Dinesh Kishin Kikla (as Administrator of the Estate of Lalitha Kishin Kikla also known as Lalita Kishin Kikla, Deceased) *v* The Hong Kong and Shanghai Banking Corporation Limited and others
[2013] SGHCR 06

Case Number : Suit No 76 of 2012 (Summons No 4327 and 4911 of 2012)

Decision Date : 19 February 2013

Tribunal/Court : High Court

Coram : Chee Min Ping AR

Counsel Name(s) : Hri Kumar, SC and Melissa Liew (instructed) and Godwin Campos (Godwin Campos LLC) for the plaintiff; Lee Eng Beng, SC, Disa Sim, Jonathan Lee and Ng Kexian (Rajah & Tann LLP) for the first and second defendants.

Parties : Dinesh Kishin Kikla (as Administrator of the Estate of Lalitha Kishin Kikla also known as Lalita Kishin Kikla, Deceased) — The Hong Kong and Shanghai Banking Corporation Limited and others

Civil Procedure

19 February 2013 Judgment Reserved

AR Chee Min Ping:

Introduction

1 The first and second defendants respectively made the present two applications, *viz*, for a stay of the present suit in favour of the courts of the United Arab Emirates ("UAE") on the basis that the UAE is the clearly more appropriate forum for the trial of the present proceedings, and for the setting aside of an order granting leave to the plaintiff to serve the writ of summons out of jurisdiction on the second defendant pursuant to O 12 r 7(1) of the Rules of Court (Cap 322, R5, 2006 Rev Ed).

Background Facts

2 The undisputed facts are as follows. The plaintiff, Dinesh Kishin Kikla, is the co-administrator of the estate of his late mother, Lalitha Kishin Kikla, also known as Lalita Kishin Kikla ("Lalitha"). Lalitha was resident in Dubai at all material times. When Lalitha passed away intestate on 10 January 2001, she left behind the amounts of US$4,476,765.32 and US$707,947.99 respectively in two fixed deposit accounts which she held with the first defendant, The Hongkong and Shanghai Banking Corporation Limited, a Singapore registered branch ("HSBC Singapore"). These monies were originally held with the second defendant, but were transferred to HSBC Singapore in or around November 1999. The second defendant is HSBC Bank Middle East Limited ("HSBC Middle East"), a Dubai registered branch of the same banking group.

3 Lalitha's husband, one Kishin Kikla, was during all material times a director, shareholder and manager of two companies operating in Dubai, namely, Building Material Enterprises (LLC) and Kikla Trading Company (collectively, "Kishin Kikla's companies"). Kishin Kikla's companies were granted overdraft facilities (collectively, the "Overdraft Facilities") by HSBC Middle East some time in the year 2000 and 1999 respectively. Kishin Kikla was the personal guarantor of the Overdraft Facilities.

4 Some time before Lalitha passed away, she signed an Authorisation Letter authorising HSBC Singapore to accept instructions from Kishin Kikla in respect of the renewal of her fixed deposit accounts in HSBC Singapore.

5 It subsequently transpired that on or around 9 May 2001 (after Lalitha had passed away), the amounts of US$4,100,000 and US$683,075.12 respectively were transferred out of Lalitha's fixed deposit accounts with HSBC Singapore to HSBC Middle East for the purpose of discharging the outstandings owing under the Overdraft Facilities. This transaction was effected notwithstanding that no authorisation was received from Lalitha's estate. It was not disputed that the transfer was effected upon the instructions of Lalitha's husband, Kishin Kikla, who has since passed away on 13 January 2002.

6 The third defendant, Namrata Agarwal also known as Namrata Kikla d/o Kishan Kikla, is the plaintiff's sister and the co-administrator of Lalitha's estate. She was joined as a defendant in this suit as required by law, although no substantive claims have been made against her. She is also the sole administrator of the estate of the late Mr Kishin Kikla. For ease of reference, any reference to "the defendants" in this judgment shall be construed as a reference to HSBC Middle East and HSBC Singapore, the substantive defendants in this suit.

The plaintiff's claim

7 The plaintiff brought the present action against the first defendant, alleging:

(i) wrongful debit by the first defendant of the total sum of US$4,783,075.12 in breach of the first defendant's mandate;

(ii) alternatively, failure to repay the Estate all monies standing under Lalitha's fixed deposit accounts , in respect of which the first defendant is indebted to Lalitha's estate; and

(iii) breach of an implied term of contract between the first defendant and Lalitha to exercise reasonable care and skill, alternatively, negligence, in effecting the transfer of the monies in Lalitha's fixed deposit accounts to the second defendant.

8 As against the second defendant, the plaintiff alleges that:

(i) the monies were paid by the first defendant to the second defendant under a mistake of fact; and

(ii) dishonest assistance or knowing receipt, as the second defendant had received the total sum of US$4,783,075.12, being proper which was the subject of fiduciary duties with knowledge that it was such property, and that Kishin Kikla's instructions to call on the fixed deposits was a fraudulent breach of such fiduciary duties.

9 In the affidavits filed and submissions made by the first and second defendants, it was made apparent that a possible defence is that a security interest had been granted by Lalitha during her lifetime in favour of the second defendant, over her fixed deposits as security in the event of default on the Overdraft Facilities. In the second affidavit filed on behalf of HSBC Middle East, its legal counsel, Nasreen Bulos stated that Lalitha had signed certain contractual documents, including a "Pledge Agreement Securing Third Party Obligations", an "Irrevocable Personal Guarantee" and a "Third Party Guarantee" (collectively, the "HSBC Middle East Securities") in favour of HSBC Middle East, that purportedly had the effect of creating a lien over the monies in Lalitha's fixed deposit

accounts which were held in HSBC Middle East. Lalitha then authorised the transfer of her fixed deposits from HSBC Middle East to HSBC Singapore in or around November 1999, and HSBC Middle East instructed HSBC Singapore to hold the monies on lien for the benefit of HSBC Middle East. Although the documents constituting the HSBC Middle East Securities were blank (HSBC Middle East's officers did not sign on these documents and various fields for material information were left blank) save for what appeared to be standard terms and Lalitha's signature, the defendants maintained that this was their case, and that the merits of their defence was a matter for trial, and not relevant for the purposes of the present applications.

