UBS AG *v* Telesto Investments Ltd and others and another matter
[2011] SGHC 170

Case Number	: Originating Summons No 1160 of 2010 (Registrar's Appeal No 59 of 2011), Suit No 801/2010 (Registrar's Appeal No 58 of 2011)
Decision Date	: 14 July 2011
Tribunal/Court	: High Court
Coram	: Steven Chong J
Counsel Name(s)	: Hri Kumar SC, Shivani Retnam, James Low and Charmaine Chiu (Drew and Napier LLC) for the plaintiff; Eddee Ng (Tan Kok Quan Partnership) for the defendant.
Parties	: UBS AG — Telesto Investments Ltd and others

CONFLICT OF LAWS – natural forum

CONFLICT OF LAWS – restraint of foreign proceedings

14 July 2011 Judgment reserved.

Steven Chong J:

Introduction

1 The two appeals before me (Registrar's Appeal No 58 of 2011 and Registrar's Appeal No 59 of 2011) relate to the issue as to which of the two jurisdictions, *ie*, Singapore or Australia, is the more appropriate forum to hear and decide the dispute between the parties arising from a customer-banker relationship.

2 The thrust of the plaintiff's case in the Singapore proceedings lies in contract where it claims for payment due under various contracts entered with the first and second defendant respectively (see [10], [12] and [17] below). The defendants, on the other hand, have commenced proceedings in Australia against the plaintiff for, *inter alia*, damages based on "deceptive" or negligent misrepresentation. Counsel for the defendants conceded at the hearing that the defendants' claim in Australia could essentially be mounted as a defence to the plaintiff's claim in Singapore. In other words, the Singapore proceedings mirror the Australian proceedings. However, the defendants claimed that based on certain perceived advantages arising from some Australian legislation, *ie*, the Australian Securities and Investments Act 2001 (Cth) ("ASIC Act"), or alternatively, ss 68 and 72 of the Fair Trading Act 1987 (NSW), or alternatively, ss 99–100 of the Fair Trading Act 1989 (Qld) ("the FTAs") (collectively known as the "Australian Acts"), their prospects of success in Australia are purportedly enhanced.

3 This decision will, *inter alia*, examine whether this factor of perceived juridical advantage, even if true, would be sufficient to displace the natural forum if it is determined to be Singapore instead of Australia. In addition, I will also consider the issue of whether the natural forum of a contractual claim can be displaced by the natural forum of a tort of misrepresentation, on the assumption that the natural fora for the contractual and misrepresentation claims are different, when the latter is in essence a defence to the contractual claim. Finally, I will examine the interplay of the principles governing stay applications with those governing anti-suit injunctions to determine whether such an injunction should be granted even if the stay is refused.

Background Facts

Dramatis Personae

4 The plaintiff in Suit No 801 of 2010 ("S 801/2010" or the "Singapore Proceedings") and Originating Summons No 1160 of 2010 ("OS 1160/ 2010") is UBS AG. Although UBS AG is named as the plaintiff in both S 801/2010 and OS 1160/2010, parties have made submissions by reference to UBS Singapore, which is the Singapore branch of UBS AG and carries on business in Singapore. For the avoidance of doubt, this judgment will employ the term "UBS AG (Singapore)" whenever the Singapore branch of UBS AG is referred to.

5 Telesto Investments Limited ("Telesto") is an underlying company of the Dog Star Trust which is a purpose trust registered in Jersey, the Channel Islands. On 3 December 2007, Telesto opened an account, *ie*, Account No [xxx] ("the Telesto account", "its account" or "the account" as the case may be) with UBS AG (Singapore).

6 Scott Francis Tyne ("Mr Tyne"), on the other hand, is a director and the controlling mind of Pole Star Funds Management Pte Ltd ("Pole Star") which, at all material times, was in charge of Telesto's discretionary investment. Mr Tyne was, at all material times, identified by Telesto (in the minutes of its directors' meeting) as the sole beneficial owner of the assets in the account. [note: 1] He was also the guarantor of all the obligations and liabilities of Telesto owing to UBS AG (Singapore), pursuant to a continuing guarantee and indemnity dated 26 September 2008 ("the Guarantee") in favour of UBS AG (Singapore).

7 Telesto and Mr Tyne are the first and second defendants of both S 801/2010 and OS 1160/2010.

8 ACN 074 971 109 Pty Ltd, the third defendant in OS 1160/2010, is the trustee of the Argot Unit Trust ("Argot") which is also a customer of UBS AG, having opened an account, *ie*, Account No [xxx] ("the Argot account") on or about 4 June 2010 with UBS AG (Singapore). Mr Tyne was, at all material times, the director of Argot and the sole beneficial owner of the assets under the Argot account. Therefore, at all material times, the common denominator of Telesto, Pole Star and Argot was Mr Tyne. The three defendants are hereinafter collectively referred to as "the defendants".

9 As an application for a stay of proceedings and/or for an anti-suit injunction typically involves an examination of the connections that the *relevant issues* of the dispute bear to each jurisdiction for the determination of the natural forum, a careful and detailed analysis of the facts giving rise to the present dispute is essential.

The events leading up to the commencement of S 801/2010

(1) Telesto's account and the relevant account documents

10 Telesto's account was booked in Singapore and was serviced by UBS AG (Singapore). The account is subject to the terms and conditions ("T&Cs") of the following documents, collectively referred to as the "Account Agreement":

(a) Account Mandate dated 13 November 2007;

(b) Risk Disclosure Statement dated 13 November 2007;

(c) Charge Over Assets dated 13 November 2007;

(d) Master Placing Agreement dated 2 June 2008;

(e) UBS AG (Singapore's) account T&Cs, as supplemented or modified by:

(i) the account T&Cs; and

(ii) investment services T&Cs.

(f) Special Risks in Security Trading (Asian version).

11 Documents (a) to (d) above were issued by UBS AG (Singapore) and were signed by the directors or authorised signatories of Telesto in Jersey. Documents (e) and (f) are the standard T&Cs as incorporated in the Account Agreement by, *inter alia*, the Account Mandate.

(2) Telesto's facilities provided by UBS AG (Singapore)

12 UBS AG (Singapore) extended to Telesto, by way of a Credit Services Notification Letter ("CSNL") dated 12 December 2007 which was subsequently revised by CSNLs dated 13 February 2008, 1 June 2008 and 1 August 2008, the following facilities:

(a) a Short Term Overdraft Facility with a limit of US$60 million;

(b) an Exchange Traded Derivative Trading Facility with a maximum risk limit of US$100,000; and

(c) an OTC Foreign Exchange and Precious Metal Derivatives Trading Facility with a maximum risk limit of US$100,000.

It is not disputed that Telesto executed the CSNLs in respect of the above facilities ("the Facilities") and is bound by the T&Cs set out therein.

13 The following are governed by Singapore law and contain (non-exclusive) jurisdiction clauses in favour of Singapore:

(a) Pursuant to cl 19.1 of the account T&Cs (General Conditions), the account and Facilities

are "governed by and construed in accordance with the law of the country in which the relevant Account is booked [*ie*, Singapore law] and [Telesto] irrevocably and unconditionally submits to the non-exclusive jurisdiction of the courts of [Singapore]"; [note: 2]

(b) Pursuant to paras 27.1 and 27.2 of the Guarantee, [note: 3] the Guarantee is "governed by and to be construed in all respects in accordance with, the laws of Singapore. [Mr Tyne] hereby submits to the non-exclusive jurisdiction of the Singapore courts and such other jurisdictions as [UBS AG] may deem fit".

(3) The events leading to the Standstill Agreement between UBS AG (Singapore) and Telesto

14 Pursuant to the CSNLs, Telesto utilised the facilities to, *inter alia*, purchase various investments ("the Investments") for its account. The Investments were secured by Telesto by way of a Charge Over Asset which, in turn, included the Investments and all other assets in the account ("the Collateral"). Notably, the Investments included bonds issued by certain Kazakhstan financial institutions, including Bank Turan-Alem ("BTA Bank") and Astana Finance ("Astana") (collectively the "Kazakh Bonds").

15 It is undisputed that UBS AG (Singapore) had sent Telesto periodic statements and confirmations reflecting the purchase of the Investments and other transactions carried out under the Account Agreement. The periodic statements and confirmations were retained by UBS AG (Singapore) in Singapore at its Retained Mail unit pursuant to Telesto's mailing instructions of 13 November 2007 when it signed the Account Mandate. [note: 4] Telesto did not dispute the statements or confirmations at any material time. Pursuant to cl 2.1 of the account T&Cs, [note: 5] Telesto undertook to inform UBS AG (Singapore) promptly and in any event, within 14 days from the date of such confirmation, and, within 90 days from the date of such statements (as applicable), of any discrepancies, omissions, credits or debits wrongly made to or inaccuracies or incorrect entries in the account or the contents of each confirmation or statement or the execution of any order. Failing which, upon the expiry of the 14 days, UBS AG (Singapore) may *deem* Telesto to have *approved* the original statements as sent by UBS AG (Singapore) to Telesto and in which case, Telesto shall be *deemed conclusively* to have *accepted* all the matters contained in such confirmation and statement without any further proof that the account is, and all entries therein and the execution of all the transactions are correct. Further, UBS AG (Singapore) shall be free from all claims in respect of the Account and all such transactions save for unauthorised transactions which have resulted from the forgery, fraud or negligence of UBS AG (Singapore) and/or any of its employees. UBS AG (Singapore), relying on *RBS Coutts Bank Ltd* v *Shishir Tarachand Kothari* [2009] SGHC 273, submitted that in the light of cl 2.1 of the account T&Cs, Telesto is deemed to have agreed to the Investments.

16 In or about September 2008, the value of the Collateral decreased due to market deterioration. Consequently, a margin shortfall occurred in the account. In or around 24 September 2008, Mr Tyne travelled to Singapore to, *inter alia*, meet with the representatives of UBS AG (Singapore) to discuss how to deal with the margin shortfall. Mr Tyne requested UBS AG (Singapore) not to liquidate the Collateral and agreed to furnish additional security by way of, amongst other things, the Guarantee.

17 Mr Tyne executed the Guarantee in Singapore on or about 26 September 2008. UBS AG (Singapore) and Mr Tyne, who was acting behalf of Telesto, further agreed to negotiate a standstill agreement on the basis that in return for UBS AG (Singapore) not exercising its right to (amongst other things) liquidate or request for more collateral, Telesto would arrange for additional collateral and repay the Total Liabilities, *ie*, "all moneys, obligations and liabilities now or at any time due, owing or incurred by [Telesto] to [UBS AG], anywhere, whether on the account, or in respect of the

Facilities or any instructions or otherwise, in whatever manner, and actual or contingent, present or future, and whether as principal debtor or as surety, including (but not limited to) all principal moneys, interest at such rates as may from time to time be payable by [Telesto], fees, charges and all expenses" (see cl 1 of the account T&Cs (General Conditions)).

18 Pursuant to cl 11.2 of the account T&Cs, Telesto was to maintain at all times sufficient Collateral for the Facilities as determined by UBS AG (Singapore) in its sole discretion. UBS AG (Singapore) may, from time to time, require additional collateral to meet the required margin for the Facilities ("Required Margin"). As at 28 October 2008, there remained a shortfall of US$ 28,159,607 in the Required Margin.

19 As no standstill agreement was reached with Mr Tyne, UBS AG (Singapore) issued Telesto a Notice of Margin Call dated 29 October 2008 [note: 6] requesting that Telesto "immediately deposit additional Collateral, or, if applicable, terminate or deal with transactions booked in [Telesto's] account, in each case in order to restore the Required Margin" ("the Margin Call"). Unfortunately, Telesto did not meet the Margin Call. Under cll 13.2 and 13.3 of the account T&Cs (General Conditions), [note: 7] the Total Liabilities became immediately due and payable. Telesto and Mr Tyne, however, continued to request UBS AG (Singapore) not to liquidate the Collateral or make further margin calls or call for further collateral. The negotiations for a standstill agreement continued.

20 On or about 22 December 2008, UBS AG (Singapore) wrote to Mr Tyne stating that "the Required Margin not been re-established[,] [a]s a result thereof, a Default Event has occurred and consequently, the full amount of the Total Liabilities became immediately due and payable to [UBS AG (Singapore)]". [note: 8] However, "in recognition of [Mr Tyne's] full co-operation to date and provided that (a) there [was] no default in any of the Collateral; and (b) there [was] no shortfall in the interest due under the account verses coupon payments under the Collateral, [UBS AG (Singapore) would] suspend enforcement of its rights under the Account Agreement for the time being". In the meantime, negotiations to finalise the terms of a standstill agreement continued.

21 On or about 23 April 2009, UBS AG (Singapore) proposed in writing the terms of a standstill agreement. Telesto was to confirm it by signing and returning a copy of the letter to UBS AG (Singapore). However, this proposed standstill agreement was not signed by Mr Tyne on behalf of Telesto. [note: 9]

22 On or about 28 April 2009, BTA Bank defaulted on two of its debt facilities which, in turn, triggered a default under the Collateral which was partly constituted of BTA Bank bonds as defined below:

(a) Telesto's EUR denominated 6.25% Turanalem Finance-Euro Medium-Term Notes 2006-27.09.2011 (ISIN XS0269267000); and

(b) Telesto's GBP denominated 7.125% Turanalem Finance-Senior Notes 2006-21.12.2009 (ISIN XS0279181662).

23 UBS AG (Singapore), by a letter dated 6 May 2009, [note: 10] demanded that Telesto make payment of €6.8 million and £2.35 million which represented the notional value of the BTA Bank bonds no later than 11 May 2009. This was because:

(a) Telesto had not returned a countersigned copy of the proposed standstill agreement.

(b) BTA Bank's default had led to a default of the Collateral.

(c) UBS AG (Singapore)'s understanding or agreement with Telesto to defer the enforcement of its rights was contingent on the absence of default under any of the Collateral including BTA Bank bonds.

24 By a separate letter dated 6 May 2009 to Mr Tyne, [note: 11] UBS AG (Singapore) called on the Guarantee.

25 Telesto and Mr Tyne failed to make any payment. They informed UBS AG (Singapore) that they would not be able to make up for the expected default by BTA Bank. Instead, they asked UBS AG (Singapore) to resume negotiations for a standstill agreement and to accept alternative collateral. UBS AG (Singapore) agreed to suspend enforcement of its rights under the Account Agreement for the time being.

