IN THE SINGAPORE INTERNATIONAL COMMERCIAL COURT
OF THE REPUBLIC OF SINGAPORE

[2024] SGHC(I) 7

Suit No 4 of 2017 (Summons No 59 of 2023)

Between

Kiri Industries Ltd

… Plaintiff

And

(1) Senda International Capital Ltd
(2) DyStar Global Holdings (Singapore) Pte Ltd

… Defendants

JUDGMENT

[Civil Procedure — Judgments and orders]
[Civil Procedure — Service]

TABLE OF CONTENTS

INTRODUCTION **1**

BACKGROUND **2**

THIS APPLICATION **5**

AN ADJOURNMENT APPLICATION **6**

OVERVIEW OF THE APPLICANTS' CONTENTIONS **10**

THE EJD ORDER **11**

THE MAKING OF THE ORDER 11

SETTING THE SCENE: BURGUNDY GLOBAL 13

THE APPLICANTS' CONTENTIONS: DISCUSSION 16

CONCLUSION AS TO THE EJD ORDER 18

THE SERVICE OUT ORDER **19**

THE MAKING OF THE ORDER 19

THE APPLICANTS' CONTENTIONS: DISCUSSION 20

GROUND (A): SUFFICIENTLY CLOSE CONNECTION 23

GROUND (B): CONTRAVENTION OF CHINESE LAW 25

GROUND (C): OTHER WAYS TO OBTAIN THE INFORMATION 30

FULL AND FRANK DISCLOSURE 35

CONCLUSION AS TO THE SERVICE OUT ORDER 39

THE SUBSTITUTED SERVICE ORDER **39**

THE MAKING OF THE ORDER 39

THE APPLICANTS' CONTENTIONS: DISCUSSION 41

Version No 2: 27 Mar 2024 (14:04 hrs)

CONCLUSION AS TO THE SUBSTITUTED SERVICE ORDER 44

OTHER MATTERS 44

CONCLUSION 46

Version No 2: 27 Mar 2024 (14:04 hrs)

This judgment is subject to final editorial corrections approved by the court and/or redaction pursuant to the publisher's duty in compliance with the law, for publication in LawNet and/or the Singapore Law Reports.

Kiri Industries Ltd
v
Senda International Capital Ltd and another
(Fan Jing, non-party)

[2024] SGHC(I) 7

Singapore International Commercial Court — Suit No 4 of 2017 (Summons No 59 of 2023)
Roger Giles IJ
19 February 2024

27 March 2024 Judgment reserved.

Roger Giles IJ:

Introduction

1 When a judgment debtor does not pay the judgment creditor, it is open to the judgment creditor to obtain an order for examination of the judgment debtor on its property and for production of documents relevant to the questions. If the judgment debtor is a company, the order is directed to an officer or officers of the company.

2 An examination order was made against a company and two of its officers. The two officers are not party to the litigation, and are foreign nationals resident out of the jurisdiction. Leave to serve the examination order on both officers out of the jurisdiction was granted, and it was served on one of the officers by substituted service. In this application, the company and that officer

challenge each of the examination order itself, the order giving leave to serve the officer out of the jurisdiction, and the order for substituted service. Their submissions raise questions as to when the Court can assert the compulsive examination power over an officer not party to the litigation and located out of the jurisdiction, and with what limitations, including having regard to infringement of the sovereignty of the country where the officer is resident.

3 For the reasons which follow, the examination order was validly made and stands, but the order giving leave to serve the applicant officer out of the jurisdiction should be set aside. The other officer is in the same position, and the leave to serve him out of the jurisdiction should also be set aside, subject to liberty to apply in that respect. Since the order giving leave to serve the applicant officer out of the jurisdiction is set aside, the order for substituted service of that officer should also be set aside, and it would have been set aside in any event.

Background

4 Kiri Industries Ltd ("Kiri") and Senda International Capital Ltd ("Senda") became joint venturers in DyStar Global Holdings (Singapore) Pte Ltd ("DyStar"). Kiri, a company incorporated and listed in India, held 37.57% of the shareholding in DyStar; Senda, a company incorporated in Hong Kong, held 62.43% of the shareholding. Senda is a wholly owned subsidiary of a company incorporated and listed in the People's Republic of China ("China", and the adjective "Chinese"), Zhejiang Longsheng Group Co, Ltd ("Longsheng"). One share was held by Well Prospering Ltd, another wholly owned subsidiary of Longsheng. DyStar carried on business in the dye industry, in which each of Kiri and Longsheng were already established players.

Version No 2: 27 Mar 2024 (14:04 hrs)

5 The relationship between Kiri and Longsheng broke down. In 2017, Kiri brought proceedings against Senda for oppression under s 216 of the Companies Act (Cap 50, 2006 Rev Ed). Senda counterclaimed against Kiri and officers of Kiri on a number of causes of action, and DyStar brought proceedings against Kiri and the officers mirroring those claims and with some additional claims.

6 The litigation was prolonged and hard fought. Senda and DyStar had some limited success in their counterclaims and claims, but in the major contest concerning oppression Kiri prevailed. A buy-out order was made that Senda purchase Kiri's shareholding in DyStar based on a valuation to be assessed (see *DyStar Global Holdings (Singapore) Pte Ltd v Kiri Industries Ltd and others and another suit* [2018] 5 SLR 1). The subsequent valuation process was complex and lengthy, but ultimately a buy-out price of US$ 603.8 million was ordered: the final valuation judgment was issued on 3 March 2023 (see *Kiri Industries Ltd v Senda International Capital Ltd and another* [2023] SGHC(I) 4). There were many first instance hearings, a number of judgments and more than one appeal in the course of the litigation.

7 Significant costs were incurred, and a number of costs orders were made. After set-off, including taking account of a payment by Senda to DyStar on Kiri's behalf, Senda is liable to Kiri in the amount of S$6,669,612.55 (excluding interest).

8 There was extensive correspondence in arriving at the costs amount. A tripartite agreement was entered into the effect of which was that Senda would pay the amount to DyStar on Kiri's behalf and would pay to Kiri in mid-December 2022 the costs amount as then ascertained (it was later slightly increased by a further costs order). Senda declined to pay on the ground that the amount of the payment by Senda to DyStar was yet to be finally ascertained or

Version No 2: 27 Mar 2024 (14:04 hrs)

agreed. It does not now dispute its liability to Kiri in the above amount. But it still has not paid the costs. In this application, it says that it does not have the means to do so.

9 In February 2023, Kiri filed two Writs of Seizure and Sale, pursuant to which a number of shares in DyStar belonging to Senda were seized to satisfy the cost liability. Senda alleged "irregularities" in the writs, but did not seek to stay or otherwise challenge them. Kiri, however, did not further prosecute the sale of the shares, and the writs have now expired.

10 In July 2023, Kiri obtained an order that Senda be examined by its director, Ms Fan Jing ("Ms Fan"), and its former director, Mr Ruan Weixiang ("Mr Ruan"), as to its means to satisfy the costs orders ("the EJD order"). Mr Ruan was Senda's sole director throughout the oppression and associated litigation until he resigned on 2 March 2023; he was and remains Managing Director of Longsheng and Chairman of the board of DyStar. Ms Fan became Senda's sole director on 2 March 2023 in succession to Mr Ruan.

11 Ms Fan and Mr Ruan are both Chinese nationals. At all material times Mr Ruan was and is resident in China. On the evidence before me, at all material times Ms Fan was and is resident in China; an issue is whether Kiri should have known that she was resident in China.

12 In September 2023, Kiri obtained an order giving leave to serve the EJD order on Senda and Ms Fan in Hong Kong and on Mr Ruan in China ("the service out order"). Senda was served at its registered office. Ms Fan could not be served in Hong Kong, and in October 2023 Kiri obtained an order for substituted service of the EJD order on her ("the substituted service order"). Service was carried out in accordance with the substituted service order.

Version No 2: 27 Mar 2024 (14:04 hrs)

13 Service has not been effected on Mr Ruan. As later described, Kiri accepts that he must be served with the judicial assistance of the Chinese Courts pursuant to the Treaty on Judicial Assistance in Civil and Commercial Matters between the People's Republic of China and the Republic of Singapore concluded in 1999 ("the Treaty"), and has set the necessary process in train, but service has not yet occurred.

14 Kiri's efforts to enforce Senda's costs liability are not the only continuation of the underlying litigation. Senda did not carry out the purchase of Kiri's shareholding in DyStar. In July 2023 Kiri applied in SIC/SUM 24/2023 ("SUM 24") for alternative relief in respect of the buy-out order, and in default a winding-up of DyStar. SUM 24 was heard on 24–25 January 2024, and at the time of hearing this application no decision had been issued.

This Application

15 SIC/SUM 59/2023 ("the application") is an application by Senda and Ms Fan (together, "the Applicants"). In the application they ask that the EJD order be set aside, or alternatively varied by requiring compliance with Chinese law and procedures; that the service out order be set aside; that the substituted service order be set aside; and as a last resort that the examination hearing not occur until after SUM 24 has been finally disposed of, including any appeal.

