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

[2022] SGHCR 4

HC/S 1046 of 2020
HC/SUM 423 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 – Stay of Proceedings]

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Vibrant Group Ltd
v
Tong Chi Ho and others

[2022] SGHCR 4

General Division of the High Court — Suit No 1046 of 2020 (Summons No 423 of 2022)
Justin Yeo AR
25 March 2022

1 April 2022

Justin Yeo AR:

1 This is an application by Peng Yuguo ("the 2nd Defendant") under O 12 r 7(1)(*c*) and (2) of the revoked Rules of Court as in force immediately before 1 April 2022 ("Rules of Court"). The 2nd Defendant seeks to set aside two orders of Court granting Vibrant Group Limited ("the Plaintiff") leave to serve its Writ of Summons and Statement of Claim (and amended versions thereof) out of jurisdiction on the 2nd Defendant in the People's Republic of China ("PRC"). The 2nd Defendant's alternative prayer is for the present suit against him to be stayed on the grounds of *forum non conveniens*, with Australia being the more appropriate forum for the trial. The other two defendants, namely Tong Chi Ho ("the 1st Defendant") and Findex (Aust) Pty Ltd ("the 3rd Defendant"), were not parties to the application, although their respective counsel attended the hearing on watching brief.

2 I heard the application on 25 March 2022 and now dismiss the application in its entirety for the reasons set out in this judgment.

Background Facts

3 The background to the dispute is fairly involved. For the purposes of this judgment, it suffices to briefly set out the facts relevant to this application.

4 The Plaintiff is a publicly listed Singapore company listed on the Singapore Exchange ("SGX"). The 1st Defendant is a Singapore citizen and was, at the material time, the Chairman of an Australian company known as Blackgold International Holdings Pty Ltd ("Blackgold"). Blackgold is the ultimate holding company of a group of companies ("Blackgold Group"). The 2nd Defendant is a PRC citizen and was, at the material time, the Executive Director and Chief Executive Officer of Blackgold. The 3rd Defendant is an Australian company providing financial advisory and accounting services.

5 The Plaintiff's Chief Executive Officer, Khua Kian Keong ("Khua") had become acquainted with the 1st Defendant before 2011. The 1st Defendant introduced Khua to the Blackgold Group and suggested that the Plaintiff invest in Blackgold at an upcoming initial public offering. From 2011 to 2013, the Plaintiff subscribed for Blackgold shares through the Plaintiff's wholly owned subsidiary. Subsequently, the 1st Defendant met with Khua *in Singapore* and through telephone discussions to discuss the possibility of the Plaintiff fully acquiring Blackgold. Following these discussions, the Plaintiff appointed a team of officers ("the Finance Team") to review and evaluate the proposed acquisition of Blackgold.

6 The review process took place from August to October 2016. This included a review of the financial position of the Blackgold Group through information provided or endorsed by, amongst others, the 1st and 2nd Defendants. The Plaintiff and the Finance Team were informed to direct queries to Tin It Phong ("Tin"), the Chief Financial Officer of Blackgold at the material time.

7 The Plaintiff alleged that from early 2016 to around July 2017, the 1st and 2nd Defendants made various representations to the Plaintiff to induce the Plaintiff to proceed with the acquisition of Blackgold ("the Representations"). The Representations included representations in relation to: (a) key indicators of the Blackgold Group's overall value and potential for acquisition; (b) the profitability of the Blackgold Group's coal trading business; (c) the status of four coal mines owned by the Blackgold Group (through PRC subsidiaries); (d) the Blackgold Group's allegedly established and profitable shipping transportation business; and (e) the profitability of the Blackgold Group's business operations and growth potential. The Representations were allegedly contained in or made through various documents provided or endorsed by the 1st and 2nd Defendants, and provided to or received by the Finance Team *in Singapore*.

8 In September 2016, the Finance Team travelled to the Blackgold Group's headquarters in Chongqing to collect information and documents relating to the Blackgold Group's financials and business operations. The Finance Team met with and interviewed the 1st and 2nd Defendants, and visited coal mines purportedly owned by the Blackgold Group's coal mining entities.

