IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2024] SGHC 329

Originating Application No 474 of 2024

Between

Finaport Pte Ltd

… *Applicant*

And

Techteryx Ltd

… *Respondent*

GROUNDS OF DECISION

[Civil Procedure — Injunctions — Anti-suit injunction]
[Conflict of Laws — Natural forum]
[Conflict of Laws — Restraint of foreign proceedings — Comity — Anti-suit injunction]
[Conflict of Laws — Restraint of foreign proceedings — Vexatious and oppressive conduct — Anti-suit injunction]
[Conflict of Laws — Restraint of foreign proceedings — Breach of agreement — Anti-suit injunction]

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v
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Vinodh Coomaraswamy J:

Introduction

1 The applicant seeks an anti-suit injunction to restrain the respondent from pursuing litigation that is now pending in Hong Kong ("the Hong Kong Suit") in which the respondent is the claimant and the applicant is the second defendant.

2 I have dismissed the application with costs. In summary, I do not accept that the Hong Kong Suit is vexatious or oppressive to the applicant or that the respondent has commenced or is pursuing the Hong Kong Suit against the applicant in breach of any obligation.

3 The applicant has appealed against my decision. I now set out the grounds for my decision.

The parties

4 The applicant is a company incorporated and carrying on business in Singapore. Its business includes providing investment advice to clients. It is therefore regulated by the Monetary Authority of Singapore ("the MAS").[1]

5 The respondent is a company incorporated in the British Virgin Islands and carries on business in Hong Kong. In December 2020, the respondent acquired the business of owning and administering TrueUSD.[2]

The TrueUSD cryptocurrency

6 TrueUSD is a cryptocurrency token that is classified as a stablecoin. A stablecoin is a cryptocurrency in which every token of the cryptocurrency in circulation is backed by a real-world asset such as a fiat currency or gold. TrueUSD is a stablecoin because every TrueUSD token in circulation is backed by one US dollar or the equivalent of one US dollar. These US dollars or equivalents comprise the TrueUSD reserves ("the Reserves").

7 A fundamental part of the respondent's business in owning and administering TrueUSD, and one of its fundamental duties, is maintaining and managing the Reserves.[3] One of the key features of TrueUSD is that third parties attest publicly and in real time that the total value of the Reserves matches the total number of TrueUSD tokens in circulation. The purpose of these attestations is to assure actual and potential holders of TrueUSD that its 1:1 backing with US dollars or equivalents has not been and will not be eroded. The

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1 First affidavit of Mr Charles Andrew O'Flaherty dated 17 May 2024 ("Mr O'Flaherty's AEIC") at para 5.

2 First affidavit of Mr Li Jinmei dated 15 July 2024 ("Mr Li's AEIC") at paras 7 and 12.

3 Mr Li's AEIC at para 7.

TrueUSD business therefore requires the Reserves to be held by third-party custodians in escrow accounts and to provide the attestations.

The Hong Kong Suit

8 The respondent commenced the Hong Kong Suit because there has been a substantial erosion of the Reserves for which it believes the applicant is liable, together with three other defendants.

9 The first defendant in the Hong Kong Suit is First Digital Trust Limited ("FDT"). FDT is a public company incorporated in Hong Kong. FDT is licensed as a trust company under the Hong Kong Trustee Ordinance (Cap 29). Part of FDT's business is holding assets as custodian and providing escrow services. By four contracts entered into between September 2020 and September 2022 (see [52] below), the respondent appointed FDT as one of the third-party custodians to hold the Reserves.

10 The second defendant in the Hong Kong Suit is the applicant. In March 2021, the applicant entered into a Discretionary Investment Management Agreement with FDT ("the DIMA"). Under the DIMA, the applicant accepted appointment as FDT's investment manager with the obligation of managing, investing and advising FDT on the Reserves.[4] Schedule 3 of the DIMA is a document known as "the Investment Profile".

11 The third defendant in the Hong Kong Suit is Aria Commodity Finance Fund ("ACFF"). ACFF is a company incorporated in the Cayman Islands. It is also an investment fund. In May 2022, FDT invested US$12m of the Reserves in ACFF.

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4 Mr O'Flaherty's AEIC at paras 39(h) and 52; Mr Li's AEIC at para 18.

12 The fourth defendant in the Hong Kong Suit is Aria Commodities DMCC ("Aria DMCC"). Aria DMCC is a company incorporated in the United Arab Emirates. In May 2022, FDT invested US$456m of the Reserves in Aria DMCC.

13 A substantial part of this investment of US$468m from the Reserves in ACFF and in Aria DMCC appears now to be irrecoverable. The circumstances in which FDT made these investments and the legal consequences of doing so form the subject matter of the Hong Kong Suit.

The US$468m investment

14 The circumstances in which FDT made these investments are as follows.

15 Between May 2021 and March 2022,[5] the applicant advised FDT to invest a total of US$468m in ACFF. This was in addition to a US$97m investment from the Reserves that the previous owner of the TrueUSD business had made before the respondent acquired the business.

16 In 2021 and 2022, FDT invested a total sum of US$468m from the Reserves in ACFF as follows: (a) it invested US$12m in ACFF; and (b) it invested US$456m in Aria DMCC. The respondent's case is that it did not know about, approve or authorise FDT's investment of US$456m in Aria DMCC. FDT denies this (see [111] below).

17 In August 2022, the respondent instructed FDT to redeem US$82.8m of the Reserves invested in ACFF.[6] ACFF has fulfilled this redemption only in

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5 Mr O'Flaherty's AEIC at para 58.

6 Mr Li's AEIC at para 30.

part.[7] The respondent has received only US$63.15m out of the US$82.8m redemption.[8]

18 ACFF's default in fulfilling the redemption naturally alarmed the respondent. As a result, the respondent commenced the Hong Kong Suit in February 2023.[9] Initially, FDT was the sole defendant in the Hong Kong Suit. The respondent's case is that FDT is liable to the respondent for the loss arising from investing the Reserves in ACFF. The respondent alleges that FDT is liable in equity as trustee, in contract and in the torts of negligence and breach of statutory duty.[10] The respondent also seeks an order requiring FDT to account for how it has dealt with the Reserves.

The review of the investment

19 In April 2023, the respondent commissioned Kroll (Hong Kong) Limited ("Kroll") to conduct a forensic accounting review of ACFF and its affiliated entities.[11] Kroll completed its review in June 2023. Kroll made four key findings:[12]

(a) FDT invested US$456m in Aria DMCC and not in ACFF.[13] As I have mentioned, the respondent's case is that it did not know about, approve or authorise the investment of US$456m in Aria DMCC.[14]

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7 Mr Li's AEIC at para 31.

8 Mr Li's AEIC at para 32.

9 Mr O'Flaherty's AEIC at para 11.

10 Mr O'Flaherty's AEIC at p 1591, para 31.

11 Mr Li's AEIC at para 34.

12 Mr Li's AEIC at para 35.

13 Mr Li's AEIC at para 35(a).

14 Mr Li's AEIC at para 35(a).

(b) The documents that FDT supplied to justify the investment of US$456m in Aria DMCC are incomplete and inconsistent.[15]

(c) ACFF does not have any audited financial statements or even unaudited management accounts.[16] Further, most of ACFF's assets comprise loans advanced to related entities.[17]

(d) ACFF did not invest the Reserves in accordance with the investment objectives and strategy set out in ACFF's private placement memorandums and fund fact sheet.[18]

20 As a result of Kroll's findings, the respondent applied *ex parte* in December 2023 for leave to join the applicant, ACFF and Aria DMCC as additional defendants to the Hong Kong Suit.[19] In the same application, the respondent sought and obtained leave to serve these three defendants out of the jurisdiction and to amend its statement of claim to advance claims against these three defendants. The Hong Kong court granted leave.

21 The respondent then amended its statement of claim in the Hong Kong Suit to make the following claims against these three defendants:

(a) FDT is a trustee of the Reserves, the respondent is the beneficiary of that trust, and the Reserves are therefore trust property. The applicant has dissipated trust property by acts or omissions in

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15 Mr Li's AEIC at para 35(e).

16 Mr Li's AEIC at paras 35(b)–35(c).

17 Mr Li's AEIC at para 35(c).

18 Mr Li's AEIC at para 36.

19 Mr O'Flaherty's AEIC at para 12.

investing the total sum of US$468m in ACFF and Aria DMCC.[20] The applicant is therefore liable to the respondent in contract and in the tort of negligence for the ensuing loss.[21]

(b) FDT remitted the total sum of US$468m to ACFF and Aria DMCC in breach of trust. ACFF and Aria DMCC acted in bad faith in receiving the sum from FDT.[22] ACFF and Aria DMCC therefore hold the sum of US$468m on constructive trust for the respondent.[23]

22 As against the applicant, the respondent advances only claims that are derived from FDT's rights against the applicant under the DIMA. In other words, the respondent seeks only to stand in FDT's shoes and to pursue claims against the applicant that the respondent derives from FDT's alleged status as the respondent's trustee.