10 A document entitled "Security Over Deposits with the Bank" was heavily relied on by HSBC Middle East and HSBC Singapore, as evidence that the monies were held subject to the rights granted by Lalitha to HSBC Middle East pursuant to the HSBC Middle East Securities. This document was allegedly executed to give effect to HSBC Middle East's intention that the fixed deposits be held on lien for its benefit, and was allegedly executed by HSBC Singapore as agent of HSBC Middle East. It is however important to note that the agreement "Security Over Deposits with the Bank" was executed only with respect to the deposit amount of US$661,318.23 with respect to an account number [xxx], which is not the account number of either of the fixed deposit accounts. Bulos also alleges that the arrangement between the first and second defendants are evinced by an internal memorandum dated 24 November 1999 from HSBC Middle East to HSBC Singapore stating that the following:

> Please note that the fixed deposits is [*sic*] under lien to HSBC Bank Middle East, Dubai (the larger amount) and the second deposit is under lien to HSBC Middle East, Deira Branch, Dubai.

The defendants also relied on various letters between Kishin Kikla's companies and HSBC Middle East, in which contemporaneous references were made of HSBC Middle East's and Kishin Kikla's companies' understanding that the Overdraft Facilities were secured by lien with HSBC Singapore over Lalitha's fixed deposits.

The issues arising in this suit

11 In the present case, although parties appear to take disparate views as to what are the true issues in dispute in this case, it nevertheless appeared that the case turned on the following issues:

(i) Did Lalitha grant to HSBC Singapore a security interest over the fixed deposits which she had in Singapore, as security for default on the Overdraft Facilities?

(ii) If so, what were the terms of the security agreement and did HSBC Singapore transfer the fixed deposits to HSBC Middle East in accordance with the terms of the security agreement?

Once the above issues have been settled, the plaintiff's claims against HSBC Singapore would be determined. If it is established that HSBC Singapore transferred Lalitha's fixed deposits to HSBC Middle East in the absence of a security agreement, then the plaintiff would be required to establish wrongdoing on HSBC Middle East's part, *ie*, that HSBC Middle East dishonestly assisted in a breach of fiduciary duties, or knowing received monies that were paid pursuant to a breach of fiduciary duties.

The applicable legal principles

12 The applicable general principles were laid down in *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460, which has been cited with approval and applied on many occasions in Singapore (see

JIO Minerals FZC and others v Mineral Enterprises Ltd [2011] 1 SLR 391 ("*JIO Minerals*") at [38]) and summarised by the Court of Appeal in *CIMB Bank Bhd v Dresdner Kleinwort Ltd* [2008] 4 SLR(R) 543 at [26]:

> ... a stay will only be granted where the court is satisfied that there is some other available and more appropriate forum for the trial of the action. The burden of establishing this rests on the defendant and it is not enough just to show that Singapore is not the natural forum or appropriate forum. The defendant must also establish that there is another available forum which is clear or distinctly more appropriate than Singapore. The natural forum is one with which the action has the most real and substantial connection. In this regard, the factors which the court will take into consideration include not only factors affecting convenience or expense (such as availability of witnesses) but also other factors such as the law governing the transaction and the places where the parties respectively reside or carry on business. If the court concludes, at this stage of the inquiry ("stage one of the *Spiliada* test"), that there is no other available forum which is clearly more appropriate for the trial of the action, it will ordinarily refuse a stay. If, at this stage, it concludes that there is some other available forum which *prima facie* is clearly more appropriate for the trial of the action, it will ordinarily grant a stay, unless there are circumstances by reason of which justice requires that a stay should nevertheless be refused. In this connection, the court will consider all the circumstances of the case. For this second stage inquiry ("stage two of the Spiliada test"), the legal burden is on the plaintiff to establish the existence of those special circumstances.

13 The Court of Appeal also stated in *JIO Minerals* at [41] that the list of relevant connecting factors that are to be considered in applying stage one of the *Spiliada* test are not closed, and depends on the factual matrix of each case. The Court of Appeal also stated that helpful guidance may be found in the following extract from Prof Yeo Tiong Min's article in *Halsbury's Laws of Singapore* vol 6(2) (LexisNexis, 2009):

> General connecting factors are considered at this stage. These include the locations of the parties, relevant witnesses, facts and evidence, and the applicable law to the issues in dispute. As the search is for the forum that is prima facie clearly more appropriate to try the case, it is important to see what the case is about, and connections which have no or little bearing on the adjudication of the issues in dispute between the parties will carry little weight. While there is a natural emphasis on the minimisation of expense and inconvenience of trial at this stage, it should be borne in mind that the true test is appropriateness.

14 However it is important to bear in mind the remarks of V K Rajah J in *Peters Roger May v Pinder Lillian Gek Lian* [2006] 2 SLR(R) 381 at [20], cited by the Court of Appeal with approval in *Rickshaw Investments and another v Nicolai Baron von Uexkull* [2007] 1 SLR(R) 377 ("*Rickshaw*") at [15], as follows:

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

Thus, the weight of each of the relevant factors in the balance of competing interests must depend on the facts of each case. The merits of the claim or the defence are relevant considerations for the purpose of a stay application on the ground of *forum non conveniens*.

Stage 1 of the *Spiliada* test

Stage 1 of the *Spiliada* test

Availability of the UAE as a forum

15 According to the defendants' expert, Samir Kanaan, the UAE is an available forum because the UAE has jurisdiction over HSBC Middle East, which albeit a Jersey-incorporated entity, has registered branches in the UAE. The plaintiff's expert, Ali Al Aidarous, takes a contrary view. According to both experts, the applicable law is Article 20 of the UAE Civil Procedures Law (Federal Law No 11 of 1982) ("Civil Procedures Law"), which provides:

> With the exception of actions in *rem* relating to real property located abroad, the courts shall have jurisdiction to hear actions brought against nationals and claims brought against foreigners having a domicile or place of residence in the State.