9 Relying on information collected and received by the Finance Team from the review process, the Plaintiff's management passed a board resolution

in Singapore to proceed with the acquisition of Blackgold by way of a scheme of arrangement pursuant to the Corporations Act of Australia ("the Scheme"). Thereafter, the Plaintiff and Blackgold entered a "Scheme Implementation Deed" on 28 October 2016. The Scheme Implementation Deed was signed in counterparts, with no clear evidence as to the jurisdiction(s) in which the counterparts were signed.

10 The meeting to carry out the Scheme was held on 26 June 2017 in Perth, Australia ("the Scheme Meeting"). Prior to the Scheme Meeting, Khua signed a letter of undertaking ("the LOU") *qua* the controlling shareholder of the Plaintiff, stating – amongst other things – that he "fully understood the current state of Blackgold", was "aware of various situations of Blackgold", "agree[d] to accept the above-mentioned status quo", and undertook that "under any circumstance, we will not hold [the 2nd Defendant] accountable or make any claim against him". However, the parties had differing accounts in relation to the finer details culminating in the signing of the LOU.

(a) Khua's evidence was that although the LOU was dated 25 June 2017, it was in fact presented to him by the 1st and 2nd Defendants on the morning of 26 June 2017, shortly before the Scheme Meeting.[1] At that time, the LOU already bore the 1st Defendant's signature and thumbprint.[2] He said that the 1st and 2nd Defendants had explained that the LOU was because the 2nd Defendant "wanted comfort and assurance that the Plaintiff would not look to [the 2nd Defendant] for compensation

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1 Affidavit of Khua Kian Keong (dated 18 February 2022), at paragraph 42.

2 Affidavit of Khua Kian Keong (dated 18 February 2022), at paragraph 42.

or hold [the 2nd Defendant] accountable for the management and operation of [Blackgold] *after the Acquisition*" (emphasis added).[3]

(b) The 2nd Defendant's evidence was that Khua had proposed entering into an agreement as follows: in exchange for the 2nd Defendant's support for the Scheme, Khua would warrant on behalf of the Plaintiff that he had conducted his own due diligence and fully understood all the underlying operations, financials and legal positions of the Blackgold Group, including any unfavourable information, and that he nonetheless decided to proceed with the Plaintiff's acquisition of Blackgold.[4] According to the 2nd Defendant, this led to the signing of the LOU dated 25 June 2017.[5]

11 Following the approval of the Scheme by the Federal Court of Australia, the acquisition was completed on 13 July 2017 for a purchase price of AUD37,635,863.00. It is undisputed that the funds for the acquisition were transferred *from Singapore* to an Australian custodian (*ie* Pacific Custodians Pty Limited) appointed by the Australian Stock Exchange for the purposes of the Scheme.

12 Sometime after the acquisition of Blackgold, the Plaintiff discovered that some of the representations were false. These came to light following a special fact-finding investigation into certain irregularities and discrepancies in respect of coal mining and coal trading receipts, as well as sales invoices of

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[3] Affidavit of Khua Kian Keong (dated 18 February 2022), at paragraph 43.

[4] Affidavit of Peng Yuguo (dated 1 March 2022), at paragraph 48.

[5] Affidavit of Peng Yuguo (dated 1 March 2022), at paragraph 50.

some of the PRC subsidiaries. Amongst other things, the investigation revealed widespread falsification of the Blackgold Group's financial and accounting information, records and other documents, and questionable transactions by or involving the management of the Blackgold Group (including the 1st and 2nd Defendants).

13 In July 2018, the 2nd Defendant was placed on leave pending the outcome of the investigation. On 16 August 2018, before the investigation was completed, the 2nd Defendant resigned as the Chief Executive Officer of Blackgold Group.

14 On 30 October 2020, the Plaintiff commenced the present suit. The primary causes of action relied upon against the 2nd Defendant are the torts of fraudulent misrepresentation and negligent misrepresentation. The Plaintiff particularised its loss and damage to include: (a) the acquisition price of AUD37,635,863.00, given that Blackgold is now allegedly of nominal value; (b) substantial costs and expenses in investigating the irregularities, assets and records of the Blackgold Group; and (c) substantial costs and expenses in addressing and complying with investigations conducted by the SGX.[6]

15 On 10 December 2020, the Plaintiff successfully obtained the leave of Court to serve the Writ of Summons and Statement of Claim on the 2nd Defendant in the PRC. On 27 December 2021, the Plaintiff successfully obtained the leave of Court to serve its amended Writ of Summons and Statement of Claim on the 2nd Defendant in the PRC. The orders referred to in the preceding sentences are referred to collectively as the "Leave Orders".

