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

[2022] SGHC 256

Suit No 1046 of 2020 (Registrar's Appeal No 92 of 2022 and Registrar's Appeal No 234 of 2022)

Between

Vibrant Group Ltd

… Plaintiff

And

(1) Tong Chi Ho
(2) Peng Yuguo
(3) Findex (Aust) Pty Ltd

… Defendants

JUDGMENT

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

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Vibrant Group Ltd
v
Tong Chi Ho and others

[2022] SGHC 256

General Division of the High Court — Suit No 1046 of 2020 (Registrar's Appeal No 92 of 2022 and Registrar's Appeal No 234 of 2022)
Teh Hwee Hwee JC
1 September, 3 October 2022

12 October 2022 Judgment reserved.

Teh Hwee Hwee JC:

Introduction

1 The plaintiff, Vibrant Group Limited, commenced Suit 1046 of 2020 ("Suit 1046") against the defendants in relation to its acquisition of a company incorporated in Australia, Blackgold International Holdings Pty Ltd ("Blackgold Australia"). The plaintiff alleges that the first and second defendants made fraudulent or, in the alternative, negligent misrepresentations that induced the plaintiff to acquire Blackgold Australia, causing the plaintiff to suffer loss and damage. The plaintiff alleges that the third defendant's negligence in conducting the audit of Blackgold Australia and in preparing the audit report caused the plaintiff to suffer loss and damage.

2 The second defendant applied by HC/SUM 423/2022 ("SUM 423/2022") to set aside two orders of court[1] granting the plaintiff leave to serve its writ of summons and statement of claim (and amended versions thereof) out of jurisdiction on the second defendant in the People's Republic of China ("PRC") or, in the alternative, for Suit 1046 to be stayed on the ground of *forum non conveniens*. The third defendant made a similar application by HC/SUM 1361/2022 ("SUM 1361/2022") to set aside an order[2] granting the plaintiff leave to serve its amended writ of summons and statement of claim out of jurisdiction on the third defendant in Australia.

3 SUM 423/2022 and SUM 1361/2022 were heard by the learned Assistant Registrar Justin Yeo (the "learned AR"). The learned AR declined to set aside the service out of jurisdiction orders or to stay the proceedings in respect of the second defendant and dismissed SUM 423/2022 on 1 April 2022,[3] but granted the application in SUM 1361/2022 to set aside the service out of jurisdiction order in respect of the third defendant on 4 July 2022.[4] HC/RA 92/2022 ("RA 92/2022") and HC/RA 234/2022 ("RA 234/2022") are appeals against the decisions of the learned AR in SUM 423/2022 (by the second defendant) and SUM 1361/2022 (by the plaintiff) respectively. I heard both appeals together on 1 September 2022. For the reasons set out in this judgment, I dismiss both appeals in their entirety.

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1 HC/ORC 6732/2020 and HC/ORC 7109/2021 of HC/S 1046/2020.

2 HC/ORC 7110/2021 of HC/S 1046/2020.

3 [2022] SGHCR 4 at [42] and [49].

4 [2022] SGHCR 8 at [48].

Facts

The parties

4 The plaintiff is a company incorporated in Singapore and listed on the Singapore Exchange (the "SGX").[5] The first defendant is a Singapore citizen and was, at the material time, the Chairman of Blackgold Australia.[6] The second defendant is a citizen of the PRC and was, at the material time, the Executive Director and Chief Executive Officer of Blackgold Australia.[7] Prior to the plaintiff's acquisition of Blackgold Australia, the management of Blackgold Australia included, among others, the first and second defendants, and Blackgold Australia's Chief Financial Officer at the material time, one Tin It Phong ("Tin").[8]

5 Leave was granted to the plaintiff to add the third defendant as a party on 1 December 2021,[9] slightly more than a year after Suit 1046 was commenced against the first and second defendants on 30 October 2020.[10] The third defendant is a company incorporated in Australia that provides financial advisory and accounting services. In or around 2013, the third defendant changed its name from "WHK Pty Ltd" to "Crowe Horwath (Aust) Pty Ltd". Subsequently, in or around 2019, the third defendant changed its name from

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[5] Khua Kian Keong's 1st Affidavit of 9 December 2020 ("Khua's 1st Affidavit") at para 7.

[6] Khua's 1st Affidavit at para 8.

[7] Khua's 1st Affidavit at para 9.

[8] Khua's 1st Affidavit at para 22.

[9] HC/ORC 6702/2021 of HC/S 1046/2020.

[10] Writ of Summons.

"Crowe Horwath (Aust) Pty Ltd" to "Findex (Aust) Pty Ltd".[11] At the material time, the third defendant and seven individuals were trading as a partnership under the name "Crowe Horwath Perth" (the "Partnership").[12] The Partnership was engaged by Blackgold Australia, by way of an engagement letter dated 24 October 2016 (the "Engagement Letter") to audit the annual financial report for the year ending on 31 October 2016 (the "FY 2016 financial report") of a group of companies for which Blackgold Australia was the ultimate holding company (the "Blackgold Group"). The Partnership was also engaged to prepare an auditor's report in respect of the said annual financial report (the "audit report") (collectively, the "Financial Reports"),[13] in accordance with Part 2M.3 of the Australia Corporations Act 2001 (Cth).[14] The plaintiff's claim against the third defendant is for the Partnership's alleged negligence in doing this work.[15]

The plaintiff's acquisition of Blackgold Australia

6 Blackgold Australia was listed on the Australia Securities Exchange (the "ASX") on 22 February 2011 through an initial public offering.[16] As the ultimate holding company of the Blackgold Group, Blackgold Australia controlled, via a corporate structure involving various subsidiaries, companies incorporated in the PRC (the "PRC subsidiaries") which were purportedly in the business of coal mining, coal trading and/or commodity logistics.[17]

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[11] Khua Kian Keong's 3rd Affidavit of 23 December 2021 ("Khua's 3rd Affidavit") at para 10.

[12] Khua's 3rd Affidavit at para 11.

[13] Khua's 3rd Affidavit at paras 19–20.

[14] Khua's 3rd Affidavit at para 11.

[15] Statement of Claim (Amendment No. 1) at paras 53A–53D.

[16] Khua's 1st Affidavit at para 11.

[17] Khua's 1st Affidavit at para 12.

7 In or around 2014, the first defendant approached the plaintiff's CEO, Khua Kian Keong ("Khua"), to discuss the prospect of acquiring the Blackgold Group's business as a whole, by acquiring Blackgold Australia.[18] However, the plaintiff was not interested in acquiring Blackgold Australia at that time. In or around 2016, the first defendant approached Khua again, in Singapore, to discuss the possibility of the plaintiff fully acquiring Blackgold Australia.[19] Flowing from those discussions, the plaintiff conducted a review that included an evaluation of the Blackgold Group's financial position from August to October 2016 (the "Review Process").[20]

8 The Review Process was led by the plaintiff's finance team, which met the first defendant and Tin at the plaintiff's offices in Singapore in September 2016 for an introduction to the Blackgold Group.[21] The finance team raised queries and requested documents relating to the Blackgold Group's financial records, accounts and business operations, including the internal unaudited financial and accounting records of the Blackgold Group entities, as well as the audited financial reports of Blackgold Australia. The finance team also collected information relating to the Blackgold Group's financial status and business operations. During this period, the first and second defendants allegedly procured and/or provided responses to the finance team's queries by making available, among other things, information and documents that had been prepared, presented, reported, endorsed or provided by them.[22]

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18 Khua's 1st Affidavit at para 15.

19 Khua's 1st Affidavit at paras 15–16.

20 Khua's 1st Affidavit at para 17.

21 Khua's 1st Affidavit at paras 21–22; Yong Kar Ming's Affidavit dated 18 February 2022 ("Yong Kar Ming's Affidavit") at para 13.

22 Khua's 1st Affidavit at paras 22–23.

9 The plaintiff claims that the first and second defendants made various representations (the "Alleged Misrepresentations") between early-2016 and July 2017 about the value and business of Blackgold Australia, orally and by the provision of information and documents, to induce the plaintiff to acquire Blackgold Australia.[23]

10 In addition, the plaintiff alleges that it relied on the Financial Reports, in deciding to proceed with the acquisition of Blackgold Australia (the "Acquisition").[24] The plaintiff asserts that the Partnership was engaged in connection with the proposed Acquisition, and the Partnership was aware that the shareholders of Blackgold Australia intended to dispose of their interest in Blackgold Australia to potential acquirers, including the plaintiff. In particular, the Partnership was aware that the plaintiff was in discussions with Blackgold Australia in relation to the Acquisition.[25]

11 On 28 October 2016, the plaintiff and Blackgold Australia entered into a scheme implementation deed (the "Scheme Implementation Deed"), which provided that the Acquisition was to take place through a scheme of arrangement (the "scheme"), in accordance with the Australia Corporations Act 2001 (Cth).[26] The Federal Court of Australia granted leave on 24 May 2017 for Blackgold Australia to convene a scheme meeting, for the shareholders of Blackgold Australia to consider approving the scheme.[27]

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[23] Khua's 1st Affidavit at paras 24–25.

