IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2016] SGHC 212

Originating Summons No 303 of 2016

Between

(1) JX Holdings Inc
(2) JX Nippon Oil & Energy Corporation

… *Plaintiffs*

And

Singapore Airlines Limited

… *Defendant*

JUDGMENT

[Companies] — [Shares] — [Transmission]

[Conflict of Laws] — [Choice of law] — [Corporations]

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JX Holdings Inc and another
v
Singapore Airlines Ltd

[2016] SGHC 212

High Court — Originating Summons No 303 of 2016
Edmund Leow JC
7 June 2016

29 September 2016 Judgment reserved.

Edmund Leow JC:

Introduction

1 This is an application made under s 194 of the Companies Act (Cap 50, 2006 Rev Ed) ("Companies Act") for a rectification of the defendant's register of members and for further consequential orders. The basis of the application is that certain shares in the defendant were purchased by a company which, owing to a complicated series of mergers and restructuring exercises under Japanese law, no longer exists. The first plaintiff claims to be the ultimate successor in title to these shares and seeks an order for rectification in order that its entitlement might be recognised. The defendant does not object to the application in principle, but it submits that it is the *second*, and not the first plaintiff, which is the legal owner of the shares.

2 The broad issue in this application, therefore, was whether title to the

shares lies with the first plaintiff or with the second. Although ostensibly simple, this issue engages novel points of law concerning the doctrine of universal succession under private international law as well as the difference between a "transfer" and a "transmission" of shares within the meaning of s 130(1) of the Companies Act. As will become clear in the course of my judgment, the outcome of my decision may well determine whether stamp duty is eventually payable. For this reason, I reserved judgment on this matter and directed that the parties seek the input of the Inland Revenue Authority of Singapore ("IRAS"), which was duly received on 26 August 2016.

3 From the outset, I record my appreciation to the parties for the considerable assistance they rendered the court through their written submissions. In particular, it was made clear to me that the defendant had no direct interest in the outcome of the application and was only participating in these proceedings in order to assist the court. The defendant rendered such assistance not just by providing a set of very helpful written submissions but also by appearing at the oral hearing to address me on the various questions of law which arose. I now give my judgment and will begin with a brief recitation of the relevant facts.

Background

4 The facts are undisputed and lie within a narrow compass. In February 1986, Kyodo Oil Co Ltd ("KOL"), a company incorporated in Japan, purchased 20,000 ordinary shares in the defendant, Singapore Airlines Limited ("the SIA Shares"). Following a share issuance in 1993 and a capital reduction exercise in 2007, KOL became (and continues to be) the registered owner of 37,340 ordinary shares in the Defendant. These shares now carry rights to dividends in both cash and kind, which are as follows: (a) $398,996.80 in

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dividend payouts; (b) 27,258 shares in Singapore Airport Terminal Services Limited ("SATS Shares" – these were issued as dividends *in specie* on the SIA Shares in 2009); and (c) $28,075.74 in dividend payments in respect of the SATS Shares.[1] Where necessary, I will refer to the SIA Shares and the SATS Shares collectively as "the Shares".

5 Between December 1992 and July 2010, KOL underwent multiple corporate restructuring exercises. The precise details are not relevant to this application and it suffices merely to say that KOL ceased to exist in 1993 and its rights and obligations then passed through a series of corporate entities which were created in the interim restructuring exercises and eventually vested in Nippon Oil Corporation ("NOC").[2] In July 2010, NOC underwent what was referred to by Mr Kotaro Kubo, the plaintiff's Japanese law expert, as an "absorption-type split". I will elaborate on the details of this legal arrangement later, but it suffices to say for now that under Art 2 of the absorption-type company split agreement ("2010 Split Agreement"), the shares were transferred from NOC to the first plaintiff, JX Holdings Inc. NOC was subsequently renamed JX Nippon Oil & Energy Corporation and it is the second plaintiff in this application.[3]

6 In the course of a review, it was discovered that the shares originally purchased by KOL were still registered in KOL's name even though it had long ceased to exist. The share certificates and the dividend cheque payments were held by M&C Services Private Limited, the share registrar for the

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1 Plaintiff's submissions at para 1.3.1 and defendant's submissions at para 3.

2 Plaintiff's submissions at paras1.4.1 to 1.4.14.

3 *Ibid* at para 1.4.14.

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defendant and SATS. It was also discovered that the SATS Shares were currently held by the defendant and the sum of $28,075.74 which had been issued as dividends on the SATS Shares since their issuance in 2009 had been paid to the defendant.[4]

The present application

7 To address this, the first plaintiff commenced Originating Summons No 303 of 2016 ("the present application") to seek the following orders:[5]

> (a) the register of members of the defendant be amended such that the SIA Shares currently held in the name of KOL be registered in the name of the first plaintiff instead;
>
> (b) the defendant transfer the SATS Shares, which had been held on behalf of KOL, to the first plaintiff; and
>
> (c) all dividends declared in respect of the Shares be paid over to the first plaintiff.

8 Section 194 of the Companies Act, under which relief is sought, provides in material part as follows:

> **Power of Court to rectify register**
>
> 194.—(1) If —
>
> (*a*) the name of any person is *without sufficient cause entered in or omitted from the register*; or
>
> (*b*) default is made or unnecessary delay takes place in entering in the register the fact of any person having

4 Plaintiff's submissions at para 1.4.16.

5 Plaintiff's submissions at para 1.5.5.

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> ceased to be a member,
>
> the *person aggrieved* or any member or the public company may apply to the Court for rectification of the register, and the Court may refuse the application or may order rectification of the register and payment by the company of any damages sustained by any party to the application.
>
> …
>
> (4) No application for the rectification of a register in respect of an entry which was made in the register more than 30 years before the date of the application shall be entertained by the Court.
>
> [emphasis added]

9 As a preliminary point, I note that applications for rectification must be taken up within 30 years of an entry having been made in the register. Given that the shares in question were purchased in February 1986, this application could potentially be time-barred. However, Mr Andrew Chan, counsel for the defendant, indicated that his client would not be raising the time-bar and was content for the application to proceed.[6] As it is settled law that limitation periods do not operate as a bar unless specifically pleaded as a defence (see *W Gregory Dawkins v The Right Hon Baron Penrhyn* [1878] 4 App Cas 51 at 59 *per* Earl Cairns LC), I am satisfied that the present claim can proceed.