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6 Statement of Claim (Amendment No 1) (dated 3 December 2021) at paragraph 54.

16 The 2nd Defendant was served with the original Writ of Summons and Statement of Claim on 22 December 2021, and the amended versions on 17 January 2022. The 2nd Defendant entered an appearance and, on 31 January 2022, filed the present application to contest the jurisdiction of the Singapore Courts to hear the present suit. The primary prayer was to set aside the Leave Orders, while the alternative prayer was for the present suit against the 2nd Defendant to be stayed on the grounds of *forum non conveniens*, with Australia being the more appropriate forum for the trial.

Issues

17 The present application gave rise to the following issues:

(a) whether the Leave Orders should be set aside for failure to meet the requirements for valid service out of jurisdiction ("the Jurisdictional Issue");

(b) whether the Leave Orders should be set aside for the Plaintiff's failure to make full and frank disclosure of the LOU when applying, *ex parte*, for the Leave Orders ("the Disclosure Issue"); and

(c) whether the action against the 2nd Defendant should be stayed on the ground of *forum non conveniens* ("the *Forum Non Conveniens* Issue").

The Jurisdictional Issue

18 The jurisdiction of the Singapore courts is territorial. Where a foreign defendant does not submit to the jurisdiction of the Singapore courts, the Singapore courts have jurisdiction over him only if he is validly served with an

originating process out of jurisdiction (*Zoom Communications Ltd v Broadcast Solutions Pte Ltd* [2014] 4 SLR 500 ("*Zoom Communications*") at [26]). The requirements for valid service out of jurisdiction are well established (see, *eg*, *Zoom Communications* at [26]*; Oro Negro Drilling Pte Ltd and others v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2020] 1 SLR 226 at [54]; and *Recovery Vehicle 1 Pte Ltd v Industries Chimiques Du Senegal* [2021] 1 SLR 342 at [50]). The sub-issues to be considered are:

(a) whether the Plaintiff has a "good arguable case" that its claim falls within one of the jurisdictional gateways in O 11 r 1 of the Rules of Court;

(b) whether the Plaintiff's claim has a "sufficient degree of merit"; and

(c) whether Singapore is the proper forum for the trial of the action.

"Good arguable case"

19 The first requirement is that the Plaintiff must demonstrate a "good arguable case" that its claim comes within one or more of the jurisdictional gateways in O 11 r 1 of the Rules of Court. This requires that the Plaintiff has "the better of the argument", *ie*, more than a *prima facie* case but less than the standard of a balance of probabilities (*MAN Diesel & Turbo SE v IM Skaugen SE* [2020] 1 SLR 327 ("*MAN Diesel (CA)*") at [30]). In determining whether the Plaintiff has a "good arguable case", the Court may consider issues of law, but should not delve into contested factual issues (*Shanghai Turbo Enterprises v Liu Ming* [2019] 1 SLR 779 at [49] and *Vinmar Overseas (Singapore) Pte Ltd v PTT International Trading Pte Ltd* [2018] 2 SLR 1271 at [45]–[46]).

20 Before going into each of the four jurisdictional gateways that the Plaintiff relied upon for the Leave Orders, I first address the 2nd Defendant's overarching (and primary) argument that the Plaintiff has failed to demonstrate a "good arguable case" in relation to all four gateways. The 2nd Defendant contended that the Plaintiff had covenanted, through the LOU, not to make any claim against the 2nd Defendant, and had therefore waived its rights to make any and all claims against the 2nd Defendant. I am unable to agree with the 2nd Defendant for three reasons.

(a) First, in determining whether there is a "good arguable case", the Court should not delve into contested factual issues (see [19] above). Specifically in relation to the LOU, the parties have taken diametrically opposing factual positions (see [10] above). In particular, the Plaintiff's evidence is that the LOU related only to matters *subsequent* to the acquisition, and therefore did not preclude the Plaintiff from making claims against the 2nd Defendant for matters *prior* to the acquisition. The 2nd Defendant's position that the LOU excluded any and all claims may well be pleaded in his defence, but it is – at the stage of challenging the jurisdiction of the Singapore courts – insufficient on its own for denying the Plaintiff a "good arguable case".

