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

[2022] SGHCR 8

HC/S 1046 of 2020
HC/SUM 1361 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 – Jurisdiction]

Vibrant Group Ltd
v
Tong Chi Ho and others

[2022] SGHCR 8

General Division of the High Court — Suit No 1046 of 2020 (Summons No 1361 of 2022)
Justin Yeo AR
7 June 2022

4 July 2022

Justin Yeo AR:

1 On 1 April 2022, I rendered my decision in *Vibrant Group Ltd v Tong Chi Ho and others* [2022] SGHCR 4 ("*Vibrant Group*"). In *Vibrant Group*, I dismissed the application by Peng Yuguo ("the 2nd Defendant") to set aside orders 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 him in the People's Republic of China ("PRC"). The other two defendants, namely Tong Chi Ho ("the 1st Defendant") and Findex (Aust) Pty Ltd ("the 3rd Defendant"), were not parties to that application, although their respective counsel attended the hearing on watching brief.

2 On 7 April 2022, the 3rd Defendant brought the present application under O 12 r 7(1)(*c*) of the revoked Rules of Court as in force immediately before 1 April 2022 ("Rules of Court"), seeking similar relief, *ie*, to set aside an order

granting the Plaintiff leave to serve its Writ of Summons and Statement of Claim (Amendment No 1) on the 3rd Defendant in Australia. The order in question will henceforth be referred to as the "Leave Order".

3 I heard the application on 7 June 2022 and received further submissions on 24 June 2022. I set aside the Leave Order for the reasons explained in this judgment.

Background Facts

4 The background to the dispute, at least insofar as it involves the 1st and 2nd Defendants, is summarised in [3] to [16] of *Vibrant Group*. In the following paragraphs, I set out supplementary facts that are specifically relevant to the present application and the 3rd Defendant's involvement.

5 The 3rd Defendant is a company incorporated under the laws of Australia that provided financial advisory and accounting services. At the material time, the 3rd Defendant was known as Crowe Horwath (Aust) Pty Ltd; its name was changed to its present name on 1 April 2019. The 3rd Defendant operated (and operates) only in Australia.

6 Blackgold International Holdings Pty Ltd ("Blackgold"), an Australian company, engaged the 3rd Defendant to audit its annual financial report for the 2016 financial year ("the 2016 Financial Report"). The contract between Blackgold and the 3rd Defendant ("the Engagement Letter") is governed by Australian law and contains an exclusive jurisdiction clause in favour of the Australian courts.

7 The 3rd Defendant conducted the audit of Blackgold in accordance with the Australian Auditing Standards made under the Australian *Corporations Act 2001* (Cth). According to the 3rd Defendant, the audit report ("the Audit Report") was prepared and issued by the 3rd Defendant in Australia. The 3rd Defendant did not provide a copy of the Audit Report to the Plaintiff. The Plaintiff had obtained the Audit Report by downloading it from the website of the Australian Securities Exchange ("ASX").

8 After the Plaintiff acquired Blackgold, it discovered that some of the representations made by the 1st and 2nd Defendants (which, the Plaintiff claims, induced the acquisition) were false. These came to light following a special fact-finding investigation into certain irregularities and discrepancies, which 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. The Plaintiff commenced the present suit against the 1st and 2nd Defendants on 30 October 2020, with the primary causes of action being the torts of fraudulent misrepresentation and negligent misrepresentation.

9 More than a year later, the 3rd Defendant was added as a defendant on 1 December 2021. The Plaintiff pleaded that the 3rd Defendant was negligent, and specifically, that it had breached its duties by failing to:

(a) obtain sufficient, appropriate, relevant and/or reliable audit evidence (or any at all) to reduce audit risk to an acceptably low level;

(b) undertake any reasonable and/or proper investigation into, or consideration or assessment of the status and creditworthiness of

the Blackgold Group's debtors, the age of the debts, the likelihood of recoverability of the debts;

(c) undertake any reasonable and/or proper investigation into, or consideration or assessment of Blackgold's assessment or system of assessment of the creditworthiness of its customers (or any at all); and

(d) exercise reasonable care and/or competence in auditing the 2016 Financial Report and issuing the Audit Report and/or to exercise professional scepticism during the audit process.

10 The Plaintiff obtained the Leave Order and subsequently served the Writ of Summons and Statement of Claim (Amendment No 1) on the 3rd Defendant in Australia on 4 March 2022.

