidence through an affidavit is that he would be able to condense the advice previously given to his client into a single document. The court should ideally have one opinion from each side containing all the relevant arguments. In the present case, as mentioned at [53] above, we were faced with five different documents from the two sides, springing from an exchange of correspondence between the parties. This was messy and undesirable.

(2) The requirements of an expert's report

65 The requirements of an expert's report are contained in O 40A r 3(2) of the Rules, and apply to all manner of experts. We will discuss each of the relevant requirements in turn. For now, it is pertinent to note that these requirements are *mandatory* except where the court otherwise directs. We would also like to highlight Form 58 of the Subordinate Courts Practice Directions (2006 Ed) ("Form 58"). Form 58 is a note which parties are obliged to furnish to their intended expert witnesses under para 152(2) of the Subordinate Courts Practice Directions. Although the Supreme Court Practice Directions (2007 Ed) do not contain similar provisions, as a matter of good practice, the same procedure should generally be adopted for proceedings in the Supreme Court.

(3) The expert's competence

66 Under O 40A r 3(2)(*a*) of the Rules, the expert's report must contain details of the expert's qualifications. The expert must show that he is "a person specially skilled in such foreign law" as required under s 47(1) of the Act. There is a substantial body of English and local case law on this subject. The English position, however, is now governed by s 4(1) of the Civil Evidence Act 1972 (c 30) (UK). We do not propose to review the state of the law on this point, but would like to highlight that solicitors should take care that their experts really have the standing of objective

experts.

67 The expert's report ought, at the very minimum, to contain a *curriculum vitae* detailing the expert's relevant experience, with special regard to the issue on which the expert's opinion is sought. In this regard, we note that Mr Fu did provide a basic resumé in his affidavit, but Shanghai Bo En did not provide any credentials whatsoever. However, even Mr Fu's resumé, which merely gave a brief chronology of his educational and professional experience, could have been improved upon. In addition, the expert's report should state the precise manner, and not merely the general area of inquiry, in which the witness would be of use to the court. As stated in *Said Ajami v Comptroller of Customs* [1954] 1 WLR 1405 at 1408:

> [N]ot only the general nature, but also the precise character of the question upon which expert evidence is required, have to be taken into account when deciding whether the qualifications of a person entitle him to be regarded as a competent expert.

68 In this regard, Form 58 lists the following areas which should be covered for the purposes of O 40A r 3(2)(*a*) of the Rules:

> (a) the expert's relevant professional or academic qualifications;
>
> (b) the expert's specific training and experience; and
>
> (c) the number of times the expert appeared as an expert witness in litigation proceedings generally and the number of occasions for the respective parties specifically.

(4) The expert's duty to the court

69 The expert's duty to the court is enshrined in O 40A r 2 of the Rules, as follows:

> **Expert's duty to the Court (O. 40A, r. 2)**
>
> **2.**—(1) It is the duty of an expert to assist the Court on the matters within his expertise.
>
> (2) This duty overrides any obligation to the person from whom he has received instructions or by whom he is paid.

This duty is of such central importance that O 40A r 3(2)(*h*) of the Rules makes it a requirement that the report "contain a statement that the expert understands that in giving his report, his duty is to the Court and that he complies with that duty". As stated by G P Selvam J in *The H156* [1999] 3 SLR 756 at [27]:

> All too often experts are extremely tendentious towards the party by whom [they are] retained. This warning is succinctly stated in *Phipson On Evidence* (14th Ed, 1990) at para 32-40: 'It is proverbial that expert witnesses are, perhaps unwittingly, biased in favour of the side which calls them, as well as over-ready to regard neutral facts as confirmation of preconceived theories, moreover, support or opposition to given hypotheses can generally be multiplied at will.'

70 It is important to understand what the expert's duty to the court entails. This was explained in *Vita Health Laboratories Pte Ltd v Pang Seng Meng* [2004] 4 SLR 162, where the High Court said (at [82]–[83]):

> It may be said – albeit with some exaggeration – that while an advocate may be as biased as he

chooses to be in pressing his client's cause, an expert cannot adopt such a stance. An advocate is expected to articulate his client's views and cause without necessarily interposing his own views. An expert, on the other hand, should not evolve into a spokesperson for his client. Any opinions expressed *must* have a genuine foundation. It really cannot be disputed that:

> [I]t [is] necessary that expert evidence presented to the court should be, and should be seen to be, the independent product of the expert, uninfluenced as to form or content by the exigencies of litigation.
>
> [*per* Lord Wilberforce in *Whitehouse v Jordan* [1981] 1 WLR 246 at 256–257.]

