Focus Energy Ltd v Aye Aye Soe
[2008] SGHC 206

Case Number : Suit 65/2008, RA 221/2008

Decision Date : 12 November 2008

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : Harish Kumar and Goh Seow Hui (Rajah & Tann LLP) for the plaintiff; Andy Chiok (Michael Khoo & Partners) for the defendant

Parties : Focus Energy Ltd — Aye Aye Soe

Conflict of Laws – Natural forum – Whether Myanmar clearly more appropriate forum than Singapore – Relevant issues and evidence determining connecting factors to forum

12 November 2008

Judith Prakash J:

1 This was a stay application by the defendant on the basis that Singapore was not the natural forum for the action. It was first heard before Assistant Registrar Teo Guan Siew ("the AR") who dismissed it. The defendant appealed. I heard the appeal and, agreeing with the AR, dismissed it. The defendant has appealed further.

2 The plaintiff is a company incorporated in the Territory of the British Virgin Islands ("BVI") and is registered as a branch of a foreign corporation in the Union of Myanmar ("Myanmar"). The defendant was a director of the plaintiff until 20 November 2007. The plaintiff is a contractor to the Myanma Oil and Gas Enterprise ("MOGE") and is in the business of enhancing oil production at an oilfield in Myanmar under a Modified Performance Compensation Contract (the "PCC Contract") dated 18 July 1997, originally entered into between MOGE and Asia Pacific Energy Company Limited, a company incorporated in the BVI.

The plaintiff's claim

3 The key individuals involved in the plaintiff's operations were its directors Martin Christen, Maung Maung Kaw Shaw and Carl Stadelhofer. The defendant was the wife of Maung Maung Kaw Shaw. In May 2003, Martin Christen passed away and his son Unni Christen became a director of the plaintiff. In August 2004 Maung Maung Kaw Shaw passed away and the defendant became a director of the plaintiff. From October 2004 Carl Stadelhofer was bought out and thereafter only Unni Christen and the defendant had management control of the plaintiff's operations in Myanmar. Unni Christen had control of the plaintiff's bank account while the defendant managed its day-to-day operations. In 2005 disputes arose between the plaintiff and Unni Christen in relation to the plaintiff's financial affairs. It should be noted that while the plaintiff maintains that its sole shareholder is Sun Energy Holding Inc, a Panamanian company, the defendant asserts that she too is a shareholder of the plaintiff.

4 The plaintiff maintained two principal bank accounts, one in Myanmar with the Myanmar Investment Commission Bank and one outside Myanmar, first with UBS AG in Zurich and later with United Overseas Bank Limited ("UOB") in Singapore. MOGE paid the plaintiff through the Myanma Foreign Trade Bank ("MFTB") in US dollars. Payments to the plaintiff were remitted by MFTB by

telegraphic transfer to the plaintiff's UBS account. Around January 2004, MFTB became unable to make payment to the plaintiff by telegraphic transfer, and started paying the plaintiff in cash instead. The plaintiff therefore opened an account with UOB to receive the cash payments couriered from MFTB in Myanmar to Singapore by KMA Corp Pte Ltd ("KMA"), a company incorporated in Singapore.

5 The plaintiff makes two main allegations in its statement of claim: first, that the defendant and KMA had conspired to have KMA charge the plaintiff 5% of the amount of cash couriered, with KMA actually receiving only about 2% and the defendant pocketing the rest ("the alleged courier conspiracy"). Second, the plaintiff alleges that the defendant then wrongfully procured the agreement of MOGE's former managing director to permit her to deposit the cash payments into her personal account with UOB (the defendant's "UOB Account") with the assurance that she would use the monies only for the plaintiff's legitimate purposes. The plaintiff further alleges that from July 2005 the defendant breached her fiduciary duties to it by depositing the cash payments into bank accounts other than her UOB Account.

6 According to the plaintiff's statement of claim, around January 2006 MOGE was able to resume payment to the plaintiff by way of telegraphic transfer and these payments were all made to the defendant's UOB Account. However, payments meant for the plaintiff continued to be made to the defendant's UOB Account until about July 2007 when the new managing director of MOGE insisted that payments meant for the plaintiff be made to the plaintiff's account.