26 A standstill agreement was finally entered into between UBS AG (Singapore) and Telesto, the terms of which are set out in the letter from UBS AG (Singapore) dated 14 December 2009. The letter of offer was signed by UBS AG (Singapore) in Singapore. It was countersigned and accepted in Jersey by Telesto on 31 December 2009 (the "Standstill Agreement"). [note: 12]

(4) The Standstill Agreement

27 Under the Standstill Agreement, in consideration of UBS AG (Singapore) agreeing not to liquidate the Collateral or to make further margin calls or call for further Collateral until 31 March 2011 or an event of default, whichever is the earlier, under the Account Agreement, Telesto agreed, *inter alia*, to the following conditions ("the Conditions"):

(a) Apply all cash flows generated by the Collateral towards the repayment of the Total Liabilities (as the term is defined in the Account Agreement);

(b) Provide and/or procure the following in favour of UBS AG (Singapore) in support of the Total Liabilities by 31 December 2009:

(i) the deposit and custody of all shares in one XS Platinum Inc held by Telesto ("Share Deposit");

(ii) an assignment of all proceeds from an action in the Supreme Court of Victoria in which Argot had an interest ("Litigation Proceeds") in the form of a Deed of Assignment by way of Mortgage ("Deed of Assignment");

(iii) a letter of undertaking from Argot ("Letter of Undertaking"); and

(iv) an overview of the assets and liabilities of Mr Tyne and his beneficially owned entities, duly signed by Mr Tyne.

(c) For the time period starting on 19 January 2009 until 18 July 2009, pay interest at a rate of two percent (2%) per annum above UBS AG (Singapore)'s cost of funds. Thereafter, and until further notice, the applicable rate of interest will be reduced to 1.5% per annum above UBS AG (Singapore)'s cost of funds.

28 The Standstill Agreement further reserved the rights of UBS AG (Singapore) under, *inter alia*, the Account Agreement and provided that the Standstill Agreement shall terminate upon the occurrence of, *inter alia*, any of the following events of default:

(a) Telesto fails to meet the Conditions ("Event of Default 1 under the Standstill Agreement");

(b) Telesto or Argot fails to comply with any of the obligations pursuant to the Letter of Undertaking ("Event of Default 3 under the Standstill Agreement"); or

(c) In the reasonable opinion of UBS AG (Singapore), a material adverse change occurs in Telesto's financial condition or operating environment or any event occurs or circumstances arise which causes UBS AG (Singapore) to believe that Telesto may not or may be unable to perform or comply with any one or more of its obligations ("Event of Default 5 under the Standstill Agreement"). [note: 13]

29 On or about 31 December 2009, pursuant to the Standstill Agreement, UBS AG (Singapore), Telesto and Argot entered into a Deed of Assignment [note: 14] under which, *inter alia*, Argot agreed to assign the Litigation Proceeds as security for Telesto's liabilities under the account.

30 On or about 28 January 2010, pursuant to the Standstill Agreement, Mr Tyne executed a Letter of Undertaking on behalf of Argot. [note: 15] Under this Letter of Undertaking:

(a) Argot undertook to open an account (*ie*, the Argot account) with UBS AG (Singapore) as soon as practicable but in any event before 31 December 2009 [*sic*].

(b) Argot undertook to charge all and any assets held within the Argot account as a continuing security in favour of UBS AG (Singapore) to secure Telesto's liabilities to UBS AG (Singapore) as soon as practicable but in any event before 31 December 2009 [*sic*].

(c) Argot agreed to apply the Litigation Proceeds directly to the Argot account towards repayment of Telesto's liabilities.

31 On or about 14 May 2010, Mr Tyne caused the Argot account to be opened. [note: 16] The Argot account was activated by UBS AG (Singapore) on 4 June 2010. [note: 17] Mr Tyne was the only authorised email user and representative of the Argot account. [note: 18] As with Telesto's account, the Argot account is booked in, and serviced by UBS AG (Singapore). It is subject to, *inter alia*, the express terms and/or conditions of the account and is governed by Singapore law and subject to the *exclusive* jurisdiction of the Singapore courts.

(5) The events of default

32 Between 31 December 2009 and October 2010, the following events of default under the Standstill Agreement occurred:

(a) Telesto failed to provide and/or procure the Share Deposit. This constituted an Event of Default 1 under the Standstill Agreement (see [28] above).

(b) Argot failed to execute a charge over all or any assets held within the Argot Account. The Argot Account remained an unfunded account (see Statement of Account as of 5 November

2010). [note: 19] This constituted an Event of Default 3 under the Standstill Agreement (see [28] above).

33 Telesto's Australian solicitors, Messrs Eakin McCaffery Cox, by a letter dated 8 October 2010 ("Eakin's letter"), made various claims against UBS AG in relation to, *inter alia*, the Kazakh Bonds. [note: 20] By reason of Eakin's letter, UBS AG (Singapore) formed the opinion that Telesto may not or may be unable to perform or comply with any one or more of its obligations. This constituted an Event of Default 5 under the Standstill Agreement.

34 On or about 11 November 2010, UBS AG issued a conclusive certificate of indebtedness dated 11 November 2010 ("UBS AG's certificate") [note: 21] certifying, amongst other things, that "by reason of [Events of Default 1, 3 and 5 under the Standstill Agreement], UBS AG formed the reasonable opinion that events and circumstances had arisen which caused UBS AG to believe that Telesto may not (or may be unable to) perform or comply with any one or more of their obligations under the Standstill Agreement". By reason of the Events of Default 1, 3 and 5, the Standstill Agreement was terminated.

The Singapore Proceedings

35 By a letter dated 15 October 2010, UBS AG (Singapore) furnished a notice of termination of the Standstill Agreement to Telesto in the light of the occurrence of the Events of Default 1, 3 and 5 under the Standstill Agreement, and that the Total Liabilities (as at 14 October 2010) in the sum of US$12,619,499.56 was immediately due and payable, and demanded payment. [note: 22]

36 By a letter dated 15 October 2010, UBS AG (Singapore) also demanded from Mr Tyne, as guarantor under the Guarantee, payment of the Total Liabilities as at 14 October 2010. [note: 23]

37 To the best of the knowledge of UBS AG (Singapore), no Litigation Proceeds have to-date been paid to Argot. Therefore, UBS AG (Singapore) only demanded payment from Telesto and Mr Tyne. Neither has made payment to date.

38 In the light of the foregoing, on 15 October 2010, UBS AG commenced S 801/2010 [note: 24] against Telesto and Mr Tyne, *inter alia*:

(a) to recover the Total Liabilities; and

(b) for a declaration that the defendants are estopped from asserting, and/or have compromised, any claims or defences they may have arising out of, or in relation to, the Investments and/or Total Liabilities, including but not limited to, the acquisition or management of the Investments and/or the Total Liabilities.

39 The writ was served on Telesto in Jersey on 5 November 2010 and on Mr Tyne in Sydney (through his solicitor from Eakin McCaffery Cox) on 14 December 2010.

The Australian Proceedings

40 On 2 November 2010, after the commencement of the Singapore Proceedings, the defendants filed Summons and Commercial List Statement proceedings number 2010/363808 in the Supreme Court of New South Wales against UBS AG's branch in Australia ("the Australian Proceedings"). [note: 25] The defendants then filed an Amended Summons and Amended Commercial List Statement ("the Australian

pleadings") on 17 December 2010. [note: 26]

41 From the defendants' affidavits filed in the Singapore Proceedings as well as their Australian pleadings, the defendants have sought to deny liability on several fronts, *inter alia*, as below:

(a) First, they alleged that in or around mid 2007, Mr Tyne, acting on behalf of Pole Star, advised UBS AG that Pole Star was the investment manager of Telesto's investment portfolio but had limited authority and required express authority of Telesto to invest in securities other than "investment grade" debt securities. This conversation purportedly took place over the phone between Mr Tyne (acting on behalf of Pole Star) and one Mr Steven Betsalel ("Mr Betsalel") who was an officer of UBS AG. It was claimed that Mr Betsalel had advised Mr Tyne that UBS AG would procure Telesto to execute documents authorising Pole Star to operate the accounts, credit facilities and trading lines with UBS AG on behalf of Telesto; [note: 27]

(b) Secondly, they alleged that the Kazakh Bonds were purchased as a result of certain misrepresentations made orally by Mr Betsalel and one Mr Edward Farrell ("Mr Farrell"), on behalf of UBS AG, to Mr Tyne (on behalf of Pole Star) and Telesto by way of a number of phone calls made in late 2007; [note: 28]

(c) Thirdly, they alleged that UBS AG owed fiduciary duties to Telesto in relation to the account and breached the same by acting as advisers to BTA Bank. BTA Bank defaulted on payment of coupons owed to bond holders, including those under the BTA Bank bonds owned by Telesto. They claimed that the decision of BTA Bank to default was on the advice given by or with the concurrence of UBS AG. [note: 29]

42 In the Australian Proceedings, the defendants claim, *inter alia:* [note: 30]

(a) A declaration that the investment transactions purportedly entered into between 14 January 2008 and 11 February 2008, (*ie*, the Kazakh Bonds) were entered into by UBS AG (Singapore) without Telesto's authority such that they were not transactions done by or on behalf of Telesto.

(b) An order that, each of the following, *viz*, the Facilities, Mortgage, the Guarantee, the Revision Letter (*ie*, the Standstill Agreement), the Trust Mortgage (*ie*, the Deed of Assignment) and the Letter of Undertaking, be declared *void ab initio;* or alternatively be declared void from a date to be determined by the court; or alternatively UBS AG be restrained from taking any action to enforce any right or entitlement arising under any such instrument.

(c) Damages.

(d) Damages or compensation pursuant to ss 12 GF or 12 GM of the ASIC Act (Cth), or alternatively, ss 68 and 72 of the Fair Trading Act 1987 (NSW) or alternatively ss 99–100 of the Fair Trading Act 1989 (Qld).

(e) Equitable compensation.

43 The writ for the Australian Proceedings was served on UBS AG (Australia)'s office in Sydney, Australia on 3 November 2010 prior to the service of the Singapore writ on Telesto in Jersey on 5 November 2010. The slight delay in the service of the Singapore writ, given that it was filed on 15 October 2010, was probably due to the fact that Telesto's previous solicitors in Singapore, Messrs

CTLC Law Corporation, did not agree to accept service on Telesto's behalf. Thus, UBS AG (Singapore) had to apply to serve the writ on Telesto out of jurisdiction. [note: 31]

The Stay Applications and the Anti-Suit Injunction

44 On 11 November 2010, UBS AG (Singapore) filed an application for an anti-suit injunction in OS 1160/2010 against the defendants in respect of the Australian Proceedings.

45 On 21 December 2010, Telesto filed Summons No 5910/2010 to stay the Singapore Proceedings in favour of the Australian Proceedings. On 10 January 2011, Mr Tyne filed Summons No 83/2011 to stay the Singapore Proceedings in favour of the Australian Proceedings (collectively "the stay applications").

46 All three applications were heard by an Assistant Registrar ("the AR") on 21 February 2011. The AR dismissed Telesto and Mr Tyne's stay applications and granted an anti-suit injunction against the defendants from continuing the Australian Proceedings.

Registrar's Appeal No 58/2011 and Registrar's Appeal No 59/2011 ("the Appeals")

47 Registrar's Appeal No 58/2011 is an appeal brought by Telesto and Mr Tyne against the decision of the AR to dismiss their stay applications.

48 Registrar's Appeal No 59/2011 is an appeal brought by the defendants against the AR's decision to grant an anti-suit injunction in OS 1160/2010 against them from continuing the Australian Proceedings.

49 At the start of the hearing of the Appeals, I directed counsel for the defendants, Mr Eddee Ng ("Mr Ng") to first proceed with his appeal in relation to the stay applications brought by Telesto and Mr Tyne. This was because, in the present circumstances where two fora have been chosen as the place of litigation by the plaintiff (on one hand) and Telesto and Mr Tyne (on the other), if I decide that stay of the Singapore Proceedings should be granted on the ground that Singapore is not the more appropriate forum to try the matter, the appeal against the AR's decision to grant anti-suit injunction would, logically, be allowed. The converse, however, is not true. The fact that Singapore is the natural or more appropriate forum to hear the dispute *per se* does not mean that the anti-suit injunction must necessarily be ordered. There are other requirements for UBS AG to establish, *eg*, that the Australian Proceedings are vexatious and/or oppressive, to justify the granting of an anti-suit injunction.

RA 58/2010: The appeal against the refusal of the stay applications

50 Parties were generally *ad idem* as regards the principles governing the stay applications on the basis of *forum non conveniens*, *viz*, the principles laid down in *Spiliada Maritme Corporation v Cansulex Ltd* [1987] AC 460 ("*Spiliada*"). Where parties expectedly differ is when applying the test, they arrived at opposing conclusions as to whether Singapore or Australia is clearly or distinctly the more appropriate forum.

51 It was common ground between the parties that *Spiliada* laid down a two-stage test to determine whether a stay of proceedings ought to be granted:

(a) Stage one: The legal burden of proof falls on the defendant to demonstrate that there is some other available forum, having competent jurisdiction, in which the case may be tried more

suitably for the interest of all parties and the ends of justice. If the court is satisfied, at this stage of the inquiry, that there is no other forum which is clearly and distinctly more appropriate than Singapore to try the matter, it will ordinarily refuse a stay.

(b) Stage two: If the Singapore court is satisfied that there is another available forum which is more appropriate to try the matter, the burden is then on the plaintiff to show special circumstances by reason of which justice requires that the stay of the Singapore Proceedings should nonetheless be refused.

Stage one of the Spiliada test

52 Under stage one of the *Spiliada* test, the defendants bear the burden of proving that Australia is clearly or distinctly the more appropriate forum to try the dispute between the parties. In this regard, the court would invariably examine the connecting factors which the dispute bears to each of the two competing jurisdictions. These factors include:

(a) general connecting factors such as residence of the parties and location of the relevant witnesses or documents;

(b) the jurisdiction in which the cause of action accrued;

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

(d) the effect of the concurrent proceedings before the foreign court.

(see *Rickshaw Investments Ltd and another* v *Nicolai Baron von Uexkull* [2007] 1 SLR(R) 377 ("*Rickshaw*") at [15] and [23]).

53 The list of connecting factors is not closed and much will depend upon the precise factual matrix of each case (see *JIO Minerals FZC and others v Mineral Enterprises Ltd* [2011] 1 SLR 391 ("*JIO Minerals*") at [41]). However, as the threshold is that the natural forum is *prima facie* clearly more appropriate to try the case, connections which have no or little bearing on the adjudication of the issues in dispute between the parties will carry little weight (see *Halsbury's Laws of Singapore on Conflicts of Law*, Vol 6(2) (Lexis Nexis, 2009) ("*Halsbury's Laws of Singapore on Conflicts of Law*") at para 75.090 as cited in *JIO Minerals* at [41]).

54 In considering the natural forum of the dispute, it is not the mere personal or geographical connections that are decisive as there must be *some legal significance* in each of the connecting factors. As such, the numerical preponderance of personal or geographical connections *per se* is not by any means conclusive (see *Yeoh Poh San & another v Won Siok Wan* [2002] SGHC 196 at [17]–[18]). Each connecting factor cannot be analysed *in vaccuo* but must instead be examined in the context of the issues in dispute between the parties.