23 The respondent has to bring a derivative claim against the applicant because it has no basis on which to sue the applicant in contract, given that the respondent has no contract with the applicant. The only parties to the DIMA are FDT and the applicant. Further, cl 25 of the DIMA expressly prohibits any person – such as the respondent – who is not a party to the DIMA from enforcing the DIMA against the applicant.[24] Equally, the respondent does not advance any other claim directly against the applicant, whether in the tort of negligence, in the tort of deceit, in the tort of conspiracy or otherwise.

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20 Mr O'Flaherty's AEIC at p 1594, para 37.

21 Mr O'Flaherty's AEIC at pp 1593–1594, paras 35–36.

22 Mr O'Flaherty's AEIC at pp 1594–1595, paras 39–41.

23 Mr O'Flaherty's AEIC at p 1595, para 42.

24 Applicant's Written Submissions dated 24 July 2024 ("AWS") at para 26(a).

24 To bring its derivative claims, the respondent relies on what is called the *Vandepitte* procedure. I describe this procedure in more detail at [85]–[86] below.

25 In May 2024, the applicant brought this application in Singapore, seeking this anti-suit injunction against the respondent.

The principles for granting an anti-suit injunction

26 The sole issue before me is whether the applicant has established any basis to justify an anti-suit injunction against the respondent.

27 There are four fundamental points about this court's jurisdiction to grant an anti-suit injunction (*Sun Travels & Tours Pvt Ltd v Hilton International Manage (Maldives) Pvt Ltd* [2019] 1 SLR 732 ("*Sun Travels*") at [65], citing *Société Nationale Industrielle Aerospatiale v Lee Kui Jak and another* [1987] AC 871 at 892).

(a) First, the jurisdiction to grant an anti-suit injunction is equitable and is to be exercised only where the ends of justice require it.

(b) 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 party proceeding in that foreign court or threatening to do so.

(c) Third, it follows that an anti-suit injunction will be issued to restrain only a party who is amenable to the jurisdiction of this court, against whom the injunction will be an effective remedy.

(d) Fourth, because an anti-suit injunction does have an effect, even if only indirectly, on the foreign court, the principle of international comity is engaged; therefore this court will exercise its jurisdiction to grant the injunction with caution.

28 Bearing in mind these four fundamental points, this court will grant an anti-suit injunction when the following requirements are met:

(a) the respondent is amenable to the jurisdiction of this court (*John Reginald Stott Kirkham and others v Trane US Inc and others* [2009] 4 SLR(R) 428 ("*John Kirkham*") at [28(a)]); and

(b) the foreign proceedings are either:

(i) vexatious or oppressive to the applicant (*VKC v VJZ and another* [2021] 2 SLR 753 ("*VKC*") at [18]); or

(ii) brought in breach of a contract between the parties to those proceedings (*John Kirkham* at [29]).

29 The two grounds under [28(b)] above are independent, free-standing grounds on which to grant an anti-suit injunction. The ground at [28(b)(ii)] is therefore not a mere subset or instance of the ground at [28(b)(i)].

30 I consider these requirements in turn.

Amenable to the jurisdiction of this court

31 The first requirement is that the respondent is amenable to the jurisdiction of this court (see [27(c)] and [28(a)] above). The respondent accepts, quite rightly, that this requirement is satisfied.[25]

32 A respondent to an application for an anti-suit injunction is amenable to the civil jurisdiction of this court in the same way as any other litigant. This court has *in personam* jurisdiction over litigants under s 16 of the Supreme Court of Judicature Act 1969 (2020 Rev Ed) ("the SCJA") (*Koh Kay Yew v Inno-Pacific Holdings Ltd* [1997] 2 SLR(R) 148 ("*Koh Kay Yew*") at [17]). Broadly speaking, there are three grounds on which this court takes *in personam* jurisdiction over a litigant:

(a) if the originating process is served on the litigant in accordance with the applicable procedural rules, whether service takes place within or outside Singapore (s 16(1)(*a*) of the SCJA);

(b) if the litigant submits to the jurisdiction of the General Division (s 16(1)(*b*) of the SCJA); or

(c) if a written law other than the SCJA confers on the General Division *in personam* jurisdiction over the litigant (s 16(2) of the SCJA).

33 The applicant has complied with s 16(1)(*a*) of the SCJA by serving this originating application on the respondent at its registered address in accordance with the Rules of Court 2021.[26] In any event, by contesting this application on

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25 Notes of Argument at p 49, lines 4–5.

26 Mr Li's AEIC at para 45.

the merits, the respondent has submitted to the jurisdiction of the General Division for the purposes of s 16(1)(*b*) of the SCJA.

Vexatious or oppressive

34 The next requirement is that the foreign proceedings are vexatious or oppressive to the applicant.

35 There are three factors that this court will consider in sequence when deciding whether to restrain foreign proceedings on the ground that they are vexatious or oppressive to an applicant:

(a) the natural forum for resolution of the dispute between the applicant and the respondent (*John Kirkham* at [28(b)]);

(b) the alleged vexation or oppression to the applicant if the respondent is allowed to continue the foreign proceedings (*John Kirkham* at [28(c)]); and

(c) whether any such vexation or oppression to the applicant is outweighed by a legitimate juridical advantage that the respondent will be deprived of if it is restrained from continuing the foreign proceedings (*John Kirkham* at [28(d)] and [29]).

Natural forum

36 The first factor to consider is the natural forum. The applicant submits that Singapore is the natural forum for resolving the dispute between the applicant and the respondent.[27]

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27 AWS at para 7.

37 For the reasons that follow, I reject the applicant's submission.

The law

38 The starting point on the first factor is that "comity suggests that the foreign court should decide whether the action in that court should proceed" rather than this court (*BCS Business Consulting Services Pte Ltd and others v Baker, Michael A (executor of the estate of Chantal Burnison, deceased)* [2023] 1 SLR 1 ("*BCS Business*") at [74]). Bearing this in mind, this court will not issue an anti-suit injunction unless it is satisfied that Singapore has a sufficient interest or sufficient connection with foreign proceedings that warrants making the decision to stop the foreign proceedings in this court rather than in the foreign court (*BCS Business* at [74]). In this regard, the natural forum requirement is merely a proxy for the requirement that this court must have a sufficient interest in the dispute to warrant its intervention (*BCS Business* at [74]).

39 A court is the natural forum for the resolution of a dispute if it has "the most real and substantial connection" with the dispute (*John Kirkham* at [33], citing *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460 ("*Spiliada*")). For Singapore to be the natural forum for a dispute, it must be shown that Singapore is clearly the more appropriate forum than the foreign court. It is not enough to show that Singapore is an equally appropriate forum. The burden of proving that Singapore is clearly the more appropriate forum lies on the applicant for the anti-suit injunction (*John Kirkham* at [33]).

40 To establish which court has the most real and substantial connection with a dispute, the court must consider all the relevant connecting factors and determine the jurisdiction where the dispute may be "tried more suitably for the interests of all the parties and for the ends of justice" (*Rappo, Tania v Accent*

Delight International Ltd and another and another appeal [2017] 2 SLR 265 ("*Rappo*") at [72], citing *Spiliada* at 476). The connecting factors include the following (*Rappo* at [71]):

(a) the personal connections of the parties and the witnesses;

(b) the connections to relevant events and transactions;

(c) the law applicable to the dispute;

(d) the existence of proceedings elsewhere; and

(e) the shape of the litigation, *ie*, the manner in which the claim and the defence have been pleaded.

41 The process of considering all the relevant connecting factors on each side is a fact-sensitive inquiry. It is not a mechanical process or a numbers game (*John Kirkham* at [34]). Rather, "it is the *quality* of the connecting factors that is crucial in this analysis" [emphasis in original] (*Rappo* at [70]). The weight that ought properly to be attached to any given connecting factor is also a fact-sensitive inquiry. The court should ascribe more weight to the connecting factors that are likely to be material to the fair determination of the specific dispute, bearing in mind the specific characteristics of that dispute and of the parties to the dispute (*Rappo* at [71]).

42 With the above principles in mind, I turn to the facts of this case.

The dispute ought to be characterised broadly

43 Before I can determine which forum is the natural forum for resolving this dispute because it has the most real and substantial connection with the dispute, I must first identify the relevant dispute.

44 The applicant identifies the relevant dispute narrowly. According to the applicant, the relevant dispute is only the bilateral dispute between the respondent and the applicant and not the multilateral dispute between the respondent on the one hand and FDT, the applicant, ACFF and Aria DMCC on the other hand.[28] The applicant submits by way of analogy that if there were an arbitration agreement between FDT and the applicant in the DIMA, the existence of the multilateral dispute would have no bearing on whether the applicant should be granted an anti-suit injunction preventing FDT from pursuing its bilateral dispute in breach of the arbitration agreement by litigating it as an aspect of the multilateral dispute.[29]

45 I reject this submission. It is true that, if FDT were to breach this hypothetical arbitration agreement, this court will ordinarily grant the applicant an anti-suit injunction unless there were strong reasons *not* to do so (see [149] below). But when this court grants an anti-suit injunction arising from breach of an arbitration agreement, it does not need to consider the question of natural forum at all. That is simply because the forum that the parties have chosen by contract must prevail over any forum which a court may consider "natural". In those circumstances, this court does not need to identify the dispute in order to answer the procedural question of whether Singapore clearly has the most real and substantial connection with the dispute. It is true that this court will still need to identify the dispute in order to answer the substantive question of whether the dispute falls within the scope of the parties' arbitration agreement. But that is an entirely different exercise that has no bearing on the natural forum question.

