Hong Hin Kay Albert and another *v* AAHG, LLC and another
[2014] SGHC 206

Case Number	: Suit No 162 of 2014 (Summons No 659 of 2014)
Decision Date	: 17 October 2014
Tribunal/Court	: High Court
Coram	: Tay Yong Kwang J
Counsel Name(s)	: Liew Teck Huat and Jason Yeo (Global Law Alliance LLC) for the plaintiffs; Siraj Omar (Premier Law LLC) for the defendants.
Parties	: Hong Hin Kay Albert and another — AAHG, LLC and another

Civil Procedure – Injunctions

Conflict of Laws – Restraint of Foreign Proceedings

Injunctions – Purposes for Grant – Restraint of Proceedings

17 October 2014

Tay Yong Kwang J:

Introduction

1 Summons No 659 of 2014 ("SUM 659/2014") is an application by Albert Hong Hin Kay ("Albert") and Edward Hong Hin Kit ("Edward") (referred to collectively as "the Plaintiffs") for an anti-suit injunction against AAHG, LLC ("AAHG") and the liquidating trustee of the DVI liquidating trust ("DVI") (referred to collectively as "the Defendants"). Specifically, the Plaintiffs sought an injunction to restrain the Defendants, their servants and/or agents from:

(a) maintaining and/or continuing with United States District Court Civil Action No 3-13-CV-2142-MO ("the US action") against the Plaintiffs; and

(b) commencing, maintaining and/or continuing with any proceedings against Albert and/or Edward, directly or indirectly in relation to the subject matter of the US action in any jurisdiction other than Singapore.

The Plaintiffs also took out a separate application, Summons No 1855 of 2014 ("SUM 1855/2014"), for the Defendants to be restrained from taking any further steps in the US action pending the determination of SUM 659/2014 and any appeals therefrom. Both parties subsequently agreed that SUM 1855/2014 could be subsumed under SUM 659/2014. At the conclusion of the hearing, I allowed the Plaintiffs' application in SUM 659/2014. The Defendants have since filed an appeal against my decision and I now set out the grounds for my decision.

The facts

Background facts

2 The Plaintiffs are brothers who are involved in the medical and healthcare business. [note: 1]

Back in the early 1990s, they entered into a joint venture with an Indonesian businessman, Boelio Muliadi, to set up a hospital in Medan, Indonesia. [note: 2] An Indonesian company known as PT Nusautama Medicalindo ("PTNM") was set up for this purpose. The construction of the hospital, which was PTNM's primary asset, was funded by a syndicated loan and cash injections from the shareholders. [note: 3]

3 Subsequently, the syndicated lenders called on the loan and DVI entered the picture when it offered credit facilities to enable the Plaintiffs to settle the outstanding loan with the syndicated lenders. [note: 4] As DVI had wanted security over the assets of PTNM, a Singapore company called Universal Medicare Pte Ltd ("Universal") was used as the holding company of PTNM for this purpose. [note: 5]

4 In June 2002, Albert transferred 10,000 Universal shares to DVI. [note: 6] This was apparently a gratuitous transfer without any valuable consideration, in recognition of DVI's assistance in settling the outstanding loan with the syndicated lenders. [note: 7] DVI subsequently went into liquidation in the United States ("US") sometime in 2003 or 2004. [note: 8] On 10 September 2004, the Defendants received a notice of sale from the solicitors acting on behalf of the liquidators, stating that there was an intended sale of the 10,000 Universal shares to Goldman Sachs (Asia) Finance for US$1,000. [note: 9] In this respect, Art 29 of Universal's Articles of Association provided that an existing shareholder was entitled to exercise a right of pre-emption over the sale of shares in Universal to third parties. [note: 10] On this basis, the solicitors acting on behalf of Albert issued a notice on 14 September 2004, stating that he was prepared to exercise the right of pre-emption and purchase the 10,000 Universal shares for US$1,000. [note: 11]

5 On 22 September 2004, Albert received a reply which stated that DVI had decided not to sell its equity interest in Universal to Goldman Sachs (Asia) Finance at that point in time. [note: 12] Nevertheless, Albert proceeded to exercise the right of pre-emption to purchase DVI's stake in Universal on 14 December 2007. [note: 13] As a result, the share register of Universal was updated on 27 December 2007 to reflect the change in ownership of the 10,000 shares from DVI to Albert. [note: 14] A share certificate dated 14 December 2007 was also issued in Albert's name. [note: 15]

6 Meanwhile, the Plaintiffs and Boelio Muliadi entered into a share sale agreement dated 24 December 2007, under which they agreed to sell 99% of the shares in Universal to Columbia Asia Healthcare Sdn Bhd ("Columbia"). [note: 16] The sale of shares to Columbia included the 10,000 shares that were transferred from DVI to Albert.

Originating Summons No 509 of 2010 ("OS 509/2010")

7 After discovering the amendment to the share register, DVI took the position that Albert had unlawfully misappropriated the 10,000 Universal shares. On 24 May 2010, DVI commenced OS 509/2010 in Singapore. [note: 17] This was an application for pre-action discovery against the Defendants and Universal in contemplation of: [note: 18]

> … commencing proceedings against all parties claiming to hold the DVI Shares, who participated in the wrongful transfer of those shares and/or who are holding or who received any sale proceeds of the DVI Shares arising from the Transfer and/or the Acquisition.

At first instance, DVI's application for pre-action discovery was granted by the learned Assistant Registrar ("AR"). On appeal, Woo Bih Li J reversed the AR's decision and dismissed OS 509/2010 in its entirety. [note: 19] It is undisputed that DVI did not pursue the matter any further.

Originating Summons No 723 of 2011 ("OS 723/2011")

8 Close to eight months after OS 509/2010 was dismissed by Woo J, DVI commenced OS 723/2011 in Singapore against the Plaintiffs, Universal and Columbia. [note: 20] DVI alleged that the Plaintiffs had wrongfully and unlawfully converted, transferred and/or procured the transfer of the 10,000 Universal shares belonging to DVI.