55 With these settled principles in mind, it is perhaps apposite to set out the key issues that arise from both the Singapore and the Australian Proceedings as it would assist in the determination of the

natural forum. Given that the defendants have not filed their Defence in the Singapore Proceedings, the Australian Proceedings are relevant insofar as it provides a clear indication of the defendants' position as regards their potential defence and their (counter)claim(s) against UBS AG.

(1) Jurisdiction in which cause of action accrued and the applicable law of the issues in dispute

56 It is clear that UBS AG's claims in the Singapore Proceedings against the defendants are made pursuant to various contractual documents:

(a) the claim for the Total Liabilities (as at 14 October 2010) against Telesto is based on the Account Agreement, the CSNLs and the Standstill Agreement; and

(b) the claim for the Total Liabilities (as at 14 October 2010) against Mr Tyne is based on the Guarantee.

Noteworthy is that Telesto's account with UBS AG (Singapore) from which the Total Liabilities (as at 14 October 2010) became due was booked in Singapore and serviced by officers of UBS AG (Singapore). Each of the contractual documents was issued by UBS AG (Singapore).

57 It is immediately apparent (see [42]–[44] above) that the issues raised by the defendants in the Australian Proceedings are essentially in the nature of defences to avoid liability to the claims brought by UBS AG in the Singapore Proceedings. By juxtaposing the respective positions of UBS AG and the defendants, it is clear that the *ultimate issue* hinges upon whether UBS AG is entitled to repayment of the Total Liabilities (as at 14 October 2010) under the contractual documents (listed at [10], [12], [17], [27] and [28] above) or whether the defendants are entitled to rescission or damages [note: 32] in respect of the investment in the Kazakh Bonds. Simply put, they are two sides of the same coin.

58 In response to each of the points raised by the defendants in the Australian Proceedings (see [41]–[42] above), counsel for UBS AG, Mr Hri Kumar ("Mr Kumar"), relied on provisions of the contractual documents to address them. Specifically, Mr Kumar submitted that by reason of the conclusive evidence clause, the *deemed acceptance* of the statements and confirmation (see [15] above), and to the execution of the Standstill Agreement, the defendants have either ratified the alleged unauthorised transactions and/or have waived their rights to challenge the Kazakh Bonds. For instance, it was Mr Kumar's submission that under the terms of the T&Cs of the Risk Disclosure Statement, UBS AG is not responsible for any advice or recommendations it might have given to Telesto in relation to any Investments, including the Kazakh Bonds. In addition to that, Telesto had agreed that UBS AG was not acting as a fiduciary and/or adviser in respect of the Kazakh Bonds. The relevant T&Cs can be found in the following documents:

(a) Clauses 1(a), (b), (d), (e), (f) and Clause 17 of the Risk Disclosure Statement; [note: 33]

(b) Clause 7.1 of the Account Mandate; [note: 34]

(c)

Clauses 2, 4, and 7 of the Master Placing Agreement; [note: 35]

(d) Clauses 2, 4 and 7 of the Investment Services T&Cs, Securities Placement Services; [note: 36] and

(e) Clauses 167–183 of the Special Risks in Securities Trading (Asian Version). [note: 37]

In other words, UBS AG's causes of action against Telesto and Mr Tyne respectively were accrued in Singapore by virtue of the account and Guarantee which gave rise to the customer-banker relationship between the parties being operated and serviced in Singapore.

(2) The existence of non-exclusive jurisdiction clauses in favour of Singapore

59 Mr Kumar submitted that several non-exclusive jurisdiction clauses in favour of Singapore can be found in the Account Agreement:

(a) clause 19.1 of the account T&Cs (General Conditions); [note: 38]

(b) paragraph 27.2 of the Guarantee; [note: 39]

(c) clause 18.1 of the Charge Over Assets; [note: 40] and

(d) other documents such as:

(i) Declaration by Account Holder(s) for access to UBS e-banking services; [note: 41]

(ii) Instruction and authorisation to give information by e-mail; [note: 42]

(iii) Foreign Exchange, Precious Metal and Option Transactions Agreement; [note: 43] and

(iv) Exchange Traded Option Facility Agreement dated 2 June 2008. [note: 44]

It was his submission that the presence of jurisdiction clauses in favour of Singapore, *albeit* non-exclusive, in the bulk of the contractual documentation clearly evinced an intention on the part of the parties that any dispute arising from the Account Agreement should be heard in Singapore.

60 Mr Ng, on the other hand, submitted that the focus of the defendants' case on the lack of authority issue is based on the understanding/agreement reached between Mr Betsalel and Mr Tyne (whereby Mr Betsalel allegedly represented that he would procure the necessary authorisation from Telesto for Pole Star such that the latter could purchase non-investment grade securities) is independent of any contractual documents entered into between UBS AG (Singapore) and Telesto and Mr Tyne. Therefore the existence of the non-exclusive jurisdiction clauses is irrelevant. [note: 45] Mr Ng pointed out that the defendants' claim against UBS AG for misrepresentations (for instance, the status of Kazakhstan banks) and for breach of fiduciary duties are matters which fall outside any contractual documents entered into between the parties. In fact, he submitted that *all* of the defendants' claims, in any event, fell outside the ambit of the composite governing law and non-exclusive jurisdiction clause in the Account Agreement. For reasons as explained in more detail in [79]–[81] below, these issues raised by the defendants cannot justifiably be detached from its contractual context.

(3) Choice of law clauses

61 The law chosen by the parties to govern their contractual relationship is also a significant factor in determining the appropriate forum. In *Rickshaw*, the Court of Appeal observed at [42]:

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

62 In this regard, it is beyond debate that the governing law of the contractual documents is Singapore law:

(a) clause 19.1 of the Account Agreement; [note: 46]

(b) paragraph 27.1 and 27.2 of the Guarantee; [note: 47] and

(c) paragraph 10 of the Letter of Undertaking. [note: 48]

63 It is noteworthy that, save for Argot's Letter of Undertaking which stipulates Victorian law as the governing law, *none* of the other material contractual documents provide for Australian law as the governing law.

64 Although the Standstill Agreement did not expressly stipulate any governing law, I agree with Mr Kumar that it would also be governed by Singapore law. As expressed by the Court of Appeal in *JIO*

Minerals at [79]:

> 79 It is well established that a three-stage approach is applied to determine the governing law of a contract (see, for example, the decision of this court in *Pacific Recreation Pte Ltd v S Y Technology Inc* [2008] 2 SLR(R) 491 ("*Pacific Recreation*") at [36]). At the first stage, the court considers if the contract expressly states its governing law ("the Express Law"). If the contract is silent, the court proceeds to the second stage and considers whether it can infer the governing law from the intentions of the parties ("the Implied Law"). If the court is unable to infer the parties' intentions, it moves to the third stage and determines the law which has the closest and most real connection with the contract ("the Objective Law").

It bears mentioning that the Standstill Agreement is not a standalone contract. Instead, it was executed to supplement and/or modify the rights and obligations of the parties under the Account Agreement. In fact, it was expressly provided in cl 7 of the Standstill Agreement that "the arrangements set forth [t]herein... are *without prejudice to [UBS AG (Singapore)'s] rights under the Account Agreement, which remained reserved*". [note: 49] In my view, it is clear that the parties intended the Standstill Agreement to be governed by the same law which governs the Account Agreement, *ie*, Singapore law, given the origin and purpose of the Standstill Agreement.

65 In any event, it is also clear that Singapore law has the closest and most real connection with the Standstill Agreement. First, some of the negotiations for the Standstill Agreement took place in Singapore. Secondly, the place of performance for the defendants' obligations under the Standstill Agreement, such as the Share Deposit and application of the cash flows generated by the Collateral towards repayment of the Total Liabilities, are to take place in Singapore. Thirdly, the Guarantee, which was entered into pursuant to the Standstill Agreement, was executed by Mr Tyne in Singapore. Finally, the Letter of Undertaking executed by Argot pursuant to the Standstill Agreement provided for the exclusive jurisdiction of Singapore.

66 In the face of the obvious contractual connections of the claim to Singapore, it was not surprising that Mr Ng conceded during the hearing of the Appeals that Singapore was clearly the natural forum for the determination of UBS AG's claims under the various contractual documents against the defendants.

(4) Location and compellability of witnesses

67 From the perspective of UBS AG (Singapore)'s contractual claim, all its witnesses to establish its claim are located in Singapore. On the other hand, the principal issues raised by the defendants centre on questions of fact which revolve around certain conversations between Mr Tyne and Mr Betsalel/Mr Farrell. To rebut the factual allegations as regards Telesto's lack of authority to purchase non-investment grade securities and the misrepresentations made in relation to the status of the Kazakhstan banks (see [41] above), all of which were purportedly made over the telephone, Mr Ng submitted that the evidence of Mr Betsalel and one Ms Anna McCeery (Mr Betsalel's direct supervisor) on the following issue would be critical:

(a) whether representations were made to Pole Star/Mr Tyne as to the procuring of the necessary authorities to cure their lack of authority to enter into non-investment grade securities on behalf of Telesto;

(b) the procedures which UBS AG had in place to get proper authorisation for a client such as

Telesto (which was evidently a trust company);

(c) whether UBS AG had indeed failed to procure the necessary authorities; and

(d) whether Telesto, Pole Star and/or Mr Tyne were advised of the failure to procure the necessary authorities.

68 Notably, Mr Betsalel has since left the employment of UBS AG (Singapore) and he appears from his email to Mr Ng (exhibited as SFT-3 in Mr Tyne's affidavit filed on 31 January 2011) to be willing to testify in either the Australian or Singapore Proceedings, although he did express reservations about filing an affidavit on behalf of the defendants. [note: 50] It is not disputed that Mr Betsalel is currently resident in Singapore. As such, he is compellable to testify at the trial in Singapore.

69 The defendants, however, submitted that the issue of location and compellability of Mr Betsalel is not a weighty factor in favour of Singapore because it is not disputed that the evidence of Mr Betsalel may be adduced by way of deposition through judicial channels under the Australian Proceedings (see the opinion of Professor Mark Aronson of the University of New South Wales (exhibited as SFT-4 in Mr Tyne's affidavit filed on 31 January 2011)).

70 The Court of Appeal in *Rickshaw* at [19] expressed the view that where the main dispute relates to questions of fact, and where "the judge's assessment of a witness's credibility is crucial, then the ***location of the witnesses takes on greater significance*** because there would be savings of time and resources if the trial is held in the forum in which the witnesses reside and where they are *clearly compellable* to testify." [emphasis in italics in original, emphasis in bold italics added]. Indeed, in the present case, although the evidence of Mr Betsalel may be adduced by way of deposition and then presented before the Australian court, it is certainly not desirable that a critical witness for a serious issue like misrepresentation should not be compellable. In addition to that, this court is also of the view that Mr Betsalel's credibility as a witness is also of importance in assisting the trial judge's determination of where the truth of this matter lay. Thus, the compellability and the importance of the assessment of credibility by the trial judge point to the unsuitability of a witness like Mr Betsalel giving evidence by way of deposition.

(5) The alleged place of tort as the natural forum

71 In spite of the patently obvious indicators which inexorably point to Singapore as the natural forum to determine UBS AG's claim, Mr Ng, nonetheless sought to convince this court to displace Singapore in favour of Australia as the more appropriate forum to try the matter. The principal point relied on by Mr Ng in aid of the appeal against the stay applications is based on certain misrepresentations made by Mr Betsalel and/or Mr Farell to Mr Tyne in relation to the Kazakh Bonds and that such misrepresentations were received and acted on by Mr Tyne in Australia. This was admittedly the only connection which the dispute has with Australia. The question then turns on whether the natural forum of UBS AG's *claim* which is (clearly and distinctly) Singapore could change to Australia just because the (potential) *defence* and/or *counterclaim* grounded in tort might favour Australia as the more appropriate forum to determine the tort. Mr Ng answered in the affirmative on the premise that since the misrepresentations were received in Australia, the natural forum for the dispute is therefore Australia. Mr Ng relied on authorities such as *Rickshaw*, *JIO Minerals*, *Cordoba Shipping Co Ltd v National State Bank, Elizabeth, New Jersey (The Albaforth)* [1984] 2 Lloyd's Rep 91 ("*The Albaforth*"), *Diamond v Bank of London & Montreal Ltd* [1979] 1 QB 333 ("*Diamond*") and *Voth v*

Manildra Flour Mills Pty Ltd (1990) 171 CLR 538 ("*Voth*") for the proposition that the place where the misrepresentation was *received* is the place where tort was committed which, in turn, is *prima facie* the natural forum to try the dispute.

72 In addition to that, Mr Ng also stressed that the defendants would be able to invoke the Australian Acts*, ie*, the ASIC Act and the FTAs, in the Australian Proceedings which are not available in Singapore. To assist the court in the interpretation of the Australian Acts, the defendants submitted an expert opinion by Mr Justin Gleeson QC ("the Gleeson Opinion" or "Opinion" as the case may be). No competing opinion on the Australian Acts was submitted by UBS AG. I will separately review the Australian Acts with the benefit of the Gleeson Opinion to determine whether there are in fact material differences between Singapore and Australia as regards the matters covered by the Australian Acts and if so, where and how this factor would feature in the *Spiliada* test.

73 To place matters in perspective, this issue of the Australian Acts only becomes relevant for consideration if Australian law is the *lex loci delicti*. This would entail accepting Mr Ng's submission that by virtue of the place of receipt of the alleged misrepresentation from Mr Betsalel and/or Mr Farell being Australia, Australia is the natural forum of the dispute. In the event that I find that Australia is not the place of the tort, the defendants would have no basis to rely on the Australian Acts in aid of the stay application.

74 According to *Halsbury's Laws of Singapore on Conflict of Laws*, at paragraph 75.092, "where the tort has been committed is *prima facie* the natural forum. It will be a significant albeit not decisive factor". As a general proposition, this much is not controversial. An analysis of the cases cited by Mr Ng is apposite at this juncture: in both the cases of *The Albaforth* and *Diamond*, the misrepresentations were received in London, England. As for *Voth*, a claim for negligent misstatement was made against an accountant for failing to draw attention to certain tax withholding laws in Missouri, USA which resulted in the imposition of a penalty. As his failure to draw attention to the requirement for withholding tax which, for all practical purposes, was equivalent to a positive statement that it was not payable occurred in Missouri, the place of the tort was determined to be Missouri. In *Rickshaw*, the Court of Appeal at [37] and [39] accepted that the place where the tort occurred (*ie*, misrepresentation was received) would, *prima facie*, be the natural forum of the tort. However, this was only one of the factors to be taken into account in the overall analysis, albeit a significant one (at [40] of *Rickshaw*). It should be noted that in *Rickshaw*, in respect of the respondent's submission that the *lex loci delicti* was not Singapore law as the alleged misrepresentations were actionable where they had been received, *ie*, either Germany or New Zealand, the Court of Appeal found that it was not clear, on the pleadings, *where* the alleged misrepresentations were in fact received (at [72]).