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28 Notes of Argument at p 37, line 28.

29 Notes of Argument at p 37, lines 30–32.

46 The applicant submits that the relevant dispute ought to be identified narrowly because the respondent is pursuing in the Hong Kong Suit four separate sets of causes of action against four separate defendants. The applicant submits therefore that the multilateral dispute is "easily divisible"[30] and that the relevant dispute for the natural forum analysis is only the respondent's dispute with the applicant. This is not a case where, for example, the respondent claims that the four defendants are parties to a conspiracy or that each defendant is a link in a chain of transfers of trust property that entails a chain of liability for knowing receipt or dishonest assistance.

47 I reject this submission. It makes the identification of the relevant dispute turn on the causes of action that a claimant chooses to advance. If a claimant chooses to advance a cause of action in conspiracy, the relevant dispute encompasses the entire multilateral dispute. If a claimant chooses to advance separate causes of action against each of multiple defendants, the relevant dispute will be each bilateral dispute. This is an overly technical approach and elevates form over substance. The substance of the natural forum inquiry is to decide which forum can best serve the interests of the parties and the ends of justice (*Rappo* at [72]). This cannot turn on how a claimant chooses to resolve the facts underlying its real grievance into one or more causes of action or the divisibility in some technical sense of those causes of action. It must turn instead on the factual and legal substance of the claimant's grievance and how that affects the dispute resolution process in the various forums under consideration.

48 In my view, the relevant dispute is the respondent's multilateral dispute with FDT, the applicant, ACFF and Aria DMCC. The factual and legal substance of the respondent's grievance is FDT's investment of US$468m in

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30 Notes of Argument at p 60, lines 28–29.

ACFF and the remittance of US$456m out of that investment to Aria DMCC at a time when the applicant was FDT's investment adviser. That has led to ACFF's failure to redeem some US$20m of the Reserves and the respondent's concern about the location of the US$456m remitted to Aria DMCC. All aspects of the respondent's true grievance arise from the same underlying set of facts. For the purposes of the natural forum analysis, the respondent's bilateral dispute with the applicant is an integral part of the respondent's multilateral dispute with FDT, the applicant, ACFF and Aria DMCC and not a separate dispute.

49 It is therefore the applicant's burden to satisfy me that Singapore is clearly the forum in which this multilateral dispute may be "tried more suitably for the interests of all the parties and for the ends of justice" (*Rappo* at [72]).

50 For the reasons that follow, the applicant has failed to discharge this burden.

The respondent's claims against FDT

51 I consider first the respondent's claims against FDT in the Hong Kong Suit (see [18] above). The respondent brings claims against FDT in equity, contract and tort. I consider the natural forum for all of these claims to be Hong Kong.

52 First, the respondent's claim against FDT in equity arises from the following four agreements that govern the respondent's contractual relationship with FDT:

(a) a Client Agreement dated 28 September 2020;

(b) a Custody Services Agreement dated 28 September 2020;

(c) an Escrow Services Agreement dated 13 January 2021; and

(d) a Deed of Amendment of the Escrow Services Agreement dated 16 September 2022.[31]

All four of these agreements are governed by Hong Kong law and contain either an exclusive or a non-exclusive jurisdiction clause in favour of Hong Kong.[32]

53 Second, the respondent's claim against FDT for breach of the Escrow Services Agreement can be brought only in the courts of Hong Kong. This agreement contains an exclusive jurisdiction clause in favour of Hong Kong.[33]

54 Finally, the respondent's claim against FDT in tort arises from an alleged breach of a statutory duty of care. This statutory duty of care is said to arise from the Hong Kong Trustee Ordinance (Cap 29). This claim is therefore also governed by Hong Kong law.

55 Further, as the respondent also points out,[34] the respondent seeks in the Hong Kong Suit the remedy of tracing against all four defendants.[35] If this remedy is granted, the tracing process will likely begin in Hong Kong. That is because FDT holds the Reserves in escrow accounts with banks in Hong Kong.

The respondent's claims against the applicant

56 I consider next the respondent's derivative claims against the applicant in the Hong Kong Suit.

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31 Mr Li's AEIC at para 14.

32 Mr Li's AEIC at paras 76(2)–76(3), 76(5) and 76(10).

33 Mr Li's AEIC at para 76(5).

34 Respondent's Written Submissions dated 24 July 2024 ("RWS") at para 87.

35 Mr Li's AEIC at p 497, para 13.

57 As I have mentioned (see [21(a)] above), the respondent brings derivative claims in contract and in tort against the applicant in the Hong Kong Suit. More specifically, the respondent's case in the Hong Kong Suit is as follows:

(a) First, the applicant is in breach of its express obligation to FDT under cl 3 of the DIMA read with the Investment Profile to invest the Reserves[36] only in ACFF or in investment products that the applicant recommends to FDT and that FDT approves in writing.[37]

(b) Second, the applicant is in breach of its implied obligation to FDT under the DIMA to: (i) act with the care and skill expected of a reasonably competent and prudent investment manager and adviser licensed by the MAS in conducting a discretionary fund management business; and to (ii) act *bona fide* in the best interests of the respondent at all material times.[38]

(c) Third, the applicant is in breach of a concurrent duty of care that it owes to FDT in the tort of negligence, the content of which is supplied by these express and implied contractual obligations.[39]

58 I do not consider that Singapore is clearly the more appropriate forum for resolving the respondent's derivative claims against the applicant for the following four reasons.

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36 Mr O'Flaherty's AEIC at p 1741, cl 3.1.

37 Mr O'Flaherty's AEIC at pp 162–163.

38 Mr O'Flaherty's AEIC at p 1592, para 33.

39 Mr O'Flaherty's AEIC at p 1592, para 34.

59 First, for the reasons set out below (at [89]–[92]), whether FDT is a trustee for the respondent such that the respondent can avail itself of the *Vandepitte* procedure in the Hong Kong Suit is a procedural issue to be decided under Hong Kong law as the law of the forum in which that suit has been brought. The applicant submits that there are complex issues relating to the *Vandepitte* procedure that must be determined by a Singapore court.[40] This is a bootstraps argument. The applicant cannot hypothesise a Singapore action in which Singapore law would determine whether the respondent could avail itself of the *Vandepitte* procedure and then rely on that hypothetical action to argue that Singapore is the natural forum for the dispute between the applicant and the respondent.

60 Second, as regards the respondent's derivative claim against the applicant in contract, I consider both Singapore and Hong Kong to be equally appropriate forums. It is true that the DIMA is expressly governed by Singapore law. It is also true that an express choice of law clause is not just a relevant consideration in determining the natural forum but is a particularly significant consideration in that determination (see also *Ivanishvili, Bidzina and others v Credit Suisse Trust Ltd* [2020] 2 SLR 638 at [106]). But if the legal issues are straightforward, or if the competing forums have domestic laws which are substantially similar, the identity of the governing law becomes a factor of little significance (*Lakshmi Anil Salgaocar v Jhaveri Darsan Jitendra* [2019] 2 SLR 372 ("*Salgaocar*") at [56], citing *Dicey, Morris & Collins on the Conflict of Laws* vol 1 (Lord Collins of Mapesbury gen ed) (Sweet & Maxwell, 15th Ed, 2012) at para 12–034). Furthermore, within the common law world, there is usually little difficulty with one forum applying the law of another (*Salgaocar* at [57], citing *Halsbury's Laws of Singapore* vol 6(2) (LexisNexis Singapore,

[40] AWS at para 84.

2016) at para 75.093). Both Singapore and Hong Kong are not only common law jurisdictions but have a law of contract that is largely common law with analogous or even identical statutory interventions. In addition, I do not consider the respondent's contractual claims under the DIMA to raise any complicated issues of Singapore contract law that would point to Singapore being a clearly more appropriate forum than Hong Kong. As such, I do not place any significant weight on the governing law of the DIMA as a connecting factor to Singapore.

61 Third, as regards the respondent's derivative claims against the applicant in tort, the applicable law depends on the choice of law rules in Hong Kong and in Singapore. The applicant submits that the natural forum for this claim is Singapore because the respondent's claims in tort against the applicant allege that the applicant fell short of the "degree of skill and diligence to be expected of reasonably competent and prudent investment managers and advisers licensed *by the MAS* to conduct discretionary fund management business" [emphasis added].[41] I do not attach significant weight to this factor. As the applicant admits, the reference to "investment managers and advisers licensed by the MAS" is not in itself a strong connecting factor in favour of Singapore.[42] The scope of the duties of an investment manager and adviser licensed by the MAS will have to be the subject of expert evidence. The same experts can just as easily give evidence at trial on these duties in Hong Kong as they can in Singapore (see [70] below).