(b) Second, there remains an open question as to whether the LOU is contractually binding in the first place, given the Plaintiff's assertion that the 2nd Defendant did not provide any consideration for the promise allegedly contained in the LOU. The 2nd Defendant claimed that consideration was provided (see [10(b)] above), but this again is insufficient for denying the Plaintiff a "good arguable case" at the

present stage given the parties' differing accounts in relation to the details culminating in the signing of the LOU.

(c) Third, to the extent that the 2nd Defendant relies on the LOU to exclude his liability for *fraudulent* misrepresentation, the LOU is arguably void for being against public policy. As observed in *Goldring, Timothy Nicholas v Public Prosecutor* [2015] 4 SLR 742 at [61], upholding a clause purporting to exclude liability for fraud would be "inimical to notions of justice"; such a clause is "void for being against public policy". In other words, there is a "good arguable case" that the LOU does not preclude the Plaintiff's cause of action in *fraudulent* misrepresentation.

21 I turn now to examine whether there is a "good arguable case" on the four jurisdictional gateways relied upon for the Leave Orders, *ie*, O 11 r 1(*c*), (*f*)(i), (*f*)(ii) and (*p*) of the Rules of Court.

O 11 r 1(c) of the Rules of Court

22 Pursuant to O 11 r 1(*c*) of the Rules of Court, service of an originating process out of Singapore is permissible with the leave of Court if "the claim is brought against a person duly served in or out of Singapore and a person out of Singapore is a necessary or *proper party* thereto" (emphasis added).

23 It is undisputed that the present suit has been properly commenced against the 1st Defendant. It is also undisputed that the 2nd Defendant is a "proper party" to this suit, in that he would have been properly joined as a defendant under O 15 of the Rules of Court had he been within the jurisdiction (see, *eg*, *CLM v CLN and others* [2022] SGHC 46 at [71]). The only argument that the

2nd Defendant could muster was the overarching contention relating to the LOU which I have rejected at [20] above.[7]

24 I therefore find that the Plaintiff has a "good arguable case" under O 11 r 1(*c*) of the Rules of Court. While this is technically sufficient for the "good arguable case" requirement, I proceed to analyse the remaining three jurisdictional gateways for completeness, and also because the analysis is relevant to "sufficient degree of merit" requirement apropos the O 11 r 1(*c*) jurisdictional gateway (see [38] below).

O 11 r 1(f)(i) of the Rules of Court

25 The O 11 r 1(*f*)(i) jurisdictional gateway requires the Plaintiff to demonstrate that "the claim is founded on a *tort*, wherever committed, which is constituted, *at least in part, by an act or omission occurring in Singapore*" (emphasis added). In order to establish jurisdiction under this jurisdictional gateway, the Plaintiff must demonstrate a "good arguable case" of (a) the existence of the cause of action in tort; and (b) the commission, "at least in part", of a constituent act in Singapore by the 2nd Defendant (*Bradley Lomas Electrolok Ltd v Colt Ventilation East Asia Pte Ltd* [1999] 3 SLR(R) 1156 ("*Bradley Lomas*") at [19]).

26 I turn first to the existence of the causes of action in tort in the present case, namely, the torts of *fraudulent* misrepresentation and *negligent* misrepresentation. The elements of the respective torts were recently reiterated

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[7] 2nd Defendant's Written Submissions (dated 21 March 2022), at paragraphs 98 and 99.

in *Ma Hongjin v Sim Eng Tong* [2021] SGHC 84 at [19] and [20]. To restate these briefly:

(a) For the Plaintiff to succeed in his claim for *fraudulent* misrepresentation, he must demonstrate that (i) the 2nd Defendant made a false representation of fact to the Plaintiff; (ii) the representation was made intending that the Plaintiff should act on it; (iii) the Plaintiff acted in reliance on the representation; (iv) the Plaintiff suffered damage by so acting; and (v) the representation was made with knowledge that it was false or in the absence of any genuine belief that it was true.

(b) For the Plaintiff to succeed in his claim for *negligent* misrepresentation, he must demonstrate that (i) the 2nd Defendant made a false representation of fact to the Plaintiff; (ii) the representation induced the Plaintiff's reliance; (iii) the 2nd Defendant owed the Plaintiff a duty to take reasonable care in making the representation; (iv) the 2nd Defendant breached that duty; and (v) the breach caused damage to the Plaintiff.

