IN THE SINGAPORE INTERNATIONAL COMMERCIAL COURT
OF THE REPUBLIC OF SINGAPORE

[2021] SGHC(I) 14

Suit No 3 of 2018 (Summons No 37 of 2021)

Between

Baker, Michael A (executor of the estate of Chantal Burnison, deceased)

… *Plaintiff*

And

(1) BCS Business Consulting Services Pte Ltd
(2) Marcus Weber
(3) Renslade Holdings Limited

… *Defendants*

JUDGMENT

[Civil Procedure] — [Injunctions] — [Anti-suit injunctions]

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Baker, Michael A (executor of the estate of Chantal Burnison, deceased)
v
BCS Business Consulting Services Pte Ltd and others

[2021] SGHC(I) 14

Singapore International Commercial Court — Suit No 3 of 2018 (Summons No 37 of 2021)
Quentin Loh J, Carolyn Berger IJ and Dominique Hascher IJ
23 September 2021

19 November 2021 Judgment reserved.

Quentin Loh J, Carolyn Berger IJ and Dominique Hascher IJ:

Introduction and the parties

1 This is an application, SIC/SUM 37/2021 ("SUM 37"), by the plaintiff, Michael Baker ("Baker"), for an anti-suit injunction ("ASI") against the second defendant from pursuing proceedings in California and against all the defendants from pursuing any further proceedings worldwide which have the same or similar subject matter of the action in Singapore comprised in SIC/S 3/2018 ("the Suit").

2 Baker is the executor of the estate of Chantal Burnison, ("Chantal" or "the Estate" as the case may be), who succumbed to cancer on 2 October 2016 in Los Angeles, United States of America ("US"). Chantal is survived by her

two daughters, Heika Burnison ("Heika", born in 1987) and Birka Burnison ("Birka", born in 1990). They are the only beneficiaries of the Estate.

3 The second defendant, Marcus Weber ("Weber"), is a Swiss National who operated out of Zurich until 2002 when he obtained a work permit to work in Singapore. Weber became a permanent resident of Singapore in 2003.

4 The first defendant, BCS Business Consulting Services Pte Ltd ("BCS") is a company incorporated in Singapore on 31 March 1999. Weber is a director and the sole shareholder of BCS. The third defendant, Renslade Holdings Limited ("Renslade (HK)") is a company incorporated in Hong Kong on 5 November 2007 and Weber is its sole shareholder. It is not disputed that Weber in effect owns and controls BCS and Renslade (HK). A reference to the "Defendants" or "Singapore Defendants" includes a reference to Weber, BCS and Renslade (HK) as the context so requires.

5 The present application arises in the context of a dispute between the plaintiff and the Defendants over the beneficial ownership of intellectual property rights in a compound called "Ethocyn" and the income and proceeds generated by those rights ("the Trust Assets", see [12] below).

Background facts

The underlying dispute

6 The facts, the issues, our findings and our grounds of decision can be found in our judgment on liability reported in *Baker, Michael A (executor of the estate of Chantal Burnison, deceased) v BCS Business Consulting Services Pte Ltd and others* [2020] 4 SLR 85 ("the Judgment"). Although we only refer to those facts, issues or findings as are necessary for the purposes of this

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application, this judgment must be read in the context of and together with the Judgment.

7 Chantal was the co-inventor of the compound, "Ethocyn". Ethocyn was used in various cosmetic and beauty products. The rights to the inventions and patents of Ethocyn ("the Ethocyn Rights") were initially assigned to California-incorporated companies controlled by Chantal ("the Chantal Companies"). The Chantal Companies entered bankruptcy proceedings in February 1999. The Ethocyn Rights, among other assets, were eventually sold to a New Zealand company, Renslade Holdings Limited ("Renslade (NZ)") on 19 October 1999 with the sanction of the US Bankruptcy Court. Sometime between 2000 and 2001 or perhaps 2002, it is not clear when (see the Judgment at [13]), the Ethocyn Rights were transferred to a Singapore company, Renslade Singapore Pte Ltd ("Renslade (S)"), and then finally to BCS on 1 April 2002.

8 Over the years, the Ethocyn Rights yielded a sizeable income and profits. This was derived mainly from a supply and distribution agreement ("SDA") entered into between BCS and Nu Skin International Inc ("Nu Skin") in June 2003. Under the SDA, BCS agreed to supply Ethocyn to Nu Skin for its usage and distribution. In return, Nu Skin would make direct payments to BCS. These payments formed the bulk of moneys generated from the Ethocyn Rights (referred to in the Judgment as the "Trust Moneys" or "Trust Monies"). Sometime in or around 2007, the bulk of Trust Moneys were transferred from BCS to Renslade (HK).

9 In or around 2014, Weber withdrew a sum of CHF9.5m (Swiss Francs) from the Trust Moneys. Baker alleged that Chantal agreed to loan Weber CHF6m but that Weber withdrew the larger sum of CHF9.5m without her

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knowledge. Weber denied this was a loan on the basis that he was using money that belonged to him.

10 Chantal was diagnosed with metastatic colon cancer in September 2015. From May 2016, Chantal repeatedly sought an account of the Trust Assets and Trust Moneys, but to no avail. We found that Weber and Dr Ralf Wojtek ("Wojtek"), a lawyer representing BCS, as well as another lawyer, Mr Urs Wehinger, delayed doing so on one pretext or another, (see [157]–[186] of the Judgment). After Chantal passed away on 2 October 2016, Baker became the executor of the Estate. He sought to have the assets of the trust and Trust Moneys transferred to the Estate. When this was not done, Baker filed the present Suit in Singapore in November 2018.

11 Baker, as executor of the Estate, sued the Defendants for: (a) breach of fiduciary duties as trustees under an oral trust or an oral agreement to hold and manage assets, the Ethocyn Rights, and the income derived therefrom, for Chantal; as well as (b) breach of a loan agreement of CHF9.5 million with 3% per annum interest ("the Loan Agreement"). Renslade (HK) was sued for dishonestly assisting BCS and Weber in their breach of fiduciary duties. The Defendants are also sued for conspiring and acting together with the intention of injuring Chantal and/or the Estate. Baker's claims, on behalf of the Estate are set out in [32] and [33] of the Judgment.

12 Baker claimed, essentially, that Chantal was the beneficial owner of the Ethocyn Rights. She had arranged for Renslade (NZ) to negotiate with the Chantal Companies and the Creditors' Committee in the bankruptcy proceedings and reached an agreement to purchase the Ethocyn Rights. There was no one else willing or interested to purchase the Ethocyn Rights despite the efforts of the Creditors' Committee, their merchant bankers, an entity known as

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the Kriegsman Group and an experienced work out specialist. Chantal was subsequently introduced to Weber and entered into an agreement with Weber ("the Trust Agreement") for Weber to acquire the Ethocyn Rights from Renslade (NZ) and to hold any income or proceeds generated from the Ethocyn Rights on trust for her (we refer to the trust as "the Trust" and the assets held on trust as "the Trust Assets"). Under this Trust Agreement, the Defendants were entitled to retain 5% of the proceeds generated. Further, although Chantal had agreed to loan Weber CHF6m, Weber then took the CHF9.5m from the Trust Moneys without her knowledge or consent.

13 The Defendants' defences are set out at [34]–[54] of the Judgment. In gist, BCS and Weber denied that there was any trust as alleged, or any kind of agreement between Chantal and Weber for the latter to acquire and hold the Ethocyn Rights and/or any income or proceeds generated on trust, for Chantal. Instead, BCS and Weber saw the acquisition of the Ethocyn Rights as a good business opportunity and agreed to purchase the same from Renslade (NZ), which had acquired the Ethocyn Rights from the bankrupt Chantal Companies with the sanction of the US Bankruptcy Court. Weber and BCS acquired the Ethocyn Rights using Renslade (S), and from 25 May 2000, until her death, Chantal worked for, and assisted Renslade (S) with the exploitation of the Ethocyn Rights as a consultant. The Ethocyn Rights were subsequently transferred to BCS because Nu Skin did not wish to deal with Renslade (S), a shell company. Further, for tax reasons, the profits generated from the Ethocyn products were transferred to Renslade HK and only 5% (from 2007 to 2014) and 10% (from 2016) of the proceeds of sale were retained by BCS in Singapore.

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The course of proceedings

14 The parties agreed to bifurcate the trial into liability and quantum tranches. In addition to their pleadings, the parties agreed upon an Agreed List of Issues for the court's decision (see the Judgment at [58] and [59]). Some of the relevant agreed issues included:

> (a) Was there a Trust Agreement between Chantal and Weber as pleaded by the Estate … in the Statement of Claim (Amendment No.3)?
>
> …
>
> (f) If a Trust Agreement existed between Chantal and Weber, what is the governing law of any alleged Trust (as defined in … the Defence (Amendment No.4) …?
>
> …
>
> (g) If the Alleged Trust was invalid, are the Defendants nevertheless holding the Trust Assets and/or Trust Moneys … and/or any other income [or] proceeds generated from the Trust assets on a resulting trust and/or constructive trust for Chantal's Estate under California Law?
>
> (h) If the Alleged Trust was valid under California law, can the assets alleged to be held on trust be claimed by Chantal's Estate?
>
> (i) Are the Trust Agreement and/or Alleged Trust illegal, void, or unenforceable as being contrary to the public policy of Singapore?
>
> (j) If the Alleged Trust is illegal, void, or unenforceable as being contrary to the public policy of Singapore, are the Defendants nevertheless holding the Trust Assets and/or the Trust Moneys and/or any other income or proceeds generated from the Trust Assets on a resulting trust for Chantal's Estate under Singapore law?

15 The parties were not able to agree the further issues framed by the other. The Estate's list of additional issues is set out at [60] of the Judgment. For the purposes of this judgment, one of the relevant issues at [60] was:

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> (e) If the Trust and/or Trust Agreement pleaded by Chantal's Estate is governed by California law, was the Trust and/or Trust Agreement invalid under California law?

16 From the Defendants' list of additional issues set out at [61] of the Judgment, one of the relevant issues was:

> (c) If the Alleged Trust … is governed by California law, was the Alleged Trust valid, legal and enforceable under California law?

17 The parties agreed that foreign law would be proved by way of submissions from registered foreign lawyers. This is one of the advantages of hearings before the Singapore International Commercial Court (a separate division of the High Court, where, *inter alia*, foreign law can be proved by legal submissions rather than through expert witnesses and findings of fact). The parties also agree that the factual witnesses would give their evidence first and the registered foreign lawyers' submissions on issues of California law would be made together with closing legal submissions from the Singapore lawyers.

18 The trial of the liability tranche took place in Singapore from 11 to 16 November 2019. The trial was originally fixed for hearing from 11 to 15, and 18 to 21 November 2019. At the joint request of counsel, this court sat, in a special sitting, on a Saturday, 16 November 2019, as counsel informed the court that they were concerned the evidence would not be completed within the days allocated for the evidence tranche of the trial. Baker, Heika and the Estate's lawyer, one Mr Johnson, gave evidence. On that Saturday, Baker closed his case at approximately 1.51pm, whereupon the Defendants elected under O 35 r 4(3) and O 110 r 3(1) of the Rules of Court (2014 Rev Ed) not to call evidence and submitted that they had no case to answer.