16 The prayers in the application ask that the orders be set aside or varied or the hearing be postponed, without limitation to the orders or the hearing so far as they concern Ms Fan. The Applicants' submissions at times were made as if Mr Ruan was an applicant and the EJD order and the service out order should also be set aside so far as they concerned him. Mr Ruan is not an applicant, plainly deliberately so, and it is necessary to confine the result in the

Version No 2: 27 Mar 2024 (14:04 hrs)

application to the positions of Senda and Ms Fan. Mr Sanjiv Rajan ("Mr Rajan"), leading counsel for Kiri, nonetheless accepted that if the reason for setting the EJD order aside applied equally in relation to Mr Ruan, the order should also be set aside as against him, and it must be the same for the service out order; see *R.D. Harbottle (Mercantile) Ltd v National Westminster Bank Ltd* [1978] QB 146 in relation to the discharge of an injunction. Mr Toh Kian Sing SC ("Mr Toh"), leading counsel for the Applicants, invited that course.

17 The orders were all made *ex parte*. It was common ground that the application invoked the power in O 32 r 6 of the Rules of Court (2014 Rev Ed) ("the ROC") to set aside an order obtained *ex parte*, and as well the inherent jurisdiction of the Court. An application to set aside an *ex parte* order is not an appeal, and the order may be set aside if the court finds that it was made under a misapprehension upon new matters being put before it: see *Tay Long Kee Impex Pte Ltd v Tan Beng Huwah (trading as Sin Kwang Wah)* [2000] 1 SLR(R) 786 at [19], where the Court of Appeal stated, in relation to the discharge of an *ex parte* injunction, that "[the judge] is to determine whether on the full facts and arguments presented by both parties before him, the injunction should be continued or discharged or a fresh injunction issued".

An Adjournment Application

18 I have referred to the prayer in the application that the examination hearing not take place until after SUM 24 has been finally disposed of, including any appeal. In the Applicants' written submissions, filed a few days before the hearing, it was submitted not only that the examination hearing should be adjourned (the language used was also that it should be stayed) until after the decision in SUM 24 was known, but also that this application should be adjourned pending the decision in SUM 24. It was submitted that this should be

Version No 2: 27 Mar 2024 (14:04 hrs)

done in the exercise of the Court's case management powers, with reference to *CIMC Raffles Offshore (Singapore) PTS Ltd v Schahin Holding SA* [2014] EWHC 1742 (Comm) ("*CIMC*"). In that case an order similar to the EJD order was set aside on the principal ground that the United Kingdom courts did not have jurisdiction to make the order against the foreign officer of the corporate judgment debtor, but Justice Sir Richard Field commented that in any event he would have exercised his discretion to direct that the officer's attendance be postponed to "take account of the parallel steps that are being taken to enforce the judgment against [the] judgment debtor": *CIMC* at [26].

19 At the hearing, Mr Toh did not begin by applying for an adjournment. He was well into his substantive submissions when attention was drawn to the written submissions and he was asked whether the request for an adjournment was maintained. It was, and Mr Toh made his submissions in that respect. I declined to adjourn the application, and should give my reasons for doing so.

20 The application was filed in early December 2023. It was supported by a lengthy affidavit of Ms Fan and an affidavit of Mr Wang Lingqi ("Mr Wang") providing an expert opinion on Chinese law. The hearing date was fixed. Pursuant to directions, responsive affidavits of Mr Manish Pravinchandra Kiri ("Mr Kiri") and Dr Arthur Xiao Dong ("Dr Dong") were filed, the latter also providing an expert opinion on Chinese law. Second affidavits of Ms Fan and Mr Wang were filed in reply, and then another affidavit of Mr Kiri. Nearly 3000 pages of materials were generated. Also pursuant to directions, written submissions were exchanged accompanied by numerous authorities. As earlier noted, the submission of an adjournment appeared in the Applicants' written submissions.

Version No 2: 27 Mar 2024 (14:04 hrs)

21 As an exercise in proper use of resources, adjournment of the application had little if anything to commend it. The preparation had been done, including the obtaining of expert opinions on Chinese law; the costs had been incurred; while the Applicants had invited Kiri to agree to an adjournment, which Kiri had declined to do, the Applicants had not applied for the question of adjournment to be considered ahead of the hearing, and the teams of counsel were gathered in the courtroom and ready to proceed. Adjournment of the application would bring considerable waste.

22 Nor in my view was there substance in Mr Toh's argument for an adjournment. It rested on proposals (not necessarily the only ones on the table) for alternative relief in SUM 24. In SUM 24, Senda contended that it was unable to carry out the buy-out order because it did not have and could not raise the necessary funds. Mr Toh referred to its proposal that funds available in DyStar be used to declare a dividend of US$100m to Kiri and Senda, US$62.43m to Senda, from which Senda would pay US$55.95m to Kiri as compensation for the oppressive acts and pay all the costs, followed by an *en bloc* sale of DyStar's shares and pro rata distribution according to shareholding. He referred then to Kiri's proposal of a two-stage alternative of purchase by DyStar, not Senda, of Kiri's shares valued at US$100m using the DyStar funds, followed by an *en bloc* sale of the remainder of the DyStar shares and distribution with priority to Kiri's entitlement to the balance of the buy-out price of US$503.8m and to the costs. In either case, he said, Kiri would receive the costs; the examination of Ms Fan (and Mr Ruan) was therefore not necessary and it was not necessary to decide this application. The Applicants supported this argument by suggesting that, in not further prosecuting the Writs of Seizure and Sale, Kiri had shown that it was prepared to wait for the alternative relief in SUM 24.

Version No 2: 27 Mar 2024 (14:04 hrs)

23 At the time of the hearing of the application, which of the proposals in SUM 24 might find favour with the Court, if one of them at all, was not known. From the debate in the course of the hearing of SUM 24, if the Kiri proposal were adopted it was likely to be well over a year before the *en bloc* sale process was completed, and its outcome could not be guaranteed. The costs had been outstanding, subject to the later slight increase, for over a year. I considered that Kiri was entitled to progress its recovery of the costs without exposure to having to wait another year or more without certainty of earlier recovery or recovery in a year or more. As to the Writs of Seizure and Sale, I did not think contentment could be read into the failure further to prosecute them. In correspondence to the Court, Kiri requested that the writs be held in abeyance because the sale of the seized shares could be superseded by an *en bloc* sale or a winding up of DyStar. It was understandable that Kiri did not take them further; sale of the seized DyStar shares would bring in another shareholder and possibly impede the *en bloc* sale then under contemplation, and possibly reduce the pot of money from which Kiri hoped to obtain the buy-out price. The failure to progress the sale of the seized shares was not because Kiri was content to wait.

24 Given the stage at which the question of adjournment was raised, a strong case for adjournment of the application in the exercise of the case management power was required. In my view, there was nothing like a strong case, and the proper course was to hear and decide the application, so that either it was known now that one or more of the orders was lost, or Kiri could continue with the examination of Ms Fan (and Mr Ruan) towards recovery of the costs.

25 I add that orders were made in SUM 24 shortly after the hearing of the application. They did not take up either of the proposals to which Mr Toh referred. The orders were for an *en bloc* sale of the shares in DyStar, with a procedure to determine a long-stop date for entry into a binding sale agreement;

Version No 2: 27 Mar 2024 (14:04 hrs)

the timing was indeterminate. There was no reason to revisit the question of adjournment.

Overview of the Applicants' Contentions

26 The Applicants contended that the EJD order and the service out order should be set aside or varied on the grounds that (a) Ms Fan and Mr Ruan were not closely connected with the substantive claim which was the subject of the EJD order, in the Applicants' submission that claim being the costs liability under the costs orders made in the underlying litigation; (b) Ms Fan and Mr Ruan were both located in China, and the EJD order and compliance with it contravened Chinese law; and (c) there were other ways for Kiri to obtain the information sought under the EJD order which would not infringe Chinese sovereignty (that is, by judicial assistance under the Treaty). Further or alternatively, they contended that the EJD order and the service out order should be set aside for failure by Kiri to fulfil its duty of full and frank disclosure when it obtained the orders on an *ex parte* basis. As to the substituted service order, they contended that it should be set aside because the mode of service was contrary to Chinese law; further or alternatively, because Kiri had failed to provide full and frank disclosure of material facts when applying for the order on an *ex parte* basis.

27 These contentions in the written submissions lumped Ms Fan and Mr Ruan together, as if Mr Ruan was an applicant; he is not, and is not necessarily in the same position as Ms Fan, and this must be remembered when coming to the Applicants' submissions in more detail. They also lumped together setting aside or varying the EJD order and setting aside the service out order, treating the grounds as applying equally in both cases. As will be

Version No 2: 27 Mar 2024 (14:04 hrs)

explained, that is not so: it is at the stage of the service out order that the grounds require consideration.

The EJD Order

The making of the order

28 By O 48 r 1(1) of the ROC, and confining its effect to a corporate judgment debtor, on an application made by *ex parte* summons supported by an affidavit in Form 99, the Court may order an officer of a corporate judgment debtor to attend before the Registrar and be orally examined on whatever property the judgment debtor has and wheresoever situated, and to produce books or documents in the possession of the judgment debtor relevant to the questions. By r 1(2), the order must be in Form 100 and must be served personally on the judgment debtor and on any officer of a body corporate ordered to attend for examination.

29 By the Supreme Court Practice Directions 2013 in force at the time ("the Practice Directions"), a questionnaire must be annexed to the examination order when it is served on the officer; the form of the questionnaire is prescribed, but the questions may be modified. At the hearing, the answered questionnaire is to be produced to the Registrar and received as evidence upon confirmation on oath that the answers provided are true and correct. The judgment creditor may then apply to discharge the officer or proceed with further questioning. The officer need not attend the hearing if the answered questionnaire, verified by affidavit or statutory declaration, is provided to the judgment creditor before the hearing and the judgment creditor agrees to apply for a discharge of the examination order at the hearing.

