IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2019] SGCA 80

Civil Appeal No 213 of 2017

Between

(1) MAN Diesel & Turbo SE
(2) MAN Diesel & Turbo Norge AS

… *Appellants*

And

(1) IM Skaugen SE
(2) IM Skaugen Marine Services Pte Ltd

… *Respondents*

JUDGMENT

[Civil Procedure] — [Service]
[Conflict of Laws] — [Natural forum]

Version No 1: 27 Oct 2020 (22:41 hrs)

TABLE OF CONTENTS

INTRODUCTION **1**

FACTS **3**

THE PARTIES 3

THE INITIAL CONTRACTS 4

THE MISREPRESENTATIONS 5

OWNERSHIP OF THE VESSELS 6

THE ASSIGNMENT AGREEMENTS 7

THE CLAIMS 9

THE SINGAPORE PROCEEDINGS 9

THE NORWEGIAN PROCEEDINGS 10

THE DECISION BELOW **11**

GENERAL PRINCIPLES 11

ORDER 11 R 1(F)(II) 13

ORDER 11 R 1(P) 14

THE APPROPRIATE FORUM REQUIREMENT 15

ISSUES BEFORE THIS COURT **16**

ISSUE 1: WHETHER LEAVE TO ADDUCE FURTHER EVIDENCE SHOULD BE GRANTED **17**

WHETHER THE COURT IS ENTITLED TO TAKE INTO ACCOUNT SUBSEQUENT DEVELOPMENTS 19

ABUSE OF PROCESS 22

Version No 1: 27 Oct 2020 (22:41 hrs)

ISSUE 2: WHETHER THE RESPONDENTS' CLAIM SHOULD BE CHARACTERISED AS AN AGGREGATE CLAIM FOR THE PURPOSES OF SATISFYING O 11 23

ISSUE 3: WHETHER THE RESPONDENTS HAVE ESTABLISHED A GOOD ARGUABLE CASE THAT O 11 R 1(F)(II) IS SATISFIED 29

ISSUE 4: WHETHER THE RESPONDENTS HAVE ESTABLISHED A GOOD ARGUABLE CASE THAT O 11 R 1(P) IS SATISFIED 36

THE DISTINCTION BETWEEN THE TWO TESTS AS SET OUT BY THE JUDGE 36

THE CAUSE OF COMPLAINT TEST SHOULD BE REJECTED 38

The substance test has been applied in the context of O 11 r 1(p) 38

Distillers is authority for the substance test 39

The cause of complaint test is not supported by principle 41

Even on the cause of complaint test, Singapore is not where the cause of action arose 42

ISSUE 5: WHETHER SINGAPORE IS THE MORE APPROPRIATE FORUM FOR THE DISPUTE 45

WHETHER SINGAPORE WAS THE MORE APPROPRIATE FORUM AT THE HEARING BEFORE THE JUDGE 47

Whether Germany and Norway were available fora 48

Governing law, place of the tort and possible transfer to the SICC 50

Other connecting factors 54

Conclusion of whether Singapore was the more appropriate forum before the Judge 56

WHETHER SINGAPORE IS THE MORE APPROPRIATE FORUM AT THE HEARING BEFORE THIS COURT 57

Existence of parallel proceedings 57

The current status of the Norwegian proceedings 61

Version No 1: 27 Oct 2020 (22:41 hrs)

OBSERVATIONS.....63

CONCLUSION.....66

Version No 1: 27 Oct 2020 (22:41 hrs)

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MAN Diesel & Turbo SE and another
v
IM Skaugen SE and another

[2019] SGCA 80

Court of Appeal — Civil Appeal No 213 of 2017
Steven Chong JA and Woo Bih Li J
20 November 2019

4 December 2019 Judgment reserved.

Steven Chong JA (delivering the judgment of the court):

Introduction

1 The doctrine of *forum non conveniens* has an impact not only in deciding on the appropriate forum to hear the dispute but more fundamentally, it also decides whether service outside jurisdiction can be granted. The act of service in compliance with O 11 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("ROC") is a *necessary* condition before the court can exercise jurisdiction over the putative foreign defendant. Consequently, in cases where a foreign defendant disputes that Singapore is the appropriate forum, that foreign defendant would typically oppose the action with an application to set aside the service and in the alternative, to stay the proceedings in favour of another forum.

2 This appeal concerns tortious claims arising from alleged negligent and/or fraudulent misrepresentations. The claims bear connections of varying

degrees and relevance with a number of competing jurisdictions – Germany, Norway and Singapore. About seven months after commencing the action in Singapore, the respondents commenced an action in Norway in respect of the *same* claims. The appellants applied to set aside the service and/or to stay the proceedings on the basis that none of the limbs of O 11 r 1 is satisfied and that Singapore is not *forum conveniens*. Although the Assistant Registrar ("the AR") found that the respondents had demonstrated a good arguable case that the claims fell within O 11 r 1(*f*)(ii), he found that Singapore was not *forum conveniens* and accordingly set aside the service. On appeal, the High Court Judge ("the Judge") allowed the appeal.

3 This appeal raises several interesting points of law and the Judge rightly recognised this by granting leave to appeal. In finding that the cause of action arose in Germany, the Judge correctly applied the substance test. He went on to observe, however, that the substance test is only relevant for the purposes of determining the place where the cause of action arose in the context of a stay application on grounds of *forum non conveniens*. But, for the purposes of satisfying the leave requirements for service outside jurisdiction under O 11 r 2(2), a different approach, which he described as plaintiff-centric, is warranted. In his view, this approach was consistent with the cause of complaint test based on his understanding of the Privy Council decision in *Distillers Co (Biochemicals) Ltd v Laura Anne Thompson* [1971] AC 458 ("*Distillers*"). At the same time, the Judge acknowledged that *Distillers* was in fact interpreted by this court in *JIO Minerals FZC and others v Mineral Enterprises Ltd* [2011] 1 SLR 391 ("*JIO Minerals*") to represent the substance test albeit in a different context.

4 Determining the place where the cause of action arose, in our view, should neither be plaintiff-centric nor defendant-centric. Instead, it should

Version No 1: 27 Oct 2020 (22:41 hrs)

necessarily be fact-centric by examining all the material facts. Therefore, is there any justification to adopt different tests to arrive at the same factual finding, *ie*, the place where the cause of action arose, even if such finding may well serve or be in aid of different purposes? Are the two tests in substance the same? Or as the Judge observed, is the distinction between the two tests a "false dichotomy"? Furthermore, since the decision below, the proceedings in Norway have reached an advanced stage. In examining whether Singapore is the appropriate forum to hear the dispute, is the court entitled to take into account subsequent developments or should the court confine its analysis to the state of affairs at the time when the order granting leave for service was made? These are some of the questions which we will address below.

Facts

The parties

5 There are four parties to this dispute. The first respondent, IM Skaugen SE, is a company incorporated in Norway. It is the holding company of the Skaugen group, which provides marine and transportation services in the oil and gas industry. The second respondent, IM Skaugen Marine Services Pte Ltd, is a Singapore-incorporated company. It is a wholly owned subsidiary of the first respondent and is one of the various ship-owning arms of the Skaugen group.[1]

6 The first appellant, MAN Diesel & Turbo SE, is a company incorporated in Germany. It is part of the MAN group which, amongst other things, designs and manufactures engines for ships. The second appellant, MAN Diesel & Turbo Norge AS, is a company incorporated in Norway. It is a wholly

[1] Statement of Claim (Amendment No 1) ("SOC"), paras 1–2.

Version No 1: 27 Oct 2020 (22:41 hrs)

owned subsidiary of the first appellant and maintains contact with the customers of the MAN group in Norway.[2]

7 In *both* the Singapore and Norwegian proceedings, the respondents allege that the appellants fraudulently and/or negligently misrepresented the rate of fuel consumption in a particular model of engines which they supplied to the Skaugen group ("the engines").

The initial contracts

8 On 6 July 2000, the first respondent entered into four shipbuilding contracts with shipbuilders from China ("the first four contracts"). The terms of the first four contracts gave the first respondent the right to approve the supplier of the main engines in the ships. On 7 August 2000, the first four contracts were novated to Somargas Limited, a special purpose vehicle ("SPV") incorporated in the Cayman Islands.[3] Somargas Limited is owned equally by the first respondent and GATX Third Aircraft Corporation ("GATX").[4]

9 Vintergas Limited is another SPV incorporated in the Cayman Islands which is also owned equally by the first respondent and GATX. On 15 May 2001, Vintergas Limited entered into another two contracts with the shipbuilders. The terms were similar to the first four contracts.

10 In total, there were therefore six ships which were to be built by the shipbuilders for the Skaugen group. We refer to the six ships as "the Vessels".[5]

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2 SOC, paras 3–4.

3 ROA Vol III (Part A), p 8 para 15.

4 ROA Vol III (Part A), p 8 para 15.

5 SOC, para 25.

Version No 1: 27 Oct 2020 (22:41 hrs)

The misrepresentations

11 Pursuant to its right to approve the supplier of the main engines, the first respondent entered into negotiations with the appellants. In the course of negotiations, the appellants provided to the first respondent and the shipbuilders various documents which contained representations concerning the engines' rate of fuel consumption.[6]

12 Subsequently, the first respondent chose the appellants' engines for installation in the Vessels. Between May 2001 and June 2002, as and when an engine was ready to be handed over by the first appellant to the shipbuilders, the first appellant would conduct a field acceptance test ("FAT") at its factory in Germany. The purpose of the FATs were to, *inter alia*, verify the fuel consumption values of the engines.[7]

13 Close to ten years later, in May 2011, the first appellant issued a press release stating that there were indications of possible irregularities in the FATs ("the May 2011 Press Release"). Specifically, the results of the fuel consumption measurement could have been internally manipulated.[8] Following investigations, the first appellant then informed the respondents that three of the six engines supplied to the Vessels could have been affected by the irregularities. In this connection, we note that the respondents' position is that *all* six engines would have been affected by the irregularities.[9] That is a question of fact which we do not have to deal with presently.

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6 SOC, para 12, 22 and 23.

7 ROA Vol III (Part C), p 201 para 20.

8 ROA Vol III (Part C), p 203 para 29.

9 SOC, para 36(6).

Version No 1: 27 Oct 2020 (22:41 hrs)

14 For present purposes, we should highlight that the Judge found the misrepresentation at each FAT to be at the "core of the [respondents'] loss", as opposed to the misrepresentations that were made in the course of negotiations. Accordingly, the Judge held that the misrepresentation of the engines' rate of fuel consumption was made in Germany, received by the respondents in Germany and relied upon in Germany. Applying the substance test, Germany was the place of the tort (*IM Skaugen SE and another v MAN Diesel & Turbo SE and another* [2018] SGHC 123 ("the GD") at [104]).

15 We observe that the Judge's finding that Germany is the place of the tort is not an issue before us. Hence, for this appeal, we will proceed on the basis that Germany is the place of the tort, as opposed to Norway or Singapore.

Ownership of the Vessels

16 We now turn to the ownership of the Vessels both *before* and *after* the May 2011 Press Release. This is a vital piece of information as *the only claim* brought by the respondents in their own capacity is the Investigation Costs Claim (as defined at [21] below). The remaining three claims are brought by way of assignment from successive owners of the Vessels, who are as follows:

(a) **Somargas HK**: On 12 March 2002, Somargas Limited and Vintergas Limited entered into novation agreements with a Hong Kong-incorporated company known as Somargas Ltd ("Somargas HK"). They agreed to transfer all their rights, benefits, obligations and liabilities under the six shipbuilding contracts to Somargas HK, which was owned equally by the first respondent and GATX.[10] The Vessels were duly

[10] SOC, para 44(1).

Version No 1: 27 Oct 2020 (22:41 hrs)

delivered by the shipbuilders to Somargas HK between October 2002 and October 2003.[11]

(b) **Somargas SG**: In February 2011, Somargas HK transferred ownership of the Vessels, as well as its assets and liabilities to Somargas II Pte Ltd ("Somargas SG"), its wholly owned subsidiary incorporated in Singapore.[12]

(c) **GATX entities**: In April 2013, Somargas SG transferred ownership of three of the Vessels to the GATX group ("the GATX entities"), which continues to own these Vessels.[13] The remaining three Vessels were sold to third parties between June 2013 and December 2014.[14]

The assignment agreements

17 From the sequence of events described in the preceding paragraph, Somargas HK, Somargas SG and the GATX entities were successive ship owners who owned the Vessels at different time periods. Pursuant to two agreements, all possible claims held by Somargas HK, Somargas SG and the GATX entities against the appellants were assigned to the respondents.

(a) **Assignment of claims held by GATX entities:** On 23 June 2014, by way of a claims transfer agreement, GATX agreed to transfer

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11 SOC, para 35.