11 On 1 April 2022, I dismissed the 2nd Defendant's application to set aside the orders granting leave to the Plaintiff to serve its Writ of Summons and Statement of Claim on the 2nd Defendant in the PRC, for the reasons found in *Vibrant Group*.

12 On 7 April 2022, the 3rd Defendant brought the present application to set aside the Leave Order.

13 On 14 April 2022, an appeal was filed against my decision in *Vibrant Group.* That appeal has been held in abeyance pending my determination of the present application.

Issues

14 The requirements for valid service out of jurisdiction are well established (see the authorities cited in *Vibrant Group* at [18]), *ie*:

(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.

15 The 3rd Defendant does not dispute that the requirements in [14(a)] and [14(b)] are met (for completeness, the jurisdictional gateways relied upon by the Plaintiff are those found in O 11 r 1(*c*), (*f*)(ii) and (*p*) of the Rules of Court). Instead, the 3rd Defendant's contention is that the Leave Order ought to be set aside because the requirement in [14(c)] has not been made out. The issue is therefore whether Singapore is the proper forum for the trial of the claim between the Plaintiff and the 3rd Defendant ("the Proper Forum Issue").

16 The 3rd Defendant also contends that the Leave Order ought to be set aside for the Plaintiff's failure to make full and frank disclosure of material facts when applying, *ex parte*, for the Leave Order ("the Disclosure Issue").

The Proper Forum Issue

17 The Proper Forum Issue is to be determined by applying 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*").

18 At the first stage of the *Spiliada* test, 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]).

19 If the court finds that there is some other available forum that is more appropriate for the case to be tried, the matter proceeds 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]).

20 In relation to the burden of proof, the Plaintiff bears the burden of proving that Singapore is the proper forum for its claim against the 3rd Defendant (see *Zoom Communications Ltd v Broadcast Solutions Pte Ltd* [2014] 4 SLR 500 ("*Zoom Communications*") at [71] and [72]).

21 In my judgment, the Plaintiff has failed to demonstrate, on the balance of probabilities, that Singapore is the proper forum for its dispute with the 3rd Defendant. Based on the arguments and evidence put forward by the Plaintiff, I also do not see any circumstances for which justice requires the Singapore courts to exercise jurisdiction despite not being the *prima facie* natural forum. I analyse the various connecting factors in the following sections of this judgment.

Personal connections of the parties and witnesses

22 The first connecting factor concerns the personal connections of the parties and witnesses to a particular jurisdiction. This factor relates to the convenience (in terms of location of witnesses) and compellability of witnesses. It takes on greater significance when the disputes revolve around questions of fact (see *Rickshaw Investments Ltd v Nicolai Baron von Uexkull* [2007] 1 SLR(R) 377 ("*Rickshaw*") at [19]), especially where the potential key witnesses are third-party witnesses over whom the party to the dispute has no control (see *Lakshmi Anil Salgaocar v Jhaveri Darsan Jitendra* [2019] 2 SLR 372 at [73]).

23 The physical location of a witness has become less significant given the proliferation of evidence taking by video-link due to travel and other restrictions during the COVID-19 pandemic (see, *eg*, *Sinopec International (Singapore) Pte Ltd v Bank of Communications Co Ltd* [2021] SGHC 245 ("*Sinopec*") at [84] and *Bunge SA and another v Shrikant Bhasi and other appeals* [2020] 2 SLR 1223 at [50]). However, given that a Singapore court cannot compel a foreign witness to testify in Singapore, the *compellability* of a foreign witness remains an important consideration (see O 38 r 18(2) of the Rules of Court; and see *JIO Minerals FZC v Mineral Enterprises Ltd* [2011] 1 SLR 391 ("*JIO Minerals*") at

[71] and *MAN Diesel & Turbo SE v IM Skaugen SE* [2020] 1 SLR 327 ("*MAN Diesel*") at [148]).

