Morgan Stanley Asia (Singapore) Pte (formerly known as Morgan Stanley Dean Witter Asia (Singapore) Pte) and others *v* Hong Leong Finance Ltd
[2013] SGHC 83

Case Number : Originating Summons No 798 of 2012

Decision Date : 19 April 2013

Tribunal/Court : High Court

Coram : Belinda Ang Saw Ean J

Counsel Name(s) : Alvin Yeo SC, Chua Sui Tong, Lim Shiqi and Edmund Koh (WongPartnership LLP) for the plaintiffs; Lee Eng Beng SC, Disa Sim and Ng Kexian (Rajah & Tann LLP) for the defendant

Parties : Morgan Stanley Asia (Singapore) Pte (formerly known as Morgan Stanley Dean Witter Asia (Singapore) Pte) and others — Hong Leong Finance Ltd

Conflict of Laws – Restraint of foreign proceedings – Vexatious and oppressive conduct

19 April 2013

Belinda Ang Saw Ean J:

Introduction

1 The background facts to this application *vide* Originating Summons No 798 of 2012 ("OS 798/2012") arose from the failure of a series of credit-linked notes issued in Hong Kong and sold in Singapore known as "Pinnacle Notes" during the global financial crisis in 2008.

Background

The parties

2 Morgan Stanley Asia (Singapore) Pte (formerly known as Morgan Stanley Dean Witter Asia (Singapore) Pte) ("P1") was the arranger of the Pinnacle Notes. As the arranger, P1 was involved in putting together the prospectus and pricing statements (collectively, the "Offering Materials") of the Pinnacle Notes.

3 Pinnacle Performance Limited ("P2"), a Cayman Islands registered company, was the issuer of the Pinnacle Notes.

4 Morgan Stanley & Co International Plc (formerly known as Morgan Stanley & Co International Limited) ("P3") was identified in the Offering Materials as, *inter alia*, the "Determination Agent", "Dealer", "Market Agent" and "Forward Counterparty" with respect to the Pinnacle Notes.

5 Morgan Stanley Capital Services LLC (formerly known as Morgan Stanley Capital Services Inc) ("P4"), a Delaware company with executive offices in New York, was identified in the Offering Materials as the "Swap Counterparty" with respect to the "Swap Agreement" underlying the Pinnacle Notes.

6 Morgan Stanley & Co LLC (formerly known as Morgan Stanley & Co Incorporated) ("P5") was a

Delaware company with executive offices in New York. It was not named in the Offering Materials. P5 provides brokerage and investment advisory services. The plaintiffs are indirect wholly-owned subsidiaries of Morgan Stanley, a publicly listed Delaware-headquartered corporation with its principal executive offices in New York.

7 The defendant, Hong Leong Finance Limited ("HLF"), was the distributor of the Pinnacle Notes pursuant to a Master Distributor Appointment Agreement dated 6 October 2006 entered into between HLF and P1, P2 and P3 ("the MDAA"). As distributor, HLF distributed six series of the Pinnacle Notes (*ie*, Series 2, 3, 6, 7, 9 and 10) between October 2006 and December 2007.

Events leading up to OS 798/2012

8 During the global financial crisis in 2008, investors who bought the Pinnacle Notes lost all if not a substantial portion of their original investment. By and large, the loss of the original investment was triggered by the failure or near bankruptcy of any one of the five "Reference Entities" in the "Reference Portfolio" contained in the base prospectus, namely Lehman Brothers Holdings Inc, Federal Home Loan Mortgage Corporation (also known as Freddie Mac), Federal National Mortgage Association (also known as Fannie Mae), and Icelandic banks Kaupthing banki hf and Landsbanki Islands hf.

9 In the chaotic aftermath of the failure of the Pinnacle Notes, the Monetary Authority of Singapore ("MAS") stepped in and set up a complaint handling process for financial institutions in Singapore. Eventually, through this process, HLF compensated Singapore-based customers (who bought Pinnacle Notes Series 9 and 10) for more than US$32m in losses. HLF was also penalised for having mis-sold these high-risk financial products, in particular Series 9 and 10 of the Pinnacle Notes, to its customers owing to lack of internal controls.

10 In April 2010, HLF filed Originating Summons No 403/2010 ("OS 403/2010") against P1 seeking pre-action discovery of documents. After pre-action discovery was ordered and documents disclosed in a list of documents in October 2011, HLF did not commence proceedings in Singapore. Instead, HLF sued the plaintiffs in New York *vide* Case No 12 Civ 6010 which was filed in the United States District Court for the Southern District of New York ("the New York Court") on 6 August 2012 ("the NY Proceedings").

11 HLF chose to sue in New York because of an ongoing US Class Action in New York (see [16] below). The main complaint in the NY Proceedings was in relation to fraud: HLF accused P5 of deceptively selling Pinnacle Notes that had been designed to fail for P5's own benefit. In particular, P5 had designed the underlying synthetic collateralised debt obligations (CDOs) to fail, and P5 was positioned to profit when the Pinnacle Notes failed because of swap transactions entered into by its affiliate P4.

12 HLF alleges in the NY Proceedings that the Pinnacle Notes were linked to synthetic CDOs that were in turn tied to inherently risky companies. The Pinnacle Notes featured two layers of financial instruments bundled together with prominence allegedly given to one so as to obscure the nature and importance of the other. The "Reference Entities" mentioned above (at [8]), which HLF alleges were inherently risky companies, were tied to the underlying layer of financial instruments (*ie*, the synthetic CDOs). This was allegedly obscured by the first layer of financial instruments which had as its "Reference Entities", and whose performance depended on, major corporations and sovereign funds with high credit ratings. When those risky "Reference Entities" of the underlying layer of financial instruments (mentioned above at [8]) failed, the original investment from the investors of the Pinnacle Notes moved to P4 pursuant to swap arrangements. By reason of this deception, the plaintiffs allegedly fraudulently misrepresented to HLF that the Pinnacle Notes constituted a safe conservative

investment when they were not.