7 The plaintiff thus brought this action on 29 January 2008 for an account and inquiry in relation to all moneys received by the defendant as a result of the alleged courier conspiracy and from payments by MOGE meant for the plaintiff but allegedly diverted, in breach of the defendant's fiduciary duties, to her UOB Account or other accounts from July 2005 to July 2007. The plaintiff claims, *inter alia*, an order that the defendant account to the plaintiff for (i) all payments made by MOGE meant for the plaintiff but which were instead paid into the defendant's personal account(s) and any income or proceeds from such payments; and (ii) all sums received by her as a result of the alleged courier conspiracy. The plaintiff also seeks all necessary and proper inquiries and directions for the taking of such accounts, as well as restitution of all moneys misappropriated from the plaintiff.

The defence

8 In her defence, the defendant denies that she received 3% of the couriered moneys from KMA pursuant to the alleged courier conspiracy. She avers that the dispute between her and Unni Christen concerns the wrongful withdrawal of monies from the plaintiff's UOB account in Singapore operated solely by Unni Christen, and states that she has since commenced Civil Regular Suit No. 1372 of 2007 in the Divisional court of Yangon, Myanmar. The defendant does not dispute that MOGE paid monies temporarily into her UOB Account, but pleads that this was to ensure the smooth continuity of the plaintiff's operations pending the resolution of her dispute with Unni Christen. The defendant denies that the payments were made wrongfully or in breach of fiduciary duty and reiterates that the monies were used for legitimate purposes for the plaintiff's benefit, such as disbursement of funds for its operation and overheads. Finally, the defendant also pleads that Singapore is not the appropriate forum for the trial of this action, which should be heard in the courts of Myanmar.

The stay application

9 On 31 January 2008 the plaintiff obtained an interim injunction restraining the defendant from operating various specific accounts into which the plaintiff's moneys had flowed, owned or controlled by her in Singapore and elsewhere. The defendant has not challenged this injunction order. The plaintiff also obtained leave to serve the writ out of jurisdiction as the defendant is resident in

Myanmar. Two months later, the defendant's Singapore solicitors accepted service on her behalf. On 9 April 2008 they entered an appearance on her behalf and took out an application for a stay of the action on the ground of *forum non conveniens* or under the court's inherent jurisdiction, as well as for leave to set aside the Order of Court granting the plaintiff leave to serve the writ of summons on the defendant out of Singapore. This latter application was subsequently dropped. The sole issue that I had to decide, thus, became whether Myanmar or Singapore was the appropriate forum for this action.

10 The defendant argued that Myanmar was the more appropriate forum for the trial of the action. To begin with, the defendant was domiciled in Myanmar, and witnesses, particularly MOGE directors and the plaintiff's chief accountant Aung Thet Swe, were also resident in Myanmar and it was "unlikely that the witnesses from MOGE [would] even leave Myanmar to testify in Singapore."

11 Second, the defendant argued that the alleged wrongs took place in Myanmar: the diversion of moneys paid by MOGE took place in Myanmar and "the fact that the monies flowed into Singapore bank accounts is irrelevant, for the alleged tort is completed once MOGE agreed to make payment and did make payment to an account designated by the defendant, be it in Singapore or elsewhere". The alleged courier conspiracy formed only a small part of the plaintiff's claim and concerned the issue of whether, from the time when the defendant became a director in August 2004 to April 2005 when the KMA arrangement ceased, there was "proper disclosure of such payments to KMA to the plaintiff's management". The defendant argued that this issue could only be tried by adducing evidence from the relevant management of the plaintiff and its chief accountant, and had nothing to do with KMA in Singapore.

12 Third, the defendant argued that the fact that the fruits of the alleged wrongs were in Singapore was not relevant because the real issue was whether the defendant "breached her fiduciary duties when she diverted the monies to the Singapore bank accounts. If she did so, then the relevant tracing remedies will follow suit. The fact that the monies flowed into the Singapore banks is wholly irrelevant, for regardless where judgment was obtained, the plaintiff would have its rights to recovery of these monies". Further, the defendant submitted, having deposed in her affidavit at [31], [36] and [37] that much of the monies had been paid out of the Singapore bank accounts to the plaintiff's creditors and remitted back to Myanmar for its operations, the significance of the Singapore banks was reduced and did not affect the alleged liability of the defendant. Finally, the defendant argued that there was a competent body to resolve the dispute in Myanmar, and that the proper law governing the defendant's duties to the plaintiff was Myanmar law; even if it was not Myanmar law but BVI law, this would be a neutral factor in determining whether Myanmar or Singapore was the natural forum.