10 In order to have standing to invoke s 194(1) of the Companies Act, one must either be a "person aggrieved" or a member of the company. In *Sing Eng (Pte) Ltd v PIC Property Ltd* [1990] 1 SLR(R) 792 at [14], the Court of Appeal held that the expression "person aggrieved" was to be construed as referring only to the classes of persons falling within the ambit of the preceding sub-paragraphs: namely, (a) a person whose name is without sufficient cause entered into or omitted from the register or (b) a person who

6 Minute sheet of Edmund Leow JC dated 7 June 2016 at p 1.

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has ceased to be a member but, by reason of default or unnecessary delay, is still listed as a member in the register. In this case, I am prepared to find, based on the undisputed facts, that both plaintiffs fall within the ambit of s 194(1)(*a*) of the Companies Act – that is to say, they are persons whose names might have been omitted from the register without sufficient cause.

11 The question, then, is whether relief should be granted. It is well settled that the court has a wide discretion in this matter. This is clear both from the language of the statute (which uses the permissive "may"), as well as the authorities on the subject (see the decision of the Court of Appeal in *Re Asian Organisation Ltd* [1961] MLJ 295 ("*Re Asian Organisation*") at 297A). *Prima facie*, it would appear that rectification should be ordered to ensure that the register accurately reflects the true state of legal entitlements. However, even if a plaintiff can show that the register is incorrect and that he is the rightful owner of the shares, the court will have regard to the ambient circumstances of the case, including delay, acquiescence in the existing state of affairs, or any other form of iniquity in deciding whether to exercise its discretion in favour of rectification. Ultimately, the test is whether the plaintiff has shown sufficient "equity to disturb the existing state of affairs" (see the decision of English High Court in *Bellerby v Rowland & Marwood's Steamship Company Limited* [1901] 2 Ch 265 at 273, cited with approval in *Re Asian Organisation* at 296G–296I).

The parties' arguments

12 The plaintiffs' case is simple. Mr Joseph Tay, counsel for the plaintiffs, contends that under Japanese law, all of KOL's rights and obligations (including its ownership of the Shares and the associated rights) had passed through an unbroken chain of succession to the first plaintiff. He relies in this

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regard on the expert opinion of Mr Kubo. However, due to an administrative oversight, the first plaintiff's name was omitted from the register. This, he submits, constitutes a sufficient basis for the court to exercise its power of rectification under s 194 of the Companies Act. Further bolstering the first plaintiff's case, Mr Tay also submits, are the following factors:

(a) The interim entities which were created in the corporate restructuring exercises have ceased to exist save for the plaintiffs, and the second plaintiff has explicitly waived any and all rights it might have to the SIA Shares in favour of the first plaintiff.[7]

(b) The first plaintiff has executed a deed undertaking to indemnify the defendant against any claims which it might become subject to as a result of the rectification.[8]

(c) The first plaintiff undertakes to ensure that any orders made by the court are brought to the attention of IRAS in order that any applicable duties will be paid.[9]

13 The defendant disagrees with the plaintiffs on a point of law. Mr Chan, counsel for the defendant, submits that the plaintiffs have erred in submitting that Japanese law would apply directly. Given that the subject matter of the present application is title to shares in Singapore, the matter must fall to be governed by Singapore law – and, in particular, the well-established principles of conflict of laws. Mr Chan explained that an application of local conflicts

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7 Plaintiff's submissions at para 2.3.8.

8 *Ibid* at para 2.4.7(a).

9 *Ibid* at para 2.4.7(b).

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rules – in particular, the doctrine of universal succession – would still yield the conclusion that title to the shares had passed to the second plaintiff by reason of a succession of corporate personality effected under Japanese law and recognised in Singapore. However, he argues that the absorption-type split which took place in 2010 does *not* count as an instance of universal succession but is instead akin to a transfer of ownership by way of a private agreement.[10]

14 The relevance of this, he explained, lies in s 130(1) of the Companies Act, which prohibits the transfer of shares unless it is effected through a proper instrument of transfer. This is critical because transfers through such instruments would attract the payment of *ad valorem* duty under the Stamp Duties Act (Cap 312, 2006 Rev Ed) ("SDA"). Mr Chan accepts that transfer of ownership pursuant to the doctrine of universal succession would not attract the payment of stamp duty but, as I noted above, he does not agree that the transfer of ownership of shares between the first and second plaintiff is an instance of universal succession. In the premises, Mr Chan submits that the register should instead be rectified to reflect that the second plaintiff, and not the first, is the owner of the shares. He argues that if the second plaintiff wishes to transfer its shareholding to the first plaintiff, it should be required to execute a proper instrument of transfer and pay the requisite stamp duty.[11]

15 Following an exchange of correspondence, the parties agreed that the second plaintiff would be added to this application by consent and that the prayers would be amended to provide that the orders in question may either be made in respect of the first plaintiff or the second plaintiff. These steps were

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10 Defendant's submissions at paras 4–5, 10, and 13.

11 *Ibid* at paras 17, 20, and 25.