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19 This therefore meant that the affidavits of evidence-in-chief of Weber and Wojtek, Weber's lawyer, were *not* admitted into the evidence and consequently disregarded. This court therefore only heard the oral testimony of Baker and his witnesses, who had been cross-examined by the Defendants' counsel, and considered the evidence contained in the documents that had been admitted without formal proof (but not necessarily as to the truth of their contents). This court did not have the benefit of any evidence, whether by evidence-in-chief or oral testimony in cross-examination from Weber and Wojtek.

20 The parties then filed their written submissions. The registered US counsel duly filed their affidavits and submissions on California law. On 3 and 6 February 2020, we heard legal submissions by registered US counsel on California law relating to bankruptcy, trusts and illegality. We also heard closing submissions from Singapore counsel on the facts and on the law, which included Singapore law on trusts, illegality, (including the unenforceability of a trust tainted by illegality), and public policy in relation to, *inter alia*, the effect of a foreign illegality.

21 We reserved judgment and after deliberation, we handed down our Judgment on 29 April 2020 and held as follows:

> (a) There was a Trust Agreement between Chantal and Weber. Renslade (NZ) had held the Ethocyn Rights on trust for Chantal. When the Rights were transferred to Renslade (S), Chantal remained the beneficial owner of those Rights. This remained the case when the Ethocyn Rights were assigned or transferred to BCS. Therefore, Chantal had always been the beneficial owner of the Ethocyn Rights, the Trust Moneys and the Trust Assets (see the Judgment at [187] and [188]).

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(b) Chantal had agreed to loan Weber the sum of CHF6m for 3 years with interest at 3% per annum but Weber had withdrawn CHF9.5m from the profits made under the Nu Skin SDA without Chantal's knowledge or consent, and had not repaid that amount or rendered an account of any interest as of the date of the Judgment (see the Judgment at [199]).

(c) The Trust Agreement was governed by Singapore law (see the Judgment at [214]). Under Singapore law, there was an express trust (at [226]) and, in any event, a resulting trust would also arise on the facts (at [230]). In the alternative, if the Trust Agreement were governed by California law, a trust would also have arisen (at [240]). This court rejected the claim that the trust was unenforceable for illegality, finding that the Trust Agreement was enforceable under both Singapore (at [258]–[269]) and California law (at [298]).

(d) As the Trust Agreement was valid and enforceable,

(i) the Defendants had breached their fiduciary duty to Chantal by failing to provide an account of the Trust and the Trust Moneys;

(ii) the Defendants had breached the Trust Agreement by unilaterally increasing the commission from 5% to 10% from 2016 to 2017 without Chantal's knowledge and consent;

(iii) Weber had breached his fiduciary duty by failing to procure BCS or Renslade (HK) to return the Trust Assets, and also breached his contractual obligation to return CHF9.5m with the 3% annual interest; and

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(iv) by claiming legal and beneficial ownership over the Trust Assets and Trust Moneys, the Defendants had conspired with the intention of injuring Chantal and/or the Estate.

22 We therefore made orders relating to the plaintiff's claims for relief. We ordered the taking of accounts. The parties have since extracted the order of court in SIC/JUD 5/2020, the relevant portions of which are produced below:

> 1. it is hereby declared that [BCS] and/or [Renslade (HK)] hold the intellectual property rights to the inventions and patents of Ethocyn ("the Ethocyn Rights") and 95% of any income or proceeds generated from the Ethocyn Rights ("the Trust Assets") including 95% of the monies which were paid by Nu Skin International Inc to [BCS] and any other income or proceeds generated from the Trust Assets on trust for the Plaintiff ("the Trust Assets and Trust Monies");
>
> 2. the Defendants are to provide a detailed account of all the transactions which have taken place in respect of the Trust Assets and Trust Monies within 14 days from the date of judgment;
>
> 3. the Defendants are to account to the Plaintiff the Trust Assets and Trust Monies, and the Plaintiff is at liberty to trace and recover the Trust Assets and Trust Monies, if necessary. The Defendants shall pay the Plaintiff all sums due to the Plaintiff on the taking of the account of the Trust Assets and Trust Monies;
>
> 4. Parties are at liberty to apply to the Court for any orders or directions in relation to the taking of accounts of the Trust Assets and Trust Monies;
>
> 5. [Weber] is to pay to the Plaintiff CHF9.5 million plus interest at the rate of 3% per annum calculated from the date the sum of CHF9.5 million was loaned to [Weber] to the date of the judgment and the post judgment interest rate of 5.33% calculated from the date of judgment until the said sum of CHF9.5 million plus interest is repaid;
>
> 6. the sum of US$10,330,658.91 which was paid by [Renslade (HK)] into Court pursuant to the Order of Court No. 2 of 2020 dated 11 January 2020, shall be released to the Plaintiff, Michael A Baker, and/or his solicitors, Drew & Napier LLC;
>
> …

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23 The Defendants appealed against this court's Judgment in CA/CA 76/2020 ("the Appeal"). The defendants then applied, on 4 May 2020, for a stay pending the Appeal in HC/SUM 25/2020. We heard and dismissed the application for a stay on 16 June 2020. The Defendants then made a further application for stay of execution to the Court of Appeal, on 17 June 2020, in CA/SUM 70/2020 ("SUM 70"). The Court of Appeal heard SUM 70 on 15 July 2020, and held, *inter alia*, that:

(a) There would be no stay for the payment of the CHF9.5m. The payment shall be made to the plaintiff's solicitors, Drew & Napier LLC ("Drew & Napier"), pending the disposal of the Appeal.

(b) The sum of US$10.3m, which had previously been paid by Renslade (HK) into court, shall remain with Drew & Napier pending the disposal of the Appeal.

24 On 19 January 2021, the Court of Appeal heard the appeal, affirmed the Judgment of this Court and orders made and dismissed the Appeal with costs stating: "We agree with the comprehensive judgment of the court below. In our view, we see no reason to disturb any of the findings made therein, or the orders made."

25 In the meanwhile, as there was no stay ordered for the taking of accounts, that process commenced with Weber asking for time to file his affidavit with an account of the Trust Assets and Trust Moneys. Following the Court of Appeal's dismissal of the application for stay of execution in SUM 70, on 13 October 2020, Weber filed an affidavit on behalf of the Defendants to account for the Trust Assets and Trust Moneys. Drew & Napier replied in a letter with objections to the account and requested the Defendants to file a

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further affidavit to address the deficiencies with the account. The Defendants' solicitors, WongPartnership LLP ("WongPartnership"), replied with further accounts, which Drew & Napier still did not find satisfactory. After further correspondence between the solicitors from both sides, Baker's lawyers eventually wrote to court to ask for directions. Pursuant to the court's directions, Weber filed a further affidavit which provided a combined account of the Trust Assets and Trust Monies from 2000 to 2021. Baker filed an affidavit in reply, to give notice of his objections to the combined account. Baker further demanded payment from the Defendants. Baker's objections to the combined accounts were disputed in turn by WongPartnership, and no payments were made.

26 After much contention and delays, the taking of accounts has moved into the final stages. Baker applied in SUM 25/2021 ("SUM 25"), for payment of US$10,313,895.25 and CHF1,662,894.67, which Baker claims are due on the accounts filed thus far, interest on the Trust Assets and Trust Moneys found due, unredacted copies of certain documents, and costs.

27 The parties appeared before us on 23 and 24 September 2021 to make their respective submissions on this SUM 37 and to make final submissions on the taking of accounts in SUM 25 (*ie*, after the plaintiff had attempted to falsify and surcharge the accounts submitted by the Defendants). This judgment deals with SUM 37 and we have yet to deliver our judgment on the taking of the accounts in SUM 25.

28 It is therefore important to note that *these proceedings are ongoing and have not been completed*. It will be completed when we deliver judgment on the taking of accounts. There may well be an appeal thereon to the Court of Appeal as there may be on our decision in SUM 37.

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SUM 37

29 We now set out the background to SUM 37. After the proceedings were filed in Singapore in November 2017, BCS initiated a suit in the US District Court for the Central District of California against Baker and one of Chantal's companies in the US, BCS Pharma Corporation ("BCS Pharma") on or around 8 August 2019 ("the Californian Proceedings"). For context and convenience, we summarise the following chronology of the relevant events in Singapore (in bold) and the Californian Proceedings:

S/N	Date	Event
1.	**November 2017**	**SIC/S 3/2018 is filed by Baker in Singapore**
2.	**18 May 2018**	**The Suit is internally transferred from the General Division of the High Court to the Singapore International Commercial Court ("the SICC")**
3.	8 August 2019	The Californian Proceedings are commenced by BCS against Baker and BCS Pharma by the filing of an initial complaint ("the Initial Complaint")
4.	3 October 2019	Baker and BCS Pharma apply for the Californian Proceedings to be dismissed on the basis of *forum non conveniens*
5.	**11 to 16 November 2019**	**Evidential trial in the SICC**
6.	**3 and 6 February 2020**	**Hearings of submissions by US counsel and Singapore counsel by the SICC**
7.	17 April 2020	US District Court dismisses the *forum non conveniens* application

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S/N	Date	Event
8.	**29 April 2020**	**The SICC issues the Judgment in favour of the plaintiff**
9.	**8 May 2020**	**The Defendants file the Appeal**
10.	**June 2020**	**The SICC dismisses the Defendants' application to stay execution pending the disposal of the Appeal**
11.	24 June 2020	Baker, BCS Pharma and BCS agree that the Californian Proceedings should be stayed pending the Appeal and file a Joint Stipulation to Stay Case ("Joint Stipulation") and a Proposed Order on Stipulation to Stay Case. The US District Court orders the Californian Proceedings to be stayed pending the resolution of the Appeal on 30 June 2020
12.	**July 2020**	**The Court of Appeal dismisses the Defendants' application to stay execution pending the disposal of the Appeal**
13.	**13 October 2020**	**Weber files his 19th Affidavit on behalf of the Defendants to account for the Trust Assets and Trust Monies**
14.	**29 December 2020**	**The Defendants wrote in to provide further account**
15.	**19 January 2021**	**The Appeal is dismissed by the Singapore Court of Appeal**
16.	10 March 2021	Baker, BCS Pharma and BCS file a Joint Status Report in the Californian Proceedings. On 19 March 2021, the parties file a joint report proposing timelines for the Californian Proceedings
17.	26 March 2021	The US District Court lifts the stay on the Californian Proceedings and sets the case schedule

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S/N	Date	Event
18.	6 April 2021	Baker and BCS Pharma file their Answer to the Initial Complaint
19.	27 April 2021	BCS files a "First Amended Complaint" adding Heika, Birka, Grey Pacific Labs LLC ("Grey Pacific Labs") and Grey Pacific Science, Inc ("Grey Pacific Science") (Grey Pacific Labs and Grey Pacific Science shall be referred to collectively as the "Grey Pacific Companies"). We refer to these as the "Additional Parties".
20.	11 May 2021	Baker and BCS Pharma file their Answer to the First Amended Complaint
21.	**14 May 2021**	**Baker files SUM 25 for payment due on the taking of the Account**
22.	11 June 2021	The Additional Parties file their Answer to the First Amended Complaint
23.	**16 June 2021**	**Baker files SUM 37 in this court and supporting affidavit**
24.	**10 August 2021**	**Weber files his 21st Affidavit on behalf of the Defendants in reply to Baker's application and affidavit in SUM 25**
25.	**20 August 2021**	**Baker files his 27th Affidavit in response to Weber's 21st Affidavit**
26.	27 August 2021	BCS applies to the California courts for leave to amend its First Amended Complaint, and proceed instead on a "Second Amended Complaint"