While this *dicta* may sometimes be criticised by practitioners as being too idealistic, it now neatly dovetails with O 40A r 2(2) of the [Rules of Court (Cap 322, R 5, 1997 Rev Ed)]. The expert should neither attempt nor be seen to be an advocate of or for a party's cause. If he appears to do this, he will inexorably lose his credibility. That said, it is entirely permissible for him to propound and press home the opinion he seeks to persuade the court to accept. In essence, his advocacy is limited to supporting his independent views and not his client's cause. This is an important distinction that some experts fail to grasp.

[emphasis in original]

71 Examples of partiality in an expert's evidence can be found in *JSI Shipping (S) Pte Ltd v Teofoongwonglcloong* [2007] 4 SLR 460 at [58]–[62], where this court commented (at [58]) that the expert evidence for both sides was "rather partisan". The respondent's expert in that case made "sweeping generalisation[s] redolent of a predisposition to shore up the respondent's stance" (at [59]), leapt to baseless conclusions adverse to the other party and left out crucial portions of a quotation which cast an entirely different light on the materials which he reproduced. The appellant's expert evidence was also similarly tainted. Although this court ultimately decided to accept the evidence of both parties' experts as being "defensible differences of opinion" (at [64]), all solicitors and their experts should pay special heed to this admonition (at [63]):

> Whilst we recognise that a certain degree of partisan advocacy may be an inevitable consequence of adducing expert evidence in the gladiatorial context of an adversarial system, we must emphatically reiterate that the court will not hesitate, in an appropriate case, to disregard or even draw an adverse inference against expert evidence that exceeds the judicially determined boundaries of coherence, rationality and impartiality. When that happens, experts should note that the primary casualty will be their professional reputation.

72 While there were no particularly egregious instances of partiality exhibited in the legal opinions before us, we should stress that foreign law experts are usually not from this jurisdiction and may not be aware of their fundamental duty to the court as highlighted above. It is the *duty* of the solicitor – as an officer of the court – instructing the expert to bring this to the latter's attention.

73 In addition to the above, any special relationship between the party and his expert must be disclosed in the report. G P Selvam J noted in *Gunapathy Muniandy v Khoo James* [2001] SGHC 165 at [12.16] that:

> The expert must not only be impartial but must also appear to be so. The expert should avoid being the witness of a party with whom he has a special relationship. If that is unavoidable he must disclose the relevant facts. On this point there must be absolute transparency from the expert witness and their legal advisers for they are both officers of the Court.

(5) The expert's brief

74 It is a requirement under O 40A r 3(2)(*c*) of the Rules that the expert's report contains "a statement setting out the issues which he has been asked to consider and the basis upon which the evidence was given". Form 58 fleshes out the details that should be provided, as follows:

(a) the complete instructions which were given to the expert;

(b) a statement of facts leading to the expert's opinion;

(c) the facts known by the expert to be true;

(d) the facts which the expert was instructed to assume; and

(e) the facts which the expert had assumed.

75 If these details are not present in the expert's report, the court is entitled to reject the opinion (see, for instance, *Ong Jane Rebecca* ([62] *supra*) at [39]–[43]). It should be evident from the requirements of Form 58 that the party engaging the expert itself needs to be crystal clear about its instructions; in particular, solicitors should pay special attention to the proper categorisation of "true" and "assumed" facts.

(6) The expert's function

76 We now come to the meat of the expert's report – the opinion itself. In this regard, we gratefully adopt the summary by Evans LJ in *MCC Proceeds Inc v Bishopsgate Investment Trust plc* [1999] CLC 417 ("*MCC Proceeds*") at [23] of the function of the expert witness on foreign law, as follows:

(1) to inform the court of the relevant contents of the foreign law; identifying statutes or other legislation and explaining where necessary the foreign court's approach to their construction;

(2) to identify judgments or other authorities, explaining what status they have as sources of the foreign law; and

(3) where there is no authority directly in point, to assist [the court] in making a finding as to what the foreign court's ruling would be if the issue was to arise for decision there.

77 The expert must first place the relevant raw sources of foreign law before the court. This is a requirement under O 40A r 3(2)(*b*) of the Rules, which provides that the expert's report must give details of "any literature or other material which the expert witness has relied on in making the report".