The plaintiff's expert asserts that while a registered branch in the UAE can satisfy the Article 20 requirement of "domicile" or "place of residence" for the purposes of establishing jurisdiction, there is no evidence of registration of HSBC Middle East, as opposed to the larger HSBC global group in the UAE. In response, the defendants refers to an affidavit filed by Bulos, the legal counsel of HSBC Middle East on 7 January 2013, in which evidence of a commercial license granted to one "HSBC Bank Middle East Limited (Dubai Branch) since the year 1984 is exhibited. Having regard to the arguments put forward and the evidence tendered, I am satisfied that the UAE courts would have jurisdiction over HSBC Middle East.

16 The next issue would be whether the UAE courts have jurisdiction to determine the plaintiff's claim against HSBC Singapore, which undoubtedly is neither "domiciled" nor "resident" in the UAE. Article 21(7) of the Civil Procedures Law of provides that:

> The courts shall have jurisdiction to hear actions against a foreigner who does not have domicile or place of residence in the State in the following circumstance:
>
> ...
>
> (7) If one of the defendants has a domicile or place of residence in the State.

As such, the defendants' expert, Kanaan, takes the position that the Dubai courts would also have jurisdiction over HSBC Singapore in this matter, since the Dubai courts would undoubtedly have jurisdiction over HSBC Singapore and Namrata. The plaintiff's expert, Aidarous, takes the different position that Article 21(7) would apply only if one of the substantive defendants was domiciled in the UAE. The plaintiff's expert also contends that Namrata's domicile is irrelevant as she is only a nominal defendant. The plaintiff also argues (see above at [15]) that the UAE courts have no jurisdiction over HSBC Middle East. As I have already determined that the UAE is an available forum to adjudicate over the plaintiff's claim against HSBC Middle East, I am unable to accept the plaintiff's arguments, and find that the UAE courts are an appropriate forum to determine the present dispute.

Residence and place of business of the parties

17 The plaintiff is resident in Canada, while HSBC Middle East is a Jersey incorporated entity with branches registered and operating in the UAE, and HSBC Singapore operates in Singapore. Namrata, a nominal defendant, is resident in the UAE. I accept that the possibility of the presence of assets in Jersey, Middle East and in Singapore of the respective defendants is a relevant factor in determining the clearly more appropriate forum. However, this factor is at best neutral, given the disparate locations of all the parties involved in a substantive manner.

Location of key witnesses and documents

18 The defendants assert that the material witnesses and evidence are to be found in the UAE. The defendants argue that the testimony of HSBC Middle East officers are crucial to fill in the gaps in the documentary evidence of HSBC Middle East and HSBC Singapore, as the relevant events had occurred more than ten years ago. The defendants assert that the evidence of relevant officers from HSBC Middle East are crucial in determining whether the monies in Lalitha's fixed deposit accounts were validly transferred to HSBC Middle East, or pursuant to the fraudulent instructions given by Kishin Kikla with knowledge, participation and/or wilful blindness of HSBC Middle East. HSBC Singapore takes the position that it merely administered the document entitled "Security Over Deposits with the Bank" as an agent for HSBC Middle East, and has no relevant evidence to offer. [note: 1] The defendants also alleged that the evidence of Namrata was crucial, as she allegedly refused to support the plaintiff in his cause of action due to her personal knowledge that his cause of action lacked merit. Further, the defendants submit that Namrata is not compellable in Singapore but is compellable in UAE and hence, this dispute should properly be tried in the UAE.

19 The plaintiff, on the other hand, claimed that the plaintiff's claim essentially rests on HSBC Singapore's alleged wrongdoing, which occurred through its employees and hence, the material witnesses would be located in Singapore. In fact, since the defendants rely on an internal memorandum dated 24 November 1999 from HSBC Middle East to HSBC Singapore as evidence of the security interest in Lalitha's fixed deposits, the evidence of the addressees of the internal memorandum are also crucial in determining HSBC Singapore's state of mind in effecting the transfer of the monies to HSBC Middle East at the relevant time. The plaintiff also submits that the plaintiff's claims do not concern Namrata, and that her opinion on the merits of the plaintiff's claim has nothing to do with any of the issues raised. In fact, the defendants have never identified the issues for which Namrata's testimony would be required. Namrata is at best only a nominal defendant who was joined because a co-administrator must be added as defendant if she does not want to be a plaintiff in the action.

20 The issues, as formulated at [11] above, would determine the most essential witnesses that are to be called to testify at the trial. I agree with the plaintiff's submission that evidence of HSBC Singapore's officers is crucial in determining the basis on which HSBC Singapore first accepted and were transferred out of HSBC Singapore. Evidence on whether HSBC Singapore had entered into an agreement with, or received instructions from Lalitha to provide the monies in her fixed deposit accounts as security in the event of a default on the Overdraft Facilities is far more crucial towards the determination of the issues. However, this is not to say that evidence relating to the states of mind of the relevant HSBC Middle East officers who purportedly requested HSBC Singapore to hold the monies transferred from Lalitha's fixed deposit accounts in HSBC Middle East in on around November 1999 on lien for HSBC Middle East is irrelevant. The issue is not whether HSBC Middle East had instructed HSBC Singapore to transfer the fixed deposits at the instance of fraud perpetuated by the late Kishin Kikla, as that *per se* would not absolve the defendants of liability to Lalitha's estate under the various causes of action brought by the estate. What was material was the state of mind of the relevant officers HSBC Middle East, what needed to be resolved between the plaintiff as against HSBC Middle East was whether HSBC Middle East was liable for any dishonest assistance or knowing receipt. Thus, the key witnesses that would need to be called at trial would conceivably be from both the UAE and Singapore. Hence, the location of witnesses does not favour either the UAE or Singapore as the clearly more appropriate forum.

21 In any event, I am of the view that the location of key witnesses and documents is neither here nor there because there is no reason offered by the defendants for why the HSBC Middle East employees cannot travel to Singapore to give evidence. Likewise, there is no reason why the relevant

HSBC Singapore officers cannot travel to the UAE to give evidence.