62 Fourth, the applicant submits that substantial weight should be attached to the fact that, under cl 24.3 of the DIMA, FDT and the applicant contemplated a mediation administered by the Singapore Mediation Centre ("the SMC") as a

41 Mr O'Flaherty's AEIC at p 1592, para 33.

42 AWS at para 94(b).

precursor to litigation and agreed to submit disputes to the non-exclusive jurisdiction of the Singapore courts.[43] I do not place much weight on this as a connecting factor to Singapore. The reference to the SMC is of little weight. The fact that FDT and the applicant contemplated submitting future disputes to a non-judicial resolution by mediation in Singapore has no bearing on whether Singapore is clearly the more appropriate forum to achieve a judicial resolution of a specific dispute in the interests of the parties and the interests of justice. Further, the fact that FDT and the applicant chose to confer only non-exclusive jurisdiction on the Singapore courts means that they intended when they entered into the DIMA that disputes should be resolved in whichever forum was the more appropriate forum for resolving a particular dispute.

Other connecting factors

63 Finally, I consider the other connecting factors to be evenly balanced.

(1) The place of the wrongs and the place where the loss was sustained

64 First, the applicant points out that it is incorporated in Singapore, carries on business in Singapore and provided investment advice to FDT from Singapore. I accept that the applicant performed its contractual obligations under the DIMA in Singapore.[44] I accept also that the alleged breach of the DIMA and the alleged breach of the applicant's duty of care in tort occurred in Singapore.[45]

65 The countervailing connecting factor is that FDT, a key party to the multilateral dispute, is incorporated in and licensed in Hong Kong. As the

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43 AWS at para 88.

44 AWS at para 90.

45 AWS at para 91.

respondent submits, it was in Hong Kong that FDT acted on the investment advice and due diligence services that the applicant allegedly rendered to FDT in breach of its contract with FDT or in breach of its duty of care to FDT.[46] Further, it was in Hong Kong that FDT invested US$468m in ACFF by remitting US$12m to ACFF and US$456m to Aria DMCC. This is because FDT held the Reserves in Hong Kong and gave the relevant remittance instructions in Hong Kong to banks in Hong Kong.[47]

66 I consider that the weight of Singapore as the place where the applicant allegedly breached its contract with and duty of care to FDT is neutralised by Hong Kong as the place where FDT acted on the applicant's advice and FDT instructed its banks to remit the US$468m to ACFF and Aria DMCC.

(2) Location and compellability of witnesses

67 I turn to the location and compellability of witnesses (*Salgaocar* at [73]).

68 FDT's witnesses are based in Hong Kong.[48] These witnesses include its Chief Executive Officer, Chief Operating Officer and Senior Legal Counsel, all of whom liaised with the applicant and the respondent with respect to the Reserves. Further, the witnesses from Kroll who may give evidence on the forensic accounting review are also likely to be based in Hong Kong.[49] As against this, the applicant's witnesses (such as its partners and its Chief Executive Officer) and the respondent's sole director are based in Singapore.[50]

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46 RWS at para 84(a).

47 RWS at para 84(b).

48 RWS at para 88(a).

49 RWS at para 88(b).

50 Mr O'Flaherty's AEIC at para 91(i).

69 I consider the location of witnesses to be a neutral factor. Both parties accept that the distribution of potential witnesses between Singapore and Hong Kong is largely even.[51]

70 I also consider this to be a factor of little significance. There is no suggestion that it would be unduly inconvenient for the witnesses in one jurisdiction to travel to and give evidence in person at a trial in the other jurisdiction, or that it would be inconvenient for them to do so through video conferencing.

(3) Documents

71 Similarly, given the ease with which documents can be conveyed between the two jurisdictions, whether physically or electronically, I do not place any weight on the location of the evidence, *eg*, documents relating to the applicant's investment advice to FDT or to the asset tracing exercise.

Conclusion on natural forum

72 In the round, taking the applicant's case at its highest, the applicant has failed to discharge its burden of establishing that Singapore is clearly the more appropriate forum for the resolution of the multilateral dispute than Hong Kong.

73 I attach significant weight to the fact that the primary defendant in the multilateral dispute is FDT and that the respondent is contractually bound to bring its claim against FDT in Hong Kong in light of the exclusive jurisdiction clause in the Escrow Services Agreement.

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[51] Mr O'Flaherty's AEIC at paras 91(i) and 92(d); Mr Li's AEIC at para 83.

74 For all of these reasons, I hold that the natural forum for resolving the parties' dispute is Hong Kong, not Singapore.

Vexation or oppression

75 The second factor to consider is the vexation or oppression to the applicant if the Hong Kong Suit is allowed to continue. The applicant submits that the Hong Kong Suit is vexatious and oppressive because:

(a) the respondent's claims against the applicant in the Hong Kong Suit are bound to fail (see [78(d)] below);[52] and

(b) the respondent joined the applicant to the Hong Kong Suit in bad faith (see [78(b)] below).[53]

76 For the reasons that follow, I reject the applicant's submissions.

The law

77 To rely on this factor, an applicant must establish "the clearest of circumstances that the foreign proceedings are vexatious or oppressive" (*Koh Kay Yew* at [25]). That is because: (a) a litigant generally has the right to commence civil proceedings in any jurisdiction whose law permits him to do so there; and (b) the respondent's act in choosing to commence proceedings in the foreign jurisdiction shows that it considers the foreign jurisdiction to be *forum conveniens*, *ie*, the most appropriate jurisdiction to resolve the dispute. It is only in the "clearest of circumstances" that this court will restrain a litigant from exercising his forensic freedom to litigate in a foreign jurisdiction (*Koh Kay Yew* at [25]).

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52 AWS at paras 6(a)–6(b).

53 AWS at paras 6(c)–6(e).

78 Whether an anti-suit injunction ought to be granted to relieve an applicant against vexation or oppression is a fact-sensitive inquiry that ultimately turns on the specific circumstances of a particular case (*John Kirkham* at [46]). The courts have, however, held that the following situations are examples of vexation or oppression (*John Kirkham* at [47]):

(a) where the applicant will be subjected to oppressive procedures in the foreign proceedings;

(b) where the respondent has shown bad faith in commencing the foreign proceedings;

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

(d) where the respondent has commenced foreign proceedings that are bound to fail; and

(e) where the foreign proceedings cause the applicant extreme inconvenience.

79 The applicant relies on the fourth and second factors to submit that the Hong Kong Suit is vexatious or oppressive.

80 I reject both submissions. I address each submission in turn.

Bound to fail

81 The applicant submits that the respondent's claims in the Hong Kong Suit are bound to fail for two reasons:

(a) First, the respondent cannot rely on the *Vandepitte* procedure to bring derivative claims against the applicant arising from FDT's rights against the applicant under the DIMA.[54]

(b) Second, even if the respondent can rely on the *Vandepitte* procedure, the derivative claims against the applicant are bound to fail.

82 For the reasons that follow, I reject both submissions.

(1) The *Vandepitte* procedure

83 I start with the applicant's submission that the respondent's claims against the applicant in the Hong Kong Suit are bound to fail because the respondent cannot rely on the *Vandepitte* procedure.

84 I begin by describing the *Vandepitte* procedure in more detail.

85 Where a trustee (T) holds property on trust for a beneficiary (B) and a third party (X) causes loss to the trust property, the general rule is that only T has the procedural right to bring action against X to recover that loss (*The State-Owned Company Yugoimport SDPR (also known as Jugoimport-SDPR) v Westacre Investments Inc and other appeals* [2016] 5 SLR 372 ("*Westacre*") at [116]). If T refuses unreasonably to bring action against X, the loss to the trust property can be recovered only by two successive proceedings. First, B must

[54] AWS at paras 6(a) and 26(b).

commence proceedings against T, either: (a) seeking to replace T with a trustee who is prepared to bring action against X; or (b) seeking a mandatory injunction against T compelling him to perform his duty as trustee by suing X to recover the loss. Second, either the new trustee or T, now compelled by the injunction, must bring the action against X to recover the loss to the trust property (*Westacre* at [117]).

86 In *Vandepitte v Preferred Accident Insurance Corporation of New York* [1933] AC 70 ("*Vandepitte*"), the House of Lords recognised a procedural shortcut that telescopes the successive proceedings engendered by the general rule. The *Vandepitte* procedure, where it applies, permits B to bring action directly against X in B's own name (*Westacre* at [117]). It is important to note that the *Vandepitte* procedure has only procedural effect. It does not create or recognise any substantive rights that B has against X directly. Accordingly, the only rights that B enforces against X in an action brought under the *Vandepitte* procedure remain the rights that T could have enforced against X as trustee in relation to the trust property (*Westacre* at [117]).