(A) The analysis on authorities which support the specific test of the the natural forum being the place of tort

75 Most of the authorities appear at first blush to support Mr Ng's submission that the tort of misrepresentation is committed in the place where it was received. Notably, the AR accepted that the tort is governed by the law where the tort was received and acted upon. However, she found that the connection with Australia in the present case to be merely a fortuitous one, *ie*, it just so happened that Mr Tyne was in Australia when he received the misrepresentations from Mr Betsalel/Mr Farrell.

76 This is where my analysis differs from that of the AR. I am of the view that the pertinent question turns on whether the inquiry of where the tort of misrepresentation was committed ends at the point of receipt. Recent decisions indicate that the place of receipt is not necessarily decisive.

For example, in *JIO Minerals*, the misrepresentation was received in India (*JIO Minerals* at [89]) and yet the Court found that the natural forum for the tort was Indonesia (*JIO Minerals* at [95]). At [91] of *JIO Minerals*, the Court of Appeal stated the English position, *viz*, the specific test that "the place of the tort is the place where the representation is received and acted upon" [emphasis added]. Given that reliance is a constituent element of the tort of misrepresentation, the place of reliance (and not merely receipt) of the misrepresentation is unquestionably relevant in the equation. It can be deduced from the cases cited at [74] above that much emphasis was placed on the place of receipt, as opposed to the place of reliance, because in those cases, the act of receipt and reliance took place in the same jurisdiction. In my view, different considerations should apply where the place of receipt and reliance are different.

(B) Misrepresentation: receipt and reliance

77 At the hearing of the Appeals, both parties disagreed as to what constitutes "reliance" or "acted upon". Mr Ng submitted that reliance occurred in Australia when Mr Tyne gave Mr Betsalel the green light to purchase the Kazakh Bonds. Mr Kumar, on the other hand, submitted that reliance took place in Singapore where the officers of UBS AG (Singapore) operated Telesto's account in Singapore to purchase the Kazakh Bonds pursuant to and in accordance with Mr Tyne's instructions.

78 Given that the courts have emphasised on the need to look back at the *series of events* in order to determine where, *in substance*, the cause of action arose, where there is a possibility that the act of receipt and reliance might have occurred in different jurisdictions, the court should adopt a fluid analysis in finding the place of the tort. In this regard, the Court of Appeal in *JIO Minerals* (at [90], [91], [93] and [94]) indicated that the real substance test as set out in *Distillers Co (Biochemicals) Ltd v Laura Anne Thompson* [1971] AC 458 at 468, should be adopted where the facts of the case do not fit comfortably with the more specific test (*ie*, where the misrepresentation was received) as suggested in *The Albaforth*.

79 If one looks at the continuum of the events, it is arguable that the place of reliance of Mr Betsalel's alleged misrepresentation was Singapore: having received the misrepresentation (in Australia), Mr Tyne acted upon those misrepresentations by communicating his instructions to the officers in Singapore which then manifested itself in the form of his instructions being carried out by the officers of UBS AG in Singapore. In other words, reliance was *crystallised* when the officers of UBS AG (Singapore) operated Telesto's account in accordance with Mr Tyne's instruction. Thus, the chain of communication which constituted the act of misrepresentation was *completed* when Telesto's account in Singapore was operated pursuant to Mr Tyne's instructions which were based on Mr Betsalel's alleged misrepresentation. This view accords with business efficacy as in a scenario where UBS AG (Singapore) transacts with, for and on behalf of international clients, to say that the place of the tort is where their client is located (barring any fortuitous happenstance) would be to hold UBS AG (Singapore) to a choice of law to which it had not agreed. It is pertinent to point out that the tort in the present case did not occur without a contractual context: *but for* the banking relationship between UBS AG and Telesto which stemmed from the various banking instruments between the two parties, Mr Betsalel and/or Mr Farrell would not have spoken to Mr Tyne about the Kazakh Bonds to begin with.

80 In applying the substance test, I find that the place of the tort for misrepresentation is Singapore and not Australia. Notably, even if the tort had occurred in Australia, in my view, that is not in and of itself sufficient to displace Singapore as the natural forum to determine the *entire* dispute between the parties (see [86]–[88] below).

81 Upon close scrutiny, one will find that the issues raised by the defendants *cannot* be

legitimately divorced from the contractual context under which the Kazakh Bonds were purchased. It is correct that the Court of Appeal in *Rickshaw* observed at [47]–[48] that in the absence of bad faith, every plaintiff has the right to avail itself of the cause of action that is most advantageous to it, for instance, in the light of choice of law considerations. However, the situation before me is entirely different from the circumstances in *Rickshaw*. In the case of *Rickshaw*, the respondent commenced proceedings in Germany on 8 September 2004 against the first appellant (which was his former employer) for a contractual claim based on the Employment Agreement for:

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

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

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

In respect of the German proceedings, a consent judgment was entered into for €151,700 on 9 December 2004 in favour of the respondent and as at November 2006, only partial payment had been made to the respondent.

82 The appellants in *Rickshaw*, on the other hand, commenced proceedings in Singapore on 10 June 2005 for the following:

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

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

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

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

83 An analysis of the causes of action of both parties in *Rickshaw* reveals that the appellants' claims against the respondent for conversion, the tort of deceit and the breach of the equitable duty of confidentiality, which transpired from a set of misrepresentations given by respondent sometime in late 2002 and throughout 2003 (see [10] of *Rickshaw*), is "narrower" than the respondent's claim in Germany, *viz*, for the breach of his Employment Agreement under which the appellants owed him his salary and expenses between 2001 and 2003 amounting to €242, 867.40. It cannot be ignored that in *Rickshaw*, the tortious claims mounted by the appellants were, in a way, independent of the respondent's wrongful termination claim under the Employment Agreement. In other words, if the wrongful termination claim in the German proceedings should succeed, it does not follow that the tortious claims in the Singapore proceedings would necessarily fail. Phrased in a different manner: the appellants' claim in Singapore did not form a *complete* defence and counterclaim to the respondent's German proceedings as there were issues before the German court which the appellants' claim in the

Singapore proceedings had no bearing on.

84 My review of the cases relied on by the defendants confirmed my understanding that the determination of the natural forum in those cases typically occurred in the context where the tort was an *independent cause of action* and where it did not operate as a defence to a contractual claim. In *JIO Minerals*, the claim was to recover investments which were induced pursuant to a misrepresentation as regards the quality and quantity of iron ore reserve in Indonesia. It was not raised as a defence. Likewise in *The Albaforth*, the claim was for damages for misrepresentation arising from a status report provided by the defendant bank on the creditworthiness of the guarantor of a charterer's liability under a charterparty. The claim was brought as an independent cause of action and was not raised to resist any contractual claim by the defendant bank. Similarly, in *Diamond*, the claim, which was an independent claim, was for misrepresentation arising from the confirmation of the credit standing of a particular broker. Finally, in *Voth*, the claim for negligent misstatement against the accountant was also pursued as an independent claim.

85 Here, the situation is quite different. It was accepted by Mr Ng that if the appeal in relation to the stay applications should fail, the defendants would simply raise the issues in the Australian Proceedings as a defence and counterclaim in the Singapore Proceedings. If UBS AG successfully discharges its legal and evidential burden of proof, this would mean that the defendants' defence and counterclaim has failed. The converse holds true. This merely reinforces my view that the "*claims*" raised by the defendants in Australia are in truth the defences against the claim by UBS AG.

(F) Whether the natural forum in determining a contractual claim can be displaced due to the tort being committed elsewhere

86 In my view, there is a very good reason why the natural forum in a dispute involving a contractual claim cannot be displaced simply because the defence seeks to avoid liability by raising a counterclaim or set-off premised on a tort which, *viewed in isolation as an independent claim*, might provide for a different natural forum. Commercial entities, in particular banks and financial institutions, strive for certainty of their contractual rights and obligations by choosing appropriately drafted governing law or jurisdiction clauses. It is not uncommon for parties to allege misrepresentation as a defence to a contractual claim. In this regard, it could not have been in the contemplation of the parties that a contractual claim, once properly instituted before a court of competent jurisdiction, could then be displaced by a foreign court merely because the place of the alleged misrepresentation (which constituted a defence to the contractual claim) was a foreign country. The impracticality and irrationality of this proposition is evident in the following scenario where the customer-banker relationship is governed by Singapore law and is subject to Singapore jurisdiction, exclusive or otherwise:

(a) In the course of the relationship, several transactions were entered into based on certain representations made by the bank's officers.

(b) Assuming that three such representations were received by the customer over a period of time in three different countries resulting in three different transactions, taking Mr Ng's submission to its logical conclusion would mean that disputes pertaining to these three transactions should be heard in the three different "natural forums". This would be a most illogical and *unnatural* outcome.

(c) If Mr Ng's submission holds true, in order to avoid such an irrational and illogical outcome, bank's officers would think twice before speaking to customers whenever they are overseas to prevent the risk of any potential claim being adjudicated in a jurisdiction not stipulated in the

governing law/jurisdiction clauses. This would seriously undermine the very essence of international banking.

87 Although the tort of misrepresentation may be a separate and distinct cause of action, in the context of the present case, it can essentially be raised as a defence to the claims by UBS AG. What is before me is a classic case of the defendant, *not the plaintiff*, who is seeking to avoid being sued in the *natural forum* of the dispute by asserting what essentially is a tortious defence in the guise of a claim in Australia. The attempt to displace Singapore as the natural forum for UBS AG's claim by doing so is disingenuous. The stay principles were not developed to facilitate such objectives. In my mind, this is nothing more than an instance of forum shopping by the defendants.

88 By reason of my analysis of the applicable legal principles and my examination of the facts which are germane to the issues before me, I arrived at the firm conclusion that Singapore is not only the natural forum of the dispute but is clearly and distinctly the more appropriate forum for the determination of the dispute between the parties. Thus, the appeal against the AR's decision not to grant a stay of the Singapore Proceedings is dismissed.

Stage two of the Spiliada test: The ends of justice

89 As I have found that Singapore is distinctly and clearly the more appropriate forum to hear the dispute, on this ground alone, RA 58/2010 must be dismissed. Stage two of the *Spiliada* test only comes into play if Australia is determined to be the more appropriate forum.

90 However, for completeness, I shall consider the submissions made by both counsel on the treatment and outcome of stage two of the *Spiliada* test. It was common ground between the parties that, should the defendants succeed in stage one of the *Spiliada* test, the court's focus at stage two of the *Spiliada* test is to consider *all* factors as to why the ends of justice require the stay of the Singapore Proceedings should nonetheless be refused. The burden, in this connection, lies with UBS AG. The mere fact that UBS AG has a legitimate or juridical advantage in the Singapore Proceedings will not be decisive (see *JIO Minerals* at [43] where the Court of Appeal cited with approval *Halsbury's Laws of Singapore on Conflicts of Law* paragraph 75.096). It is incumbent on UBS AG to establish, by way of cogent evidence, that it would be denied substantial justice if the case is heard in Australia. I should add that my analysis on the differences, if any, between Australian and Singapore law on the common issues has an important bearing and is entirely relevant to the issue of "injustice" to the defendants in the granting of the anti-suit injunction (see [155] below).

(1) Injustice to UBS AG as it would be subject to Australian law which was not part of its contractual bargain

91 In this regard, Mr Kumar submitted that the burden is discharged by UBS AG because the parties have agreed for the dispute to be subject to Singapore jurisdiction and governed by Singapore law. Accordingly, to grant the stay of the Singapore Proceedings would be tantamount to mandatorily subjecting UBS AG to the Australian Acts which was never in the contemplation of the parties when they entered into the banking relationship. Notably, this factor would already have been considered at stage one of the inquiry and if that was held not to be sufficient (though in this case, it was) to refuse the stay, then, in my view, it would not be right for this same factor to be reconsidered at stage two. However, I must make clear that I am not suggesting that the court is invariably precluded from considering *all* matters relevant in stage one at stage two of the inquiry. Indeed, the issue of foreign law would become relevant for reconsideration if there are material differences in the foreign law which may apply unfairly or unjustly to the plaintiff in the Singapore Proceedings. For example, in *Kuwait Oil Co (KSC) v Idemitsu Tankers KK (The Hilda Maru)* [1981] 2 Lloyd's Rep 510 at

513, the English Court of Appeal refused the stay of the English proceedings in favour of Kuwait because the indemnity provision in the contract might be held to be invalid or unenforceable in Kuwait.

(2) The juridical advantage which Telesto and Mr Tyne can benefit from the Australian Acts

(A) The Gleeson Opinion

92 There is clearly some overlap between the legal principles governing stay applications and anti-suit injunctions. In support of the appeals against the refusal to stay the Singapore Proceedings as well as the anti-suit injunction (which will be dealt with in detail below), Mr Ng submitted that the balance of justice is on the defendants' side because they would be deprived of a legitimate juridical advantage if they are precluded from pursuing their claim in the Australian Proceedings. He relied on the Gleeson Opinion that highlighted several juridical advantages under the Australian Acts. Insofar as the ASIC Act is concerned, the Gleeson Opinion drew attention to the following advantages:

(a) Under s 12BB, where the representation concerns a future matter (invoked in the present case as an alternative), there are two benefits to the plaintiff. First, unless the defendant had reasonable grounds for making the representation at the time it was made, it will be *deemed* misleading. Secondly, there is a reversal of onus of proof as the defendant will be taken not to have reasonable grounds for making representation unless evidence is adduced to the contrary.

(b) There is no requirement for the plaintiff to prove or plead intent, negligence or carelessness in the conduct. If the conduct, viewed objectively, has the character of being misleading or deceptive, or likely, or is likely to mislead or deceive, it is actionable.

(c) Assuming there is a contravention of s 12DA, the ASIC Act provides what has been described as a "remedial smorgasbord".

(d) In relation to damages, a body of Australian law has built up as to what constitutes as sufficient causation, *ie*, it is enough if the impugned conduct is a cause of the relevant loss, it need not be the sole or even dominant cause.

(e) Concepts of remoteness and foreseeability (which might apply in a claim in tort) are not automatically translated into the statute.

(f) In granting orders under s 12GF, the Australian court is not constrained by limitations under the general law upon a party's right to rescind for misrepresentation. It can and must consider all the circumstances, including the causal link between the defendant's conduct and the loss asserted, the plaintiff's responsibility and any other available remedy (*Akron Securities Ltd v Illife* (1997) 41 NSWLR 353 at 366).

93 Further, the Gleeson Opinion also compared the ASIC/FTA regimes with that of the common law of causation, remedies for negligent misrepresentation, tort of deceit and the Misrepresentation Act (Cap 390, 1994 Rev Ed) ("Misrepresentation Act") in Singapore and concluded that the claim under the Australian Acts is broader for the following reasons:

(a) Singapore law requires the existence of a duty to act carefully in respect of the statements. The duty depends on the existence of factual foreseeability, proximity and policy considerations. Under the Australian Acts, the existence of a duty is not required.