13 HLF alleges that this fraudulent misrepresentation led it to enter into the MDAA to sell the Pinnacle Notes to its Singapore-based customers. Besides the compensation of US$32m, HLF has sought punitive damages in the NY Proceedings. [note: 1]

14 In addition to the above, HLF also further claims in the NY Proceedings that, under New York law, the doctrine of "equitable subrogation" entitles it to assert legal claims that are sought by the Singapore investors in parallel proceedings in New York (see [16] below). There is no equivalent doctrine of equitable subrogation under Singapore law.

15 OS 798/2012 was filed on 22 August 2012 to, *inter alia*, restrain HLF from suing or continuing to prosecute proceedings whether in the US or elsewhere (save in Singapore) in relation to any claims concerning or arising out of the credit-link notes issued by P2, specifically Series 2, 3, 6, 7, 9 and 10 of the Pinnacle Notes. At the time of the hearing of OS 798/2012, there were no proceedings filed in Singapore.

The US Class Action

16 On 25 October 2010 (more than one and a half years prior to the commencement of the NY Proceedings), a group of 18 Singapore investors who bought Pinnacle Notes from distributors such as HLF ("the Singapore investors") commenced a class action (Case No. 10 Civ 8086) in the New York Court alleging, *inter alia*, fraud against the plaintiffs ("the US Class Action"). The allegations were similar to those set out in [11] and [12] above (in fact, HLF based its claims on those of the Singapore investors in the US Class Action). In essence, the Singapore investors allege that the fraud of the plaintiffs led them to buy the Pinnacle Notes and caused them to suffer loss.

17 The New York Court had accepted that the US Class Action should be litigated in New York and New York was found to be the *situs* of the alleged fraud in the US Class Action. It is also significant that in the US Class Action, the plaintiffs had applied to the New York Court to dismiss the claims of the Singapore investors.

18 On 31 October 2011, Judge Leonard B Sand ("Judge Sand") (who heard the motion to dismiss in *Dandong, et al v Pinnacle Performance Limited, et al* (10 Civ. 8086 (LBS) allowed the motion in part. Notably, the Singapore investors' claims founded on fraud, fraudulent inducement, and breach of implied covenant of good faith and fair dealings were allowed to continue in New York. The plaintiffs tried to appeal against Judge Sand's decision, but the Court of Appeal for the Second Circuit declined to consider the appeal.

19 The plaintiffs disagreed with Judge Sand's findings. However, I am of the view that Judge Sand determined that New York had jurisdiction over the US Class Action by applying principles that were broadly similar to those that the Singapore courts would have applied.

20 Judge Sand disagreed with the plaintiffs that there were jurisdictional clauses in play that excluded litigation in New York. On the issue of *forum non conveniens*, Judge Sand also disagreed with the plaintiffs that the core allegations in the US Class Action concerned activities that occurred in Singapore. Judge Sand was aware that the Singapore investors' claims must not be mere assertions and conclusions without basic supporting facts, and he was satisfied on the material available that the Singapore investors' case against the plaintiffs met the requisite threshold. At p 4 of his Order dated 31 October 2011 ("the October Order"), he held: [note: 2]

> On a motion to dismiss, a court reviewing a complaint will consider all material factual allegations as true and draw all reasonable inferences in favor of [the Singapore investors]. *Lee v. Bankers Trust Co*., 166 F.3d 540, 543 (2d Cir.1999). "To survive dismissal, the plaintiff must provide the grounds upon which his claims rests through 'factual allegations sufficient to raise a right to relief above the speculative level.'" *ATSI Commc'ns Inc. V. The Shar Fund, Ltd.*, 493 F.3d 87, 93 (2d Cir. 2007) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). Rather, [the Singapore investors'] complaint must include "enough facts to state a claim of relief that is plausible on its face." *Id*. at 1940 (citing *Twombly*, 550 U.S. at 570). Plausibility, in turn, requires that the allegations in the complaint "raise a reasonable expectation that discovery will reveal evidence" in support of the claim. *Twombly*, 550 U.S. at 556.

21 Judge Sand was satisfied that there was enough plausible material before the court to conclude that (at pp 9 and 10 of the October Order):

> ...the vast majority of actions that [the Singapore investors] allege were fraudulent occurred in New York and London. MS Capital's creation of single-tranche CDOs created to match each series of Notes occurred in New York... MS Capital's selection of the assets underlying the CDOs also occurred in New York.... MS International's selection of the underlying assets for the CLNs was done in London... The parties, of course, dispute who actually drafted the offering materials, but taking [the Singapore investors'] factual allegations as true, we must assume at this stage of the proceedings that it was MS Capital in New York.
>
> ....
>
> Having found that most of the activity alleged to be fraudulent occurred not in Singapore but in New York (and to a lesser extent in London), we find that the availability of evidence and witnesses – not to mention issues of expense and convenience – favor [the Singapore investors'] choice of a New York forum.