24 In the present case, the 3rd Defendant is an Australian company that does not have any business presence in Singapore. The Plaintiff's pleaded allegations against the 3rd Defendant involve fact-centric questions (see [9] above). The relevant witnesses for the 3rd Defendant are the actual persons who conducted the audit, all of whom reside in Australia; they are also third-party witnesses who are no longer in the employ of the 3rd Defendant.[1]

25 It is undisputed that the 3rd Defendant's witnesses cannot be compelled to give evidence in these Singapore proceedings. However, Plaintiff's counsel raised two arguments as to why the personal connections of the witnesses still point towards Singapore:

> (a) First, the Plaintiff's witnesses are Singaporean or based in Singapore.[2] The Plaintiff's key witnesses are Khua Kian Keong (the Plaintiff's Chief Executive Officer), Tin It Phong ("Tin", the Chief Financial Officer of Blackgold at the material time), officers in the Plaintiff's finance team. There are also officers from Ernst & Young Advisory Pte Ltd ("Ernst & Young"), who had conducted the special investigation into the irregularities. The Plaintiff contends that Tin and the officers from Ernst & Young cannot be compelled to give evidence in Australian proceedings (citing *Australian Securities and Investments Commission (ASIC) v Rich* [2004] NSWSC 467 at [4]).

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1 Affidavit of Kim Lawrence Perry (dated 7 April 2022), at paragraphs 36 to 39.

2 Affidavit of Khua Kian Keong (dated 29 April 2022), at paragraph 37(a).

(b) Second, the Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters ("Hague Evidence Convention") – to which both Singapore and Australia are parties – "significantly dilute[s] (or even neutralise[s])" the fact that the 3rd Defendant's witnesses cannot be compelled to give evidence in the present suit.[3] The Hague Evidence Convention affords the 3rd Defendant an official, multilateral, facilitative mechanism to achieve compellability to a significant extent. Australia is obliged to "apply the appropriate measures of compulsion in the instances and to the same extent as are provided by its internal law for the execution of orders issued by the authorities of its own country or of requests made by parties in internal proceedings" (citing Article 10 of the Hague Evidence Convention).[4] In addition, pursuant to Article 12 of the Hague Evidence Convention, Australia can only refuse the execution of a letter of request in only two limited circumstances (*ie*, where the execution of the letter of request does not fall within the functions of Australia's judiciary, and where Australia considers that its sovereignty or security would be prejudiced)[5] and there is no evidence that either of these limited circumstances apply in the present case. As such, the practical effect of Articles 10 and 12 of the Hague Evidence Convention is that Australian domestic laws on compellability apply with equal force and effect to compel Australian witnesses to give evidence in Singapore.[6] Plaintiff's

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3 Plaintiff's submissions tendered at the hearing on 7 June 2022, at paragraph 3.4.

4 Plaintiff's further submissions (dated 24 June 2022), at paragraph 14.

5 Plaintiff's further submissions (dated 24 June 2022), at paragraph 15.

6 Plaintiff's further submissions (dated 24 June 2022), at paragraph 16.

> counsel further pointed out that in *Re Samsung C&T Corporation* [2017] FCA 1169, the Federal Court of Australia expressly endorsed the applicability and availability of the Hague Evidence Convention between Singapore and Australian parties.[7]

26 Neither of these arguments supports the Plaintiff's case that the witnesses are more closely connected to Singapore than Australia. Indeed, it appears to me that witness compellability would pose less of an impediment if the claim proceeds in Australia.

27 On the issue at [25(a)], the Plaintiff's witnesses may well be Singaporean or based in Singapore. However, when analysing the availability of evidence and witnesses, the focus is not primarily with the Plaintiff's evidence (given that it is the Plaintiff which wishes to pursue its claim in Singapore). Instead, the potential prejudice to the 3rd Defendant in running its defence is likely to be more significant for the purposes of the analysis (see *Ivanishvili Bidzina v Credit Suisse Trust Ltd* [2020] 2 SLR 638 ("*Ivanishvili*") at [86]; while *Ivanishvili* was decided in the context of an application for a stay on grounds of *forum non conveniens*, the same reasoning applies to the Proper Forum Issue). In relation to the Plaintiff's key witnesses, the Plaintiff's Chief Executive Officer and finance team are presumably willing to give evidence for the Plaintiff even if the claim proceeds overseas – in this regard, it is telling that the Plaintiff's professed difficulty with the compellability of its own witnesses is limited only to Tin and the officers from Ernst & Young.[8] However, it is unclear whether these witnesses (*ie* Tin and the officers from Ernst & Young)

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7 Plaintiff's further submissions (dated 24 June 2022), at paragraph 17.

8 Plaintiff's written submissions (dated 24 May 2022), at paragraph 77.

are actually in a position to give evidence on how the audit was conducted by the 3rd Defendant or what their evidence would add to the determination of the claim against the 3rd Defendant.[9] In contrast, there are clear issues with witness compellability if the claim proceeds in Singapore, given that the 3rd Defendant's witnesses – who have first-hand knowledge of the conduct of the audit – are third-party witnesses over whom the 3rd Defendant no longer has control.