22 Since all the relevant documents are either in both Arabic and English, or in English, there is similarly no reason why the relevant documents cannot be transported to Singapore for the purposes of a trial. On the other hand, there does not appear to me any reason why the relevant English documents cannot be translated into Arabic, if the trial was to take place in the UAE. Thus, the location of key witnesses and documents are at best neutral factors in the consideration of whether the UAE courts are the clearly more appropriate forum to determine the parties' dispute.

Existence of non-exclusive jurisdiction clause

23 The fixed deposit accounts are governed by HSBC Singapore's general terms and conditions governing accounts, and cl 23.2 of the latter provides as follows:

> You shall submit to the non-exclusive jurisdiction of the courts of Singapore and agree that service of legal process may be effected on you if sent by registered post to the last address you have notified us in writing.

Furthermore, cl 14.02 of the agreement entitled "Security Over Deposits with the Bank" executed by Lalitha and HSBC Singapore provides that:

> ... the Depositor submits to the non-exclusive jurisdiction of the Singapore Courts but this Security may be enforced in the Courts of any competent jurisdiction.

24 The plaintiff submits that where a non-exclusive jurisdiction clause exists in favour of Singapore, strong cause must be shown by the party seeking a stay in favour of another jurisdiction, and that the existence of such a clause creates a strong *prima facie* case that Singapore is an appropriate forum. In support, the plaintiff cites the following extract from a decision of Chan Seng Onn J, *Citibank NA v Robert* [2011] 3 SLR 465 at [12]-[15]:

> 12 The court has discretion whether or not to grant a stay on the grounds of *forum non conveniens*. This discretion exists even when parties have agreed to an exclusive jurisdiction clause (*Bambang Sutrisno v Bali International Finance Ltd* [1999] 2 SLR(R) 632 at [7]-[9] ("*Bambang*")). However, while each case has to be decided within its particular factual matrix, where parties have agreed to litigate exclusively in a forum other than Singapore, a stay would ordinarily be granted unless exceptional circumstances warrant otherwise (see *The "Eastern Trust"* [1994] 2 SLR(R) 511 at [8]). Similarly, where a defendant, in breach of an agreement applies for a stay of proceedings on the ground of *forum non conveniens*, the court, while not bound to refuse a stay, would in usual circumstances give effect to the agreement between parties (*Bambang* at [9]).
>
> ... where there is an agreement between parties as to choice of jurisdiction, the court would strongly lean in favour of giving effect to the contractual bargain unless exceptional circumstances warrant otherwise (see, *eg*, *Golden Shore Transportation Pte Ltd v UCO Bank* [2004] 1 SLR(R) 6 at [33] ("*Golden Shore*")). By inserting a jurisdiction clause, the parties indicate that they regard certain jurisdictions as more appropriate forums than others. ... Ultimately, however, even though the existence of a jurisdiction clause may *prima facie* weigh the scales more heavily in one direction than another, the court in exercising its discretion must still take into account factors relevant to the particular factual matrix. ... First, the court, upon construing the terms of agreement between parties, would ordinarily give effect to those contractual intentions, unless the defendant has strong cause to renege. Second, as endless permutations of

> jurisdiction clauses are possible and limited only by the ingenuity of the draftsman, each jurisdiction clause has to be construed carefully to determine the precise ambit of the agreement between parties.
>
> ... where a jurisdiction clause exists, the court has to examine such carefully, and construe the ambit of what was agreed to between parties. The clause will ordinarily weigh heavily in favour of the party seeking to uphold the agreement. However, that does not preclude the grant of a stay where strong cause against enforcing the agreement is shown.

25 The plaintiff also relies on *PT Jaya Putra Kundur Indah v Guthrie Overseas Investments Pte Ltd* [1996] SGHC 285 in which Lai Siu Chiu J, in construing the effect of a non-exclusive jurisdiction clause in favour of Indonesia, held at [64]:

> ... the presence of a non-exclusive jurisdiction clause specifically choosing Indonesia as the forum for trial of the action showed that, prima facie, the parties had agreed that Indonesia would be an appropriate forum for the trial of the action than elsewhere. Jurisdiction agreements, though they may be non-exclusive in nature, should be respected and, when possible, upheld. Of course, there may be other fori in which an action concerning a breach of the 1st JVA may be brought, but Indonesia would clearly be an appropriate forum for the trial of an action arising out of a breach of the 1st JVA. So the parties have agreed. The plaintiffs should not be heard to argue that Indonesia would not be appropriate forum for the trial of this action.

26 The case of *Orchard Capital I Ltd v Ravindra Kumar Jhunjhunwala* [2012] 2 SLR 519 ("*Orchard Capital*"), although included in the plaintiff's bundle of authorities, was not specifically highlighted in the plaintiff's submissions. In *Orchard Capital* at [24]-[25], Andrew Phang Boon Leong JA stated that there are two possible central strands of analysis concerning non-exclusive jurisdiction clauses, as follows:

> The *first* central strand is *contractual* in nature. Put simply, *depending on the intention of the parties concerned, a non-exclusive jurisdiction clause could (taken at its highest) be given the effect of an exclusive jurisdiction clause* - in which case strong cause would be required to be demonstrated by the party seeking to sue in a jurisdiction other than that stated in the relevant clause itself (in this case, the Appellant). Such effect may, for instance, be given where it would be a breach of the non-exclusive jurisdiction clause to object to the exercise of jurisdiction by the selected forum, given the wording of the clause and the circumstances....
>
> The *second* central strand is *general* in nature. Put simply, a non-exclusive jurisdiction clause is *a factor - in all cases - in ascertaining whether or not the action concerned ought to be stayed* (pursuant to the principles first laid down in the seminal House of Lords decision of *Spiliada* ([12] *supra*)), although (according to Prof Yeo) its qualitative strength as a factor will differ, depending on the precise circumstances before the court. We will, in fact, return to these principles later (see below, especially at [31]). As Prof Yeo correctly emphasises, this second central strand is *separate and distinct* from the first inasmuch as it is *not* premised on the contractual intention of the parties as such (see *Yeo* at 350 and 351).