9 At that time, there was a dispute regarding the actual ownership of the Universal shares in question. [note: 21] The Plaintiffs pointed out that DVI was merely holding on to the Universal shares in the capacity of a trustee and therefore did not have any beneficial interest in the shares. There was, however, no reference to any beneficial owner in the action commenced by DVI. The Plaintiffs' objections were made known in the reply affidavit filed by Edward and the skeletal submissions tendered on behalf of the Plaintiffs. It appeared that DVI failed to respond to the Plaintiffs' objections.

10 Apart from that, the Plaintiffs also highlighted that the 10,000 Universal shares were not listed as assets belonging to DVI in the liquidation proceedings that were ongoing in the US. [note: 22] In view of the substantial factual disputes concerning DVI's claim, the Plaintiffs made an application to convert OS 723/2011 into a writ action. [note: 23] The Plaintiffs' application was allowed at first instance and this was subsequently upheld on appeal. As a result, OS 723/2011 was redesignated as Suit No 61 of 2012 ("S 61/2012"). [note: 24]

11 After the conversion, DVI was directed, on 1 March 2012, to file its statement of claim by 26 March 2012. DVI failed to comply with this direction. [note: 25] Subsequently, an "unless order" was issued on 5 April 2012 for DVI to file and serve its statement of claim by 20 April 2012. DVI also failed to comply with this order. Instead, DVI proceeded to withdraw S 61/2012 by filing a notice of discontinuance on 19 April 2012. [note: 26] This was one day before the deadline of 20 April 2012 as stipulated in the "unless order".

12 In response, the Plaintiffs applied to set aside and expunge the Defendants' notice of discontinuance. One of the grounds relied upon by the Plaintiffs was the doctrine of abuse of process. The Plaintiffs' application to set aside the notice of discontinuance was, however, disallowed by the AR at first instance. The Plaintiffs appealed against the AR's decision but the appeal was dismissed by Lai Siu Chiu J.

The US action

13 Close to 20 months after filing the notice of discontinuance in Singapore, the Defendants commenced legal proceedings against the Plaintiffs in the US. [note: 27] The basis of the US action was substantially similar to S 61/2012 in Singapore. In summary, the Defendants alleged that the Plaintiffs had misappropriated the Universal shares. [note: 28] It was also mentioned for the first time that AAHG had purchased the beneficial interest in the Universal shares on or about 31 October 2006. DVI was therefore only the legal owner while AAHG was the beneficial owner of the shares in question. It bears noting that the Defendants did not, in the course of prosecuting the US action,

mention any of the prior legal proceedings it had undertaken in Singapore.

The current proceedings

14 In response to the US action, the Plaintiffs commenced Suit No 162 of 2014 ("S 162/2014") in Singapore against the Defendants on 7 February 2014. As the Defendants were both based in the US, the Plaintiffs took out an application, Summons No 655 of 2014 ("SUM 655/2014"), for leave to serve the court documents out of jurisdiction. The *ex parte* application came before me on 20 February 2014 and I granted the Plaintiffs leave to serve the writ of summons and the statement of claim on the Defendants in the US.

15 Subsequently, the Plaintiffs took out SUM 659/2014, which is the present application, for an anti-suit injunction against the Defendants. Prior to SUM 659/2014 being heard, the Plaintiffs had, in SUM 1855/2014, also applied for an interim injunction to restrain the Defendants from taking any further steps in the US action pending the final disposition of SUM 659/2014. As mentioned above, both parties agreed that SUM 1855/2014 could be subsumed under SUM 659/2014.

The parties' arguments

16 In the present application, both parties were largely in agreement with respect to the general legal principles applicable to the grant of anti-suit injunctions. The parties' dispute pertained primarily to the application of these legal principles to the factual matrix in the present case.

The Plaintiffs' arguments

17 First, with regard to the issue of whether the Defendants were amenable to the jurisdiction of the Singapore court, the Plaintiffs highlighted that the Defendants had invoked the jurisdiction of the Singapore court twice in OS 509/2010 and OS 723/2011. [note: 29] It was argued that the Defendants were therefore amenable to the jurisdiction of the Singapore court for the resolution of the dispute between the parties.

18 Second, in relation to the issue of whether Singapore is the natural forum, the Plaintiffs argued that the dispute essentially involved the shares of a company (*ie*, Universal) which was incorporated and based in Singapore. [note: 30] The Plaintiffs also referred to the Court of Appeal decision of *JIO Minerals FZC and others v Mineral Enterprises Ltd* [2011] 1 SLR 391 ("*JIO Minerals FZC v Mineral Enterprises*"), where it was observed that in relation to tort claims, the place of the tort was *prima facie* the natural forum. On this basis, it was argued that the natural forum must be Singapore as the alleged tort took place in Singapore. [note: 31] The Plaintiffs further submitted that the dispute had no connection with the US except for the fact that the Defendants were companies based in the US. [note: 32] It was also highlighted that the Defendants had invoked the jurisdiction of the Singapore court twice in OS 509/2010 and OS 723/2011. It was thus the Plaintiffs' case that the Defendants had accepted Singapore as the natural forum and were therefore estopped or otherwise precluded from denying this. [note: 33]

19 In response to the Defendants' submissions that the US is the natural forum, the Plaintiffs argued that the Defendants only chose to commence the US action after they had failed to obtain their desired outcomes in OS 509/2010 and OS 723/2011. [note: 34] Further, the Plaintiffs emphasised that the issues concerning the liquidating trustee's standing and DVI's basis for claiming that they owned the shares were first raised by the Plaintiffs in OS 509/2010. Notwithstanding this, the

Defendants still commenced OS 723/2011 in Singapore. [note: 35] The Plaintiffs submitted that this must amount to an unequivocal election by the Defendants that Singapore is the proper jurisdiction to resolve the aforementioned issues. Finally, the Plaintiffs asserted that the issues concerning US law were, in any event, uncomplicated. [note: 36] All that was required of the Defendants was to place clear and categorical evidence before the court.