22 Judge Sand noted that the Singapore investors had pleaded more than a generalised motive of the fraud and that the means alleged were adequately particularised (at pp 19-20 of the October Order):

> As to motive, the means alleged were as follows: [the Singapore investors] were enticed by relatively safe CLNs, secured by sovereign nations and highly-rated corporations. Contrary to standard practice endorsed in 2007 by Morgan Stanley itself....[the Singapore investors'] principal was invested not in highly secure "underlying assets" but in custom-made synthetic CDOs that were at best risky and possibly rigged to fail. That they were custom-made is clear from the chronology. Exactly one day before a particular series of Notes was issued, Morgan Stanley issued an underlying synthetic CDO that precisely matched the amount of funds raised from a particular series. MS International then chose that newly made synthetic CDO as the underlying asset for the Notes... That Morgan Stanley was aware of the riskiness of the CDOs is clear from public statements by Morgan Stanley's chief economist in 2006... as well as from that fact that Morgan Stanley had itself created the CDOs. See *In re Citigroup Inc. Sec. Litig*., 753 F. Supp. 2d 206, 235 (S.D.N.Y. 2010) (finding that a CDOs underwriter "is in the best position to recognise the threats the [CDOs] faced..."). Thus both the means and the likely prospect of achieving concrete benefit were present in this case.
>
> Moving on to motive, [the Singapore investors] have succeeded in pleading more than a

"generalized motive, ...which could be imputed to any publicly-owned, for profit endeavour." *Chill*, 101 F. 3d at 268. They have pled what amounts to self-dealing by Morgan Stanley, insofar as Morgan Stanley was betting against, or "shorting", the synthetic CDOs that it had itself created. The engineered frailty of the CDOs and Morgan Stanley's positions on both sides of the deal adequately alleges motive. See *Fraternity Fund Lts. v. Beacon Hill Asset Mgmt. LLC*, 376 F. Supp. 2d 385, 404 (S.D.N.Y. 2005) (self-dealing sufficient to establish motive).

23 As stated, New York was found to be the *situs* of the alleged fraud in the US Class Action, and Judge Sand held that New York "has a significant interest in this dispute". [note: 3]

24 Judge Sand's decision was carefully reasoned and should be respected. In the present case, the correct approach for this court is to give real and respectful weight to the decision of Judge Sand when determining whether an anti-suit injunction is appropriate.

25 The US Class Action is continuing in New York. There is affidavit evidence that discovery for the US Class Action is currently ongoing and is scheduled to end later this year. [note: 4] Since 15 October 2012, both the NY Proceedings and the US Class Action were transferred from the docket of Judge Sand to Judge Jesse M Furman ("Judge Furman").

The relevant legal principles

26 The general principles governing the exercise of the court's jurisdiction to grant an injunction restraining a party from pursuing foreign proceedings are well-established (see *Ashlock William Grover v SetClear Pte Ltd and others* [2012] 2 SLR 625 ("*Ashlock William Grover*"); *John Reginald Stott Kirkham and others v Trane US Inc and others* [2009] 4 SLR(R) 428 ("*John Reginald Stott Kirkham*")). The broad principle underlying the anti-suit jurisdiction is that it is to be exercised when the ends of justice require it (see *Evergreen International SA v Volkswagen Group Singapore Pte Ltd and others* [2004] 2 SLR(R) 457 at [15]; *Société Nationale Industrielle Aerospatiale v Lee Kui Jak and another* [1987] 1 AC 871 ("*Lee Kui Jak*")). Briefly, the factors to be considered in an anti-suit application are as follows:

(a) Whether the defendant is amenable to the jurisdiction of the Singapore court;

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

(c) Whether the foreign proceedings are vexatious or oppressive to the plaintiff if they are allowed to continue;

(d) Whether an injunction would cause any injustice to the defendant by depriving the defendant of legitimate juridical advantages sought in the foreign proceedings; and

(e) Whether the commencement of the foreign proceedings is in breach of any agreement between the parties.

At the outset, I should mention that the factors (b) – (e) above are not independent of each other, and the authorities cited above have stressed the importance of looking at all the factors in the round.

27 The natural forum (factor (b) in the preceding paragraph) is the forum which is clearly more appropriate than an alternative forum for the trial of the action. To be clear, this is distinct from what

some cases refer to as "a natural forum", by which they merely mean a forum which is not inappropriate (see for example *Cherney v Deripaska* [2009] 2 CLC 408 at [24]; *Royal Bank of Canada v Cooperatieve Centrale Raiffeisen-Boerenleenbank BA* [2004] 1 CLC 170 at [40]).

28 The onus of showing that Singapore is clearly and distinctly the more appropriate forum is on the applicant for the anti-suit injunction (see *John Reginald Stott Kirkham* at [33]). Even if Singapore is the natural forum to adjudicate the claims, it does not follow that the foreign proceedings should be automatically restrained. Chao Hick Tin JA (delivering the judgment of the Court of Appeal) in *John Reginald Stott Kirkham* explained (at [45]) that it would be inconsistent with comity to restrain a party from proceeding in a foreign court for this reason alone. Toulson LJ in *Deutsche Bank AG & another v Highland Crusader Offshore Partners LP & others* [2010] 1 WLR 1023 ("*Highland Crusader*") whilst making the same point, went even further at [50]:

> If the English Court considers England to be the natural forum *and can see no legitimate personal or juridical advantage in the claimant in the foreign proceedings being allowed to pursue them*, it does not automatically follow that an anti-suit injunction should be granted. For that would be to overlook the important restraining influence of considerations of comity.
>
> [emphasis added]

29 Factor (e) (at [26] above) is generally aimed at jurisdiction clauses. Where there is an exclusive jurisdiction clause, the general rule is that the clause ought to be enforced as between the parties unless there are strong reasons not to do so (see *Donohue v Armco Inc and others* [2002] 1 All ER 749 per Lord Bingham at [24] and per Lord Hobhouse at [45]; *Turner v Grovit and others* [2002]) 1 WLR 107).

30 Steven Chong J in *UBS AG v Telesto Investments Ltd and others and another matter* [2011] 4 SLR 503 considered the principles governing the exercise of the court's jurisdiction to grant an anti-suit injunction where a non-exclusive jurisdiction clause was in play. It is useful to set out his comments at [118] to [119] of that decision:

> 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 plc 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 [*Highland Crusader*] at [105]).
>
> (b) There is no presumption that multiplicity of proceedings is vexatious (see *Lee Kui Jak* ([109] *supra*) 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 ([*Highland Crusader*] at [107]).