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taken to accommodate the possibility that the court might find against the plaintiffs on the issue of the incidence of title to the shares.[12]

Section 130(1) of the Companies Act

16 In order to identify the issues in this application, it is necessary to first consider the structure and purpose of s 130(1) of the Companies Act, which governs the transfer of shares in public companies ("s 130(1)"). The subsection provides as follows:

> Notwithstanding anything in its constitution, a *public company shall not register a* ***transfer of shares*** *or debentures unless a proper instrument of transfer has been delivered* to the company, but this subsection *shall not prejudice any power to register as a shareholder or debenture holder any person to whom the right to any shares in or debentures of the company has been* ***transmitted by operation of law***.
>
> [emphasis added in italics and bold italics]

17 Section 130(1) is mirrored by s 126(1) of the Companies Act, which imposes the same obligation on private companies. This provision traces its history to s 66 of the Companies Ordinance 1940 (Ord No 49 of 1940) which likewise provided that it would not be lawful for any company (no distinction was made between private and public companies) to register a transfer of shares if it was not accompanied by a proper instrument of transfer. However, it specifically excepted situations in which the shares had been "transmitted by operation of law." This provision itself was based on the identically worded s 63 of the Companies Act 1929 (c 23) (UK) ("UK CA 1929"), which was the English enactment on which our Companies Ordinance was based. The purpose behind the enactment of s 63 of the UK CA 1929, as explained by the

12 Plaintiff's submission at para 1.6.1.

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English High Court in *In re Greene, decd; Greene v Greene* [1949] 1 Ch 333, was to end the "then prevalent practice of providing for the oral transfer of shares to the great detriment of the Revenue" (at 339) by ensuring that a transfer of shares was made by a dutiable instrument of transfer .

18 However, it has always been the case that a "transmission" of shares is distinct from a "transfer" and is not subject to the requirement that it must be accompanied by an instrument of transfer (see *Re Kenzler* (1983) 7 ACLR 767 ("*Re Kenzler*") at 771). The relevant distinction is this: a transfer is a voluntary disposition of legal title to the shares brought about by an act of the shareholder; a transmission, by contrast, is an automatic devolution of title which takes place by operation of law upon the occurrence of a legally significant event (*eg*, the death of the shareholder or the shareholder being adjudged a bankrupt): see *Re Kenzler* at 772–773. *Re Kenzler* is a decision of the Supreme Court of Queensland on s 95 of the Companies Code (Qld), which is equivalent to s 130(1) of our own Companies Act. The distinction drawn between a "transfer" and a "transmission" in *Re Kenzler* was subsequently approved by our Court of Appeal in *Seah Teong Kang (co-executor of the will of Lee Koon, deceased) and another v Seah Yong Chwan (executor of the estate of Seah Eng Teow)* [2015] 5 SLR 792 at [41] and [42], albeit in the context of s 259 of the Companies Act.

19 The point, for present purposes, is this. The present application is for the court to exercise its power to rectify the register to reflect the incidence of legal title. This requires the court to consider whether the passing of title took place via a transfer – in which event it would appear that relief should not be granted, because no instrument of transfer has been executed and the rectification of the register in the manner sought might result in the non-

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payment of stamp duty – or through a transmission. The plaintiffs argue that the present case involves a transmission. They contend that the ownership of the shares has been transmitted to the first plaintiff by operation of law, consequent upon a succession in corporate personality under Japanese law. The defendant, by contrast, submits that the transfer of title from the second plaintiff to the first is more properly characterised as a transfer. Its position is therefore that the register should only be rectified to reflect that the second plaintiff, and not the first, is the owner of the shares.

20 In the light of the foregoing, it will be convenient to divide the analysis in this judgment into two parts.

(a) First, I will consider whether the law even recognises the change of ownership of assets and liabilities between corporate entities through a process of corporate succession effected under foreign law. And if it does, the question is whether this passing of title through such a process is properly to be considered a "transfer" or a "transmission" within the meaning of s 130 of the Companies Act.

(b) Second, and on the assumption that the law does recognise a passing of title in this manner, I will consider whether it is the first or second plaintiff that owns the shares (and is therefore the party in whose favour the register should be rectified).

Corporate succession under foreign law

21 I begin with the first issue, which concerns the transfer of assets by corporate succession. The starting point is to remember that a corporation is a legal person. Thus, its existence, as well as the incidents of its personhood,

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must depend on the law of the country in which it was formed – *ie*, the law of its incorporation (see Dicey, Morris & Collins, *The Conflict of Laws* vol 2 (Sweet & Maxwell, 15th Ed, 2012) ("*Dicey, Morris & Collins*") at para 30-010). It also follows that the law of incorporation governs the dissolution of the corporation. As Lord Wright held in *Lazard Brothers and Company v Midland Bank, Limited* [1933] AC 289 at 297, "[t]he will of the sovereign authority which created [the corporation] can also destroy it. English law will equally recognise the one, as the other, fact." These two propositions are specific instantiations of a wider principle, which is that all matters relating to the *status* of the corporation, such as issues of internal management and its capacity to enter legal relations, are governed by the law of incorporation (see *Walter Woon on Company Law* (Sweet & Maxwell Asia, 3rd Ed, 2009) at para 1.88).

22 In the present application, I am concerned with a specific expression of this wider principle, which is commonly referred to in the authorities as the doctrine of "universal succession", though the use of this expression is not without its dissentients. In broad terms, this doctrine holds that where the law of incorporation recognises a succession of corporate personality from one corporate entity to another, then the law of the forum will recognise not just the changed *status* of the company, but also the fact that the successor has inherited the rights and liabilities of its predecessor. As this appears to be the first time that this principle has been discussed in Singapore, I will consider it at length.

Metliss *and* Adams

23 In my view, it would be appropriate to begin my analysis by describing the facts of *National Bank of Greece and Athens SA v Metliss* [1957] AC 509

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("*Metliss*"), which is the leading case on this subject. In 1927, a Greek bank issued sterling bonds which provided that any disputes arising therefrom would be governed by English law. These bonds were guaranteed by yet another Greek bank. In 1941, payment of interest ceased as a result of World War 2. In 1953, the Greek Parliament passed an Act (which was accompanied by a Royal decree to the same effect) to amalgamate the guarantor bank with a third bank. The Act provided that the new entity ("new bank") was to be the "universal successor to the rights and obligations in general of the amalgamated companies [*ie*, the guarantor bank and the third bank]." The bondholders subsequently brought a suit in the English courts to seek recovery of the unpaid interest on the bonds and the question was whether the new bank was liable on the ground that it had inherited the liabilities under the guarantee. The House of Lords unanimously answered this question in the affirmative.