20 Third, in relation to the issue of whether the Defendants' pursuit of the US action amounts to vexatious or oppressive conduct, the Plaintiffs relied mainly on the Defendants' conduct in the legal proceedings leading up to the present application. The Plaintiffs highlighted that having failed to obtain the desired outcomes in both OS 509/2010 and OS 723/2011, the Defendants thereafter decided to commence the US action as they knew that any legal proceedings in Singapore were likely to be struck out for abuse of process. [note: 37]

21 The Plaintiffs also referred to an order obtained in the US Bankruptcy Court on 9 July 2014, pursuant to which the documents concerning DVI's liquidation were ordered to be destroyed. [note: 38] It was submitted that any action commenced in Singapore would therefore fail for want of evidence. The Plaintiffs argued that the Defendants had deliberately refrained from suing in Singapore as they knew that any legal proceedings undertaken by them would be faced with the real prospect of being struck out. [note: 39] The Plaintiffs also submitted that US law does not have the convention of awarding costs to the successful party. [note: 40] In this regard, the Plaintiffs argued that they were being compelled to defend the US action out of their own funds as they would not be entitled to costs even if their case prevailed.

22 Finally, the Plaintiffs argued that they would suffer severe and substantial injustice if the Defendants were allowed to maintain and continue the US action. The Plaintiffs referred to DVI's admission that it had no funds in Singapore and that the US action had been commenced on a contingency basis. [note: 41] It was argued that if the Defendants were to bring the action in Singapore, the Plaintiffs would be entitled to seek security for costs. This would not be possible in the case of the US action. [note: 42] In relation to the issue of expenses, the Plaintiffs submitted that they would be exposed to substantial costs which would not be recoverable even if they were to prevail in the US action. These would include the costs of instructing lawyers in the US, court fees, travel and accommodation costs and other related expenses. [note: 43] The Plaintiffs argued that the Defendants' purpose in commencing the US action was to pressurise the Plaintiffs into giving in.

The Defendant's arguments

23 With regard to the issue of jurisdiction, the Defendants accepted that they had twice invoked the jurisdiction of the Singapore court in relation to the dispute between the parties. [note: 44] Nevertheless, the Defendants argued that this does not, in itself, entitle the Plaintiffs to an anti-suit injunction. [note: 45]

24 On the issue of natural forum, the Defendants submitted that the burden was on the Plaintiffs to establish that Singapore was clearly the more appropriate forum for adjudicating the claims made by the Defendants in the US action. [note: 46] While the Defendants accepted that the underlying dispute concerning the ownership of the Universal shares is governed by Singapore law, it was submitted that the court should also take into account the fact that the Plaintiffs had chosen to defend the Defendants' claim by raising numerous substantive and procedural issues governed by US law. [note: 47] These included, amongst others, the nature and effect of the notice of sale, DVI's

capacity or authority to issue the notice of sale and to sell the shares to a third party and AAHG's standing to commence proceedings in Singapore against the Plaintiffs. On this basis, the Defendants argued that the majority of the issues in dispute were governed by US law and the US should therefore be the natural forum. [note: 48]

25 On the issue of whether there would be vexation or oppression to the Plaintiffs if the US action was allowed to proceed, the Defendants highlighted instances where foreign proceedings have been held to satisfy this requirement: [note: 49]

(a) a party is subject to oppressive procedures in the foreign court;

(b) there has been bad faith in the institution of the foreign proceedings;

(c) the foreign proceedings were commenced for no good reason;

(d) the foreign proceedings were bound to fail; and

(e) the foreign proceedings would cause extreme inconvenience.

The Defendants submitted that none of these factors featured in the present case. [note: 50]

26 In response to the Plaintiffs' argument that the Defendants only commenced the US action due to the concern that any legal proceedings in Singapore would likely be struck out for abuse of process, the Defendants highlighted that the Plaintiffs' arguments on the doctrine of abuse of process had already been considered and dismissed by the court. [note: 51] The Defendants also referred to the High Court decision of *Chee Siok Chin and others v Minister for Home Affairs and another* [2006] 1 SLR(R) 582, where V K Rajah J (as he then was) considered the various instances where abuse of process was made out. It was submitted that the Plaintiffs' allegation of abuse of process was wholly devoid of merit as the facts of the present case did not fall within any of those scenarios. [note: 52]

27 The Defendants also referred to the Court of Appeal decision of *Koh Kay Yew v Inno-Pacific Holdings Ltd* [1997] 2 SLR(R) 148 ("*Koh Kay Yew*") where a distinction was drawn between cases where proceedings were only commenced in one jurisdiction and cases where a party had commenced multiple proceedings and abused different judicial systems. [note: 53] It was observed that the courts should be extremely cautious in granting an injunction in the former case so long as the party who commenced the foreign proceedings was entitled to do so. The Defendants highlighted that they were not seeking to maintain concurrent proceedings in multiple jurisdictions as the proceedings in Singapore were discontinued prior to the commencement of the US action. [note: 54] It was further argued that the Defendants had a legitimate reason to commence the US action as the Plaintiffs had raised multiple issues governed by US law. [note: 55] Finally, the Defendants also highlighted that there would not be any risk of conflicting decisions given that there was only one set of proceedings. [note: 56] There would also be only one set of costs given that the parties would be litigating in a single arena.

28 In relation to the issue of whether the Defendants would be prejudiced if they were restrained from continuing with the US action, it was submitted that there was a real risk of the Defendants being precluded from commencing the action in Singapore due to the expiry of the statutory limitation period. [note: 57] The Defendants further argued that the Plaintiffs' offer to waive the limitation period

was misconceived in so far as the limitation period was imposed by law. [note: 58] In this respect, it was submitted that the Defendants would no longer have the right to commence proceedings upon the expiry of the limitation period. The Defendants highlighted that they would be left without any recourse and would therefore be irreparably prejudiced in the event that the anti-suit injunction is granted.

The decision of the court

29 In the Court of Appeal decision of *John Reginald Stott Kirkham and others v Trane US Inc and others* [2009] 4 SLR(R) 428 ("*John Reginald v Trane*"), it was held that the following elements had to be considered in determining whether an anti-suit injunction should be granted:

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

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

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

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

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

At the outset, it is undisputed that the institution of the US action is not in breach of any agreement between the Plaintiffs and the Defendants as no such agreement exists. The fifth element is therefore inapplicable in the present case. I will now proceed to address the first four elements in turn.

Jurisdiction

30 The Defendants have not made any substantive response to the Plaintiffs' argument that they had submitted to the jurisdiction of the Singapore court. In fact, the Defendants accepted that they had twice invoked the jurisdiction of the Singapore court in relation to the dispute between the parties. [note: 59] This was with reference to OS 509/2010 and OS 723/2011 which were commenced in Singapore by DVI.