13 The plaintiff submitted that the defendant having admitted that she diverted moneys paid by MOGE that were to be paid to the plaintiff, she had no defence to the plaintiff's claim for an account and an inquiry; her explanation as to what she did with these moneys or the possibility that some or all of the appropriations might have been legitimate would not detract from her obligation to account or the necessity for an inquiry. The plaintiff also submitted that, with respect to the alleged courier conspiracy, the defendant had to account both on the plaintiff's end where she took the moneys and on the KMA end where she paid the moneys, and there must be an inquiry in this regard.

14 The plaintiff argued that Myanmar was not clearly or distinctly the more appropriate forum because the diversion occurred in Singapore and to the defendant's accounts located (like the plaintiff's principal bank account) in Singapore. The defendant thus had assets in Singapore. As for the alleged courier conspiracy, the plaintiff acknowledged that it was unable to plead the particulars relating to the conspiracy but argued that it was "likely that their agreement was concluded or at

least worked out in Singapore as KMA is a Singapore company and the sums that were misappropriated by the defendant under the alleged conspiracy were couriered to Singapore by KMA in cash and were received into and paid out of bank accounts in Singapore". Thus in substance the cause of action arose in Singapore; Singapore was therefore the place of the tort and *prima facie* the natural forum.

Issues arising from the plaintiff's claim

15 On her appeal against the decision of the AR, the defendant argued that there were three main issues to be determined at trial:

(a) The identity of the true owners of the plaintiff, and whether the defendant was one of the owners;

(b) Whether the diversion of funds from MOGE was in the interest of the plaintiff; and

(c) Whether there was any conspiracy between the defendant and KMA to overcharge the plaintiff.

16 I did and do not accept this formulation of the issues. The plaintiff makes clear that it has two claims: the tortious claim for the alleged courier conspiracy and the company law and equitable claim for breach of fiduciary duty. With regard to the latter, the plaintiff seeks an account by the defendant of what became of the moneys that were to be paid to the plaintiff but were instead diverted into the defendant's personal bank accounts. There is simply no issue of who the "true owners" of the plaintiff are, since the defendant is being sued in her capacity as director. Nor is the issue of whether the diversion was in the plaintiff's interest relevant to the present action. Meagher, Gummow and Lehane, *Equity Doctrines and Remedies* (4th Ed, 2002) ("Meagher, Gummow and Lehane") state at p875, [25-025]:

> In any case where a plaintiff seeks the remedy of an account, he must prove, *inter alia*, that the defendant is an accounting party, and that he, the plaintiff, is entitled to some sum from the defendant, although he is uncertain what is the quantum of that sum. He must do more than demonstrate that he might be owed some money, or that he wants, as it were, to have a kind of general discovery.

17 They then describe at (p871, [25-020]) as one of eight categories where equity could "decree an account in aid of a common law right" a case where:

> although the right relied on by the plaintiff was legal, the parties stood in a quasi-fiduciary relationship or a relationship of confidence. … In *Asset Risk Management Ltd v Hyndes* BC9909077; [1999] NSWCA 201 the New South Wales Court of Appeal made an order to account against the manager of the plaintiff company, who admitted he had stolen $46,000,000 of the company's money, but declined to say what he had done with it.

18 The defendant admits that the moneys were indeed diverted (defendant's affidavit at [21]):

> It is a fact that between August 2005 to [*sic*] August 2007, monies paid from MOGE to FEL were paid into two bank accounts operated by me:
>
> a . A US Dollar bank account No. 01-X-XXXXXX-X in the name of Integrated marketing Limited ("IML") maintained with the SCB ("the IML account"), and

b. My Account i.e. my US Dollar account No. 352-XXX-XXX-X with the UOB ("the Account").

In this regard, I admit paragraph 40 of Smith's 1st Affidavit as well as the payments referred in paragraph 44 of Smith's 1st Affidavit.

19 Paragraphs 40 and 44 of Smith's first affidavit read as follows:

There are a number of facts that confirm that payments from MOGE were made either into the Account and/or to IML's account No. 01-X-XXXXXX-X with SCB.