(b) The range of actionable conduct appears to be wider under the Australian Acts. A misstatement is an example of misleading conduct. Further, express statements may be taken together with omissions to determine whether the conduct as a whole is misleading.

(c) Once it is established that the conduct is objectively misleading, there is no additional requirement to show that there was any negligence in the conduct.

(d) Where the conduct consists of a future representation, there is a statutory reversal of onus. Thus, the conduct is deemed misleading unless the defendant proves it had reasonable grounds for the conduct at the time it occurred.

(e) The range of available remedies under the Australian Acts is also wider.

94 The Gleeson Opinion also observed that the Misrepresentation Act would not extend to Telesto, Mr Tyne and Argot as, in reliance on the alleged misrepresentation, the purchase of the Kazakh Bonds was entered into with a third party. In other words, there was no contract with the alleged wrongdoer, UBS AG. In addition to that, s 2(1) of the Misrepresentation Act speaks of "representation of fact" which does not appear to extend to representations to the future and does not appear to carry a reversal of onus where representations to the future are concerned. Finally, the Misrepresentation Act does not provide for the same range of remedies available under the Australian Acts.

(B) No contrary opinion adduced by UBS AG and its position that there is no difference between the Singapore and Australian regimes

95 As UBS AG did not submit a contrary opinion on the Australian Acts, my comparative analysis shall proceed on the basis that the Gleeson Opinion on Australian law is unchallenged. The issue of Australian law is relevant in the context of the stay applications to demonstrate that the ends of justice would not be achieved if the stay of the Singapore Proceedings is granted. At this stage of the inquiry, it is my task to determine whether there are material or significant differences between the two regimes. Mr Kumar sought to convince the court that the alleged advantages under the Australian Acts were "overstated" and even "false" [note: 51] and that in essence, there is no material difference between the two regimes in the area of the law on misrepresentation whereas Mr Ng advanced the divergent position by emphasising on the juridical advantages under the Australian Acts which are apparently unavailable under the Singapore regime. It may appear somewhat incongruous for Mr Kumar to assert at stage two of the *Spiliada* test that there are no material differences. However, on closer scrutiny, it is clear that Mr Kumar's case against the stay application is premised on the defendants failing at stage one which I have accepted. Further, his position is entirely consistent with UBS AG's case in support of the anti-suit injunction (as explained in detail at [155] below). This court, however, takes this view: proceeding on the basis that Australia is the natural forum (a necessary assumption before we reach the stage two balancing of justice exercise), if there are no material differences between the two regimes (the position emphatically advocated by Mr Kumar), then I can see no injustice to UBS AG for the case to be heard in Australia as no prejudice of any sort would befall upon it given that establishing UBS AG's case in Singapore would not be any different from that in Australia.

96 Having reviewed the Gleeson Opinion and having compared it with the position under Singapore Law on the same issues, I arrived at the conclusion that there are no significant or material differences which would make it unjust or unfair for the case to be heard in Australia. Therefore, if stage one of the *Spiliada* test had been satisfied (which I found to the contrary at [79]–[80]; [86]–[88] above), UBS AG would not have satisfied the burden of proof under stage two. To fully

appreciate the absence of material differences, it is imperative to set out the defendants' case on the alleged misrepresentation:

(a) The oral advice given by UBS AG (through Mr Betsalel and Mr Farrell) to Mr Tyne resulted in Mr Tyne and Pole Star agreeing to reconfigure Telesto's portfolio to exclusively comprise, *inter alia*, the Kazakh Bonds recommended by UBS AG in order to reduce the risk of the portfolio. Subsequently, UBS AG advised Mr Tyne (and through him, Pole Star and Telesto) that the Kazakh Bonds met the criteria established pursuant to such recommendations. [note: 52]

(b) UBS AG failed to inform Telesto, Mr Tyne, Argot (and Pole Star) of matters relevant to Kazakh Bonds, in particular the bank frauds which led to the bankruptcy of two government-regulated banks in Kazakhstan, that Kazakhstan banks frequently used disinformation, false accounting and bogus forecasts to routinely mischaracterise sources of problems, *etc*. [note: 53]

(c) In the light of such matters which UBS AG had failed to disclose, the express representation by UBS AG as to the suitability of the Kazakh Bonds were misleading or deceptive or likely to mislead or deceive, and/or were representations as to future matters which under the Australian Acts would be taken to be misleading or deceptive absent evidence that there were reasonable grounds for making them. [note: 54]

(d) The impugned conduct of UBS AG was causative of the damage to Telesto in that but for the conduct it would never have purchased the Kazakh Bonds and Mr Tyne and Argot would not have provided the additional securities. [note: 55]

(C) The alleged differences between the Singapore and Australian regimes

(i) The existence of Duty of care

97 Although no contrary opinion on Australian law was adduced by UBS AG, I should make some preliminary observations of the Gleeson Opinion. It provided an objective review of the salient features of the Australian Acts and a comparative analysis with Singapore law on common issues based on the advice received from Singapore counsel. However, the Gleeson Opinion, rightly and in my view fairly, did not seek to advance the defendants' case that it would be unjust to deprive them of the juridical advantages available in the Australian Proceedings or that it would be unjust for the dispute to be heard in Singapore. Nor did the Gleeson Opinion conclude that the differences would make a material bearing on the outcome of the dispute given the specific facts of the case. For example, although there is no requirement for the defendants to establish that UBS AG owed them a duty of care under the Australian Acts, the Gleeson Opinion made no comment on whether this was a material juridical advantage in the sense that the defendants, on the facts, were bound or likely to fail in establishing such duty of care in Singapore. That was correctly reserved for Mr Ng to make good in his submissions in support of the Appeals. Although a claim under the Australian Acts appears to be broader than under Singapore law (given the prerequisite of duty of care in the latter), the language used in the defendants' Australian pleadings nevertheless alluded to the existence of such duty of care:

Negligent and misleading advice

34. At all material times, UBS [AG] held itself out as *having specialist knowledge and expertise*... [emphasis added]

It is settled law that "if someone who possessed of a special skill undertakes, quite irrespective of contract, to apply that skill for the assistance of another person who relies upon such skill, a duty of care will arise", per Lord Morris in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 at 503 .

98 Further, based on the defendants' Australian pleadings, it is clear that they are making a claim in tort against UBS AG, further or in the alternative, to the claims under the Australian Acts:

> 42 The matters pleaded in paragraph 41 above were matters that UBS [AG] *ought to have known given the specialist expertise that it professed to possess*, and the fact that this information was in the public domain.
>
> 43 The failure of UBS [AG] to be aware of the matters pleaded in paragraph 41 above was negligent.
>
> ...
>
> 4 7 *But for UBS [AG]'s negligent, or further or in the alternative, misleading or deceptive conduct, or conduct that was likely to mislead or deceive, Telesto would not have purchased the [Kazakh] Bonds*.
>
> 48 By reason of UBS [AG]'s negligent, *or further or in the alternative, misleading or deceptive conduct, or conduct that was likely to mislead or deceive, [Telesto, Mr Tyne and Argot] and each of them have suffered loss and damage*.
>
> [emphasis added]

Thus, any argument which emphasised the significance of the Australian Acts in purportedly providing the defendants an "easier task" in proving its case in Australia overlooked the fact that the defendants have, at the same time, mounted a claim in tort which does not come under the purview of the Australian Acts. Any perceived advantage under the Australian Acts, in this regard, was therefore "overstated".

(ii) The reversal of burden of proof under the Australian acts

99 Central to Mr Ng's submission was the advantage under the Australian Acts which relates to the reversal of burden of proof as regards representations to future matters. Notably, nowhere in the Opinion did Mr Gleeson QC state that the representations received by Mr Tyne relate to matters in the future. The emphasis that the representations regarding the status and/or suitability of the Kazakh Bonds were representations as to a future matter probably stemmed from the Australian pleadings which have characterised them as such. [note: 56] Mr Ng's emphasis on the reversal of burden of proof point would, however, be rendered moot and academic if the misrepresentation, taken at face value, relates to an existing or past fact. From the defendants' own pleaded case at [40] of the Australian pleadings, I am of the view that the statements allegedly made by Mr Betsalel and Mr Farrell were made in respect of present facts pertaining to the status and/or suitability of the Kazakh Bonds. By way of illustration, the following are examples of the alleged "representations" made by Mr Betsaslel and Mr Farrell to Mr Tyne all of which, on its face, relate to existing facts: [note: 57]

(a) the nation of Kazakhstan had little or no external debt;

(b) Kazakhstan by way of its national fund Samruk-Kazyna ("SK"), being the repository of national oil revenues, had tens of billions of dollars of liquid assets;

(c) Kazakhstan was "honourable" and "proud" and had repaid International Monetary Fund loans early and in full;

(d) Kazakh financial institutions were audited by "Big 4 accounting firms";

(e) Kazakhstan had a "best practice" financial regulatory regime; and

(f) BTA was "too big to fail" and "would be supported by the Government of Kazakhstan".

100 Further, the defendants in [41] of the Australian pleadings enumerated facts which UBS AG ought to have known given the specialist expertise they professed. These facts include, *inter alia*, those as below: [note: 58]

(a) between 2004 and 2006, Nauryz Bank Kazakhstan and Valyut-Tranzit Bank, being the two banks regulated by the Government of Kazakhstan, had gone into bankruptcy;

(b) the insolvency of those banks was largely attributable to substantial frauds perpetrated by bank management and not detected by external auditors or regulatory agencies; and

(c) external auditors had proved ineffective in the detection of accounting frauds perpetrated by Kazakh financial institutions.

101 If, in the Singapore Proceedings, Telesto and Mr Tyne are able to adduce evidence to prove the facts as pleaded in [40] and [41] of their Australian pleadings (which is their burden to do so even under the Australian Proceedings), they should be able to establish a *prima facie* case that:

(a) Mr Betsalel and/or Mr Farrell did not honestly and actually believe that their statements were true;

(b) Mr Betsalel and/or Mr Farrell were reckless or careless as to the truth of their statements; and

(c) Mr Betsalel and/or Mr Farrell were negligent in making the representation in [40] given those facts as set out in [41].

If the defendants were able to establish sub-paras (a) or (b) above, they would be able to show that there was fraudulent misrepresentation on the part of Mr Betsalel and/or Mr Farrell (see *Derry v Peek* [1886–1890] All ER 1 at 23). This would render the view in the Gleeson Opinion that the claim under the Australian Acts is broader than a claim in deceit in Singapore, on the basis that there is no requirement under the Australian Acts to prove that the statement was made knowing it was untrue, or with reckless indifference to its truth, moot. Further, if the defendants are able to establish either one of sub-paras (a)–(c) above, UBS AG would then bear the legal and evidential burden of showing the reverse in order to succeed in proving its case on a balance of probabilities. In other words, although there may be some differences between Australian and Singapore law, they do not translate into any material difference on the specific facts on this dispute. In this sense, I agree with Mr Kumar that the differences were indeed "overstated" by Mr Ng.

(iii) The applicability of the misrepresentation act to the present case

102 Both counsel also agreed that under s 2(1) of the Misrepresentation Act, the burden of proof is reversed, *ie*, once the representee proves that the statement was false, the burden shifts to the representor to prove that, at that time of the representation up till the time of the contract, he had reasonable grounds to believe that his statement was true, failing which the representor would be liable for negligent misrepresentation. This is no different from the position under the Australian Acts, *vis-à-vis* the reversal of burden, except that both Mr Ng and the Gleeson Opinion sought to distinguish the position by suggesting that the Misrepresentation Act does not apply to Telesto and Mr Tyne since neither purchased the Kazakh Bonds from UBS AG (Singapore). In response, Mr Kumar submitted that the representation, if proved to have been made by Mr Betsalel and Mr Farell, would indeed be governed by the Misrepresentation Act.

103 The applicability of the Misrepresentation Act is a matter of Singapore law which is entirely within the province of this court. It is settled law that the Misrepresentation Act is only applicable where the misrepresentation induces a contract (see *Trans-world (Aluminium) v Cornelder China (Sing)* [2003] 3 SLR(R) 501 at [124]). Notably, it is true that s 2(1) of the Misrepresentation Act will not operate in a situation where Y enters into a contract with Z on reliance of some misrepresentations made by X. Y will have recourse against X for damages in tort but will not have the benefit of relying on s 2(1) of the Misrepresentation Act because X was not party to the contract. Applying this to the facts of the present case, it appears that the defendants may not be able to avail themselves of the Misrepresentation Act *vis-à-vis* UBS AG in relation to the purchase of Kazakh Bonds.

104 However, given my earlier observations at [101] above that on the facts, UBS AG would have to prove otherwise if the defendants are able to establish a *prima facie* case of misrepresentation, the inability of the defendants to rely on the Misrepresentation Act as regards the Kazakh Bonds would, at best, be of academic interest and would not have mattered ultimately. Accordingly, while I do not disagree with the Gleeson Opinion that there are differences between the Australian Acts and the position under Singapore law, on the facts of this case, I find that there are no differences of sufficient materiality. This finding, oddly enough, actually favours the defendants as regards stage two of the *Spiliada* test but alas this is of no comfort to the defendants since they have failed to overcome the test in stage one.

105 Given my conclusion at stage one, I dismiss the appeal against the AR's decision not to grant a stay of the Singapore Proceedings.

RA 59/2010: The appeal against the anti-suit injunction

106 In the context of an anti-suit injunction, the principles governing the issues for the determination of the natural forum are as stated in *Spiliada* (see *Koh Kay Yew v Inno-Pacific Holdings Ltd* [1997] 2 SLR(R) 148 ("*Koh Kay Yew*") at [18]) and to that extent, there is some overlap between the considerations under the stay applications and the anti-suit injunction application. There is a temptation to grant an anti-suit injunction following the refusal of the stay application. However, from my review of the authorities, it is clear that an anti-suit injunction is not invariably granted whenever a stay is refused. A timely reminder was recently articulated by the Court of Appeal in *John Reginald Stott Kirkham v Trane US Inc and ors* [2009] 4 SLR(R) 428 ("*Kirkham*") at [45]:

> [W]e ought to add that, had we found that Singapore was the natural forum to adjudicate the claims in the Indonesian Action, it did not follow that the Indonesian Action should *ipso facto* be restrained....

107 Thus, I now turn to consider the defendants' appeal in RA 59/2010, *viz*, the appeal against the AR's decision to grant an anti-suit injunction against the defendants from continuing the Australian Proceedings.

General principles

108 In *Kirkham*, the Court of Appeal at [28]–[29] stated the considerations which should be taken into account in determining whether an anti-suit injunction should be granted:

(a) whether the defendants are amenable to the jurisdiction of the Singapore court;

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

(c) the alleged vexation or oppression to the plaintiffs if the foreign proceedings are to continue;

(d) the alleged injustice to the defendants if an injunction would deprive the defendants of the advantages sought in the foreign proceedings; and

(e) whether the institution of the foreign proceedings is in breach of any agreement between the parties.