12 SOC, para 44(5).

13 SOC, para 44(9)(b).

14 SOC, paras 44(10) and 44(13).

Version No 1: 27 Oct 2020 (22:41 hrs)

all possible claims by GATX and/or its subsidiaries against the appellants, in relation to the engines, to the first respondent.[15]

(b) **Assignment of claims held by Somargas SG and Somargas HK**: On 27 January 2015, by way of an assignment agreement, the second respondent took assignment of all claims held by Somargas SG against the Appellants in relation to the engines.[16] This allegedly included the claims held by the previous ship owner Somargas HK. According to the respondents, when Somargas HK transferred its ownership of the Vessels, assets and liabilities to Somargas SG in February 2011, it was the "intention and understanding" that Somargas SG would hold the benefit of any claims held by Somargas HK.[17]

18 It is convenient at this point to deal with the appellants' objection that there is no documentary evidence that the claims of Somargas HK were ever transferred to Somargas SG, and therefore could not have been assigned to the respondents.[18] Because the respondents are only required to show a "good arguable case" that their claims fall under O 11 r 1 (a standard which we will elaborate on below), it is not necessary for us to deal with this contested factual issue at this stage. It suffices for us to "look primarily at the plaintiff's [*ie*, the respondents'] case and not to attempt to try disputes of fact on affidavit": see *Bradley Lomas Electrolok Ltd and another v Colt Ventilation East Asia Pte Ltd and others* [1999] 3 SLR(R) 1156 ("*Bradley Lomas*") at [15], which we

15 SOC, para 44(14).

16 SOC, para 44(15).

17 ACB Vol (II) (Part A), pp 271–272.

18 Appellants' case, para 17.

Version No 1: 27 Oct 2020 (22:41 hrs)

affirmed in *Vinmar Overseas (Singapore) Pte Ltd v PTT International Trading Pte Ltd* [2018] 2 SLR 1271 ("*Vinmar*") at [42].

19 We therefore proceed on the assumption that the claims held by Somargas HK, Somargas SG and the GATX entities against the appellants were validly assigned to the respondents.

The claims

20 Pursuant to the two agreements stated above at [17], the respondents claim damages against the appellants for, *inter alia*, the loss and damage suffered by Somargas HK, Somargas SG and the GATX entities by way of excessive fuel consumption.[19] In our judgment, we refer to the assigned claims as "the Somargas HK Claim", "the Somargas SG Claim", and "the GATX Claim".

21 In addition, the respondents also claim damages arising from the time and resources incurred by the first respondent in investigating the excessive fuel consumption of the Vessels and in engaging the appellants in negotiating a settlement. We refer to this as the "Investigation Costs Claim".

22 Unlike the three assigned claims, the Investigation Costs Claim is the only claim brought by the respondents in their own capacity.

The Singapore proceedings

23 On 28 January 2015, the respondents commenced the Singapore proceedings. While the respondents secured leave *ex parte* to serve the writ on

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19 SOC, para 46.

Version No 1: 27 Oct 2020 (22:41 hrs)

the appellants outside Singapore, the AR set aside the service on the basis that Germany and not Singapore was the more appropriate forum for the dispute: *IM Skaugen SE and another v MAN Diesel & Turbo SE and another* [2016] SGHCR 6 at [139].

24 The matter came before the Judge as a Registrar's Appeal. On 2 August 2017, the Judge allowed the respondents' appeal and held that there was a good arguable case that the respondents' claims came within O 11 r 1(*f*)(ii) and O 11 r 1(*p*). Further, unlike the AR, the Judge found that Singapore was the appropriate forum for the dispute, on the primary ground that both Germany and Norway were not available fora. The Judge granted the appellants' leave to appeal against his decision allowing service out of jurisdiction.

The Norwegian proceedings

25 Apart from the Singapore proceedings, the respondents also commenced an action against the appellants in Norway. The substantive Norwegian proceedings were commenced on 26 August 2015, approximately seven months after the commencement of the Singapore proceedings.[20] It is not in dispute that both the Norwegian and Singapore proceedings involve the exact same claims and issues. Further, the respondents also acknowledge that they did not seek a stay of either the Norwegian or Singapore proceedings. Instead, they were content to let both proceedings progress. The key difference is that while the Singapore proceedings remain at the service stage, the Norwegian proceedings have advanced significantly. The parties have exchanged pleadings and responded to disclosure requests in the Norwegian proceedings, and a hearing

[20] ROA Vol III (Part M), p 4 para 6.

Version No 1: 27 Oct 2020 (22:41 hrs)

was scheduled to take place in October 2018.[21] While the hearing has not taken place due to some complications arising out of the first respondent's bankruptcy (which we set out at [163]–[168] below), the point still remains that the Norwegian proceedings have reached a far more advanced stage than the Singapore proceedings. As we will explain, this is a significant point in the *forum non conveniens* analysis.

The decision below

General principles

26 In his decision, the Judge provided a useful summary of the requirements for valid service out of jurisdiction and the applicable burden and standard. We generally agree with these principles which we will apply in our analysis below.

27 First, it is well established that there are three requirements for valid service out of jurisdiction, as was set out in *Zoom Communications Ltd v Broadcast Solutions Pte Ltd* [2014] 4 SLR 500 ("*Zoom Communications*") at [26] (see also *Oro Negro Drilling Pte Ltd and others v Integradora de Servicios Petroleros Oro Negro SAPI de CV and others and another appeal (Jesus Angel Guerra Mendez, non-party)* [2019] SGCA 74 ("*Oro Negro*") at [54]):

(a) the plaintiff's claim must come within one of the jurisdictional gateways in O 11 r 1;

(b) the plaintiff's claim must have a sufficient degree of merit; and

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[21] ROA Vol III (Part M), p 62.

Version No 1: 27 Oct 2020 (22:41 hrs)

(c) Singapore must be the more appropriate forum for the trial or determination of the action ("the appropriate forum requirement").

28 The Judge rightly observed that where a plaintiff relies on a head of jurisdiction under O 11 r 1 which, in itself, requires the court to examine the merits of the plaintiff's claim, *ie* requirement (a), the inquiry on whether the plaintiff's claim has a sufficient degree of merit, *ie* requirement (b), is subsumed in the former: GD at [37]. In the present appeal, the relevant jurisdictional gateways which the respondents rely on all require an examination of the merits. Consequently, requirement (b) does not have to be addressed separately.

29 Second, the Judge noted that in an *ex parte* application for service under O 11, the burden of establishing the three requirements is on the plaintiff. This burden remains on the plaintiff in a setting aside application taken out by the defendant: GD at [34].

30 Third, as for the applicable standard, the plaintiff must show that it has a good arguable case that its claim comes within one of the jurisdictional gateways in O 11 r 1: GD at [35]. We pause here to note the Judge was of the view that a good arguable case entails one side "having a *much better* argument on the material available" [emphasis added]: GD at [35]. We have since clarified in *Vinmar* at [45], which post-dates the Judge's decision, that the plaintiff is only required to have "the better of the argument", as opposed to a "much better argument". The latter standard would be imposing too high a standard of proof. In our judgment, the former standard is sufficient to reflect that the threshold is more than a mere *prima facie* case, but is lower than that of a balance of probabilities.

Version No 1: 27 Oct 2020 (22:41 hrs)

31 In addition, for the appropriate forum requirement, *ie* requirement (c), the Judge noted that the plaintiff must discharge its burden to show that Singapore is *clearly* the forum in which the case can be suitably tried for the interests of all the parties and for the ends of justice: GD at [39]. In *Zoom Communications* at [77], we clarified that the substance of the test in *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460 ("*Spiliada*") is essentially the same whether the inquiry takes place as part of a challenge to the existence of the local court's jurisdiction (as in the present case), or as part of an application for a stay of proceedings on improper forum grounds. However, what is different is that the *burden of proof* is reversed. In the case of a plaintiff defending a challenge to jurisdiction, the plaintiff has the burden to show that the *local court* is the forum which is clearly more appropriate for the trial of the action. In the case of a defendant seeking a stay of proceedings on improper forum grounds, the defendant has the burden of showing that a foreign jurisdiction is the forum which is clearly more appropriate for the trial of the action: *Zoom Communications* at [77]. We also observed in *Oro Negro* that it remains an open question whether the second stage of the *Spiliada* test is applicable in the context of leave applications for service outside jurisdiction (*ie*, whether the Singapore courts can nevertheless grant leave if the plaintiff can show that substantial justice cannot be done in the otherwise appropriate foreign forum): *Oro Negro* at [80(d)].

Order 11 r 1(f)(ii)

32 Order 11 r 1(*f*)(ii) states as follows:

> **Cases in which service out of Singapore is permissible (O.11, r.1)**
>
> **1.** Provided that the originating process does not contain any claim mentioned in Order 70, Rule 3(1), service of an originating

Version No 1: 27 Oct 2020 (22:41 hrs)

> process out of Singapore is permissible with the leave of the Court if in the action —
>
> …
>
> (*f*)(ii) the claim is wholly or partly founded on, or is for the recovery of damages in respect of, damage suffered in Singapore caused by a tortious act or omission whenever occurring;

33 The Judge found that the respondents had established a good arguable case that their claim fell within O 11 r 1(*f*)(ii). The Judge appeared to be aware of the different components of the claim. Nevertheless, he treated the claims as an aggregate claim and found that there was damage *partly* suffered in Singapore arising from the misrepresentation. This was because Somargas SG and the GATX entities, which are Singapore-incorporated entities, incurred additional fuel expenses. Further, the capital value of the Vessels was diminished: GD at [142]–[143].

Order 11 r 1(p)

34 Order 11 r 1(*p*) states as follows:

> **Cases in which service out of Singapore is permissible (O. 11, r.1)**
>
> **1.** Provided that the originating process does not contain any claim mentioned in Order 70, Rule 3(1), service of an originating process out of Singapore is permissible with the leave of the Court if in the action —
>
> …
>
> (*p*) the claim is founded on a cause of action arising in Singapore;

35 According to the Judge, in determining if the claim is founded on a cause of action arising in Singapore, the court ought not to apply the substance test set out by this court in *JIO Minerals*. The substance test refers to the test which

Version No 1: 27 Oct 2020 (22:41 hrs)

looks at the events constituting the tort and asks where, in substance, the cause of action arose (*JIO Minerals* at [90]).

36 The Judge observed that *JIO Minerals* was not a case on O 11 r (1)(*p*). Rather, it was a case which considered the double actionability rule in an application to stay proceedings on grounds of *forum non conveniens*. The decision of the Privy Council in *Distillers* was therefore of greater relevance, as it considered a statutory provision that was *in pari materia* with O 11 r (1)(*p*). According to the Judge, *Distillers* stood for a test which focused on "the cause of complaint", which "would obviously include the type of harm which the plaintiff complains of and seeks to remedy": GD at [165]. Given that the cause of the respondents' complaint included the increased fuel expenditure incurred by Singapore-incorporated entities, which was continuing in nature, the Judge held that the respondents had made a good arguable case that O 11 r (1)(*p*) was satisfied: GD at [168].

The appropriate forum requirement

37 The Judge observed that under O 11 r 2(2), the court has to be satisfied that "the case is a proper one for service out of Singapore". This would entail determining the more appropriate forum of the dispute: GD at [170].

38 The Judge observed that Germany was *prima facie* the more appropriate forum. The place where a tort occurred is *prima facie* the more appropriate forum: *Rickshaw Investments Ltd and another v Nicolai Baron von Uexkull* [2007] 1 SLR(R) 377 ("*Rickshaw*") at [37]. However, the Judge considered that Germany was an unavailable forum. According to the Judge, Art 27 of the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2007] OJ L 339/3 ("the Lugano Convention")

Version No 1: 27 Oct 2020 (22:41 hrs)

required Germany to cede jurisdiction over the dispute in favour of Norway, which was the court first seised: GD at [173].

39 Further, at the time the Judge heard the matter and gave oral grounds for his decision, the Norwegian Court of Appeal had dismissed the respondents' claim in its entirety on the basis that it was subject to arbitration (this decision was later reversed by the Supreme Court of Norway).[22] According to the Judge, this meant that Norway was also not an available forum: GD at [237]. Accordingly, the unavailability of both Germany and Norway sufficed to render Singapore as the appropriate forum for the dispute: GD at [128]. Consequently, the Judge allowed the respondents' appeal in relation to service out of jurisdiction. For completeness, the Judge went on to deal with the other connecting factors assuming that both Germany and Norway were available fora.

Issues before this Court

40 We observe that the following findings made by the Judge are no longer in issue in the present appeal:

(a) The respondents have established a good arguable case that they have standing to bring the action against the appellants: GD at [72].

(b) The respondents did not fail to make full and frank disclosure at the *ex parte* service out of jurisdiction application: GD at [74].

(c) The place of the tort is Germany: GD at [104].

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22 1st affidavit of Henrik Boehlke dated 30 October 2017, para 8.

Version No 1: 27 Oct 2020 (22:41 hrs)

(d) The respondents have established a good arguable case that the tort is actionable in Germany and Singapore, thus satisfying the double actionability rule: GD at [130]. The flexible exception to the double actionability rule does not apply: GD at [131].

(e) The respondents' claim does not fall within O 11 r (1)(*f*)(i): GD at [140].