[24] Khua's 3rd Affidavit at para 21.

[25] Khua's 3rd Affidavit at para 18–19.

[26] Peng Yuguo's 1st Affidavit dated 24 February 2022 at para 30 ("Peng's 1st Affidavit").

[27] Peng's 1st Affidavit at paras 32–33.

12 According to the second defendant, in the course of negotiations leading up to the scheme meeting, he, as a majority shareholder in Blackgold Australia,[28] requested an increase in the cash consideration for the scheme.[29] The second defendant claims that as a result, Khua proposed that the parties enter into an agreement whereby, in exchange for the second defendant supporting the scheme and not seeking an increase in cash consideration for the scheme, Khua would warrant on the plaintiff's behalf that Khua had conducted his own due diligence and that he had fully understood the underlying operations and financial and legal positions of the Blackgold Group, including any unfavourable information, and had nonetheless decided to proceed with the Acquisition.[30] Shortly before the scheme meeting, the parties signed a letter of undertaking (the "LOU") drafted in Chinese dated 25 June 2017, setting out those terms.[31] There was an undertaking in the LOU not to hold the second defendant liable:[32]

> … [Khua and the first defendant] will not hold [the second defendant] accountable or make any claim against him, or ask to reduce the acquisition price or require [the second defendant] to make an economic compensation or bear any liabilities of the management and operation of [Blackgold Australia], neither will [the plaintiff] make such claims.

13 Khua, however, disputes the second defendant's version of the event. His evidence is that the second defendant presented the LOU to him to sign shortly before the scheme meeting because the second defendant wanted assurance that the plaintiff would not look to him for compensation or hold him

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28 Peng's 1st Affidavit at para 9.

29 Peng's 1st Affidavit at paras 41 and 45.

30 Peng's 1st Affidavit at paras 47–48.

31 Peng's 1st Affidavit at para 50 and p 466.

32 Peng's 1st Affidavit at p 466.

accountable for the management and operation of Blackgold Australia after the Acquisition.[33]

14 The scheme meeting took place in Perth, Western Australia, on 26 June 2017,[34] and the Acquisition was eventually completed for a price of AUD37,635,863 on 13 July 2017.[35]

15 The plaintiff claims that subsequent to the Acquisition, it discovered that the first and second defendants had made false representations to it. The Alleged Misrepresentations came to light following a special investigation (the "special audit") into certain irregularities and discrepancies in the trading receipts and sale invoices of some of the PRC subsidiaries (the "Irregularities"). The special audit was carried out by a special auditor, Ernst & Young Advisory Pte Ltd ("EY"), appointed by the plaintiff's audit committee. The special audit by EY allegedly revealed, among other things, widespread falsification of financial and accounting information, records and other documents, and questionable transactions by and/or involving the management of the Blackgold Group, which included the first and second defendants.[36]

The law

The requirements for service out of jurisdiction

16 The Singapore courts' *in personam* jurisdiction is properly founded over a defendant when the defendant has been duly served with an originating

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33 Khua Kian Keong's Affidavit dated 18 February 2022 ("Khua's 4th Affidavit") at paras 42–45.

34 Peng's 1st Affidavit at para 73(b).

35 Khua's 1st Affidavit at para 18.

36 Khua's 1st Affidavit at paras 41–42.

process, either inside or outside of Singapore, in a manner authorised by the law (in respect of service outside of Singapore, see, *eg*, *PT Gunung Madu Plantations v Muhammad Jimmy Goh Mashun* [2018] 4 SLR 1420 at [16]). The statutory basis for the *in personam* jurisdiction of the Singapore courts over a defendant who is outside Singapore is found in s 16(1)(*a*)(ii) of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed), which provides as follows:

> **Civil jurisdiction — general**
>
> 16.—(1) The General Division shall have jurisdiction to hear and try any action in personam where —
>
> (a) the defendant is served with a writ of summons or any other originating process —
>
> …
>
> (ii) outside Singapore in the circumstances authorised by and in the manner prescribed by Rules of Court or Family Justice Rules …

17 Order 11 r 1 of the presently revoked Rules of Court (Cap 322, R 5, 2014 Rev Ed) as in force immediately before 1 April 2022 (the "ROC") sets out the grounds and conditions for the court to grant leave for service out of jurisdiction.

18 It is trite that the following three requirements must be met for the plaintiff to obtain leave to serve originating processes out of jurisdiction (see, *eg*, *Oro Negro Drilling Pte Ltd and others v Integradora de Servicios Petroleros Oro Negro SAPI de CV and others and another appeal (Jesus Angel Guerra Mendez, non-party)* [2020] 1 SLR 226 ("*Oro*") at [54], referring to *Zoom Communications Ltd v Broadcast Solutions Pte Ltd* [2014] 4 SLR 500 ("*Zoom Communications*") at [26]):

(a) First, the plaintiff must have a good arguable case that its claim falls within one of the "jurisdictional gateways" under O 11 r 1 of the ROC.

(b) Second, there must be a sufficient degree of merit to the plaintiff's claim.

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

19 The plaintiff bears the burden of showing that all three requirements are met (*MAN Diesel & Turbo SE and another v IM Skaugen SE and another* [2020] 1 SLR 327 ("*MAN Diesel (CA)*") at [29]). This applies both at the stage of the *ex parte* application by the plaintiff seeking leave to serve out of jurisdiction, and at the *inter partes* stage after the defendant has entered an appearance and seeks to set aside the order.

20 Furthermore, at the stage of the *ex parte* application, the plaintiff is required to make full and frank disclosure of all material facts within the plaintiff's knowledge (see *The "Vasiliy Golovnin"* [2008] 4 SLR(R) 994 at [83]). A failure to do so may be a ground to set aside an order granting leave for service out of jurisdiction (*Oro* at [54], referring to *Zoom Communications* at [68]–[69]).

21 In both the appeals before me, there is no dispute that the first two requirements are met. Only the third requirement, *ie*, that Singapore must be the proper forum for the trial of the action, is in dispute.

22 The applicable legal principles for determining whether Singapore is the more appropriate forum for the purpose of service of process out of jurisdiction are well established (see *Oro* at [80]):

(a) The question of whether Singapore is the more appropriate forum for the action only arises for determination if the court is first satisfied that there is at least another available forum. Singapore can only be *forum non conveniens* if there is a more appropriate forum other than Singapore.

(b) The plaintiff bears the burden of demonstrating that Singapore is, on balance, the more appropriate forum. It is strictly irrelevant whether Singapore is the more appropriate forum "by a hair or by a mile".

(c) The inquiry for determining whether Singapore is the more appropriate forum is the same as that undertaken at the first stage of the *Spiliada* test. This means that Singapore will be the more appropriate forum if it has the most real and substantial connection with the disputes raised. The court should weigh the connecting factors that have the most relevant and substantial associations with the dispute rather than undertake a mechanical application of established connecting factors. The court should also be primarily concerned with the quality of the connecting factors rather than the quantity of factors on each side of the scale.

23 As explained in *Halsbury's Laws of Singapore* vol 6(2) (LexisNexis, 2020 Reissue) ("*Halsbury's Laws of Singapore*") at para 75.090, at the first stage of the *Spiliada* test, general connecting factors are considered. In

examining these factors, it is important to have regard to what the case is about. Connections that have little or no bearing on the adjudication of the issues in dispute between the parties will carry little weight. The search is for connecting factors that have the most relevant and substantial associations with the dispute (see *Rappo, Tania v Accent Delight International Ltd and another and another appeal* [2017] 2 SLR 265 ("*Tania Rappo*") at [70]).

24 The Court of Appeal set out in *JIO Minerals FZC and others v Mineral Enterprises Ltd* [2011] 1 SLR 391 ("*JIO Minerals*") five indicators for consideration at the first stage of the *Spiliada* test at [42] (see also *Halsbury's Laws of Singapore* at paras 75.091–75.095):

(a) the personal connections of the parties and the witnesses to the competing fora;

(b) the connections between relevant events and transactions to the competing fora;

(c) the law applicable to the dispute;

(d) the existence of parallel proceedings elsewhere (*ie*, *lis alibi pendens*); and

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

25 Ultimately, in this exercise of determining the proper forum for the trial of the action, the court seeks to identify the jurisdiction in which the case may be "tried more suitably for the interests of all the parties and for the ends of justice" (see *Tania Rappo* at [72]).