24 Three fully reasoned speeches were delivered. Of the three, it is convenient to begin with the speech of Lord Keith of Avonholm, for he provided an explanation of the concept of universal succession, with which the principle discussed in this section of the judgment has become closely associated. Lord Keith held as follows (at 530):

> The [new bank] was expressly declared by the relevant Greek statute and subsequent royal decree to be the "universal successor" of the banks which were absorbed and extinguished by the amalgamation decree. This conception, as expounded in the evidence in this case, is common to other legal systems which have borrowed from the Roman law. Used generally with reference to an heir who takes up a succession on death, *it carries with it a liability on the heir to the deceased's creditors for the deceased's debts. From this aspect he represents the deceased. The persona of the deceased is regarded as continued in the heir, or, as it is otherwise expressed, he is* eadem persona cum defuncto. *He is no more to be regarded as a new party introduced into a contract than is*

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> *an executor or administrator of a dead man's estate* in English law. … [emphasis added]

25 As Lord Keith pointed out, the concept of "universal succession" is not one with a precise parallel in English law, being derived from a unique concept of testamentary succession that existed in Roman law. This is also not a concept known to Singapore law. However, the basic idea may be grasped by the use of (yet another) metaphor, which is that the new entity merely "steps into the shoes" of the old and is to be considered, for all intents and purposes, to be the same person. Thus, if the new bank were described as a "universal successor", it would seem to follow that it should be taken to have inherited the full bundle of rights *and* obligations which used to inhere in its predecessor. Slightly later in his speech, Lord Keith held (also at 530):

> *The extinction of a corporation under statute or decree and the passing of all its rights and liabilities to a successor exhibits, in my view, all the features of a universal succession.* It may not generally be so regarded, but the consequences appear to me to be in many respects indistinguishable. But be that as it may, in the present case *the new bank has been declared the universal successor of the old banks. The result is to fix on it the* ***status and the liabilities*** *of a universal successor. That, in short, is the effect of the evidence given of the Greek law, and in this matter, which is essentially a* ***question of status,*** *it is to Greek law that recourse must be had.*
>
> [emphasis added in italics and bold italics]

26 Viscount Simonds was less enamoured of the metaphor of universal succession, which he opined was unnecessary and potentially misleading (at 524; and in this regard see generally, Adrian Briggs, *Private International Law in English Courts*, (Oxford University Press, 2014) ("*Private International Law*") at para 10.58). Instead, he preferred to base his decision on the simple point of fairness. If (as the parties agreed the principle of comity required) the status of the new bank as an heir to the corporate personality and

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the assets of the guarantor bank must be recognised, then this must also entail the recognition that the new bank had taken on the obligations of the guarantor bank whose mantle it inherited. One cannot have one without the other. In an oft-cited passage, Viscount Simonds put the matter as follows (at 525):

> I believe that justice will be done if your Lordships think it right not only to recognize the fact that the new company exists by the law of its being but to recognize also what it is by the same law. *It is conceded that its status must be recognized. That is a convenient word to use. But what does it include or exclude? If a corporation exists for no other purpose than to assume the assets, liabilities and powers of another company, what sense is there in our recognizing its existence if we do not also recognize the purposes of its existence and give effect to them accordingly.* If, for reasons of comity, we recognize the new company as a juristic entity, neither the Greek Government, the creator, nor the new company, its creature, can complain that we too clothe it with the attributes with which it has been vested.
>
> [emphasis added]

27 Lord Tucker focused on the substance of the Greek decree. He specifically rejected the contention that it was possible to say that the Greek decree had wrought a change to the "status" of the new bank (that is to say, it made it a universal successor to the guarantor bank) without necessarily also effecting a transfer of the assets and liabilities from the guarantor bank to the new. The quintessence of such a change in status was the assumption of the rights and responsibilities of its predecessor. He put the point thus (at 529):

> The identity of the old bank has become merged in the amalgamation by a process which is by no means alien to English legal conceptions. *It is of the very essence of the transaction that the liabilities and assets of the former should attach to the latter, and to recognize the existence of the new entity but to ignore an essential incident of its creation would appear to me illogical.* … In my view, the fact that *this liability was attached to it at birth by its creator can properly be regarded as a matter pertaining to the status of the appellant company and accordingly governed by the law of its domicile.*

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[emphasis added]

28 To summarise, the *ratio* of *Metliss* is that the succession of corporate personality is a matter which goes to the *status* of the foreign corporation and is therefore governed by the law of incorporation. As far as the law of the forum is concerned, once an entity is recognised as having the *status* of a universal successor, then it will be clothed with *both* the assets and liabilities of its predecessor(s). This point appears to be both logical and just.

29 However, there was soon to be a twist in the tale. Shortly after the decision in *Metliss*, a new law was enacted in Greece which provided that a new company which is formed after a process of universal succession would inherit the rights of its predecessors, but it would not assume any liabilities which derived either from loans in gold or foreign currency unless a law was specifically passed to that effect. Notably, this law also purported to have retrospective effect. It is plain that this law had been passed in an attempt to circumvent the decision in *Metliss* and it was not long before the effect of this new law was the subject of litigation in the English court. It came before the House of Lords in *Adams and others v National Bank of Greece SA and other appeals* [1960] AC 255 ("*Adams*"), where the question was whether the new Greek law had the effect of inoculating the new bank from claims from the bondholders. The House of Lords held, again unanimously, that it did not.

30 A majority of the House of Lords was reluctant – perhaps understandably, given that the sovereign act of another state was involved – to dispose of the case solely on the footing that the new Greek law was not one which related to the status of the new bank. Rather, they first began by characterising the issue as one concerning the subsistence of contractual obligations (in this case, the new bank's liabilities in respect of the interest

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payments on the bonds). This was an important manoeuvre because it allowed them to conclude that this was a matter governed by the proper law of the contract (*ie*, English law), and not Greek law. On this footing, the answer was obvious. The "substance and effect" of the new Greek law was to discharge liabilities which had *already* accrued under English law (after the first law was passed and the new bank created) and on this basis, it had to fail because it was well-established that foreign law could not discharge liabilities which had accrued under English law (*per* Viscount Simonds at 274; *per* Lord Reid at 282–283; *per* Lord Tucker at 285). Lord Reid explicitly declined to speculate on what the outcome in *Metliss* would have been had the first law provided for the same exclusion of liabilities the new Greek law did. He held (at 283):

> Finally, it was said that if [the first law] had originally contained the provision which has now been inserted in it by [the new Greek law] we could not have held the respondent liable to the appellants, and why should it make a difference that the present law was enacted in two stages. It is quite true that in that case the respondent could not have been held liable. A different and perhaps difficult question would have arisen. What effect, if any, could we give to a selective law which, though purporting to make the new bank the universal successor, imposed on it some but not all of the obligations of the old bank? I will not attempt to answer that question. In this case the fact is that before [the new Greek law] was passed the respondent had become bound to fulfil the obligations in the old bank's English contracts, and for the reasons which I have given those obligations have not been affected or discharged by the enactment of the new law. I am therefore of opinion that this appeal should be allowed.