41 In the circumstances, the issues that arise for our determination in the present appeal are:

(a) whether the appellants and respondents should be granted leave to adduce further evidence in CA/SUM 89/2018 and CA/SUM 109/2018;

(b) whether the respondents' claim should be characterised as an aggregate claim for the purposes of satisfying O 11;

(c) whether the respondents have established a good arguable case that O 11 r 1(*f*)(ii) is satisfied;

(d) whether the respondents have established a good arguable case that O 11 r 1(*p*) is satisfied; and

(e) whether Singapore is the more appropriate forum for the dispute, such that the case is a proper one for service out of Singapore under O 11 r 2(2).

Issue 1: Whether leave to adduce further evidence should be granted

42 It is uncontroversial that in interlocutory appeals, the requirements in *Ladd v Marshall* [1954] 1 WLR 1489 – non-availability, relevance and

Version No 1: 27 Oct 2020 (22:41 hrs)

credibility – do not have to be applied in an unattenuated manner. The court can however remain guided by the three requirements: *Anan Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co)* [2019] 2 SLR 341 at [57].

43 In the present appeal, the appellants, by way of CA/SUM 89/2018, are seeking to adduce two affidavits from Mr Henrik Boehlke. Mr Boehlke represents the appellants in the Norwegian proceedings. In these two affidavits, Mr Boehlke lists and explains the developments in the Norwegian proceedings *after* the Judge's decision. The appellants rely on these developments, *inter alia*, to contend that Norway is the more appropriate forum for the dispute.

44 In the event that leave is granted to the appellants, the respondents, by way of CA/SUM 109/2018, seek leave to adduce affidavits from Mr Morits Skaugen (the chief executive officer of the first respondent and director of the second respondent) and Mr Truls Leikvang (counsel for the respondents in the Norwegian proceedings). These affidavits explain why the respondents have had to pursue their claims both in Singapore and Norway.

45 There is no question that the requirement of non-availability is satisfied. Neither is there anything to suggest that the further evidence is not credible.

46 In our view, this issue turns on the question of *relevance*. Put simply, in examining whether Singapore is the more appropriate forum, is the court entitled to take into account subsequent developments after the Judge's decision, or is the court confined to the relevant materials which were before the Judge? If it is the former, it follows that the application to adduce further evidence ought to be allowed.

Version No 1: 27 Oct 2020 (22:41 hrs)

Whether the court is entitled to take into account subsequent developments

47 It appears to be common ground that the court is entitled to take into account subsequent developments *after* the Judge's decision in determining if Singapore is the more appropriate forum. Nevertheless, given that this court has yet to make an authoritative pronouncement on this issue, we take this opportunity to provide our observations.

48 We first note that the Judge was confronted with a similar issue below. There, it was the appellants, *ie*, the parties who are now seeking to adduce the further evidence, who submitted that their setting aside application had to be determined on the factual position as it stood when the respondents secured the leave *ex parte*: GD at [179]. The appellants were seeking to advance this argument as Germany was an available forum at the time when leave was obtained *ex parte* but was found to be no longer available at the time of the setting aside application before the Judge. We pause at this juncture to note that, in our view, Germany *was* an available forum even at the time of the hearing before the Judge but we will address that separately below.

49 After a comprehensive review of the relevant authorities, the Judge held that the court is entitled, during the setting aside application, to take into account events subsequent to the respondents obtaining leave *ex parte*. The reasons provided by the Judge can be summarised as follows:

> (a) Shutting out the subsequent developments will only result in a waste of costs and time for both parties. For instance, if the Judge had set aside the service on the basis that Germany was an available forum, when it was not at the time of the hearing, the plaintiff could simply seek leave to re-serve the writ or to serve a fresh writ. The defendant, if it was so minded, would have to return to court to set aside the re-served or

Version No 1: 27 Oct 2020 (22:41 hrs)

fresh writ. The relevant issues could have been dealt with at the initial setting aside application: GD at [190].

(b) A setting aside application is an *inter partes* hearing. The other party would have full and proper notice of the subsequent developments which are being relied on: GD at [191].

(c) The court is not *obliged* to take into consideration subsequent developments if there is sharp practice or substantial prejudice to the other party, such that it amounts to an abuse of the process of the court: GD at [193].

(d) In a stay application, the court will have regard to the subsequent developments. The two approaches ought to be aligned: GD at [196].

50 We endorse the holding of the Judge and the reasons provided. It must be right that the court in a setting aside application is able to take into account subsequent developments after *ex parte* leave was granted. If the decision in the setting aside application is appealed against, the Judge sitting in the High Court is also entitled to consider the subsequent developments. If that Judge grants leave to appeal, this court is also entitled to have regard to the subsequent developments.

51 We say so for three main reasons – principle, coherence and policy.

52 First, as a matter of *principle*, this approach furthers the purpose of the doctrine of *forum non conveniens*, which is to locate the jurisdiction in which the case may be tried more suitably for the interests of all the parties and for the ends of justice: *Rappo, Tania v Accent Delight International Ltd and another and another appeal* [2017] 2 SLR 265 ("*Rappo Tania*") at [72]. In deciding if

Version No 1: 27 Oct 2020 (22:41 hrs)

Singapore is the more appropriate forum, the court has to consider the forum with the most real and substantial connection at the material time, and not at the previous hearing. At this stage, the court is considering whether to *exercise* its jurisdiction – there is no reason in principle why the court should go back in time in order to determine if it should exercise or continue to exercise jurisdiction over the foreign defendant. That would be antithetical to the very purpose of the doctrine of *forum non conveniens*. The selection of the more appropriate forum is quite plainly a dynamic inquiry. Thus in a situation such as the present case where there is an appeal, it is essential for the appellate court to examine all the available evidence before it as opposed to the state of the evidence when the application was *first* heard and decided below, in order to determine whether service should henceforth be allowed or set aside.

53 Second, this approach promotes *coherence* and *consistency* in the law. There is no reason, in principle, why subsequent developments can be taken into account for stay applications but not for O 11 applications. The same normative considerations, referred to in the preceding paragraph, apply to both applications. As we noted in *Vinmar* at [119], where the same normative considerations underlie different areas of the law, the law should strive to speak with one voice. We further note that in *Lakshmi Anil Salgaocar v Jhaveri Darsan Jitendra* [2019] 2 SLR 372 ("*Lakshmi*"), we had, in the context of an application for an anti-suit injunction, allowed subsequent developments after the decision below to be taken in account.

54 Third, as a matter of *policy*, this approach furthers the interests of parties by allowing cases to be dealt with expeditiously having regard to the saving of time and costs.

Version No 1: 27 Oct 2020 (22:41 hrs)

55 Finally, it is self-evident that the court will only consider subsequent developments that are *relevant* to the *forum non conveniens* analysis. Insofar as there is a concern that parties will raise wholly unmeritorious matters on the pretext of them being "subsequent developments", it is trite that the concept of abuse of process pervades the law of civil procedure and would apply in its full force: *Vinmar* at [129].

Abuse of process

56 Indeed, in the present appeal, the respondents object to the appellants' application to adduce fresh evidence on the basis that it is an abuse of process. Specifically, they highlight that the appellants are seeking to raise the issue of parallel proceedings, when this was not raised below. Further, before the AR, the appellants had also confirmed that they were not relying on the issue of parallel proceedings, as discussed in *Virsagi Management (S) Pte Ltd v Welltech Construction Pte Ltd and another appeal* [2013] 4 SLR 1097 ("*Virsagi*").[23]

57 We disagree with the respondents' contention. Having perused the notes of evidence of the hearing before the AR, it is clear that while the appellants had informed the AR that they were not relying on *Virsagi*, this was in relation to the doctrine of forum election which is *distinct* from the doctrine of *forum non conveniens*. In *Virsagi*, this court explained that the presence of parallel proceedings can be considered in two situations. It can be considered as part of the application of the doctrine of *forum non conveniens*, pursuant to the principles in *Spiliada*. It can also be considered under the *separate* doctrine of forum election, which involves a separate analytical framework from that of

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[23] Respondents' skeletal arguments for CA/SUM 89/2018 and CA/SUM 109/2018, para 7.

Version No 1: 27 Oct 2020 (22:41 hrs)

forum non conveniens (*Virsagi* at [41]–[42]). Under the doctrine of forum election, a plaintiff who has commenced parallel proceedings in respect of the same dispute is put to an election because it is oppressive for the defendant to have to defend itself in two different jurisdictions, and because there is a real risk of inconsistent findings by the courts in each of those jurisdictions (*Rappo Tania* at [65]). In the present appeal, we are *not* concerned with the doctrine of forum election, with the caveat that the *normative considerations* underlying that doctrine remain relevant for the doctrine of *forum non conveniens*. Rather, the factor of parallel proceedings is one that we consider in the *forum non conveniens* analysis.

58 In that context, it is clear beyond doubt that the appellants had raised the Norwegian proceedings as part of the *forum non conveniens* analysis before the Judge, which he then considered at [234]–[239]. In these circumstances, the appellants' application is not an abuse of process and we allowed CA/SUM 89/2018. On that basis, we also allowed the respondents' contingent application to adduce further evidence in CA/SUM 109/2018 in order to address us on why the two proceedings had to progress concurrently. Finally, at the hearing before us, the appellants sought leave to admit the fourth affidavit of Mr Henrik Boehlke filed on 20 March 2019. The respondents confirmed that they had no objections and we granted the application.

Issue 2: Whether the respondents' claim should be characterised as an aggregate claim for the purposes of satisfying O 11

59 Before turning to the specific jurisdictional gateways under O 11 r 1, we first address an important preliminary issue which has a critical bearing on our assessment of whether the jurisdictional gateways in O 11 r 1 are satisfied.

Version No 1: 27 Oct 2020 (22:41 hrs)

60 According to the appellants, there are four distinct claims in the statement of claim, three of which were assigned by the previous ship owners to the Respondents. The Judge erred in treating the four claims as a single aggregate claim, and ought to have separately assessed whether each of the four claims satisfied O 11 r 1(*f*)(ii) or O 11 r 1(*p*).

61 The respondents submit that the appellants' arguments are "clearly untenable" and the claims should not be disaggregated. Applying the principle of joinder, there are "common questions of law and fact … [the] relief claimed are in respect of or arise out of the same transaction or series of transactions".[24] It is further contended that the first respondent is the holding company of the Skaugen group and was "at the centre of the factual matrix on which the claims … are founded".[25]

62 It appears to us that the Judge was alive to the different components of the respondents' claim: the three claims *assigned* by the ship owners to the respondents and the Investigation Costs Claim brought by the first respondent in its own capacity. To recapitulate, the various components are:

(a) **Somargas HK Claim (by way of assignment)**: Loss and damage incurred by Somargas HK from the time it accepted delivery of the Vessels between October 2002 to October 2003 and February 2011.

(b) **Somargas SG Claim (by way of assignment)**: Loss and damage incurred by Somargas SG from February 2011 to between April 2013 and December 2014.

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24 Respondents' case, para 20.

25 Respondents' case, para 21.

Version No 1: 27 Oct 2020 (22:41 hrs)

(c) **GATX Claim (by way of assignment)**: Loss and damage incurred by the GATX entities from the time they obtained ownership of three of the Vessels in April 2013.

(d) **Investigation Costs Claim**: Loss and damage incurred by the first respondent in the form of time and resources expended to investigate the excessive fuel consumption of the Vessels, and the time and resources of engaging the appellants in negotiating the settlement of the respondents' claims against the appellants.

63 In considering whether the respondents had established a good arguable case that their claim fell within one or more of the jurisdictional gateways under O 11 r 1, the appellants contend that the Judge did not distinguish between the different components of the respondents' claim.

64 We agree with the appellants that the claims, which are distinct from one another, should not have been viewed as a single aggregate claim. Instead, the claims ought to have been treated as four distinct claims incurred by four different entities at four different periods of time. The Judge had therefore, with respect, erred in this regard.

65 In our judgment, it was incumbent on the Judge to assess whether *each* of the four claims, standing alone, would have satisfied one or more of the jurisdictional gateways in O 11 r 1.

66 We consider this approach to be logical and sensible as a matter of *principle*. We note that the transfer of ownership of the Vessels and the assignment of the claims were all conscious and deliberate decisions taken by the Skaugen group. However, the mere act of assigning a claim, in and of itself, cannot possibly convert a claim which does not satisfy the jurisdictional

Version No 1: 27 Oct 2020 (22:41 hrs)

requirement in O 11 r 1 into an otherwise valid claim. Otherwise, parties would effectively be allowed to circumvent O 11 r 1 by assigning their alleged claims (which are otherwise outside the scope of O 11 r 1) to a party whose *own claim* is able to satisfy one or more of the jurisdictional gateways under O 11 r 1. The foundation for a court's jurisdiction is primarily territorial. It is for that reason that the various jurisdictional gateways in O 11 r 1 have been carefully delimited and defined. It is incomprehensible how a single corporate decision to assign a claim can somehow result in the O 11 r 1 requirements being bypassed.