It is important to note that in *Orchard Capital* at [26], Phang JA cautioned against taking *Orchard Capital* as authority for a wholehearted acceptance of the first central strand by the Court of Appeal, as its application is not without difficulties. On the facts, the second central strand was applied to the facts. In the present case, the plaintiff appeared to have treated the existence of a non-exclusive jurisdiction clause as one of the factors to be considered in determining whether the UAE is a clearly more appropriate forum, applying the *Spiliada* principles (see above at [12]). The plaintiff

therefore appears to be making an argument along the lines of the second central strand as envisaged in *Orchard Capital, ie*, that the existence of a non-exclusive jurisdiction clause is a relevant factor in applying the *Spiliada* principles, as opposed to the first central strand, although the plaintiff has urged the court to require strong cause to be shown for reneging on a non-exclusive jurisdiction clause is typically applied where proceedings have been commenced in breach of an exclusive jurisdiction clause.

27 Thus, applying the second central strand of analysis as propounded in *Orchard Capital*, the non-exclusive jurisdiction clause in favour of Singapore is a factor which the court can consider in deciding whether or not the present action ought to be stayed. However, the weight of this factor is not significant, as there is no indication that the parties intended the non-exclusive jurisdiction clauses to indicate that the UAE is an inappropriate forum, or, conversely, that Singapore is to be the most appropriate forum. Notably, cl 14.02 of the agreement entitled "Security Over Deposits with the Bank" explicitly provided that the submission to the non-exclusive jurisdiction of Singapore was not to affect the right of the plaintiff to sue in another jurisdiction. Thus, while the presence of the non-exclusive jurisdiction clauses are relevant in determining whether Singapore is the *forum non conveniens*, this factor does not clearly demonstrate whether the UAE is a clearly more or less appropriate forum to determine the dispute.

Governing law of the claims

28 Choice of law issues are relevant to the question of jurisdiction, for the reasons stated in *Rickshaw* at [42]:

> … 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.

29 With respect to HSBC Middle East, the causes of action relied on by the plaintiff are in dishonest assistance, knowing receipt and restitution. Both parties do not dispute that dishonest assistance is to be classified as a tort for the purpose of determining the governing law: see *OJSC Oil Company v Roman Arkadievich Abrahamovich* [2008] EWHC 2613 (Comm). Hence, the choice of law rule is that of double actionability and the *lex loci delicti* is relevant in determining the more appropriate forum: see *JIO Minerals* at [110]. Parties also do not dispute that moneys paid under a mistake of fact and knowing receipt are characterised as restitutionary claims: see *Thahir Kartika Ratna v PT Pertambangan Minyak dan Gas Bumi Negara (Pertamina)* [1994] 3 SLR(R) 312 at [31]-[32] and [37].

30 With respect to tortious claims, parties also do not dispute that the applicable principles have been set out in *Rickshaw* at [37], *viz*, that the location of the commission of the tort is *prima facie* the natural forum. The court ought to examine the events constituting the tort and ask itself where in substance did the cause of action arise. The defendants submit that the crux of the plaintiff's claim centers upon wrongdoing committed in Dubai, and that its claims against HSBC Middle East are the "primary claims". This is because the alleged wrongdoing by Kishin Kikla by way of issuance of fraudulent instructions occurred in Dubai, and any alleged dishonest assistance on the part of HSBC Middle East must have occurred in Dubai, where HSBC Middle East applied the monies transferred from

Lalitha's fixed deposit accounts to discharge the outstandings under the Overdraft Facilities.

31 The plaintiff, however, submits that the crux of its tortious claim lies in Singapore because:

(i) Lalitha opened the fixed deposit accounts in Singapore and entered into the agreement, "Security Over Deposits with the Bank" which stipulated that Singapore laws to be govern any dispute, and provided for the non-exclusive jurisdiction of Singapore;

(ii) the governing law of the agreement, "Security Over Deposits with the Bank", that allegedly created a lien over the fixed deposit accounts is Singapore law;

(iii) the Authorisation Letter which created the alleged fiduciary relationship is to be governed by Singapore, and therefore Kishin Kikla's breach of fiduciary duties is governed by Singapore law; and

(v) the instructions received in Singapore were acted upon in Singapore which caused the transfer of monies out of the fixed deposit accounts in Singapore.

32 The plaintiff also urges the court to look beyond the manner in which the causes of action are framed, and to identify the true issues in dispute for the purpose of determining the proper law governing the dispute between the parties. Indeed, the proper approach is to look beyond the formulation of the claim and to identify, according to the *lex fori*, the issues thrown up by the claim and defence (see *Macmillan Inc v Bishopgate Investment Trust PLC and others (No 3)* [1996] 1 WLR 387 ("*Macmillan*") at 407). As Staughton LJ held in *Macmillan* at 388-399, the rules of conflicts of laws are directed at the issue of law in dispute, rather than the cause of action on which the plaintiff relied. This statement was endorsed by Andrew Ang J in *Murakami Takako v Wiryadi Louise Maria and others (No 2)* [2008] 3 SLR(R) 198 at [41]. When one turns to the affidavits filed on behalf of the defendants, it appears that HSBC Middle East's defence is essentially, that it was entitled to call on the fixed deposit accounts in Singapore pursuant to a security arrangement, and that this defence would turn on the interpretation of the relevant banking documentation and terms therein. [note: 2] Indeed, if the defendants had the contractual basis to assert their rights over the monies in Lalitha's fixed deposit accounts, then the plaintiff's claims against both the defendants must fail as the defendants were doing no more than exercising their contractual rights. Hence, the liability of the defendants would turn on the interpretation of the document entitled "Security Over Deposits With the Bank" which purportedly created the security which both of the defendants were entitled to rely on. HSBC Singapore would be entitled to transfer the fixed deposits to HSBC Middle East if the agreement gave it the legal right to do so, and HSBC Middle East would be entitled to receive the fixed deposits, as the execution of the agreement, "Security Over Deposits With the Bank" was a means of executing its instructions to HSBC Singapore to create a lien over the fixed deposits, pursuant to Lalitha's mandate as embodied in the HSBC Middle East Securities. It would therefore be essential to look to the governing law of the contract "Security Over Deposits With the Bank", which is Singapore law, to resolve this issue.