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S/N	Date	Event
27.	24 September 2021	The US District Court allow BCS's application to proceed on the Second Amended Complaint. The California court also directs the US Defendants to file their answers to the Second Amendment Complaint by 5 November 2021, and that all timelines in the Californian Proceedings to be pushed back by six months so as to allow for discovery
28.	**24 September 2021**	**This Court hears the application in SUM 25**

The Initial Complaint

30 In the Initial Complaint,[1] BCS referred to the contract it had with Nu Skin (see [8] above) to supply the Ethocyn compound. BCS claimed that BCS Pharma and Baker had interfered with BCS's contractual relationship with Nu Skin. Specifically, under an amendment to the Nu Skin SDA, Nu Skin was to pay US$2m to BCS by January 2018. However, Baker had contacted Nu Skin and improperly instructed Nu Skin to make payment to BCS Pharma.[2] We refer to the claims arising from these alleged facts as the "Intercepted Payment Claims". In addition, BCS claimed that BCS Pharma had lowered its production and operation costs, but did not reduce the corresponding amounts that it claimed from BCS, resulting in overpayments by BCS.[3] On these alleged facts, BCS claimed in conversion[4] the amounts BCS paid in excess of BCS Pharma's actual production and operating costs, and punitive damages based on fraud and

1 See Joint Bundle of Documents for SUM 37 (16 September 2021) ("JBD-37") Bundle B1 at pp 156–172.

2 JBD-37 Bundle B1 at pp 158–159, para 12.

3 JBD-37 Bundle B1 at p 160, para 21.

4 JBD-37 Bundle B1 at pp 166–170.

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malice on the part of BCS Pharma. We refer to this as "the Overpayment Claims".

The First Amended Complaint

31 Subsequently, on 27 April 2021 (*ie*, after the Defendants' Appeal was heard and dismissed by the Court of Appeal), BCS filed the First Amended Complaint. BCS added, as defendants, Heika, Birka (Chantal's daughters) and the Grey Pacific Companies (both Delaware incorporated companies carrying on business in California). We refer to the defendants in the Californian Proceedings, who did not appear as a party to the current proceedings before us, collectively as the "US Defendants". These would include Heika, Burka, BCS Pharma, Baker in his personal capacity, as well as the Grey Pacific Companies.

32 In the First Amended Complaint, BCS no longer pursued the Overpayment Claims. It maintained its allegation that BCS Pharma had overstated production and operating costs,[5] but this allegation did not, in and of itself, constitute any causes of action. Instead, this allegation, together with new assertions, combined to support BCS's new causes of action in unfair competition and civil conspiracy.[6]

33 The new assertions made were as follows:

(a) Chantal had made representations to the court during the bankruptcy proceedings of the Chantal Companies that the buyer of the Ethocyn Rights, Renslade (NZ), was a party at arm's length,[7] and also

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5 JBD-37 Bundle B1 at p 422, para 61.

6 JBD-37 Bundle B1 at pp 430–432.

7 JBD-37 Bundle B1 at pp 412–414, paras 15–20.

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later that she did not own the Ethocyn Rights when she declared her net worth as less than US$350,000 as of 1 May 2001.[8]

(b) BCS obtained the Ethocyn Rights from Renslade (S) on 1 April 2002. "All rights in Ethocyn were to be owned by [BCS] with no ownership interest retained by [Chantal]. [BCS] did not hold the rights in trust for [Chantal] or her estate. The Ethocyn Rights were held by [BCS], and the proceeds from the exploitation of the Ethocyn Rights, after deducting [BCS's] share of the profits, were segregated in [Renslade (HK)], an entity owned by Weber".[9]

(c) Chantal had wanted her daughters to profit from the Ethocyn business. On her directions, Weber incorporated the Amarillis Foundation which was to own all the shares in Renslade (HK). Weber was named as first beneficiary, and Heika and Birka as second beneficiaries, who were (after an amendment to the Foundation's regulations) to benefit within thirty years and always after Weber's death. "Throughout these transactions, [Chantal] had no ownership interest in the Ethocyn Rights or in the proceeds thereof."[10] However, Baker defied Chantal's instructions to Weber and sought to enlarge the estate. Heika and Birka joined Baker to benefit from the Ethocyn business without the restrictions placed by the structure of the Amarillis Foundation.[11]

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8 JBD-37 Bundle B1 at p 414, para 22.

9 JBD-37 Bundle B1 at pp 414–415, para 23.

10 JBD-37 Bundle B1 at p 416, paras 28–31.

11 JBD-37 Bundle B1 at p 417, paras 32–33.

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(d) After Chantal's death in October 2016, Baker, Heika and Birka conspired to incorporate Grey Pacific Science and Grey Pacific Labs on 27 October 2016. After Grey Pacific Labs was incorporated, Baker signed a master trademark agreement purporting to convey all the Ethocyn Rights belonging to BCS to Grey Pacific Labs.[12] On 30 January 2017, Grey Pacific Labs filed for a patent in the US Patent Office for a method of synthesising Ethocyn and similar compounds (the "Patent Filing"), which BCS discovered only in 2021. Grey Pacific Science has marketed and distributed Ethocyn. This was concealed from the Singapore court in the Suit.[13] In doing so, Baker, BCS Pharma, Heika and Birka have cut BCS out of business and contracts. We refer to the claims relating to, and arising out of, this purported assignment of trademark rights as the "Trademark Claims".

(e) In November 2017, Baker initiated litigation in Singapore, fraudulently alleging that the Ethocyn Rights were beneficially owned by Chantal. Baker would have been "judicially estopped" from making such assertions in the US, but as Singapore does not apply that doctrine, Baker was allowed to proceed and succeeded against the Defendants.[14]

34 It is important to note that the Defendants ran the same defence and case as stated at [33(a)]–[33(c)] above, in the Singapore proceedings. Having failed before this court and the Court of Appeal, the defendants now run the same case before another court in another jurisdiction. We accept [33(d)] was not, for obvious reasons, an issue before us. Importantly, however, the issue contained

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12 JBD-37 Bundle B1 at pp 417–418, paras 35–37.

13 JBD-37 Bundle B1 at pp 418–419, paras 39–41.

14 JBD-37 Bundle B1 at pp 420–421, paras 51–54.

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in the first sentence of [33(e)] was also the case pleaded before us by the Defendants. Again, they had failed before us and the Court of Appeal. The mischief contained in the second sentence of [33(e)] above is that the Defendants never ran the argument of "judicial estoppel" before us, despite being able to run all the other arguments under California law in relation to bankruptcy, trusts, illegality, as well as the public policy of Singapore where a person has obtained assets from a foreign bankruptcy court by making false and misleading statements to the foreign court. This is clearly an abuse of process and a breach of the rule in *Henderson v Henderson* (1843) 3 Hare 100 ("*Henderson v Henderson*"), both of which we will deal with below (see [70] and [79] below).

35 On the basis of these allegations, BCS made the following claims:

S/N	Claim	Against	Relief	Remarks
1.	Tortious interference with contract	All defendants	Actual and punitive damages	In addition to the Intercepted Payment Claims, additionally that the defendants have entered into business with Nu Skin to the exclusion of BCS
2.	Conversion	Baker and BCS Pharma	Actual and punitive damages	Part of the Intercepted Payment Claims
3.	Money had and received	Baker and BCS Pharma	Actual and punitive damages	Part of the Intercepted Payment Claims
4.	Unjust enrichment	Baker and BCS Pharma	Actual and punitive damages	Part of the Intercepted Payment Claims
5.	Fraud	Baker and BCS Pharma	Actual and punitive damages	Part of the Intercepted Payment Claims

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S/N	Claim	Against	Relief	Remarks
6.	Conversion of trademark to Ethocyn[15]	Baker, Grey Pacific Labs and Heika	Damages and punitive damages	Part of the Trademark Claims
7.	Breach of fiduciary duty[16]	Baker	Damages and punitive damages	Part of the Trademark Claims
8.	Unfair competition under the California Business & Professions Code §17200[17]	All defendants	Injunctive relief to stop defendants from using Ethocyn trademark rights Restitution Damages	Unlawful business practices including intercepting the payment from Nu Skin, misrepresenting production and operating costs, and assigning trademark rights without BCS's knowledge or approval
9.	Civil conspiracy[18]	All defendants	Damages and punitive damages	Wrongful acts of intercepting payments, misrepresenting production and operating costs, and fraudulently assigning trademark rights

15 JBD-37 Bundle B1 at pp 427–428, paras 94–101.

16 JBD-37 Bundle B1 at pp 428–430, paras 102–112.

17 JBD-37 Bundle B1 at pp 430–432, paras 113–122.

18 JBD-37 Bundle B1 at pp 431–432, paras 123–128.

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S/N	Claim	Against	Relief	Remarks
10.	Racketeer Influenced And Corrupt Organizations Act, 18 U.S.C. § 1962(b)[19]	Baker, Heika and Birka	Damages (triple actual damages)	BCS relies on various acts of the US Defendants
11.	Racketeer Influenced And Corrupt Organizations Act, 18 U.S.C. § 1962(c)[20]	All defendants	Damages (triple actual damages)	BCS relies on various acts of the US Defendants
12.	Declaratory judgment estopping defendants from asserting existence of a trust under 28 U.S.C. §§ 2201, 2202	All defendants	Declaration	On the basis of the representations that Chantal had made during the bankruptcy proceedings of the Chantal Companies, declaratory judgment that "[the] [US] Defendants are judicially estopped from asserting the existence of a trust, that the sale of the Ethocyn rights in the bankruptcy action was anything other than an arms-length transaction, and that [Chantal] retained any rights in Ethocyn after the sale."[21]

[19] "It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce."

[20] "It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt."

[21] JBD-37 Bundle B1 at pp 440–441, para 188.

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36 Baker and BCS Pharma, as well as the remaining US Defendants, have filed Answers to the First Amended Complaint. Relevantly, Baker and BCS Pharma have pleaded that the First Amended Complaint and the claims therein are "barred by the doctrines of collateral estoppel and/or *res judicata*, in light of the final judgment of the SICC in Case No SIC/S 3/2018 which was affirmed by the Singapore Court of Appeal in Case No CA/CA 76/2020. The Singapore Court of Appeal's decision is final and non-appealable."[22] Baker and BCS Pharma have also referred to the Judgment as constituting a money judgment against Weber, BCS and Renslade (HK), and further, that the claim for declaratory judgment fails as there is no actual controversy given that any such controversy has been barred by estoppel.[23] The Additional Parties have also pleaded "collateral estoppel and/or *res judicata*" on the basis of the Judgment and the decision in the Appeal.[24]

The Second Amended Complaint

37 As the Californian Proceedings progressed and entered the discovery phase, BCS served a third-party subpoena on Nu Skin on 22 June 2021. On 6 July 2021, Nu Skin replied and objected to the subpoena on the ground that it had entered into a settlement agreement dated 28 May 2020 with BCS ("the Settlement Agreement"). Under the Settlement Agreement, BCS' claims against Nu Skin were settled and discovery regarding these claims was barred, in exchange for payment from Nu Skin ("the Settlement Sum").[25]

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22 JBD-37 Bundle B1 at p 456, para 80.