31 As regards the construction of the non-exclusive jurisdiction clause to determine its legal effect based on the intentions of the parties, I refer to *Orchard Capital I Ltd v Ravindra Kumar Jhunjhunwala* [2012] 2 SLR 519 ("*Orchard Capital*"). In that case, the Court of Appeal considered the legal effect of a non-exclusive jurisdiction clause in favour of Hong Kong in a stay application on grounds of *forum non conveniens*. Andrew Phang JA (delivering the judgment of the Court of Appeal) considered the comments of the Hong Kong Court of Appeal in *Noble Power Investments Ltd v Nissei Stomach Tokyo Co Ltd* [2008] 5 HKLRD 631 on the general effect of non-exclusive jurisdiction clause (at [16]):

> The court in *Noble* considered the effect of non-exclusive jurisdiction clauses at some length, as follows (at [31]-[33]):
>
> > 31 In considering the effect of a non-exclusive jurisdiction clause, it is critical to recognize that there are differences in approach depending upon where proceedings have been instituted. Where proceedings are instituted in the named forum (to which the parties have agreed to submit), the party who seeks a stay or otherwise to contest the jurisdiction or appropriateness of that forum, has a very heavy burden to discharge, since that party has by definition agreed contractually to submit to the jurisdiction. In other words, he is seeking to avoid a forum to which he has, by contract, agreed to submit. The extent of this burden is discussed below.
> >
> > 32 Where, however, proceedings are instituted in a forum *other than* the identified one, an altogether different approach may be required. Here, much depends on the precise wording of the clause in question. If the other forum is one to which the parties have also agreed to *submit* in the event of their being sued, it may be that there is little difference between the two situations. Where, however (as is more common) the other forum is merely one in which proceedings can be instituted without any obligation on the party sued actually to submit to that forum, the approach is different. The party who then seeks to contest the jurisdiction or appropriateness of that forum is in a better position so to do (compared with the situation articulated in the previous paragraph) simply because he would not be seeking to avoid a forum to which he has contractually agreed to submit.
> >
> > 33. Some simple illustrations to summarize the foregoing propositions might assist:
> >
> > (1) A sues B in Hong Kong. Hong Kong is named as a non-exclusive jurisdiction to which the parties have agreed to submit in the event of their being sued. The burden on B, if he contests the appropriateness of the Hong Kong courts, is a heavy one.
> >
> > (2) A sues B in Hong Kong. Hong Kong is on this occasion not named as a jurisdiction but the courts of, say, Japan are named as the non-exclusive jurisdiction. However, on a true construction of the relevant clause, the parties have nevertheless agreed to submit to the jurisdiction of the courts of any other forum (which would include Hong Kong) in the event of their being sued there. Again, in view of the agreement actually to submit, the burden on B is also a heavy one.
> >
> > (3) A sues B in Hong Kong. Again, Hong Kong is not named as the non-exclusive

> jurisdiction but the courts of Japan are. However, this time the parties have not agreed to submit to any jurisdiction other than the Japanese courts. In other words, while the parties have agreed to submit to Japanese jurisdiction in the event that they are sued there, and while they have also agreed that they are at liberty to institute proceedings in a jurisdiction other than Japan, no positive obligation exists for a party to submit to any jurisdiction other than Japan. Here, the burden on B is less heavy.

[emphasis in original]

32 The Court of Appeal in *Orchard Capital* did not have to consider specifically the contractual approach to determining the legal effect of a non-exclusive jurisdiction clause because the parties' arguments in that case centred on the weight to be accorded to the non-exclusive jurisdiction clause as a factor in ascertaining whether or not the action concerned ought to be stayed based on a standard *forum non conveniens* analysis. However, Phang JA (at [26]) took the opportunity to caution that the contractual approach to interpreting the legal effect of a non-exclusive jurisdiction clause based on the intention of the parties was "not without difficulties", and that the appellate court could not "wholeheartedly" accept the contractual approach advocated by Professor Yeo Tiong Min in his article "The Contractual Basis of the Enforcement of Exclusive and Non-Exclusive Choice of Court Agreements" (2005) 17 SAcLJ 306 ("Prof Yeo's Article").

33 Finally, brief mention should be made of the relevance of international comity in anti-suit injunction cases like this. It was observed in *The Reecon Wolf* [2012] 2 SLR 289 (at [23]) that:

> "Comity" is defined in *Morguard Investments Ltd v De Savoye* [1990] 3 SCR 1077 at 1096 (and subsequently approved in *Amchem Products Incorporated v British Columbia (Workers' Compensation Board)* [1993] 1 SCR 897)... in the following terms:
>
> > 'Comity' in the legal sense is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws...

34 In *Amchem Products Inc. v Workers' Compensation Board of British Columbia* (1993) 102 DLR (4th) 96, Sopinka J discussed the importance of comity considerations in anti-suit injunction applications and held (at p 119):

> ... the domestic court as a matter of comity must take cognisance of the fact that the foreign court has assumed jurisdiction. If, applying the principles relating to *forum non conveniens*... the foreign court could reasonably have concluded that there was no alternative forum that was clearly more appropriate, the domestic court should respect that decision and the application [for an anti-suit injunction] should be dismissed.

35 Considerations of comity are necessary given the impact a grant of an anti-suit injunction would have on foreign proceedings. To this end, the courts must have regard to comity, and be aware that the anti-suit jurisdiction must be exercised "with caution" (see *Airbus Industrie GIE v Patel* [1999] 1 AC 119).

The parties' arguments

The plaintiffs' arguments

The plaintiffs' arguments

36 The matters relied upon by the plaintiffs centred on the issues primarily to be resolved between the plaintiffs and HLF in relation to the MDAA as well as HLF's compensation to its customers in the sum of US$32m by virtue of the indemnity clause in the MDAA (clause 14). Hence, the plaintiffs' contentions concentrated on P1 to P3 who, with HLF, were parties to the MDAA and upon the geographical location of witnesses given the Singapore-centric Pinnacle Notes.