67 We note that our view is supported by the fact that in hearing O 11 applications, the court is able to grant leave on terms or as to part of the claim only (see *Singapore Civil Procedure 2019* vol 1 (Chua Lee Ming gen ed) (Sweet & Maxwell, 2019) at para 11/1/7). Moreover, as observed in *Halsbury's Laws of Singapore* vol 6(2) (LexisNexis, 2016 Reissue) ("*Halsbury's Laws*") at para 75.031, citing *The Volvox Hollandia* [1988] 2 Lloyd's Rep 361 at 371–372, "[t]he plaintiff's claims may be good in some parts but bad in others, in which case the plaintiff will only be allowed to proceed in respect of the good parts."

68 The facts of this case illustrate the importance of treating each distinct claim separately. Under O 11 r 1(*f*)(ii), a claim which is *partly* founded on damage suffered in Singapore is sufficient to satisfy that limb. If the four claims are seen as one aggregate claim, it suffices for just one of the four claims to pertain to damage incurred in Singapore. However, if the four distinct claims are assessed separately, then *each* claim has to at least be *partly* founded on damage incurred in Singapore if O 11 r (1)(*f*)(ii) is to be satisfied.

69 We note that the position we have taken is similar to the one adopted in England. In *Glencore International AG v Exeter Shipping Ltd and others* [2002] CLC 1090, Rix LJ stated at [50]:

Version No 1: 27 Oct 2020 (22:41 hrs)

> … in the absence of a general submission to the jurisdiction (see *The Kapetan Markos* [1986] 1 Lloyd's Rep 211 at 228/9) the general rule is that permission has to be obtained within the four corners of the English long-arm statute for *each separate claim made against him*: see *Holland v. Leslie* [1894] 2 QB 346 and *Waterhouse v. Reid* [1938] 1 KB 743. [emphasis added]

70 As such, in determining whether the plaintiff has established a good arguable case that one or more of the jurisdictional gateways in O 11 r 1 is satisfied, the court must consider each distinct claim separately. Further, in cases involving the assignment of claims, the jurisdictional requirements are assessed from the perspective of the *original assignor* as the claimant and not the *ultimate assignee* - *ie* the question is whether the original assignor, if it was suing in its own capacity, is able to bring the claim against the defendant? This was explained by Mr Justice Marcus Smith in *Microsoft Mobile OY (Ltd) v Sony Europe Ltd and others* [2018] All ER (Comm) 419 ("*Microsoft Mobile*") at [158]–[159]:

> 158 In my judgment, where the identity of the person whose "claim" is being considered for the purposes of a [head of jurisdiction], that person is the original holder of the claim, and not the last person to whom that claim was transferred. The jurisdictional rules must be applied not in relation to the claim as assigned (where the ultimate assignee would be regarded as the claimant) but to the claim as it originally subsisted (so that the original assignor would be regarded as the claimant).
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> 159 This is clearly the approach of English national law. The assignee cannot, by virtue of the assignment, be in a better position than the assignor would have been in. This is reflected in the damages that the assignee can recover if a cause of action is assigned to him (where the rule is that the assignee cannot recover more than the assignor could have done) and in the fact that an assignee is bound by choice of jurisdiction and arbitration clauses.

71 We turn to the respondents' contentions. The respondents contend that there are common questions of law and fact that arise in each of the respondents' claims against the appellants. Further, all the relief claimed arise out of the same

Version No 1: 27 Oct 2020 (22:41 hrs)

transaction or series of transactions.[26] As the Judge found, the misrepresentation was intended to be relied upon by the first respondent as well as the subsequent ship owners (*ie*, Somargas HK, Somargas SG and the GATX entities). All the ship owners would have suffered damage that resulted directly from the misrepresentation, thus satisfying O 11 r 1(*f*)(ii).

72 With respect, this misses the point. The relevant test in O 11 r 1(*f*)(ii) is whether the claim is wholly or partly founded on damage *suffered in Singapore*. The fact that any given ship owner suffered damage which directly resulted from the misrepresentation is neither here nor there, if none of that damage can be traced to Singapore. The respondents' contention is relevant to a question of joinder but has no application if jurisdiction has yet to be established. The fact that there are common questions of law and fact is wholly irrelevant. To speak of joinder without establishing jurisdiction is akin to putting the cart before the horse.

73 It cannot be gainsaid that the damage was suffered by distinct entities at different points of time. This gave rise to distinct claims which the various entities held in their own capacities. In this connection, the fact that the first respondent is the holding company of the Skaugen group does not mean that the claims should be seen as being "owned" by the Skaugen group. We repeat our holding in *Goh Chan Peng and others v Beyonics Technology Ltd and another and another appeal* [2017] 2 SLR 592 ("*Goh Chan Peng*") that the single economic entity concept is not recognised in Singapore. To do so would critically undermine the doctrine of separate legal personality, and would also

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[26] Respondents' case, para 20.

Version No 1: 27 Oct 2020 (22:41 hrs)

be difficult to reconcile with the restricted approach towards the piercing of the corporate veil: *Goh Chan Peng* at [75].

74 Finally, at the hearing before us, counsel for the respondents, Mr Lawrence Teh, sought to draw a distinction between the present case and *Microsoft Mobile*. He contended that in *Microsoft Mobile*, Nokia (the assignor) and Microsoft Mobile (the assignee) were *separate businesses with no relation to one another*. In that context, it was right that the claims held by Microsoft Mobile in its own capacity ought not to be aggregated with the claims assigned by Nokia. In contrast, the assignments in the present case were pursuant to *internal transfers* within the Skaugen group or between related entities (*ie*, between the Skaugen group and GATX). It was not an assignment across unrelated businesses. The four distinct claims should therefore be aggregated.

75 We do not accept Mr Teh's contention. While Mr Teh draws a valid distinction between the facts of *Microsoft Mobile* and the facts at hand, there is no reason in principle why the *legal consequences* ought to differ. The point simply is that both the transfer of the ownership of the Vessels and the assignments of claims were deliberate and conscious decisions taken by the Skaugen group. Having decided to do so, it must accept the attendant legal consequences that are a direct result of its own decisions. These consequences include there being four distinct claims incurred by four distinct entities at four different time periods.

Issue 3: Whether the respondents have established a good arguable case that O 11 r 1(*f*)(ii) is satisfied

76 On the basis that there are four distinct claims in the present case which should not be aggregated, we turn to examine whether the respondents have established a good arguable case that O 11 r 1(*f*)(ii) is satisfied. The appellants'

Version No 1: 27 Oct 2020 (22:41 hrs)

position is that damage was suffered in Singapore only when the Vessels were transferred to the Singapore-incorporated entities, *ie* Somargas SG and the GATX entities.

77 We find the following extract in *Halsbury's Laws* at para 75-051 to be a useful summary of the relevant principles on O 11 r 1(*f*)(ii):

> Secondly, the court may also grant leave if the claim is wholly or partly founded on, or is for the recovery of damages in respect of, damage suffered in Singapore caused by a tortious act or omission occurring anywhere. This provision allows the court to assume jurisdiction based on damage suffered in Singapore. The provision does not expressly require that the damage suffered in Singapore be significant, but it must probably not be merely trivial. Two kinds of claims are in fact enumerated in this sub-rule: claims founded on damage, and claims for the recovery of damages. This distinction reflects the difference (in the domestic common law) between torts where damage is part of the cause of action and torts where damage is not. The phrase 'wholly or partly' qualifies only the first type of claim. The significance of this is that if damage is suffered both in Singapore and elsewhere, a claim founded on all the damage wherever occurring can be brought in Singapore (since the claim needs only be partly founded on the damage in Singapore), whereas if the claim is only for the recovery of damages and not founded on damage, the claim is restricted to the damage suffered in Singapore.

78 In the absence of any evidence to the contrary, it can be assumed that the damage for each distinct claim is suffered in the jurisdiction where the relevant entity is incorporated (*ie*, Hong Kong for the Somargas HK Claim, Norway for the Investigation Costs Claim and Singapore for the Somargas SG Claim and the GATX Claim). If the respondents were able to adduce evidence to suggest, for example, that the additional fuel expenditure incurred by Somargas HK was disbursed from Singapore, the analysis might well have been different. But Mr Teh candidly acknowledged that there was no such evidence before the court to displace the presumption that the damage was suffered by each entity in the jurisdiction where they were incorporated.

Version No 1: 27 Oct 2020 (22:41 hrs)

79 Instead, Mr Teh sought to rely on a different argument. In late 2004, the Skaugen group had moved its operations to Singapore. From 2005, the gross earnings of the Vessels were allegedly subject to pooling arrangements run and managed in Singapore, from which distributions would then be declared. The damage suffered by the ship owners would have been "booked" in Singapore. For these reasons, according to Mr Teh, the locality of the losses had to be regarded as Singapore, at least from the end of 2004 onwards. It is "immaterial" where the ship owners were incorporated.

80 In our view, a distinction must be drawn between the *damage*, which is the financial act of incurring the loss (*ie*, the increased fuel expenditure), and the *end result* of such damage, which is the reduced distributions or dividends from the pooling arrangements. In fact, it appears to us that the respondents themselves are aware of this distinction, and have consistently maintained that the damage is in the form of the *increased fuel expenditure* and not the *reduction in distributions*. This is evident from their statement of claim and Mr Morits Skaugen's seventh affidavit dated 20 October 2017, to which we now turn to.

81 Under the section titled "Loss and damage" in the statement of claim, the respondents particularise the Somargas HK Claim, Somargas SG Claim and the GATX Claim as follows:

> 46. By reason of the aforesaid, the [second respondent] is entitled to claim damages against the [appellants] for loss and damage incurred, and which continues to be incurred, by each of the aforesaid registered shipowners relating to the *excess fuel consumption* of the Vessels.
>
> [emphasis added]

82 There is nothing in this paragraph which even suggests that the damage refers to the reduction in distributions.

Version No 1: 27 Oct 2020 (22:41 hrs)

83 In this regard, Mr Morits Skaugen's seventh affidavit dated 20 October 2017 ("the seventh affidavit") is also telling. At the hearing of the appeal, we directed Mr Teh's attention to paras 8 and 11 of the seventh affidavit. He accepted that if one were to accept Mr Skaugen's clarification of the respondents' case in the seventh affidavit, then no damage was suffered in Singapore in respect of the Somargas HK Claim and the Investigation Costs Claim. None of Mr Skaugen's affidavits filed before the seventh affidavit suggested otherwise.

84 For context, before the Judge, the appellants had sought to advance the argument that one question of public importance, which merited leave to appeal, was whether a party could be said to have suffered damage in Singapore by reason of that party having "booked" such damage into accounts in Singapore (*ie*, the same argument that the respondents advanced before us on appeal). Mr Morits Skaugen responded through the seventh affidavit to state the respondents' case:

> 8. Mr Nijsen has stated *incorrectly* that the Plaintiff's case for Singapore jurisdiction was that it should be regarded as having suffered damage in Singapore and/or be regarded to have a cause of action arising in Singapore by the primary reason of having 'booked' such damage into accounts in Singapore.
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> …
>
> 11. … I am advised by the Plaintiffs' solicitors that the Plaintiffs' case was understood by the Court when it gave its reasons for deciding to allow Plaintiffs' appeal. *From the terms of the Plaintiffs' claim, the Court saw that the damage was partly incurred in Norway, partly incurred where the shipowners were incorporated before finally and most significantly, the loss and damage was incurred in Singapore when the vessels were transferred to Singapore incorporated entities.*
>
> [emphasis added]

85 Two points ought to be highlighted from the seventh affidavit.

Version No 1: 27 Oct 2020 (22:41 hrs)

86 First, it is clear that the respondents' position is that damage was suffered in Singapore only when the Vessels were transferred to Somargas SG in February 2011. Put another way, there was no damage suffered in Singapore during the preceding period when Somargas HK owned the Vessels between October 2002 to October 2003 and February 2011. Further, in respect of the Investigation Costs Claim, which is brought by the first respondent in its own capacity, the damage was suffered in Norway, where the first respondent is incorporated.

87 Second, Mr Skaugen also expressly stated in no uncertain terms that the respondents were not claiming that damage was suffered in Singapore by reason of the booking of damage in Singapore and the reduction in distributions. The respondents' submission is directly contradicted by the evidence that has already been given by Mr Skaugen on affidavit, and we therefore reject it.

88 Therefore, while the respondents have established a good arguable case that O 11 r (1)(*f*)(ii) is satisfied for the Somargas SG Claim and the GATX Claim, they have failed to do so for the Somargas HK Claim and the Investigation Costs Claim.

89 For completeness, we should also mention one final point on this issue. Even if we were to take the respondents' case at its highest, it is unclear, at least based on the available evidence before us, whether the pooling arrangements were managed in Singapore from 2005 onwards. The respondents' position is as follows:[27]

> … From 2005 onwards, the [Vessels] were managed by Norgas Carriers Pte Ltd, a Singapore company, in line with the award

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27 Respondents' case, para 22.