78 It should be noted that the purpose of procuring expert evidence is not merely to place the content of foreign law before the court, but also to obtain the expert's opinion as to such law's effect. In relation to foreign statutes, Lord Denman CJ said in *Baron de Bode's Case* (1845) 8 QB 208 at 251; 115 ER 854 at 870:

Properly speaking, the nature of such evidence is not to set forth the contents of the written law, but its effect and the state of law resulting from it. The mere contents, indeed, might often

mislead persons not familiar with the particular system of law …

79 The expert should be aware that he must put forth not only his view of the effect of the foreign statute in question, but also the foreign rules of construction which he applied in reaching his view; otherwise, the court will apply Singapore rules of construction. Similarly, where foreign cases are cited, the expert ought to describe how the foreign court would regard such cases in terms of their precedent value, if any. If academic literature is relied upon, experts should have regard to Form 58, which counsels the expert to:

(a) identify the literature or other material which he relied on in making the report;

(b) state whether he had the opportunity to verify the literature; and

(c) state the identity and qualifications of the author of the literature.

80 The expert opinions in the instant case were particularly lacking in this regard. Various Chinese statutory provisions were cited, but it was apparent that there was a hierarchy of statutes which distinguished between laws enacted by the National People's Congress and its standing committees as well as administrative regulations by the State Council of the People's Republic of China on the one hand, and local laws and administrative rules on the other. The interrelationship between the various statutory provisions was crucial, but neither side made much effort to explain how a Chinese court would regard the relative importance of these provisions. Furthermore, Shanghai Bo En's legal opinions referred to one case and two "explanatory notes" appended to the statutes, but the legal significance of such documents under Chinese jurisprudence was never discussed.

81 Moving on, it should be noted that the expert's role differs slightly when the issue is the construction of a foreign *document*, as opposed to a foreign *statutory provision*. In *King v Brandywine Reinsurance Co* [2005] 1 Lloyd's Rep 655, the court had to consider the meaning of the phrase "removal of debris" contained in an insurance policy document which was governed by New York law. Waller LJ incisively stated at [68] that:

> It is perhaps also important to remember that the role of an expert, unless the court is concerned with special meanings, is to prove the rules of construction of the foreign law, and it is then for the court to interpret the contract in accordance with those rules. In other words the view of the expert as to the meaning which would be given to the word "debris" is not admissible evidence unless he is saying that it has a special meaning under New York law [see Dicey & Morris 13th ed., 32‖189].

82 In those cases where the law is not settled in the foreign jurisdiction, the expert's duty is more extensive and far-reaching. The expert should then give his opinion as to the likely decision of a foreign court. However, caution should be exercised. As Evans LJ stated in *MCC Proceeds* ([76] *supra*) at [24]), where there is no authority directly on point on the foreign law being considered:

> [I]t is important, in our judgment, to note the purpose for which the evidence is given. [It] is to predict the likely decision of a foreign court, [and] not to press upon the English judge the witness's personal views as to what the foreign law might be.

83 For instance, in *National Bank of Egypt International Ltd v Oman Housing Bank SAOC* [2003] 1 All ER (Comm) 246, the English High Court shut out the expert's evidence because the claimant's purpose in seeking to adduce expert evidence was not to predict the likely decision of the foreign court but to impress upon the court the expert's view of what the foreign law ought to be rather than

what the Court of Appeal in Oman had decided.

84 An expert should similarly also be warned against expressing any opinion on issues outside the area of his competence as well as issues which are not part of his brief. Where the expert can only come to a provisional or qualified opinion, this too must be stated clearly in his report, along with an explanation of the reasons for the uncertainties.

85 Whatever the case, it is clear that the expert cannot merely present his conclusion on what the foreign law is without also presenting the underlying evidence and the analytical process by which he reached his conclusion. For instance, in *The H156* ([69] *supra*) at [27], Selvam J quite rightly warned against "the expert deciding the issue by assuming the power of decision", saying:

> The function of an expert on foreign law is to submit the propositions of foreign law as fact for the consideration of the court. [T]he court will then make its own findings of what the foreign law is. Even though the expert may submit his conclusions, he must present the materials and the grounds he uses to make his conclusions. The expert may not usurp the function of the court and present his finding. Further he cannot decide the issue by applying the law to the facts without setting out the law and the reasoning process.

He denounced as a "pretended opinion" (*ibid*) the Norwegian lawyers' report which consisted of the single sentence: "The heads of damages are of a type recognised in Norwegian law" (*id* at [14]).