33 The same reasoning would apply to the plaintiff's claim against HSBC Middle East for restitution, as there would be no valid cause of action in restitution if HSBC Middle East was merely asserting its contractual rights. The applicable choice of law rule in restitution claims has been stated in *CIMB Bank*

Bhd v Dresdner Kleinwort Ltd [2008] 4 SLR(R) 543 ("*CIMB Bank*") where the Court of Appeal cited with approval Rule 230 of *Dicey, Morris and Collins on the Conflict of Laws* (Sweet & Maxwell, 14th Ed, 2006) ("*Dicey, Morris and Collins*"), at [31]:

> 31 Dicey, Morris and Collins states in Rule 230 as follows: at para 34R-001):
>
> (1) The obligation to restore the benefit of an enrichment obtained at another person's expense is governed by the proper law of the obligation.
>
> (2) The proper law of the obligation is determined as follows:
>
> (a) If the obligation arises in connection with a contract, its proper law is the law applicable to the contract;
>
> (b) If it arises in connection with a transaction concerning an immovable, its proper law is the law of the country where the immovable is situated (*lex situs*);
>
> (c) If it arises in any other circumstances, its proper law is the law of the country where the enrichment occurs.

The defendants urged the court to hold that the applicable rule is Rule 230(2)(c) as the parties' dispute did not arise in connection with a contract or an immovable property. The plaintiff submits that quite clearly, the applicable rule is 230(2)(a), since the right to restitution must arise from the failure of the document entitled "Security Over Deposits With the Bank" to create a security interest over the fixed deposits in favour of HSBC Middle East. In support, the plaintiff cites the following extract from *CIMB Bank* at [34], which cites with approval the following extract from *Dicey, Morris and Collins*:

> Although the obligation to restore an unjust benefit does not arise *from* a contract, it may, and very frequently does, arise in connection with a contract. This is the case where a party seeks to recover money paid pursuant to an *ineffective* contract, e.g. by reason of a failure of consideration or as a repayment of money paid under an illegal contract or where he claims a *quantum meruit* for work done or services rendered under a contract which turned out to be void. ...
>
> ... [T]he choice of law rule for dealing with the consequences of a contract being void, or being avoided, or being discharged for frustration, will be the law which governed the real or supposed contract and pursuant to which the avoidance or discharge was brought about. It will, therefore, be *generally* unnecessary to decide whether the claim for an order to settle the rights of the parties in the aftermath of a failed contract is to be characterised for choice of law purposes as a contractual or a restitutionary matter.

I am of the view that the applicable limb is 2(a) of Rule 230. The reason is that the dispute concerns a purported agreement to provide security in respect of the fixed deposit accounts. The issue is whether HSBC Middle East lacked contractual basis (on the basis of the document entitled "Security Over Deposits With the Bank" which was allegedly executed by HSBC Singapore as HSBC Middle East's agent) to assert a lien over the moneys in the fixed deposit accounts, and thus, can be said to arise in connection with a contract. Thus, while the claims for restitution on the basis of mistaken payments and knowing receipt are restitutionary claims, the dispute turns essentially on contractual interpretation and thus can be said to arise in connection with a contract. Hence, Rule 230(2)(a) applies, and the applicable law is Singapore law.

34 I now turn to the claims in contract, the tort of negligence, and breach of fiduciary duties *vis a vis* HSBC Singapore. I do not understand the defendants to be making submissions that Singapore law is not the governing law with respect to these claims. All that the defendants submit is the plaintiff's claims against HSBC Singapore are parasitic on the claims against HSBC Middle East. For the reasons stated above at [33], I am of the view that the dispute between the parties turns on the construction of the agreement, "Security Over Deposits With the Bank", which is governed by Singapore law. It is clear on the facts that any alleged tort or breach committed by HSBC Singapore would have been committed in Singapore and therefore closely connected to Singapore.

Enforceability of judgment obtained in Singapore

35 The defendants submit that even if the plaintiff was successful in his claim and obtained judgment in Singapore, he would have to re-litigate the matter in the UAE because the Singapore judgment would not be enforceable in the UAE. The defendants' UAE law expert, Kanaan, states that a foreign judgment is unenforceable in the UAE where the UAE courts have jurisdiction to try the case. The defendants urge the court to depart from High Court authorities such as *Ang Ming Chuang v Singapore Airlines Ltd (Civil Aeronautics Administration, Third Party)* [2005] 1 SLR(R) 409 ("*Ang Ming Chuang*") at [54], in which it is held that the plaintiff's inability to enforce a judgment in a foreign jurisdiction is not a factor which a defendant may raise in favour of a stay application. The defendants submit that the rationale articulated by the High Court in *Ang Ming Chuang* for its holding, *viz*, that the plaintiff ought to bear the consequences of unenforceability since it was its own decision to sue in the forum in question, is not applicable in the present case, as the defendant would be unjustifiably open to the risk of a second round of proceedings in the UAE. The defendants submit that *Ang Ming Chuang* is inconsistent with the Court of Appeal decision of *Murakami Takako (executrix of the estate of Takashi Murakami Suroso, deceased) v Wiryadi Louise Maria and others* [2009] 1 SLR(R) 508 at [36], in which it was held on the facts that the enforceability of an Indonesian judgment in other jurisdictions is an important consideration which it could not ignore in arriving at the conclusion that Indonesia was the more appropriate forum.