31 Quite apart from the issue of submission to jurisdiction, the Court of Appeal in *Koh Kay Yew* also observed that a party would be amenable to the jurisdiction of the court in so far as the party was validly served with the court documents as required by the Rules of Court. In this regard, being amenable to the jurisdiction of the local courts simply means being liable or accountable to this jurisdiction. Such jurisdiction can be established either through the proper service of documents or through submission to the jurisdiction.

32 Returning to the facts of the present case, the Plaintiffs had, in SUM 655/2014, sought leave to serve the court documents out of jurisdiction in accordance with the Rules of Court. Leave was granted and it is undisputed that both the writ of summons and the statement of claim were validly served on the Defendants in the US. This was followed by the Defendants filing the memorandum of appearance on 17 March 2014. Up to the point in time when the present application came before me, the Defendants did not take any steps to challenge the jurisdiction of the Singapore courts. It is undisputed that the Defendants have not made any attempt to set aside the present action for want

of jurisdiction.

33 Nevertheless, Mr Siraj Omar, counsel for the Defendants, submitted that they had accepted service without prejudice to their right to set aside the action for lack of jurisdiction. Mr Omar took the position that the Defendants had not submitted to the jurisdiction of the Singapore courts for the purposes of this action. Regrettably, the Defendants failed to make any submissions on why the Singapore courts should not have jurisdiction over the present application. There was no evidence to suggest that leave to serve out of jurisdiction was improperly obtained or that the actual service on the Defendants was invalid. Furthermore, given my finding that Singapore is the natural forum for the dispute between the parties, there does not appear to be any ground on which the Defendants can rely to set aside the action for lack of jurisdiction. In fact, in addressing the issue of whether the Defendants are amenable to the jurisdiction of the Singapore court, the Defendants have not proffered any substantive arguments apart from stating that the Defendants' alleged submission to jurisdiction in the previous two actions did not "in itself entitle the Plaintiffs to an order in terms of the Injunction Application". [note: 60]

34 In the final analysis, I am of the view that over and above any arguments relating to submission to jurisdiction, the first element of amenability to jurisdiction is satisfied through the proper service of documents on the Defendants in the present case.

Natural forum

35 It is well-established that the principles to be applied in determining the natural and proper forum in the context of anti-suit injunctions are the same principles laid down by Lord Goff in the seminal judgment of *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460. The Court of Appeal in *John Reginald v Trane* provided the following guidance at [33]:

> … In *Spiliada*, Lord Goff framed the test for determining the natural forum as the forum with which the dispute has the most real and substantial connection. In the context of the present case, it must not only be shown that Singapore is an appropriate forum, but that Singapore is clearly the *more* appropriate forum. The onus of showing that Singapore is clearly the more appropriate forum should logically fall on the applicant for the anti-suit injunction. …
>
> [emphasis in original]

36 In ascertaining whether Singapore is clearly the more appropriate forum, the court has to adopt a multi-factorial approach and consider the appropriate weight to be apportioned to each factor, depending on the factual matrix in question and the likely issues in dispute. These factors include the location and residence of the parties, the availability of witnesses and the law applicable to the issues in dispute. I will now proceed to deal with these factors individually.

Location and residence of parties

37 One of the factors relied upon by the Plaintiffs to support their position that Singapore is the natural forum is the fact that both Albert and Edward are Singapore citizens who are ordinarily resident in Singapore. [note: 61] While this is indeed a relevant factor that can be taken into account for the purposes of determining the natural forum for the present dispute, it cannot be overlooked that the Defendants are foreign companies not incorporated in Singapore. In fact, there is no evidence to suggest that either of the Defendants has any presence in Singapore. I am therefore of the view that the factor relating to the location and residence of the parties is a neutral factor which does not point in favour of any particular forum.

Location and compellability of witnesses

38 It is acknowledged that both parties have not made any specific arguments on the location and compellability of the relevant witnesses. Based on the affidavits that have been placed before me, it appears that the Plaintiffs, especially Albert, are likely to be among the primary witnesses in the dispute between the parties. As mentioned above, the Plaintiffs are both Singapore citizens who reside in Singapore. [note: 62]

39 Nevertheless, it has been recognised that the physical locations of witnesses are generally of less significance today in the light of the ease and availability of cross-examination via video-link. The Court of Appeal in *John Reginald v Trane* also acknowledged that the location of witnesses is only really significant in relation to third-party witnesses who are not in the employ of the parties given that this could give rise to issues of compellability. In this regard, the location and residence of the Plaintiffs cannot be given much weight for the following reasons. First, they are clearly parties to the ongoing dispute and there will therefore be no issues of compellability. Second, while the Plaintiffs have relied on the fact that it would be inconvenient for them to travel to the US in the light of their age, there is no evidence to suggest that it would not be possible for cross-examination to be carried out via video-link. On that basis, there would be no need for the Plaintiffs to physically travel to the US to defend the action in so far as they are able to give evidence via video-link.

40 Both parties have not made any submissions on the potential third-party witnesses they intend to call and any issues relating to compellability that may arise therein. I am therefore of the view that the factor concerning the location and compellability of witnesses is also a neutral factor which does not point in favour of any particular forum.

Location of tort and the applicable law

41 I move on to the issue concerning the location of the alleged tort and the applicable law. In this regard, the Plaintiffs argued that the dispute was primarily over the shares in Universal, a company incorporated and based in Singapore. [note: 63] It was further submitted that the tort allegedly committed by the Plaintiffs in converting or misappropriating the Universal shares also took place in Singapore. [note: 64] On that basis, the Plaintiffs argued that Singapore must be the natural forum for the present dispute.

42 In contrast, the Defendants highlighted that the Plaintiffs had chosen to defend the action by raising numerous substantive and procedural issues governed by US law. [note: 65] The Defendants took the position that the majority of the issues in dispute between the parties were issues concerning US law and the US must therefore be the natural forum. [note: 66]

43 The Defendants' case is that the Plaintiffs had wrongfully converted and transferred the 10,000 Universal shares to Albert. It is undisputed that the alleged tort committed by the Plaintiffs occurred in Singapore. In this respect, the Court of Appeal in *JIO Minerals FZC v Mineral Enterprises* held at [106] that in relation to tort claims, the place of the tort is *prima facie* the natural forum. In the earlier decision of *John Reginald v Trane*, the Court of Appeal also acknowledged that the place where the alleged tort occurred would be a weighty factor, but not, by any means, a conclusive factor in ascertaining the natural forum of the dispute. An example of how the *prima facie* position may be displaced would be in a situation where the place of the commission of the tort was fortuitous. In such a situation, it has been said that the place of the tort may provide no more than a convenient starting point or *prima facie* position and that the court should look into more substantial factors in

the application of the test.