31 Of the Law Lords, the only one who explicitly treated the new law as a status-altering enactment and identified the issue as one concerning the status of the new bank was Lord Denning. Referring to the speech of Lord Tucker in *Metliss* (cited at [27] above), he held that the "essence" of an amalgamation by universal succession was the assumption by a new entity of *both* the assets and the liabilities of the former entities. On this understanding, the new law –

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which excluded liabilities on bonds payable in gold and foreign currency – fell far short of effecting a true universal succession. In these circumstances, he held that it was open to the English courts to refuse to accept the recognition of the changed status of the new bank. He held that the new law was "so inconsistent with the essence of the transaction, that there is no comity of nations which requires the English courts to recognise it" (at 290).

32 *Adams* is now sometimes cited as authority for the proposition that the courts will not recognise the transfer of assets and liabilities by way of corporate succession unless the law of incorporation provides for a "true" universal succession (see *Dicey, Morris & Collins* at para 30-011; Martin Davies, Andrew Bell, and Paul Le Gay Brereton, *Nygh's Conflict of Laws in Australia* (LexisNexis, 2010) at para 35.48). For my part, I doubt that the case stands for such a wide proposition. Of the Law Lords, only Lord Denning explicitly recognised such a possibility; Lord Reid, who was part of the majority, deliberately declined to express any concluded view on the subject. It seems to me that Professor Briggs was correct when he observed that the position in English law is unclear, though it is *likely* that a court applying English law would hold that the new entity is, despite what was said in the foreign enactment, the successor to *both* the assets and the liabilities of its predecessors (see *Private International Law* at paras 10.59 and 10.62).

33 Be that as it may, what is clear from a comparison of *Metliss* and *Adams* is that the courts will closely scrutinise the juridical nature of the question that is before it in order to determine what is really in issue. This exercise – the characterisation of the legal issue – is a preliminary to any ruling on the choice of law. (I pause to note that the "issue" in a case is not necessarily the same thing as the cause of action – in the case of *Metliss*, for

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example, the cause of action was one in contract, but the legal issue was the legal status of the new bank.) If the issue is one which concerns the status of the company, then the position in the law of incorporation will, for reasons of comity, be determinative. If it is not, then the outcome of the case would depend very much on the substantive category in which the issue is classified, for that will determine what law (and hence what rules) are applicable.

Post-**Metliss *cases***

34 *Metliss* has been widely followed around the Commonwealth (see, *eg*, the decision of the High Court of New Zealand in *Natural Section Clothing Ltd v Commissioner of Trade Marks* [1995] 3 NZLR 599 and the decision of the Supreme Court of British Columbia in *Re Maple Leaf Mills Ltd* (1963) 35 DLR (2d) 683). I will not attempt to cover all the decisions which were cited to me, but will confine myself to a representative sample in order that I might be able to sketch the contours of the doctrine as it has developed over time.

35 The first case I will discuss is the decision of the Federal Court of Australia in *Re Sidex Australia Pty Ltd (rec and mgr apptd); Sipad Holding ddpo and another v Popovic and others* [1995] 18 ASCR 436 ("*Re Sidex*"), which was also a case concerning the ownership of shares. Sidex Australia Pty Ltd ("Sidex Australia") was a company incorporated in New South Wales in 1970. In 1976, a substantial group of commercial enterprises operating in the Former Republic of Yugoslavia traded together under a collective. A part of this collective, known as "Sour Sipad" was granted what was known under Yugoslav law as a "special legal subjectivity". Between 1986 and 1988, Sour Sipad subscribed for shares in Sidex Australia. In 1990, a law was passed to allow the creation of "western type" corporations (the judgment did not specify what this meant, but I assume it refers to privately held corporations

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with separate legal personalities) and Sour Sipad was one of the enterprises privatised. This new entity – referred to as the "new Sour Sipad" – then applied for a rectification of the register of Sidex Australia to reflect the fact that it was the owner of the shares formerly held by the old Sour Sipad (whose name had in any event been incorrectly entered). This application was granted.

36 Lehane J first found as a fact that the old Sour Sipad had ceased to exist. The effect of the new law was not so much the "transformation" of the old Sour Sipad, but the creation of an *entirely new entity* – the new Sour Sipad – to succeed to *all* the rights and property of the old Sour Sipad. Applying *Metliss*, he held that there had nevertheless been a succession of corporate personality to the effect that all the assets and liabilities which were previously held in the name of the old Sour Sipad were now held in the name of the new Sour Sipad. Pertinently, for present purposes, he held that this occurred notwithstanding the fact that s 183(2) of the Companies (New South Wales) Code (NSW) ("NSW Companies Code") (which is equivalent to s 130(1) of our Companies Act) specified that transfers in shares had to take place by way of an instrument of transfer. He said (at 443):

> … this court, applying our rules of private international law, will recognise and give effect to the transfer of assets and assumption of liabilities for which Yugoslavian law provides … If what happened [*ie* the succession of corporate personality] is to be regarded as including a transfer of shares in Sidex Australia, it was, I think, one to which s 183(2) of the Companies (NSW) Code applied: that is, the lack of a proper instrument of transfer did not prejudice the power of Sidex Australia to register the "new" Sour Sipad as a shareholder, that body being a person to whom the right to shares in Sidex Australia had devolved by operation of law. I think, therefore, that the right to correct the register and the possibility of an order for rectification continued unaffected.