(A) FDT'S PLEADED CASE IN THE HONG KONG SUIT

87 The applicant submits that the respondent cannot rely on the *Vandepitte* procedure to bring the Hong Kong Suit because FDT denies in its defence in the Hong Kong Suit that FDT and the respondent ever intended any trust to arise in respect of the Reserves "but intended instead to create a debtor and creditor relationship only".[55] The applicant goes on to submit that the position must

[55] Mr O'Flaherty's AEIC at p 1629, para 10(7).

therefore be that FDT is not a trustee of the Reserves for the respondent and that the respondent is not the beneficiary of any trust in respect of the Reserves.[56]

88 I reject this submission for four reasons.

89 First, the applicant's submission rests on the unspoken premise that the issue of whether the respondent can rely on the *Vandepitte* procedure in the Hong Kong Suit is governed by Singapore law on the *Vandepitte* procedure.[57] I do not accept this premise. The *Vandepitte* procedure has purely procedural effect (see [86] above). Whether the respondent can rely on the *Vandepitte* procedure in particular proceedings is therefore a purely procedural issue. As a procedural issue, it is governed by the law of the forum in which the action has been brought. Whether the respondent can rely on the *Vandepitte* procedure in the Hong Kong Suit is therefore governed by Hong Kong law. It is not governed by Singapore law, whether as the law that governs the substantive causes of action between FDT and the applicant that the respondent hopes to pursue as derivative claims in the Hong Kong Suit or as the law of the forum in which the applicant has chosen to commence proceedings to seek an anti-suit injunction.

90 Second, even if the issue of whether the respondent can rely on the *Vandepitte* procedure is governed by Singapore law, the threshold question in analysing that issue is whether FDT is a trustee for the respondent. That threshold question is governed by Hong Kong law. The contracts that the respondent relies on for its case that FDT is a trustee for the respondent are the Client Agreement, the Custody Services Agreement and the Escrow Services

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56 Mr O'Flaherty's AEIC at p 1629, paras 10, 19, 24(2), 26, 27(1) and 39(1).

57 Notes of Argument at p 16, lines 1–8.

Agreement (see [52] above). All of these contracts are governed by Hong Kong law.[58]

91 Third, even if I am wrong on my first and second reasons, I am not satisfied that the respondent's case on this issue in the Hong Kong Suit is clearly bound to fail. Whether FDT holds the Reserves on trust for the respondent is a disputed issue in the Hong Kong Suit. As such, I cannot take FDT's pleaded denial that it is a trustee and its pleaded denial that the respondent is a beneficiary (see [87] above) at face value and on affidavit evidence alone as being dispositive on this issue.

92 Finally, even if I were to conclude that the respondent is clearly unable to rely on the *Vandepitte* procedure as a matter of Singapore procedural law, that conclusion would still not lead me to a finding that the Hong Kong Suit is vexatious or oppressive. That approach would have the effect of shutting the respondent out of pursuing the Hong Kong Suit without giving the Hong Kong court the opportunity to determine an issue which is ultimately one of Hong Kong procedure. Given my finding that Hong Kong is the natural forum for resolving the relevant dispute, and by analogy with the proper approach in analysing the natural forum factor (see [38] above), I consider it more appropriate that the issue of whether the respondent can rely on the *Vandepitte* procedure in the Hong Kong Suit be decided by the Hong Kong court in the Hong Kong Suit rather than in this court on this application.

(B) THE APPLICANT'S PLEADED CASE IN THE HONG KONG SUIT

93 The applicant next submits that the respondent cannot rely on the *Vandepitte* procedure to bring the Hong Kong Suit because the respondent has

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[58] Notes of Argument at p 16, lines 1–7; Mr Li's AEIC at para 76.

taken the position in its statement of claim in the Hong Kong Suit that it services TrueUSD stablecoins on behalf of TrueUSD token holders and maintains the Reserves for the benefit of TrueUSD token holders.[59] This is allegedly a concession that the beneficiaries of any trust over the Reserves are the TrueUSD token holders and not the respondent.

94 In support of this submission, the applicant relies on cl 6 of the Escrow Services Agreement between FDT and the respondent. Clause 6 provides expressly that the respondent "shall have no proprietary rights in the [Reserves] and shall hold the [Reserves] exclusively for the benefit of the [h]olders".[60]

95 I reject this submission.

96 Even if TrueUSD token holders are beneficiaries of a trust over the Reserves, that means only that TrueUSD token holders are the *ultimate* beneficiaries of this trust. The status of TrueUSD token holders as ultimate beneficiaries does not exclude the possibility that the respondent is an intermediate beneficiary under a sub-trust. It is common for escrow or custody arrangements to consist of an initial trust and a chain of sub-trusts. Thus, neither the respondent's pleaded position in the Hong Kong Suit (see [93] above) nor cl 6 of the Escrow Services Agreement (see [94] above) excludes as a matter of logic the possibility that FDT holds legal title to the Reserves on an initial trust for the respondent, and that the respondent holds its rights under that initial trust as sub-trustee on a sub-trust for TrueUSD token holders as ultimate beneficiaries.

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59 Mr O'Flaherty's AEIC at p 1578, para 7.

60 Mr Li's AEIC at p 341, cl 6.

(C) PREREQUISITE FOR THE *VANDEPITTE* PROCEDURE NOT SATISFIED

97 The applicant next submits that the respondent cannot rely on the *Vandepitte* procedure to bring the Hong Kong Suit because the respondent has failed to raise, let alone establish, a prerequisite for invoking the procedure. That prerequisite is that B must ask T to sue X and that T must have refused to do so (in Singapore law, see *Motor Insurers' Bureau of Singapore and another v AM General Insurance Bhd (formerly known as Kurnia Insurans (Malaysia) Bhd) (Liew Voon Fah, third party*) [2018] 4 SLR 882 at [60]–[64]).[61]

98 I do not accept that this is invariably a prerequisite for relying on the *Vandepitte* procedure.[62] In appropriate cases, a trustee's failure to sue may suffice to establish a refusal to sue. Indeed, FDT's pleaded case in the Hong Kong Suit suggests that FDT would have refused to sue even if asked. As such, the fact that it is not part of the respondent's case in the Hong Kong Suit that it asked FDT to sue the applicant and that FDT refused to do so does not establish that the respondent's case is clearly bound to fail.

(D) SPECIAL CIRCUMSTANCES

99 The applicant next submits that the respondent cannot rely on the *Vandepitte* procedure to bring the Hong Kong Suit because the respondent has not shown any special circumstances to justify reliance on the *Vandepitte* procedure. Examples of special circumstances include fraud on the part of the trustee or collusion between the trustee and the third-party wrongdoer.

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61 AWS at para 42.

62 Notes of Argument at p 20, lines 26–29 and p 23, lines 4–5.

100 I do not accept this submission. I cannot conclude on the evidence before me that the respondent's case is clearly bound to fail on the ground that no special circumstances exist.

(E) CLAUSE 25 OF THE DIMA

101 The applicant submits that the Hong Kong Suit is bound to fail by reason of cl 25 of the DIMA. Clause 25 of the DIMA provides as follows:[63]

> Unless expressly provided in this Agreement, any person who is not a Party to this Agreement shall have no rights under the Contracts (Rights of Third Parties) Act (Cap. 53B) or otherwise, to enforce any of its terms.

102 The applicant submits that the respondent, as a non-party to the DIMA, has no right to enforce any of the terms of the DIMA against the applicant.[64] The applicant submits further that the phrase "or otherwise" in cl 25 of the DIMA has the effect of excluding even indirect enforcement pursuant to a derivative claim advanced under the *Vandepitte* procedure.[65]

103 I reject this submission. The phrase "or otherwise" cannot preclude the respondent from relying on the *Vandepitte* procedure to advance a derivative claim arising from FDT's rights under the DIMA. I say this for three reasons.

104 First, the respondent is not a party to the DIMA. Clause 25 of the DIMA is incapable of imposing any contractual obligation on the respondent. There is no legal basis on which a contract between A and B can impose obligations on C. That includes an obligation restricting C's rights to pursue a derivative claim against B, where that derivative claim is permitted under some other branch of

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63 Mr O'Flaherty's AEIC at p 1754, cl 25.1.

64 AWS at paras 27–28.

65 Notes of Argument at p 19, lines 3–10.

the substantive or procedural law. I cannot see how the applicant (who is a stranger to the alleged trust between FDT and the respondent) can, by entering into the DIMA with FDT, deprive the respondent (who is a stranger to the DIMA) of a procedural right conferred on the respondent by the courts of equity, acting independently both of any express trust or any express contract.

105 Second, allowing a contract between T and X to restrict B's right to rely on the *Vandepitte* procedure against X would defeat the very reason the *Vandepitte* procedure exists in the first place. The courts of equity recognised the *Vandepitte* procedure in order to protect a beneficiary of a trust against a trustee failing to perform his fiduciary duty to protect the trust property against loss caused by a third party. The *Vandepitte* procedure would be useless if the common law were to permit the trustee and the third party to enter into a contract that precludes the beneficiary from relying on the *Vandepitte* procedure.