37 Counsel for the plaintiffs, Mr Alvin Yeo SC ("Mr Yeo"), referred to the factors (a), (b) and (c) set out in [26] above, arguing that it would be vexatious or oppressive to allow the NY Proceedings to continue.

38 First, he pointed out that HLF was a Singapore finance company regulated by MAS and was amenable to the jurisdiction of this court. There was no dispute on factor (a).

39 Secondly, Mr Yeo argued that Singapore was the natural forum for the resolution of the substantive dispute between the parties given the following connecting factors with Singapore:

(a) HLF's relationship with P1 to P3 was governed by the MDAA which contained the following governing law and jurisdiction clause (clause 24):

> This Agreement is governed by and shall be construed in accordance with the laws of the Republic of Singapore. The parties hereto submit to the non-exclusive jurisdiction of the courts of Singapore.

The non-exclusive jurisdiction clause was relied upon as a "very strong indicator" that Singapore was the most appropriate forum to hear the case. [note: 5] Furthermore, the dispute concerned losses suffered in Singapore on investment products sold in Singapore based on alleged misrepresentations made and relied upon in Singapore. Singapore law therefore governed HLF's contractual and tortious claims against the plaintiffs.

(b) From the standpoint of the location of documents and witnesses, they were to be found in Singapore. As for the witnesses for the plaintiffs who reside overseas, they would make themselves available and travel to Singapore.

(c) HLF's pre-action discovery process in Singapore (*vide* OS 403/2010) was an acknowledgment and recognition that Singapore was the natural forum for the resolution of claims relating to its distribution of the Pinnacle Notes.

40 Thirdly, Mr Yeo argued that HLF was blatantly forum shopping. The background to the NY Proceedings made its commencement by HLF vexatious and oppressive. HLF's claim for US$32m arose from the voluntary settlement of the claims of Singapore-based customers under the complaint handling process set up in Singapore by MAS. Put another way, HLF's claim was essentially to recover an indemnity for the US$32m paid to HLF's customers, and this indemnity claim (prescribed in clause 14 of the MDAA) could have been easily litigated in Singapore. HLF's core complaint in the NY Proceedings was the fraudulent misrepresentations that took place exclusively in Singapore, and were substantially the same claims for which HLF sought and obtained pre-action discovery in Singapore against P1. In the circumstances, Mr Yeo argued that the claims by HLF have nothing to do with New York. As for the US Class Action, Mr Yeo argued that this connection, if anything, was a tenuous connection to New York. Mr Yeo accused HLF of trying to "*ape the claims made in the [US Class Action] in a transparent attempt to ride on the coat tails of that action*." [note: 6]

41 According to Mr Yeo, the commencement of NY Proceedings was plainly tactical and brought to avail HLF of procedural advantages in New York. The procedural advantages were identified by the plaintiffs as follows: [note: 7]

> These include contingency fee arrangements (which are illegal in Singapore), broad and invasive discovery and deposition processes, liability to potentially substantial awards of punitive damages and no entitlement to recovery of costs by the successful party. The Plaintiffs also believe that [HLF] is aiming to capitalise on the perceived unpopularity of Wall Street institutions with the American public, thereby making a trial before an American jury an unattractive prospect for the Plaintiffs.

HLF's arguments

42 Counsel for HLF, Mr Lee Eng Beng SC ("Mr Lee") argued that the application *vide* OS 798/2012 was an attempt by the plaintiffs to evade the jurisdiction of the New York Court. According to Mr Lee, the non-exclusive jurisdiction clause (clause 24) made clear that the parties contemplated that proceedings may be brought outside of Singapore. Furthermore, contrary to Mr Yeo's contention, Mr Lee argued that New York (and not Singapore) was the natural forum for HLF's claims against the plaintiffs.

43 Mr Lee pointed out that at the time of the hearing, no proceedings have been filed in Singapore for the substantive dispute to be resolved by the Singapore courts; there were only proceedings in one jurisdiction between HLF and the plaintiffs *(ie*, the NY Proceedings). He argued that the burden on the plaintiffs to obtain an anti-suit injunction is more difficult to discharge in these circumstances, citing *Koh Kay Yew v Inno-Pacific Holdings Ltd* [1997] 2 SLR(R) 148 ("*Koh Kay Yew*") at [22] in support of his proposition.

44 Mr Lee also argued that even if, for the sake of argument, Singapore was the natural forum in respect of HLF's claims, it did not *ipso facto* mean that an anti-suit injunction should be granted (see [28] above). The plaintiffs had to show strong or compelling reason why the NY Proceedings were vexatious or oppressive, and they were unable to do so. In fact, New York is a very convenient forum for the plaintiffs because they are already defending themselves in the US Class Action, and, as such, it cannot be vexatious or oppressive for HLF to commence the NY Proceedings.

45 In relation to HLF's pre-action discovery application in 2010 against P1 *vide* OS 403/2010 (see [10] above), Mr Lee pointed out that the application was not a substantive claim. The NY Proceedings were different and much wider in scope and content. I agreed with Mr Lee that OS 403/2010 was, at best, a neutral factor.

46 Mr Lee also submitted that the plaintiffs are seeking to prevent HLF from asserting their legitimate claim in equitable subrogation which is only available under New York law and that this would cause injustice to HLF (see factor (d) at [26] above).

47 Mr Lee also contended that the anti-suit injunction application ought not to have been brought before applying to stay the NY Proceedings. In response to this particular contention by Mr Lee, Mr Yeo countered that assuming Singapore was the natural forum, there was no pre-requirement that the applicant for anti-suit injunction must seek relief from the foreign court before applying for anti-suit injunction, citing *Ashlock William Grover* at pp 630-631 as illustration and Adrian Briggs & Peter Rees, *Civil Jurisdiction and Judgments* (Informa, 5th Ed, 2009), Chapter 5, Section (E) at para 5.35. On this last point, I agreed with Mr Yeo that the plaintiffs had the option to either seek the

assistance of the New York Court or the Singapore courts.