44 Returning to the facts of the present case, the place where the wrongful conversion or transfer of shares occurred was not fortuitous. The Plaintiffs were based in Singapore and the shares at the heart of the dispute were those of Universal, a company that is incorporated and based in Singapore. Quite apart from the fact that the alleged wrongful transfer of shares occurred in Singapore, the dispute is also likely to involve an interpretation of Art 29 of Universal's Articles of Association. This would be for the purpose of ascertaining the scope of Albert's right of pre-emption and whether the act of transferring the Universal shares from DVI to Albert was a proper exercise of such a right. These potential issues are undisputedly governed by Singapore law. On that basis, I am of the view that there is nothing on the facts of the case to displace the *prima facie* position that Singapore ought to be the natural forum given that it was the place of the commission of the alleged tort.

45 The Court of Appeal also observed in *John Reginald v Trane* (at [44]) that the governing law would be a "*significant* factor in determining the appropriate forum to hear a dispute" [emphasis added]. This arises from the general proposition that where a dispute is governed by a foreign *lex causae*, the forum would be less adept in applying the law than the courts of the jurisdiction from which the *lex causae* originates. In this respect, the Court of Appeal further acknowledged that while a court may very well apply the laws of another country 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. Applying these considerations to the facts of the present case, I am of the view that there will be substantial savings in time and resources if the matter is heard in Singapore.

46 The Defendants, in their skeletal submissions, also acknowledged that the underlying dispute was governed by Singapore law: [note: 67]

> The Defendants accept that the underlying dispute between the parties – ie: the ownership of 10,000 shares in [Universal] is one that is governed by Singapore law. That is why the Defendants invoked the jurisdiction of the Singapore court to obtain relief against the Plaintiff by way of [OS 723/2011].

Nevertheless, the Defendants went on to argue that the Plaintiffs had chosen to defend the claim by raising numerous substantive and procedural issues concerning US law. [note: 68] These include, *inter alia*, the nature and effect of the notice of sale, DVI's capacity or authority to issue the notice of sale and to sell the shares to a third party and AAHG's standing to commence proceedings in Singapore against the Plaintiffs. I am, however, of the view that these issues raised by the Plaintiffs actually fall within the scope of ancillary issues that have to be resolved alongside the other more substantive issues which are undisputedly governed by Singapore law. I therefore cannot accept the Defendants' assertion that "it is patently clear that the majority of the issues in dispute between the parties are issues of United States law" [emphasis in original]. [note: 69] Conversely, it is more apparent that the majority of the legal issues arising in the dispute between the parties are governed by Singapore law.

47 On an overall assessment of the relevant factors, I am of the view that there is nothing on the facts of the case to displace the *prima facie* position that Singapore ought to be the natural forum on the basis that the alleged wrongful transfer of the shares occurred in Singapore. In fact, most of the substantive legal issues arising out of the dispute between the parties fall to be governed by Singapore law. The substantial savings in time and resources to be gained from the Singapore court applying the law of its own jurisdiction reinforces the position that Singapore is clearly the more appropriate forum to adjudicate the claims in the US action. The second element of Singapore being

the natural forum for the dispute between the parties is therefore satisfied on the facts of the present case.

Alleged vexation or oppression to the plaintiffs

48 The establishment of Singapore as the natural forum is, by itself, an insufficient basis for the grant of an anti-suit injunction. The Plaintiffs have to further establish that the pursuit of the US action by the Defendants would be vexatious or oppressive. What amounts to vexation or oppression has never been conclusively defined in the numerous case authorities dealing with the grant of anti-suit injunctions. The Court of Appeal in *John Reginald v Trane* (at [47]) gave a few examples of when courts have found vexation or oppression on the facts:

(a) where a party is subjected to oppressive procedures in the foreign court;

(b) bad faith in the institution of the foreign proceedings;

(c) commencing the foreign proceedings for no good reason;

(d) commencing proceedings that are bound to fail; and

(e) extreme inconvenience caused by the foreign proceedings.

These are certainly not closed categories and they merely serve as examples of when vexation or oppression was established in previous cases. In fact, the Court of Appeal went on to acknowledge that these situations "can also be suitably described by the word *unconscionable*" [emphasis in original].

49 In the Privy Council decision of *Societe Nationale Industrielle Aerospatiale v Lee Kui Jak and another* [1987] 1 AC 871, Lord Goff of Chieveley acknowledged that as with the basic principle of justice underlying the whole of the anti-suit jurisdiction, it has been emphasised that "the notions of vexation and oppression should not be restricted by definition" (at 893). He then went on to cite the observations made by Bowen LJ in *McHenry v Lewis* (1882) 22 Ch D 397 at 407–408, which were also cited by our Court of Appeal in *John Reginald v Trane* at [46]:

> I agree that it would be most unwise, unless one was actually driven to do so for the purpose of deciding this case, to lay down any definition of what is vexatious or oppressive, or to draw a circle, so to speak, round this court unnecessarily, and to say it will not move outside it. I would much rather rest on the general principle that the court can and will interfere whenever there is vexation and oppression to prevent the administration of justice being perverted for an unjust end. I would rather do that than attempt to define what vexation and oppression mean; they must vary with the circumstances of each case.

With these general principles in mind, I now proceed to address the issue of whether vexation or oppression has been made out on the facts of the present case.