28 On the issue at [25(b)], the Hague Evidence Convention is certainly a useful facilitative mechanism, and the fact that both Singapore and Australia are parties to it means that there is an increased likelihood of Australian witnesses giving evidence in Singapore proceedings and *vice versa*. However, I do not think that the potential application of the Hague Evidence Convention for the taking of evidence in the present suit "significantly dilute[s] (or even neutralise[s])" witness compellability as a factor pointing towards Australia as the more appropriate forum, for the following reasons:

(a) First, the Hague Evidence Convention is facilitative rather than mandatory in nature, in that it only requires a witness to testify pursuant to compulsion prescribed under the foreign law, if and when the foreign authority accedes to the request for judicial assistance (see *Sinopec* at [156]). As Plaintiff's counsel recognised, the Hague Evidence Convention does not guarantee witness compellability.[10]

(b) Second, mutual judicial assistance often involves a multitude of considerations and may be a "relatively more cumbersome means of

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9 3rd Defendant's written submissions (dated 24 May 2022) at paragraph 49.

10 Plaintiff's further submissions (dated 24 June 2022), at paragraph 13.

obtaining evidence" (see *Ivanishvili* at [96]). While arrangements and accommodations can be made, "it would *typically* be easier to secure the evidence of witnesses in the jurisdiction where they are located. All else being equal, this would be a factor pointing in favour of that jurisdiction, but its weight will depend on the circumstances of each case" (emphasis in original) (*Ivanishvili* at [96]). For example, taking evidence by deposition through mutual judicial assistance may not be suitable where the witness in question is a critical witness in relation to whom an assessment of credibility may be important in assisting the trial court's determination of the truth of the matter (see *UBS AG v Telesto Investments* [2011] 4 SLR 503 ("*UBS AG*") at [70]). In the present case, the 3rd Defendant's witnesses are the very auditors being accused of professional negligence in Australia, and who are – in all likelihood – going to be critical witnesses at the trial. It would be desirable that they are compellable to give evidence before the trial court, instead of having to take their evidence by deposition or other means.

(c) Third, the fact that both Singapore and Australia are parties to the Hague Evidence Convention cuts both ways, in that evidence can be taken thereunder from witnesses in *either* jurisdiction. For example, it can similarly be said that if the claim proceeds in Australia, the witnesses whom the Plaintiff professes to have difficulty compelling (*ie* Tin and the officers from Ernst & Young) may give evidence in the Australian proceedings under the Hague Evidence Convention. Indeed, given that the evidence of these witnesses appears less directly relevant (*contra* the evidence of the 3rd Defendant's non-party witnesses), on balance, mutual judicial assistance in the taking of evidence may be more suitable for these witnesses than for the 3rd Defendant's non-party witnesses.

(d) Fourth, and for completeness, based on the case authorities cited to me, it appears that the Singapore courts have not generally considered the Hague Evidence Convention to be a significant factor in the proper forum analysis (although this may also be because arguments on the Hague Evidence Convention were not raised by counsel in those cases). In *MAN Diesel*, the witnesses were in Germany and Norway; in *Ivanishvili*, the witnesses were in Switzerland; in *TMT Co Ltd v The Royal Bank of Scotland plc (trading as RBS Greenwich Futures)* [2018] 3 SLR 70, the witnesses were in England; and in *Good Earth Agricultural Co Ltd v Novus International Pte Ltd* [2008] 2 SLR(R) 711, the witnesses were in Hong Kong. All the above-mentioned countries are parties to the Hague Evidence Convention. However, save for the court considering the possibility of seeking judicial assistance from the Swiss courts in *Ivanishvili* (and concluding that the court will usually assume that it is easier to secure the evidence of witnesses in the jurisdiction where they are located), none of these case authorities expressly addressed the relevance of the Hague Evidence Convention in determining the proper forum for the dispute.

29 I therefore find that the personal connections of the parties and witnesses points away from Singapore, and towards Australia, as the proper forum for the Plaintiff's claim against the 3rd Defendant.

Connections to relevant events and applicable law to the dispute

30 The second and third types of connecting factors enumerated in *Rappo* concern the connections to relevant events and transactions, and the law applicable to the dispute. I consider both types of connecting factors together because they are intertwined in the present application.