Version No 2: 27 Mar 2024 (14:04 hrs)

30 Kiri applied for the EJD order by an *ex parte* summons in SIC/SUM 21/2023 filed on 10 July 2023. Following the structure of Form 100, it asked for orders that Senda by its director Ms Fan, for whom a Chinese identification number and a Hong Kong address ("the Hong Kong address") were given, and Mr Ruan its former director, for whom a Chinese identification number and an address in China were given, attend before the Registrar on a date to be fixed and be orally examined as to whether Senda has any property or means of satisfying the cost orders against it and whether any and what debts are owing to Senda, and produce any books or documents in Senda's possession or power relating to those questions. The Hong Kong address was the address of Senda's registered office.

31 The application was supported by an affidavit of Mr Kiri. Form 99 referred to in O 48 r 1(1) is relatively formal: the deponent identifies the judgment debt, says that it is unsatisfied, says that "it is desired to examine the judgment debtor (or an officer of the judgment debtor company) on the question whether any and if so what debts are owing to him (or the judgment debtor company) and/or means of satisfying the judgment debt", and asks for an order for attendance and production of documents. Mr Kiri's affidavit was lengthy, but effectively followed that form.

32 The EJD order was made by an Assistant Registrar on 14 July 2023, in the terms as asked. It was endorsed with a notice that if Senda neglected to obey the order, Ms Fan and Mr Ruan would "each be liable to process of execution for the purpose of compelling the said Senda International Capital Ltd to obey the same". In accordance with the Practice Directions, it was accompanied by questionnaires for each of Ms Fan and Mr Ruan setting out questions to be answered and documents to be produced, the completed questionnaires and the documents to be brought to the hearing. Notes to the questionnaires included

Version No 2: 27 Mar 2024 (14:04 hrs)

that they were required to attend the hearing unless they obtained Kiri's consent to dispense with their attendance or discharge the order, and the warning that if they failed to attend the hearing, Kiri may commence committal proceedings against them for that failure with a penalty that may be imposed of fine and/or imprisonment.

Setting the scene: Burgundy Global

33 In *Burgundy Global Exploration Corp v Transocean Offshore International Ventures Ltd and another appeal* [2014] 3 SLR 381 ("*Burgundy Global*"), Transocean entered judgment against Burgundy Global, and applied for and obtained EJD orders against directors of Burgundy Global all of whom were foreign nationals ordinarily resident in the Philippines. After unsuccessful attempts to serve the orders on the directors in the Philippines, Transocean obtained an order for substituted service by service on Burgundy Global's Singapore lawyers and advertisement in the Philippines. The issues before the Court of Appeal included whether a Singapore court had jurisdiction under O 48 of the ROC to make an EJD order against a corporate officer who was based overseas, and if so whether leave was required to serve the order out of the jurisdiction and whether leave should be granted.

34 On the issue of jurisdiction, the Court began by noting (at [61]) that nothing in the language of O 48 r 1 barred the court from issuing EJD orders against company officers who were ordinarily resident overseas. The directors, however, submitted that there was a presumption against extraterritoriality in statutory interpretation, whereby O 48 r 1 should be confined to company officers who were resident in Singapore because of concerns relating to enforcement and international comity. The Court examined a number of English cases, observing (at [78]) that they "do not appear to speak with one voice", and

Version No 2: 27 Mar 2024 (14:04 hrs)

distinguished between personal jurisdiction, meaning whether a person is or can be brought before a court, and substantive jurisdiction, meaning what a court can do to regulate the conduct in another country of a person over whom it has personal jurisdiction. The question of substantive jurisdiction was concerned with giving effect to the presumption against extraterritoriality (at [81]), and where the EJD order was sought against a foreign officer the issue was whether the court *should* exercise personal jurisdiction over the officer; and "in coming to a decision on this it seems inevitable that it should also have regard to whether this is merely the prelude to the impermissible exercise of exorbitant substantive jurisdiction" (at [82]).

35 The Court's examination of the English cases included the observation (at [86]):

> … But companies can only act through individuals, and the only way a court can exert control over companies would be to issue orders – whether directly or indirectly – against those individuals who act on its behalf and who are able to effect the corporate litigant's compliance with the order of the court. If a court was not able to issue orders against such foreign officers, then they would not have the means to control foreign companies which are legitimately within its personal and substantive jurisdiction. This would be a surprising result and one we are unwilling to reach.

36 On the interpretation of O 48 r 1, the Court declined to apply the English case of *Masri v Consolidated Contractors International (UK) Ltd (No 4)* [2010] 1 AC 90, in which it had been held that under the English counterpart of O 48 r 1 a court could not make an EJD order against an officer of a corporate judgment debtor who was ordinarily resident abroad. It was said (at [87]) that the civil procedure rules in Singapore were different, and on the basis that the power existed to issue an EJD order out of the jurisdiction against the director or officer of a corporate litigant, the concerns there expressed could be addressed by the court when it came to consider whether it would exercise its

Version No 2: 27 Mar 2024 (14:04 hrs)

power and permit a party to proceed against the foreign directors or officers of a corporate litigant: that was a matter of which arose at the leave stage. Separately holding that leave was required to serve an EJD order out of the jurisdiction, it was said (at [92]) that "any concerns relating to the imposition of extraterritorial jurisdiction on a foreign officer can be considered and addressed at the stage where leave is sought to serve an EJD order abroad", and the Court continued:

> 93. Indeed, in our judgment, *service* is the crucial act that engages the court's jurisdiction over a foreign person. As a matter of Singapore law, personal jurisdiction may be found when the putative defendant is physically within the jurisdiction at the time, the writ is served on him … or when the requirements stipulated in O 11 of the ROC have been met and leave has been given for a writ to be served on the defendant not physically within the confines of Singapore …
>
> 94. To hold that there is an absolute prohibition on the issuance of EJD orders against foreign officers would go too far because it is entirely conceivable for such an order to be served within the jurisdiction when the officer comes to Singapore for a temporary visit. Even an originating process may be validly served in this manner … But whether the EJD Order may be served *out of jurisdiction* is an entirely separate matter, and it is at that stage that the court may weigh the competing considerations …
>
> [emphasis in original]

37 From *Burgundy Global*, there was power in the Assistant Registrar to make the EJD order requiring the attendance of Ms Fan (and Mr Ruan) to be examined and the production by them of Senda's books and documents, notwithstanding that they were foreign nationals and out of the jurisdiction. The order could remain unserved and inoperative, held in prospect of them coming to Singapore and being served. Any concerns over extraterritoriality in the exercise of exorbitant substantive jurisdiction would arise on the application to serve the EJD order on Ms Fan (and Mr Ruan) out of jurisdiction, not at the time of making the order.

Version No 2: 27 Mar 2024 (14:04 hrs)

The Applicants' contentions: discussion

38 As has been noted, the Applicants' contended that both the EJD order and the service out order should be set aside on the same grounds of lack of close connection, contravention of Chinese law, and other ways to obtain the information. These were, however, described by the Applicants as matters which "militate against the Court's exercise of such jurisdiction". Despite the lumping together this was a recognition that they go to whether the court should exercise personal jurisdiction over the officers by the "crucial act" of service, that is, at the time of the application for the service out order. In the scene set by *Burgundy Global*, they are not grounds for impugning the making of the EJD order.

39 The Applicants' lumping together of the EJD order and the service order may have been contributed to by the reports of Mr Wang and Dr Dong, in which opinions were exchanged on whether the EJD order or compliance with it involved contravention of Chinese law. Their debate in those terms is understandable when they would have been unaware of *Burgundy Global*. At the hearing Mr Toh appeared to accept that, on the authority of *Burgundy Global*, the grounds did not come into the making of the EJD order, but into the making of the service out order. In any event, that is the case. Even if made out, they are not a basis for setting aside the EJD order.

40 Nor is there any question of failure in the duty of full and frank disclosure. The submission, also made globally in relation to both the EJD order and the service out order, was that Ms Fan's residency in China, the potential contravention of Chinese law, and the existence of the Treaty were "material facts which should have been highlighted" in the *ex parte* application. However, without now going into whether they were material facts which should have

Version No 2: 27 Mar 2024 (14:04 hrs)

been highlighted, they similarly would only come into the making of the service out order.

41 In oral submissions, Mr Toh's argument for setting the EJD order aside became that the application for the order, or at least the continuance of the order, was an abuse of process. This had appeared in the Applicants' written submissions as a "preliminary issue". In those submission the ultimate submission was that Kiri's purpose was to inconvenience Ms Fan and Mr Ruan in having them come to Singapore or putting them in jeopardy of either contravening Chinese law or the EJD order; it was also suggested that Kiri was "harassing and oppressing" Mr Ruan "perhaps (unjustifiably) for not trying hard enough to get Senda to carry out the buyout".