Version No 1: 27 Oct 2020 (22:41 hrs)

> of the [Approved International Enterprise] status awarded to the [Skaugen group]. *The gross earnings of the [Vessels] would be received by Norgas Carriers Pte Ltd and form the Norgas Revenue Sharing Pool.* Norgas Carriers Pte Ltd would then deduct voyage-related expenses, including the fuel expenditure. The net earnings of the Norgas Revenue Sharing Pool would then be paid into the EBITDA Sharing Pool where member [*sic*] of the EBITDA Sharing Pool (who might not be members of the Norgas Revenue Sharing Pool) would then share in the net earnings of all [vessels] in the EBITDA Sharing Pool. *From 2005 onwards, Norgas Carriers Pte Ltd was also the pool manager of the EBITDA Sharing Pool. …* [emphasis added]

90 It appears that the respondents may have intended to refer to Norgas Carriers Private Limited, rather than Norgas Carriers Pte Ltd. The latter, Norgas Carriers Pte Ltd, is the former name of the second respondent between 2004 and 2006.[28] The former, Norgas Carriers Private Limited, is the new name of a company formerly known as NGC (Asia) Pte Ltd and Norgas (Asia) Pte Ltd from 2011 onwards.[29] Subsequent to the oral hearing before us, it was clarified by the respondents that the two entities are distinct locally-incorporated entities.

91 Therefore, according to the respondents, a Singapore-incorporated company, Norgas Carriers Private Ltd, became the pool manager of the Norgas Revenue Sharing Pool and the EBITDA Sharing Pool from 2005 onwards. But this is not borne out by the materials before us.

92 As regards the Norgas Revenue Sharing Pool, it appears, based on the statement of claim, that Norgas Carriers Private Ltd, only became the pool manager on or around 1 January 2012. Paragraph 44(8) of the statement of claim reads (bearing in mind that the reference should be to Norgas Carriers Private Limited and not Norgas Carriers Pte Ltd):

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28 Dentons' letter dated 21 November 2019, para 4.

29 Dentons' letter dated 21 November 2019, para 5.

Version No 1: 27 Oct 2020 (22:41 hrs)

> On or around 1 January 2012, the [second respondent], [Somargas SG] and other entities in the [Skaugen group] entered into a Norgas Pool Agreement to formalise the Norgas Pool, or now known as the Norgas Revenue Sharing Pool, the objective of which is to employ the vessels in the pool with a view to obtain the best possible commercial market terms for the participating vessels in the pool. The pool manager is Norgas Carriers Pte Ltd, a Singapore incorporated company which forms part of the IMS Group.

93 Further, after reviewing the Norgas Pool Agreement dated 1 January 2012, it is also clear that Norgas Carriers Private Limited was appointed as the pool manager of the Norgas Revenue Sharing Pool on the same date.[30] Therefore, the documentary evidence does not show, as the respondents appear to have alleged, that Norgas Carriers Private Limited was the pool manager of the Norgas Revenue Sharing Pool from 2005 onwards.

94 As for the EBITDA Sharing Pool, counsel for the appellants, Mr Danny Ong Tun Wei, referred us to the amended agreement for the EBITDA Sharing Pool dated 12 April 2013.[31] It clearly reflects that the pool manager *prior* to the amended agreement is Norgas Carriers AS, a company incorporated in Norway. Norgas Carriers Private Ltd only became the pool manager of the EBITDA Sharing Pool *after* the entry of the amended agreement dated 12 April 2013. There is also no mention of who the pool manager is in para 44(2) of the statement of claim:

> On or around 18 June 2002, [Somargas HK] entered into an EBITDA Pool Agreement with Norgas Limited and Norgas Carriers AS to establish a joint EBITDA pool for the purposes of pooling the earnings derived from participants' vessels and the expenses of operating and managing these vessels. The Vessels entered into the joint EBITDA pool upon their delivery to [Somargas HK].

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30 ACB Vol II (Part A), p 205.

31 ACB Vol II (Part A), p 163.

Version No 1: 27 Oct 2020 (22:41 hrs)

95 Having reviewed the Norgas Pool Agreement and the EBITDA Pool Agreement, it appears that the respondents' assertion that the relevant pool managers were Singapore-incorporated entities from 2005 might be incorrect. Nevertheless, this point is ultimately academic as we do not accept that the damage is in the form of reduced distributions. Rather, the damage for the Somargas SG Claim, Somargas HK Claim and GATX claim is in the increased fuel expenditure incurred by each ship owner in its own capacity.

Issue 4: Whether the respondents have established a good arguable case that O 11 r 1(*p*) is satisfied

96 We turn to consider whether the respondents have established a good arguable case that O 11 r 1(*p*) is satisfied in respect of the four claims, *ie* that they are each founded on a cause of action arising in Singapore.

97 According to the appellants, the Judge had misapplied the *Distillers* test in holding that the cause of action for misrepresentation arose in Singapore. Given that the Judge had applied the substance test and determined that the *lex loci delicti* was Germany, he ought to have applied the same test and determined that Germany was the place where the cause of action arose. In contrast, the Respondents contend that a distinction should be drawn between the "substance test for *lex loci delicti*" and the "procedural test of the locality of the cause of action" for O 11 r 1(*p*).[32]

The distinction between the two tests as set out by the Judge

98 We first consider whether the Judge was right to adopt a separate "cause of complaint" test for O 11 r (1)(*p*), instead of the substance test set out in *JIO*

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[32] Respondents' Skeletal Submissions, para 19.

Version No 1: 27 Oct 2020 (22:41 hrs)

Minerals. According to the Judge, the decision of the Privy Council in *Distillers* stood for the alleged "cause of complaint" test. The "cause of complaint" is neither the tortious act nor the act which completes the cause of action. The "cause of complaint" is a combination of all of the factors, with the focus on the plaintiff's complaint in the actions, which would include the type of harm which the plaintiff complains of and seeks to remedy: GD at [165].

99 The Judge added that the cause of complaint test was to be contrasted with the substance test, which seeks to ask the more general and factual question of where in substance the tort took place: GD at [166].

100 In drawing the purported distinction between the place of the tort and where the cause of action arose, the Judge also explained at [155]:

> … The two concepts are quite different. The place of a tort is a question of weighing the facts. A cause of action is a legal construct under Singapore law. Although determining whether a cause of action arose in Singapore also involves weighing the facts, it requires the court to weigh and view those facts not in isolation but through that legal construct. To put it another way, the inquiry as to the *loci delicti* starts with the facts and weighs them in order to identify the *lex loci delicti* and then to ascertain whether the facts in question give rise to a claim known to the *lex loci delicti*. The inquiry under Order 11 r 1(*p*) starts instead with the actual cause of action which the plaintiff has chosen to plead under Singapore law and asks whether that specific cause of action arose in Singapore.

101 With respect, we disagree with the purported distinction drawn by the Judge. *Distillers* is not authority for a *separate* cause of complaint test. *Distillers* is in fact authority for the substance test. The purported distinction between the two tests is, in our view, a "false dichotomy": GD at [154]. Neither is there any reason in principle why there should be two separate tests, with the cause of complaint test adopting a more plaintiff-centric standard. We would take the

Version No 1: 27 Oct 2020 (22:41 hrs)

converse position that there should only be one test for reasons of principle and coherence in the law.

The cause of complaint test should be rejected

The substance test has been applied in the context of O 11 r 1(p)

102 We first note that the substance test has been applied by the courts in respect of O 11 r 1(*p*). For example, in *Nippon Catalyst Pte Ltd v PT Trans-Pacific Petrochemical Indotama and another* [2018] SGHC 126, Audrey Lim JC (as she then was) applied the substance test to O 11 r 1(*p*), and stated at [54]:

> As for O 11 r (1)(*p*), service out of Singapore is permissible with leave if "the claim is founded on a cause of action arising in Singapore". It has been noted by commentators that there remains some uncertainty as to the proper test to be applied (*Singapore Civil Procedure 2018, Vol I* (Sweet & Maxwell, 2018) (Foo Chee Hock, gen ed) at para 11/1/40), but it appears that the prevailing test is to ask "where in substance did the cause of action arise" (*Kishinchand Tiloomal Bhojwani v Sunil Kishinchand Bhojwani and another* [1997] 1 SLR(R) 518 at [23]; *Karaha Bodas Co LLC v Pertamina Energy Trading Ltd and another* [2005] 2 SLR(R) 568 at [15]). To answer this question, one has to look at the place of the torts alleged by Nippon. As I examine below, the place of the torts is Indonesia, not Singapore.

103 In fact, on one view, it follows implicitly from this court's decision in *JIO Minerals* that the substance test is applicable to O 11 r 1(*p*). There, we relied on *Distillers* as authority for the substance test. Although *JIO Minerals* was a case concerning a stay application, *Distillers* was a case on service out of jurisdiction. As the Judge rightly noted, the relevant provision in *Distillers* is *in pari materia* with O 11 r 1(*p*). It therefore could be said to follow implicitly from *JIO Minerals* that the substance test applies for O 11 r 1(*p*). The passage in *JIO Minerals* at [90] where *Distillers* was cited reads:

> The test that is commonly applied for determining the place of the tort is that which looks at the events constituting the tort

Version No 1: 27 Oct 2020 (22:41 hrs)

> and asks where, in substance, the cause of action arose ("the Substance Test") (see, for example, the House of Lords decision of *Distillers Co (Biochemicals) Ltd v Laura Anne Thompson* [1971] AC 458 at 468 and the English Court of Appeal decision of *Metal und Rohstoff AG v Donaldson Lufkin & Jenrette Inc* [1990] 1 QB 391 at 443). The Singapore courts have also applied the Substance Test (see, for example, the Singapore High Court decisions of *Wing Hak Man v Bio-Treat Technology Ltd* [2009] 1 SLR(R) 446 at [26] and *Focus Energy Ltd v Aye Aye Soe* [2009] 1 SLR(R) 1086 at [14]).

104 We note that this is in fact the position in England. In *Sophocleous and others v Secretary of State for Foreign and Commonwealth Affairs and another* [2019] QB 949, the English Court of Appeal stated at [23]–[24]:

> 23 The general approach of the private international law of negligence is to ask where in substance the cause of action arose: see *Distillers* ... In personal injury cases this is, in general, the place where the injury is suffered. Thus, in the *Distillers* case, although the drug thalidomide was manufactured and sold in England to the relevant Australian company who distributed it in Australia, the Privy Council held that the courts of New South Wales had jurisdiction to try the case because … there was "a cause of action which arose within the jurisdiction".
>
> 24 *The context of the Distillers case was the rule giving jurisdiction to the court to implead a foreign defendant rather than the double actionability rule which applies to acts done in a foreign country. But cases on jurisdiction provide an apt analogy.*
>
> [emphasis added]

Distillers is authority for the substance test

105 However, could it be said that *JIO Minerals* and the authorities above had misinterpreted *Distillers*? Might *Distillers* stand for a separate test which is *not* the substance test?

106 In our view, while the Privy Council used the language of a "cause of complaint" at certain parts of *Distillers*, it is clear that the test which they adopted was in fact the substance test. The Privy Council held that the proper

Version No 1: 27 Oct 2020 (22:41 hrs)

test was to look back over the series of events constituting the tort and to ask the question, where in substance did this cause of action arise: *Distillers* at 468E. That, in essence, is the substance test that was adopted in *JIO Minerals*. Further, the conclusion reached by the Privy Council also makes it clear that the cause of action in that case had, in substance, arisen in New South Wales.

107 Briefly, on the facts of *Distillers*, the defendant was an English company which manufactured a sedative and sleep-inducing drug containing thalidomide. The drug was distributed to an Australian company who sold it in New South Wales. The plaintiff's mother, domiciled in New South Wales, bought the drug while pregnant with the plaintiff. The plaintiff claimed that the ingestion of the drug resulted in the plaintiff being born without arms and with defective eyesight. The plaintiff alleged that the defendant was negligent in failing to warn of possible side-effects of the drug for pregnant women: *Distillers* at 464.

108 In determining where the cause of action arose, for the purposes of satisfying a provision *in pari materia* to O 11 r 1(*p*), the Privy Council rejected a test which required the *whole cause of action* to arise within the jurisdiction: *Distillers* at 467A–C. It also rejected a test which required the *last ingredient* of the cause of action to arise within the jurisdiction: *Distillers* at 468A–E. The rejection of the latter test is particularly significant. The last ingredient to a cause of action is typically the damage suffered by the plaintiff. However, the location of damage might be purely fortuitous. For example, if the plaintiff's mother had purchased the drug but only consumed it in South Africa while on holiday, the damage would have been suffered in South Africa. But that surely could not be where the cause of action arose.