RA 92/2022

26 As mentioned (at [1] and [3] above), the plaintiff claims against the second defendant for fraudulent, or in the alternative, negligent misrepresentations, and RA 92/2022 is the second defendant's appeal against the learned AR's decision declining to set aside the service out of jurisdiction orders or to stay the proceedings in respect of the second defendant. I shall refer to the alleged wrongful actions of the first and second defendants in the misrepresentation claims collectively as the "torts".

27 The issues raised in RA 92/2022 are as follows. First, whether the learned AR erred in finding that Singapore is the proper forum for the trial of the action against the second defendant. In connection with this point, the following sub-issues are raised:

(a) whether the place of the torts is Australia (or Singapore);

(b) whether the connecting factors point towards Australia as the more appropriate forum; and

(c) whether there is a risk of conflicting decisions if the plaintiff's claim against the second defendant continues in Singapore while its claim against the third defendant is pursued in Australia.

28 Further, there is an issue of whether the learned AR erred in declining to set aside the orders for service out of jurisdiction in respect of the second defendant on the basis of the plaintiff's failure to disclose all material facts when obtaining the orders for service out of jurisdiction.

Whether the service out of jurisdiction orders should be set aside because Singapore is not the proper forum

The place of the torts

29 The second defendant disagrees with the learned AR's finding that the place of the torts is Singapore (see *Vibrant Group Ltd v Tong Chi Ho and others* [2022] SGHCR 4 ("*Vibrant Group Ltd 1*") at [35]) and submits that the place of the torts is Australia. The second defendant argues that this is because the plaintiff is relying on statements contained in the audited financial reports of Blackgold Australia, management accounts of the Blackgold Group and several documents, which were prepared and made in accordance with the applicable law and standards in Australia.[37] Further, the acts of reliance on the Alleged Misrepresentations by the plaintiff took place in Australia, since the steps that were taken to acquire Blackgold Australia were taken in Australia. These steps include, among other things, the entry into the Scheme Implementation Deed, the convening of a scheme meeting, obtaining the approval of the scheme by the Federal Court of Australia and paying the consideration for the scheme in Australia dollars to an Australia Custodian appointed by the ASX.[38] The second defendant further contends that the fact that the plaintiff had remitted the purchase price from Singapore is merely a reflection of the fact that the plaintiff is a Singapore-based company, and the source of the plaintiff's funds would presumably be Singapore.[39] Relatedly, the fact that the plaintiff's alleged loss and damage was suffered in Singapore is fortuitous, and this is to be expected given that the plaintiff is a Singapore-based company.[40]

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[37] Second Defendant's Written Submissions dated 26 August 2022 ("D2WS") at paras 68–69.

[38] D2WS at paras 71 and 77.

[39] D2WS at para 82.

[40] D2WS at para 86.

30 In relation to tortious claims, the place of the tort is *prima facie* the natural forum for determining such claims. Although this is only one of the factors in the overall *forum conveniens* analysis, it is a significant factor (see *Rickshaw Investments Ltd and another v Nicolai Baron von Uexkull* [2007] 1 SLR(R) 377 at [37]–[40] ("*Rickshaw Investments*"); *JIO Minerals* at [106]).

31 The general test for determining the place of the tort is the "substance test" (see *MAN Diesel (CA)* at [102]; *JIO Minerals* at [90]). The "substance test" looks at the events constituting the tort and asks where, in substance, the cause of action arose. As explained in *Halsbury's Laws of Singapore* at para 75.378, what these events are, and their respective significance, depend on what the plaintiff pleads as the tort that he is relying on. This is evident in the present case, where the reliance of the plaintiff on the alleged wrongful actions of the first and second defendants in the misrepresentation claim is a weighty factor in determining the place of the tort. After all, it is one element that goes towards establishing a claim in misrepresentation (see [86]–[87] below). In contrast, the reliance of the plaintiff on the alleged wrongful actions of the third defendant in the negligence claim does not feature as centrally in the determination of the place of the tort, considering that the element of reliance is merely one of the considerations when determining whether a duty of care has arisen (as further elaborated on at [53] below).

32 The "substance test" is a general one that is applicable to all torts, although legal principles on the application of the "substance test" to specific torts have also been developed. In the context of misrepresentation, the Court of Appeal held in *JIO Minerals* (at [93]) that if the representation was received and acted upon in a single jurisdiction, that place should be the place of the tort,

unless that place was fortuitous or if the receipt and reliance occur in different countries.

33 Based on the facts of this case, the key elements of the torts of fraudulent misrepresentation and negligent representation, *ie*, the receipt of the representations and the reliance upon the representations, all took place in Singapore. There is evidence that the Alleged Misrepresentations were made and received in Singapore. Those representations include representations that were made during the meeting between the first defendant and Khua in Singapore in early-2016,[41] and the meeting between the plaintiff's finance team and the first defendant and Tin at the plaintiff's offices in Singapore in September 2016 for an introduction to the Blackgold Group (see above at [8]). In addition, representations were made by the first and second defendants through documents prepared, presented, provided or endorsed by them, including documents contained in thumb drives which the plaintiff received or accessed in Singapore.[42] The plaintiff's finance team relied on the information and documents, which it reviewed and summarised in Singapore,[43] to make its recommendations to the plaintiff's management. The chain of reliance continued with a board resolution that was passed in Singapore by the plaintiff's management to acquire Blackgold Australia.[44] These events form the substance of the plaintiff's case that the first and second defendants made

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41 Khua's 1st Affidavit at para 16.

42 Khua's 1st Affidavit at para 26(b) and Khua's 4th Affidavit at para 25.

43 Yong Kar Ming's Affidavit at para 21.

44 Yong Kar Ming's Affidavit at para 21; Khua's 4th Affidavit at paras 29–30.

misrepresentations to induce it to acquire Blackgold Australia, and that those misrepresentations were received and relied upon in Singapore.[45]

34 The second defendant, while contending that the place of the torts is Australia, did not proffer any evidence that the Alleged Misrepresentations were received by the plaintiff in Australia. Instead, the second defendant points to the fact that the financial statements and reports that the plaintiff is relying on to advance its case were prepared and made in accordance with the applicable law and standards in Australia (see [29] above).[46] Here, the second defendant is referring to the location where the information that the plaintiff relied on originated from, but the inquiry under the substance test is the location where the plaintiff relied on the information. This argument therefore does not assist the second defendant. The second defendant also points to the steps that were taken by the plaintiff in Australia to acquire Blackgold Australia.[47] But these steps do not have a strong bearing on the determination of the action in misrepresentation relative to other factors that are relevant to the inquiry. There is merit in the plaintiff's submission[48] that the Acquisition is merely a culmination of the Alleged Misrepresentations and the plaintiff's reliance on those representations. In and of themselves, the steps of acquisition taken in Australia have less to do with the substantive elements of the plaintiff's claim in misrepresentation than the matters that occurred in Singapore, which took place before the plaintiff's decision to proceed with the Acquisition. As earlier

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45 Plaintiff's Written Submissions for RA 92/2022 dated 26 August 2022 ("PWS1") at paras 19–22.

46 D2WS at paras 67–69.

47 D2WS at para 71.

48 PWS1 at para 91.

explained (at [23] above), the weight to be given to a connecting factor depends on whether that factor has a bearing on the adjudication of the issues in dispute.

35 As the Alleged Misrepresentations were received and relied upon in Singapore, Singapore is the place of the torts and is *prima facie* the natural forum. There is nothing on the facts to suggest that Singapore, as the place of the torts, was fortuitous so as to displace the *prima facie* position. I do not agree with the second defendant's argument that the fact that receipt of some of the representations took place in Singapore is entirely happenstance since the plaintiff is based in Singapore (see above at [29]). The fact that the plaintiff is based in Singapore is, as the learned AR correctly observed, "one of the significant reasons that most of the constituent acts in the alleged torts occurred in Singapore" (*Vibrant Group Ltd 1* at [35]).

Other connecting factors

36 The second defendant relies heavily on the steps taken by the plaintiff in Australia to acquire Blackgold Australia and the LOU as connecting factors to Australia. As observed earlier (see [34] above), these steps taken to acquire Blackgold Australia are more in the nature of consequences flowing from the commission of the torts. They are therefore not weighty connecting factors since they have little bearing on the adjudication of the issues in the plaintiff's action in misrepresentation against the second defendant.