42 In oral submissions, I think these excesses were not maintained. There were a number of strands to the argument, with some crossover with the adjournment application. One was that the application for the EJD order was for the ulterior purpose of obtaining evidence of Senda's means for use in SUM 24, evidence going to its ability to give effect to the buy-out order either to contest Senda's position that it did not have and could not obtain the necessary funds or to help in arriving at an alternative order. Another (perhaps inconsistently) was that Kiri already knew Senda's means from its evidence in SUM 24, so there was no longer a proper purpose in the examination. Another was that by one or other of the proposals in SUM 24 earlier described, the costs would be paid by Senda, so there was no point in an examination of its means and production of its books and records and again there was no proper purpose in the examination. It was also said that the questionnaires went beyond inquiry into Senda's means, and well (again perhaps inconsistently) that Senda had offered to provide answers to the questionnaires, which would have obviated the need for the examination but which Kiri had unreasonably refused.

Version No 2: 27 Mar 2024 (14:04 hrs)

43 There is no merit in this argument, and that includes rejection of the suggested ultimate purpose and the suggested harassment and oppression. The question in SUM 24 was Senda's ability to pay US$603.8m for Kiri's shares in DyStar, essentially its ability to raise the funds from external sources; that is a vastly different question from Senda's ability to pay costs in the order of S$6.6m and examination into Senda's ability to pay the vastly smaller amount would not have shed useful light on its ability to pay the US$603.8m. I do not accept the suggested ulterior purpose. Conversely, SUM 24 was concerned with Senda's ability to pay the vastly larger amount, it was not a venue for testing its ability to pay in the order of S$6.6m, and there remained a proper purpose in the application. That is underscored by the fact that in entering into the tripartite agreement Senda held out that it could pay the costs, and even when it declined to pay its reason was not that it did not have the means to pay, but a quibble over the amount to be paid to DyStar; Kiri had and still has understandable reason to enquire into Senda's ability to pay the lesser amount through the EJD order. For the reasons given in relation to adjournment, that one of the proposals in SUM 24 might eventually lead to payment of the costs does not make Kiri's continuation of the application pointless, let alone an abuse of process. And finally, the questionnaires: they do not manifestly go beyond proper inquiry into Senda's means and it would be for the Registrar to rule on any particular objection to questioning in the examination hearing, and the proposal for answering the questionnaires was qualified – Kiri should not be required to accept whatever answers are given, and is entitled to go further in examining the Senda officers.

Conclusion as to the EJD Order

44 The challenge to the EJD order is not successful; it stands.

Version No 2: 27 Mar 2024 (14:04 hrs)

The Service Out Order

The making of the order

45 Order 11 r 8 of the ROC provides:

> (1) Subject to Order 69, Rule 10, service out of Singapore of any summons, notice, or order issued, given or made in any proceedings is permissible only with the leave of the Court, but leave shall not be required in any proceedings in which leave for service of the originating process has already been granted.
>
> (2) Rule 2 shall, so far as applicable, apply in relation to an application for the grant of leave under this Rule.
>
> (3) Rules 3, 4 and 6 apply in relation to any document for the service of which out of Singapore leave has been granted under this Rule as they apply in relation to an originating process.

46 It was held in *Burgundy Global* that the qualification in Rule 8(1) where leave for service of the originating process had already been granted did not dispense with the need for leave where a summons, notice or order was to be served out of jurisdiction on a non-party. It was not in contest that leave was required for service of the EJD order out of Singapore.

47 Order 11 r 2, taken up in Rule 8(2), relevantly provides that an application for the grant of leave must be made by *ex parte* summons supported by an affidavit stating certain matters, including "in what place or country the defendant is, or probably may be found" (O 11 r 2(1)(*c*)), and that no leave is to be granted "unless it shall be made sufficiently to appear to the Court that the case is a proper one for service out of Singapore under this Order" (O 11 r 2(2)). Order 11 rr 3, 4 and 6, taken up in Rule 8(3), are made applicable to any document for the service of which out of Singapore leave has been granted under the Rule; they are concerned with modes of service abroad.

Version No 2: 27 Mar 2024 (14:04 hrs)

48 Kiri applied for the service out order by an *ex parte* summons SIC/SUM 36/2023 filed on 15 September 2023. It asked for leave to serve the EJD order on Senda at the Hong Kong address, on Ms Fan at the Hong Kong address "or elsewhere as Fan Jing may be found in Hong Kong", and on Mr Ruan at an address in China, alternatively at the Hong Kong address, or elsewhere as he may be found "in China, and/or … Hong Kong".

49 The application was supported by another affidavit of Mr Kiri. As to Ms Fan being found in Hong Kong, he referred to a Notice of Change of Company Director for Senda in the Hong Kong Integrated Companies Registry Information System ("ICRIS") showing her "Correspondence Address" as the Hong Kong address, and a Director's Particulars search showing the same, and said:

> 11. I note that the above 'Correspondence Address' of Fan is also the registered office of Senda in Hong Kong, as reflected in the Company Particulars Search obtained from ICRIS dated 5 September 2023 … Kiri has not been able to identify any other addresses for Fan.
>
> 12. Accordingly, based on the above, to the best of my information, knowledge and belief, Fan is located in Hong Kong.

50 The order was made by an Assistant Registrar on 18 September 2023.

The Applicants' contentions: discussion

51 Under O 11 r 2, there is a discretion to grant leave to serve the EJD order out of Singapore, if it sufficiently appears to the Court that the case is a proper one to do so. The Applicants did not say otherwise. Their submission that the leave should not have been granted was on the three grounds earlier stated (at [26]), plus the failure to give full and frank disclosure.

Version No 2: 27 Mar 2024 (14:04 hrs)

52 I return to *Burgundy Global*. As earlier explained, the Court held that the application for leave to serve out of the jurisdiction is the time when the court "may weigh the competing considerations". When the Court turned to whether leave should be granted in that case, after accepting that the leave could be granted retrospectively, it was said:

> 111. In our judgment, however, the discretion to grant leave to serve an EJD order out of jurisdiction is one that must be exercised sparingly. As we noted in *PT Bakrie Investindo v Global Distressed Alpha Fund 1 Ltd Partnership* [2013] 4 SLR 1116 at [16], the predominant purpose of an EJD order is to obtain information to assist the judgment creditor in executing his judgment. In this respect it is very similar to a subpoena – both are orders directed at persons who might not necessarily be parties to the suit requiring them to provide relevant information to the court. Both are equally intrusive in that they generally require the person against whom the order is made to attend court personally. We note that under O 38 r 16(2), a person served with a subpoena to produce documents could sufficiently comply by causing the documents to be produced without attending personally; no such option exists in the ROC for a person served with an EJD order. We also return here to the observation we have made at [82] above, which is that even though the application for leave might appear to be one that is directed at invoking the court's personal jurisdiction over the non-party in question, that is only anterior to the further question of whether this will ultimately entail the exercise of exorbitant substantive jurisdiction to an impermissible degree.
>
> 112. Having said that, we do not think it would be appropriate to lay down strict or exhaustive rules as to when a court may exercise its discretion to allow service abroad of an EJD order. The fundamental question is whether the foreign officer is so closely connected to the substantive claim that the Singapore court is justified in taking jurisdiction over him. We nevertheless make two tentative points. First, as the whole point of an EJD order is to obtain information about the judgment debtor's finances, the extent of the foreign officer's knowledge of his company's financial affairs will be an important threshold consideration. Parties should not be allowed to haul before the court a foreign officer who is unlikely to possess any relevant information. But even if a foreign officer has relevant information, that fact alone would generally be insufficient; after all, the same could be said about any individual sought to be subpoenaed to give evidence. Something more would be required. For example, the court might wish to

Version No 2: 27 Mar 2024 (14:04 hrs)

> consider the extent of the foreign officer's involvement in the matters relating to the claim. It might be easier to justify invoking the court's jurisdiction over a foreign officer who has played a key role in the events giving rise to the judgment creditor's successful claim. Ultimately, the duty is on the judgment creditor to persuade the court that this is a proper case to grant leave to serve out of the jurisdiction.

53 The Applicants' ground (a) took up the question of a sufficiently close connection with the substantive claim (see [26]). But *Burgundy Global* was carefully not strict or exhaustive, and the Applicants put forward grounds (b) and (c) as other factors militating against the exercise of the discretion to grant leave to serve the EJD order, with particular emphasis on the caution against leave being the preliminary to the excessive exercise of an exorbitant substantive jurisdiction.

54 I will come to the test of a sufficiently close connection with the underlying claim in considering the Applicants' ground (a), but *Burgundy Global* establishes, and the application of the test in that case as later described demonstrates, that the discretion to grant leave to serve an EJD order must "be exercised sparingly". In *Changfeng Shipping Holdings Ltd v Sinoriches Enterprises Co Ltd* [2021] 2 HKC 472, while adopting the approach of the Singapore Court of Appeal and applying a slightly modified sufficiently close connection test, the Hong Kong Court of First Instance did not fully accept that the discretion to exercise jurisdiction should be sparingly exercised, saying that while there was a need to exercise the discretion with extreme caution, "this qualitative restraint should not be translated into a quantitative restraint" (at [28]) and that "[i]n these days and age, the discretion properly exercised does not offend international law or comity" (at [29]). But my instruction is from the Court of Appeal.