109 According to the Privy Council, "[t]he right approach is, when the tort is complete, to look back over the series of events constituting it and ask the

Version No 1: 27 Oct 2020 (22:41 hrs)

question, where in substance did the cause of action arise"? There is no ambiguity that the substance test was both *articulated* and *applied* in *Distillers*. The Privy Council held at 469B–E:

> In the present case on the assumptions made for the purpose of testing jurisdiction there was negligence by the English Company in New South Wales causing injury to the plaintiff in New South Wales. So far as appears, the goods were not defective or incorrectly manufactured. *The negligence was in failure to give a warning that the goods would be dangerous if taken by an expectant mother in the first three months of pregnancy.* That warning might have been given by putting a warning notice on each package as it was made up in England. It could also have been given by communication to persons in New South Wales—the medical practitioners, the wholesale and retail chemists, patients and purchasers. *The plaintiff is entitled to complain of the lack of such communication in New South Wales as negligence by the defendant in New South Wales causing injury to the plaintiff there: That is the act (which must include omission) on the part of the English company which has given the plaintiff a cause of complaint in law. The cause of action arose within the jurisdiction.* [emphasis added]

110 It is clear that the Privy Council was *applying* the substance test in *Distillers*. This is borne out by the fact that they did not wholly rely on the fact of damage being suffered in New South Wales (*ie*, the last element of the tort) – it also considered that the *relevant acts which constituted negligence* occurred within New South Wales.

The cause of complaint test is not supported by principle

111 According to the Judge, the cause of complaint test is in principle justifiable as it seeks to provide a more plaintiff-centric approach as opposed to the substance test. However, we consider that it is in fact more principled to adopt a single unifying test across the board to determine where a cause of action in tort arises.

Version No 1: 27 Oct 2020 (22:41 hrs)

112 In response to the Judge's point that there should be a more plaintiff-centric approach in the context of service out of jurisdiction applications, we recently stated in *Li Shengwu v Attorney-General* [2019] 1 SLR 1081 at [94] that the O 11 jurisdiction is an "exorbitant" one as the foundation for a court's jurisdiction is primarily territorial. On that basis, there is no reason in principle why established legal principles should be relaxed in O 11 applications to render them more plaintiff-friendly.

113 We consider that coherence in the law also demands that the same test, *ie*, the substance test, be applied to determine where a cause of action in tort arose. For example, the substance test is used in stay applications, because the place of the tort is *prima facie* the more appropriate forum for the dispute: *Rickshaw* at [37]. The substance test is used to determine if the Singapore courts should *exercise* jurisdiction. It is both logical and practical for the same test to govern O 11 r 1(*p*), which is an anterior inquiry to determine if Singapore can even exercise jurisdiction over the defendant. Whether a defendant chooses to set aside service or stay the action, the same test should be used to determine where the cause of action arose. It is unnecessary to create a separate test which is unsupported by precedent and principle.

Even on the cause of complaint test, Singapore is not where the cause of action arose

114 The Judge noted that the cause of complaint test is one that is a "combination of all the factors" (which we have stated is precisely the function of the substance test as well). For completeness, we ought to mention that notwithstanding the Judge's articulation of the cause of complaint test, the Judge seemed to have only relied on the fact that damage was suffered in Singapore to support his finding that the cause of action arose in Singapore: GD at [168]. The Judge reasoned as follows:

Version No 1: 27 Oct 2020 (22:41 hrs)

> The cause of complaint in this action includes the *increased expenditure on fuel incurred by the plaintiffs' assignors*. That complaint is continuing in nature. The plaintiffs' assignors *continued to suffer that harm so long as they owned the ships and bore that increased expenditure*. The plaintiffs' assignors who suffered loss of this type include *entities located in Singapore*. The plaintiffs' "cause of complaint" occurred in Singapore. And therefore their cause of action within the meaning of Order 11 r 1(*p*) arose in Singapore. The plaintiffs have thus made a good arguable case that Order 11 r 1(*p*) is satisfied. [emphasis added]

115 The respondents, relying on the passage above, submit that as far as the cause of complaint test is concerned, the "single unifying factor" in the present case is where the damage was suffered. Such damage was "clearly suffered in Singapore", "not fortuitous", and "the result of genuine, long-term commercial arrangements".[33]

116 Two points bear mentioning. Insofar as the purported cause of complaint test looks to all the factors, the Judge ought not to have focused only on the fact that damage was suffered in Singapore. In fact, that was the approach that the Privy Council expressly rejected in *Distillers*, as the location of damage might be wholly fortuitous. Even if we applied the purported cause of complaint test in the manner set out at [168] of the GD, more damage was suffered *outside* Singapore rather than in Singapore. Singapore-incorporated entities owned the Vessels since February 2011. For the vast majority of that period, they owned only three Vessels as the other three had been sold to third parties between June 2013 and December 2014. However, the Judge did not appreciate this point because he had approached the respondents' claim as one aggregate claim which for the reasons set out at [64]–[70] above, we disagree with.

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33 Respondents' case, para 48.

Version No 1: 27 Oct 2020 (22:41 hrs)

117 In contrast, all six Vessels were owned by Somargas HK between October 2002 to October 2003 and February 2011. The relevant damage was suffered in Hong Kong. On the reasoning employed by the Judge at [168], it would appear that one could make a stronger case that Hong Kong is where the cause of action arose if the primary determinant is that of damage. But that would be an unexpected outcome as neither the respondents nor the appellants are even suggesting that Hong Kong is where the cause of action arose. Why then, should Singapore be where the cause of action arose? The main relevance of Hong Kong and Singapore *to the present claims* is that they were locations where damage was suffered as they were where Somargas HK, Somargas SG and the GATX entities were incorporated. In essence, funds, which are by their nature fungible and transferable across jurisdictions, were lost in Hong Kong and Singapore. But Hong Kong and Singapore have nothing to do whatsoever with the misrepresentations made by the appellants and the respondents' reliance on the same. The fact that the Skaugen group may have reorganised their operations to Singapore is also not relevant to the present claim insofar as it is not alleged that there was any damage suffered by reason of that reorganisation.

118 In our view, the Judge ought to have applied the substance test to determine where the cause of action arose. Applying the substance test, Germany is where the cause of action arose, as it was where the misrepresentation as to the true fuel efficiency of the engines was made, received and relied upon (GD at [104]).

119 The respondents have thus not established a good arguable case that O 11 r (1)(*p*) is satisfied for any of the four claims.

Version No 1: 27 Oct 2020 (22:41 hrs)

Issue 5: Whether Singapore is the more appropriate forum for the dispute

120 Finally, we address the issue of whether Singapore is the more appropriate forum for the dispute. The relevance of the *forum non conveniens* analysis to service out of jurisdiction applications lies in O 11 r 2(2), which states:

> No such leave shall be granted unless it shall be made sufficiently to appear to the Court that the case is a proper one for service out of Singapore under this Order.

121 The Judge rightly noted at [174] of the GD:

> Whether a particular case is a proper one for service of originating process out of the jurisdiction within the meaning of Order 11 r 2(2) is determined by the *Spiliada* test (*Spiliada* at 481A). Satisfying the *Spiliada* test is therefore an integral part of the plaintiff's burden under Order 11, both when applying *ex parte* for leave and also when resisting a defendant's *inter partes* application to set aside leave.

122 As a preliminary matter, we note that the respondents have asserted that "the [a]ppellants do not contend that the learned Judge had wrongly exercised his discretion … Instead, the [a]ppellants now argue that the learned Judge's finding that Singapore is the appropriate forum should be re-examined in light of the latest developments in the proceedings in Norway."[34]

123 This is not accurate because the appellants' arguments as to why Singapore is not the more appropriate forum are in fact twofold:

(a) First, if the court finds that only some of the respondents' claims satisfy O 11 r 1, Norway is the more appropriate forum since it is the only forum where all of the respondents' claims can be tried;

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34 Respondents' case, paras 52–53.

Version No 1: 27 Oct 2020 (22:41 hrs)

(b) Second, even if all of the respondents' claims satisfy O 11 r 1, there are changed circumstances that warrant reconsideration of the Judge's decision. The Norwegian proceedings have "reached the doorstep of trial".[35]

124 The respondents' submissions on the *forum non conveniens* analysis can be summarised as follows:

(a) The Judge had correctly exercised his discretion. Although the Judge found that Norway was not an available forum, he also noted that there were connecting factors that pointed to Singapore being the more appropriate forum than Norway.[36]

(b) It is an abuse of process for the appellants to rely on the subsequent developments in Norway in the *forum non conveniens* analysis.[37] We have already stated at [56]–[57] why we reject this contention.

125 Notwithstanding their submissions, it is telling that the respondents had initially offered, in respect of the present appeal, to stay the Singapore proceedings in favour of the Norwegian proceedings. While the offer was subsequently withdrawn as the liquidator of the second respondent did not agree with it, the initial offer is revealing. It shows that the respondents themselves appear to acknowledge that it is undesirable for there to be parallel proceedings in both Singapore and Norway in the light of the developments in the Norwegian

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35 Appellants' Skeletal Submissions, para 36.

36 Respondents' case, para 54.

37 Respondents' case, para 55.

Version No 1: 27 Oct 2020 (22:41 hrs)

proceedings after the Judge's decision. The Norwegian proceedings have reached an advanced stage and *concern the same claim, issues and parties*.

126 But first, we propose to consider if the Judge was right to hold that Singapore is the more appropriate forum on the basis of the materials that were before him.

Whether Singapore was the more appropriate forum at the hearing before the Judge

127 The applicable principles are not in dispute: *Oro Negro* at [80]. Singapore would be the more appropriate forum if it is the forum with which the dispute has the most real and substantial connection. In this regard, some relevant connecting factors include the personal connections of the parties, the connections to relevant events and transactions, the governing law of the dispute, the existence of proceedings elsewhere and the overall shape of the litigation.

128 We have also cautioned that courts should avoid applying the connecting factors in a mechanical fashion. Instead, greater weight should be ascribed to factors that are likely to be material to a fair determination of the dispute. Rather than a mechanical numbers game, the entire multitude of factors ought to be considered. The court is primarily concerned with the quality of the connecting factors rather than the quantity of factors on each side of the scale: *Lakshmi* at [52]–[54].

129 The question, therefore, is whether the respondents satisfied their burden to show that Singapore is the more appropriate forum. In our view, they did not and our reasons are as follows.

Version No 1: 27 Oct 2020 (22:41 hrs)

Whether Germany and Norway were available fora

130 We begin with our views on whether Germany and Norway were available fora before the Judge. According to the Judge, because both Germany and Norway were not available fora, that sufficed to make Singapore the appropriate forum.

131 The Judge reasoned that both Germany and Norway had acceded to the Lugano Convention. Under Art 27 of the Lugano Convention, Germany was obliged to respect the decision of the respondents in commencing proceedings in Norway. It could not exercise jurisdiction and was thus not an available forum. However, in October 2016, the Norwegian Court of Appeal had decided that the respondents' claims were subject to arbitration and could not be litigated, whether in Norway, Germany or Singapore. Therefore, Norway was not an available forum as well: GD at [205]–[206].

132 In our judgment, the Judge erred in finding Norway and Germany both to be unavailable fora. Article 27 of the Lugano Convention states:

> (1) Where proceedings involving the same cause of action and between the same parties are brought in the courts of different States bound by this Convention, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.
>
> (2) Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court.

133 It is plain from a literal reading of Art 27 that Germany is obliged to decline jurisdiction *only if* jurisdiction in Norway is established. At the time of the hearing before the Judge, it is true that the Norwegian Court of Appeal had held that the respondents' claims were subject to arbitration and therefore declined jurisdiction. Critically, however, that decision was subject to appeal.

Version No 1: 27 Oct 2020 (22:41 hrs)

This meant that there were two alternative scenarios that could result from the appeal:

(a) If the Norwegian Court of Appeal's decision was *reversed* by the Supreme Court of Norway (as it eventually was two months after the Judge's decision), then Norway would be seised of jurisdiction and would be an available forum. In that event, Germany would have to decline jurisdiction.

(b) However, if the Norwegian Court of Appeal's decision was *upheld* by the Supreme Court of Norway, then the Norwegian courts would not have established jurisdiction. Art 27 of the Lugano Convention would therefore *not* prevent the German courts from exercising jurisdiction. Consequently, Germany would be an available forum. In fact, while the appeal was pending, Germany would already have been an available forum given that Norway had declined jurisdiction.

(c) Accordingly, *either* Norway or Germany would have been an available forum at all points of time, and the final result would ultimately depend on the outcome of the respondents' appeal against the decision of the Norwegian Court of Appeal.

134 We find support for our view from the evidence of the appellants' expert, Prof Stephan Lorenz. In his second affidavit, Prof Lorenz opined at para 1:

> … the jurisdiction of the German court could revive if, by any reason, the procedure before the Norwegian court would end without a decision or a legally binding settlement. Art 27(1) Lugano Convention aims to spare the claimant the cost and the effort of a second action before the courts of the second state and therefore does not end but only stays the proceedings until a decision is taken by the foreign court. *Thus the impediment is*

Version No 1: 27 Oct 2020 (22:41 hrs)

> *only of temporary nature at the current state of the proceedings.*
> [emphasis added]

135 With respect, the Judge had therefore erred in treating *both* Germany and Norway as unavailable fora, such that Singapore was the appropriate forum by default. When we queried Mr Teh on this point, he candidly accepted that Germany or Norway would have been an available forum at all points of time. The connecting factors analysis before the Judge was thus relevant and material, to which we now turn. We will also analyse the relevant factors in the same order as they were assessed by the Judge.