31 The place where the tort occurred is *prima facie* the natural forum for determining the claim (*Rickshaw* at [37]). In order to determine the place of the tort, the approach is to consider the events constituting the tort and to ask *where*, *in substance*, the cause of action arose (see *JIO Minerals* at [90] and *MAN Diesel* at [113]).

32 For the Plaintiff's claim against the 3rd Defendant, I find that the place of the tort is Australia.

(a) First, the duty of care allegedly owed by the 3rd Defendant is based on Australian law. Specifically, the issue is whether the 3rd Defendant had taken reasonable care in satisfying itself that the financial reports were prepared in accordance with the Australian Accounting Standards as required under the Australian *Corporations Act 2001*.[11] The Statement of Claim clearly raises issues such as whether the 3rd Defendant had "complied with the accounting standards prescribed by the Australian Accounting Standards Board" and whether the 3rd Defendant had ensured that the financial reports "conformed to generally accepted accounting policies, principles and practices applicable in Australia".[12] In addition, the Plaintiff specifically pleaded that it would rely on the Australian *Corporations Act 2001*, the Australian Accounting Standards and the Australian Auditing Standards.[13]

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11 Statement of Claim (Amendment No 1) at paragraph 53B.

12 Statement of Claim (Amendment No 1), at paragraph 53B.

13 Statement of Claim (Amendment No 1), at paragraph 53B.

(b) Second, the 3rd Defendant's evidence is that the allegedly negligent audit was conducted in Australia, and the Audit Report was issued in Australia. It is undisputed that the audit work was done pursuant to a contract governed by Australian law, with an exclusive jurisdiction clause in favour of the Australian courts. In this regard, the evidence of the Plaintiff's Chief Executive Officer is that he *did not know* where the audit work was actually performed and where the Audit Report was issued.[14] Plaintiff's counsel submitted that based on the affidavit of the 3rd Defendant's representative, it appeared that parts of the audit may have been conducted in the PRC or Malaysia, given that subsidiaries of the Blackgold Group were companies incorporated in the PRC, and given that Crowe Horwath Malaysia was involved as a component auditor.[15] While I am not in a position to determine, on the evidence before me, the precise geographical locations in which the audit work was conducted, the point remains that there is *no evidence at all*, *and the Plaintiff does not contend*, that the audit was conducted in *Singapore*. As such, 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.

(c) Third, I pause to address the Plaintiff's arguments that Singapore is the place in which it *relied* on the Audit Report and *suffered loss and damage* (through transferring funds from Singapore for the acquisition of Blackgold, as well as incurring costs and expenses in investigating the irregularities and complying with investigations conducted by the

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14 Affidavit of Khua Kian Keong (dated 29 April 2022), at paragraph 33(a).

15 Plaintiff's written submissions (dated 24 May 2022), at paragraph 83.

Singapore Exchange). In *Vibrant Group*, I found that Singapore was the proper forum for the claims against the 2nd Defendant, after considering factors including the place of reliance (albeit in the context of reliance on the representations of the 1st and 2nd Defendants) and the place where loss and damage was suffered (see *Vibrant Group* at [35] and [40(d)]). However, the present situation is somewhat different from that in *Vibrant Group.* While the Plaintiff's reliance on representations is a *significant and major element* in the context of the misrepresentation claims against the 1st and 2nd Defendants, the same arguably cannot be said of the Plaintiff's reliance on the Audit Report in the context of the negligence claim against the 3rd Defendant. The place where loss and damage was suffered is also not by itself determinative of the place of the tort. Weighing all the factors in the balance, the place of reliance or the place where loss and damage was suffered does not, in my view, sufficiently displace the considerations in [32(a)] and [32(b)] above. On balance, the place of the tort is Australia, which accordingly appears to be the natural forum for determining the claim.

33 For completeness, I address two other points raised by Plaintiff's counsel, which did not alter my analysis.

(a) First, Plaintiff's counsel submitted that one reason supporting Singapore as the proper forum was that the "double actionability rule" was met in this case.[16] The "double actionability rule" posits that for a tort, wherever committed, to be actionable in Singapore, the alleged wrong must be actionable as a wrong *both* under the law of the forum

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16 Plaintiff's written submissions (dated 24 May 2022), at paragraph 67.

and the place where the wrong was committed. However, as 3rd Defendant's counsel pointed out, the reference to the "double actionability rule" appears to be an attempt by the Plaintiff to "pull itself up by its own bootstraps".[17] In essence, the Plaintiff was suggesting that because it commenced the claim against the 3rd Defendant in Singapore, the application of the "double actionability rule" somehow meant that Singapore became the proper forum. This argument is reminiscent of that described by the court as "misplaced" in *Nippon Catalyst Pte Ltd v PT Trans-Pacific Petrochemical Indotama and another* [2018] SGHC 126 ("*Nippon Catalyst*") at [60]. As the court observed, the "double actionability rule" is conceptually distinct from the question of whether Singapore is the proper forum and is not intended to assist the court in determining the proper forum (*Nippon Catalyst* at [60]).