50 The Plaintiffs argued that the Defendants already knew back in 2008 that the Plaintiffs had sold their shares in Universal, including the block of 10,000 shares alleged to have been wrongfully transferred to Albert. On this basis, it was submitted that the Defendants' claim against the Plaintiffs was an instance of "overreaching and oppressive conduct" as the Defendants already knew that the Plaintiffs no longer held the shares in question. [note: 70] However, the tort of conversion does not depend on whether the defendant still possesses the item that is allegedly converted. The defendant

may have disposed of the item in question and still be held liable for the tort of conversion. The Defendants have also claimed damages for the losses they suffered as a result of the alleged wrongful transfer of shares. The fact that the Plaintiffs may no longer be in possession of the shares does not preclude the Defendants from commencing an action against the Plaintiffs for wrongful conversion or transfer of the shares.

51 I am, however, of the view that vexation has been made out in the present case after taking into account the Defendants' prior conduct in the legal proceedings leading up to the present application. It is undisputed that DVI first invoked the jurisdiction of the Singapore court back in 2010 when it filed an application for pre-action discovery against the Plaintiffs and Universal in OS 509/2010. [note: 71] At first instance, the AR granted DVI's application. The Plaintiffs then appealed against the AR's decision. Woo J allowed the Plaintiffs' appeal and dismissed OS 509/2010 in its entirety. [note: 72] It is undisputed that DVI did not take the matter any further.

52 Subsequently, DVI again invoked the jurisdiction of the Singapore court in 2011 when it commenced OS 723/2011 against the Plaintiffs, Universal and Columbia. In that action, DVI alleged that the Plaintiffs had wrongfully and unlawfully converted, transferred and/or procured the transfer of the 10,000 Universal shares from DVI to Albert. [note: 73] Up to that point in time, there was no reference whatsoever to AAHG. Nevertheless, the Plaintiffs, in Edward's reply affidavit, brought up the issue of whether DVI was merely the bare legal owner of the shares in question. DVI failed to address the issue. Given DVI's failure to respond, the Plaintiffs highlighted the same issue again in their skeletal submissions. The issue remained unresolved as DVI did not clarify whether it was merely a trustee of the shares in question.

53 Quite apart from the issue of whether DVI had any beneficial interest in the 10,000 Universal shares, the Plaintiffs also raised queries regarding the list of assets filed in the course of DVI's liquidation proceedings in the US. In this respect, while DVI claimed to be the owner of the Universal shares in question, the shares were not reflected in the list of assets placed before the court. [note: 74] The Plaintiffs subsequently made an application for OS 723/2011 to be converted into a writ action in the light of the substantial factual disputes which remained unresolved. [note: 75] The Plaintiffs' application was allowed at first instance and DVI proceeded to file an appeal against the AR's decision. [note: 76] The Plaintiffs also filed a cross-appeal against the costs order granted by the AR. Both appeals came before me on 23 February 2012 and I dismissed DVI's appeal in relation to the AR's order to convert OS 723/2011 into a writ action. The Plaintiffs' appeal with regard to the AR's order as to costs was allowed. DVI did not appeal against my decision and OS 723/2011 was consequently redesignated as S 61/2012.

54 As a result of the conversion, during a pre-trial conference held on 1 March 2012, DVI was directed to file and serve its statement of claim by 26 March 2012. [note: 77] DVI failed to comply with this direction. In the subsequent pre-trial conference on 5 April 2012, the AR issued an "unless order" in the light of DVI's non-compliance with the earlier direction. DVI was ordered to file and serve its statement of claim by 20 April 2012, failing which its case would be struck out. [note: 78] DVI also failed to comply with this order. Instead of filing its statement of claim, DVI withdrew the action by filing a notice of discontinuance on 19 April 2012. The action was withdrawn just one day before the stipulated deadline of 20 April 2012. The Plaintiffs attempted to strike out or expunge the notice of discontinuance filed by DVI but the application was dismissed by the AR at first instance. The Plaintiffs appealed against the AR's decision but the appeal was dismissed by Lai Siu Chiu J on 19 July 2012.

55 More than a year later, the Defendants commenced the US action against the Plaintiffs. [note: 79] The claims and remedies sought in the US action were substantially the same as those in relation to OS 723/2011. The only difference was that it was revealed that AAHG had purchased the beneficial interest in the 10,000 Universal shares on or about 31 October 2006. [note: 80]

56 Looking at the evidence as a whole, the Defendants were effectively blowing hot and cold throughout the entire course of the legal proceedings leading up to the present application. When things did not go its way, DVI did not hesitate to take the matter further through the appeal process. When DVI could not succeed in the appeal process, it was prepared to ignore the clear directions of the court and to disengage from the legal proceedings completely. This was effectively what had happened in OS 723/2011 and subsequently S 61/2012. DVI failed to file its statement of claim and instead opted to file a notice of discontinuance one day before the deadline stipulated in the "unless order". Seeing that the tide was turning against them in the Singapore proceedings, the Defendants chose to completely abandon S 61/2012, only to commence the US action more than a year later.

57 While the Defendants have attempted to justify this sudden shift to the US on the basis that the Plaintiffs had raised substantive and procedural issues concerning US law, I am not inclined to accept this explanation for the following reasons. First, as already mentioned above in the context of ascertaining the natural forum for the dispute, I am of the view that the issues relating to US law are largely ancillary in nature. The substantive issues concerning the underlying dispute between the parties have not changed and are clearly governed by Singapore law. The Defendants have accepted this in their skeletal submissions. [note: 81] Second, the Defendants would have known about the scope of the Plaintiffs' objections much earlier, most likely at the point in time when the reply affidavits were filed. If the Defendants were genuinely of the view that the US would be the more appropriate forum to hear the dispute in the light of the Plaintiffs' defence, it would have discontinued the Singapore action and commenced the US action at that point in time. Instead, it chose to resist the Plaintiffs' application to convert OS 723/2011 into a writ action and even brought an appeal against the AR's decision to grant the Plaintiffs' application. After the appeal was dismissed, DVI refused to comply with the order to file and serve its statement of claim within the stipulated deadline. When faced with an "unless order", DVI chose to file its notice of discontinuance one day before the deadline stipulated in the "unless order". In the circumstances, I cannot accept the Defendants' justification that it had discontinued S 61/2012 on the basis that the US would have been a more appropriate forum to hear the dispute between the parties. It was more likely that DVI came to the conclusion that it could no longer sustain the Singapore action and therefore chose to bring the battle to a different jurisdiction.