37 I will now turn to consider the LOU as a connecting factor. The second defendant claims that the plaintiff's alleged covenant in the LOU not to make any claim against him (see [12] above) is a connecting factor to Australia. He asserts that the circumstances leading up to the signing of the LOU and the interpretation of its terms will be key issues for determination at trial. The

second defendant further contends that since the signing of the LOU took place in Australia and the preamble of the LOU makes reference to the scheme, which was to be implemented in Australia (see [11] above), the LOU is governed by Australia law.[49]

38 In my view, the LOU is a relevant connecting factor that must be weighed in the balance. However, while the second defendant relies on it as an alleged agreement in his defence, the issue as regards its existence and effect is separate from the main issues for adjudication in the misrepresentation action. Even if it is accepted for the sake of argument that the LOU is governed by Australia law, as the learned AR correctly found, greater weight should be placed on the law applicable to the torts in this action than on the governing law of the LOU (*Vibrant Group Ltd 1* at [40(c)]). In other words, even if the LOU is governed by Australia law, it would be insufficient to outweigh the competing consideration that the applicable law of the misrepresentation action is Singapore law, given my finding that Singapore is the place of the torts (see [35] above).

39 In fact, there are a number of other connecting factors pointing to Singapore as the more appropriate forum to determine the action between the plaintiff and the second defendant.

40 First, the plaintiff is a company incorporated and publicly listed in Singapore. The second defendant is a PRC citizen. Neither of them is based in Australia.

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[49] D2WS at para 91–94.

41 Second, the key witnesses for the suit in misrepresentation are located in Singapore. These witnesses include:

(a) Tin, who was Blackgold Australia's Chief Financial Officer at the material time and heavily involved in the Review Process leading up to the plaintiff's decision to acquire Blackgold Australia,[50] and who resides in Singapore.[51] The plaintiff submits that Tin cannot be compelled to testify before the Australia courts (*Australian Securities and Investments Commission (ASIC) v Rich* [2004] NSWSC 467 at [4])[52] and the second defendant did not dispute this in his submissions before me.

(b) The first defendant, who has filed his defence in Suit 1046. The plaintiff's claim against the first defendant, which is largely connected to the claim against the second defendant, will proceed in the Singapore courts.

(c) Khua, the CEO of the plaintiff, who was involved in the Acquisition right from the start.

(d) The plaintiff's financial team, which led the Review Process, during which the second defendant's misrepresentations were purportedly made. Given that the plaintiff's case involves allegations of fraudulent misrepresentations, the evidence of the witnesses who were involved in the Review Process will be crucial.

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50 Statement of Claim (Amendment No. 1) at para 21(a).

51 Khua's 4th Affidavit at para 66.

52 PWS1 at para 88.

42 The personal connections of the plaintiff and the potential witnesses are particularly important in an action for fraudulent misrepresentation and/or negligent misrepresentation, where reliance on a witness' testimony, such as Tin's evidence on the events leading up to the decision to acquire Blackgold Australia, will be necessary to resolve disputed questions of fact. The location of the witnesses therefore carries great weight, in view of the savings in time and resources that follow from having the trial in the forum in which the key witnesses reside and where they are clearly compellable to testify (see *Rickshaw Investments* at [19]).

43 As explained in the analysis above (at [29]–[35]) on the place of the misrepresentations, the material events and transactions are connected to Singapore. The applicable law is Singapore law. Further, the plaintiff's alleged losses were suffered in Singapore. Other than the acquisition price of AUD37,635,863 that was paid by the plaintiff by way of transfer of funds from the plaintiff's Singapore bank accounts,[53] the plaintiff incurred costs and expenses in Singapore as a result of the discovery of the Irregularities. Such costs and expenses included professional fees for the engagement of EY to carry out the special audit to look into the Irregularities and management time costs incurred to investigate the Irregularities (see [15] above).[54] Additionally, after the Irregularities came to light, SGX undertook investigations and the plaintiff incurred costs and expenses to address and comply with SGX's queries and directions, as well as the SGX Mainboard Rules.[55]

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53 Khua's 4th Affidavit at para 59.

54 Statement of Claim (Amendment No. 1) at para 54(b).

55 Statement of Claim (Amendment No. 1) at para 54(c).

44 As for proceedings elsewhere, I will explain later in this judgment that any potential proceedings that the plaintiff may commence against the third defendant in Australia will not present any real risk of re-litigation or conflicting decisions (see [83]–[90] below).

45 In the premises, I agree with the learned AR that Singapore is the proper forum for the trial of the action against the second defendant (see *Vibrant Group Ltd 1* at [41]).

Whether the service out of jurisdiction orders should be set aside because of the plaintiff's failure to make full and frank disclosure of all material facts

46 The second defendant submits that the existence of the LOU is a material fact that the plaintiff must have deliberately chosen not to disclose, and that such non-disclosure would justify the exercise of discretion to set aside the service out of jurisdiction orders.[56] The second defendant therefore contends that the learned AR has erred in declining to set aside the service out of jurisdiction orders, citing the Court of Appeal's observation in *Tay Long Kee Impex Pte Ltd v Tan Beng Huwah (trading as Sin Kwang Wah)* [2000] 1 SLR(R) 786 ("*Tay Long Kee Impex*") at [35] that "[w]here there [was] suppression [of material facts in an *ex parte* application], instead of innocent omission, it must be a special case for the court to exercise its discretion not to [set aside the remedy granted, notwithstanding such omission]".[57]

47 I am of the view that on the facts of this case, the undisclosed fact did not "displace [the judgment] that the connecting factors, taken as a whole, point to Singapore as the proper forum for the trial of the [action]" (see *Zoom*

56 D2WS at para 103.

57 D2WS at para 109.

Communications at [69] and [91]). I agree with the learned AR that it would not be proportionate to set aside the service out of jurisdiction orders for this non-disclosure (see *Vibrant Group Ltd 1* at [47]), and I find no reason to interfere with the learned AR's exercise of discretion.

RA 234/2022

48 As mentioned (at [1] and [3]), the plaintiff is claiming against the third defendant for negligence in the Partnership's audit. RA 234/2022 is the plaintiff's appeal against the learned AR's decision to set aside the service out of jurisdiction order in respect of the third defendant.

49 The key issue raised in RA 234/2022 is whether the learned AR erred in finding that Australia is the proper forum for the trial of the dispute between the plaintiff and the third defendant. The sub-issues are as follows:

(a) whether the place of the tort is Singapore (or Australia);

(b) whether the other connecting factors raised point towards Singapore as the proper forum for the dispute; and

(c) whether there is a risk of conflicting decisions if the plaintiff's claims against the first and second defendants continue in Singapore while its claim against the third defendant is pursued in Australia.

50 The learned AR had observed that there was no failure by the plaintiff to give full and frank disclosure, even though it was not necessary for the learned AR to make any finding on this issue, given his conclusions on the issue

of the proper forum of the dispute.[58] Parties have addressed this point for completeness, and I will do the same below.

Whether the service out of jurisdiction orders should be set aside because Singapore is not the proper forum

The place of the tort

51 The plaintiff submitted that the key elements of the tort of negligence inform the place of the tort, and that the place of the tort is Singapore for the following reasons:

(a) With regard to the duty of care allegedly owed by the third defendant to the plaintiff, the plaintiff emphasised that the Partnership had voluntarily assumed responsibility towards a Singapore-incorporated company and that the plaintiff had relied on the Financial Reports, prepared by the Partnership, in Singapore.[59]

(b) With regard to the standard of care, it was contended that even though the Australia accounting standards are applicable, this is a neutral factor as both the Singapore and Australia standards are largely similar.[60] The plaintiff also refers to the possibility of transferring this case to the Singapore International Commercial Court ("SICC") and thus being able to adduce foreign law on the basis of submissions rather than proof.[61]

58 [2022] SGHCR 8 at [47].

59 Plaintiff's Written Submissions for RA 234/2022 dated 26 August 2022 ("PWS2") at paras 42-45.

60 Minute sheet in RA 92/2022 and RA 234/2022 dated 1 September 2022.

61 PWS2 at paras 54–56.

(c) With regard to loss and damage, the plaintiff points out that it remitted funds from Singapore to acquire Blackgold Australia and incurred costs and expenses to investigate the Irregularities in Singapore.[62]

52 The plaintiff contends that the learned AR had "under-emphasised the place of reliance" by the plaintiff.[63] I do not agree with the plaintiff. The learned AR had considered the fact of reliance by the plaintiff on the audit report to be relevant in the determination of the place of the tort and accorded due weight to it (see *Vibrant Group Ltd v Tong Chi Ho and others* [2022] SGHCR 8 ("*Vibrant Group Ltd 2"*) at [32(c)]). The authorities are clear that in cases of pure economic loss where the links between the parties are not "bounded by the physical laws of nature", a duty of care would generally arise "where the defendant has voluntarily assumed responsibility to the plaintiff and/or the plaintiff has reasonably relied on the defendant to take care to avoid such loss" (*NTUC Foodfare Co-operative Ltd v SIA Engineering Co Ltd and another* [2018] 4 SLR 762 at [21]). On appeal, the Court of Appeal in *NTUC Foodfare Co-operative Ltd v SIA Engineering Co Ltd and another* [2018] 2 SLR 588 further observed (at [41]) that:

> … in cases of pure economic loss, there may be sufficient legal proximity between the parties even if the defendant does not voluntarily assume responsibility to the plaintiff and the latter does not specifically rely on the former not to cause it loss … We agree with the Judge that there was no assumption of responsibility or specific reliance. However, in our judgment, these are neither essential nor inflexible conditions for the requirement of proximity to be fulfilled in cases of pure economic loss. Other aspects of the relationship between the parties may establish a sufficiently close relation between them for a duty of care to arise; it is thus necessary to consider

62 PWS2 at paras 49–51.

63 PWS2 at para 41.

> physical, circumstantial and causal proximity and the proximity factors referred to … above.