37 Section 183(1) of the NSW Companies Code provides that a company

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shall not register a transfer of shares unless a proper instrument of transfer has been delivered. Section 183(2) carves an exception in nearly identical terms to that which exists under s 130(1) of our Companies Act – it provides that a person may be registered as a shareholder if his right has "devolved by will or by operation of law". This is a significant point, because it goes back to the distinction between a "transfer" and "transmission" which was discussed above. It is clear that, as a matter of Australian law, a change in the ownership of assets pursuant to a process of corporate succession may be effected without the need for an instrument of transfer (and the consequent payment of stamp duty). On this point, I agree with the position taken in *Re Sidex*. The devolution of ownership that attends universal succession is one that takes place by operation of law and is a process which should be classified as a transmission, rather than a transfer within the meaning of the Companies Act.

38 The next case is the decision of the English High Court in *Centro Latino Americano de Commercio Exterior SA v Owners of the Ship "Kommunar" (The "Kommunar" (No 2))* [1997] 1 Lloyd's Rep 8 ("*The Kommunar (No 2)*"), which concerned the arrest of a vessel off the coast of Falmouth in 1995. The owner of the vessel was a Russian Corporation, AOL, and the arrest had been made pursuant to certain debts which arose in relation to services provided to POL, AOL's predecessor and a State-owned enterprise, between 1991 and 1992. . Under s 21 of the Merchant Shipping Act 1981 (UK), the court would only be seised of its admiralty jurisdiction via an arrest *if and only if* the owner of the vessel at the time of arrest (in this case, in 1995) was *also* (a) the person who was liable on the claim in respect of which the arrest had been brought (to use the language of the statute, "the person who would be liable *in personam*") and (b) the owner or charterer of, or in possession or control of, the vessel at the time when the cause of action arose

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(in this case, between 1991–1992). The question for the court was whether AOL was the same legal person as POL such that the admiralty jurisdiction of the court might be engaged.

39 Colman J concluded AOL was not. He noted right from the outset that the case was different from that of *Metliss* in the sense that in order for the admiralty jurisdiction of the court to be engaged, it would not suffice for AOL to be seen as a "universal successor" of all the *assets and liabilities* of POL. Instead, what was required was that there had to be *continuity* of legal personality and on the facts he held that this was absent for the following reasons: (a) POL was an unincorporated state enterprise which was conceived as a branch of the Ministry of Fisheries whereas AOL was a joint stock company; (b) the incorporation of POL took place in stages and it was never contemplated that the entirety of its assets would be transferred to AOL; and (c) upon the incorporation of AOL, all of its shares were first held by a State-owned fund for sale by that fund to the public. Put together, these factors suggested that there were sufficient incidents of discontinuity that it could not be said, at least for the purposes of s 21 of the Merchant Shipping Act (and in this regard, the court noted that this section had to be construed narrowly), that AOL was the same legal person as POL. The first factor was one that Colman J focused particular attention on, for he said that the "kind of legal entity created at the moment of registration differed so fundamentally from the kind of legal entity that existed up to that time, that to describe them as the same juridical person would be entirely improbable" (at 17).

40 *The Kommunar (No 2)* is useful for clarifying the nature of the doctrine of universal succession. The doctrine of universal succession does not require the unbroken and consistent existence of the former entity and its eventual

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transformation into a new. Rather, it is properly seen as a process of inheritance. Therefore, it can take place even if an entirely new entity is formed to take over the assets and liabilities of the old (as was done in *Re Sidex*). It would seem to suggest that the doctrine of universal succession can also apply even if the former entity continues to exist after it has given up its assets and liabilities. This might seem incongruous, given that the notion of "succession" suggests the extinction of the former entity but as Professor Briggs cautioned, "[s]uccession is, in truth, an image; a metaphor, but not a straightjacket" (see *Private International Law* at para 10.63). Much depends, in the ultimate analysis, on what is recognised by the law of incorporation.

41 The third case is another decision of the English High Court, *Astra SA Insurance and Reinsurance Co v Sphere Drake Insurance Ltd and another* [2000] 2 Lloyd's Rep 550 ("*Astra*"). In 1954, a State insurance company, ADAS, was set up by the government of the People's Republic of Romania. In 1990, a decree was passed to provide that ADAS would cease to exist and, in its place, there would be three private companies were established, of which one was the plaintiff, Astra. Under this decree, which was passed pursuant to a 1954 law providing for the division of state-owned enterprises, each of these three companies took over certain of the assets and liabilities of ADAS in the terms set out in the decree. Astra was designated as the successor of all of ADAS's assets which pertained to its international insurance and reinsurance activities "amounting to Lei 3,500 million, and, up to these limits, the related liabilities." The question before the court was whether this limitation of liability meant that Astra did not succeed to, and therefore was not bound by, certain arbitration clauses in the reinsurance agreements entered into between the respondents and ADAS.

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42 David Steel J answered this question in the negative. After careful consideration of the expert evidence he received on Romanian law, he held that the purport of the Romanian law was to effect the transfer of the entirety of ADAS's assets and liabilities to three different institutions, each of which would be considered the successor to that part of the assets and liabilities which it received upon the dissolution of ADAS. He reached this conclusion notwithstanding the existence of an ostensible limitation of Astra's liabilities and despite the fact that ADAS's liabilities were split between three companies. In this regard, he conceded that the relevant Romanian law was "not elegantly worded" but nevertheless agreed with the respondent's expert that this phrase in the decree had to be read in the light of the 1954 law, which clearly contemplated the complete transfer of the patrimony of the state enterprise to the new institution(s) to be created. On this basis, he concluded that Astra was bound by the arbitration clauses in the reinsurance contracts.

Summary of the law

43 To summarise, the following propositions may be distilled from the cases:

(a) As a matter of first importance, the precise legal issue first has to be distilled in order that the proper law may be applied. The legal issue is not necessarily the cause of action; instead, it is the fulcrum on which the outcome of the application depends.

(b) If the legal issue is one which concerns the status of a foreign corporation, this will fall to be decided according to the law of incorporation. The status of the foreign corporation as it exists in its law of incorporation will be recognised in our courts out of comity.