109 It is indisputable that the jurisdiction to grant an anti-suit injunction, which by the nature of the order has a significant impact on the foreign proceedings, is one that must be exercised with caution (see *Societe Nationale Industrielle Aerospatiale v Lee Kui Jak* [1987] AC 871 ("*Lee Kui Jak*") at 892, in turn citing *Cohen v Rothfield* [1919] 1 KB 410, 413). Such an injunction is, however, only granted and justified "in the clearest of circumstances that the foreign proceedings are vexatious or oppressive" (see *Koh Kay Yew* at [25]). Where the anti-suit injunction is sought in the face of an exclusive jurisdiction clause governed by the law of the same forum, there is no question of comity in such a case. It is instead an enforcement of a contractual right not to be sued in another jurisdiction (see *Turner v Grovit* [2002] 1 WLR 107 ("*Turner v Grovit*") at [27]). However, in the absence of an exclusive jurisdiction clause, the principle of comity requires the court to recognise that in granting an injunction, though it may operate *in personam* against the defendant, it would inevitably interfere with the foreign court process (see *Halsbury's Law of Singapore on Conflicts of Law* at p 120). For this reason, the law requires the applicant to demonstrate that the conduct of the foreign proceedings is vexatious and/or oppressive to warrant the court's intervention in granting an injunction. These considerations must always be borne in mind in deciding whether to grant or refuse an anti-suit injunction.

110 Of the five considerations set out above, it is common ground that the defendants are amenable to the jurisdiction of the Singapore court. Further, my analysis in [79]–[80] and [86]–[88] above in arriving at my determination that Singapore is the natural forum of the dispute under RA 58/2010 would similarly apply to RA 59/2010. It is UBS AG's case that the appeal against the anti-suit injunction should be dismissed because the Australian Proceedings were commenced in breach of the jurisdiction clauses in favour of Singapore and/or are otherwise vexatious or oppressive. On the other hand, it is the defendants' case that the cornerstone of the grant of an anti-suit injunction is entirely founded on wrongful breach of contract or vexatious conduct in the pursuit of the Australian Proceedings and absent such breach or vexatious conduct, which is the situation in the present case, the anti-suit injunction should be discharged. Specifically, the defendants advanced their case against the anti-suit injunction on the basis that injustice would be caused to them because "they will be deprived of substantial juridical advantages under Australian law". [note: 59] In this regard, my finding at [97]–[101] above that there are no differences of sufficient materiality between Australian law and Singapore law on the common issues in the dispute would equally apply here.

Whether the institution of the Australian Proceedings is in breach of any agreement between parties

111 This ground is founded on a contractual right and is a separate inquiry distinct from the requirement of vexatious or oppressive conduct. Mr Kumar first relied on paragraph 4 of the Letter of Undertaking executed by Argot as stipulated below: [note: 60]

> 4. Applicable law and jurisdiction
>
> The present Letter of Undertaking shall be *exclusively governed by and construed in accordance with the laws of Singapore*. The place of performance of all obligations, as well as the *exclusive place of jurisdiction for any dispute arising out of and in connection with the present Letter of Undertaking shall be Singapore*.
>
> UBS reserves the right, however, to take legal action against [Argot] before the authority of its domicile, or before any other competent authority, in which event exclusively the laws of Singapore shall remain applicable.
>
> [emphasis added]

112 Mr Kumar, understandably, attached considerable emphasis on the Letter of Undertaking since that is the only relevant contractual document which expressly provided for the *exclusive* jurisdiction of the Singapore court. He submitted that Argot has clearly breached the agreement by its institution of the Australian Proceedings. Argot would therefore need to demonstrate "strong reasons for departing from [the exclusive jurisdiction clause]" to justify not staying the proceedings in the face of an exclusive jurisdiction clause (see *Donohue v Armco Inc & Ors* [2002] All ER 749 ("*Donohue v Armco*") at [24]).

113 Is Argot's breach critical or even relevant for the purposes of the anti-suit injunction? This issue must be examined in the context of the entire dispute. First, it is pertinent to point out that Argot is not a party to the Singapore Proceedings and therefore there is no issue of parallel proceedings insofar as Argot is concerned. Secondly, I accept Mr Ng's submission that it would not be consistent for Argot to bring an action in Singapore in respect of its claims which "follow as a matter of law from any judgment in favour of Telesto [in Australia]". In other words, Argot's claim hinges on the outcome of the declaratory reliefs brought by the defendants in the Australian Proceedings. Therefore, while Argot's claim in the Australian Proceedings, viewed in isolation, could be construed as

a breach of an *exclusive* jurisdiction clause, that breach would only assume significance if the commencement of the Australian Proceedings by Telesto and Mr Tyne is somehow wrongful and/or vexatious. In short, the fate of Argot's claim in the Australian Proceedings would have to abide the outcome of my analysis *vis-à-vis* Telesto and Mr Tyne.

114 Although the jurisdiction clauses which apply to Telesto and Mr Tyne are *non-exclusive* in nature, Mr Kumar nonetheless submitted that their conduct in commencing the Australian Proceedings amounts to a breach of contract. He relies on *Sabah Shipyard (Pakistan) Ltd v Islamic Republic of Pakistan* [2003] 2 Lloyd's Rep 571 ("*Sabah case*") at [37] and [43] in support of the proposition that where a non-exclusive jurisdiction clause is in force, the court may infer an intention not to bring or continue parallel proceedings in foreign countries after an action has been commenced in the primary forum stated in the non-exclusive jurisdiction. In this respect, as UBS AG had commenced S 801/2010 in Singapore on 15 October 2010 prior to the institution of the Australian Proceedings and given that Mr Tyne had agreed to waive any objection that any action commenced in Singapore was brought in an inconvenient forum (as provided in para 27 of the Guarantee), Mr Kumar submitted that it could not have been the intention of the parties that if proceedings were commenced in Singapore, parallel proceedings could be pursued elsewhere.

115 Mr Ng, on the other hand, advanced a completely different position in relation to the nature of the non-exclusive jurisdiction clauses. He maintained that since UBS AG had entered into the *non-exclusive* jurisdiction clauses, which by its nature contemplated the possibility of simultaneous trials in the jurisdiction referred to in the clause as well as in other competent courts, it therefore accepted the possibility of parallel proceedings. If trial is pursued abroad, there can be no breach of any agreement and equally, it could not amount to vexatious or oppressive conduct.

(1) The legal effect of exclusive and non-exclusive jurisdiction clauses

116 In the light of the diametrically opposing positions adopted by Mr Kumar and Mr Ng, it is necessary to determine the legal effects of exclusive and non-exclusive jurisdiction clauses in the context of an application for an anti-suit injunction.

117 The observation of the House of Lords in *Turner v Grovit* at [27] on the legal effects of exclusive and non-exclusive jurisdiction clauses in the context of an application for an anti-suit injunction is instructive:

> [W]here the applicant is relying upon a contractual right not to be sued in the foreign country (say because of an *exclusive jurisdiction clause* or an arbitration clause), then absent some special circumstances, he has by reason of his contract a legitimate interest in enforcing that right against the other party of the contract. But where he is relying upon conduct of the other person which is unconscionable for some non-contractual reason, [the] law requires that the legitimate interest must be the existence of proceedings in this country which need to be protected by the grant of [an anti-suit injunction].

118 It is important to understand the nature of the contractual bargain in a non-exclusive jurisdiction clause. By such a clause, the parties simply agree to submit to that jurisdiction, which for ease of reference shall be referred to as the "primary forum". They also implicitly accept the "primary forum" as appropriate (see *British Aerospace v Dee Howard & Co* [1993] 1 Lloyd's Rep 368 at 376).

119 An overview of the cases involving exclusive and/or non-exclusive jurisdiction clauses shows that:

(a) The starting point for considering the effect of a non-exclusive jurisdiction clause must be the wording of the clause. In terms of contract law, a party could not ordinarily be said to be in breach of a contract containing a non-exclusive jurisdiction clause merely by pursuing proceedings in an alternative jurisdiction (see *Deutsche Bank AG and anor v Highland Crusader Offshore Partners LP and ors* [2010] 1 WLR 1023 ("*Deutsche Bank*") at [105]).

(b) There is no presumption that multiplicity of proceedings is vexatious (see *Lee Kui Jak* at 894). In the case of non-exclusive jurisdiction clauses, the burden is on the applicant for the anti-suit injunction to show that the foreign proceedings are "vexatious or oppressive for some reason independent of the mere presence of the non-exclusive [jurisdiction] clause" (see Thomas Raphael*, The Anti-Suit Injunction* (Oxford University Press, 2008) ("*Raphael*") at para 9.12).

(c) In the case of a non-exclusive jurisdiction clause, either party is *prima facie* entitled to bring proceedings in a court of competent jurisdiction. Duplication of litigation through parallel proceedings is undesirable, but it is an inherent risk where the parties elect to adopt a non-exclusive jurisdiction clause (*Deutsche Bank* at [107]).

(d) An exclusive jurisdiction clause creates a contractual right not to be sued elsewhere, (see *Turner v Grovit* at [27]), but even then, the court has discretion whether to enforce or even refuse it (see *Donohue v Armco* at [27]).

120 In view of the foregoing, it appears that Telesto and Mr Tyne cannot be said to have acted *in breach* of their obligations under the *non-exclusive* jurisdiction clauses. To hold otherwise would blur the distinction between exclusive jurisdiction clauses and non-exclusive jurisdiction clauses and render any such distinction illusionary or redundant. In support of this view is *Raphael's* observation at para 9.10 (cited in *Deutsche Bank* at [85]) that to interpret a non-exclusive jurisdiction clause as leading to the conclusion that parties could not have intended that proceedings be commenced in a forum other than the primary forum "would mean that non-exclusive [jurisdiction] clauses could be converted into something close to an exclusive jurisdiction clause by the simple expedient of commencing parallel proceedings in [the primary forum] soon after the commencement of the foreign proceedings".

121 My reading of the *Sabah* case does not support Mr Kumar's submission that, in the context of the existence of a non-exclusive jurisdiction clause, the commencement of proceedings in a competent court of jurisdiction other than the primary forum could *per se* constitute a breach of contract. In this connection, an examination of the contextual background of the *Sabah* case is necessary in order to better understand the decisions of both the English High Court and English Court of Appeal in granting an anti-suit injunction against the continuation of the foreign proceedings in spite of the use of a non-exclusive jurisdiction clause in the contractual documents.

122 In that case, Sabah Shipyard (Pakistan) Pte Ltd ("Sabah Shipyard") was incorporated in Pakistan for the *sole* purpose of entering into agreements with the Government of Pakistan ("the GOP") and a state-owned corporation, KESC, relating to the design, construction and maintenance of electric generation facility at Karachi. The agreements included an implementation agreement (between Sabah Shipyard and the GOP) and a power purchase agreement (between Sabah Shipyard and KESC). The GOP entered into a guarantee in favour of Sabah Shipyard under which it guaranteed the obligations of KESC under the power purchase agreement. Clause 1.91 of the guarantee provided that each party consented to the jurisdiction of the courts of England for any action filed by the other party under the agreement and provided for enforcement in England, subject to immaterial exceptions.

123 Disputes arose between the parties and an arbitration was held in Singapore which resulted in an award in Sabah Shipyard's favour in the sum of US$6.84m. Sabah Shipyard made a demand on the GOP under its guarantee. In response, the GOP issued proceedings in Islamabad for:

(a) a declaration that the award had been obtained by fraud and was not binding on the GOP; and

(b) a declaration that the guarantee was therefore not enforceable.

In addition to that, the GOP also obtained an *ex parte* injunction against Sabah Shipyard to prevent it from making any demand on the guarantee.

124 In the light of this development, Sabah Shipyard issued proceedings against the GOP in England and sought an anti-suit injunction against the Islamabad proceedings. David Steel J granted the anti-suit injunction and his decision was upheld by the English Court of Appeal.

125 In my view, the *Sabah* case does not stand for the *general* proposition that where a non-exclusive jurisdiction clause applies, the court may infer an intention on the part of the contracting parties not to bring or continue parallel proceedings in foreign countries after an action has been commenced in the primary forum stated in the non-exclusive jurisdiction clause. Notably, caution has been expressed in interpreting the *Sabah* case in the manner as suggested by Mr Kumar. Toulson LJ in *Deutsche Bank* at [112] opined that:

> The *Sabah* case [2003] 2 Lloyd's Rep 571 has given rise to a good deal of debate as to its interpretation. I agree with Andrew Smith J in *Evialis v SIAT* [2003] 2 Lloyd's Rep 377 and *Raphael, The Anti-Suit Injunction* that *the decision is best understood to have been based on the finding that the GOP acted in breach of its contract with Sabah by bringing proceedings in Islamabad in which it claimed an injunction to prevent Sabah from enforcing its rights against GOP in England pursuant to the English non-exclusive jurisdiction clause*. (This view is supported by Walker LJ's statement in the *Sabah* case [2003] 2 Lloyd's Rep 571, para 44 that the injunction "is being granted by the court to which both parties have agreed to give effect to the bargain they made".) If I am wrong, and the injunction was granted not in support of a legal right but *under the court's power to protect Sabah from vexatious and oppressive litigation, for reasons already discussed the conduct of the GOP was certainly vexatious and oppressive on the particular facts of the case*. On either approach, the case needs to be seen in the context of its own particular facts. It would be wrong in my view to extrapolate from it a rule of law that the prosecution of foreign litigation in parallel with litigation in England pursuant to a non-exclusive jurisdiction clause is per se vexatious or oppressive….
>
> [emphasis added]

126 Similar sentiments were expressed by *Raphael* at paragraph 9.10 where he opined that:

> Sabah should be read as specific to the unusual facts of the case, where the foreign proceedings included a claim for an anti-suit injunction to restrain proceedings in the chosen forum.

The learned authors of *Cheshire, North & Fawcett's Private International Law*, (Oxford University Press, 14th Ed) ("*Cheshire")* at p 474 echoed the same:

> Where the agreement provides for the non-exclusive jurisdiction of the English courts there is no breach of agreement in bringing proceedings abroad and therefore an injunction will not be granted on the basis of breach of an agreement. However, *if one party (A) by way of a pre-emptive strike seeks an injunction abroad whereby the other party (B) will be permanently restrained from making any demand under a contract (containing a non-exclusive English jurisdiction clause) in the hope of preventing B from starting proceedings in England, this is a breach of contract and vexatious. An injunction restraining A from continuing the proceedings abroad will then be granted on the basis of vexation or oppression*.
>
> [emphasis added]

127 It is therefore clear that the general consensus in rationalising the *Sabah case* is that the anti-suit injunction in respect of the Islamabad proceedings was granted on grounds that it was vexatious and oppressive as opposed to the drawing of an inference that parties had intended that no parallel proceedings be commenced upon agreeing to a non-exclusive jurisdiction clause. Furthermore, the breach of contract in the *Sabah case* was not the breach of the non-exclusive jurisdiction clause but rather the breach of contract in commencing proceedings to *prevent* Sabah Shipyard from enforcing its rights under the contract. Indeed, where parties seek to eliminate the possibility of parallel proceedings in different jurisdictions, an *exclusive jurisdiction clause* could be employed to give effect to such an intention. This is especially so in the present case since different jurisdiction clauses are applicable to different contracts. Clearly the parties by employing different types of clauses to govern different contracts intended for different consequences to arise. In the circumstances, I find that the institution of the Australian Proceedings was not in breach of any contractual obligation other than Argot's Letter of Undertaking which I have separately dealt with at [113] above. As such, to justify the continuation of the anti-suit injunction, the burden is on UBS AG to prove vexatious and/or oppressive conduct *independent* of the non-exclusive jurisdiction clauses.