53 Having regard to the reliance that the plaintiff placed on the Partnership, I agree with the conclusion of the learned AR and the third defendant's submissions,[64] that the duty of care, if any arises, emanates from the Partnership's duty to take reasonable care in complying with Australia law and the applicable accounting or auditing principles, standards and practices in Australia. The plaintiff's argument that is premised on the reliance of the plaintiff as one of the proximity factors does not shift the balance towards Singapore as the proper forum. The element of reliance, which must be established to succeed in a misrepresentation claim, is only one of the possible ways by which a duty of care could arise in a negligence claim. Any reliance by the plaintiff is therefore accorded greater significance in the misrepresentation action against the second defendant and less significance in the negligence action against the third defendant. Accordingly, I am of the view that the learned AR did not err in the amount of emphasis that he gave to the place of reliance.

54 The principles guiding the application of the "substance test" in respect of the *tort of negligence* appears to be a relatively unexplored point of law in our local jurisprudence.[65] I turn now to examine the English and Australian authorities cited by the third defendant on this point.

55 In *Base Metal Trading Ltd v Shamurin* [2005] 1 WLR 1157 ("*Base Metal Trading*"), the defendant and two Russian nationals were in the business of investing and trading in metal. They had formed a number of Russian companies for this purpose but wanted to set up a foreign company that would

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[64] Third Defendant's Written Submissions dated 26 August 2022 ("D3WS") at para 103.

[65] PWS2 at para 40; D3WS at para 108.

attract customers who were reluctant to trade with the existing Russian companies in view of the prevailing banking, legal and regulatory situation in Russia at the time. The claimant company was thus set up and incorporated in Guernsey, and the defendant and one of the Russian nationals ("Yuri") were made directors of the claimant company. The defendant was responsible for selling metal to foreign purchasers and was generally responsible for the claimant company's activities outside of Russia. The defendant and Yuri had agreed that the claimant company would hedge the company's exposure on resale price on physical trades by means of future trades made on the London Metal Exchange. Subsequently, the claimant company alleged that the defendant made a series of speculative trades in the name of the claimant company that resulted in losses of over £6m. The claimant company thus brought a claim for the damages and losses suffered as a result of the defendant's alleged breach of duty of care. At first instance, the judge found, among other things, that the claim in tort was governed by Russian law, under which it was undisputed that the claims were not actionable.

56 The judge at first instance answered the question "where in substance was the tort committed?" by identifying "the gravamen of the case against [the defendant] as being [his] decision to speculate" (*Base Metal Trading* at [16]). This was a decision made in Moscow, Russia, where all aspects of the claimant company's business were conducted. The judge also found that although the trades were done in London where the claimant company had its bank account, the place where the loss was in fact felt by the claimant company was Russia, manifested by its lack of liquidity (*Base Metal Trading* at [16]). The judge's decision was affirmed in part on appeal to the English Court of Appeal.

57 Tuckey LJ (delivering the leading judgment of the English Court of Appeal) reasoned (at [46]):

> … *the wrongful acts*, being the decisions to speculate and give instructions accordingly, *all took place in Russia. The place where the loss occurs is not determinative.* When damage has occurred which makes the tort complete the right approach is to look back over the series of events constituting it and ask where in substance the cause of action arose: see *Distillers Co (Biochemicals) Ltd v Thompson* [1971] AC 458, 468. The judge after this long trial was entitled to conclude that [the claimant] really felt its loss in Russia. As part of its claim it had alleged that it had been unable to fulfil a contract in Russia because of the liquidity crisis caused by [the defendant's] activities. The judge obviously did not ignore the fact that the trading losses occurred in London where [the claimant] had its bank account, but again it does not seem to me that these factors compelled the judge to conclude that all [the claimant company's] loss had occurred here, still less that the substance of the tort was committed here [in the United Kingdom]. [emphasis added]

58 *Distillers Co (Biochemicals) Ltd v Laura Anne Thompson* [1971] AC 458 ("*Distillers Co*") is a case that was cited with approval by our Court of Appeal in *JIO Minerals* (at [90]) and *MAN Diesel (CA)* (at [101] and [103]) as authority for the "substance test". In *Distillers Co*, the first defendant was an English company which manufactured a drug containing thalidomide. The drug was distributed to an Australian company which sold it in New South Wales. The claimant's mother bought and ingested the drug while pregnant, which allegedly caused the claimant to be born without arms and with defective eyesight. The claimant commenced an action in the Supreme Court of New South Wales, alleging that the first defendant's negligence as the manufacturer and supplier of the drug caused the claimant to be born with disabilities.

59 In upholding the decision of the Court of Appeal of the Supreme Court of New South Wales refusing the first defendant's attempt at setting aside the writ, the Privy Council reasoned (at 469B–469E) that:

> So far as appears, the goods were not defective or incorrectly manufactured. The negligence was in failure to give a warning that the goods would be dangerous if taken by an expectant mother in the first three months of pregnancy … The plaintiff is

> entitled to complain of the lack of such communication in New South Wales [even though the warning could have been put in place when the drug was manufactured in England] as negligence by the defendant in New South Wales causing injury to the plaintiff there. That is the act (which must include omission) on the part of the English company which has given the plaintiff a cause of complaint in law. The cause of action arose within the jurisdiction.

60 Importantly, the Privy Council also cautioned that it would be inappropriate to determine the place of the tort based only on the place where damage happened (at 467H–468A):

> In a negligence case the happening of damage to the plaintiff is a necessary ingredient in the cause of action, and it is the last event completing the cause of action. But the place where it happens may be quite fortuitous and should not by itself be the sole determinant of jurisdiction.

61 In *Dow Jones & Company Inc v Gutnick* [2002] 194 ALR 433 ("*Dow Jones*"), a case involving the tort of defamation, the High Court of Australia made the following general observation (at [43]):

> Attempts to apply a single rule of location (such as a rule that intentional torts are committed where the tortfeasor acts, or that torts are committed in the place where the last event necessary to make the actor liable has taken place) have proved unsatisfactory if only because the rules pay insufficient regard to the different kinds of tortious claims that may be made … In the end the question is 'where in substance did this cause of action arise'? In cases, like trespass or *negligence,* where *some quality of the defendant's conduct is critical, it will usually be very important to look to where the defendant acted, not to where the consequences of the conduct were felt.* [emphasis added]

62 In my view, the decisions in *Base Metal Trading*, *Distillers Co* and *Dow Jones* provide instructive guidance, considering that the "substance test" was identified as the applicable test for determining the place of the tort in each of those cases. *Distillers Co* is also the very authority that our Court of Appeal in *JIO Minerals* and *MAN Diesel (CA)* relied upon for the "substance test" (see

[58] above). Read together with *Dow Jones* (see [61] above), the place where the alleged wrongful act was committed is to be given greater significance in a case involving the tort of negligence. On the other hand, the place where the loss was suffered is not, by itself, determinative. It is on this basis that in *Base Metal Trading*, the place of the tort was adjudged to be Russia, where the wrongful decisions to speculate were taken and instructions to trade were given accordingly (see [55]–[57] above). Similarly, in *Distillers Co*, the place of the tort was found to be Australia, where the defendant failed to provide any warning of possible side effects of the drug for pregnant women (see [58]–[59] above).

63 The crux of the plaintiff's action against the third defendant is premised on the Partnership's alleged negligence in conducting the audit and in rendering the audit report, and its alleged failure to uncover the Irregularities. Since the Partnership is alleged to have fallen short of an alleged duty of care owed to the plaintiff in relation to professional services provided by the Partnership in Australia, the place of the alleged wrongdoing is Australia. As such, even if the provision of the third defendant's professional services in Australia involved an audit exercise that may have spanned across various jurisdictions, the conclusion remains unchanged. I therefore find that the learned AR did not err in concluding that "the fact that parts of the audit may possibly have been conducted in the PRC or Malaysia does not aid the plaintiff's attempt to demonstrate that Singapore is the proper forum" (see *Vibrant Group Ltd 2* at [32(b)]).