27 The Plaintiff pleaded and gave evidence to establish the elements for both torts (as briefly described in [7] to [12] above). The 2nd Defendant sought to undermine the Plaintiff's causes of action as follows:

(a) The 2nd Defendant denied making any false representations about the Blackgold Group for the purpose of inducing the Plaintiff to enter into the acquisition.[8] He contended that the financial accounting

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8 Affidavit of Peng Yuguo (dated 24 February 2022) at paragraphs 68 and 69, and Affidavit of Peng Yuguo (dated 16 March 2022) at paragraph 11.

records which were provided to the Plaintiff were true to the best of his knowledge, information and belief, and were audited by a reputable audit firm (*ie* the 3rd Defendant).[9]

(b) The 2nd Defendant took issue with the Plaintiff's allegation that he (*ie* the 2nd Defendant) had made false representations in relation to the status of two of the coal mines. The Plaintiff had claimed that the two coal mines had closed prior to the acquisition, but this is "completely untrue" because (amongst other things) the Finance Team would have seen the two mines in operation during the Chongqing trip.[10]

28 The defences as presently raised by the 2nd Defendant are premised heavily on disputed factual issues. They also do not completely address the various elements of each tort. While the 2nd Defendant has caveated that he reserved his rights to expand and supplement on his defences in due course,[11] for the purposes of this application, the contentions do not sufficiently move the needle in denying the Plaintiff a "good arguable case" of the existence of the causes of action.

29 I turn next to whether there is a "good arguable case" that the torts were committed, "at least in part", in Singapore. The 2nd Defendant's contention is that the alleged torts of fraudulent or negligent misrepresentation were committed in Australia, given that the acquisition was governed by the laws of Australia. While the pre-acquisition processes spanned different jurisdictions

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[9] Affidavit of Peng Yuguo (dated 24 February 2022) at paragraphs 68 and 69.

[10] Affidavit of Peng Yuguo (dated 16 March 2022) at paragraphs 13 to 19.

[11] Affidavit of Peng Yuguo (dated 16 March 2022) at paragraph 20.

including Singapore, the PRC and Australia (see [5]–[9] above) and the acquisition was completed in Australia, it cannot seriously be disputed that the alleged torts were constituted, "at least in part, by an act… occurring in Singapore". It was in Singapore where most of the information relating to the acquisition was received, where the potential acquisition was substantially studied and decided upon, and where the Plaintiff suffered damage (see, in particular, the italicised references to Singapore in [5], [7], [9] and [11]).

30 There is therefore a "good arguable case" under O 11 r 1(*f*)(i) of the Rules of Court that the alleged torts of fraudulent or negligent misrepresentation were constituted, at least in part, in Singapore.

O 11 r 1(f)(ii) of the Rules of Court

31 The O 11 r 1(*f*)(ii) jurisdictional gateway requires the Plaintiff to demonstrate that "the claim is wholly or partly founded on, or is for the recovery of damages in respect of, *damage suffered in Singapore* caused by a tortious act or omission wherever occurring" (emphasis added). In this regard, it is not necessary that *all* the damage must be suffered in Singapore; it suffices if some *significant* damage is suffered in Singapore (see *Nippon Catalyst Pte Ltd v PT Trans-Pacific Petrochemical Indotama* [2018] SGHC 126 at [52]).

32 In the present case, while the acquisition price was paid in Australian dollars, the acquisition price was paid through the transfer of funds from Singapore to Australia (see [11] above). In addition, the Plaintiff has claimed for substantial costs and expenses incurred in Singapore, in the light of the

various investigations (see [14] above).[12] On the Plaintiff's pleaded case, and based on the evidence before me, the Plaintiff has suffered significant damage in Singapore as a result of the alleged torts. As such, there is a "good arguable case" under O 11 r 1(*f*)(ii) of the Rules of Court.

O 11 r 1(p) of the Rules of Court

33 The O 11 r 1(*p*) jurisdictional gateway requires the Plaintiff to demonstrate that "the claim is founded on a *cause of action arising in Singapore*" (emphasis added). The test is to consider *where, in substance*, the cause of action arose (see *MAN Diesel (CA)* at [113]).