106 Third, even if the common law permitted T and X to enter into a contract that precludes B from relying on the *Vandepitte* procedure, I consider that very clear and specific words must be used to achieve that purpose because of the *Vandepitte* procedure's protective purpose. The generic phrase "or otherwise" is in my view insufficient to have that effect.

107 For all these reasons, I do not accept that it is clear that the respondent cannot rely on the *Vandepitte* procedure by reason of cl 25 of the DIMA.

(2) The substantive derivative claims

108 I turn to the second plank of the applicant's submission that the respondent's claims in the Hong Kong Suit are bound to fail: that even if the respondent can rely on the *Vandepitte* procedure in the Hong Kong Suit, the

substantive derivative claims the respondent has brought against the applicant in the Hong Kong Suit are bound to fail (see [81(b)] above).

(A) THE DERIVATIVE CLAIMS IN CONTRACT

109 I start with the respondent's derivative claim in contract alleging that the applicant is in breach of the express and implied terms of the DIMA (at [57(a)]–[57(b)] above). Clause 24.1 of the DIMA expressly provides that Singapore law governs FDT's contractual rights against the applicant under the DIMA.

110 The applicant submits that the respondent's derivative claims in contract are bound to fail because FDT's pleaded defence in the Hong Kong Suit entirely exonerates the applicant of any breach of its obligations to FDT in contract.[66]

111 FDT has pleaded the following points in its defence in the Hong Kong Suit:

(a) The respondent expressly assented and agreed to the terms of the DIMA, including the term that entitled the applicant not to seek confirmation before effecting transactions unless expressly requested to do so.[67]

(b) Between May 2021 and March 2022, in compliance with the DIMA and the Investment Proposal, the applicant advised and directed that FDT invest the Reserves in ACFF.[68]

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66 AWS at paras 46–47.

67 Mr O'Flaherty's AEIC at p 1631, para 15(4).

68 Mr O'Flaherty's AEIC at p 1632, para 17(1) read with p 1582, paras 13–14.

(c) The respondent agreed to follow the applicant's advice and to invest the Reserves in ACFF.[69]

(d) The respondent instructed FDT to facilitate the investment of the US$468m in ACFF by remittances to ACFF and to Aria DMCC.[70]

(e) FDT acted on these instructions from the respondent, which FDT was obliged to follow, and invested the US$468m pursuant to the DIMA and in compliance with the Escrow Services Agreement.[71]

(f) The respondent authorised the investment of the US$468m in ACFF, both before FDT made the investment and by ratification after FDT had made the investment.[72]

(g) The applicant's advice to invest US$468m in ACFF was "proper advice" both:

(i) for the purposes of the applicant's duties to FDT under the DIMA and the Investment Profile; and

(ii) for the purposes of FDT's duties to the respondent under the Escrow Services Agreement.[73]

112 I reject the applicant's submission that FDT's pleaded defence means that the respondent's derivative claims in contract against the applicant are

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69 Mr O'Flaherty's AEIC at p 1632, para 17(2).

70 Mr O'Flaherty's AEIC at p 1632, para 17(3) read with p 1587, para 25.

71 Mr O'Flaherty's AEIC at p 1632, para 17(4).

72 Mr O'Flaherty's AEIC at p 1641, para 39(2)(c).

73 Mr O'Flaherty's AEIC at p 1643, para 39(7).

bound to fail. The premise of this submission is that the respondent is bound by FDT's pleaded defence in the Hong Kong Suit. I do not accept this premise.

113 The respondent points out correctly that it is entirely to be expected that FDT's pleaded defence in the Hong Kong Suit will take the position that the applicant did not breach any of its obligations to FDT in contract.[74] It is in FDT's self-interest to plead this in its defence for two reasons. First, pleading that the applicant fulfilled its duties to FDT under the DIMA affords FDT an additional defence to the respondent's claim against FDT for breach of the Escrow Services Agreement. Second, this plea protects FDT against any allegation that it is in breach of duty by failing to bring action against the applicant under the DIMA if the respondent were to succeed in establishing that FDT is a trustee for the respondent. This may well also have a bearing on whether the respondent can avail itself of the *Vandepitte* procedure in the Hong Kong Suit.

114 I also consider that it would undermine the very purpose of the *Vandepitte* procedure if B were, automatically and invariably, to be bound by a position adopted by T as against X. That is especially so where the position adopted by T is a self-interested and self-serving one taken to advance T's own procedural and substantive defences to B's derivative claim. To draw an analogy with the statutory derivative action under s 216A of the Companies Act 1967 (2020 Rev Ed), where a minority shareholder alleges that a company's directors have breached their fiduciary duties to the company, the company will very often reject the allegation by asserting positively and forcefully that the directors have performed fully all of their obligations to the company and that the company therefore has no claims against the directors. Any such assertion does not and cannot, in itself, defeat either: (a) the minority shareholder's

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74 Notes of Argument at p 54, lines 16–19.

application for leave to commence a statutory derivative action against the directors; or (b) the substantive derivative claims that the minority shareholder eventually brings against the directors in the company's name, if such leave is granted.

115 Finally, whether the applicant performed its contractual obligations to FDT or breached them is a mixed question of fact and law. Even if FDT's admissions or concessions of *fact* may bind the respondent in advancing its derivative claim against the applicant, provided that they are within FDT's knowledge and that they are made *bona fide*, I consider that the very concept of an admission or a concession is inapt when it comes to questions of law. Questions of law that are in issue in litigation must be determined judicially in that litigation[75] and cannot be determined by a self-interested and self-serving position taken by a party to the litigation as against a third party to the litigation, even if the claims being litigated are derived from that party's rights against the third party.

116 For all of these reasons, I do not accept that the respondent's derivative claims in contract against the applicant in the Hong Kong Suit are bound to fail.

(B) THE DERIVATIVE CLAIMS IN TORT

117 This finding suffices to dispose of this factor in the applicant's submission that the Hong Kong Suit is vexatious and oppressive. It is therefore unnecessary to consider whether the respondent's derivative claims in tort against the applicant in the Hong Kong Suit are also bound to fail.

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75 Notes of Argument at p 55, lines 11–14.

118 In any event, to the extent that the derivative claims in tort rely on a concurrent duty of care with the same content as the applicant's express and implied contractual duties to FDT, the same reasons lead me to conclude that the respondent's derivative claims in tort against the applicant in the Hong Kong Suit are also not bound to fail.

Bad faith

119 The applicant's alternative submission on vexation or oppression is that the respondent joined the applicant to the Hong Kong Suit in bad faith. To advance this submission, the applicant relies on three aspects of the respondent's conduct in the Hong Kong Suit:

(a) The respondent deliberately misrepresented material facts to the Hong Kong court when it secured leave *ex parte* to join the applicant to the Hong Kong Suit.[76]

(b) The respondent joined the applicant to the Hong Kong Suit in deliberate breach of the tiered dispute resolution mechanism in cl 24.3 of the DIMA.[77]

(c) The respondent joined the applicant to the Hong Kong Suit for a collateral purpose, *ie*, to obtain discovery from the applicant to be used against FDT.[78]

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76 AWS at para 6(e).

77 AWS at para 6(d).

78 AWS at para 6(c); Notes of Argument at p 28, lines 25–26.

120 I reject the applicant's submissions that any of these aspects of the respondent's conduct gives rise to vexation or oppression. I address each of them in turn.

(1) Misrepresentations to the Hong Kong court

121 The applicant submits that the respondent made two material misrepresentations of fact to the Hong Kong court when it obtained leave *ex parte* to join the applicant as the second defendant and to serve the applicant out of the Hong Kong court's jurisdiction.[79]

122 First, the respondent represented to the Hong Kong court that the respondent "did not approve" the terms of the DIMA.[80]

123 I accept that this was a misrepresentation or was, at the very least, inaccurate. The respondent was actively involved in negotiating the terms of the DIMA and even provided comments and suggestions on drafts of the DIMA.[81] Further, in March 2021, FDT's solicitor sent an e-mail to the respondent's solicitor attaching the final version of the DIMA and the Investment Profile for the respondent's "final review".[82] The respondent's solicitor replied to that email two days later, stating that that draft of the DIMA "looks great" and that he would "go ahead and collect signatures".[83]

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79 AWS at paras 70–75.

80 Mr O'Flaherty's AEIC at p 488, para 102.

81 AWS at para 72.

82 Mr Li's AEIC at p 549.

83 Mr Li's AEIC at p 549.

124 Second, the respondent represented to the Hong Kong court that a side letter dated 15 March 2021 ("the Side Letter") was a contract between FDT and the applicant.[84]

125 I accept that this too was a misrepresentation or was, at the very least, inaccurate.[85] Although the Side Letter is drawn up as a letter issued by the respondent and addressed to both FDT and the applicant,[86] it is in no way a contract between FDT and the applicant. The Side Letter is on its face the unilateral act of the respondent signed by one of its directors.