58 Apart from that, the Defendants have also highlighted the fact that there was no risk of there being concurrent proceedings in the present case given that S 61/2012 had already been discontinued prior to the commencement of the US action. [note: 82] While that may indeed be the case, there is no strict rule that restricts the grant of anti-suit injunctions to situations where there are concurrent proceedings in different jurisdictions. Ultimately, the court is concerned with the issue of whether the continuation of the foreign proceedings would amount to vexatious or oppressive conduct. Looking at the evidence as a whole, especially the Defendants' conduct in the course of the legal proceedings, I am satisfied that the continuation of the US action would amount to vexatious conduct on the part of the Defendants. The third criterion is therefore met on the facts of the present case.

Alleged injustice to the defendants

59 It was observed by the Court of Appeal in *John Reginald v Trane* that the third and fourth

elements are closely related, being two sides of the same coin. In determining where the balance of justice lies, the court has to consider the injustice to the defendant if the plaintiff is allowed to pursue the foreign proceedings and also the injustice to the plaintiff if he or she is not allowed to do so (*John Reginald v Trane* at [27]).

60 Given that the Plaintiffs have established a *prima facie* case of vexatious conduct, the Defendants would now have to demonstrate why it would nevertheless be unjust for the anti-suit injunction to be granted. The Defendants' arguments on this issue were relatively straightforward. In essence, it was submitted that there was a real risk of the Defendants being precluded from commencing legal proceedings in Singapore as the statutory limitation period for the dispute had already expired. [note: 83] In the circumstances, the Defendants argued that it would be unjust for them to be restrained from pursuing the US action as they would effectively be left with no avenue to pursue the claim against the Plaintiffs. In response to the Plaintiffs' offer to waive the limitation defence if the action was commenced and served within two weeks of the injunction being granted, the Defendants submitted that this was not possible as the statutory limitation period was imposed by law. [note: 84] The Defendants would no longer have the right to commence legal proceedings upon expiry of the statutory limitation period. On that basis, it was argued that the Plaintiffs' offer to waive the limitation defence was misconceived and wholly irrelevant to the issue of whether the anti-suit injunction ought to be granted. [note: 85]

61 I am unable to accept the Defendants' argument that the Plaintiffs' offer to waive the limitation defence is wholly irrelevant. While the Defendants are right in submitting that the statutory limitation period is imposed by law, s 4 of the Limitation Act (Cap 163, 1996 Rev Ed) states unequivocally that:

> Nothing in this Act shall operate as a bar to an action unless this Act has been *expressly pleaded as a defence* thereto in any case where under any written law relating to civil procedure for the time being in force *such a defence is required to be so pleaded*.
>
> [emphasis added]

A party which intends to rely on the defence of limitation is required to specifically plead the relevant statute of limitation. This requirement is set out in O 18 r 8 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed):

> A party must in any pleading subsequent to a statement of claim *plead specifically any matter*, for example, performance, release, *any relevant statute of limitation*, fraud or any fact showing illegality —
>
> (*a*) which he alleges makes any claim or defence of the oppose party *not maintainable*;
>
> (*b*) which, if not specifically pleaded, might *take the opposite party by surprise* …
>
> [emphasis added]

On this basis, I cannot accept the Defendants' argument that the Plaintiffs' offer to waive the limitation defence is devoid of any legal content. Given that a party is required to specifically plead any limitation defence, an undertaking to waive the limitation defence would have the effect of precluding that party from relying on such a defence in its pleadings. The statutory limitation period will thereby be inapplicable as s 4 clearly states that nothing in the Limitation Act shall operate as a bar to an action unless it has been expressly pleaded as a defence.

62 Returning to the facts of the present case, Edward filed an affidavit on 16 July 2014 stating as follows: [note: 86]

> I confirm that if the US action is restrained, the Plaintiffs would be prepared to undertake to waive limitation if the action is commenced and served within 2 weeks of the Order restraining the US action. This is more than enough time. I should however make it clear that this is without prejudice to all the Plaintiffs' rights, including the right to apply to strike out the action as an abuse of process.

During the hearing, Mr Liew Teck Huat, counsel for the Plaintiffs, confirmed that they would undertake to waive the time bar in Singapore if the Defendants were to file and serve their action within two weeks of the order being granted. In the light of the foregoing, I was satisfied that injustice would not be occasioned to the Defendants in the event that they were restrained from pursuing the US action.

In the final analysis, apart from the fact that the four elements set out in *John Reginald v Trane* were established in the present case, I was also of the view that the balance of justice lay in favour of granting the anti-suit injunction. I therefore granted the Plaintiffs' application in SUM 659/2014.

The undertaking

63 After the anti-suit injunction was granted on 21 July 2014, the Defendants' solicitors wrote to the court on 30 July 2014 to request that further arguments be heard. In that letter, the Defendants explained that following the grant of the injunction, they were conscious of the need to commence the action in Singapore within the two-week time frame given by the Plaintiffs (*ie*, by 4 August 2014). Accordingly, they wrote to the Plaintiffs' solicitors on 29 July 2014 to ask if they had instructions to accept service of process. Due to the urgency of the matter, the Defendants asked for a reply by the following day.

64 The Plaintiffs' solicitors replied on the same day, stating that it was inappropriate for the Defendants to ask for a reply by the next day. In response, the Defendants explained that a prompt response was required as they had to commence the action in Singapore within the two-week time frame given by the Plaintiffs. On 30 July 2014, the Plaintiffs responded to state that they had not agreed to "waive any of their rights in relation to their limitation defence". The reply went on to state that the Plaintiffs would "raise and rely on the limitation defence" in response to any proceedings commenced by the Defendants in Singapore.

65 In this regard, the Defendants argued that the position adopted by the Plaintiffs was contrary to the clear words set out in Edward's affidavit. It was further submitted that the Plaintiffs had clearly and unequivocally waived the limitation period on the condition that any fresh proceedings be commenced and served within two weeks of my order. Taken aback by the Plaintiffs' sudden change in position, the Defendants requested that further arguments be heard.

66 In a subsequent letter dated 5 August 2014, the Plaintiffs clarified that they had only *offered* to waive the limitation period on their part and the Defendants did not accept their offer. On that basis, the Plaintiffs argued that the offer had no legal effect as it was not incorporated in the order of court.