34 In relation to the torts of fraudulent or negligent misrepresentation, there are complications in determining the place of the cause of action, given that a misrepresentation may be made in one jurisdiction, received in a second and relied upon in a third (see *IM Skaugen SE v MAN Diesel & Turbo SE* [2018] SGHC 123 ("*IM Skaugen (HC)*") at [89]). In this regard, the principles relevant to the present case are:

(a) Where a misrepresentation is received and relied upon in a single jurisdiction, that jurisdiction is the place of the tort unless it is fortuitous that the misrepresentation was received and relied upon in that jurisdiction (*IM Skaugen (HC)* at [90(a)], citing *JIO Minerals FZC and others v Mineral Enterprises Ltd* [2011] 1 SLR 391 ("*JIO Minerals*") at [93]).

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[12] Affidavit of Khua Kian Keong (dated 18 February 2022) at paragraph 58.

(b) Where a misrepresentation is made in one jurisdiction and is received and relied upon in another jurisdiction, if the misrepresentation is made to a specific person, the place of the tort is the place where the representation was received and relied upon (*IM Skaugen (HC)* at [90(b)], citing *JIO Minerals* at [91] and [93]).

35 Regardless of whether the present case falls within [34(a)] or [34(b)] above, there is a "good arguable case" that most of the Representations were received and relied upon in Singapore. The place of the torts is therefore Singapore. The 2nd Defendant contends that the connection with Singapore was "entirely fortuitous because the Plaintiff is based in Singapore".[13] I am unable to see how there is any fortuity in the present case; the fact that the Plaintiff is based in Singapore is, in fact, one of the significant reasons that most of the constituent acts in the alleged torts occurred in Singapore (see [29] above). I therefore find that there is a "good arguable case" under O 11 r 1(*p*) of the Rules of Court.

"Sufficient degree of merit"

36 The second requirement is that the Plaintiff must show a "sufficient degree of merit" in its claims. Whether this is a separate requirement from the "good arguable case" requirement depends on the precise jurisdictional gateway relied upon.

37 Some of the jurisdictional gateways listed in O 11 r 1 of the Rules of Court require the court to examine the merits of the Plaintiff's claim in relation

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[13] 2nd Defendant's Written Submissions (dated 21 March 2022), at paragraph 86.

to the "good arguable case" requirement. For these jurisdictional gateways, the requirement of a "sufficient degree of merit" is subsumed in the requirement of a "good arguable case" and does not have to be addressed separately (see, *eg*, *MAN Diesel (CA)* at [28]). O 11 r 1(*f*)(i), (*f*)(ii) and (*p*) of the Rules of Court all fall within such a situation (*MAN Diesel (CA)* at [28] read with [24]; *Bradley Lomas* at [19]). There is therefore no need to separately consider whether the Plaintiff has demonstrated sufficient merit for these gateways.

38 As for the jurisdictional gateway in O 11 r 1(*c*) of the Rules of Court, I find that the "sufficient degree of merit" requirement is made out in view of the analysis at [26] to [29] and [34] to [35] above.

Whether Singapore is the proper forum

39 The third requirement is that Singapore must be the proper forum for the trial of the action. This requirement embodies the same test that is applied when considering a stay on the grounds of *forum non conveniens*, *ie*, the two-stage test in *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460 ("*Spiliada*").

> (a) At the first stage, the court determines whether, *prima facie*, there is some other available forum that is more appropriate for the case to be tried. In making this determination, the court undertakes an analysis of connecting factors, including (i) personal connections of the parties and witnesses; (ii) connections to relevant events and transactions; (iii) the applicable law to the dispute; (iv) the existence of proceedings elsewhere; and (v) the "shape of the litigation", *ie*, the manner in which the claim and the defence have been pleaded (*Rappo, Tania v Accent Delight International Ltd* [2017] 2 SLR 265 ("*Rappo*")

at [71]). It is the *quality* (rather than quantity) of the connecting factors that is crucial in this analysis (*Rappo* at [70]). The aim of the inquiry is to identify whether any connections point towards a jurisdiction in which the case may be more suitably tried, for the interests of all the parties and the ends of justice (*Rappo* at [72]).