Issues relating to New York law

48 The parties filed affidavits deposed by their respective experts on New York law, and the views of these experts were referred to in both parties' written submissions. However, counsel for both sides confirmed at the hearing that they would not require this court to decide on the issues raised by these experts in the resolution of OS 798/2012. [note: 8] It was thus unnecessary to consider arguments that turned mainly on the correct interpretation of what appeared to be hugely divergent accounts of New York law, including arguments relating to whether HLF had "subject matter jurisdiction" in the NY Proceedings. Both parties agreed that these issues were for the New York Court to decide and would be pursued there if I refuse to grant the anti-suit injunction.

The main issue

49 As I see it, the main issue in OS 798/2012 was whether this court would be justified in interfering with HLF's purported entitlement to bring legal proceedings in New York. On the facts of this case, the court had to consider if Singapore was clearly and distinctly the more appropriate forum, and whether HLF's conduct in pursuing the NY Proceedings was in breach of the rights of the plaintiffs in contract or was otherwise vexatious or oppressive so as to justify the granting of an injunction to restrain HLF from continuing with those proceedings.

Discussion and decision

50 I start by setting out the facts that were material to my consideration. First, HLF's claims in the NY Proceedings focus on either P5 or P4 as the main culprits in the alleged fraud, with P1 to P3 playing a subsidiary role at the behest of either P5 or P4.

51 Second, significance must be attached to the fact that the allegations of fraud in the NY Proceedings and the US Class Action were based on the same common scheme that was central to both actions, and that the defendants in the US Class Action were the very same plaintiffs in this present application. The claims in the NY Proceedings and US Class Action mirrored each other in many areas.

52 Third, the New York Court had accepted and assumed jurisdiction of the US Class Action.

53 Fourth, the plaintiffs are already firmly defending the US Class Action.

54 Fifth, the plaintiffs were seeking to stop HLF from continuing with the NY Proceedings in circumstances where no proceedings had been commenced in Singapore between the parties for the same claims in New York.

The Natural Forum

Non-exclusive jurisdiction clause

55 In this application, the parties did not put in issue, and hence the court was not concerned with, a point of construction of the non-exclusive jurisdiction clause (clause 24). It was not Mr Yeo's case that based on the terms of clause 24 (see [39]) above), HLF was in breach of it by pursuing proceedings in New York.

56 Instead, Mr Yeo relied on the existence of the non-exclusive jurisdiction of a particular named court (*ie*, Singapore) in the MDAA as "a very strong indicator" [note: 9] that the Singapore court was the correct one in which to resolve the substantive disputes. But how much weight should one accord to a non-exclusive jurisdiction agreement? In *Orchard Capital*, the Court of Appeal at [30], approved of the following observations from Prof Yeo's Article:

> 88 It goes too far, perhaps, to say that a non-exclusive jurisdiction agreement will never be accorded any more weight than any other connections in the case under consideration. On the other hand, it may also go too far to say that a non-exclusive jurisdiction agreement will *always* be a strong indicator of the appropriate forum to hear the case. **The weight to be attributed to it ought to depend on the circumstances.** It may make a difference whether the jurisdiction clause formed part of a closely negotiated contract or is a standard term in a contract of adhesion. Where the parties have clearly put their minds to the consideration of the clause, that will understandably be a very strong factor. On the other hand, if the parties have indicated a list of possible countries for the disputes to be tried, then the choices may not mean very much in terms of comparative appropriateness, and the court may even be justified in not giving any particular weight to the clause.

[emphasis in original in bold and italics]

57 However, in this application, there was no explanation by the plaintiffs on the facts why greater emphasis or weight ought to be placed upon the existence of clause 24 as a factor. Clause 24 was not expressed in wide terms to cover "any dispute which may arise out of or in connection with" the MDAA between the parties (*cf* the jurisdiction agreement in *Global Partner Fund Ltd v Babcock & Brown Ltd (in liq)* [2010] NSWCA 196). With regard to P4 and P5, Mr Yeo did not deal with how and why P4 and P5, who were not parties to the MDAA, were entitled to rely on clause 24 against HLF. In fact, the thrust of Mr Yeo's argument was that clause 24, *together with all the factors*, pointed towards the conclusion that Singapore was the natural forum.

58 In the final analysis, clause 24 was merely one factor that I had to weigh up against all the other factors in the case.

The US Class Action

59 I alluded earlier to the fact that the allegations of fraud in the NY Proceedings and the US Class Action were based on the same common scheme that was central to both actions (see [16] above). Notably, the plaintiffs are already defending the US Class Action. At the same time, HFL's action in New York mirrored the US Class Action in that HLF asserted substantially the same claims in fraud in the NY Proceedings.

60 In short, both sets of proceedings against the plaintiffs in New York are closely connected. It follows that the centre of gravity of both sets of disputes is in New York and it remains expedient to hear them in the same jurisdiction. As I see it, a refusal to grant an anti-suit injunction would create the best chance for all matters to be effectively determined in one jurisdiction. In this way, there would be no risk of inconsistent judgments. Equally, the undesirability of parallel proceedings elsewhere would be obviated.

61 There are also related case management reasons why it would appear that New York is a more appropriate forum than Singapore. As mentioned (see [25] above), on 15 October 2012, both the US Class Action and NY Proceedings were reassigned from Judge Sand to Judge Furman. [note: 10]

Assigning both these cases to one judge is a strong positive sign that the New York Court has recognised that the subject matter of the claims in the NY Proceedings are closely connected with the claims against the plaintiffs in the US Class Action.