Version No 2: 27 Mar 2024 (14:04 hrs)

Ground (a): sufficiently close connection

55 As Senda's sole director, Ms Fan will have knowledge of Senda's property and means of satisfying the costs liability, and the ability to produce its books and records. But so far as appears, she has no connection to speak of with the substantive claim, whether the claim be regarded as the underlying proceedings in which the costs orders were made or (as the Applicants took it) the resulting costs liability. In his affidavit dated 21 July 2023 filed in support of SUM 24, Mr Kiri said that he believed she was Mr Ruan's assistant, a description he maintained in an affidavit in this application, but there is nothing before me to indicate whether in that capacity she was more than an amanuensis or what part if any she played in the matters litigated between Kiri and Senda, including the involvement of Longsheng as detailed in the judgments in the oppression proceedings.

56 In that respect, her position is similar to that of Mr Serafica, one of the directors in *Burgundy Global*. There was no evidence that the other directors had any knowledge of the company's activities and assets, but it was argued from a phrase in his affidavit that he did. The Court considered that it was not open for Transocean to rely on the affidavit, but said (at [114]):

> … But even if the contents of Mr Serafica's affidavit were taken into account, we have already noted that the mere fact that an officer has some information about the company's finances would normally not be sufficient to justify the court's exercise of its jurisdiction extraterritorially over that officer. No other evidence was provided by Transocean as to why we should exercise a discretion in this case, aside from some assertions by counsel that Mr Serafica had been intimately involved in the initial stages of the proceedings. For these reasons, we do not think that this is a proper case for granting leave.

Version No 2: 27 Mar 2024 (14:04 hrs)

57 A close connection with the substantive claim, while described in *Burgundy Global* at [112] as fundamental, is also described as something which the court might wish to consider, and which might make it easier to justify invoking the court's jurisdiction over the foreign officer. It can be the "something more" in addition to the foreign officer having relevant information, but there can be some other "something more", and the ultimate question is whether the court is persuaded that it is a proper case to grant leave to serve out of the jurisdiction. Is there something more in the present case?

58 Mr Rajan did not suggest something more; his submissions really did not grapple with ground (a). The emphasis on a close connection with the substantive claim can give room for manipulation, with the judgment debtor ensuring that the officers with knowledge of the company's affairs are officers who have had no connection with the substantive litigation; in that event, the significance of a close connection may diminish. In SUM 24, it was suggested that Ms Fan replaced Mr Ruan in order to distance Mr Ruan from Senda's affairs, the response to which was that Mr Ruan remained an officer of Longsheng and DyStar which he would not have done if that were the reason for his replacement. Mr Rajan did not make a like suggestion, and I do not think it can properly be found that there was manipulation in this case. And it would be difficult to hold any such manipulation against Ms Fan, who as Mr Ruan's assistant would be likely to have been manipulatee rather than manipulator, when considering the intrusion involved in taking jurisdiction over her.

59 I do not think that Ms Fan satisfies the close connection test, or that there is otherwise justification in invoking the court's jurisdiction over her. On ground (a), the leave order should be set aside so far as it concerns her.

Version No 2: 27 Mar 2024 (14:04 hrs)

60 Mr Ruan is not in the same position. Although no longer an officer of Senda, he has knowledge of Senda's property and its means of satisfying the costs liability, and any question of the extent of his current knowledge will be a matter for the Registrar at his examination. He was in the thick of the underlying litigation, as witness and as a person involved in the oppressive acts as found on which the buy-out order was made, and whether the claim be regarded as the underlying litigation or the costs liability he has a close connection with it. It is not a case of consequential setting aside of the service out order so far as it concerns him.

Ground (b): contravention of Chinese law

61 Disentangled from ground (c), with which there was some overlap, the Applicants' argument rested on Article 284 of the Civil Procedure Law of the People's Republic of China ("the Civil Procedure Law"). It and the preceding Article 283 provided:

> **Article 283** Pursuant to the international treaty concluded or participated by the People's Republic of China or in accordance with the principle of reciprocity, a People's Court and a foreign court may request each other to carry out service of documents on behalf, investigation and collection of evidence and any other litigation acts. Where a request by a foreign court for assistance is prejudicial to the sovereignty, security, or public interest of the People's Republic of China, the People's Court shall refuse to enforce.
>
> **Article 284** Request for and provision of judicial assistance shall be carried out via the channels stipulated in the international treaty concluded or participated by the People's Republic of China; where there is no treaty relations, request for and provision of judicial assistance shall be carried out via diplomatic channels. An embassy or consulate of a foreign country based in the People's Republic of China may serve documents on a citizen of the foreign country and carry out investigation and collection of evidence, but shall not violate the laws of the People's Republic of China and shall not adopt mandatory measures.

Version No 2: 27 Mar 2024 (14:04 hrs)

> Except for the circumstances stipulated in the preceding paragraph, no foreign agency or individual shall carry out service of documents, investigation and collection of evidence in the People's Republic of China without the consent by the relevant administrative authorities of the People of Republic of China.

62 Distilled from the submissions as a whole, the argument as based on Mr Wang's reports went as follows. The EJD order requires Ms Fan to provide evidence, by attending before the Registrar and being examined and by producing Senda's documents. She is a Chinese national resident in China. The Treaty is in force between Singapore and China, providing in its Article 2 for the mutual provision of judicial assistance by both contracting parties in, amongst other matters, "the taking of evidence". If the Treaty applies to provision of evidence by her (which for ground (c) the Applicants said it did), then by force of Article 284 of the Civil Procedure Law, the only way she can be required to produce evidence is by a request for judicial assistance through the Treaty; as explained by Mr Wang, this involves evaluation of the request and review of the resulting evidence by courts in China, and the evidence would not be taken before the Registrar in Singapore but would be taken by a court in China and transmitted to the Singapore courts. If the Treaty does not apply, then also by force of Article 284 the collection of her evidence requires the consent of the relevant Chinese administrative authorities, and again the evidence would be collected not by examination before the Registrar in Singapore, but in China. Either way, according to Mr Wang, it would be a breach of Chinese law to compel a witness within China to provide evidence in Singapore proceedings in some other way, that is, not by the Treaty procedure or with prior consent of the relevant Chinese administrative authorities; the service out order is therefore contrary to Chinese law.

Version No 2: 27 Mar 2024 (14:04 hrs)

63 Mr Wang's opinion was expressed in relation to the EJD order itself, but as earlier explained the service of the order is the crucial act and I have directed his opinion to the service out order. Mr Wang also opined that the EJD order would be an exercise of the Singapore Court's jurisdiction within China, and that disregard of Chinese law as described would be considered an encroachment on Chinese sovereignty; if also directed to the service out order, however, that is not in point as the ground is that Chinese law would be contravened and depends on examination of that law.

64 Dr Dong took issue with Mr Wang in two principal respects. First, in his opinion the EJD order did not involve the collection of evidence within Articles 283 and 284. Under Chinese law, he said, evidence was what was provided to prove the facts which the parties relied on to support their respective cases in the trial proceedings, and after judgment "the concept of evidence is no longer relevant in the subsequent enforcement proceedings". The EJD order required attendance in Singapore to be orally examined in order to identify the assets of Senda in aid of enforcing the debt owed by it, which was similar to the Chinese mechanism of an order to report property in the enforcement of a judgment and was not taking evidence as understood in Chinese law. Secondly, in any event the EJD order was not a violation of Article 284, because what was really prohibited under Chinese law was carrying out the investigation and collection of evidence in the territory of China; it would be permissible for a person to go out of China to be orally examined before a foreign court, and Article 284 was not a prohibition on a foreign court ordering a person to do so. These contentions can similarly be directed to the service out order as the crucial act enlivening the potential operation of the EJD order in relation to Ms Fan.

65 As to the collection of evidence, Mr Wang's response in his second report was that the concept of evidence was relevant to civil procedure in

Version No 2: 27 Mar 2024 (14:04 hrs)

general and was not confined to trial or pre-judgment stages, with reference to provisions said to illustrate the relevance of the concept in Chinese enforcement proceedings. One provision was concerned with evidence to support an application in enforcement proceedings, but there were some in which materials showing the judgment debtor's means were referred to as evidence.

66 The concept of evidence can certainly be relevant in enforcement proceedings, such as the evidence put forward in order to obtain an EJD order or an order to report property, and as well the materials showing the judgment debtor's means can be described as evidence of their means. The question, however, is what is meant by collection of evidence in Articles 283 and 284 of the Civil Procedure Law.

67 In interpreting the Articles, it must be remembered that they and the other provisions in Chinese law are before me in translation and nuances of words and expression may have been lost; with the best of assistance from Mr Wang and Dr Dong, it would be wrong to take definitive guidance from the words alone. I consider that I should seek to be guided also by considering the intent of the Articles. Their intent, it seems to me, is to have a wide operation whereby either through the use of treaty procedures or by necessary consent of Chinese administrative authorities, any activity constituting the collection of evidence in a wide sense is subject to Chinese oversight; a legalistic concept of evidence is not the answer. In this respect I prefer Mr Wang's opinion: examination of a judgment debtor to ascertain their means, in my view, is a collection of evidence caught by the Articles.