36 The plaintiff submits that the enforceability of Singapore judgments in the UAE is irrelevant, because the court ought to be concerned with the appropriateness of the forum for the trial process, as opposed to the enforceability of judgments, citing in support the local High Court decision of *Ismail bin Sukardi v Kama bin Ikhwan and another* [2008] SGHC 191 ("*Ismail bin Sukardi*") at [27]. Further, the plaintiff's UAE law expert, Aidarous, is of the view that the plaintiff will be able to enforce a Singapore judgment in the UAE without re-litigation of the matter. In any event, the plaintiff has submitted that if the plaintiff is successful in obtaining a judgment in Singapore, that judgment can be enforced in Jersey, as HSBC Middle East is a Jersey incorporated entity. In support, the plaintiff has adduced an expert report from a Jersey law expert to that effect, which has been unopposed by the defendants. [note: 3]

37 I should first of all, note that in the affidavit filed by the defendants' own expert, Kanaan, on 27 August 2012, he acknowledges Article 92 of the Civil Procedures Law of the UAE *may* prevent the plaintiff from bringing a claim in the UAE after the matter has been determined in Singapore, although it makes no specific reference to matters previously determined in foreign proceedings. Article 92 provides that:

> A defence that the action should not be heard on the grounds that it has been previously determined may be adduced at any stage of the proceedings, and the court may rule thereon on its own motion.

Therefore, the possibility of re-litigation of the matter in the UAE may be more apparent than real, as

Article 92 could have the effect of preventing re-litigation of a dispute previously determined by a foreign court.

38 With respect to the authorities cited in relation to this issue by the parties, I note that in *Murakami*, the Court of Appeal was commenting on the relevance of the enforceability of judgments as a relevant factor in applying the *Spiliada* principles on *forum non conveniens*. However, while the enforceability of judgments in other jurisdictions may generally be a relevant factor, I am of the view that the plaintiff's clearly demonstrated intention to pursue a claim in a jurisdiction and run the risk of unenforceability of the claim in another jurisdiction is also a critical factor that cannot be overlooked: see also *Ang Ming Chuang* at [54] and *Ismail bin Sukardi* at [27]. I am of the view that the plaintiff ought to be held to its election of jurisdiction in which to sue and bear the risk of unenforceability in other jurisdictions. While there are differing views taken by the respective UAE law experts on the enforceability of Singapore judgments in the UAE without the need for re-litigation, there is nevertheless unopposed expert evidence to the effect that Singapore judgments are enforceable on HSBC Middle East in Jersey. As that is the plaintiff's chosen manner of enforcing any judgment it might obtain if it was successful, I am of the view that it ought to bear the consequences of its decision, and hence, this factor is to be regarded as neutral.

Conclusion on the first stage

39 In conclusion, the balance of relevant factors leads to the conclusion that the UAE is not the clearly more appropriate forum to hear the dispute, as none of the relevant factors point towards the UAE as the clearly more appropriate forum.

The second stage

40 Having arrived at the conclusion above at [39], there is no need to consider the second stage of the *Spiliada* test. Nevertheless, the second stage will be considered for completeness. The applicable principles have been set out in *Brinkerhoff Maritime Drilling Corp v PT Airfast Services Indonesia* [1992] 2 SLR(R) 345 and endorsed by the Court of Appeal more recently in Rickshaw at [19]:

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

Assuming that the *prima facie* natural forum is the UAE, the question is whether a stay should nevertheless not be granted for reasons of justice.

Relevance of time bar

41 It is not disputed by both parties' UAE law experts that the plaintiff's claim is time-barred in the UAE. The three year limitation period had begun running from the plaintiff's awareness of the purported harm to Lalitha's estate, and that three-year period has been spent.

42 The defendants submit that the issue of time bar is really a neutral factor, since granting a stay would defeat the plaintiff's claim altogether, and refusing a stay on the other hand would deprive the defendants of their accrued rights. Assuming that UAE law was to apply as the governing law over

the parties' dispute, the defendants also contend that limitation period is a "substantive" rather than "procedural" issue which ought to be governed by UAE law. Hence, the plaintiff's action would also be time barred in Singapore. Furthermore, since the plaintiff has provided no credible reason for allowing the time bar to lapse since the plaintiff discovered the transfer of monies as early as 2002, or 2006 or 2007, it should not be allowed to take advantage of the more generous limitation period in Singapore. Thus, a stay ought to be granted.

43 The plaintiff submits that it would be unjust to stay the suit as the plaintiff would not be able to pursue its claim against HSBC Middle East in the UAE, and given that Singapore law is the governing law for the plaintiff's claim against HSBC Singapore, it would be unjust for the plaintiff to be forced to pursue its claim against only HSBC Singapore in the UAE, when the Singapore courts are in the best position to apply Singapore law to determine the substantive dispute between the parties. The plaintiff takes the position that although the plaintiff had become aware of the fund transfer from HSBC Singapore to HSBC Middle East in 2002, as a result of his "personal circumstances", it was only in 2006 or 2007 that he "got a better picture" of the circumstances under which the monies in the fixed deposit accounts were wrongfully transferred to HSBC Middle East. Thereafter, the plaintiff was involved in defending a lawsuit brought by the Emirates Bank against him, which resulted in him only taking legal advice on his claims in 2009, by which time the limitation period in the UAE had already lapsed.

44 Having determined that Singapore law would govern the dispute between the parties (see above at [32]-[34]), I need not deal with the defendant's argument that the substantive law which is applicable is UAE law. I turn now to the case of *Spiliada*, where Lord Goff set out the relevant considerations when an action may be time barred in a foreign jurisdiction, at 483-484:

> … Again, take the example of cases concerned with time bars. Let me consider how the principle of forum non conveniens should be applied in a case in which the plaintiff has started proceedings in England where his claim was not time-barred, but there is some other jurisdiction which, in the opinion of the court, is clearly more appropriate for the trial of the action, but where the plaintiff has not commenced proceedings and where his claim is now time barred. Now, to take some extreme examples, suppose that the plaintiff allowed the limitation period to elapse in the appropriate jurisdiction, and came here simply because he wanted to take advantage of a more generous time bar applicable in this country; or suppose that it was obvious that the plaintiff should have commenced proceedings in the appropriate jurisdiction, and yet he did not trouble to issue a protective writ there; in cases such as these, *I cannot see that the court should hesitate to stay the proceedings in this country, even though the effect would be that the plaintiff's claim would inevitably be defeated by a plea of the time bar in the appropriate jurisdiction.* Indeed a strong theoretical argument can be advanced for the proposition that, if there is another clearly more appropriate forum for the trial of the action, a stay should generally be granted even though the plaintiff's action would be time barred there*. But, in my opinion, this is a case where practical justice should be done. And practical justice demands that, if the court considers that the plaintiff acted reasonably in commencing proceedings in this country, and that, although it appears that (putting on one side the time bar point) the appropriate forum for the trial of the action is elsewhere than England, the plaintiff did not act unreasonably in failing to commence proceedings (for example, by issuing a protective writ) in that jurisdiction within the limitation period applicable there, it would not, I think, be just to deprive the plaintiff of the benefit of having started proceedings within the limitation period applicable in this country.*
>
> [emphasis added]

45 Applying the above principles, with an aim to doing practical justice, the question which has to

be answered is whether the plaintiff acted unreasonably in allowing the time bar in the UAE to lapse? A close examination of the relevant facts is required to answer this question.