62 Case management by the same judge is sensible and expedient as he can, where appropriate, take into account the progress of both sets of proceedings to ensure a just and orderly disposal of the litigation as well as to prevent irreconcilable decisions. Hearings of all the claims before the New York Court would be coordinated; inconvenience to witnesses who reside elsewhere in the United States, England, Hong Kong and Singapore would be probably minimised as regards individual travel to New York for the US Class Action and the NY Proceedings. I also note that the compellability of ex-employees of P4 and P5 as witnesses in New York by subpoena was a factor that found much favour with Judge Sand since they would be key witnesses in the US Class Action. [note: 11]

63 Finally, I gave some weight to the more than likely emergence of the so-called "Cambridgeshire Factor" with litigation remaining in New York. In the seminal case of *The Spiliada* [1987] 1 AC 460, the shipowners of a ship known as the "Spiliada" alleged that the cargo of sulphur owned by the shipper was wet when loaded and that this had caused severe corrosion to their vessel. Accordingly, the shipowners sought to serve proceedings out of the jurisdiction on the shippers for an action for damages. In holding that England was the natural forum, one factor which was accorded significant weight by the court was what is now famously known as the "Cambridgeshire Factor". There, the judge at first instance, Staughton J, had already started to hear the trial of a similar action for damages involving the same defendant shippers in respect of another ship called the "Cambridgeshire", and considered that the accumulated experience of counsel and solicitors derived from their participation in the *Cambridgeshire* action would "*contribute to efficiency, expedition and economy*" (at p 486). His decision was affirmed by the House of Lords, where Lord Goff held at p 485-486:

> I believe that anyone who has been involved, as counsel, in very heavy litigation of this kind, with a number of experts on both sides and difficult scientific questions involved, knows only too well what the learning curve is like; how much information and knowledge has to be, and is, absorbed, not only by the lawyers but really by the whole team, including both lawyers and experts, as they learn about the interrelation of law, fact and scientific knowledge, having regard to the contentions advanced by both sides in the case, and identify in their minds the crucial matters on which attention has to be focused, why these are the crucial matters, and how they are to be assessed... [Staughton J] was, in my judgment, entitled to take the view (as he did) that this matter was not merely of advantage to the shipowners but also constituted an advantage which was not balanced by a countervailing equal disadvantage to [the shipper]... This is not simply a matter... of financial advantage to the shipowners; it is a matter which can, and should, properly be taken into account, in a case of this kind, in the objective interests of justice.

64 The plaintiffs have instructed the same solicitors in the US in both proceedings that are before the same judge (*ie*, Judge Furman) in what will be highly complex cases (given the sophisticated nature of the alleged fraud and the financial instruments involved) which will inevitably have many overlapping issues and require the assistance of multiple witnesses and experts. By parity of reasoning, it therefore does not seem expedient to require that HLF be enjoined from litigating in New York and to litigate the same matter in Singapore instead.

Conclusion on the natural forum

65 A non-exclusive clause leaves open the possibility that there may be another appropriate

jurisdiction (per Toulson LJ in *Highland Crusader*, with whom Carnwath and Goldring LJJ agreed, at [64]). In my view, having regard to the overall circumstances, Singapore was an appropriate jurisdiction but not clearly the most appropriate forum for the determination of claims brought by HLF in the NY Proceedings. Accordingly, I found that the plaintiffs had failed to discharge their burden of showing that Singapore is the more appropriate forum than New York.

Whether the NY Proceedings were vexatious or oppressive

66 I was not persuaded that the NY Proceedings were vexatious or oppressive. My reasons are as follows.

Nature of the dispute in the NY Proceedings

67 The main cause of action in the NY Proceedings was fraud and it involved allegations that P5 together with each of its affiliates (*ie*, P2 to P4) had acted in concert to perpetrate this fraud. It is contended that P5, the holding company, utilized its domination of P1 to P4 to perpetrate its fraud against HLF and investors who purchased the Pinnacle Notes. This is the "alter ego" argument pursuant to which P5 is alleged to be liable as alter ego of P2 to P4.

68 Even if P2 to P4 were not the alter ego of P5, Mr Lee explained that HLF's fraud claim in the NY Proceedings could still be advanced against P2 to P4. It was contended in the NY Proceedings that P4 (a New York based entity) "masterminded the fraud" and that the P3 (a London-based entity) implemented the fraud. [note: 12] According to HLF, P1 played "a tertiary role in the events", [note: 13] and P2 was a shell corporation in the Cayman Islands with no officers or employees. Its role was simply to issue the Pinnacle Notes as part of the fraudulent scheme. [note: 14]

69 On the other hand, the plaintiffs have sought to refashion and straight jacket HLF's claims as being principally against P1 to P3 as they maintain that P5 (and to a lesser extent, P4) were not involved in the selling of Pinnacle Notes to Singapore-based investors. On this basis, they have argued that the connection to New York is tenuous and that HLF has acted in a vexatious manner by commencing the NY Proceedings.

70 It is important to emphasise that the question to be decided in this application is whether the claims pursued by HLF in New York were vexatious or oppressive, and not whether it was vexatious or oppressive for HLF to refuse to pursue different claims which it does not want to pursue at all. Therefore, in my view, in addition to my findings that there are strong reasons why it would be expedient to have the proceedings heard in New York instead of Singapore, it cannot be vexatious or oppressive for HLF to frame its claim in a manner which was most advantageous to it.

No concurrent proceedings in Singapore

71 As alluded to above at [15], neither HLF nor the plaintiffs have commenced substantive proceedings in Singapore. Applying the general principle in *Koh Kay Yew*, the court should be slow to grant an anti-suit injunction where there is no existing *lis* in Singapore. The policy reason for this was set out at [23] of *Koh Kay Yew*:

> ... The party who commenced the foreign proceedings would only have done so in one jurisdiction. He would have in no way abused the systems of justice of various jurisdictions to his advantage. It is the defendant in the foreign proceedings that is complaining about the action and wants the foreign proceedings stopped. *In such a case, we think that as long as the party who commenced the foreign proceedings was entitled to do so, whether or not the foreign*

courts recognise this, then our courts should be extremely cautious in granting an injunction... For an injunction in these cases to be justified, there must be strong and compelling reasons why an action in the foreign courts should not be started or continued. This would simply be because the dangers of the party commencing multiple proceedings and abusing the different judicial systems, whether for tactical reasons or otherwise, is non-existent. A court's role is to achieve fairness and justice according to the law of the land. However, this does not include preventing a party from commencing or continuing his foreign proceedings simply on the basis that it would be more inconvenient for one party as compared to the other. Any party who has been aggrieved has the right to seek recourse to justice in any judicial system that is convenient for him. This is his natural right. It is not up to a plaintiff to bring an action in a court which is convenient for the defendant.