64 I note additionally that beyond the cases cited by the third defendant, there appears to be further support for giving significant weight to the place where the negligent act occurred in determining the place of the tort. In Martin Davies *et al*, *Nygh's Conflict of Laws in Australia* (LexisNexis Butterworths,

10th Ed, 2020) ("*Nygh's Conflict of Laws*") at paras 20.9 and 20.12, the position in Australia is as follows:

> 20.9 If the tort alleged is based on a negligent act or omission of the defendant causing physical harm, the tort is committed in the place where that negligent act or omission occurred, even though consequential injury was suffered elsewhere … *The same is true in cases of negligent acts causing purely economic loss; the tort is committed where the negligent act occurred, not where the loss was suffered.*
>
> 20.12 *If the negligence consists of a failure to provide services or advice without proper care, the tort is committed in the place where those services were or ought to have been rendered …*
>
> [emphasis added]

65 For the proposition at para 20.12, *Nygh's Conflict of Laws* refers to the case of *Voth v Manildra Flour Mills Pty Ltd* (1990) 97 ALR 124 ("*Voth*"). I am mindful that *Voth* concerned a stay application, and that the test of whether the forum in which a stay was sought was a "clearly inappropriate forum" endorsed in *Voth* has been rejected by the Court of Appeal in *JIO Minerals* at [45]. For avoidance of doubt, I reference *Voth* only in relation to the reasoning adopted in respect of identifying the place of the tort, given the similarities in the fact patterns in *Voth* and the present case.

66 In *Voth*, the respondent companies were incorporated and resident in New South Wales and were members of a group of companies (the "Group"). The respondents obtained leave to serve their statement of claim outside New South Wales and in the State of Missouri, United States of America (the "US"), in order to commence professional negligence proceedings in the Supreme Court of New South Wales against the appellant, who was an accountant practising in the State of Missouri. The appellant had provided accounting, auditing and related services to the Group's operating company in the US ("MMC"), which was a corporation established under the laws of the State of

Kansas. The Internal Revenue Code of the US imposed upon the first respondent liability to income tax in respect of interest paid to it by MMC and also imposed an obligation upon MMC to deduct and withhold the tax. The required deductions and payments of withholding tax were not made, and the respondents alleged that the failure to do so was the result of negligent acts or omissions by the appellant. The damage to the respondents was largely suffered in New South Wales. The appellant submitted, among other things, that New South Wales was a clearly inappropriate forum (this being the test in Australian jurisprudence for cases concerning service out of jurisdiction) because the cause of action sued on by the respondents is a foreign tort, given that the acts or omissions complained of occurred outside New South Wales (*Voth* at 142). The High Court of Australia (per Mason CJ, Dean, Dawson, Toohey and Gaudron JJ, with Brennan J dissenting), held that the allegedly negligent act was initiated and completed in Missouri and thus the tort, if there was one, was committed in Missouri. In arriving at this conclusion, the majority reasoned as follows (*Voth* at 143–144):

> It was held in *Jackson v Spittall* (1870) LR 5 CP 542 [(*"Jackson v Spittall*")] at 552, that the question whether a cause of action is to be classified as local or foreign is to be answered by ascertaining the place of 'the act on the part of the defendant which gives the plaintiff his cause of complaint' …
>
> The authority of *Jackson v Spittall* was expressly affirmed in [*Distillers Co*], at 467 [in which the Privy Council adopted the "substance test"] …
>
> The approach formulated in *Distillers* [*ie*, the "substance test"] does no more than lay down an approach by which there is to be ascertained, in a common sense way, that which is required by *Jackson v Spittall*, namely, the place of 'the act on the part of the defendant which gives the plaintiff his cause of complaint' …
>
> One thing that is clear from *Jackson v Spittall* and from *Distillers* is that *it is some act of the defendant, and not its consequences, that must be the focus of attention.* Thus, in *Distillers* the act of ingestion of the drug Distaval by the

> plaintiff's mother was ignored, the place of that act being treated like the place of the happening of damage, as one that might have been 'quite fortuitous'.
>
> …
>
> The act of the appellant giving the respondents their cause of complaint was committed in Missouri and thus the tort, if there was one, was committed in Missouri.
>
> [emphasis added]

67 As can be gleaned from the above extract, the majority held that it was the location of the defendant's *actions* and not the location where the *consequences* of those actions were felt that must be the focus of attention. The place of the tort was found to be Missouri in the US, because the negligent audit was done there. This line of reasoning is consistent with the authorities of *Base Metal Trading*, *Distillers Co* and *Dow Jones*, which I relied on for my conclusion (at [62] above) as to the relevant principles for determining the place of the tort in the context of negligence.

68 The majority in *Voth* ultimately decided to allow the appeal and order that the action be stayed. In arriving at that decision, the majority considered, among other things, that: (a) the action had a substantial connection with the law of Missouri; (b) the appellant resided and worked in Missouri and the professional standards of accountants in Missouri would therefore be relevant to his liability; and (c) the greater part of the evidence in any trial of the action would be found in Missouri (*Voth* at 145).

69 Brennan J, the dissenting judge, proceeded on a different basis in analysing the facts of *Voth*. He found that the appellant's negligence did not lie in carelessness in auditing, but rather in failure to communicate the results of the audit to the respondents so as to reveal their liability to pay the withholding tax which occurred in New South Wales (see *Voth* at 151–152).

70 The plaintiff argues in its further written submissions that *Voth* is not good law in Singapore,[66] and is of limited assistance. According to the plaintiff, the majority's decision in *Voth* is "questionable" because, among other things, it did not apply or consider the principles elucidated in *JIO Minerals* at [91] and [93] for identifying the place of the tort in the context of misrepresentation.[67] It appears that the plaintiff has conflated the tort of negligent misrepresentation with the tort of negligence. It is clear from the majority's decision that "[each respondent company sued] for damages for the *tort of negligence*" [emphasis added] (see *Voth* at 127). I am cognisant that the majority in *Voth* made reference to the phrase "negligent misstatement", for instance, when it stated at 144 that "[t]he present case is one that may be properly described either as a failure to advise (ie, an omission) or as a negligent misstatement of fact (ie, a positive act)", but this is distinct from the tort of negligent misrepresentation. Further, it is unclear how the plaintiff's argument (*ie*, that the principles in *JIO Minerals* specific to the tort of misrepresentation should be applied here) advances its case, given that the plaintiff's pleaded case is one of negligence. In particular, the plaintiff has pleaded that "[t]he Partnership owed the [p]laintiff a duty of care to exercise reasonable skill and care … to be expected of reasonably skilled, competent and/or prudent auditors …", the duty of care encompassed taking reasonable care to, among other things, "[a]ct in accordance with the applicable auditing standards in Australia …" and the Partnership had "negligently conducted its audit …".[68] There is no allegation of misrepresentation against the Partnership.

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66 Plaintiff's Further Written Submissions dated 3 October 2022 ("PFWS") at para 5.

67 PFWS at para 9.

68 Statement of Claim (Amendment No 1) at paras 53A, 53B(c) and 53C.

71 In relation to the standard of care that is owed, the applicable accounting and auditing standards, being Australian, are connecting factors to Australia, even if it is accepted that they are largely similar to the standards in Singapore as counsel for the plaintiff contends (see [51(b)] above). The learned AR was correct to give due weight to the fact that the duty of care allegedly owed by the Partnership is based on Australia law and that the Partnership was bound by Australia auditing standards, which will determine if there was any wrongdoing on the Partnership's part by virtue of their falling short of the standard of care required of them.

72 The plaintiff's reliance on the possibility of transfer to the SICC to argue that Singapore is the proper forum is misplaced. The Court of Appeal held in *MAN Diesel (CA)* at [144] that: "… the good arguable case in favour of a transfer to the SICC, in and of itself, will not be sufficient to displace a foreign jurisdiction which is the more appropriate forum based on an application of the conventional connecting factors".

73 As for the place where loss and damage was suffered, it is clear from the authorities that it is not determinative and may be of less significance in comparison to the place where the allegedly negligent/wrongful act took place. I find no reason to come to a different view in this case.

74 Finally, it is significant that various connecting factors that point towards Australia as the proper forum are also present in this case, as discussed below at [80].