Governing law, place of the tort and possible transfer to the SICC

136 On the governing law, the Judge accepted that the *lex loci delicti* was German law. At this stage, it is convenient to note that in the Norwegian proceedings, the respondents have now taken the position that Norwegian law is the governing law. This position was pleaded on 16 April 2018 and thus would not have been known to the Judge:[38]

> Evidently, the case has its closest connection with Norway … It was here the fraud was committed and it was here Skaugen made its dispositions and acted its reliance on the information provided about the company's engines. This is not disputed. It is also in Norway the immediate effect of the fraud arose. Based on the criterion of connection in the Irma Mignon judgment, there can be no doubt about the law applicable.
>
> Already this suggests that *Norwegian law must be applied.*
>
> [emphasis added]

137 Be that as it may, it is clear that Singapore law is not the governing law for the dispute. Further, Germany is the place of the tort and is thus *prima facie*

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38 ACB Vol II (Part B), p 63.

Version No 1: 27 Oct 2020 (22:41 hrs)

the more appropriate forum. On these two points, it cannot be said that Singapore is the more appropriate forum.

138 Nevertheless, according to the Judge, "the good arguable case in favour of a transfer to the SICC ["the SICC factor"] tends to favour Singapore as clearly the more appropriate forum to hear the dispute": GD at [217]. The Judge reasoned as follows:

(a) Order 110 r 25 allows the SICC to order, on the application of a party, that foreign law be determined on the basis of submissions instead of proof. This substantially reduces the time and expense involved in pleading issues of foreign law: GD at [214].

(b) The International Judges in the SICC are familiar with and adept at applying foreign law. Although there is no German judge, there are judges from civil law jurisdictions – a Japanese judge sits on the SICC bench, and Japan's Civil Code has historically been influenced by the German Civil Code: GD at [214].

(c) If parties were to proceed in Germany, additional time and costs might have to be expended to appoint counsel and initiate proceedings in the German courts. In Singapore, although German counsel would have to be appointed, local counsel had already been briefed and are familiar with the dispute: GD at [215].

(d) In a dispute where the factual and legal connections are distributed across diverse and geographically divided jurisdictions, the dispute might be better dealt with by an international panel of judges rather than a judge of any one jurisdiction: GD at [216].

Version No 1: 27 Oct 2020 (22:41 hrs)

139 In our view, the Judge erred in placing substantial weight on the SICC factor. It is true that in *Rappo Tania* at [123], this court referred to the qualities and capabilities of the SICC as an important factor within the broader *forum non conveniens* analysis. We had however cautioned that this was merely one factor, which ultimately had to be considered in the round with the other connecting factors.

140 It is clear that the Judge placed substantial weight on the SICC factor. The Judge analysed three connecting factors on the assumption that both Germany and Norway were available fora: GD at [209] (although the Judge referred to four factors, the first factor – availability of Germany as an alternative forum – is not relevant to the analysis of the connecting factors as the Judge was prepared to assume that Germany was an available forum).

141 The first connecting factor that the Judge referred to was "[t]he governing law [and] possible transfer to the SICC". The Judge recognised that the governing law of the dispute was German law. He then immediately considered the SICC factor and without reviewing the other factors, concluded at [217] as follows:

> My conclusion on this factor is that the advantages of having the matter heard in either Germany or Norway are overstated once the benefits of the SICC are taken into account. *Hence the good arguable case in favour of a transfer to the SICC tends to favour Singapore as clearly the more appropriate forum to hear the dispute.* [emphasis added]

142 The Judge then considered the second connecting factor – availability of witnesses – and concluded that this did not "point away" from Singapore as the more appropriate forum: GD at [223]. Finally, on the third connecting factor – availability of documents – the Judge was of the view that this pointed to Singapore as the more appropriate forum: GD at [232].

Version No 1: 27 Oct 2020 (22:41 hrs)

143 We will analyse the second and third connecting factors below. For present purposes, we focus on the Judge's conclusion at [217], reproduced at [141] above. On a literal reading of [217], the Judge appeared to suggest that *vis-à-vis* the governing law of the dispute (German law) and the SICC factor, Singapore was the more appropriate forum for the dispute. In any event, even if the Judge was not of that view, he had placed substantial weight on the SICC factor. With respect, both positions would have been wrong in principle.

144 In our judgment, the SICC factor, in and of itself, will not be sufficient to displace a foreign jurisdiction which is the more appropriate forum based on an application of the conventional connecting factors. To illustrate, suppose that there is a dispute where the competing fora are Germany and Singapore, and the governing law is German law. The place of the tort is also Germany. Assume also that the case satisfies the transfer requirements of the SICC. On this hypothetical, *the more appropriate forum would virtually always be Germany and not Singapore*. It is stating the obvious that the German courts will be best equipped to deal with issues of German law. Notwithstanding all the qualities and the capabilities of the SICC, Singapore cannot possibly be the more appropriate forum over Germany by the SICC factor alone. At the very most, *less weight* will be placed on the fact that the governing law is something other than Singapore law. The "discount" to be given will be based on factors such as whether Singapore law is substantially similar to that foreign law and whether there are complex issues of law.

145 Further, as to the weight to be ascribed to the SICC factor, we also re-emphasise the following points made in *Rappo Tania* at [124]:

> We emphasise that the possibility of a transfer to the SICC should not be considered by plaintiffs as a free pass to elude all jurisdictional objections to the adjudication of a dispute in Singapore. Like all arguments on *forum non conveniens*, a

Version No 1: 27 Oct 2020 (22:41 hrs)

> submission that the possibility of a transfer to the SICC weighs in favour of an exercise of jurisdiction by the Singapore courts must be grounded in specificity of argument and proof by evidence. A plaintiff must articulate the particular quality or feature of the SICC that would make it more appropriate for the dispute to be heard in Singapore by the SICC, as well as prove that the dispute is of a nature that lends itself to the SICC's capabilities. It is also relevant for the court to consider whether the Transfer Requirements are likely to be satisfied. If, for example, the plaintiff fails even to show a *prima facie* case that the dispute is of an "international and commercial" nature, we do not think its reliance on the possibility of a transfer to the SICC should be given any weight whatsoever. The court does not, however, need to make a conclusive determination at this stage of the analysis on the susceptibility of the dispute to a transfer. Just as it is sufficient for the court at this stage to form a *prima facie* view of the governing law of the dispute (see *Yeoh Poh San v Won Siok Wan* [2002] SGHC 196 at [15]), so it suffices for it to make a *prima facie* determination as to whether a transfer to the SICC should succeed.

146 In our view, as compared to the SICC factor, the Judge ought to have placed more weight on the governing law of the dispute being German law and the place of the tort being Germany. The SICC factor, therefore, does not change our analysis that Singapore is not the more appropriate forum for the dispute.

Other connecting factors

147 We turn to two other connecting factors which the Judge regarded as relevant and material. We deal with these factors briefly.

148 On the availability of witnesses, the Judge regarded this as a neutral factor which did not point away from Singapore being the more appropriate forum. While the Judge accepted that the relevant personnel were based in Europe, he stated that "the [appellants] cannot identify any of the key witnesses who cannot be compelled to give evidence in Singapore and who may be inconvenienced by having to do so": GD at [220]. With respect, we are of the view that this factor can be said to be one that points away from Singapore as

Version No 1: 27 Oct 2020 (22:41 hrs)

the more appropriate forum. In *JIO Minerals* at [71], this court noted that a Singapore court cannot compel a foreign witness to testify in a Singapore court: O 38 r 18(2) ROC. Accordingly, the fact that the witnesses, who are primarily based in Germany and Norway, cannot be compelled to either testify in person in Singapore or give evidence via video-link is a factor that points away from Singapore as being the more appropriate forum.

149 As regards the availability of documents, the Judge made the following points:

(a) The key documents exhibited in this case are either in English, or in both English and German. This suggests that Singapore, an English-speaking forum is more suitable for resolution of this dispute: GD at [226].

(b) While the appellants raised the point that certain documents would be subject to German and European Union data protection requirements, the appellants failed sufficiently to identify and particularise what specific documents would be subject to data protection restrictions that might affect the appellants' ability to transfer the documents to Singapore: GD at [229].

(c) At least half of the evidence will be concerned with issues relating to the respondents' reliance on the misrepresentation and the extent of loss and damage suffered. That evidence lies with the respondents in Singapore: GD at [231].

150 In our judgment, the availability of documents is a factor which is at most a neutral factor and ought to be given limited weight. As this court observed in *John Reginald Stott Kirkham and others v Trane US Inc and others*

Version No 1: 27 Oct 2020 (22:41 hrs)

[2009] 4 SLR(R) 428 at [40], this is not a strong factor as "documentary evidence is, in this modern age, easily transportable between jurisdictions". We have no doubt that insofar as the respondents are is in possession of key documents in Singapore, they would have adduced them in Germany or Norway as well. It is also not as if the appellants are likely to object to the admissibility of these documents. They are simply records of fuel consumption which are uncontroversial as it is to be expected that the ships will consume fuel and money will have to be spent on the same. Further, the translation point is also one that should be given very limited weight. There is nothing to suggest that the documents in the present case are so complex that there will be difficulties translating them from one language to another.

Conclusion of whether Singapore was the more appropriate forum before the Judge

151 Accordingly, with respect, the factors relied upon by the Judge, even when taken together, do not support a finding that Singapore is clearly the more appropriate forum for the dispute. For the reasons above, both Germany and Norway are more appropriate fora. Further, contrary to the Judge's finding, both of them could also not be said to be unavailable fora.

152 We make one final point. We have stated that the Investigation Costs Claim and the Somargas HK Claim do not satisfy any of the jurisdictional gateways in O 11 r 1. In contrast, all four claims can be tried in either Germany or Norway. This is another factor which points away from Singapore being the more appropriate forum as it would only be a subset of proceedings which could occur in the two other jurisdictions. As the appellants rightly note, the ends of justice are best served by a single composite trial hearing all the claims: *BC*

Version No 1: 27 Oct 2020 (22:41 hrs)

Andaman Co Ltd and others v Xie Ning Yun and another [2017] SGHC 64 at [75], citing *Donohue v Armco Inc & Others* [2002] 1 All ER 749 at [36].[39]

Whether Singapore is the more appropriate forum at the hearing before this court

153 In any event, based on the further evidence adduced by the appellants, it is now clear beyond doubt that Singapore is not the more appropriate forum for the dispute. Norway is instead the more appropriate forum based on the factor of parallel proceedings.

Existence of parallel proceedings

154 It is well established that the existence of parallel proceedings can be considered as part of the *forum non conveniens* analysis: *Virsagi* at [38]. The existence of parallel proceedings gives rise to concerns of duplication of resources and the risk of conflicting judgments. As we noted in *Lakshmi* at [59], the weight to be given to this factor would depend on the "degree to which both proceedings have advanced and the degree of overlap in both proceedings".

155 Here, it is undisputed that the Norwegian proceedings have reached a more advanced stage than the Singapore proceedings, which is still at the stage of service. Further, the Norwegian and Singapore proceedings both concern the same claims and issues. The respondents themselves concede this. In their pleadings filed in the Norwegian proceedings, the respondents state that "[t]he claim made [in Singapore] is essentially the same as the claim relating to the Somargas engines in the present case".[40] Significant weight must therefore be

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39 Appellants' case, para 69.

40 ACB Vol II (Part B), p 58.

Version No 1: 27 Oct 2020 (22:41 hrs)

given to the existence of parallel proceedings in the present case. In our view, it would be rare for a Singapore court to allow service out of jurisdiction, when there is a foreign proceeding involving *the same claims* brought by the *same claimants* and where the trial in the foreign jurisdiction is imminent.

156 Indeed, as we have stated at [125] above, the respondents initially offered to stay the proceedings "[s]o as to avoid a multiplicity of proceedings and a risk of inconsistent judgments".[41] This is a clear sign that the respondents themselves recognise the undesirability of parallel proceedings. Notwithstanding this acknowledgment, the respondents proceed to cast aspersions on the appellants, claiming that they have been frustrating the respondents' action and have contested jurisdiction in both Singapore and Norway on unmeritorious grounds.[42]

157 With respect, this is an untenable position for the respondents to take. As defendants, the appellants remain fully entitled to challenge the jurisdiction of the Singapore and Norway courts to hear the action. The fact remains that it was the respondents who made a *deliberate and conscious decision* to commence proceedings in both Norway and Singapore. They chose to allow both proceedings to advance, and did not seek a stay in either of the two proceedings. In fact, their reason for not seeking a stay in the Norwegian proceedings is telling. According to them, it was "very likely that the application would be refused, as the respondents would not be able to demonstrate how the

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41 Respondents' case, para 4.