68 As to collection of evidence in the territory of China, Mr Wang's response was that the EJD order sought to impose a legal obligation over individuals in China to produce evidence in the course of and for the purposes

Version No 2: 27 Mar 2024 (14:04 hrs)

of Singapore legal proceedings, and "the purport and substance of the EJD Order is to collect evidence from witnesses in the PRC, which falls squarely within the scope and intention of Article 284…". He gave four reasons. One was that Ms Fan (and Mr Ruan) were required to provide a written response to the questionnaire before the hearing, and that this was collecting evidence in China. The second was that compelling a witness in China to leave China to provide evidence for foreign proceedings "infringes the spirit and intent of Article 284" and constituted the collection of evidence; it was "analogous to a situation where a resident in the PRC is compelled to physically take evidence from the PRC and bring it to the Singapore courts". The third was that Article 284 "unequivocally prescribes" that no foreign agency is allowed to collect evidence in the PRC without the requisite approval from the relevant PRC administrative authorities. The fourth was that because the proposed method of collection of evidence in the EJD order circumvented the prescribed method through which agencies were allowed to collect evidence from individuals in China, the order violated Chinese law and sovereignty.

69 I do not find these reasons persuasive. The Articles are concerned with (relevantly) the provision of judicial assistance either pursuant to a treaty or in the absence of a treaty, meaning assistance to a foreign court in doing something within China, and otherwise with the service of documents and investigation and collection of evidence within China: the last sentence in Article 284 is clear in stating the scope of the acts as acts within China. It is the collection of evidence within China which is to be subject to Chinese oversight. The EJD order does not require any collection of evidence within China, but that Ms Fan (and Mr Ruan) come to Singapore and be examined and produce documents. They must bring a completed questionnaire, but it does not have to be completed in China, and even if it were it is the production to the Registrar in Singapore

Version No 2: 27 Mar 2024 (14:04 hrs)

which is the collection of the evidence. Compelling a witness in China to leave China to provide evidence for foreign proceedings, in the sense that the EJD order purports to order the witness to do so, is the antithesis of the collection of evidence in China – the collection of evidence is where the witness goes to for the foreign proceedings. The third reason does not take the matter further, and whatever may be said of the imposition upon Ms Fan (and Mr Ruan) and infringement of Chinese sovereignty, that is not caught by the Articles.

70 On this matter, Dr Dong's position is to be preferred. I therefore do not accept that the service out order should be set aside as against Ms Fan on ground (b). Mr Ruan is in no better position.

71 I should note an argument hinted at in Kiri's written submissions, but not developed by Mr Rajan, that the service out order was for service on Ms Fan in Hong Kong as someone to be found in Hong Kong, so that Hong Kong law and not Chinese law would be the consideration when deciding whether leave to serve out of the jurisdiction should be granted. In the absence of development and answer I am reluctant to express a concluded view, and it is not necessary to do so. As at present advised, I do not think the argument has merit. Service of the EJD order is one thing, and carrying it out and compliance with it is another and different thing.

Ground (c): other ways to obtain the information

72 The ground rested on the Treaty. I have referred to its Article 2, providing for mutual judicial assistance in (amongst other things) the taking of evidence. By its Article 12:

> 1. In civil and commercial matters, the court of one Contracting Party may request the other Contracting Party to take evidence which it deems necessary such as the

Version No 2: 27 Mar 2024 (14:04 hrs)

> examination of parties, witnesses and experts and the production of documents.
>
> 2. The evidence maybe taken before the court of the requested party or any fit and proper person named in the Letter of Request or such other person as the court of the requested party thinks fit.

73 Implicit in the Applicants' submissions was that the examination of a judgment debtor, including an officer of a corporate judgment debtor, is a taking of evidence which can be the subject of a Letter of Request, and that Kiri could have initiated a Letter of Request asking that the Chinese courts conduct the examination of Ms Fan. They submitted that the service out order should be set aside because the EJD order should not be given effect by service out when that alternative legitimate procedure existed, one which did not involve infringement of Chinese sovereignty and imposition of extraterritorial jurisdiction over Ms Fan. The Applicants relied in particular on *Mackinnon v Donaldson, Lufkin and Jenrette Securities Corp* [1986] Ch 482 ("*Mackinnon*"), *Nix v Emerdata Ltd* [2022] EWHC 718 (Comm) ("*Nix*") and *Gorbachev v Guriev* [2023] KB 1 ("*Gorbachev*").

74 In *Mackinnon* the plaintiff obtained *ex parte* a bankers' book order against an American bank, a non-party to the litigation, requiring the bank to produce documents held at its head office in New York, and a subpoena against an officer of the bank at its London office. Both the order and the subpoena were set aside. An alternative procedure was available of application to a court in New York, an application which required the leave of the United Kingdom court which was likely to be given. It was held that there was personal jurisdiction over the bank because of its branch within the jurisdiction, but that save in exceptional circumstances the court should not require production by a non-party of documents outside the jurisdiction concerning business which it has transacted outside the jurisdiction, on the principle "that a state should refrain

Version No 2: 27 Mar 2024 (14:04 hrs)

from demanding obedience to its sovereign authority by foreigners in respect of their conduct outside the jurisdiction" (at 493G). When considering whether there were exceptional circumstances, Hoffmann J said (at 499F) that "in a case like this, where alternative legitimate procedures are available, an infringement of sovereignty can seldom be justified except perhaps on the grounds of urgent necessity …".

75 In *Nix*, the defendant applied for third party disclosure against a firm of New York lawyers which had provided advice to the plaintiff, and for permission to serve the application on the lawyers out of the jurisdiction. Cockerill J concluded that there was no jurisdiction to make the service out order, but said (at [23]) that even if there were jurisdiction to make an order for service out contemplating an application against a foreign non-party for disclosure, she "would not be minded to order it in circumstances where, for example, one is plainly trespassing on the letter of request regime". Her Ladyship explained that a court would only exercise its discretion to order a letter of request outwards in circumstances which paralleled the letter of request inwards, and that the court would not permit letters of request inwards for disclosure because any foreign court seeking documents from a person resident within the jurisdiction must only ask for individual documents separately described. She said (at [27]):

> This application is in essence (and acknowledged to be) a way around the letter of request regime. The letter of request regime is the proper, courteous, respectful method of obtaining evidence within a foreign jurisdiction from a foreign party. It is a very sensitive topic in many jurisdictions; one can see this in relation to disclosure via the many, many reservations to disclosure which are appended to the Hague Convention. Many countries take a still more cautious line as to disclosure generally and third-party disclosure in particular than this jurisdiction does. In those circumstances, it would be invidious for this court to attempt to impose its standards on a third party

Version No 2: 27 Mar 2024 (14:04 hrs)

> based in another jurisdiction by an assertion of direct jurisdiction over them.

76 In *Gorbachev* the plaintiff applied for an order for third party disclosure against a firm of English solicitors in relation to documents held by the firm on behalf of certain Cypriot companies. Permission was granted to serve the application on the Cypriot companies. In an appeal by the Cypriot companies against Jacob J's refusal to set aside the service, it was held that there was jurisdiction to make the disclosure order when the documents were within England and Wales, and that the judge's exercise of his discretion to make the service out order could not be said to have been wrong. The judge had recognised that the judgment in *Nix* "sets out powerful reasons why, generally speaking, applications against overseas third-parties should generally be made using the letter of request regime", but considered that a number of matters including the fact that the documents were within the jurisdiction were nonetheless sufficient to justify the exercise of the court's discretion to order service out. The Court of Appeal itself referred with apparent approval (at [59]) to Cockerill J's description of the letter of request procedure as the proper, courteous, respectful method of obtaining evidence within a foreign jurisdiction from a foreign party, and observed (at [82]) that circumventing the letter of request procedure and its limitations would "infringe international comity in ways that would be objectionable to foreign states". When leaving for later decision whether there was jurisdiction to make an order in relation to documents not within England and Wales, the Court said (at [90]):

> Even if jurisdiction exists to make an order against a third party for production of documents held abroad, in view of the availability of the letter of request procedure it would only be in an exceptional case that it would be appropriate to exercise that jurisdiction, for the reasons given by Cockerill J in *Nix v Emerdata Ltd.* Still less would it be appropriate to do so in order to obtain documents (for example, classes of documents) which could not be obtained pursuant to a letter of request.

Version No 2: 27 Mar 2024 (14:04 hrs)

77 In these cases, both the availability of the letter of request procedure and the limits on its availability were taken into account. A disclosure order against a foreign non-party and an EJD order against a foreign non-party are alike as a command to the recipient, in the one case to produce documents to a court in the jurisdiction and in the other case to attend and be examined (and also to produce documents) in the jurisdiction. In *Burgundy Global* at [111] it was recognised that an EJD order was intrusive in similar manner to a subpoena in generally requiring the person against whom the order is made to attend court personally, and concern was expressed for the exercise of exorbitant substantive jurisdiction to an impermissible degree: that must include particular regard to comity where a letter of request procedure is in force between the forum and the country of the recipient's residence. In my view, in the sparing exercise of the discretion to grant leave to serve an EJD order out of the jurisdiction, it is appropriate to have regard to the Treaty if it provides a way of examining Senda's officers as to its means.

78 Mr Rajan did not question that the Treaty provides a way of enquiring into Senda's means, or question that the EJD order could be implemented by judicial assistance under the Treaty. It does not follow that a service out order for the EJD order should be refused: regard to the Treaty does not mean that it must be followed, as the outcome in *Gorbachev* illustrates.

79 Mr Wang explains the procedure under China's Implementing Rules for Service and Evidence relevant to a request for judicial assistance, and the procedure would not be as speedy as an examination before the Registrar in Singapore: in seeking to serve Mr Ruan pursuant to the Treaty, Kiri was told that it would take six to nine months, and an examination will surely not be speedier. The enquiry would be before a Court in China, less convenient for Kiri. On the other hand, the EJD order is of questionable utility when it cannot

Version No 2: 27 Mar 2024 (14:04 hrs)

readily be enforced unless Ms Fan chooses to come within the jurisdiction, a matter noted in relation to the disclosure order in *Gorbachev* (at [82]): the long way is likely to be the productive way.