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(c) In some cases, the law of incorporation might recognise that an entity has the status of a "universal successor". What is usually meant by this is that the entity is seen as having inherited the legal personality of another company, with the attendant consequence that it inherits all the assets and liabilities of its predecessor. This process does not necessarily entail that there is a continuity of legal personality between the old and new entities; the process can be discontinuous, but the "essence of the transaction" is that the new entity has taken on either the whole or a part of *both* the assets *and* liabilities of its predecessor(s).

(d) The transfer of assets and liabilities through this process of universal succession is to be regarded as a "transmission" and not a "transfer" within the meaning of the Companies Act. For this reason, succeeding company may be registered as a shareholder in place of the predecessor company without there being any need for a proper instrument of transfer to be prepared and delivered.

(e) Succession can be found even though the succeeding entity inherits only a part, rather than the whole of the patrimony of the original entity, as long as this is the position in the law of incorporation and the intent was nevertheless that the newly created entity would be the successor to that part of the assets and liabilities it received.

(f) Succession extends not just to the ownership of assets and liabilities. It can, in some cases, even mean the uninterrupted continuation of pending arbitration proceedings, subject to such notice requirements as might be required by the law of the forum: see *Eurosteel Ltd v Stinnes AG* [2000] 1 All ER (Comm) 964.

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44 In my judgment, the propositions articulated in the previous paragraph should be adopted in Singapore for two reasons. First, the key principle underpinning the doctrine of universal succession is that of international comity, which our courts have recognised as a principle of signal importance (see *Q & M Enterprises Sdn Bhd v Poh Kiat* [2005] 4 SLR(R) 494 at [25] and [44]). Second, our courts have long recognised that matters relating to substantive company law, such as the authority of agents to bind companies (see *Beluga Chartering GmbH (in liquidation) and others v Beluga Projects (Singapore) Pte Ltd (in liquidation) and another (deugro (Singapore) Pte Ltd, non-party)* [2014] 2 SLR 815 at [86]) or matters relating to internal management (see *Focus Energy Ltd v Aye Aye Soe* [2009] 1 SLR(R) 1086 at [32]) fall to the governed by the law of incorporation. It would be consistent with this to recognise that the law of incorporation can also bring about a succession of corporate personality and also to recognise the changes in the ownership of assets and liabilities that attend such a process of succession. With that, I turn to apply these principles to the facts.

Title to the shares

45 Like in *Re Sidex*, the broad issue in this case is the ownership of shares. However, the specific question which arises in this context is whether title in the shares had devolved from KOL, a Japanese company, to the first or second plaintiff through a process of universal succession. In other words, this is a matter which concerns the *status* of a foreign company and it falls to be decided by the law of incorporation, *ie* Japanese law. In order to answer this question, a more detailed examination of the expert evidence which was led on Japanese law is necessary.

46 As I noted above, KOL underwent a number of different corporate

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restructuring exercises between 1986 and 2010. These were referred to by Mr Kubo as "absorption-type mergers", "incorporation-type company splits", and "absorption-type company splits".[13] Each of these is a form of corporate reconstruction or amalgamation specifically provided for under the Japanese Companies Act or its predecessor, the Commercial Code of Japan. Mr Kubo explained the differences between each as follows:

(a) In the case of an absorption-type merger, two or more companies will merge to form one company. One of the entities, which is designated the "surviving company", inherits all the rights and obligations of the absorbed company (or companies, as the case may be), which ceases to exist as at the date of the merger. In this case, *all* the rights and obligations of the absorbed entities are transferred to the surviving companies and there is no need to specify in the merger agreement the rights and obligations which are to be transferred.[14]

(b) In the case of an incorporation-type company split, all or a part of the obligations of the "splitting company" will be hived off and be transferred to a *newly-incorporated* entity. The original company ("the splitting company") will continue to exist in an attenuated form and will hold all rights and obligations not transferred. The rights and obligations to be transferred must be specified in a "split plan", which has to be prepared by the splitting company prior to the split.[15]

(c) In the case of an absorption-type company split, the "splitting

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13 Expert Opinion of Kotaro Kubo at para 5.1.1 (AEIC of Kotaro Kubo dated 11 March 2016 at pp 11–14).

14 *Ibid* at para 5.1.3.

15 *Ibid* at para 5.1.4.

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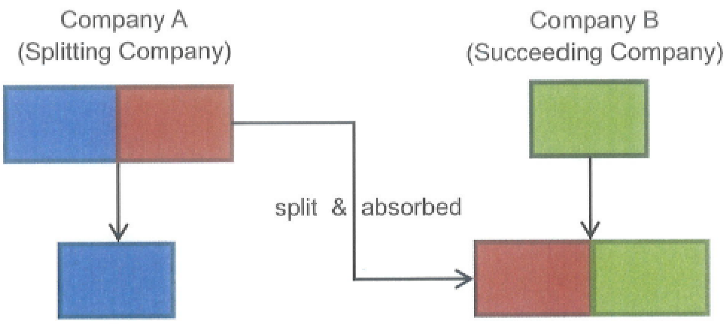
company" likewise transfers some of its rights and obligations to another company, except in this case, the company which receives it is an *existing* company (known as the "succeeding company"). This is why it is an "absorption" and not an "incorporation". The splitting company will continue to exist and will hold all rights and obligations not absorbed by the succeeding company. The rights and obligations which are to be absorbed must be specified in the split agreement between the splitting company and the succeeding company. To aid understanding, I reproduce a diagram explaining the mechanics of an absorption-type split found in Mr Kubo's expert opinion:[16]



47 For present purposes, we can focus only on the "absorption-type company split", for that was what the parties focused on. Under Art 2(xxix) of the Japanese Companies Act, an "absorption-type split" is defined as an "action of causing *another company to succeed to all or part of the rights and obligations* that a Stock Company or Limited Liability Company holds in connection with its business undertakings" [emphasis added]. Article 759(1) of the same then provides that a "Stock Company *succeeding* in an Absorption-type Company Split shall succeed to the rights and obligations of

16 *Ibid* at para 5.1.5.