(b) If the first stage is answered in the positive, the matter moves to the second stage where the court will ordinarily grant a stay unless there are circumstances for which justice requires that a stay nonetheless be denied. Put another way, the court will consider whether justice requires that the court exercise its jurisdiction even if it is not the *prima facie* natural forum (*Rappo* at [107]).

40 I find that Singapore is the proper forum for the trial of the present suit, in the light of the various connecting factors to Singapore:

(a) First, the Plaintiff is a publicly listed Singapore company incorporated and headquartered in Singapore. Potential key witnesses including Khua, the Finance Team and Tin, are based in Singapore, while the 1st Defendant is also a Singapore citizen. It bears emphasis that Tin was the Chief Financial Officer of Blackgold at the material time and was heavily involved in the lead up to the acquisition (*eg* the meeting at Blackgold Group's headquarters in September 2016, communications between Blackgold and the Plaintiff, *etc*), as well as the alleged "clean up" efforts following the discovery of the irregularities.[14]

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[14] See, *eg*, Affidavit of Khua Kian Keong (dated 18 February 2022) at paragraph 25; Statement of Claim (Amendment No 1) at paragraphs 21 and 45.

Plaintiff's counsel submitted that if the action is to be heard in Australia instead of Singapore, Tin cannot be compelled to give evidence in those proceedings (citing *Australian Securities and Investments Commission (ASIC) v Rich* [2004] NSWSC 467 at [4]). In the absence of expert evidence on the compellability of witnesses under Australian law, I make no finding on this point, save to note that 2nd Defendant's counsel did not dispute the submission, and instead responded that there was no evidence that Tin would be unwilling to testify in Australian proceedings. I further note that the 2nd Defendant did not provide evidence in relation to personal connections of witnesses in his two affidavits (although 2nd Defendant's counsel contended, from the Bar, that there would probably be witnesses based in Australia and the PRC). The fact that numerous key witnesses are located in Singapore and the absence of evidence of similarly strong connections of witnesses to any other jurisdiction points towards Singapore as the proper forum for the trial of the present suit.

(b) Second, there is a "good arguable case" that the place of the torts is Singapore (see [35] above). This also means that Singapore is, *prima facie*, the natural forum for determining these claims (see, *eg*, *Rickshaw Investments Ltd v Nicolai Baron von Uexkull* [2007] 1 SLR(R) 377 ("*Rickshaw*") at [37] and [39]). While this is not in itself a determinative factor, it is a "significant" one (*Rickshaw* at [40]). The 2nd Defendant argued that the proper forum is the place of the acquisition, *ie*, Australia. However, considering the circumstances of the present case, the place of acquisition does not trump the place of the torts in pointing towards Singapore as the proper forum.

(c) Third, the applicable law in relation to the torts of fraudulent and negligent misrepresentation is Singapore law. The 2nd Defendant contended that Australian law is the governing law by virtue of the LOU being signed in Australia. However, it should also be kept in mind that (i) the signatories are Singapore citizens (*ie* the 1st Defendant and Khua); (ii) there is a lack of evidence as to where the 1st Defendant signed the LOU (if the 1st Defendant had signed the LOU before Khua had sight of it, as Khua has contended), and (iii) the LOU purports to waive the right of a Singapore company (*ie* the Plaintiff) against the 2nd Defendant (a PRC citizen). Furthermore, *even if* the LOU is governed by Australia law, this does not displace the primacy of Singapore law being the applicable law to the torts in question given that Singapore is the place of the torts (see [35] above).

(d) Fourth, the Plaintiff suffered loss and damage in Singapore (see [29] to [32] above). Despite having the opportunity to do so in his final response affidavit, the 2nd Defendant did not controvert the Plaintiff's evidence that the source of funds for the acquisition was *in Singapore*, and that the substantial costs and expenses relating to the investigations were incurred *in Singapore*.

(e) Fifth, the Plaintiff's action against the 1st Defendant is clearly a matter over which the Singapore courts have jurisdiction. The 1st Defendant has entered an appearance and filed his defence without disputing this. Given the common questions of law and fact arising in the claims against the 1st and 2nd Defendants in the present suit, there is a risk of conflicting decisions should the action against the 1st Defendant

proceed in Singapore while the action against the 2nd Defendant proceeds in a separate forum.