23 JBD-37 Bundle B1 at p 457, paras 95–96.

24 JBD-37 Bundle B1 at p 469, Second Affirmative Defense.

25 JBD-37 Bundle B6 at pp 3542–3543, para 13(a).

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38 BCS then allegedly found out that the Settlement Agreement was entered into *by Baker, who held himself out as a representative of BCS*.[26] It was subsequently discovered that Baker's counsel in the Californian Proceedings did not know about the Settlement Agreement. Nor did the counsel instructed by Baker in Utah in relation to the settlement negotiations with Nu Skin know about the Californian Proceedings.[27]

39 BCS was unable to obtain a copy of the Settlement Agreement. Nu Skin's Utah counsel refused to provide a copy of the Settlement Agreement, partly for fear of further litigation from Baker. Baker's Utah counsel similarly represented that Baker's instruction was to *not* disclose the Settlement Agreement.[28]

40 BCS thus applied for leave from the California court on 27 August 2021 to amend its complaint a second time. In its proposed Second Amended Complaint, BCS made further allegations that Baker had:[29]

> (a) instructed and retained counsel in Utah, US, purportedly on behalf of BCS to assert and/or threaten to assert claims against a third party, Nu Skin;
>
> (b) concealed from Nu Skin the existence of the Californian Proceedings;

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26 JBD-37 Bundle B6 at p 3542, para 10.

27 JBD-37 Bundle B6 at pp 3543–3544, para 13(c).

28 JBD-37 Bundle B6 at p 3543, para 13(b).

29 JBD-37 Bundle B6 at p 3540–3541, para 9.

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(c) fraudulently induced Nu Skin to enter into the Settlement Agreement;

(d) concealed the negotiations with Nu Skin and the Settlement Agreement from BCS and the California court; and

(e) misappropriated and/or failed to remit the Settlement Monies to BCSS despite purporting to settle claims on BCS's behalf.

On the basis of these allegations, BCS added three further claims against Baker in his personal capacity,[30] in (a) conversion; (b) money had and received and (c) unfair competition. We refer to the claims relating to, and arising out of, the Settlement Agreement as the "Wrongful Settlement Claims".

41 On 3 September 2021, Baker filed his opposition to BCS's application for leave to amend its complaint.[31] In his opposition, Baker argued that BCS's new allegations raised in the Second Amended Complaint, even if true, would simply mean that the Settlement Agreement would be invalid.[32] The invalidity of the Settlement Agreement means that BCS would be free to commence proceedings against Nu Skin and the Settlement Sum would also be returned to Nu Skin. This would, in turn, render BCS's claims against Baker redundant.[33] Additionally, given that BCS's rights under the SDA, and any claims arising therefrom, are held on trust for the Estate, it is difficult to see what loss or damage BCS has suffered.[34]

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30 JBD-37 Bundle B6 at p 3544, para 14.

31 JBD-37 Bundle B6 at pp 3648–3649, para 7.

32 JBD-37 Bundle B6 at p 3649, para 8.

33 JBD-37 Bundle B6 at p 3655, para 23.

34 JBD-37 Bundle B6 at p 3656, para 24.

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42 On 24 September 2021, the California court allowed, in full, BCS's application to proceed with the Second Amended Complaint. The timelines for the Californian Proceedings have also been pushed back for six months, so as to allow for discovery to take place.

Parties' arguments

43 Baker complains that the Californian Proceedings are a collateral attack on the Judgment and the Appeal. This court found, and the Court of Appeal affirmed, that there is a valid and binding Trust over the Ethocyn Rights in favour of the Estate. In contradiction of this, BCS takes the position in the Californian Proceedings, that absolute ownership of the Ethocyn Rights belonged to it (and subsequently Renslade (HK)). This, on Baker's view, clearly amounts to vexatious and oppressive conduct on the part of BCS, which justifies the grant of an ASI.

44 In response, BCS argues that it is not seeking to undermine this court's Judgment. The causes of action raised in the Californian Proceedings are separate and distinct from those that have been adjudicated upon by this court, and the Californian Proceedings also concern facts which were only discovered by BCS *after* the conclusion of the Appeal. BCS insists that it should be entitled to formulate and pursue its claims in a manner most advantageous to it.

The legal principles

45 The general principles relating to the granting of an ASI were stated by the Court of Appeal in *Lakshmi Anil Salgaocar v Jhaveri Darsan Jitendra* [2019] 2 SLR 372 ("*Lakshmi*") at [49]:

> (a) The jurisdiction is to be exercised when the "ends of justice" require it.

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> (b) Where the court decides to grant an anti-suit injunction, its order is directed not against the foreign court but against the parties so proceeding or threatening to proceed.
>
> (c) An injunction will only be issued to restrain a party who is amenable to the jurisdiction of the court, against whom an injunction will be an effective remedy.
>
> (d) Since such an order indirectly affects the foreign court, the jurisdiction is one which must be exercised with caution.

It will be seen that these principles have been derived from the Privy Council's decision in *Société Nationale Industrielle Aerospatiale v Lee Kui Jak* [1987] AC 871:

> First, the jurisdiction is to be exercised when the 'ends of justice' require it … Second, where the court decides to grant an injunction restraining proceedings in a foreign court, its order is directed not against the foreign court but against the parties so proceeding or threatening to proceed.
>
> …
>
> Third, it follows that an injunction will only be issued restraining a party who is amenable to the jurisdiction of the court against whom an injunction will be an effective remedy: see eg Re North Carolina Estate Co (1889) 5 TLR 328 per Chitty J. Fourth, it has been emphasised on many occasions that, since such an order indirectly affects the foreign court, the jurisdiction is one which must be exercised with caution …

46 These general principles include, importantly, the reminder that since such an order indirectly affects the foreign court, comity requires that this jurisdiction is one that must be exercised with caution. The authorities have identified five non-exhaustive key factors that the court will consider in deciding whether to grant such an injunction (*Lakshmi* at [50]):

> (a) whether the defendants are amenable to the jurisdiction of the Singapore court;
>
> (b) the natural forum for resolution of the dispute between the parties;
>
> (c) the alleged vexation or oppression to the plaintiffs if the foreign proceedings are to continue;

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> (d) the alleged injustice to the defendants as an injunction would deprive the defendants of the advantages sought in the foreign proceedings; and
>
> (e) whether the institution of the foreign proceedings is in breach of any agreement between the parties.

47 The reference in *Lakshmi* (at [50(e)]) to an "agreement between the parties" explains the distinction drawn in the authorities between *contractual* and *non-contractual ASIs* (see *Halsbury's Law of Singapore – Conflict of Laws* vol 6(2) (LexisNexis, 2020 Reissue) ("*Halsbury*") at para 75.125). Contractual ASIs refer to those granted to restrain the ASI defendant, from breaching a contractual obligation to commence proceedings in a specific forum. The ASI sought by Baker in this case is not contractual in nature, seeing that there is no such obligation on BCS to sue in any particular forum.

48 Instead, Baker is asking for a *non-contractual ASI*. The hallmark of non-contractual ASIs is *vexatious and oppressive conduct* on the part of the ASI defendant (*Halsbury* at paras 75.127 and 75.128). Whether the ASI defendant's conduct in instituting foreign proceedings is vexatious and oppressive, is an objective issue to be answered with the reference to the facts of each case (*Koh Kay Yew v Inno-Pacific Holdings Ltd* [1997] 2 SLR(R) 148 ("*Koh Kay Yew*") at [19]).

49 Within the category of non-contractual ASIs, a further distinction can be drawn between cases of *consecutive* and *concurrent proceedings*. Consecutive proceedings cases differ from concurrent proceedings cases because in the former situation, the forum court has already issued a judgment. It would be vexatious and oppressive for an ASI defendant to commence foreign proceedings, so as to relitigate issues that have been decided by the forum court and thus undermine a judgment with *res judicata* effect: Thomas Raphael QC, *The Anti-Suit Injunction* (OUP, 2nd Ed, 2019) ("*Raphael*") at [5.18].The same

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point was made in Steven Gee QC, *Commercial Injunctions* (Sweet & Maxwell, 7th Ed, 2021) ("*Gee*") at [14-094]:

> The English court may grant an injunction to prevent a party bound by the res judicata or issue estoppel effect of an English judgment relitigating the underlying dispute or issue abroad. This extends to litigating abroad matters which could and should have been litigated as part of the original action. Granting an anti-suit injunction for this purpose both forwards an important English public policy of ***preventing collateral attack on a final judgment*** by a disappointed litigant, ***prevents relitigation of determined issues***, and gives effect to a substantive right not to be sued which has been created by the relevant judgment.
>
> [emphasis added]

50 We accept that in situations of consecutive proceedings, there may sometimes be a fine line between a party arguing in the foreign court that a prior judgment should not be *enforced* or *recognised* in a foreign jurisdiction, and vexatious and oppressive conduct which needs to be enjoined. The former is generally an issue for the foreign court to determine, according to its own rules on the enforcement and recognition of foreign judgments. A court would be slow to interfere with the foreign court's determination of how its judgment should be treated. Notwithstanding this, however, there remains the possibility that, in certain circumstances, mounting a challenge against a court's judgment in foreign jurisdictions would amount to clearly vexatious and oppressive conduct which must be restrained. An important point of distinction lies in whether the defendant is merely resisting an enforcement proceeding brought by the successful plaintiff in the foreign court, or whether the defendant has pre-emptively decided, on its own accord, to launch a collateral attack of the court's judgment in a foreign jurisdiction. Further, it bears repeating that an ASI operates against the ASI defendant *in personam*, and is not directed at the foreign court. Indeed, in the final analysis, the need to account for the foreign court's own jurisdiction to determine its own matters for itself is simply a

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reflection of the established principle that the jurisdiction to grant an ASI is one to be "exercised with caution": *Lakshmi* at [49(d)].

51 A paradigm example of a case involving consecutive proceedings, which justified an ASI can be seen in *Masri v Consolidated Contractors (No 3)* [2009] QB 503 ("*Masri*"). In *Masri*, the claimant commenced an action in London against the defendants in respect of an agreement reached in 1992. The claimant obtained judgment against the defendants, in which the English court declared, *inter alia*, that the 1992 agreement had not been terminated. The defendants then commenced an action in Yemen for declarations that, *inter alia*, the agreement had been terminated and that the defendants were not liable to the claimant. As noted above, this was not a case where the defendant was resisting enforcement *per se* – there was no attempt by the claimant to commence enforcement proceedings in Yemen. The claimant applied for an ASI, which was granted by the English High Court. The defendant appealed.

52 The English Court of Appeal dismissed the defendant's appeal. Lawrence Collins LJ concluded that the fact that the respondent was seeking to relitigate in a foreign jurisdiction (*ie*, Yemen) matters which were already *res judicata* between himself and the claimant by reason of the English judgment, could be sufficient ground for the grant of an ASI. He described a case "in which the judgment debtors are seeking to relitigate abroad the merits of a case which, after a long trial, they have lost in England" as "a classic case of vexation and oppression": *Masri* at [82], [86]–[95], and [100]. The English court has powers to make such an ancillary order in protection of its jurisdiction and its processes, including the integrity of its judgments, as well as the underlying rights of the successful claimant.