126 The applicant submits that the Side Letter is significant for three reasons. First, it contains the respondent's express acknowledgment that it had read, understood and agreed to the terms of the DIMA.[87] Second, it contains the respondent's express undertaking to submit disputes arising out of the Side Letter to arbitration in Hong Kong. Third, the respondent did not exhibit the Side Letter to its affidavit in support of its *ex parte* applications and exhibited a completely unrelated document in its place. Thus, the Hong Kong court was deprived of the opportunity to examine the Side Letter for itself and to detect the respondent's misrepresentation.[88]

127 The respondent explains these misrepresentations as simple mistakes.[89] I accept this explanation.

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84 Mr O'Flaherty's AEIC at p 118, para 103.

85 AWS at paras 73 and 74(a).

86 Mr Li's AEIC at p 544.

87 Mr Li's AEIC at p 544.

88 AWS at para 74(b).

89 Mr Li's AEIC at para 61.

128 The misrepresentation in relation to the respondent "not approv[ing]" the terms of the DIMA must be read in context. The respondent made this point in the course of making the broader – and indisputable – point that the respondent is not a party to the DIMA and is therefore not bound by its terms. I accept that the reference to the respondent not approving the terms of the DIMA was intended merely to make the point that the respondent did not approve being bound by the terms of the DIMA.

129 As for the respondent's misrepresentation in respect of the Side Letter, I accept that this is likely to have been an error. The Side Letter is a document that is in the possession of both FDT and the applicant as its addressees. The respondent could not hope to gain any tactical advantage by deliberately misrepresenting its nature or its contents to the Hong Kong court or by deliberately withholding it from the Hong Kong court.

130 I therefore do not accept that these misrepresentations amount to the "clearest of circumstances that the foreign proceedings are vexatious or oppressive" (see [77] above).

131 In any event, the applicant has applied to set aside the order joining it as the second defendant in the Hong Kong Suit.[90] I consider it far more appropriate for the Hong Kong court to determine whether these misrepresentations are deliberate misrepresentations and, if so, the procedural consequences that ought to ensue for the respondent's carriage of the Hong Kong Suit. These consequences include whether the joinder and leave to serve out of the jurisdiction should be set aside. It is not for this court to pre-empt that determination, whether by granting an anti-suit injunction or otherwise.

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[90] Notes of Argument at p 7, lines 30–32.

132 For all these reasons, I do not accept that the Hong Kong Suit is vexatious or oppressive to the applicant because the respondent has made these misrepresentations to the Hong Kong court.

(2) Dispute resolution clause in the DIMA

133 The applicant next submits that the respondent has acted in bad faith in joining the applicant to the Hong Kong Suit because it has done so in breach of cl 24.3 of the DIMA.

134 I reject this submission. Clause 24.3 of the DIMA sets out a tiered dispute resolution mechanism. I address this argument in greater detail when I address the applicant's second ground for seeking an anti-suit injunction below, *ie*, breach of a contract between the parties. For now, it suffices to say that the respondent cannot be in breach of cl 24.3 of the DIMA simply because it is not a party to the DIMA.

135 The applicant cannot therefore rely on the respondent's alleged failure to comply with cl 24.3 of the DIMA as evidence that the Hong Kong Suit is vexatious or oppressive.

(3) Collateral purpose

136 The applicant submits that the respondent has joined the applicant to the Hong Kong Suit for a collateral purpose, *ie*, a purpose other than to resolve a substantive dispute between the applicant and the respondent. That collateral purpose is to secure discovery from the applicant that the respondent can then use to advance its case against FDT. The applicant accepts that it has no direct evidence to prove this allegation. Instead, it submits that the respondent's

"flimsy" case is circumstantial evidence from which I should infer a collateral purpose.[91]

137 Bringing a claim that is "flimsy", or even a claim that is bound to fail, is not in itself a sufficient basis from which to infer that the claim is brought for a collateral purpose. There can be many reasons for a litigant to bring a claim that can be characterised as "flimsy" or even bound to fail. These reasons include poor advice, a lack of discernment in selecting and omitting claims or defendants, an overly ambitious or aggressive approach to litigation and even a hope to expand existing law or to establish new law, if necessary in an appellate court.

138 The applicant submits that the respondent has made statements in an affidavit filed on its behalf in the Hong Kong Suit that suggest that its real purpose in joining the applicant to the Hong Kong Suit is to obtain discovery from the applicant that it can use against FDT. The applicant refers to the following statements in that affidavit:[92]

(a) the respondent's claims in the Hong Kong Suit "are premised on (among other things) breaches of fiduciary duties as a trustee by FDT";

(b) removing the applicant from the Hong Kong Suit "may impede [the respondent's] efforts to trace the whereabouts of the assets beneficially belonging to [the respondent]"; and

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91 Notes of Argument at p 31, lines 13–16.

92 AWS at para 58.

(c) there are "serious factual disputes … that can only be properly determined if [the applicant] remains a party to the [Hong Kong] proceedings".

139 I do not accept that these statements justify the inference that the respondent has joined the applicant to the Hong Kong Suit for the real purpose of obtaining discovery from the applicant to be used against FDT.

140 The proper purpose for a litigant to commence ordinary civil litigation is to pursue the litigation to a judgment in order to secure relief that vindicates an actual or apprehended infringement of the litigant's legal rights. Nothing in the evidence before me suggests that the respondent has joined the applicant to the Hong Kong Suit with no intention of pursuing the claim against the applicant to judgment. Given that lack of evidence, any concurrent purpose that the respondent may have in joining the applicant to the Hong Kong Suit – whether that purpose is to secure discovery from the applicant to advance its claim against FDT or to obtain information about assets for the purpose of asset tracing – cannot turn the Hong Kong Suit into proceedings that the applicant is pursuing in bad faith. All else being equal, a claimant who has arguable causes of action against multiple defendants is perfectly entitled to bring an action against all of the defendants, even if it knows that some of those defendants have no means with which to satisfy a judgment and even if the real purpose for bringing the action against those defendants is to secure documents from them in discovery that will be of assistance in advancing the case against the other defendants. So long as the claimant intends to pursue the action against those defendants to judgment, it cannot be said that the claimant has commenced the action against them for a collateral purpose.

141 For the reasons I have already given, I have held that the respondent has arguable causes of action against the applicant. Of course, I have made that holding for the purposes only of the issues that I have to determine on the application for an anti-suit injunction before me. Whether those causes of action are arguable for the purposes of a striking out application in the Hong Kong Suit is not a matter before me and is not one on which I express any view. It suffices now for me simply to conclude that, even if one of the respondent's reasons for joining the applicant to the Hong Kong Suit was to secure discovery from the applicant which will assist the respondent in its claim against FDT, that does not suffice to be vexation or oppression to justify an anti-suit injunction.

142 The applicant submits that it is vexatious or oppressive for the respondent to join the applicant to the Hong Kong Suit before it has established that FDT is a trustee of the Reserves for the respondent.[93] I do not accept this submission. The very purpose of the *Vandepitte* procedure is to telescope the successive proceedings that a beneficiary would otherwise have to bring in order to recover a loss to the trust property. Whether a putative trustee is in law a trustee is likewise a threshold issue that can be resolved in the telescoped proceedings.

143 On a related note, I do not accept that the respondent is engaging in an unreasonable "scattergun approach" by pursuing FDT, the applicant, ACFF and Aria DMCC in a single suit, instead of litigating its claims against FDT separately and initially. A claimant with multiple causes of action against multiple defendants is not obliged to sue them one by one in some logical sequence. The only restriction on the claimant's right to bring a single action against all the defendants are the applicable procedural rules on joinder of

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93 AWS at para 41.

parties and joinder of causes of action. The joinders in the Hong Kong Suit give rise to only two possibilities. If the respondent has joined defendants and causes of action in accordance with Hong Kong procedural law, then I do not consider that the Hong Kong Suit is capable of being vexatious or oppressive on this ground. If the respondent has not done so, I consider that that issue ought to be decided by the Hong Kong court: (a) because that issue is an issue of procedure governed by Hong Kong law; (b) because the Hong Kong court is seised of the litigation which raises that question squarely for determination; and (c) because Hong Kong is the natural forum for the substantive dispute between the respondent on the one hand and FDT, the applicant, ACFF and Aria DMCC on the other.

144 For all of these reasons, I do not accept the applicant's submission that the Hong Kong Suit is vexatious or oppressive because the respondent has joined the applicant to the Hong Kong Suit for a collateral purpose.

Legitimate juridical advantage

145 The final factor in considering whether to grant an anti-suit injunction on grounds of vexation or oppression is whether granting the injunction would cause the respondent to suffer any injustice in being deprived of a legitimate juridical advantage in the foreign proceedings that outweighs a *prima facie* case of vexation or oppression that the applicant has made out (*John Kirkham* at [28(d)], [29] and [53]; *VKC* at [35]). A legitimate juridical advantage includes a remedy that is available to the respondent only in the foreign proceedings but not under the law of the competing forum (*VKC* at [20]).

146 As I have found that the applicant has failed to establish that the Hong Kong Suit is vexatious or oppressive, I need not analyse this factor further.