80 It is no small thing to command a Chinese national resident in China to come to Singapore to be examined, and to produce documents in Singapore, as the EJD order itself says under pain of being "liable to process of execution" and as the questionnaire says being liable to fine or imprisonment. Unless there is good reason, the available Treaty process should be followed. In my view, on ground (c) also the service out order, the crucial act in making that command, should be set aside so far as it concerns Ms Fan.

81 It is difficult to see why this ground does not apply equally to the service out order so far as it concerns Mr Ruan. The service out order should also be set aside so far as it concerns him, but subject to any application made within 10 days by the parties or either of them to vary or discharge the order; any such application may be made by letter to the Registry.

Full and frank disclosure

82 It is unnecessary to consider whether there was failure in full and frank disclosure when the service out order was obtained. However, I will briefly explain why I would have set the order aside so far as it concerns Ms Fan for that reason also.

83 The principles governing disclosure in an *ex parte* application were not in dispute. Kiri was obliged to disclose material facts which it knew or ought to have known had it made proper enquiries, being facts which the Court should consider in coming to its decision: see generally *Bahtera Offshore (M) Sdn Bhd v Sim Kok Beng and another* [2009] 4 SLR(R) 365 at [20]–[23]. It could not be

Version No 2: 27 Mar 2024 (14:04 hrs)

gainsaid that if Ms Fan resided in China, that was a matter of importance. It would have brought into consideration use of the Treaty procedure for service on Ms Fan, a matter within Kiri's understanding at the time in relation to Mr Ruan: Mr Kiri's affidavit included that Kiri understood that the documents could only lawfully be served on Mr Ruan, a Chinese citizen situated in China, pursuant to the Treaty. It would have brought into consideration compliance with Chinese law in carrying out the EJD order, a matter different from its service, and Kiri was alive to Article 284 and should have been alive to the question debated between Mr Wang and Dr Dong.

84 In his affidavit Mr Kiri asserted that "to the best of my knowledge, information and belief" Ms Fan was "located in Hong Kong", with the basis for this conclusion being the "Correspondence Address" in the documents filed with the Hong Kong authorities, and said that Kiri had not been able to identify any other addresses for Ms Fan. The same affidavit included that a Directors' Particulars search obtained from ICRIS stated Mr Ruan's "Correspondence Address" as the Hong Kong address, but referred also to three other documents showing addresses for Mr Ruan in China; while the affidavit asserted that, based on these documents, to the best of Mr Kiri's knowledge, information, and belief Mr Ruan was "located in China and/or in Hong Kong". This and the known fact that the Hong Kong address was Senda's registered office suggested that the "Correspondence Address" was not a true guide to the residence of Ms Fan. Ms Fan was known (and disclosed) to be a Chinese citizen, her possible residence in China was material, and little more could have brought the Assistant Registrar to the view that Ms Fan was resident in China and either not "located in Hong Kong" or, if "located in Hong Kong" in the sense of having a presence there, nonetheless resident in China.

Version No 2: 27 Mar 2024 (14:04 hrs)

85 There was more known to Kiri at the time. It disclosed Mr Ruan's former directorship of Senda, and that Senda was a wholly owned subsidiary of Longsheng and Mr Ruan was the "Chairman and General Manager" of Longsheng. But it knew that Longsheng was a substantial Chinese-based company and that Senda was an investment vehicle for Longsheng, not an actively trading company, and from Mr Ruan's involvement in the oppression proceedings Kiri could not reasonably have thought other than that his responsibilities as a senior officer of Longsheng meant that he was located in China and that either one or both (depending on timing) of the Chinese addresses was a residential address or he was elsewhere resident in China. In an affidavit dated 21 July 2023 filed in SUM 24, Mr Kiri had said that he believed that Ms Fan was Mr Ruan's assistant. Those matters, if disclosed, would have significantly detracted from the already weak guide of the "Correspondence Address" to the "location" of Ms Fan: would not, or at least could not, Mr Ruan's true "location" be China, probably resident at one of the Chinese addresses, and would or could not his assistant also be "located" in China where he was "located" and probably also resident in China? The reference to the "location" of Ms Fan in Hong Kong masked the question of where she was resident and whether she was resident in China. As well, if Ms Fan was Mr Ruan's assistant, that could throw up whether she had a sufficiently close connection in accordance with *Burgundy Global*. These matters should have been disclosed.

86 There was material non-disclosure. It is no answer to say, as Mr Rajan submitted in answer, that by the "Correspondence Address" Ms Fan had represented, "If you want to give me notice, do so in Hong Kong". It was not just a question of giving notice to Ms Fan.

Version No 2: 27 Mar 2024 (14:04 hrs)

87 The Applicants submitted that there was also non-disclosure in that Kiri ought to have known that Ms Fan was resident in China, either by making public searches in China based on her identification number or by writing to her to ask about an arranged service. While Mr Kiri said that Kiri had not been able to identify any other addresses for Ms Fan, it was said, it had not tried to do so. I do not accept this. There was no evidence of what public searches could have been made to ascertain Ms Fan's residence. In July 2023 Kiri wrote to Senda's lawyers enquiring after instructions to accept service of any EJD order and accompanying questionnaires. A little later in July 2023, Kiri emailed Ms Fan and Mr Ruan informing them that the EJD proceedings had been commenced and steps would be taken to serve the relevant order and documents personally on them, and enquiring if they had appointed Singapore counsel to act on their behalf. There was no response to either enquiry. While Kiri did not specifically ask Ms Fan where she resided, I have no doubt that, if it had, there would have been no response.

88 The Applicants also submitted that there was material non-disclosure in that in the later attempts to serve Ms Fan in Hong Kong, Kiri was told, as described at [93] below, that Ms Fan was "not present" at the Hong Kong address and "should be in China too", and in late October 2023 was told by Senda's lawyers that she was ordinarily resident in China; but, they said, it failed to file a supplementary affidavit to make voluntarily disclosure, referring to *The Norglimpt* [1988] QB 183 at 187–188. Mr Rajan did not respond to the submission. The occasion for supplementary disclosure in the present circumstances may be debateable – so far as I am aware the matter has not yet been considered in Singapore – and, it being unnecessary to go into it, in the absence of full submissions I will not do so.

Version No 2: 27 Mar 2024 (14:04 hrs)

Conclusion as to the service out order

89 The challenge to the service out order is successful. It should be set aside so far as it concerns Ms Fan, and also so far as it concerns Mr Ruan subject to any application as previously indicated.

The Substituted Service Order

90 Since the service out order is set aside, the substituted service order as against Ms Fan loses its foundation, and must also be set aside. But I would have set the substituted service order aside in any event.

The making of the order

91 Senda was duly served at the Hong Kong address, its registered office, although the documents were returned. Attempts to serve Ms Fan at the Hong Kong address, unsurprisingly, were not successful.

92 On 25 October 2023, Kiri applied *ex parte* in SIC/SUM 55/2023 for an order for substituted service on Ms Fan. It asked for leave to serve the EJD order and accompanying documents on Ms Fan by sending a soft copy via email to her at xxx@lonsen.com, a Longsheng email address, and posting the documents to her at the Hong Kong address. The application was supported by affidavits of Mr Gondalia Sureshkumar Savajibhai ("Mr Suresh") and Mr Lo Ka Cheong Kevin ("Mr Lo"), the former the company secretary of Kiri and the latter the process server who had attempted service on Ms Fan.

93 Mr Lo had attended at the Hong Kong address, asked the man who answered the door if Ms Fan or Mr Ruan were present, and been told that the man recognised Mr Ruan's name as someone from Senda, but had not heard of Ms Fan's name before and had not seen her before. Mr Lo told the man that

Version No 2: 27 Mar 2024 (14:04 hrs)

Ms Fan should be one of the bosses of Senda, to which the man replied that Senda's bosses were in China, so if Ms Fan was one of the bosses, she should be in China too. Mr Lo attended at the Hong Kong address on a later occasion. He asked the woman who answered the door if Ms Fan was present, and was told that she was not.

94 Mr Suresh added that a woman who returned the documents left at the Hong Kong address for Senda told Kiri's Hong Kong lawyers that Senda was at the address, but not Ms Fan or Mr Ruan; she said Senda could be contacted to receive the documents if there were documents for Senda and provided the phone number of one "Miki". So far as appears, Kiri did not telephone "Miki". Mr Suresh said that Kiri had not been able to identify any other addresses for Ms Fan in Hong Kong or elsewhere, and that even though the man who answered the door at the Hong Kong address claimed that the bosses of Senda should be in China "it appears that he was not a personnel of Senda, and it is also clear that he did not know who Fan was, or where Fan may be". He said that based on the searches performed on ICRIS, meaning those which showed the Hong Kong address as Ms Fan's "Correspondence Address", to the best of Kiri's knowledge, information, and belief Ms Fan was "in Hong Kong".

95 The substituted service order was made, in the terms as asked, on 26 October 2023. The EJD order and accompanying documents were sent via registered post to Ms Fan at the Hong Kong address, but the post office response was "recipient not available" and they were returned. The delivery and read receipt function of the email software showed that the email was delivered and read. According to Ms Fan, however, she was not aware of the emailed documents, and in any event could read and speak only Mandarin.