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53 Hence, besides restraining vexatious and oppressive conduct, the court will also intervene by way of an injunction to prevent an abuse of its processes. The protection of a court's own judgment and processes is a matter properly for that court to determine. As the Court of Appeal stated in *Beckett Pte Ltd v Deutsche Bank AG* [2011] 2 SLR 96 at [19]:

> … In our view, the issue was very simply this. As stated by Lord Hobhouse of Woodborough in *Turner v Grovit* [2002] 1 WLR 107 at [24] (the facts of that case are not directly relevant), a court may issue an anti-suit injunction to restrain an individual from continuing to prosecute foreign proceedings which amount to an abuse of its (*ie*, the aforesaid court's) process because of their effect on pending litigation in that court. Such abuse is a species of unconscionability and wrongful conduct justifying the grant of an injunction. We should add that once there is an abuse of the court's process, the matter ceases to be a case involving only the competing interests of the parties concerned – the public interest in ensuring that the judicial process is not abused is engaged, and the court must intervene, where it is able to do so, to prevent its process from being abused.

In referring to the specific instance where the continued prosecution of foreign proceedings may have an impact on pending litigation in the court issuing the ASI, we do not understand the Court of Appeal to be *restricting* such ASIs to that specific situation – it is clear instead that the Court of Appeal was referring to just one instance where the abuse would justify an injunction. The principle remains that a court will intervene to prevent its process from being abused.

54 This principle was also referred to in *Masri* and approved by the High Court in *Beckett Pte Ltd v Deutsche Bank AG and another* [2011] 1 SLR 524 at [34]. It suffices for us to quote from *Masri* at [100]:

> It is consistent with principle for an English court to restrain relitigation abroad of a claim which has already been subject of an English judgment. There is long-established authority that protection of the jurisdiction of the English court, its process and its judgments by injunction is a legitimate ground for the grant of an anti-suit injunction.

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55 The key question, therefore, is whether the Californian Proceedings amount to a relitigation of the issues that we have already decided in the Suit, which Judgment has been affirmed by the Court of Appeal. As we will go on to explain, *many* (but not all) of the claims raised by BCS in the Californian Proceedings are contradictory to the findings made in the Judgment. These allegations, including the key allegations relating to the doctrine of judicial estoppel, therefore amount to an attempt by BCS to relitigate issues already decided by this court. This is thus both vexatious and oppressive to the Estate and also an abuse of this court's process, and it warrants the grant of an ASI. However, BCS should be allowed to pursue those claims which *do not* contradict our findings, in the Californian Proceedings.

56 We have set out the claims being made by BCS in California from [30]–[42] above. In our judgment, these claims clearly proceed on the following factual premises: (a) that *there is no Trust* in favour of the Estate over the Ethocyn Rights, or in the alternative *the said Trust is not enforceable*; (b) because of Chantal's false statements to the US Bankruptcy Courts, the Estate is judicially estopped from asserting the existence of the Trust; (c) that the sale of the Ethocyn Rights in the bankruptcy action was anything other than an arms-length transaction; and (d) that Chantal did not retain any rights in Ethocyn after the sale. However, the existence, validity and enforceability of the Trust were two of the key issues decided by us in these proceedings. We have earlier referenced the parties' lists of agreed, as well as non-agreed issues, all of which raised the existence, validity and enforceability of the Trust (see [14]–[16] above), both under Singapore law as well as California law.

57 As we noted, at [63] of the Judgment, the existence, validity and enforceability of the Trust formed the "heart of the dispute" between the parties:

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> 63 At the heart of this dispute are two underlying issues:
>
> (a) Was there a Trust Agreement between Chantal and Weber and his companies (BCS and Renslade (HK)) to hold the Ethocyn Rights and all income and proceeds therefrom on trust for Chantal ("Trust Agreement") or did Weber purchase the Ethocyn Rights for his own investment in his own right?
>
> (b) If there was a valid Trust Agreement, was it unenforceable or void as a result of an illegality under Singapore law and/or California law?

Having considered the evidence put before us and after considering the legal and factual closing submissions, including submissions on US law from registered US lawyers, we found as a fact (see [21] above) that there was a Trust Agreement between Chantal and Weber, which gave rise to the Trust, and the Trust was valid and enforceable, whether its governing law was Singapore law or California law. As noted above, we also ruled on illegality and public policy whether Singapore or California was applied.

58 Therefore, the factual premise on which the Californian Proceedings are predicated clearly and directly contradicts and seeks to undermine the findings of this court. Indeed, this is clear from our questions to the Defendants' counsel, Mr Thio Shen Yi SC ("Mr Thio SC"), and his replies during oral submissions on 23 September 2021:

> Berger, IJ: Yes, I---I'm having a problem with this because you did raise various questions [in this Suit] that US law on bankruptcy and trusts and you did argue *that the trust was illegal or unenforceable* for a variety of reasons…
>
> …
>
> Loh, JAD: … Was it not argued *before us* that we certainly shouldn't be allowing a party to make a statement on oath to a US Court, mislead the US Court, and now come to us and say, 'Well, please forget all about that'? Now, that argument was made before us.

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Thio: Yes, but the preclusive effect of … that statement is a little different. Because it goes to either credibility or it's something to persuade Your Honour that, look, ***the trust cannot exist ...*** *because Chantal said something directly opposite to what she's asserting here* …

…

Loh, JAD: But I'm having difficulty with that, Mr Thio, because what I just said was clearly said to us in the context of public policy and illegality. 'You shouldn't allow a party to go on oath and say these things'. And it was pointed out to us in no uncertain terms that this paragraph, that paragraph, *et cetera*, of what Chantal had filed in the bankruptcy proceedings were lies. *And therefore, as a matter of public policy, we shouldn't let somebody disavow what she said*.

Thio: Well, Your Honour, … Like, … they [*ie*, Chantal] did a bad thing. You ought not to countenance this behaviour. And therefore, we wrap it up and try to bring it under the doctrine of illegality. At but that failed. And illegality is a complex issue which has different requirements and it has different consequences.

So … it's not the same doctrine, Your Honour. [**I]t's *closely related on the facts*** but they are legally distinct. *I think that's the best answer that I can offer*.

…

Berger, IJ: Wouldn't you have to agree that if the trust, as this Court has determined, if there is a trust, that all of your claims [*in the Californian Proceedings*] would have to fail?

…

Thio: But the declaration is that they are judicially estopped from asserting that there is a trust. So that's different from the question of whether there is a trust or not …

…

Loh, JAD: Alright. So let's leave that to one side. Your learned friend has read out parts of your client's current statement of claim or points of claim [in

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> the *Californian Proceedings*]. And it seems to say that you're disavowing there's any trust …
>
> Thio: … Well, the---of course, in the original complaint, you will find that they are this the original complaint, which was running, I suppose, in parallel to the Singapore proceedings, does disavow the trust. But with the (indistinct) complaint, as you can see from the remedy that has been sought, where the remedy is that they are judicially estopped from asserting the … trust from arising, then the pleadings makes sense in that context …
>
> [emphasis added in italics and bold italics]

59 Mr Thio SC was *unable* to answer Justice Berger's second question referenced above; the transcript does not show the almost resigned shrug of his shoulders that was evident to us and followed by, with respect, a lame attempt not to answer the question but to try and draw a distinction when there was none. In these exchanges, Mr Thio SC conceded that the Californian Proceedings, as commenced by the Initial Complaint, was initially premised on the position that there was no trust, in direct contradiction of this court's findings in the Judgment. He qualified his position by saying that the claim in judicial estoppel, as first raised in the First Amended Complaint, no longer required the position that there was no trust, but instead that the plaintiff was *prevented* from asserting a trust. As we will explain later (see [72]–[78] below), this is, *in substance*, if not in form, an attack on the *enforceability* of the Trust, which is another matter expressly considered, and rejected, in the Judgment. With respect, Mr Thio SC's attempt to draw the difference between "judicial estoppel" and its preclusive effect on the one hand, and claiming there was no trust or no enforceable trust on the other, is a distinction without any difference. This is clear from the pleadings in the Californian Proceedings and Weber's 23rd affidavit filed on 22 September 2021, where he exhibits the Second Amended Complaint at paragraphs 21 and 23:

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> 21. On May 24, 2000, Renslade Holdings Pte Ltd, a Singapore Incorporated Company ("Renslade SG") acquired all rights transferred under the Asset Purchase Agreement from Renslade NZ and, in 2002, transferred these rights to the Plaintiff [BCS]. Renslade SG was, at that time, owned by Marcus Weber ("Weber"), who was also the owner of the Plaintiff [BCS].
>
> …
>
> 23. By Deed of April 1, 2002, [BCS] obtained the rights to Ethocyn from Renslade SG. All rights in Ethocyn were to be owned by [BCS] with no ownership interest retained by Burnison. [BCS did not hold the rights in trust for Burnison or her estate. The Ethocyn Rights were held by [BCS], and the proceeds from the exploitation of the [Ethocyn] Rights, after deducting [BCS's] share of the profits, were segregated in Renslade Holdings Hong Kong ("Renslade HK"), an entity owned by Weber.

60 In our judgment, the Defendants are attacking the existence or enforceability of the Trust in the Californian Proceedings. This was something they put in issue before us, but Baker has prevailed, and they have failed. It is very clear to us that the Defendants are now pursuing this same line of factual and legal allegations – which they have failed to establish before us in Singapore – in the Californian Proceedings, and trying to dress it up with an argument on "judicial estoppel" which they alleged was a rule of procedure that would not apply in Singapore.

Amenability to jurisdiction and natural forum

61 We briefly address the Singapore Defendants' amenability to this court's jurisdiction, as well as the question of which is the natural forum to hear the claims being pursued in the Californian Proceedings, which are relevant factors to be considered in deciding whether to grant the ASI.

62 The point on amenability to this court's jurisdiction can be disposed of briefly. As referenced at [3] and [4] above, BCS is a Singapore corporation and Weber is a permanent resident in Singapore and carries out at least some of his

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business in Singapore and Hong Kong. He is the sole shareholder and director of BCS and the sole shareholder of Renslade HK. The Singapore Defendants submitted to this court's jurisdiction by appearing in these proceedings without objecting to the jurisdiction of the Singapore courts or otherwise challenging the jurisdiction of the Singapore courts. The importance of this fact cannot be overstated in this context, which will become relevant when we consider the Defendants' vexatious and oppressive, as well as procedurally abusive, conduct. This is a case where the Singapore Defendants have willingly participated in these proceedings, filed and responded to various applications, and proceeded on the basis that they would defend the action in Singapore. Although the Defendants eventually decided to argue that there was no case to answer after the plaintiff's case at trial had closed, this does not change the fact that the Defendants were (and continue to be) participants in the Singapore court's processes. The proceedings in relation to the taking of accounts has not been completed. This is how they have conducted themselves for the almost four years since they first entered their respective appearances in this matter.

63 Turning to the question of natural forum, BCS now argues before us that California is the natural forum to hear the claims pursued in the Californian Proceedings, insofar that these claims are founded on facts which occurred in the US, and are likely governed by US and not Singapore law. We agree with BCS that its claims in the Californian Proceedings are founded on facts which occurred in the US. We are also prepared to accept that these claims could be governed by US law. However, even assuming that California is the natural forum to hear the claims being pursued in the Californian Proceedings, this is not a bar to Baker's prayer for an ASI. First and foremost, as we have noted earlier, the defendants never challenged the jurisdiction of the Singapore courts. Secondly, many of the business aspects in this case, as is more common

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nowadays, also span across Switzerland, parts of Europe in the early days of setting up the Ethocyn business, New Zealand, Singapore and Hong Kong. The evidence shows the parties communicating from different parts of the world and also meeting in different parts of the world. Beyond this, however, there are other factors and legal principles that require discussion.