(b) Second, Plaintiff's counsel submitted that the Singapore courts were fully capable of hearing and determining disputes and issues governed by foreign law (including Australian law) with the input of expert evidence.[18] This submission does not add anything to the Plaintiff's argument that Singapore is the proper forum, as it is simply a general statement of the uncontroverted fact that there exists a mechanism to determine issues of foreign law if so required. Plaintiff's counsel further pointed out that there were Australian Judges sitting in the Singapore International Commercial Court ("SICC"), and therefore, that there was no reason for the Singapore courts to avoid determining the dispute simply because it may be governed by Australian law (citing

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17 3rd Defendant's counsel's oral submissions at the hearing on 7 June 2022.

18 Plaintiff's written submissions (dated 24 May 2022), at paragraph 107.

Rappo at [116]).[19] While it is true that the qualities and capabilities of the SICC may be considered, the weight to be accorded to the "SICC factor" must be understood in the light of the subsequent decision of *MAN Diesel*. In *MAN Diesel*, the court cautioned that the "SICC factor" in itself will not be sufficient to displace a foreign jurisdiction which is the more appropriate forum based on the conventional connecting factors; at the very most, less weight will be placed on the fact that the governing law is something other than Singapore law (*MAN Diesel* at [144]). It should also be kept in mind that in *Rappo*, the court emphasised the importance of a plaintiff proving that the dispute is of a nature that lends itself to the SICC's capabilities, and for the court to consider whether the requirements for a transfer to the SICC would likely be satisfied (see *Rappo* at [124]). In the present application, the Plaintiff did not raise any arguments to substantiate any potential transfer to the SICC. Indeed, the Plaintiff did not indicate any intention to transfer the matter to the SICC at all. As such, for purposes of determining the proper forum, I do not place any significant weight on the undoubted capability of the Singapore courts (in general) and the SICC (in particular) to determine issues of foreign law as a factor in favour of Singapore being the proper forum.

Existence of proceedings elsewhere

34 The fourth connecting factor concerns the existence of proceedings elsewhere. To clarify, there are no proceedings presently existing elsewhere. The only existing legal proceedings are found in Singapore by way of the

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19 Plaintiff's written submissions (dated 24 May 2022), at paragraph 107.

present suit. The issue relating to this connecting factor is therefore the possibility of proceedings being commenced elsewhere (specifically, Australia) if the present application is granted, resulting in concurrent proceedings in Singapore and Australia.

35 Plaintiff's counsel contended that if the Leave Order is set aside and the Plaintiff's claim against the 3rd Defendant must be pursued in Australia, the relevant Australian limitation period will expire sometime in July 2023. This compels the Plaintiff to commence an action against the 3rd Defendant in Australia promptly once the Leave Order is set aside,[20] which will result in concurrent proceedings in Singapore and Australia. He further contended that there is a serious risk of conflicting or inconsistent decisions if the claims against the 1st and 2nd Defendants are tried in Singapore, while the claim against the 3rd Defendant is tried in Australia. This risk comes about because the falsity (or otherwise) of the 1st and 2nd Defendants' representations to the Plaintiff is relevant to the question of whether the 3rd Defendant had breached its duty of care to the Plaintiff in failing to detect the untruths.[21] Put another way, in deciding the negligence claim against the 3rd Defendant, the court will inevitably have to first ascertain the falsity (or otherwise) of the 1st and 2nd Defendants' representations.[22]

36 While there is some factual link between the claims against the 1st and 2nd Defendants on the one hand and the claim against the 3rd Defendant on the other, the analysis must focus more practically on the *degree of impact* any

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20 Plaintiff's further submissions (dated 24 June 2022), at paragraphs 6 and 7.