86 In the present case, there was some evidence of such errors in both parties' expert opinions. The opinions tended to cite copious amounts of statutory provisions and, without much discussion, conclude that the relevant provisions supported one proposition or another. The opinions tended to degenerate at times into a slinging match between the appellants' experts and the respondent's experts, which we did not find helpful.

87 Finally, the expert should note that he is to consider opposing opinions, if any. Order 40A r 3(2)(*e*) of the Rules states that an expert's report must:

> where there is a range of opinion on the matters dealt with in the report —
>
> (i) summarise the range of opinion; and
>
> (ii) give reasons for [the expert's] opinion …

This last requirement cannot be overemphasised. An expert should not attempt to conceal any adverse opinions which have come to his knowledge. An expert is not expected to become an advocate against the party engaging him, but, at the same time, he must be aware that his duty is owed primarily to the court.

(7) Summary of the expert's conclusions

88 The expert's report must contain a short summary of the conclusions reached (see O 40A r 3(2)(*f*) of the Rules and Form 58). In addition, it should contain "a statement of belief of correctness of the expert's opinion" (see O 40A r 3(2)(*g*) of the Rules). In this regard, Form 58 contains a prescribed formula for the statement, which also covers the requirements of O 40A r 3(2)(*h*) of the Rules.

(8) The instructing solicitors' duty

89 Solicitors should familiarise themselves with the guidelines which we have discussed above. We

stress that it is the duty of the solicitor instructing the expert to bring these guidelines to the latter's attention. Non-compliance with these requirements may result in the expert's opinion being accorded little or no evidentiary weight as well as in adverse cost consequences for the party who engaged that expert.

Credit for the pledged shares registered under the respondent's name

90 There was only one further issue for our consideration. The appellants argued before the learned judge that as no credit was given for the value of the pledged shares in the respondent's letter of demand, there was a substantial and *bona fide* dispute over the debt claimed. As mentioned earlier (at [13] above), the learned judge rejected this contention as she held that the beneficial interest in the pledged shares had not changed and the pledge had not been enforced.

91 The appellants contended before us that the pledged shares were lodged by the respondent with Laien's company secretary in breach of the 2003 contract. According to the appellants, it was agreed that the share certificates relating to the pledged shares were to be retained by the respondent as security and there was no provision in the contract for the registration of those share certificates. The respondent was only entitled to realise the rights in the pledged shares 30 days after Shanghai Pacific breached its repayment obligations *vis-à-vis* ICBC Shanghai. However, the respondent registered the share transfer forms pertaining to the pledged shares in or about October 2003 when there had not been any breach by Shanghai Pacific entitling the respondent to realise the security. Further, because the pledged shares were registered in the respondent's name, the appellants and Mr Lee were prevented from exercising their voting rights at an extraordinary general meeting ("EGM") held on 28 July 2006. Finally, by reason of the invalidity of the 2003 contract, the transfers of the pledged shares were also void.

92 We noted that the above share transfer forms expressly stated that there was to be "[n]o change in beneficial ownership" upon the transfer of the pledged shares. This was also stated in the resolution of Laien's directors dated 13 October 2003 which authorised the transfer of the pledged shares upon the execution, stamping and delivery to Laien of the share transfer forms. The condition that there would be no change in beneficial ownership could only have had meaning if it was intended that the respondent could register the share transfers even before any default entitling it to enforce the pledge. We also accepted the respondent's point that if the registration of the pledged shares was in breach of the 2003 contract, the appellants ought to have taken steps to recover those shares when they were transferred in October 2003. No explanation was given by the appellants as to why they had not taken any steps to rectify this alleged irregularity. All this suggested that the parties did not consider registration of the pledged shares to constitute enforcement of the pledge. Enforcement of the pledge, as found by the learned judge (at [26] of the GD), would involve some exercise of the rights of a beneficial owner, for instance, by selling the pledged shares or exercising the voting rights attached to those shares. In this regard, we noted that the EGM of 28 July 2006, during which the respondent exercised its voting rights arising from the pledged shares, took place long after the date on which it was entitled to enforce the pledge (which was 30 days after Shanghai Pacific's breach of its repayment obligations in 2004). For these reasons, we agreed with the learned judge's decision on this point.

Conclusion

93 In summary, the appellants failed to persuade us that there was a substantial and *bona fide* dispute over the debt demanded by the respondent. For that reason, we dismissed both appeals with the usual cost orders.