42 Respondents' case, paras 2 and 61.

Version No 1: 27 Oct 2020 (22:41 hrs)

proceedings in Singapore would lead to swift, proper and cost-effective proceedings".[43]

158 Under these circumstances, the respondents are solely responsible for the current state of affairs, and the risk of inconsistent judgments. The respondents were the plaintiffs both in the Singapore and Norwegian proceedings (*ie*, a "common plaintiff" situation). It was not a case where the respondents were suing the appellants in Singapore and the appellants were suing the respondents in Norway (*ie*, a "reversed parties" situation), in which case one could understand why there would be a competition between different fora. Here, the parallel proceedings were a direct consequence of the respondents' decision to commence proceedings in two jurisdictions and thereafter in failing to seek a stay of either of the two proceedings. Further, before the Judge, the respondents argued vigorously that Singapore is the more appropriate forum based on the various connecting factors. Yet, in the Norwegian proceedings, they argued that the connecting factors point to Norway as having the closest connection to the dispute: see [136]. In our view, for the respondents to rely on mutually inconsistent positions in order to justify parallel proceedings is disingenuous to say the least.

159 It is therefore clear to us that Singapore is not the more appropriate forum for the dispute and the case is not a proper one for service under O 11 r 2(2).

160 We deal with two further points raised by the respondents.

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43 1st affidavit of Truls Leikvang dated 3 October 2018, para 21.

Version No 1: 27 Oct 2020 (22:41 hrs)

161 The respondents have explained that the reason why the Norwegian proceedings were commenced was because "[the respondents] were advised that there is a possibility that the Singapore Court will find that it is necessary to apply Norwegian law to determine the respondents' claim … and that there is a requirement under Singapore law that the claim remains actionable under Norwegian law". We note, however, that it was always open for the respondents to seek a stay before the Norwegian courts. It is conceded that they did not do so.[44]

162 Next, the respondents have brought up the issue of time bar. According to the respondents, the appellants have now raised a defence of time bar under German law and Norwegian law in the Norwegian proceedings. If the defence of time bar succeeds, "the [r]espondents must be allowed to return to Singapore to seek justice and a substantive determination of their claim against the [a]ppellants".[45] In our view, this submission has no merit. If the defence of time bar succeeds in the Norwegian proceedings, the respondents have only themselves to blame for not commencing the Norwegian proceedings earlier. It does not, in any way, provide any legitimate justification for the Singapore courts to exercise jurisdiction if it is not otherwise the more appropriate forum: *Vinmar* at [141]. If the claim is indeed time-barred under Norwegian law, that would be the legal consequences of the respondents' conduct in the prosecution of their claims. In any event, we note that the respondents themselves do not accept that the defence of time bar has any merit.

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44 1st affidavit of Truls Leikvang dated 3 October 2018, paras 9–10.

45 Respondents' case, para 71.

Version No 1: 27 Oct 2020 (22:41 hrs)

The current status of the Norwegian proceedings

163 For completeness, it is helpful to provide an update on the current status of the Norwegian proceedings, although this does not affect our analysis above that Singapore is not the more appropriate forum for the dispute both at the time of the hearing before the Judge and before us.

164 The Norwegian proceedings were originally fixed for an oral hearing before the Oslo District Court between 15 and 26 October 2018.[46] However, the oral hearing did not proceed as the first respondent became the subject of bankruptcy proceedings in Norway. On 11 November 2018, the first respondent was placed in liquidation and the second respondent was ordered to be wound up.[47] While the liquidator of the first respondent has not appeared in the Singapore proceedings, the liquidator of the second respondent appeared in the present appeal on a watching brief.

165 It transpired that on or around 8 February 2018, the second respondent had purportedly assigned its claims in the Singapore and Norwegian proceedings to the first respondent. Thereafter, on or around 11 September 2018, the first respondent assigned both the claims in its own capacity, as well as the claims assigned by the second respondent, to a Norwegian-incorporated SPV known as ImskMan AS.[48]

166 On 21 December 2018, the liquidator of the first respondent informed ImskMan AS that it was challenging, by way of avoidance proceedings, the

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46 4th affidavit of Henrik Boehlke dated 6 March 2019, para 8.

47 Dentons' letter dated 31 May 2019, para 5.

48 4th affidavit of Henrik Boehlke dated 6 March 2019, paras 11–12.

Version No 1: 27 Oct 2020 (22:41 hrs)

purported assignment of the claims from the first respondent to ImskMan AS.[49] During the hearing, we were informed by Mr Ong that the avoidance proceedings were commenced in June or July 2019 and are ongoing. We were also informed by Mr Teh that the avoidance proceedings will only be heard, at the earliest, in the second quarter of 2020.

167 In addition, the liquidator of the first respondent also requested to be joined as a party in the Norwegian proceedings on 30 January 2019. It also applied to be joined as a party to the Norwegian proceedings, and for the Norwegian proceedings to be stayed pending the determination of the avoidance proceedings. This application was allowed by the Oslo District Court on 11 February 2019. Both Mr Ong and Mr Teh confirmed that ImskMan AS has appealed against this decision of the Oslo District Court.

168 We make two brief points in relation to the current status of the Norwegian proceedings. When the parties appeared before the court on 15 July 2019 for a case management conference, it was accepted on both sides that the validity of the assignment of claims by the respondents to ImskMan AS has no bearing on the identity of the correct claimants in both the Norwegian and Singapore proceedings, which are the respondents. Rather, the validity of the assignment of claims would only go towards identifying the party who is to receive the *ultimate benefit* of the claims if they succeed. The second point is that the delay arising from the avoidance proceedings is also a direct consequence of the respondents' decision to assign their claims to ImskMan AS. In any event, we have already provided our reasons as to why Singapore is not the more appropriate forum for the dispute at [127]–[152]. The existence of

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[49] 4th affidavit of Henrik Boehlke dated 6 March 2019, para 13.

Version No 1: 27 Oct 2020 (22:41 hrs)

parallel proceedings in Norway is another factor which points away from Singapore as being the more appropriate forum of the dispute, as it is available to hear all four claims brought by the respondents. It is also at a far more advanced stage, notwithstanding the current status of the Norwegian proceedings as we have just described.

Observations

169 Given our decision, there is strictly no need to examine the appellants' arguments that the respondents do not have a good arguable case with respect to the misrepresentation claim or that their losses are in truth expectation losses and not claimable. For completeness, we will make some brief observations.

170 The first observation relates to a point about causation. The appellants submit that the alleged damage is not actionable because it was not *caused* by any alleged misrepresentation. The transfer of ownership of the Vessels from Somargas HK to Somargas SG to the GATX entities were due to internal restructurings. Somargas SG and the GATX entities would have taken over and operated the Vessels in the same way as Somargas HK, regardless of any alleged misrepresentation.[50] The ship owners cannot pursue a claim premised on damage which arose not from their own reliance on the alleged misrepresentation, but from another party's reliance.

171 We do not think this contention has much merit. The Judge has in fact dealt with it at [125] of the GD:

> It seems to me, however, that subsequent owners of the six ships might also be said to have relied on the misrepresentation. I agree with the reasoning of the assistant

[50] Appellants' Skeletal Submissions, para 18.

Version No 1: 27 Oct 2020 (22:41 hrs)

> registrar in *Skaugen* at [77] that the facts, viewed holistically, suggest that the defendants knew that the engines were to be installed on ships which were not to be owned by any one corporate entity in particular but to be deployed generally within the Skaugen group. So long as the entities which owned the ships and which have assigned their claims to the plaintiffs are part of the Skaugen group, I consider there to be a good arguable case that they were within the class of persons to whom the representation was made.

172 Relatedly, the appellants argue that the GATX entities should not be allowed to claim for damage because they had learned of the potential irregularities and yet accepted the transfer of the Vessels from Somargas SG.[51] A representee who knows or discovers the truth before altering his position cannot be said to have been misled. We note, however, that the UK Supreme Court has expressed some doubt about this legal proposition in *Zurich Insurance Co plc v Hayward* [2016] 3 WLR 637 at [44]–[45], although without expressing a concluded view:

> 44 … it is not necessary to express a final view on the question whether it always follows from the fact that the representee knows that the representation is false that he cannot succeed. As explained earlier, questions of inducement and causation are questions of fact. It seems to me that there may be circumstances in which a representee may know that the representation is false but nevertheless may be held to rely upon the misrepresentation as a matter of fact.
>
> 45 This very case could have been such a case. The judge considered this possibility … where he said:
>
> > "At the very least, statements made in the course of litigation will be viewed with healthy scepticism and weighed against the other material available. Often the other party will not be sure, even then, whether the statement is in fact true and will mainly concern himself with how likely it is to be accepted by the court. Sometimes (a staged road traffic 'accident' for example) the other party may actually be certain from his own direct knowledge that the statement is a deliberate lie.

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[51] Appellants' Skeletal Submissions, para 22.

Version No 1: 27 Oct 2020 (22:41 hrs)

> But even then he and his advisers cannot choose to ignore it; they must still take into account the risk that it will be believed by the judge at trial. This situation is quite different from a proposed purchase, where if in doubt one can simply walk away." …

173 It appears to us that this is a sensible position. Notwithstanding the respondents' knowledge of the misrepresentation, they still had to operate the Vessels to earn freight. They would have suffered *more damage* if they left the Vessels in a dormant state and were simply mitigating their losses. In that sense, it appears to be arguable that the misrepresentation is a *continuing* misrepresentation, made to all the members of the Skaugen group, which did not end at a finite point of time. It continued so long as the engines were installed in the Vessels. It therefore appears to us that there is a good arguable case that the appellants' misrepresentation caused the damage suffered by the GATX entities although we express no concluded view given our decision.

174 Our second point pertains to whether the damages that the respondents seek to claim are expectation losses. The appellants contend that the respondents seek to claim damages for expectation losses, which are not recoverable in tort.[52] The alleged expectation losses refer to the:

(a) Diminution in the capital value of the Vessels. The respondents allege that if the Vessels had been consuming fuel at a lower rate, three of the six Vessels sold by Somargas SG to external parties would have been sold for a higher price.

(b) Lower dividends from pool profits had the engines consumed fuel at a rate consistent with the alleged misrepresentations.

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52 Appellants' Skeletal Submissions, para 24.

Version No 1: 27 Oct 2020 (22:41 hrs)

175 There is no dispute that expectation losses cannot be recoverable in tort as a general rule. But without expressing a concluded view, it appears to us that there is a good arguable case that these losses are *consequential losses* which are recoverable. We find the following extract from Gary Chan Kok Yew and Lee Pey Woan, *The Law of Torts in Singapore* (Academy Publishing, 2nd Ed, 2016) at para 14.025 to be relevant:

> The Court of Appeal in [*Wishing Star Ltd v Jurong Town Corp* [2008] 2 SLR(R) 909] has reaffirmed the principle in [*Smith New Court Securities Ltd v Citibank NA* [1997] AC 254] that damages for deceit include all losses flowing directly from the plaintiff's reliance on the defendant's fraudulent misrepresentation, whether or not such loss was foreseeable. This means that the measure of damages for fraud is wider than that for negligence in that it is not limited by the remoteness rule. *The damage so arising may also include consequential losses, eg, such loss of profits which the plaintiff would have made but for the fraud.* This broader concept is justified by first, the need to deter fraud, and secondly, considerations of fairness which would favour placing the risks of ensuing losses on the fraudster rather than the innocent party. [emphasis added]

Conclusion

176 In summary, our answers to the relevant issues are as follows:

(a) **Issue 1**: We granted the parties' applications to adduce further evidence on the basis that the court is entitled to take into account subsequent developments after the Judge's decision.

(b) **Issue 2**: For the purposes of satisfying the jurisdictional gateways in O 11 r 1, the respondents' claim should be seen as four distinct claims, and not aggregated to form a single composite claim.

Version No 1: 27 Oct 2020 (22:41 hrs)

(c) **Issue 3**: The respondents have established a good arguable case that O 11 r 1(*f*)(ii) is satisfied only in respect to the Somargas SG Claim and the GATX Claim.

(d) **Issue 4:** The respondents have not established a good arguable case that O 11 r 1(*p*) is satisfied in respect of all four claims.

(e) **Issue 5**: Singapore is *forum non conveniens* and the case is not a proper one for service under O 11 r 2(2).

177 Accordingly, we allow the appeal and set aside the service granted by the Judge.

178 Finally, taking into account the parties' respective costs schedules and the novelty of the arguments raised in this appeal, we order the respondents to pay the appellants the costs of the appeal, the two applications for leave to adduce further evidence and the application for leave to appeal, fixed at $50,000 inclusive of disbursements. The costs orders below shall be reversed in favour of the appellants. The usual consequential orders, if any, will apply.

Steven Chong
Judge of Appeal

Woo Bih Li
Judge

Ong Tun Wei Danny, Yam Wern-Jhien, Tay Shi Ing and Bethel Chan Ruiyi (Rajah & Tann Singapore LLP) for the appellants;
Teh Kee Wee Lawrence and Wong Yong Jing, Justin (Dentons Rodyk & Davidson LLP) for the respondents;
Koh Junxiang and Charis Toh (Clasis LLC) for the liquidator of the

Version No 1: 27 Oct 2020 (22:41 hrs)

second respondent (on watching brief).

Version No 1: 27 Oct 2020 (22:41 hrs)