64 We begin by distinguishing the authorities which have stated that it is a necessary condition that Singapore is the natural and proper forum for an ASI to be granted on the ground that the foreign proceedings are vexatious and oppressive: see *Koh Kay Yew* at [19] and *VKC v VJZ and another* [2021] SGCA 72 at [18]. Those cases address the usual case of concurrent proceedings, and the question of consecutive proceedings was not considered. We have already explained the nature of this distinction and why it is necessary to bear this in mind when approaching the exercise of the discretion to grant an ASI (see [49]–[54] above).

65 The requirement of natural forum stems from the underlying need for the forum to have *sufficient interest* with the case before an ASI is granted. It also follows that the natural forum requirement is *not an invariable one*, and the court may grant an anti-suit injunction *even though it is not the natural forum if it otherwise has sufficient interest with the matter*: *Halsbury* at para 75.129 (for instance, in single forum cases where the action is only justiciable abroad, the forum court may act notwithstanding that it is not the natural forum: see *Airbus Industrie GIE v Patel* [1999] AC 119 at 139). In a consecutive proceedings case, the forum court's sufficient interest would arise from the need to *protect its judgment from a collateral attack*, occasioned by the commencement of proceedings abroad by the ASI defendant: *Masri* at [96], *per* Lawrence Collins LJ. Therefore, if the claims pursued by BCS *do* amount to relitigation of issues already decided by this court, we will have no reservation in issuing an ASI,

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even if California may be the natural forum when considering some aspects of this case. This court has an interest in protecting its judgment and preventing an abuse of its own processes. In any event, insofar that the claims raised by BCS in California concern issues *already decided by this court*, in the circumstances of this case, the consideration of the natural forum is strictly speaking immaterial.

BCS's claims as an attempt at relitigating matters already decided in the Judgment

66 As referenced by our comments above, we start by noting that the claims pursued by BCS, as reflected in the Second Amended Complaint, fall into four categories, which correspond to four series of events:

(a) the Intercepted Payment Claims, which pertains to BCS Pharma's interception of the US$2m which Nu Skin was supposed to pay to BCS;

(b) the Trademark Claims, which pertains to the purported assignment of trademark rights from BCS to Grey Pacific Labs and Grey Pacific Science's subsequent exploitation of the same;

(c) the claim in judicial estoppel, which pertains to Chantal's declaration to the US Bankruptcy Courts that the sale of the Ethocyn Rights to Renslade (NZ) was above board; and

(d) the Wrongful Settlement Claims, which pertains to the negotiation and conclusion of the Settlement Agreement.

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Intercepted Payment Claims and Trademark Claims

67 We agree with Baker[35] that the Intercepted Payment Claims and the Trademark Claims are an attempt by BCS to relitigate matters that were put in issue before this court and have decided by this court. As noted, perhaps *ad nauseum*, the Defendants were unsuccessful in trying to appeal the findings and Judgment against them. In the Second Amended Complaint, BCS asserts that it is the proper owner of the Ethocyn Rights and the US$2m. BCS alleged, in the US Proceedings, that "no ownership interest [was] retained by [Chantal]" and BCS "did not hold the rights in trust for [Chantal] or her estate".[36] This assertion, that it owns the Ethocyn Rights and the proceeds therefrom absolutely, is a repeat of the Singapore Defendants' defence in the Suit. This assertion further contradicts the finding of this court that the Ethocyn Rights and all proceeds therefrom belong to *the Estate* beneficially. More egregiously, the reliefs prayed for by BCS in the Second Amended Complaint include, *inter alia*, restitution of the US$2m and the trademark rights that were wrongfully assigned. These prayers for relief also contradict the orders from this court for the Singapore Defendants to account for the Trust Assets. As pointed out by the plaintiff, by accounting for the Trust Assets and Trust Monies in SUM 25, the Defendants must be taken to have accepted that the Trust Assets and Trust Monies belong to the Estate.[37] They have even gone as far as seeking deductions for work done as trustee in relation to the Trust Assets, including the intercepted US$2m.[38]

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35 Plaintiff's Written Submissions for SUM 37 (16 September 2021) ("PWS-37") at para 49.

36 JBD-37 Bundle B1 at p 414, para 23.

37 PWS-37 at para 102.

38 Marcus Weber's 21st Affidavit (10 August 2021) at paras 8, and 38–105.

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68 However, in relation to the Trademark Claims, we note that BCS's complaints do not just relate to the ownership of the Ethocyn Rights (which amounted to relitigation of issues already decided by this Court), but also with Baker's fraudulently holding out that he was an officer of BCS. This aspect, in our view, does not amount to relitigation. Legal title to the Ethocyn Rights remained with BCS, and to that extent any divesting of said legal title should be properly done by *BCS*. It was not for Baker to "short-circuit" the process and pretend to be an officer of BCS, a party against whom he was embroiled in bitter litigation. Put another way, there is nothing to stop BCS proceeding against Baker in his *personal capacity*, for lying about his affiliation to BCS. In the same vein, insofar that Heika, as an officer of Grey Pacific Labs, willingly entered into the assignment agreement for the trademark rights knowing that Baker is not an officer of BCS, BCS should also be allowed to claim against her (and also Grey Pacific Labs, if Heika's state of mind can be attributed back to it). In this regard, we note the characterisation of these claims put forward by Mr Thio:

> Thio: … I mean, the easier example, I suppose, are the IP rights. For example, I mean, if I have a third party's property in my house and I refuse to return that property, wrongfully refuse to return that property, that third party cannot break into my house or can't pick the lock, take out the prop---take the property and leave. Now, no damage has been caused to me. … the locks were picked but they are intact. I have suffered no financial loss. But there is trespass. And that's a rot that is a wrong that I am entitled to seek redress against, even though I am not entitled to any redress in relation to the property that was moved.
>
> So, for example, the IP rights, if you fraudulently masquerade as a[n] officer of the company, that is a breach of well, that's a tort. That tortious the company the proper process of company the organisation of companies is engaged. Now, trust law isn't engaged.
>
> …

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> … But if we do not succeed on judicial estoppel, and they can said and they are allowed to say that this is a or wha---they prove to the---or they can rely on the judgment of the Singapore Court to say all this is on trust, there are still claims that well, there are still wrongs to be addressed. We have genuine grievances that we are entitled to seek … redress for. I heard---if either company, I'm the legal owner of the company, I'm the legal owner of or the company is a legal owner of intellectual property rights at that point of time, there is a proper way of transferring these, either by way of a court order or by way of an agreement. But you don't masquerade, you don't pretend to be my officer and take those. You don't come into my house and take my sta---take your stuff without my permission.

We will address this in terms of the scope of the ASI that could be granted, if we were so minded.

Judicial estoppel claim

69 We are also of the view that the claim in judicial estoppel is an attempt by BCS to relitigate the issue of Chantal's declaration to the US Bankruptcy Courts. In oral arguments before us, Mr Thio SC emphasised that BCS did not raise, and thus this court did not have to decide, the claim in judicial estoppel. In response, Baker's counsel, Ms Woo Shu Yan ("Ms Woo"), argued that BCS could, and should, have raised the claim in judicial estoppel before this court. As a result, having failed to raise the claim in judicial estoppel earlier, BCS could not now be allowed a second bite at the cherry.

70 We agree with Ms Woo. It is vexatious and oppressive for an ASI defendant not just to relitigate issues which has been decided by the forum court, but also issues which *could, and should*, have been brought before the forum court (but were not): *Raphael* at [5.19]; *Gee* at [14-094]; *Noble Assurance v Gerling-Konzern* [2006] EWHC 253 (Comm) ("*Noble Assurance*") at [95] (this principle can be analogised to the extended doctrine of *res judicata* as

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pronounced in the seminal decision of *Henderson v Henderson*). This principle is expressed in *Raphael* at [5.19] in the following terms:

> When a matter was not decided in the original … proceedings, but could and should have been raised in those proceedings, it has been held that in appropriate circumstances it can be an 'abuse of process' and thus vexatious and oppressive, to seek to raise those matters in subsequent foreign litigation.

71 In our judgment, the claim in judicial estoppel *could*, and *should*, have been raised by the defendants before this court, in the Suit. Mr Thio SC argued otherwise, and there were, broadly speaking, two planks to his arguments: (a) first, that that the claim in judicial estoppel is *not* an attack on the findings of this court such that it did not matter whether or not judicial estoppel was raised before us in the Suit; and (b) secondly, that the claim in judicial estoppel could not have been raised in Singapore. We find neither of these planks convincing, and address them in turn.

72 We begin with Mr Thio's argument that the claim in judicial estoppel *does not* amount to an attack on the findings of this court. We find it important to set out again, in a fair bit of detail, our exchanges with Mr Thio on this point:

> Loh, JAD: Alright. So let me ask you this. Was it not argued before us that we certainly shouldn't be allowing a party to make a statement on oath to a US Court, mislead the US Court, and now come to us and say, 'Well, please forget all about that'? Now, that argument was made before us.
>
> Thio: Yes, but the preclusive effect of that ar---with the effect of that statement is a little different. Because it goes to either credibility or it's something to persuade Your Honour that, look, the trust cannot exist because you have to make the---because Chantal said something directly opposite to what she's asserting here. But---…
>
> Loh, JAD: But I'm having difficulty with that, Mr Thio, because what I just said was clearly said to us in the context of public policy and illegality. 'You

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shouldn't allow a party to go on oath and say these things'. And it was pointed out to us in no uncertain terms that this paragraph, that paragraph, *et cetera*, of what Chantal had filed in the bankruptcy proceedings were lies. And therefore, as a matter of public policy, we shouldn't let somebody disavow what she said. Now, I can't see, I think that is the point Justice Berger was bringing up, counsel also say, 'By the way, the United States, if they try to do this, there's judicial estoppel. And there's no way they would be allowed to disavow what they told the Court. And here are the authorities.'

…

Loh, JAD: But the question is, you are now, no doubt to me in my mind and speaking for myself, having a second bite of the cherry on an issue that should have been raised here.

Thio: … In Singapore, the argument that was thought most likely to succeed or to persuade Your Honours, which failed eventually, was the public policy and illegality argument.

But that is not the same as a judicial estoppel argument, which is a distinct or a defined doctrine under US law. It appears explicitly in the text of the decision cited. But---and not in Singapore. It doesn't appear here. So we couch it in different terms. Like, we---they did a bad thing. You ought not to countenance this behaviour. And therefore, we wrap it up and try to bring it under the doctrine of illegality. At---but that failed. And illegality is a complex issue which has different requirements and it has different consequences.

So it---it's not the same doctrine, Your Honour. It---it's closely related on the facts but they are legally distinct. I think that's the best answer that I can offer

Berger, IJ: Wouldn't you have to agree that if the trust, as this Court has determined, if there is a trust, that all of your claims would have to fail? … If there is a trust, then your clients don't have any interest in what's been transpiring since the existence of the trust has been decided. And even if there were misrepresentations made to

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obtain a transfer of the trademark or whatever, it's of no consequence and of no interest in terms of standing for your clients to complain about it. Unless you can convince the Court that it should ignore the existence of the trust.