Whether the Australian Proceedings are vexatious and/or oppressive

128 This is a separate and independent basis for an anti-suit injunction and should not be conflated with the other basis, *viz*, a breach of an exclusive jurisdiction clause, which has been dealt with above. The power to order an anti-suit injunction, independent of a breach of an exclusive jurisdiction clause, is dependent upon there being wrongful conduct of the party to be restrained of which the applicant is entitled to complain and has a legitimate interest in seeking to prevent (see *Turner v Grovit* at [24]). The court should look at all circumstances of the case to determine whether the foreign proceedings are vexatious or oppressive (see *Koh Kay Yew* at [19]). As was observed in *Regalindo Resources Pte Ltd v Seatrek Trans Pte Ltd* [2008] 3 SLR(R) 930 ("*Regalindo*") at [18] (in turn citing *Dicey Morris & Collins on the Conflict of Laws* vol 1 (Lawrence Collins gen ed) (Sweet & Maxwell, 14th Ed, 2006) ("*Dicey & Morris*") at paragraph 12-073)), vexation or oppression may be indicated from:

> [a] subjecting the other party to oppressive procedures in the foreign court, especially a party with no substantial connection with the jurisdiction; [b] bad faith in the institution of the proceedings, or the institutions of proceedings which are bound to fail; [c] extreme inconvenience caused by the foreign proceedings; [d] multiplicity of actions, especially where the foreign action might spawn further consequential litigation which might not be reconcilable with the foreign decision; [e] bringing proceedings which interfere with or undermine the control of the [court of the primary forum] of its own process; [f] bringing proceedings which could and should have formed part of [an action brought earlier in the primary forum]; [g] bringing proceedings for no good reason in a court which will disregard an express choice of [law of the primary forum].

129 Mr Kumar's submitted that it was clear that Argot has fallen foul of limb (g) above, given that it had entered into an exclusive jurisdiction clause in the Letter of Undertaking. For reasons as explained at [113] above, this "breach" is not relevant in the ultimate analysis. Mr Ng, on the other hand, characterised it as a "secondary breach".

130 Mr Kumar further submitted that the defendants' institution of the Australian Proceedings was vexatious as it amounts to a subversion of the express choice of law by the parties with the substitution of the Australian Acts. The commencement of the Australian Proceedings which sought to apply a law *different* from the parties' express choice of law was described as "plainly vexatious" as by doing so, Australian law, which UBS AG never agreed to, will be applied to the dispute. *Cadre SA v Astra Asigurari SA* [2006] 1 Lloyd's Rep 560 ("*Cadre*") (at [7] and [18]) was cited in aid of this argument. In addition, it was submitted that as the defendants have refused to identify the Australian remedies which they are purportedly seeking which cannot be granted by the Singapore courts, such conduct was especially vexatious when viewed against their actual prayers in the Australian originating process which relate to damages or declaration, *ie*, remedies which can readily be obtained in Singapore.

131 Mr Kumar also highlighted the fact that as most of the witnesses and documents are located in Singapore, the imposition to require UBS AG to send its employees (from Singapore) and the documents (from Singapore and some from Jersey) to Australia for the proceedings, while not entirely impossible, would be vexatious or oppressive. This is especially so when there are not many witnesses and in fact no documents in Australia. However, the residence of the parties and location of the witnesses or documents are typically treated as a neutral factor or at least not a weighty factor in the balancing exercise (see *Kirkham* at [37], [38] and [40]). As noted in [38] of *Kirkham*, "the location of witnesses is only really significant in relation to third party witnesses *who are not in the employ of the parties* as it could give rise to issues of compellability" [emphasis added]. In this regard, my observations on the compellability of Mr Betsalel at [70] above would apply with equal force in this analysis.

132 The defendants' institution of the Australian Proceedings was also described as an attempt at forum shopping. It was urged that such a cynical motive is unconscionable and an anti-suit injunction should be granted (see *Cadre* at [18]). Mr Kumar submitted that based on the chronology of events, it is apparent that Telesto and Mr Tyne were well aware that UBS AG was commencing or had commenced the Singapore Proceedings when they instituted the Australian Proceedings on 2 November 2010. Further, the defendants were also fully aware that the issues in the Australian Proceedings could be raised as a defence or counterclaim in the Singapore Proceedings (see Mr Tyne's 2nd Affidavit at [10]). [note: 61]

(1) Timing of the commencement of the Australian Proceedings

133 Was the Australian Proceedings commenced to vex or oppress UBS AG? In terms of the *timing* of the commencement of the Australian Proceedings, I accept Mr Ng's submission (which is supported by the Eakin letter dated 8 October 2010 (see [33] above)) that the legal action against UBS AG was already in the contemplation of Telesto, at the very least, from as early as 8 October 2010. Hence, unlike the AR, I will be slow to impute any ulterior motive of "getting ahead" before the Singapore Proceedings given that Telesto had evinced its stance even prior to the commencement of the Singapore Proceedings. I would also add that, in the ordinary scheme of things, little weight should be assigned to the order in which the claims were brought in the competing jurisdictions since to do so would be to encourage parties to rush to fire the first shot as was aptly pointed out by Bingham LJ in *El Du Pont de Nemours v Agnew* [1987] 2 Lloyd's Rep 585; see also *Deutsche Bank* at [118]. Similar sentiments were expressed by the Court of Appeal in *Rickshaw* at [87]–[88] though I should add that

it was said in the context where there is no natural forum unlike the present case. Moreover, no argument was mounted to the effect that Mr Tyne and/or Argot, by virtue of the former's nationality and/or the latter's place of incorporation, were brought into the picture in order to confer jurisdiction on the Australian court as was found to be the case in *Turner v Grovit* (at [17]).

(2) The possibility of conflicting judgments in the context of non-exclusive jurisdiction clauses

134 It bears emphasis that the question whether an anti-suit injunction should be granted when proceedings are brought in two jurisdictions with the possibility of conflicting judgments has recently been answered in the negative. The fact that there are such concurrent proceedings does not in itself means that the conduct of either action is vexatious or oppressive or an abuse of court, nor does that in itself justify the grant of an injunction (see *Lee Kui Jak* at 894; *Credit Suisse First Boston (Europe) Ltd v MLC (Bermuda) Ltd* [1999] CLC 579 at 596; *Airbus Industrie GIE v Patel* [1998] CLC 702 ("*Patel*") at 708–709). In *Patel*, Lord Goff noted at 709 that since, as between common law jurisdictions, there was no international treaty governing jurisdiction issues, the basic principle was that each jurisdiction is independent and there is "*no embargo on concurrent proceedings in the same matter in more than one jurisdiction*" [emphasis added].

135 In other words, the possibility of parallel proceedings and risks of conflicting judgments do not, by themselves, warrant the grant of an anti-suit injunction. This is especially so where the parties have entered into an agreement which provides for a non-exclusive jurisdiction clause, out of which parallel proceedings flows as a natural consequence from it. Where it is contemplated that proceedings may be brought in more than one jurisdiction, it cannot constitute a breach of contract nor vexatious and oppressive conduct (see *Royal Bank of Canada v Cooperatieve Centrale Raifeissen-Boerenleenbank BA* [2004] 1 CLC 170 ("*Royal Bank of Canada"*) at 205). In this connection, with the benefit of time for a more detailed analysis, I disagree with the AR's holding that the "presence of a non-exclusive jurisdiction clause is, in my view, no excuse for parallel proceedings to continue. To allow this would be contrary to the spirit of the jurisdiction clauses and would be oppressive to the plaintiff."

136 Mr Ng relied on two decisions with facts seemingly similar to the present case to demonstrate that the Australian Proceedings are not vexatious or oppressive. The case of *Royal Bank of Canada* involved the Royal Bank of Canada ("RBC"), a Canadian bank having its principal place of business in Toronto, and the defendant, Rabobank, an institution organised under the laws of Netherlands having its principal place of business in Utrecht. Both parties have business in London and New York. RBC's claim was based on a swap agreement recorded in a Total Return Swap Confirmation with Rabobank. Pursuant to the swap agreement, Rabobank was liable to pay RBC $517m plus $6m interest as on 28 June 2002. The swap agreement formed part of and was subject to an International Swap Dealers Association Master Agreement which was expressly governed by English Law and included a non-exclusive jurisdiction clause in favour of England (see [139] below).

137 On 21 June 2002, Rabobank gave notice that it would not pay the sum due under the swap agreement and commenced proceedings in New York claiming rescission of the agreement and damages in the alternative on grounds of fraudulent misrepresentation. RBC then commenced English proceedings on 24 June 2002 which was the next working day after 21 June 2002. It is significant to note that the claims and cross-claims in the English and New York proceedings essentially *mirrored* each other.

138 As the New York proceedings was likely to go to trial before the English action (12 January 2004 and 8 March 2004 respectively), RBC applied for an anti-suit injunction. RBC agreed with Rabobank that if its application for an anti-suit injunction should fail, the English proceedings should

be stayed pending outcome of the New York suit.

139 The Master Agreement was expressly governed by and to be construed in accordance with English law and included the following provision:

> **Governing law and jurisdiction**
>
> **Governing law**
>
> This agreement will be governed by and construed in accordance with the law specified in the schedule (by part 4 of the schedule paragraph (h) English law)
>
> With respect to any suit action or proceedings relating to the Agreement ('proceedings') each part irrevocably:-
>
> *Submits to the jurisdiction of the English Courts*. If this Agreement is expressed to be governed by English law.
>
> Waives any objection which it may have at any time to the laying of venue of any Proceedings brought in any such court, waives any claim that such Proceedings have been brought in an inconvenient forum and further waives the right to object with respect to such Proceedings that such court does not have any jurisdiction over such party.
>
> *Nothing in this Agreement precludes either party from bringing Proceedings in any other jurisdiction ... nor will the bringing of one Proceedings in any one or more jurisdictions preclude the bringing of Proceedings in any other jurisdiction*.
>
> [emphasis added]

140 RBC's case on appeal was solely premised on the argument that by agreeing to a non-exclusive jurisdiction clause, there is an *implied term* that either party must be entitled to insist that the trial should take place first in the "primary forum", *ie*, where the English court was stipulated as the "primary forum", in any conflict as to the place of trial between the forum and any other forum, the English court should take precedence (see *Royal Bank of Canada* at 172). Rejecting the appropriateness to import such an implied term, Evans- Lombe J, delivering the decision of the English Court of Appeal, held (at 198) that the clause in the Master Agreement was a non-exclusive jurisdiction clause which, *inter alia*, gave *express sanction* to the determination of those proceedings in a court other than the English court and also expressly contemplated that proceedings to determine those issues *might run parallel and simultaneously in a number of jurisdictions* in addition to that of the English court. Evans-Lombe J further noted (also at 198) that the clause did not expressly deal with parallel proceedings and/or the possibility of simultaneous trials in different jurisdictions where the issues to be tried were substantially the same.

141 On the facts, the English Court of Appeal held that Rabobank's pursuit of the New York proceedings, *being permitted by the terms of agreement between the parties*, could not be construed as vexatious or oppressive or a breach of contract by Rabobank. The Court of Appeal opined that it was possible that a foreign suit, properly commenced and pursued at the outset, might become oppressive during its course. However, it would require stronger circumstances before a foreign suit which had been fully and properly contested up to a point near trial could be characterised by an English court as having become oppressive, or as having been conducted oppressively by the foreign claimant. In the light of this, the English Court of Appeal upheld the

decision of the judge at first instance not to grant an anti-suit injunction against Rabobank. In arriving at this decision, it is important to bear in mind that parties did not appeal against the finding of the judge at first instance that London, England was not the more natural or appropriate forum than New York for the determination of the dispute (*Royal Bank of Canada* at 201). This is quite different from the present case given my finding that Singapore is the natural forum to determine the dispute, the significance of which I will elaborate below at [153] and [156].

142 In *Deutsche Bank*, the first claimant was a German bank with its principal place of business in Frankfurt and an office in London while the second claimant was an associated company registered in the US with its principal place of business in New York. The first to third defendants were a group of companies operating as major US hedge funds. It was accepted that all the investment decisions relating to the defendants were made in Dallas, Texas.

143 The defendants entered an agreement to buy from the claimants tranches of asset-backed collaterised loan obligations. These agreements took the form of three global master purchase agreements which, in turn, were a standard form of international finance agreement. The agreements provided for English governing law and the non-exclusive jurisdiction of the English courts. Paragraph 17 of the Global Master Repurchase Agreement ("GMRA") entered into by parties stipulated as below:

> **Governing law**
>
> This agreement shall be governed by and construed in accordance with the laws of England. Buyer and seller hereby irrevocably submit for all purposes of or in connection with this agreement and each transaction to the jurisdiction of the courts of England.
>
> ...
>
> *Nothing in this paragraph shall limit the right of any party to take proceedings in the courts of any other country of competent jurisdiction*.
>
> [emphasis added]

144 The claimants subsequently made margin calls on the defendants which they did not pay whereupon the claimants served default and valuation notices. On 16 October 2008, the defendants filed proceedings against the claimants in Texas alleging, *inter alia*, that the claimants had induced them, through one Mr Newell, to buy securities by fraudulent or negligent misrepresentation. The amended complaint alleged ten causes of action against the claimants (in the English action) and one included the violation of the Texas Securities Act (by making false and misleading misrepresentations and omissions of material facts concerning the securities).

145 On 7 November 2008, the claimants issued proceedings in the English High Court/Commercial Court for amounts due under the default valuation notices (for US$70m plus interest) and applied for an anti-suit injunction preventing the defendants from continuing the Texas proceedings. The judge at first instance granted the anti-suit injunction and held that, absent foreseeable change since the contractual jurisdiction had been agreed, a party would ordinarily act vexatiously or oppressively in pursuing proceedings in a non-contractual jurisdiction in parallel with proceedings in the contractual jurisdiction.

146 The English Court of Appeal, however, disagreed and allowed the defendant's appeal as it found that in contracting for a non-exclusive jurisdiction clause which did not clearly indicate whether prior or subsequent parallel proceedings in a non-selected forum were permitted or prohibited, parties

would usually be taken to have anticipated and accepted the possibility of parallel proceedings (citing *Raphael* at paragraph 9.12 with approval at [105]). It further held at [106] that there is *no general presumption* that proceedings brought in the non-contractual forum were vexatious or oppressive unless strong grounds, which had been unforeseeable at the time the contractual jurisdiction was agreed or were otherwise exceptional, could be demonstrated.