[emphasis added]

72 In this case, the starting position is that HLF is *prima facie* entitled to sue the plaintiffs in New York and the court should not interfere *for that reason alone.* The non-exclusive jurisdiction clause (clause 24) envisages that proceedings may be commenced elsewhere besides the named forum (see [30] above). It did not matter, contrary to the suggestion by the plaintiffs, that the NY Proceedings (in their view) represented a more difficult and roundabout route for HLF than suing in Singapore under the MDAA.

Juridical advantages of pursuing the claims in New York

73 In relation to the juridical advantages that HLF would be entitled to if it pursues its claims against the plaintiffs in New York (see the plaintiffs arguments at [41] above), now that the plaintiffs have failed to show that Singapore is the natural forum, it is hard to see why HLF's ability to avail itself to these juridical advantages would be vexatious and unjust to the plaintiffs *per se*. The onus is on the plaintiffs to show how it is unjust, and, in my view, they were unable to do so.

74 Be that as it may, HLF's equitable subrogation claim in the NY Proceedings is a relevant consideration. According to Mr Lee, under this equitable subrogation claim, HLF "stood in the shoes" of some of the Singapore investors who had been compensated by HLF. As a stranger to the US Class Action, HLF could not share directly in any recovery in that action. For that reason, Mr Lee argued that it must assert a claim in equitable subrogation in New York to pursue such a claim. According to Mr Lee, an anti-suit injunction in favour of the plaintiffs would effectively prevent HLF from pursuing a claim in equitable subrogation which can only be meaningfully pursued in New York for both legal and practical reasons. [note: 15]

75 Mr Yeo disagreed. He argued that HLF's equitable subrogation claim served no purpose other than as a tenuous basis for arguing that there existed a New York connection. This was because HLF did not have a claim in equitable subrogation under New York law.

76 I agreed with Mr Lee that the question of whether or not HLF's claim in equitable subrogation was sustainable as a matter of New York law was not for this court to decide. The merits of HLF's claim for equitable subrogation under New York law was a matter for the New York Court. But leaving questions of the merits aside, there is force in Mr Lee's contention that if an anti-suit injunction is granted, HLF would suffer prejudice because it may be deprived of any meaningful ability to pursue this claim in New York.

77 A lost of a potential juridical advantage is a factor to be considered in deciding whether to grant an anti-suit injunction since the court is concerned with the ends of justice (see Lord Goff's

comments in *Lee Kui Jak* at 896 for the general rule that the court will not grant an injunction if, by doing so, it will deprive the defendant of advantages in the foreign forum of which it would be unjust to deprive him).

78 I also agreed with Mr Lee that it seems practical and expedient to let HLF's equitable subrogation claim proceed in the same forum as the US Class Action because its outcome is dependent on the result of the US Class Action. [note: 16]

Conclusion on whether NY Proceedings were vexatious or oppressive

79 In light of the above, I find that apart from the plaintiffs failing to show that Singapore is the natural forum, the NY Proceedings were legitimately brought by HLF and were not vexatious or oppressive.

Comity Considerations

80 In addition to my findings above, I am also of the view that considerations of international comity have an impact on this application.

81 Taking a commonsensical approach, and having particular regard to the fact that the NY Proceedings have, to borrow from the words of the HLF's expert, "*the same core nucleus of operative facts as the claims asserted in [the Class Action]*" [note: 17] and that the equitable subrogation claim sought by HLF largely depends on the outcome of the US Class Action, it would in my view be contrary to considerations of comity to restrain HLF's NY Proceedings.

Conclusion

82 In the end, I was satisfied that Singapore was not clearly the most appropriate forum for the resolution of the disputes pleaded by HLF in the NY Proceedings. This is one case where this court could, in accordance with the ends of justice, help to ensure that all claims concerning the plaintiffs in relation to the Pinnacle Notes are heard in one jurisdiction by refusing to grant an anti-suit injunction. HLF's action in New York will, subject to any decision of the New York Court, continue in New York.

83 I therefore refused the plaintiffs' application in OS 798/2012 with costs fixed at $35,000 plus reasonable disbursements.

[note: 1] Christopher David Jackson's 1st Affidavit at p 1960-2682.

[note: 2] Christopher David Jackson's 1st Affidavit, Exhibit marked CJ-15.

[note: 3] October Order at p 12, Christopher David Jackson's 1st Affidavit, Exhibit marked CJ-15.

[note: 4] Ian Macdonald's 1st Affidavit at [28].

[note: 5] Plaintiffs' Written Submissions at [93].

[note: 6] Plaintiffs' Written Submissions at [16].

[note: 7] Plaintiffs' Written Submissions at [14], [113] and [114].

[note: 8] Notes of Arguments dated 19 November 2012.

[note: 9] Plaintiffs' Written Submissions at [93].

[note: 10] HLF's Written Submissions at [37].

[note: 11] October Order at p 11, Christopher David Jackson's 1st Affidavit, Exhibit marked CJ-15.

[note: 12] HLF's Written Submissions at [16].

[note: 13] HLF's Written Submissions at [17].

[note: 14] HLF's Written Submissions at [18].

[note: 15] HLF's Written Submissions at [168].

[note: 16] HLF's Written Submissions at [168].

[note: 17] HLF's New York Law Expert Report at [25].