67 As explained in my grounds of decision above, one of the factors that the court has to take into account when determining whether to grant an anti-suit injunction is the issue of injustice occasioned to the defendant if he or she were restrained from carrying on with the foreign action. On

the facts of the present case, it was clear that the Defendants would be precluded from commencing proceedings in Singapore as the statutory limitation period had already expired. I granted the anti-suit injunction on the basis that the Plaintiffs would fulfil their undertaking not to rely on the limitation defence in the event the Defendants commence legal proceedings in Singapore within two weeks from the date the order was granted. While the Plaintiffs' offer was not incorporated in the order of court, it was certainly one of the factors which were put forward by the Plaintiffs to tilt the balance in favour of granting the anti-suit injunction. During the hearing before me, there was no indication that the offer had expired or had been withdrawn. The Plaintiffs cannot change their stance after the anti-suit injunction has been granted in their favour. There was therefore no need to hear further arguments on this issue.

Conclusion

68 For the reasons set out above, the anti-suit injunction in favour of the Plaintiffs was granted. I ordered the Defendants to pay costs fixed at $7,500, inclusive of disbursements, to the Plaintiffs. This was a global amount which also took into account the dismissal of the Plaintiffs' appeal in Registrar's Appeal No 120 of 2014 (in respect of a costs order made by an Assistant Registrar which was heard at the same time as SUM 659/2014).

[note: 1] Hong Hin Kit's 1st Affidavit filed on 10 February 2014 ("HHK-1") at p 2, para 4.

[note: 2] HHK-1 at p 2, paras 5–6.

[note: 3] HHK-1 at p 2, para 7.

[note: 4] HHK-1 at p 3, paras 8–12.

[note: 5] HHK-1 at p 3, para 12.

[note: 6] Dennis J. Buckley's 1st Affidavit filed on 25 June 2014 ("DJB-1") at p 3, para 6.

[note: 7] HHK-1 at p 4, para 14.

[note: 8] DJB-1 at p 3, paras 7–8.

[note: 9] HHK-1 at pp 18–19.

[note: 10] HHK-1 at p 34.

[note: 11] HHK-1 at p 51.

[note: 12] HHK-1 at p 54.

[note: 13] HHK-1 at p 57.

[note: 14] HHK-1 at p 5, para 21.

[note: 15] HHK-1 at p 60.

[note: 16] HHK-1 at p 5, para 22.

[note: 17] HHK-1 at pp 62–64.

[note: 18] HHK-1 at p 76, para 1.2.5.

[note: 19] HHK-1 at p 6, para 25; DJB-1 at p 9, para 28.

[note: 20] HHK-1 at pp 123–127

[note: 21] HHK-1 at pp 6–9, paras 27–30.

[note: 22] HHK-1 at p 9, paras 31–32.

[note: 23] HHK-1 at p 9, para 33.

[note: 24] HHK-1 at p 9, para 34; DJB-1 at p 10, para 31.

[note: 25] HHK-1 at p 9, para 34.

[note: 26] HHK-1 at p 9, para 35.

[note: 27] HHK-1 at p 10, para 40.

[note: 28] HHK-1 at pp 228–229.

[note: 29] Plaintiffs' Skeletal Submissions dated 18 July 2014 ("PSS") at p 25, para 90.

[note: 30] PSS at p 25, para 94.1.

[note: 31] PSS at p 26, para 94.2.

[note: 32] PSS at p 26, para 96.

[note: 33] PSS at p 27, paras 98–99.

[note: 34] PSS at p 27, para 102.

[note: 35] PSS at p 28, para 105.

[note: 36] PSS at p 28, para 106.

[note: 37] PSS at p 29, para 114.

[note: 38] PSS at p 29, para 115.

[note: 39] PSS at p 30, para 117.

[note: 40] PSS at p 30, para 122.

[note: 41] PSS at p 31, para 125.

[note: 42] PSS at p 31, para 126.

[note: 43] PSS at p 32, para 128.

[note: 44] Defendants' Skeletal Submissions dated 21 July 2014 ("DSS") at p 3, para 4.

[note: 45] DSS at p 4, para 5.

[note: 46] DSS at p 4, para 6.

[note: 47] DSS at pp 5–6, para 11.

[note: 48] DSS at p 6, para 12.

[note: 49] DSS at pp 7–8, para 16.

[note: 50] DSS at p 8, para 17.

[note: 51] DSS at p 9, para 19.

[note: 52] DSS at pp 9–10, paras 20–21.

[note: 53] DSS at pp 11–12, para 22.

[note: 54] DSS at pp 12–13, paras 23–24.

[note: 55] DSS at p 13, para 26.

[note: 56] DSS at p 14, para 27.

[note: 57] DSS at p 14, para 27.

[note: 58] DSS at p 15, paras 28–29.

[note: 59] DSS at p 3, para 4.

[note: 60] DSS at p 4, para 5.

[note: 61] PSS at p 26, para 94.3.

[note: 62] PSS at p 26, para 94.3.

[note: 63] PSS at p 25, para 94.1.

[note: 64] PSS at p 26, para 94.2.

[note: 65] DSS at pp 5–6, para 11.

[note: 66] DSS at p 6, para 12.

[note: 67] DSS at pp 4–5, para 8.

[note: 68] DSS at pp 5–6, para 11.

[note: 69] DSS at p 6, para 12.

[note: 70] PSS at p 30, paras 120–121.

[note: 71] HHK-1 at pp 62–64.

[note: 72] HHK-1 at p 6, para 25.

[note: 73] HHK-1 at p 125.

[note: 74] HHK-1 at p 9, paras 31–32.

[note: 75] HHK-1 at p 9, para 33.

[note: 76] HHK-1 at p 9, para 34.

[note: 77] HHK-1 at p 9, para 34.

[note: 78] HHK-1 at p 9, para 35.

[note: 79] HHK-1 at p 10, para 40.

[note: 80] HHK-1 at p 228, para 10.

[note: 81] DSS at pp 4–5, para 8.

[note: 82] DSS at pp 12–13, paras 23–24.

[note: 83] DSS at p 14, para 27.

[note: 84] DSS at p 15, para 29.

[note: 85] DSS at p 15, paras 28–29.

[note: 86] Hong Hin Kit's 3rd Affidavit filed on 16 July 2014 at p 9, para 42.

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