Thio: Well, I think that is one reason why that---why a declaration is being sought. Because the---my learned friend says that the declaration goes completely contrary to the finding of this Court. I beg to differ. Because what the declaration says is that you cannot---I mean, the Singapore Court's jurisdiction is not being challenged. You the---they can't take a US Court decision saying the exact opposite and come to Singapore and say the Singapore Court should change its position. No, it's enforceable. BCS is a Singapore company. It's enfor---that decision is enforceable against them. They can't run away from it.

Well---and in a world where we have multiple cate---you have multiple suits with a possibility of inconsistent decisions, that's something that we accept. We deal with it, …

But the declaration is that they are judicially estopped from asserting that there is a trust. So that's different from the question of whether there is a trust or not. It is a preclusionary---it's a preclusion. They are precluded …

Berger, IJ: No, I understand that the judicial estoppel position or claim, if you were successful in the United States, would mean that the client in Singapore would be unable to rely on there being a trust because the plaintiff would be estopped from bringing it up. So you could proceed as if there's been no determination of that trust because of estoppel. And as we have discussed a minute ago, that's something that could have been presented to this Court as another reason why the California Court would not find this to be a valid trust on the basis that you cannot raise this, having previously taken a contrary position. But as things stand right now, where it wasn't raised in Singapore, you're asking the US Court to ignore it on the basis of judicial estoppel.

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> Thio: … I mean, of course, this is assuming, and this is still in answer to Justice Berger's point that, *if we do not succeed on the trust issue and that we and they---and that the---everything is held on trust for the estate, I mean, is there anything left?*
>
> …
>
> Loh, JAD: Alright. So let's leave that to one side. Your learned friend has read out parts of your client's current statement of claim or points of claim. And it seems to say that you're disavowing there's any trust.
>
> Thio: Well, the---of course, in the original complaint, you will find that they are this---the original complaint, which was running, I suppose, in parallel to the Singapore proceedings, does disavow the trust. But with the (indistinct) complaint, as you can see from the remedy that has been sought, where the remedy is that they are judicially estopped from asserting the---a trust from arising …

73 To begin with, Mr Thio SC conceded that the claims in illegality and public policy on one hand, and judicial estoppel on the other, are "closely related". We do not think these claims are "closely related", but instead are the same facets or aspects which fall within the overlapping area of two intersecting circles. In the Suit, the Defendants' case, on illegality and public policy, was that Chantal orchestrated Renslade (NZ) to purchase the Ethocyn Rights, and made false declarations in the US Bankruptcy Proceedings to approve the sale of the Ethocyn rights to Renslade (NZ). To that extent, the Trust Agreement, and by extension the Trust, would be unenforceable (see Judgment at [242]–[245]). We have dealt with this issue extensively in the Judgment at [258]–[269], having found that the declarations by Chantal were false. In particular, we highlight that arguments were made before us not only on illegality under Singapore law, but also under California law, which pertained to both illegality *and* public policy, as well as going to whether the trust was constituted for a valid purpose. We note in particular the Defendants' argument, as we

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summarised at [283] of the Judgment, was that: "because Chantal's false statements to the Bankruptcy Court constituted a fraud on the court, public policy prohibits enforcement of the Trust". Having considered these various submissions and having heard US counsel, we concluded that the Trust was enforceable under Singapore and California law.

74 Turning to the judicial estoppel claim, BCS *again* relies on Chantal's false statements or misrepresentations to the US Bankruptcy Court to argue that the Estate cannot assert the Trust as against the Defendants. As we noted in the oral hearing, the Defendants could have easily added judicial estoppel as another ground on which the Trust could not be enforced in their arguments before us in the Suit. They had already put forward a litany of complaints on the same factual basis, and we do not see any reason why they could not have included judicial estoppel as well. In fact, the phrase "illegality and public policy" could have very well been replaced with the phrase "judicial estoppel", and the Defendants' arguments before us would have remained the same (albeit buttressed by further submissions on the legal aspects of judicial estoppel). As an illustration, the Defendants had submitted in their reply submissions dated 27 December 2019 at paragraph 227:

> If the Plaintiff's Allegations are true, then the statements made by Ms Burnison in the US proceedings under penalty of perjury which disavowed any interest in Renslade NZ or the Ethocyn Rights would have been false, and made **deliberately** with the **knowledge** that they were false. Ms Burnison's fraudulent statements constituted **clear breaches of US law**, *including* (a) perjury, (b) fraud on the court, (c) violation of 18 U.S.C. s 152, and (d) violation of 18 U.S.C. s 157.
>
> [emphasis in original]

It would not have been surprising or out of place if the Defendants had simply added a further argument that the same also gave rise to judicial estoppel under California law that prevented Baker from asserting the existence of the Trust.

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75 Facing this hurdle, Mr Thio SC attempted to draw a distinction between the argument on illegality and public policy, which answers the question of "whether there is a trust or not", and the argument on judicial estoppel, which would preclude the plaintiffs from "asserting that there is a trust". As we have stated above (see [59]), we find this a distinction without any difference and totally unconvincing. Both of these arguments stem from the *same* fact, *ie*, that "Chantal said something [before the US Bankruptcy Courts] directly opposite to what she's asserting here [in the Suit]". Furthermore, this distinction suggests that the only thing that the court is concerned with in terms of illegality and public policy is the existence of the trust, whereas, in truth, this argument can also be characterised as an issue of *enforceability* of the trust, which overlaps significantly with what a plaintiff can or cannot assert in proceedings based on the trust.

76 More importantly, however one characterised these various defences, both of the arguments on illegality/public policy and judicial estoppel go towards the *existence and enforceability* of the Trust as a matter of substance, which are matters already canvassed in the Judgment. The weakness of Mr Thio SC's distinction is most clearly shown through his exchanges with Berger IJ. When asked whether "if there is a trust … all of [BCS's] claims [in the Californian Proceedings] would have to fail", Mr Thio SC conceded that all of BCS's claims would fail. But the existence of the Trust was clearly a finding made by this court. Further, Mr Thio SC also conceded that BCS would not have standing in any of the claims brought in the Californian Proceedings unless "[BCS] can convince the [Californian] Court that it should ignore the existence of the trust". In the same vein, Mr Thio accepted that "in answer to [Berger IJ's] point that, if we do not succeed on the trust issue and that … everything is held on trust for the estate, I mean, is there anything left?" Put differently, the claim

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in judicial estopped aims to achieve the substantial result that the Trust Assets and Trust Monies are *not* held on Trust for the Estate. But this court clearly found to the contrary (see references cited at [21] above). Put another way, it is clear from Mr Thio SC's arguments, that the judicial estoppel claim is a necessary step for BCS in the Californian Proceedings *because* it would circumvent our findings concerning the Trust.

77 We make one further point on the *timing* of the judicial estoppel claim. BCS only added this claim in the First Amended Complaint *after* the Appeal was dismissed by the Court of Appeal. The timing suggests that the claim in judicial estoppel was strategically concealed by BCS, to be deployed in the event that the Appeal did not end in its favour.

78 For the reasons stated in [73]–[77] above, the claim in judicial estoppel *was* an attack on the Judgment of this court, because it was, in substance, seeking to establish that the Trust Assets and Trust Monies were *not* held on Trust for the benefit of the Estate. It therefore follows that this claim *should* have been raised before this court in the Suit, where the issue of the existence and enforceability of the Trust was exhaustively canvassed, unless there is any reason why this claim *could not* have been heard in the Suit.

79 This brings us to the second plank of Mr Thio SC's argument, that judicial estoppel *could not* have been raised in Singapore. We agree that if there were legitimate reasons to not have pursued the claim in judicial estoppel, then BCS should not be penalised for failing to raise the same before us during the Suit. If, however, there is no legitimate reason, then BCS would not be allowed to drip-feed issues in multiple fora, which would be vexatious and oppressive. This is in line with the *Henderson v Henderson* doctrine referenced above at [34]. In *Henderson v Henderson* at 382, Wigram VC observed:

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> [W]here a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special case[s], *not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.*
>
> [emphasis added]

80 This principle was elaborated in *Goh Nellie v Goh Lian Teck and others* [2007] 1 SLR(R) 453 ("*Nellie Goh*") at [53]:

> … To put it shortly, a court should determine whether there is an abuse of process by looking at all the circumstances of the case, including whether the later proceedings in substance is nothing more than a collateral attack upon the previous decision; whether there is fresh evidence that might warrant re-litigation; whether there are *bona fide* reasons why an issue that ought to have been raised in the earlier action was not; and whether there are some other special circumstances that might justify allowing the case to proceed. The absence or existence of these enumerated factors (which are not intended to be exhaustive) is not decisive. In determining whether the ambient circumstances of the case give rise to an abuse of process, the court should not adopt an inflexible or unyielding attitude but should remain guided by the balance to be found in the tension between the demands of ensuring that a litigant who has a genuine claim is allowed to press his case in court and recognising that there is a point beyond which repeated litigation would be unduly oppressive to the defendant. *In the context of cases such as the present, the inquiry is directed not at the theoretical possibility that the issue raised in the later proceedings could conceivably have been taken in the earlier but rather at whether, having regard to the substance and reality of the earlier action, it reasonably ought to have been.* …
>
> [emphasis added]

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These principles as laid down in *Goh Nellie* were subsequently approved by the Court of Appeal in *The Royal Bank of Scotland NV (formerly known as ABN Amro Bank NV) & others v TT International (nTan Advisory Pte Ltd & others) and another appeal* [2015] 5 SLR 1104 at [102].

81 Here, Mr Thio SC explained that judicial estoppel was not raised before this court as estoppel would be a matter of procedure governed by the *lex fori*, *ie*, Singapore law, and Singapore law does not recognise judicial estoppel. In this regard, Mr Thio relied upon the leading English treatise on conflict of laws, *Dicey, Morris and Collins on the Conflict of Laws* vol 1 (Lawrence Collins gen ed) (Sweet & Maxwell, 15th Ed, 2012) ("*Dicey*"), for the characterisation of the existing categories of estoppel as being procedural.[39] We do not think that Mr Thio SC's explanation here passes muster. Whether a rule of law is substantive or procedural in nature is to be decided by the process of *characterisation* undertaken by the forum courts. While the *existing* categories of estoppel recognised by *English* law are procedural, this does not mean that judicial estoppel *must necessarily* be procedural under *Singapore* law. In fact, *Dicey* expressly recognises that whether a *specific specie* of estoppel can be characterised as a rule of substance or procedure "may well vary with the type of estoppel under consideration" (*Dicey* at [7–038], citing Yeo Tiong Min SC (*hon*), *Choice of Law for Equitable Doctrines* (OUP, 1st Ed, 2004) at 134–136). It was thus *open* to the Defendants to raise the facts relating to the judicial estoppel claim, and to raise the question of *characterisation* before us. The fact is that they failed to do so *at all*, preventing this court from even considering the proper characterisation of judicial estoppel.

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39 Defendants' Written Submissions for SUM 37 (16 September 2021) at para 87(d).