Conclusion

147 For all of these reasons, I reject the applicant's submission that an anti-suit injunction ought to be granted against the respondent on the basis of vexation and oppression.

148 I now turn to consider the applicant's alternative submission that an anti-suit injunction ought to be granted against the respondent on the basis that the respondent has commenced the Hong Kong Suit in breach of contract.

Breach of contract

149 If foreign proceedings are commenced in breach of a contract between the parties to those proceedings, this is a ground in itself on which this court will grant an anti-suit injunction (*Sun Travels* at [67]). Even though the jurisdiction to grant an anti-suit injunction ordinarily engages the principle of international comity (see [27(d)] above), this principle is of attenuated relevance when this court is being asked simply to enforce a contract between the parties (*John Kirkham* at [29]). This court therefore need not feel diffident about enjoining foreign proceedings that one party has commenced in breach of a contract with the other party, provided that the injunction is sought promptly and before "the foreign proceedings are too far advanced" (*Sun Travels* at [68], citing *Aggeliki Charis Compania Maritima SA v Pagnan SpA (The "Angelic Grace")* [1995] 1 Lloyd's Rep 87 at 96).

150 Indeed, where foreign proceedings are commenced in breach of one of two specific types of contracts – an arbitration agreement and an exclusive jurisdiction agreement – this court will ordinarily deny the injunction only if there are strong reasons *not* to restrain the foreign proceedings. Thus, an anti-suit injunction may be granted to restrain such proceedings even if there is no

unconscionable conduct on the respondent's part in commencing the foreign proceedings (*Sun Travels* at [68]).

151 Under cl 24.3 of the DIMA, FDT is obliged to submit disputes under the DIMA to a tiered dispute resolution process involving bilateral negotiation and then mediation at the SMC before FDT can commence litigation against the applicant to resolve that dispute. Clause 24.3 provides as follows:[94]

> Parties [*ie*, the applicant and FDT] shall first attempt to settle any complaint or dispute relating to or in connection with this Agreement including any question regarding its existence, validity or termination or an alleged breach thereof by negotiation. If the Parties do not meet or the dispute cannot be settled through negotiation within 30 days from the date of notice for a meeting issued by a Party to the other Party, then any one Party may take step to refer the dispute for mediation at the Singapore Mediation Centre ("SMC"). In the event the dispute is not settled by mediation for whatever reason(s) within 90 days from the date the dispute is referred to the SMC, any Party may then refer the dispute for final resolution by litigation in the Courts. Parties hereby submit to the non-exclusive jurisdiction of the Singapore Courts.

152 It is common ground that the respondent is not a party to the DIMA and is therefore not bound by its provisions as a matter of contract law. Indeed, this point is part of the *positive* case of the applicant in support of its application[95] and also of the respondent in opposition to the application.[96]

153 The applicant nevertheless submits: (a) that the respondent is obliged to comply with cl 24.3 of the DIMA; and (b) that its failure to comply with cl 24.3 of the DIMA warrants this court restraining the respondent from pursuing the Hong Kong Suit in the same way that this court would restrain any other

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94 Mr O'Flaherty's AEIC at p 1754, cl 24.3.

95 Notes of Argument at p 9, lines 1–3.

96 RWS at para 46.

respondent from pursuing foreign proceedings that it has commenced in breach of a contractual obligation under an arbitration agreement or an exclusive jurisdiction clause.

154 I reject both submissions.

No obligation to comply with cl 24.3 of the DIMA

155 The applicant's first submission proceeds as follows. If a dispute were to arise between FDT and the applicant over FDT's rights under the DIMA, FDT would be in breach of the DIMA if it were to commence proceedings against the applicant to resolve the dispute without first complying with cl 24.3.[97] All of the claims that the respondent brings against the applicant in the Hong Kong Suit are derived from FDT's rights against the applicant under the DIMA.[98] When the respondent advances a derivative claim in respect of these rights against the applicant, the respondent cannot be in a better position than FDT. The respondent is therefore obliged to comply with cl 24.3 before commencing proceedings against the applicant in respect of the derivative claims. The respondent has failed to do this. This failure is a sufficient basis, in itself, to grant an anti-suit injunction to restrain the respondent from pursuing the Hong Kong Suit against the applicant in the same way as a failure to comply with an arbitration clause or an exclusive jurisdiction clause would be. That is so even if the Hong Kong Suit cannot be characterised as vexatious or oppressive.[99]

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97 AWS at paras 5 and 65.

98 Notes of Argument, p 9, line 21 to p 10, line 2.

99 AWS at paras 5 and 112.

156 I reject this submission. Instead, it is my view that relying on the *Vandepitte* procedure does not oblige the respondent to comply with cl 24.3 of the DIMA when commencing proceedings asserting a derivative claim against the applicant (assuming for present purposes that FDT is a trustee). I come to that conclusion for two reasons.

157 First, the respondent enjoys no substantive advantage over FDT by pursuing the derivative claims without complying with cl 24.3 of the DIMA. Any advantage is a purely procedural advantage. That is because cl 24.3 of the DIMA is purely procedural in two senses. The precursors to litigation in cl 24.3 cannot affect in any way the applicant's substantive rights or obligations arising from a dispute with FDT. Furthermore, cl 24.3 does not even attempt to govern the applicant's substantive rights and obligations in the *process* by which a dispute with FDT that cannot be resolved by settlement or mediation will be adjudicated upon with binding finality. For example, cl 24.3 does not oblige FDT to submit any such dispute to arbitration or to the exclusive jurisdiction of a particular court to be adjudicated upon with binding finality.

158 Conferring a procedural advantage on a beneficiary is the very purpose of the *Vandepitte* procedure. It is true that the intended procedural advantage is the saving of time and cost that arises from telescoping the successive proceedings that would otherwise be required to restore the loss to the trust property. But it is a necessary byproduct of the *Vandepitte* procedure that it confers other procedural advantages. One of those is that, by the law of contract, the beneficiary is not bound by the procedural effect of a tiered dispute resolution clause in a contract to which it is not privy. Of course, the analysis would be different if cl 24.3 were not procedural in the second sense that I have identified above. If cl 24.3 included an arbitration agreement or an exclusive jurisdiction agreement, policy imperatives may well bind the beneficiary to that

aspect notwithstanding the rule of privity. As cl 24.3 is purely procedural in both senses, however, it is not necessary for me to consider this hypothetical further.

159 Second, the contractual mechanics by which the respondent could have complied with cl 24.3 of the DIMA are impossible to contemplate. A person such as the respondent who is not a party to the DIMA has no contractual right under cl 24.3 to issue the notice of meeting contemplated by cl 24.3 to initiate settlement negotiations with the applicant over a dispute arising from derivative claims under the DIMA. Equally, the applicant is under no contractual obligation under cl 24.3 to respond to a notice of meeting issued by a person such as the respondent who is a not a party to the DIMA. Equally, FDT has no contractual right to issue a notice of meeting to initiate settlement negotiations with the applicant when it has no dispute with the applicant under the DIMA.

160 In response to this point, the applicant submits that the respondent should have asked *FDT* to sue the applicant and to advance the respondent's derivative claims as direct claims against the applicant.[100] But the whole point of the *Vandepitte* procedure is – in certain circumstances – to allow a beneficiary to bypass a trustee that does not consider it has any claim against a third party arising from a loss to the trust property and to sue the third party directly. And, for reasons I have given, I consider Hong Kong to be the natural forum to determine whether those circumstances have been established.

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100 Notes of Argument at p 45, lines 11–17.

No analogy with an arbitration or exclusive jurisdiction agreement

161 The applicant's second submission is that the respondent's failure to comply with cl 24.3 of the DIMA is in the same category as a failure to comply with an arbitration agreement or an exclusive jurisdiction clause.

162 This court restrains foreign proceedings commenced in breach of a contract between the parties to those proceedings because that breach of contract is a civil wrong. In that sense, the anti-suit injunction is the functional equivalent of specific performance.

163 In this case, the respondent has committed no civil wrong against the applicant by commencing proceedings in Hong Kong. Even the applicant accepts that the respondent is not a party to the DIMA and is not bound by cl 24.3 as a matter of contract. And, even if the respondent availing itself of the *Vandepitte* procedure also obliges the respondent (contrary to my view) to comply with cl 24.3 of the DIMA, the applicant does not go so far as to suggest that the respondent's failure to do so is a civil wrong giving the applicant a substantive legal remedy against the respondent.

164 For all of these reasons, I do not accept that this court should issue an anti-suit injunction against the respondent to restrain it from pursuing the Hong Kong Suit by analogy with the cases in which this court issues an anti-suit injunction to restrain a breach of contract by a respondent in commencing or pursuing foreign proceedings.

Conclusion

165 For all of the foregoing reasons, I am not persuaded that the ends of justice require granting the applicant the exceptional remedy of an anti-suit

injunction (see [27] above). I have therefore dismissed the applicant's application and ordered the applicant to pay to the respondent the costs of and incidental to this application, such costs fixed at $9,000, including disbursements and GST.

Vinodh Coomaraswamy J
Judge of the High Court

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