46 The plaintiff's explanation for not commencing action immediately upon his awareness of the transfer of the monies out of Lalitha's HSBC Singapore fixed deposit accounts in 2002 is set out in the plaintiff's affidavit dated 2 October 2012 at para 82:

> ... I had become aware of the transfer of funds from HSBC Singapore to HSBC Middle East sometime in 2002. However, at the time, I was occupied with certain proceedings taken out by my father's creditors against me after my father's death, and I also had to deal with my divorce in 2004. After my divorce, my wife had kept all the relevant documents and it was only after my wife showed me some documents that I started getting a better picture of the circumstances under which the monies in the fixed deposit accounts were wrongfully transferred to HSBC Middle East. This would have been around 2006 or 2007.

The plaintiff then further elaborated in his affidavit filed on 3 December 2012 on the reason for the reasons for delay in bringing the present action, at para 38:

> ... [Namrata and I] obtained the Grant of Letters of Administration on 2 May 2006. It is important to note that during that period of 2003 to 2006, I also had my personal issues to deal with. The year after Kishin Kikla passed away, my wife Sunanda and I got separated. Our marriage ended in a messy divorce in 2004 and after which there was a huge custody battle for my two boys which I finally won just before I enrolled them in the summer semester of 2005 in Switzerland. I stayed with them until sometime in 2006. Sunanda and I stayed separately from the time we were separated. Sunanda always kept possession of all of Kishin Kikla's and [Lalitha]'s documents and I saw no reason to ask for them. She passed me some documents that she thought relevant, but not all. I recall having reviewed some documents that suggested a wrongful transfer from HSBC Singapore to HSBC Middle East. This would have been around 2006 or 2007. Before I could investigate further and obtain legal advice, Emirates Bank International PJSC ("Emirates Bank") commenced a claim against me and I was busy defending that. But it was also at around this time that Sunanda reviewed some documents in her possession to assist me in defending the claim by Emirates Bank. I found even more documents that showed monies had been wrongfully transferred and decided to obtain legal advice in Singapore sometime in 2009.

The plaintiff then brought an action in Singapore in 2009 against HSBC Singapore. However, shortly thereafter, the plaintiff and HSBC Singapore caused a consent order to be entered pursuant to an agreement to settle the dispute, allegedly because he was wrongly advised that his claim was time-barred under the Limitation Act. Upon realising its mistake, the plaintiff brought this present action, this time, in his capacity as the beneficiary to Lalitha's estate. The defendants have since brought an action to strike out the present action on the ground that the parties have previously entered into an agreement to compromise their dispute. That application to strike out succeeded at first instance, but the first instance decision was overturned on appeal.

47 The plaintiff's explanation that in 2002, when he first discovered the transfer of the fixed deposits from HSBC Singapore to HSBC Middle East, he did not suspect any wrongdoing, does not appear to me to be inherently incredible. There also does not appear to be any reason why the plaintiff's explanation that his preoccupation with his "personal circumstances" resulted in him discovering some relevant documents only in 2006 or 2007 cannot be believed. It was not disputed that Emirates Bank did commence an action against the plaintiff in the Supreme Court of British Columbia, but that suit was only filed in November 2008. It is not inconceivable that the plaintiff may have discovered further documents only in 2009, when his wife was going through documents to

assist the plaintiff in defending the suit against Emirates Bank, which was when he decided to bring an action in Singapore.

48 In fact, the plaintiff explained in his affidavit filed on 3 December 2012 that when he first commenced an action in Singapore in October 2009 against HSBC Singapore, the plaintiff was solely concerned with pursuing its claim against HSBC Singapore for breach of mandate and its duties as a banker at the material time. The plaintiff also averred that he subsequently made attempts to contact HSBC Singapore for more information, but none was forthcoming, because HSBC Singapore needed time to retrieve documents dating as far back as in excess of 10 years ago. It was only on 6 May 2012 that HSBC Singapore informed the plaintiff by letter that it was unable to assist in the plaintiff's inquiry. That resulted in the plaintiff serving the writ on HSBC Singapore. Subsequently, HSBC Singapore took out SUM 3638 of 2010 to strike out the suit, alleging that it was time-barred, and that culminated in the consent order which the parties entered into, with the plaintiff being under the mistaken belief that ithe action was time-barred.

49 Given the procedural history, it cannot be gainsaid that the plaintiff was being dilatory or that the plaintiff has deliberately allowed the time bar to lapse in the UAE. Therefore, on the assumption that the UAE is the natural forum to determine the dispute between the parties, the plaintiff would be time-barred from pursuing its cause of action against the defendants, in the UAE, thereby suffering prejudice through no fault of his. As such, on the assumption that the UAE is *prima facie* the natural forum, I am of the view that a stay should not be granted, so that the plaintiff can be allowed to proceed in Singapore against the defendants.

Conclusion

50 In the circumstances, the defendants' applications are dismissed, as the UAE is not the clearly more appropriate forum to determine the parties' dispute. The registry will in due course be fixing a date before myself for the issue of costs to be determined.

[note: 1] See affidavit of Jerome Arul Roberts filed on 7 January 2013 at para 8(b), DBOD, vol 2 Tab 20.

[note: 2] See Bulos' affidavit, PBAF-9 at [11]

[note: 3] see Robinson's report PBAF 4