21 Plaintiff's written submissions (dated 24 May 2022), at paragraph 70.

22 Plaintiff's written submissions (dated 24 May 2022), at paragraph 70.

overlapping proceedings would have on the justice of the case, and whether there is any *sufficiently real possibility of conflicting findings of fact* (see *Ivanishvili* at [114]). In this regard, I think that the risk of conflicting or inconsistent decisions is overstated, as is any impact of potentially overlapping proceedings on the justice of the case.

(a) First, while I am not in a position to comment on the substantive correctness of the Plaintiff's position on the Australian law on limitation (in the absence of expert evidence on the matter), even if the Plaintiff's understanding is correct and proceedings must be promptly instituted in Australia resulting in concurrent proceedings, there are legal options and judicial case management tools that can be considered which can minimise the risk of conflicting or inconsistent decisions. This is especially so given that even the proceedings in Singapore are in the early stages.

(b) Second, while determining the falsity of the representations is logically prior to the question of whether the 3rd Defendant was negligent in failing to detect the falsity, the claim against the 3rd Defendant involves a different set of issues and inquiries. The claims against the 1st and 2nd Defendants involve investigating the falsity (or otherwise) of the representations made by the 1st and 2nd Defendants. In contrast, the claim against the 3rd Defendant involves a consideration of the actual documents perused by the 3rd Defendant during the audit, the 3rd Defendant's actions or omissions in conducting the audit, the scope of the 3rd Defendant's obligations and whether a reasonable auditor in the 3rd Defendant's same position would have reached the same conclusions. To illustrate the different issues at hand: even assuming that

> the documents provided to the 3rd Defendant for the audit indeed contained falsehoods, that is only the beginning of the inquiry against the 3rd Defendant; the court determining the Plaintiff's claim against the 3rd Defendant must consider this in the light of the contractual clauses in the Engagement Letter (*eg* those specifying the applicable standard of audit or those specifying that the 3rd Defendant would not be auditing or independently verifying certain accounting records or the accuracy and completeness of documentation provided to it).

37 While still on the connecting factor concerning the existence of proceedings elsewhere, it bears noting that the Engagement Letter contains an indemnity clause under which Blackgold agreed to indemnify the 3rd Defendant, to the extent permitted by the Australian *Corporations Act 2001*, from any liabilities, losses, claims, costs, damages or expenses. Given the exclusive jurisdiction clause (in favour of the Australian courts) that governs the Engagement Letter, any third-party proceedings or counterclaims brought by the 3rd Defendant to seek a contribution or indemnity *must* be brought in Australia. Those indemnity proceedings cannot be pursued in Singapore and if so brought, must be stayed in favour of the Australian courts (see *Choice of Court Agreements Act 2016* (Cap 39A, 2020 Rev Ed), s 12). In my assessment, the issue of whether such indemnity proceedings will eventually be brought is presently speculative. Also, it appears undisputed that the exclusive jurisdiction clause does not bind the Plaintiff (not being a party to the Engagement Letter). Be that as it may, the existence of an exclusive jurisdiction clause in the Engagement Letter is a factor (albeit not a strong one) in favour of the claim against the 3rd Defendant being brought in the forum where any putative indemnity proceedings must be filed, *ie*, Australia.

38 For completeness, on my query, the 3rd Defendant has confirmed that if the Leave Order is set aside, it will *not* apply to intervene in the present suit as it is not a necessary party thereto under O 15 r 6 of the Rules of Court.[23]

39 I find that the connecting factor concerning the existence of proceedings elsewhere does not point in favour of Singapore as the proper forum.

Shape of the litigation

40 The fifth connecting factor, *ie* "shape of the litigation", concerns the manner in which the parties have pleaded their cases (*Rappo* at [71]). The Plaintiff has pleaded a claim for negligence against the 3rd Defendant, based on Australian law as well as Australian accounting and auditing standards (see [32(a)] above). This connecting factor therefore does not point in favour of Singapore as the proper forum for the Plaintiff's claim against the 3rd Defendant; instead, Australia again appears to be the proper forum.

Conclusion on the Proper Forum Issue

41 For the reasons detailed [17] to [40] above, I find that the Plaintiff has failed to demonstrate that Singapore is the proper forum for the Plaintiff's claim against the 3rd Defendant. I also do not see any circumstances for which justice requires the Singapore courts to exercise jurisdiction despite not being the *prima facie* natural forum.

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[23] 3rd Defendant's further submissions (dated 24 June 2022), at paragraphs 3 and 4.