Other connecting factors to Singapore and Australia

75 The plaintiff argues that the key witnesses, including Khua, the plaintiff's finance team, the plaintiff's special auditor, EY, the first defendant,

and Tin are based in Singapore, and that Tin and the first defendant cannot be compelled to give evidence in any Australian proceedings.[69] However, this argument fails to take into account the third defendant's conduct of its defence, which would entail the admission of witness evidence of six named individuals whom the third defendant says were involved in the conduct of the audit by the third defendant that the plaintiff is complaining about.[70] In respect of the claim in negligence against the third defendant, besides the location of the witnesses, it is also necessary to consider the compellability of the witnesses to testify. Importantly, the six named individuals are no longer in the third defendant's employ,[71] and are not compellable to give evidence in Singapore, because they are foreign witnesses who are not compellable by the Singapore courts to testify in a Singapore court (*JIO Minerals* at [71]). On the other hand, if necessary, several of the plaintiff's key witnesses are presumably willing to testify in Australia to advance the plaintiff's case in Australia even if they are not compellable to give evidence there. These witnesses include Khua, the finance team in the plaintiff's employ, and the persons involved in the special audit by EY engaged by the plaintiff. Furthermore, the evidence of the persons who conducted the audit by the third defendant is likely to be directly relevant and more critical to the claim that the third defendant was negligent in conducting the audit of Blackgold Australia and in preparing the audit report, compared to the evidence of the individuals based in Singapore who may be unwilling to testify in Australia. Those Singapore-based individuals, such as Tin and the first and second defendants, are unlikely to be in a position to shed much light on the manner in which the audit was conducted by the third defendant.

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[69] PWS2 at paras 72–76.

[70] D3WS at paras 38 and 45–46.

[71] D3WS at para 38 and Kim Lawrence Perry's Affidavit dated 7 April 2022 ("Kim Lawrence Perry's Affidavit") at paras 36–39.

76 The plaintiff argues that absent any evidence or explanation as to the type, nature, relevance and/or significance of the evidence that the individuals who conducted the allegedly negligent audit will be giving for the third defendant's defence, little to no weight should be placed on the third defendant's arguments that those individuals may potentially be unavailable to give evidence.[72] On this point, the ruling of the Court of Appeal in *JIO Minerals* (at [67]) is instructive:

> … *It would not be appropriate to require the Appellants to demonstrate exactly how they would use the testimony of the Indonesian Witnesses at this interlocutory stage.* The Appellants have not yet prepared their Defence. We acknowledge, on the other hand, that a defendant applying for a stay should not be permitted to assert, without substantiation, that it requires foreign witnesses because that would make it easy for defendants to manufacture a connecting factor. *Our view was that a defendant should at least show that evidence from foreign witnesses is at least arguably relevant to its defence.* … [emphasis added]

77 In the present case, the third defendant has explained that the named individuals who conducted the audit reside in Australia and are no longer employed by the third defendant.[73] In my view, the evidence of those individuals is at least arguably relevant to the third defendant's defence to the plaintiff's action in negligence against the third defendant.

78 The plaintiff also argues that "the connection to Australia is significantly diluted due to the fact that parts of the audit may have been conducted in the PRC or Malaysia".[74] In this regard, the plaintiff relies on *Siemens AG v Holdrich*

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[72] PWS2 at para 78.

[73] D3WS at paras 38 and 46.

[74] PWS2 at para 82.

Investment Ltd [2010] 3 SLR 1007, in which the Court of Appeal held (at [4]) that:

> … The purpose of the *forum conveniens* analysis is to identify the most appropriate forum in which to try the substantive dispute. It is wrong to say that Singapore is *forum non conveniens* simply because the connecting factors which point to Singapore are outweighed by all the connecting factors which point away from Singapore. The connecting factors which point away from Singapore must point to a more appropriate forum than Singapore, and they might not do so if those connections are dispersed amongst several jurisdictions. Quite simply, Singapore is *forum non conveniens* only if there is a more appropriate forum than Singapore.

79 I am not persuaded by the plaintiff's argument. As I have already explained above, the heart of the dispute between the plaintiff and the third defendant relates to the third defendant's provision of professional services in Australia (see [63] above). That is not diminished by the fact that parts of the audit may have been conducted in the PRC or Malaysia. In any event, it is the plaintiff's burden to show that Singapore is the proper forum. So, even if parts of the audit may have been conducted outside Australia, that does not assist the plaintiff in showing that Singapore is the proper forum, particularly when it is not the plaintiff's case that any part of the third defendant's audit was conducted in Singapore.

80 In my judgment, the learned AR was correct in concluding that the plaintiff failed to discharge its burden to show that Singapore is the proper forum, having regard to the various connecting factors. The third defendant is an Australia-incorporated company that does not have any business presence in Singapore.[75] The Partnership was engaged to audit the FY 2016 financial report and to prepare the audit report via an Engagement Letter that is governed by

[75] Kim Lawrence Perry's Affidavit at paras 32–33.

Australia law and that contains an exclusive jurisdiction clause in favour of the "Courts of Australia or that State".[76] I cannot agree with the plaintiff's argument that the location of the parties to the contract between Blackgold Australia and the third defendant, and the governing law and exclusive jurisdiction clauses therein, are mere "red herring[s]".[77] The plaintiff's action against the third defendant is directed at the audit that flowed from this contract between Blackgold Australia and the Partnership. The location of the parties to the contract, the contract's governing law, and the fact that the applicable standards required of the third defendant in conducting its audit emanate from Australia, are therefore important considerations even though the plaintiff is suing for negligence.

81 Finally, I also consider the indemnity clause incorporated in the contract between the Partnership and Blackgold Australia,[78] which is governed by Australia law and contains an exclusive jurisdiction clause in favour of the Australia courts. Pursuant to this indemnity clause, the Partnership is contractually entitled to bring third party proceedings or a counterclaim against Blackgold Australia to seek a contribution or indemnity. The learned AR observed (in *Vibrant Group Ltd 2* at [37]) that the indemnity clause is a factor pointing towards Australia as the proper forum because any third party proceedings or counterclaims brought by the third defendant to seek a contribution or indemnity must be brought in Australia, in light of the exclusive jurisdiction clause in favour of the Australia courts. The learned AR nevertheless found that this factor was to be accorded less weight because whether any such proceedings will eventually be brought is speculative at this

[76] Kim Lawrence Perry's Affidavit at para 11(h) and p 37.

[77] PWS2 at para 79.

[78] Kim Lawrence Perry's Affidavit at para 11(g) and p 32.

stage and in any event, the exclusive jurisdiction clause does not bind the plaintiff, who is not a party to the contract. The plaintiff takes issue with the learned AR's observations, arguing that this factor is wholly irrelevant to the plaintiff's claim against the third defendant because "no prejudice or injustice will be suffered by [the third defendant] even if it is required to bring indemnity proceedings against Blackgold Australia in Australia, while the [plaintiff's] action against [the third defendant] is determined in Singapore".[79] Considering the other connecting factors to Australia, the outcome of the analysis remains the same even if no weight is ascribed to this indemnity clause.

The risk of re-litigation and conflicting decisions

82 I will turn next to deal with the arguments relating to the risk of re-litigation and conflicting decisions if the action by the plaintiff against the first and second defendants is to proceed in Singapore and the one against the third defendant is to proceed in Australia.

83 The second defendant refers to the learned AR's decision to set aside the service out of jurisdiction orders in respect of the third defendant, which means that the plaintiff would have to pursue its claim against the third defendant in Australia. On that basis, the second defendant argues that given the "interconnectedness between the [plaintiff's] claims against both the [first and second defendants as well as the third defendant]", Australia would be the more proper forum for the trial of the main action.[80]

84 As for the plaintiff, it argues that its case against all three defendants relies largely on the same evidence in so far as they relate to the Alleged

[79] PWS2 at para 80.

[80] D2WS at paras 98–100.

Misrepresentations by the first and second defendants and the Irregularities. The plaintiff makes the argument that "the falsity of the [first and second defendants' representations] and the existence of the Irregularities are *intrinsically relevant* to the question of whether the Partnership had breached its duty of care to the [plaintiff] in failing to detect these untruths" [emphasis added].[81] In particular, counsel for the plaintiff provided, in the course of oral submissions, the example of having to argue for a second time before the Australia court that the first and second defendants made fraudulent (or negligent) misrepresentations that caused damage to the plaintiff, and take the risk that the Australia court may come to a different conclusion from the Singapore court.[82] Accordingly, the plaintiff argues that the real risk of conflicting decisions militates against the setting aside of the service out of jurisdiction order that was granted with respect to the third defendant.

85 Indeed, the existence of parallel proceedings and the consequent undesirability of two actions raising common issues being tried in two jurisdictions is relevant in determining the proper forum (see, *eg*, *PT Hutan Domas Raya v Yue Xiu Enterprises (Holdings) Ltd and another* [2001] 1 SLR(R) 104 at [24]). However, the weight to be given to the existence of parallel proceedings depends on the circumstances, which includes factors such as the degree of overlap of issues and parties and the degree to which the respective proceedings have advanced (*Virsagi Management (S) Pte Ltd v Welltech Construction Pte Ltd and another appeal* [2013] 4 SLR 1097 at [39]).