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82 In the circumstances, this was entirely unsatisfactory, given that the Defendants had also made extensive submissions to this court during the Suit about California law through their US counsel. Insofar that the Californian courts would have considered the claim in judicial estoppel, there was no reason why this claim "could [not] have been presented to this Court as another reason why the California Court would not find this to be a valid trust" (see [72] above). Indeed, we have already observed at [74] above that the claim of judicial estoppel would neatly fall in place together with the other bases on which the Defendants sought to contest the enforceability of the Trust. As a matter of substance and reality, we find that the issue of judicial estoppel *ought* to have been raised before us (see *Nellie Goh* at [53]), and that it "properly belonged to the subject of litigation" (*Henderson v Henderson* at 382). To allow the Defendants to pursue this in the Californian Proceedings, in the light of our view that those proceedings amount in substance to a collateral attack on a Singapore Judgment, would be oppressive as well as an abuse of process and warrants this court's intervention. *Raphael* aptly states (at para 19.44, footnote 81) that:

> In this regard, the Singapore courts have adopted the remark in the first edition of this work that 'the greater the positive and voluntary involvement of the injunction respondent in the local proceedings, and the longer the local suit has been allowed to proceed before the commencement of the parallel proceedings, the stronger the case for an injunction' (see *PT Sandipala Arthaputra v STMicroelectronics Asia Pacific* [2015] 5 SLR 873 at [137]).

Wrongful Settlement Claims

83 However, we recognise that the Wrongful Settlement Claims does not amount to an attempt at relitigating issues that we have already decided. First, the facts giving rise to the Wrongful Settlement Claims were only uncovered by BCS *after the Appeal concluded*. Baker did not dispute this. More significantly, Baker also did not contend that these facts *could have been discovered by BCS*

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with reasonable diligence. This court clearly did not deal with the issue of the Wrongful Settlement Claims.

84 Secondly, the crux of the Wrongful Settlement Claims does not rest with the ownership of the Ethocyn Rights, but rather with Baker's misrepresentation to Nu Skin that he was a representative of BCS. As far as Nu Skin was concerned, its counterparty was BCS, who held legal title to the Ethocyn Rights. To that extent, BCS was the proper party who should deal with Nu Skin, even if BCS was only holding to the Ethocyn Rights on trust for the Estate. Again, if the Estate wanted to deal with Nu Skin directly, the proper course of action was for BCS to first divest legal title in the Ethocyn Rights to the Estate. Baker was not entitled to "short-circuit" the process by lying about his affiliation with BCS. Therefore, BCS would be entitled to pursue the Wrongful Settlement Claims against Baker *in his personal capacity.*

The Californian Proceedings are still at an early stage

85 For completeness, we are mindful of the principle that an ASI should not be granted if foreign proceedings have proceeded to an advanced stage because of considerations of comity: *Sun Travel & Tours Pvt Ltd v Hilton International Manage (Maldives) Pvt Ltd* [2019] 1 SLR 732 at [82]. In this case, the Californian Proceedings are still at an early stage, with BCS still being able to amend its pleadings and discovery yet to begin. This is not a situation where the Californian Proceedings have advanced to the trial stage such that there would be a wastage of resources if BCS is restrained from continuing with the proceedings, nor has the US court made any findings which may be undermined by the ASI. The balance of convenience, therefore, points towards the grant of the ASI.

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86 A related consideration is that of delay. In this regard, we note that SUM 37 was filed only on June 2021, almost two years after the Californian Proceedings were commenced (see [29] above). However, we do not find this to be fatal. As Ms Woo explained, instead of applying before this court for an ASI, the plaintiff decided to apply in California for a stay of the Californian Proceedings[40] (even though we note that the plaintiff initially applied to *dismiss* the Californian Proceedings on the ground of *forum non conveniens* in October 2019 but failed, and the Californian Proceedings were only stayed by consent in June 2020). Ms Woo further reminded this Court that there was another action in the US commenced by Dev Service SA ("Dev"), a company owned and controlled by Weber, against a property at Lake Arrowhead ("Arrowhead Property") which was bought using the Trust Monies ("Arrowhead Litigation"). According to Ms Woo, the Arrowhead Litigation was withdrawn after the Appeal was dismissed. For that reason, the plaintiff expected that the Californian Proceedings would also be withdrawn. But they were surprised when they were not. We accept Ms Woo's explanation as to why SUM 37 was not filed earlier, and on that basis find that there is no delay sufficient to defeat the plaintiff's application for the ASI.

BCS should not be allowed to claim against the US Defendants

87 For the foregoing reasons, BCS should not be allowed to continue the Californian Proceedings against *the Estate*. However, in the Californian Proceedings, BCS is also claiming against the US Defendants. A question thus arises as to whether BCS should also be restrained from claiming against the US Defendants, notwithstanding that they did not appear as parties to the Suit.

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40 Transcripts at 92/27-28.

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88 We are of the view that this question should be answered in the affirmative. The forum court has the power to enjoin an ASI defendant from litigating, in foreign proceedings, against those *who are not parties to the proceedings before the forum court*: *Gee* at [14-094]; *Noble Assurance* at [95]–[97]; *Crescendo Maritime Co v Bank of Communications* [2016] 1 Lloyd's Rep 414 ("*Crescendo*") at [54]–[56].

89 In *Noble Assurance*, a London reinsurer commenced proceedings abroad attempting to nullify the result of a London arbitration award against the reinsured, who was party to the arbitration, as well as the ultimate reinsured, who was not party to the arbitration. The English High Court found that it was vexatious of the reinsurer to commence foreign proceedings against the reinsured. Further, and more importantly, insofar that the reinsurer joined the ultimate insured in the foreign proceedings on the basis that they shared the same legal position, it was equally vexatious of the reinsurer to claim against the ultimate reinsured as well. To that extent, the English High Court found that it had jurisdiction to grant a temporary injunction enjoining the reinsurer from claiming against both the reinsured and ultimate reinsured. In *Crescendo*, the position in *Noble Assurance* was accepted as part of the *ratio* of the latter case.

90 In our view, the reasoning in *Noble Assurance* applies with equal (or even greater) force to the present case. Many claims against the US Defendants are also premised on the footing that BCS/Renslade HK own the Ethocyn Rights absolutely, which is contrary to the findings of this court in the Suit. Further, the Daughters and the Grey Pacific Companies, while not parties to the Singapore proceedings, are inextricably linked to the Trust. Heika and Burka are the beneficiaries of the Estate, the latter of which is the only beneficiary of the Trust. Heika gave evidence before us. BCS Pharma and Grey Pacific Companies were incorporated to serve as vehicles for Baker and the Daughters.

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Put another way, the US Defendants are clearly parties who should have the benefit of the Singapore judgment even if they are not, strictly speaking, privy to the same. The attempt to make these claims against the US Defendants, in our view, clearly amount to an attempt to denude our judgment of any real practical effect, since, if successful, BCS's argument would suggest that Chantal's daughters, the beneficiaries of the Estate, cannot then rely on our findings that the Estate was the beneficiary of the Trust. To that extent, this court would be justified in enjoining BCS from suing the US Defendants.

The ambit of the ASI

91 For the reasons set out above, we are of the view that many of the claims pursued by BCS in the Californian Proceedings amount to an attempt at relitigating matters already decided by this court, and thus vexatious and oppressive and amount to an abuse of process. We also find that BCS's claims are vexatious and oppressive towards the Estate. Moreover, these claims relitigating the same issues that have been decided by this court amount to a collateral attack of this court's Judgment. This justifies the issuance of an ASI against BCS, to restrain BCS from relitigating the subject-matter of the Suit against the Estate *and* the US Defendants through the Californian Proceedings.

92 However, we have also noted that not *all* of the claims pursued by BCS are attempts at relitigating issues already decided by this court. To that extent, BCS is allowed to pursue these claims, which do not impinge on any findings and rulings contained in the Judgement of this court.

93 In relation to Prayer 1 of SUM 37, we hereby grant the order as follows:

(a) The first defendant, BCS, is hereby restrained, whether acting by itself, its officers, its servants or agents or otherwise, from prosecuting

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or continuing to prosecute proceedings under Case No. 2:19-cv-06914-JWH-PR, commenced by BCS in the United States District Court for the Central District of California in the United States of America on 8 August 2019, against Baker both in his individual and personal capacity and as well as his capacity as the Executor of the Estate of Chantal Burnison, deceased, and against BCS Pharma, Heika, Birka and the Grey Pacific Companies, insofar as such proceedings relate to the existence, validity and/or enforceability of the Trust in the Ethocyn Rights and assets held on behalf of Chantal Burnison, and now, her estate, and any issues relating to the reliance on and/or assertion of the said trust or any issues litigated before the Singapore Courts in SIC/S 3/2018, the Judgment dated 29 April 2020 and CA/CA 76/2020.

(b) For the avoidance of doubt, BCS shall not be restrained in Case No. 2:19-cv-06914-JWH-PR, commenced by BCS in the United States District Court for the Central District of California in the United States of America on 8 August 2019, from pursuing claims against Baker, BCS Pharma, Heika, Burnison, and Grey Pacific Companies for claims against Baker for allegedly holding himself out as an officer of or for signing of the assignment agreement transferring the trademark rights, and the settlement agreement with Nu Skin, and for claims against Heika, as an officer of Grey Pacific Labs, for allegedly willingly entering into the assignment agreement for the trademark rights knowing that Baker is not an officer of BCS, or for claims related thereto provided always that they do not relate to the existence, validity and/or enforceability of the Trust in the Ethocyn Rights and assets held on behalf of Chantal Burnison, and now, her Estate, and any issues relating to the reliance on and/or assertion of the said Trust or any issues litigated

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before the Singapore Courts in SIC/S 3/2018, the Judgment dated 29 April 2020 and CA/CA 76/2020.

94 In relation to Prayer 2 of SUM 37, we hereby grant the following order:

(a) The Defendants, BCS, and Renslade (HK) are hereby restrained, whether acting by themselves, their officers, their servants or agents or otherwise, and Weber is hereby restrained, whether acting by himself, his servants or agents or as an director, officer or servant or agent or shareholder of BCS and Renslade (HK) or otherwise, from prosecuting or continuing to prosecute proceedings in the United States of America or anywhere else in the world against Baker, whether in his personal capacity and/or his capacity as Executor of the Estate of Chantal Burnison, deceased, Heika and/or Birka insofar as any such proceedings relate to the existence, validity and/or enforceability of the Trust in the Ethocyn Rights and assets held on behalf of Chantal Burnison, and now, her Estate, and any issues relating to the reliance on and/or assertion of the said Trust or any issues litigated before the Singapore Courts in SIC/S 3/2018, the Judgement dated 29 April 2020 and CA/CA 76/2020.

95 In relation to Prayer 3, costs shall follow the event. Costs are awarded to the Plaintiff to be borne by the Defendants, jointly and severally. If the parties are unable to agree on costs, they are to file written submissions of no more than five pages each, excluding authorities and any necessary annexes, within one week from the date of this judgment.

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96 There shall be liberty to apply, and generally.

Quentin Loh
Judge of the Appellate Division

Carolyn Berger
International Judge

Dominique Hascher
International Judge

Woo Shu Yan, Tay Hong Zhi Gerald and Regina Lim (Drew & Napier LLC) for the plaintiff;
Thio Shen Yi SC, Justin Ee and Kevin Elbert (TSMP Law Corporation) (instructed), Chong Pao Lan Monica, Vithiya d/o Rajendra, Wong Zheng Hui Daryl, Wang Yufei and Daryl Kwok Wai Tat (Guo Weide) (WongPartnership LLP) for the defendants.

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