The Disclosure Issue

42 My decision on the Proper Forum Issue is sufficient for setting aside the Leave Order. However, as counsel had provided detailed submissions on the Disclosure Issue, I address this issue for completeness as well.

43 The relevant legal principles may be simply stated as follows:

(a) In an *ex parte* application, an applicant has a duty to make full and frank disclosure of all matters within the applicant's knowledge which might be material to the matter (*The "Vasiliy Golovnin"* [2008] 4 SLR(R) 994 ("*Vasiliy Golovnin*") at [83]).

(b) The duty of full and frank disclosure extends only to "plausible, and not all conceivable or theoretical, defences" (*Vasiliy Golovnin* at [87]).

(c) 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]).

(d) While non-disclosure of material facts is a ground for setting aside the order obtained *ex parte*, 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]). For instance, in the context of an order obtained *ex parte* for service of process out of jurisdiction, it is possible that the non-disclosure may not displace the fact that the connecting factors taken as a whole nonetheless point to Singapore as the proper forum (*Zoom Communications* at [91]).

44 In the affidavit supporting the application for the Leave Order, the Plaintiff had disclosed that the 3rd Defendant was an Australian company, that Blackgold is an Australian company listed on the ASX, that Blackgold had engaged the 3rd Defendant to "prepare an auditor's report, in accordance with Part 2M.3 of the Australian Corporations Act 2001",[24] and that the resulting Audit Report had referred to the Australian "Corporations Act 2001", "Australian Accounting Standards", "Corporate Regulations 2001" and "International Financial Reporting Standards".[25]

45 The crux of the 3rd Defendant's complaint is that when applying for the Leave Order, the Plaintiff failed to disclose certain facts which effectively downplayed the substantial connection between the dispute and Australia. The main alleged non-disclosures concern the failure to mention material facts relating to (a) the relevant governing law (*ie*, that the Engagement Letter was governed by Australia and was subject to an exclusive jurisdiction clause in the Engagement Letter, which the Plaintiff would have known about had proper inquiries been made); and (b) the place of the tort, given that the Plaintiff must have known that an Australian company (*ie* the 3rd Defendant) auditing another Australian company (*ie* Blackgold) would likely have conducted the audit in

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24 Affidavit of Khua Kian Keong (dated 23 December 2021), at paragraph 11.

25 Affidavit of Khua Kian Keong (dated 23 December 2021), at paragraph 20.

Australia, and given that the Plaintiff had itself obtained the Audit Report from the ASX website.

46 Plaintiff's counsel submitted that the non-disclosures were immaterial. This is because the exclusive jurisdiction clause in the Engagement Letter was irrelevant to the Plaintiff's claim against the 3rd Defendant, given that the claim was based on the tort of negligence. Furthermore, the Plaintiff was not a party to the Engagement Letter and the governing law or exclusive jurisdiction clause did not bind the Plaintiff. The existence of the exclusive jurisdiction clause is therefore not a "plausible" defence to the Plaintiff's application for the Leave Order. In relation to the location where the audit work was performed, the Plaintiff claimed to be unaware of the geographical location(s) in which the audit was performed or the Audit Report was issued, and it was thus not possible for the Plaintiff to disclose such information in its application for the Leave Order; what the Plaintiff knew at that time was that the 2016 Financial Report and the Audit Report were received by the Plaintiff in Singapore, and that the Plaintiff had suffered loss and damage in Singapore.

47 To my mind, the only omission is that the Plaintiff did not draw the court's attention specifically to the exclusive jurisdiction clause in the Engagement Letter. However, I do not think that this is a material omission, given that the Plaintiff (a) had already disclosed various other linkages to Australia; and (b) is not bound by the Engagement Letter or the exclusive jurisdiction clause found therein. While I did consider the exclusive jurisdiction clause in weighing the connecting factor concerning the existence of proceedings elsewhere, this was ultimately not a strong factor (see [37] above). Overall, I do not think that the omission to expressly mention the exclusive jurisdiction clause is a material non-disclosure that would, in itself, warrant the

setting aside of the Leave Order. However, this is now moot given my decision to set the Leave Order aside on the basis of the connecting factors.

Conclusion

48 For the foregoing reasons, I set aside the Leave Order and will hear parties on costs.

Justin Yeo
Assistant Registrar

Mr Justin Ee, Mr Timothy Yong and Mr Terence Yeo
(M/s TSMP Law Corporation) for the Plaintiff.
Mr Terence Tan (M/s Drew & Napier LLC) for the 3rd Defendant.