86 The overlap between the plaintiff's case against the first and second defendants and the plaintiff's case against the third defendant should be

[81] PWS2 at para 66.

[82] Minute sheet in RA 92/2022 and RA 234/2022 dated 1 September 2022.

considered in perspective based on the facts. In the action for fraudulent misrepresentation against the first and second defendants, the plaintiff has to establish five cumulative requirements as follows (*Panatron Pte Ltd and another v Lee Cheow Lee and another* [2001] 2 SLR(R) 435 at [14]):

(a) a false representation of fact by words or conduct;

(b) the representation must be made with the intention that it should be acted upon by the plaintiff, or a class of persons which includes the plaintiff;

(c) the plaintiff acted upon the false statement;

(d) the plaintiff suffered damage by so doing; and

(e) the representation must be made with the knowledge that it is false, or in the absence of any genuine belief that it is true.

87 As for the action in negligent misrepresentation, the plaintiff would have to establish five cumulative elements as follows (*Yong Khong Yoong Mark and others v Ting Choon Meng and another* [2021] SGHC 246 at [91]):

(a) the representor made a false representation of fact to the representee;

(b) the representation induced the representee’s actual reliance;

(c) the representor owed the representee a duty to take reasonable care in making the representation;

(d) the representor breached that duty of care; and

(e) the breach caused damage to the representee.

88 On the facts of the present case, the inquiry would be focused on (for the purposes of the claims in both fraudulent and negligent misrepresentation): (a) whether the first and second defendants did make the Alleged Misrepresentations about Blackgold Australia's value and business; (b) whether these representations were in fact false; (c) whether the plaintiff did proceed with the Acquisition because it relied on the representations; and (d) whether it suffered damage as a result. In respect of the claim in fraudulent misrepresentation, the first and second defendants' states of mind at the time of making the representations would be in issue. In particular, the question would be whether they had knowledge of the falsity of their representations or lacked any genuine belief in their truth. Further, the inquiry would also focus on whether the first and second defendants intended for the plaintiff to proceed with the Acquisition in reliance on their representations. In respect of the claim in negligent misrepresentation, the plaintiff would have to show that the first and second defendants owed the plaintiff a duty to take reasonable care in making the representations and that the first and second defendants breached that duty.

89 On the other hand, for the plaintiff's claim in negligence against the third defendant, the plaintiff would have to establish five cumulative elements as follows (*Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 at [21]):

(a) the defendant owes the plaintiff a duty of care;

(b) the defendant has breached that duty of care by acting (or omitting to act) below the standard of care required of it;

(c) the defendant's breach has caused the plaintiff damage;

(d) the plaintiff's losses arising from the defendant's breach are not too remote; and

(e) such losses can be adequately proved and quantified.

The inquiry for the claim in negligence against the third defendant, in contrast to the inquiry for the claims in fraudulent and/or negligent misrepresentation against the first and second defendants, will be centred on what the Partnership was engaged to do, the level of skill that is to be expected of a reasonably competent auditor and the investigation or steps that would have been taken by a reasonably competent auditor to uncover "irregular or unusual matters" (*Clerk & Lindsell on Torts* (Sweet & Maxwell, 23rd Ed, 2020) at paras 9-231 to 9-232, citing *Pacific Acceptance Corporation Ltd v Forsyth* (1970) 92 WN (NSW) 29 at 62). Contrary to what the plaintiff contends, in dealing with the plaintiff's claim against the third defendant for professional negligence in its role as auditor, an Australia court would likely not need to determine any substantial issue about whether the first and second defendants in fact made any misrepresentations to induce the plaintiff to acquire Blackgold Australia. Rather, as submitted by the third defendant, the inquiry would be focused on whether a reasonable auditor in the same position as the Partnership would have reached the same conclusions which it arrived at.[83] The inquiry would be undertaken by examining, in the main, the financial and accounting records that were before the Partnership. It would focus on matters such as, *eg*, whether the auditor was put on inquiry by the existence of irregularities within the records (*PlanAssure PAC (formerly known as Patrick Lee PAC) v Gaelic Inns Pte Ltd* [2007] 4 SLR(R) 513 at [54], [65], [69], [73] and [77]) or whether the auditor failed to qualify its audit report when faced with the inability to obtain audit

[83] D3WS at paras 154–157.

evidence (*JSI Shipping (S) Pte Ltd v Teofoongwonglcloong (a firm)* [2007] 4 SLR(R) 460 at [113]). As provided by the contract between the Partnership and Blackgold Australia:[84]

> [The Partnership's] work will be based on documents and information provided to it, or obtained by it in connection with the Services. [The Partnership] will not verify the accuracy and completeness of such documentation or information.

The contractual clause provides context for the scope of the duty of care owed by the Partnership and goes towards showing that the Partnership's duty did not extend to warranting against misrepresentations that would not have been detected by a reasonable auditor in the shoes of the Partnership. Seen in this context, the risk of re-litigation and conflicting decisions must not be overstated.

90 As for the plaintiff's claims against the second defendant for fraudulent and/or negligent misrepresentation, not only do the connecting factors point to Singapore; the claims are also clearly more closely connected with the plaintiff's claims against the first defendant based on the same causes of action than the claims against the third defendant based on negligence. The plaintiff's claims against the second defendant should therefore be tried in Singapore together with the claims against the first defendant as there are common facts and issues involved. Indeed, if the plaintiff's action against the first defendant were tried in Singapore but the plaintiff's action against the second defendant were tried in Australia, that would lead to an even greater risk of conflicting decisions.

[84] Kim Lawrence Perry's Affidavit at para 11(d) and page 28.

Whether the service out of jurisdiction orders should be set aside because of the plaintiff's failure to make full and frank disclosure of all material facts

91 For completeness, I address the issue of the plaintiff's alleged failure to make full and frank disclosure of all material facts in obtaining leave to serve the originating process on the third defendant outside Singapore. This is strictly not necessary given that I have affirmed the learned AR's decision to set aside the service out of jurisdiction order in respect of the third defendant.

92 Before the learned AR, the third defendant took issue with the plaintiff's omission to mention certain facts that point to the connection between the dispute and Australia. The learned AR found that the only such omission by the plaintiff was the failure to draw the court's attention specifically to the exclusive jurisdiction clause in the Engagement Letter, which was, in his view, not a material omission, since the plaintiff had already disclosed other linkages to Australia and the plaintiff is not bound by the Engagement Letter nor the exclusive jurisdiction clause found therein (*Vibrant Group Ltd 2* at [47]). I have no reason to disagree with the learned AR's exercise of discretion.

93 The third defendant also argues on appeal that the plaintiff had failed to state whether Singapore was the more appropriate forum. In addition, the defendant contends that the plaintiff had failed to state that it did not know where the audit was conducted.[85] As stated by the Court of Appeal in *Tay Long Kee Impex* at [21], material facts are those which would have been material for the court to know in dealing with the application, and includes those facts that the applicant would have known if it had made proper inquiries.

[85] D3WS at paras 173–179.

94 In my view, the omission of the plaintiff to state whether Singapore was the more appropriate forum would be more appropriately regarded as a failure to substantiate a relevant factor in its application. By that omission, the plaintiff put its application at risk of a dismissal. As for the fact that the plaintiff did not know where the audit was conducted, I am unable to agree with the third defendant that the plaintiff's lack of knowledge is itself material information which the court would necessarily have considered at the *ex parte* stage, in deciding whether to grant the order for service out of jurisdiction. It would have had little bearing on whether the requirements to obtain leave to serve out of jurisdiction were satisfied. The circumstances of the case also do not suggest any deliberate attempt by the plaintiff to mischaracterise the situation or to convey any false impression that the issue of proper forum was not in dispute.

Conclusion and orders made

95 For the above reasons, I dismiss RA 92/2022 and RA 234/2022, and uphold the orders made by the learned AR.

96 I will hear parties on the question of costs separately.

Teh Hwee Hwee
Judicial Commissioner

Thio Shen Yi SC, Chan Kah Keen Melvin, Ee Eng Yew Justin, Yong Wei Jie Timothy and Terence Yeo (TSMP Law Corporation) for the plaintiff;
Cham Shan Jie Mark (Zhan Shanjie) and Matthew Tan Jun Ye (Aquinas Law Alliance LLP) for the second defendant;
Gary Leonard Low, Tan Wee Kio Terence (Chen Weiqiao) and Tan Jia Yi (Drew & Napier LLC) for the third defendant;
The first defendant absent.