Version No 2: 27 Mar 2024 (14:04 hrs)

The Applicants' contentions: discussion

96 The Applicants' primary submission was that the substituted service order should be set aside because the mode of service was contrary to Chinese law.

97 As noted at [28] above, by O 48 r 1(2) the EJD order had to be served personally on Ms Fan. Order 62 r 5(1) of the ROC provides that if it appears to the Court impracticable for any reason to serve a document personally, the Court may make an order for substituted service of the document. The Applicants submitted that by O 11 r 8(3) of the ROC read with O 11 r 3(2), the EJD order could not be served out of the jurisdiction and in China in a manner contrary to Chinese law, and that the service was contrary to Chinese law because by force of Article 284 of the Civil Procedure Law the only permissible mode of service was pursuant to the Treaty.

98 The first step in the argument is that the EJD order could not be served out of the jurisdiction and in China in a manner contrary to Chinese law. Order 11 r 8 is set out at [45] above. On the assumption of a valid grant of leave to serve the EJD order out of the jurisdiction, O 11 r 3 applies in relation to it. Order 11 r 3(2) provides that nothing in the Rule or in any order or direction of the Court made by virtue of it "shall authorise or require the doing of anything in a country in which service is to be effected which is contrary to the law of the country". In *Humpuss Sea Transport Pte Ltd (in compulsory liquidation) v PT Humpuss Intermoda Transportasi TBK and another* [2015] 4 SLR 625, the High Court stated (at [59]) that two of the common methods of service available irrespective of where the defendant resided were personal service and substituted service with leave of the Court, in each case provided it did not contravene the law of the foreign jurisdiction; and (at [85]–[87]) where the

Version No 2: 27 Mar 2024 (14:04 hrs)

service was contrary to the law of the foreign jurisdiction and therefore invalid under O 11 r 3(2), the service was incapable of cure. Mr Rajan made no submission against this operation of the ROC.

99 The second step in the argument is that service by a substituted service order was contrary to Chinese law. At least in relation to personal service, again Mr Rajan made no submission against service pursuant to the Treaty as the only permissible means of service on a Chinese national resident in China. In Kiri's application for the service out order, it exhibited the separate legal opinion from a Chinese lawyer that "[d]ocuments can only be lawfully served on Ruan, a Chinese citizen situated in China, through the judicial assistance of the Chinese courts through the [Treaty]", and its explanation for not having served Mr Ruan was that any service would have to be pursuant to the Treaty. It must be the same for substituted service: the Treaty procedure cannot be circumvented by an order for substituted service.

100 What, then, was Mr Rajan's answer to the Applicants' submission? With respect, it was not clearly expressed, but its substance was that the substituted service order was validly made for service on Ms Fan not in China, but in Hong Kong, and the mode of service was valid under Hong Kong law. The point of the argument, as I understood it, was that compliance with Chinese law was irrelevant. There was evidence that substituted service by a means able to bring the document to the notice of the person to be served was available under Hong Kong law, and it was submitted that the order was properly made on what was known at the time and it did not matter if it is now known that Ms Fan was not in Hong Kong.

101 Substituted service is not necessarily at a fixed physical location, and was not in this case insofar as the documents were to be sent to an email address.

Version No 2: 27 Mar 2024 (14:04 hrs)

The Applicants submitted that a document is received by a person at the location where the person accesses the email inbox, referring to *Maughan v Wilmot (No 2)* [2016] 1 WLR 2200 at [19]–[20], and so the service by sending to the email address of a person resident in China would take place in China and would be contrary to Chinese law; since Ms Fan was resident in China, if she did read the email the service on her was contrary to Chinese law. It added that even for service pursuant to the Treaty, by a combination of Article 7 of the Treaty and Article 90 of the Civil Procedure Law, the Chinese court would only allow service by email if the potential recipient had consented to being served in that manner, and Ms Fan had not consented.

102 There is force in the Applicants' response. However, Mr Rajan's position has difficulties at a more general level. If Ms Fan was resident in China, as on the evidence before me she was, and under Chinese law the only permissible means of service on her was pursuant to the Treaty, personal service on her would be contrary to Chinese law. How can that be overcome by substituted service instead of personal service? I do not see how the fact that the substituted service order was validly made in Hong Kong, if it be the fact, means that Chinese law was not infringed by its purported service on Ms Fan otherwise than pursuant to the Treaty. The substituted service order may be taken as a substitute for personal service on Ms Fan in Hong Kong, but she was resident in China and not in Hong Kong and could not be personally served there; if she was to be personally served, she had to be served in China, which was contrary to Chinese law. The substitute could not exceed that which it replaced. In my view, the substituted service order should be set aside as contrary to Chinese law.

103 What Mr Rajan's argument does is focus attention on the Applicants' secondary submission, that the substituted service order should be set aside for

Version No 2: 27 Mar 2024 (14:04 hrs)

failure in full and frank disclosure when Kiri applied for the order. I consider that the substituted service order should be set aside for that reason also. Again, I will be brief in saying why.

104 I have explained why I consider that there was material non-disclosure at the time of obtaining the service out order. In the affidavits at the time of obtaining the substituted service order, even greater doubt appeared on whether Ms Fan "is in Hong Kong", the phrase used where previously the phrase had been "located in Hong Kong". Mr Lo was told that Ms Fan had not been seen before, and if she was one of Senda's bosses should be in China too, and the lawyer had been told that Ms Fan was not at the Hong Kong address. It should have been apparent from the lawyer being told that somebody from Senda could be contacted to receive documents that the Hong Kong address was no more than a postbox. The application was nonetheless maintained based on the "Correspondence Address"; but as in relation to the service out order, a material question was Ms Fan's residence, not whether she was "in Hong Kong". On Ms Fan's residence, none of the matters which I have said should have been disclosed in relation to the service out order were disclosed. There was the same material non-disclosure.

Conclusion as to the substituted service order

105 The challenge to the substituted service order succeeds. It should be set aside because its foundation in the service out order has been lost, but it would in any event have been set aside.

Other Matters

106 The Applicants submitted that, if the orders as against Ms Fan and Mr Ruan were set aside, the like orders as against Senda should also be set aside

Version No 2: 27 Mar 2024 (14:04 hrs)

as there was no point to them. Kiri did not respond to the submission. It is not clear to me that there is no point in the orders as against Senda remaining; if there is no point, they will fade into obscurity, but they should remain in case there is point.

107 The prayer that the EJD order be varied by requiring compliance with Chinese law and procedures was repeated in the Applicants' written submissions, with refinement to variation requiring Kiri to obtain prior consent from the Chinese authorities and for the evidence to be taken in the manner prescribed by the Treaty. As explained in *Burgundy Global*, the EJD order may be served within the jurisdiction, with no question of compliance with Chinese law and procedures. Assuming that there is power to vary the order, for that reason alone I decline to do so. It may be that conditions on carrying the order into effect could have accompanied the service our order, but that order has been set aside and variation does not arise.

108 The examination hearing is presently fixed for 9 July 2024. What will happen as a result of my decision of this application is not for me, although it seems unlikely that it will go ahead. However, for like reasons to those given in relation to the adjournment application, I decline to order that the examination hearing, if one eventuates, not occur until after SUM 24 has been decided.

109 Finally, Kiri's written submissions included that this application had been commenced by Senda and Ms Fan for a collateral purpose, and should be dismissed as an abuse of process. From a remark made by Mr Rajan in the course of the hearing, I think the submission is not maintained, but I should nonetheless deal with it. The collateral purpose was said to be "to delay and frustrate Kiri's lawful efforts to obtain information to aid in enforcing its outstanding costs orders…". An account of events was given said to support

Version No 2: 27 Mar 2024 (14:04 hrs)

that predominant purpose. Even if Ms Fan is to be equated with Senda, I am not prepared to find a purpose of delay and frustration, something beyond a continuation of the hard fought carriage of the underlying litigation. But I do not equate Ms Fan with Senda: the EJD order imposes upon her, under pain of punishment, and she is entitled to resist it or its implementation. If my decision of the application is correct, she has done so with considerable, although not complete, success, for a valid purpose.

Conclusion

110 I decline to set aside the EJD order. The service out order is set aside so far as it concerns Ms Fan. It is also set aside so far as it concerns Mr Ruan, but subject to any application made within 10 days by the parties or either of them to vary or discharge the order; any such application may be made by letter to the Registry. It is not set aside so far as it concerns Senda. The substituted service order is set aside.

111 If the parties are unable to agree on costs within 28 days, they should jointly inform the Registry, including stating the area(s) of disagreement. Directions will be given for decision on the area(s) of disagreement on written submissions.

Roger Giles
International Judge

Version No 2: 27 Mar 2024 (14:04 hrs)

Rajan Sanjiv Kumar, Loong Tse Chuan, Wong Pei Ting and Prabu Devaraj s/o Raman (Allen & Gledhill LLP) for the plaintiff;
Toh Kian Sing SC, Cheng Wai Yuen Mark, Soh Yu Xian Priscilla, Lim Wee Teck Darren and Mao Zhichao @ Mao Zhihong (Rajah & Tann Singapore LLP) for the first defendant and non-party.

Version No 2: 27 Mar 2024 (14:04 hrs)