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the Company Splitting in the Absorption-type Company Split agreement, on the Effective Day" [emphasis added].[17] Article 923 provides that when a company undergoes an absorption-type split, this will have to be recorded in the corporate register of the splitting and succeeding companies within two weeks. The corporate register is maintained by the Legal Affairs Bureau, a branch of the Japanese Government.

48 As set out at [5] above, NOC was the direct successor of the rights and obligations of KOL in 2010 and it then entered into the 2010 Split Agreement with the first plaintiff. It is also not disputed that the registration requirements have been satisfied. To use the nomenclature adopted by Mr Kubo, NOC (which, it will be recalled, was later renamed and is the second plaintiff) was the splitting company while the first plaintiff (JX Holdings Inc) was the succeeding company.[18] Pointing to the provisions set out above, Mr Kubo's opinion was that "legal title and all ownership rights to [the shares]… had been transferred by operation of Japanese law from NOC to [the first plaintiff]" and that none of the other entities (including the second plaintiff") "ought to have any valid claim or residual interest in respect of the same."[19]

49 Mr Chan, on behalf of the defendant, does not dispute that ownership of the shares had devolved to the second plaintiff (when it was still named NOC) by operation of law pursuant to the doctrine of universal succession. He also does not dispute that the first plaintiff is the owner of the shares under Japanese law. However, he contends that the first plaintiff's acquisition of the

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17 *Ibid* at paras 5.2.1(c) and 6.5.2; Mr Kubo's AEIC at pp 76, 78, and 80.

18 *Ibid* at paras 6.5.1–6.5.4.

19 *Ibid* at paras 6.5.7 and 7.1.1.

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shares was, in the ultimate analysis, one which took place by way of a private agreement (the 2010 Split Agreement) and is therefore more properly classified as a transfer of ownership and not a transmission by way of universal succession. He stresses that while "Japanese law provides for the succession to be effective in accordance with such agreement, it is an agreement which undergirds the transfer".[20] That being the case, a proper instrument of transfer is required and stamp duty should be payable before the first plaintiff can be registered as the owner.

50 With respect, I do not agree. It is plain from Mr Kubo's evidence, described above, that the changes in ownership that take place pursuant to an absorption-type split take effect by way of a process of *succession*, and not a transfer. Indeed, Mr Kubo's conclusion, after laying out the relevant statutory material, was that the transfer of title had taken place "by operation of law".[21] While it is the duty of the court to make findings on what the content of foreign law is, the court has to proceed on evidence. And in this regard, the only evidence that was placed before me was raw sources of foreign law (namely, the translations of the various provisions of the Japanese statutes set out above) contained in Mr Kubo's expert report and I found that they support his conclusion. This being the case, it seems to me that the proper conclusion to draw is, first, that the first plaintiff is the owner of the shares and, second, that this change in ownership took place by way of a process of transmission and therefore no instrument of transfer is required.

51 While the trigger for such a succession is a private agreement between

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20 Defendant's closing submissions at para 4.

21 Expert Opinion of Kotaro Kubo at para 6.5.7.

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two entities, this is quite beside the point. Indeed, I note that even in the case of an "absorption-type merger" or an "incorporation-type company split" – both of which Mr Chan accepts give rise to a true instance of universal succession – the transfers of assets and liabilities still take place by private initiative. In the former, there is a merger agreement; in the latter, there is a "split plan" (see [46] above). It is not clear to me that there is any principled basis for distinguishing between the three types of restructurings on this basis.

52 Finally, I note that that while Singapore does not have any provision providing for demergers, the Companies Act provides for the amalgamation of companies. Section 32C of the SDA provides that any notice of amalgamation is to be treated as conveyance on sale by each amalgamating company to the amalgamated company. By reason of this, stamp duty would *prima facie* be payable. It might be thought that this unfairly privileges foreign companies over local ones to the extent that foreign companies are afforded an avenue to effect the transfer of shares without having to pay stamp duty whereas the transfer of assets pursuant to a process of amalgamation under our Companies Act would seemingly attract the payment of stamp duty. This was clearly a point which troubled the defendant. However, I note the following.

53 First, s 15(1) of the SDA provides that *ad valorem* duty shall not be chargeable in respect of any instrument executed in relation to the transfer of shares pursuant to amalgamations which satisfy the conditions set out in the Stamp Duties (Relief from Stamp Duty Upon Reconstruction or Amalgamation of Companies) Rules (Cap 312, R 3, 2002 Rev Ed). Second, Singapore law will only recognise the transfers of assets and liabilities under the doctrine of universal succession if it is clear that it is provided for by the law of incorporation. It will also be incumbent upon any company that seeks

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relief under s 194 of the Companies Act on this basis to prove the content of foreign law on this issue. Finally, foreign corporations will have to comply with whatever conditions are set out in the law of their incorporation which might include the payment of taxes. This would discourage foreign companies from pursuing mergers or demergers in their home jurisdiction for the sole purpose of avoiding the payment of stamp duty in Singapore.

Conclusion

54 In light of the foregoing, I grant the plaintiffs an order in the terms of their amended prayers 1–3 and 5–7 (these relate to the prayers for relief which would be appropriate if I found that the first plaintiff, and not the second, is the legal owner of the shares under Singapore law).[22] I note that prayer 6 relates to an order that the plaintiffs are to notify IRAS of the rectification of the register and to pay any duties which might be assessed to be due. Even though IRAS has offered a preliminary view on this matter (see [2] above), they did not have the benefit of considering the interaction between the doctrine of universal succession and the policy considerations behind s 130 of the Companies Act. For this reason, I would nevertheless direct that they be informed of the nature of the order I have made and the reasons for it, in order that they might take any steps that they deem appropriate, whether in relation to this case specifically or in respect of future cases involving similar facts.

55 As the parties informed me that they had reached an agreement on costs, I make no order as to costs.[23]

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22 Summons No 2614 of 2016 at Annex A.

23 Minute sheet of Edmund Leow JC dated 7 June 2016 at p 1.

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Edmund Leow
Judicial Commissioner

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