41 For the reasons above, I find that the connecting factors point towards Singapore being the proper forum for the trial of the present suit. As such, there is no need to consider the second stage of the *Spiliada* test.

42 I therefore decline to set aside the Leave Orders on the basis of the Jurisdictional Issue.

The Disclosure Issue

43 It is well established that an applicant in an *ex parte* application has a duty to make full and frank disclosure of all matters within his knowledge which might be material to the matter (*The "Vasiliy Golovnin"* [2008] 4 SLR(R) 994 ("*Vasiliy Golovnin*") at [83]). The 2nd Defendant sought to set aside the Leave Orders on the basis of the Plaintiff's failure to make full and frank disclosure of the LOU when applying *ex parte* for these orders.

44 It is undisputed that the Plaintiff did not disclose the existence of the LOU when applying for the Leave Orders. The Plaintiff's explanation for non-disclosure of the LOU was that the duty of full and frank disclosure extended only to "plausible, and not all conceivable or theoretical, defences" (*Vasiliy Golovnin* at [87]). The Plaintiff contended that the LOU was not a "plausible" defence for three reasons:

(a) First, the LOU is an agreement not to pursue claims against the Blackgold Group *after* the acquisition.

(b) Second, the LOU is void and has no legal effect because the 2nd Defendant did not provide any consideration in exchange for the alleged promise not to make any claims against him.

(c) Third, the LOU is void and has no legal effect because a person cannot contractually exclude liability for his own fraud.

45 The test for materiality is an objective one to be determined based on what may be relevant in enabling the court to arrive at an informed decision on the *ex parte* application (*contra* what the applicant alone thinks is relevant) (*Vasiliy Golovnin* at [87]). The duty to make full and frank disclosure does not, however, require the applicant to disclose *every* relevant document; it is, ultimately, all about "striking the right balance" (*Vasiliy Golovnin* at [88]).

46 In my view, the LOU is a material fact that ought to have been disclosed when the Plaintiff applied *ex parte* for the Leave Orders. Doing so would have "[struck] the right balance". While the Plaintiff may have strong convictions that the LOU is not a plausible defence for the reasons in [44] above, those convictions are ultimately in the nature of arguments. There is a real possibility that had the Plaintiff disclosed the LOU, the court may well have come to a different conclusion on the plausibility of the LOU as a defence:

(a) First, the contention at [44(a)] above is a factual position taken by the Plaintiff which could *plausibly* have been controverted by the 2nd Defendant (this has, indeed, transpired; see [10(b)] above).

(b) Second, the contention at [44(b)] above is a factual and possibly legal argument concerning whether consideration was given for the LOU, for which the 2nd Defendant could *plausibly* have

raised a counterargument (this has also transpired; see [10(b)] above).

(c) Third, the contention at [44(c)] above presents a "good arguable case" that the LOU cannot exclude liability for fraudulent misrepresentation (see [20(c)] above). However, this remains *arguable* at this stage, and does not justify its non-disclosure when applying *ex parte* for the Leave Orders. Furthermore, the position of the LOU *vis-à-vis* the claim for *negligent* misrepresentation remains tenuous.

47 I therefore find that the Plaintiff has failed to disclose a material fact, *ie*, the LOU. However, while this is a ground for setting aside the Leave Orders, the court retains an overriding discretion in determining whether to do so (*Vasiliy Golovnin* at [84]). In exercising such discretion, the court will often consider the proportionality of the omission against its impact (*Vasiliy Golovnin* at [84]).

48 Considering all the circumstances of the present case, particularly the connecting factors pointing to Singapore as the proper forum for the trial of the present suit (see [39] to [41] above), I decline to set aside the Leave Orders despite the non-disclosure of the LOU (see also the approach taken in *Zoom Communications* at [69] and [91]).

The *Forum Non Conveniens* Issue

49 The 2nd Defendant's alternative prayer is for the present suit against him to be stayed on the grounds of *forum non conveniens*, with Australia being the

more appropriate forum for the trial. I dismiss this alternative prayer for the reasons given in [39] to [41] above.

Conclusion

50 For the foregoing reasons, I dismiss this application in its entirety and will hear parties on costs.

Justin Yeo
Assistant Registrar

Mr Justin Ee, Mr Timothy Yong and Mr Terence Yeo
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Mr Mark Cham and Mr Matthew Tan
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