147 Mr Ng drew my attention to the fact that *Royal Bank of Canada* and *Deutsche Bank* both bore an important similarity with the present case, *ie*, they all involve a claim under contract in one jurisdiction and a claim for the tort of misrepresentation in the other. Furthermore, the other interesting feature shared by these two cases with the present Appeals is that the claim in tort can essentially be mounted as a defence and counterclaim against the contractual claim. The mirroring effect of these proceedings would inevitably lead to the possibility of conflicting judgments by the two different jurisdictions on what is essentially the same subject matter. Yet, the anti-suit injunction was not ordered in either *Royal Bank of Canada* or *Deutsche Bank*.

148 Mr Kumar expectedly sought to distinguish the two key decisions relied on by Mr Ng. First, he highlighted the fact that in both *Royal Bank of Canada* and *Deutsche Bank*, the non-exclusive jurisdiction clauses, unlike the present case, specifically provided that the parties were not precluded from commencing legal proceedings in any other court of competent jurisdiction. Although it is correct that the courts did observe that the clauses expressly contemplated the pursuit of parallel proceedings, there is nothing in the judgments to suggest that the outcome would be any different if it were otherwise. In my view, the pivotal consideration is whether the jurisdiction clause in question is exclusive or non-exclusive. The mere fact that the non-exclusive jurisdiction clauses in the present case did not specifically provide that the defendants are not precluded from commencing proceedings in another competent court does not make it any less non-exclusive. Once the clause is non-exclusive, certain consequences would flow from the parties' choice in the same way that an exclusive jurisdiction clause would render the institution of foreign proceedings a breach of contract. Both parties must be held to their contractual bargain, no less, no more. In the instant case, it is common ground between the parties that the jurisdiction clauses in the Account Agreement and the Guarantee are *non-exclusive* and the contractual bargain contained therein does not bar the institution of foreign proceedings. The submission made in *Royal Bank of Canada* and *Deutsche Bank* was premised on the propriety to import an implied term (see the "primary forum" argument as illustrated at [140] above). I can see no commercial reason or justification to do so. If it was the parties' intention that litigation ought to be fought before one court of competent jurisdiction and no other, the clause can simply be drafted as an exclusive jurisdiction clause rather than be implied as a term of contract *via* a convoluted legal fiction.

149 Secondly, Mr Kumar correctly identified that in *Deutsche Bank*, save for English law being stipulated as the governing law and the provision of the non-exclusive English jurisdiction clause, there was little connection between England and the matter in dispute. He submitted that the same could not be said of the present case where there are ample connecting factors between Singapore and the matter in dispute. In addition to that, unlike the present case, there were also ample connections between Dallas, Texas and the dispute. This together with the court's observation that the dispute bore little connections with England (at [120] of *Deutsche Bank*) effectively meant that England was found not to be the natural forum. Similarly, the anti-suit injunction was refused in *Royal Bank of Canada* in circumstances when England was likewise not the natural forum (at 201). Given the courts' determination that England was not the natural forum in those two cases, it was not surprising that the courts did not find the institution of the foreign proceedings to be vexatious or oppressive.

150 Would the outcome be any different if the court considering the anti-suit injunction is the natural forum as in the present case? From my reading of the relevant cases, in such circumstances,

it appears to me that if the plaintiff is able to show that the defendants would not suffer injustice if the foreign proceedings are restrained, then an anti-suit injunction should be granted (see [153]–[154] below).

The balance of justice

151 My analysis thus far may be summarised as follows:

(a) The commencement of the Australian Proceedings is not in breach of contract (apart from Argot which I have separately dealt with in [113] above).

(b) There is no presumption that multiplicity of proceedings is vexatious. The possibility of conflicting decisions in the context of non-exclusive jurisdiction clauses, while undesirable is not in and of itself vexatious or oppressive.

(c) The claims and issues in both proceedings are essentially similar though not identical.

(d) Although there might be some differences between Australian law and Singapore law on the common issues, the differences are "*overstated*" and are not of sufficient materiality to displace the natural forum, Singapore.

152 It is quite clear that Mr Ng relied heavily on the perceived significant differences under the Australian Acts in his quest to highlight the juridical advantages so as to impress upon the court that the defendants would suffer injustice if the anti-suit injunction is not discharged. He placed considerable weight on several decisions in aid of his proposition that the court should discharge the anti-suit injunction:

(a) if the court is satisfied that "there was good reason behind its institution of the foreign legal process" (see *Regalindo* at [22]);

(b) where "there are substantial reasons to induce him to bring the two actions" (see *Peruvian Guano Company v Bockwoldt* [1883] 23 Ch D 225 at 230); and

(c) the court will not grant an injunction, if by doing so, "it will deprive the plaintiff of advantages in the foreign forum of which it would be unjust to deprive him" (see *Societe Aerospatiale* at 896).

Clearly for the cases to be relevant in the present appeal, it is imperative for the defendants to demonstrate that there are substantial differences between the Australian and Singapore regimes under which the former confers on them juridical advantages not available in the latter.

153 By the same token, Mr Ng also relied on *Lee Kui Jak* at 895 and 896 to illustrate the point that to justify the grant of an injunction, the [applicant] must show that:

… (a) the English court is the natural forum for the trial of the action, to whose jurisdiction the parties are amenable; *and* (b) that justice does not require that the action should nevertheless be allowed to proceed in the foreign court.

…

> [(c) more specifically,] the court will not grant an injunction if, by doing so, it will deprive the [respondent] of advantages in the foreign forum of which it would be unjust to deprive him. …

(see also *Bank of America National Trust & Savings Association v Djoni Widjaya* [1994] 2 SLR(R) 898 at [15]; *Seismic Shipping Inc and anor v Total E&P UK PLC* [2005] EWCA Civ 359 at [44]–[46] and *Royal Bank of Canada* at 209). The rationale for this proposition is simply that if there is no advantage which the defendant would be deprived of if the foreign proceedings are restrained, then there is no reasonable explanation for not defending or pursuing the claim in the natural forum. Consequently, the court is entitled to conclude or infer that the defendants in instituting such foreign proceedings are indeed acting vexatiously or oppressively. Viewed in this perspective, Mr Ng understandably devoted a significant part of his submissions on the differences between Australian and Singapore law on the common issues, for instance, that of misrepresentation. Consistent with this principle, in *Cadre* at [18], the anti-suit injunction was granted to restrain the Romanian proceedings because the English High Court found that there was *no good reason* for the defendant to seek to have the dispute determined in Romania and that the proceedings were started as a defensive step to prevent other courts from taking jurisdiction rather than because Romania was the natural or appropriate forum to hear the dispute.

154 In response to the alleged injustice if the anti-suit injunction is not discharged, Mr Kumar made the following points:

> (a) The court may still grant an anti-suit injunction even where there would have been some advantage to the opposing party in the foreign proceedings as long as the court is satisfied that substantial justice would be done in the forum. For instance, in *Kishinchand Tiloomal Bhojwani and another v Sunil Kishinchand Bhojwani and another* [1996] 1 SLR(R) 861 ("*Bhojwani*") at [20]–[21], despite the defendant's contention that she would enjoy much wider discovery rights in New York than in Singapore, the court nevertheless granted the injunction.
>
> (b) In *Evergreen International SA v Volkwagen Group Singapore Pte Ltd and ors* [2004] 2 SLR(R) 457 ("*Evergreen International*"), the defendants argued that they would be afforded the advantage from the Belgian courts (based on a different limitation convention in respect of the defendant's action in tort) where the limit of liability would be considerably higher than the limit in Singapore. The court recognised the advantage the defendant might have in Belgium but nonetheless granted the injunction as it found that the limitation regime in Singapore is not an unjust regime and cannot be properly termed as "injustice" (see [58] and [62] which, in turn, cites the decision of G P Selvam J in *The Owners of the Ship or Vessel Ming Galaxy v The Owners of the Ship or Vessel or Property Herceg Novi* [1998] SGHC 303).
>
> (c) The law is clear that even if the respondent may point to substantive and procedural advantages available to him in the foreign court, if these advantages are available to him only in a forum which is not the natural forum, they will be given little weight, and may even be themselves seen as evidence of oppression (see *Regalindo* at [18] citing *Dicey & Morris* at paragraph 12-073). As Australia can hardly be said to be the natural forum of the dispute, the alleged "advantages" (if any) should be accorded little weight.

155 Given my finding that there are no differences of sufficient materiality between the laws of Australia and Singapore on the issues in dispute, it must follow that there would be no injustice to the defendants if the Australian Proceedings are restrained by the grant of an anti-suit injunction. I should add there is also nothing unjust about the laws of Singapore on the issue of misrepresentation.

As I have observed in [99]–[101] above, if Telesto and Mr Tyne are able to adduce evidence to prove the facts as pleaded in the Australian pleadings (a burden which they similarly bear under the Australian Proceedings), they should be able to establish a *prima facie* case of misrepresentation in which event, the burden would be on UBS AG to prove otherwise even under Singapore law. I agree with the AR that the "loss" of the alleged juridical advantages does not render it "unjust" for the dispute to be heard and determined in Singapore, which I have found to be the natural forum of the dispute. In the premises, it must follow there would be no legitimate reason for the defendants to pursue the Australian Proceedings. In any event, even if the differences can amount to some juridical advantages (which I have determined to be overstated), the court can still grant the anti-suit injunction particularly in this case since the advantages are only available in the Australian Proceedings which is not the natural forum of the dispute. It is of significance that in *Bhojwani* and *Evergreen International*, the courts did not find any injustice in depriving the defendants of the juridical advantages because the advantages were only available in New York and Belgium respectively which were not the natural fora of the dispute. There is no reason for a different outcome, on the specific facts of this case especially given my finding that Australia is not the natural forum of the dispute.

156 Further, the compellability of Mr Betsalel cannot be overemphasised since he is an important and probably a key witness to the serious issue of misrepresentation (see [70] and [131] above). The misrepresentation issue was introduced and raised by the defendants, and there is nothing intrinsically wrong in that since it is the defendants' prerogative to do so. However, it seems to me that it is oppressive for the defendants to pursue the claim in Australia in circumstances where UBS AG is unable to compel Mr Betsalel's attendance at the trial. There is no written undertaking by Mr Betsalel that he would do so and I have my doubts whether such an undertaking, even if provided, is enforceable in Australia should he fail to turn up. Taking all the circumstances into consideration, I arrive at the conclusion that the defendants are acting vexatiously and/or oppressively in instituting and continuing with the Australian Proceedings. For completeness, I should state clearly that I would have arrived at the same conclusion even if the compellability of Mr Betsalel had not arisen as an issue. This finding merely made it a more *compelling* case for the anti-suit injunction.

157 By reason of my findings, the defendants' appeal in RA 59/2010 is also dismissed.

Conclusion

158 Accordingly, both Appeals are dismissed with costs, on an indemnity basis, to be taxed if not agreed. Although the law in these areas is well travelled, Mr Hri Kumar and Mr Eddee Ng have nonetheless raised several interesting and important issues for the court's determination and I wish to record my appreciation to them for their able assistance in presenting the parties' respective submissions.

[note: 1] Plaintiff's Bundle of Affidavits ("PBAF") PBAF 2, Tab 11, p 8 at [23]; pp 67 and 72

[note: 2] PBAF 1 at p 165

[note: 3] PBAF 1 at p 336

[note: 4] PBAF 1 at p 77

[note: 5] PBAF 1 at p 75

[note: 6] PBAF 1 at p 339

[note: 7] PBAF 1 at pp 161-162

[note: 8] PBAF 1 at p 341

[note: 9] PBAF 1 at pp 343-346

[note: 10] PBAF 1 at p350

[note: 11] PBAF 1 at p 348

[note: 12] PBAF 1 at pp 353-356

[note: 13] PBAF 1 at p 354

[note: 14] PBAF 1 at pp 366-370

[note: 15] PBAF 1 at pp 372-373

[note: 16] PBAF 1 at pp 375-389

[note: 17] PBAF1 at p 390

[note: 18] PBAF 1 at pp 379 and 385

[note: 19] PBAF 1 at p 400

[note: 20] PBAF 1 at pp 404-405

[note: 21] PBAF1 at pp 407-409

[note: 22] PBAF 1 at pp 411-412

[note: 23] PBAF 1 at pp 413-414

[note: 24] PBAF 1 at pp 418-440

[note: 25] PBAF 1 at p 481-509

[note: 26] PBAF 2, Tab 6 at pp 273-301

[note: 27] PBAF 2, Tab 6 at pp 277-278, [10]-[12]

[note: 28] PBAF 2, Tab 6 at pp 283-284, [40]

[note: 29] PBAF 2, Tab 6 at p 291, [68]-[72]

[note: 30] PBAF 2, Tab 6 at p 297

[note: 31] PBAF 2, Tab 6 at pp 5-6, [14]-[16] ; p 69

[note: 32] PBAF 2, Tab 6 at p 297

[note: 33] PBAF 1 at p 190

[note: 34] PBAF 1 at p 154

[note: 35] PBAF 1 at pp 213-216, 220

[note: 36] PBAF 1 at pp 242-246

[note: 37] PBAF 1 at pp 290-295

[note: 38] PBAF 1 at p 165

[note: 39] PBAF 1 at p 336

[note: 40] PBAF 1 at p 87

[note: 41] PBAF 1 at p 100

[note: 42] PBAF 1 at p 107

[note: 43] PBAF 1 at p 117

[note: 44] PBAF 1 at p 133

[note: 45] Defendant's written submissions filed on 18 May 2011 at pp52 -53, [72]

[note: 46] PBAF 1 at p 165

[note: 47] PBAF 1 at p 336

[note: 48] PBAF 1 at p 373

[note: 49] PBAF 1 at p 354

[note: 50] PBAF 2, Tab 7, at p 74

[note: 51] Plaintiff's written submissions dated on 12 May 2011 at p 135, [316]

[note: 52] PBAF 2, Tab 6 at pp 282-284, [37]-[40]

[note: 53] PBAF 2, Tab 6 at pp 284-285, [41]

[note: 54] PBAF 2, Tab 6, at pp 284-286, [41]-[48]

[note: 55] PBAF 2, Tab 6, at p 286, [47]; p 290, [61]

[note: 56] PBAF 2 , Tab 6 at pp 285-286, [45]

[note: 57] PBAF 2, Tab 6 at pp 283-284, [40]

[note: 58] PBAF 2, Tab 6, at pp 284-285, [41]

[note: 59] Defendant’s written submissions filed on 18 May 2011 at pp 104-108, [137]-[142]

[note: 60] PBAF 2 , Tab 3 at p 149

[note: 61] PBAF 2, Tab 3 at p 4, [10]