…

Fourth, there are a number of remittance advices from UOB that show that MOGE telegraphed its payments into the Account (this is, from the period from in or about January 2006 when it was able to resume payment by this mode):

(i) Payment of US$663,070.48 from MFTB to the Account on 26 April 2006 with the entry under "Remittance Information" stating "SETM FOR INCREMENTAL OIL PRODUCTION IN JULY 2005", that is, in payment of the plaintiff's invoice for Incremental Production in July 2005;

(ii) Payment of US$500,000 from MFTB to the Account on 15 June 2006 with the entry under "Remittance Information" stating "SETM FOR INCREMENTAL OIL PRODUCTION IN AUG '05", that is, in payment of the plaintiff's invoice for Incremental Production in August 2005;

(iii) Payment of US$500,000 from MFTB to the Account on 20 June 2006 with the entry under "Remittance Information" stating "SETM FOR INCREMENTAL OIL PRODUCTION IN AUGUST 2005", that is, in payment of the plaintiff's invoice for Incremental Production in August 2005;

(iv) Payment of US$405,661.03 from MFTB to the Account on 20 June 2006 with the entry under "Remittance Information" stating "SETM FOR INCREMENTAL OIL PRODUCTION IN AUGUST 2005", that is, in payment of the plaintiff's invoice for Incremental Production in August 2005;

(v) Payment of US$500,000 from MFTB to the Account on 18 July 2006 with the entry under "Remittance Information" stating "SETM FOR INCREMENTAL OIL PRODUCTION IN SEP '05", that is, in payment of the plaintiff's invoice for Incremental Production in September 2005;

(vi) Payment of US$500,000 from MFTB to the Account on 21 August 2006 with the entry under "Remittance Information" stating "SETM FOR INCREMENTAL OIL PRODUCTION IN SEPT '05", that is, in payment of the plaintiff's invoice for Incremental Production in September 2005;

(vii) Payment of US$436,099.46 from MFTB to the Account on 29 August 2006 with the entry under "Remittance Information" stating "SETM FOR INCREMENTAL OIL PRODUCTION IN SEPT '05", that is, in payment of the plaintiff's invoice for Incremental Production in September 2005; and

(viii) Payment of US$500,000 from MFTB to the Account on 11 September 2006 with the entry under "Remittance Information" stating "SETM FOR INCREMENTAL OIL PRODUCTION IN OCT '05", that is, in payment of the plaintiff's invoice for Incremental Production in October 2005;

20 The defendant thus has not admitted to *stealing* the moneys, but she has admitted to diverting them. The issues of justification or necessity (because Unni Christen allegedly refused to release

monies for the plaintiff's operations from the plaintiff's UOB account) raised by her defence must be considered in tandem with her account of what happened to the moneys. Meagher, Gummow and Lehane at 178, [5-110] note (albeit in the different context of account for profits by a fiduciary):

> The authorities are unanimous in holding that whether or not there is actual fraud, dishonesty or bad faith on the part of the fiduciary is irrelevant to his liability. He may be liable although his integrity emerges from the proceedings unscathed.

21 Similarly, the Court of Appeal observed in *Ng Bok Eng Holdings Pte Ltd and anor v Wong Ser Wan* [2005] 4 SLR 561 at [54]:

> Under para 14 of the First Schedule to the Supreme Court of Judicature Act (Cap 322, 1999 Rev Ed), it is expressly provided that the High Court has the "[p]ower to grant all reliefs and remedies at law and in equity". Of course, this only sets out the general power of the High Court. It would be for the court in each case to decide whether a particular relief ought to be granted in the circumstances there prevailing. As we have noted above, Lord Hardwicke in Higgins did not give any reason as to why the relief by way of account should not be ordered in addition to the relief of having the property, which was conveyed in breach of the Elizabethan Statute, restored. *While it is true that an account of profits is the traditional remedy for breaches of equitable obligations, it did not mean that that remedy may not be granted by the court in other situations. No rule should remain immutable in the eyes of equity. Ultimately, it is the justice of the case which will dictate what relief will be appropriate.* [emphasis added]

22 The plaintiff will have to prove at trial a breach of fiduciary duty by the defendant in order to obtain its equitable remedy of an account and recover any monies wrongfully retained in the defendant's possession, but having admitted to the fact of diversion, the defendant would have to explain both her reasons for diverting the monies, as well as what then became of them. I agreed therefore with the plaintiff's submission that "the evidence of the witnesses will be chiefly relevant for determining the legitimacy of the items in the account to be provided by the defendant," as well as for determining whether she was justified in diverting the moneys. The defendant's resistance to explaining what became of the diverted moneys in the sense of producing information and proof of whether she spent them for the plaintiff's legitimate purposes, will be largely futile in light of her admission. Thus, the correct issues are whether the defendant did conspire with KMA to cheat the plaintiff pursuant to the alleged courier conspiracy, and whether the defendant breached her fiduciary duties to the plaintiff by diverting moneys from MOGE to which it was entitled.

The law on *forum non conveniens*

23 The principles for determining the appropriate forum to hear an action are well settled. Under the two-stage *Spiliada* test (*Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460), the defendant seeking a stay must first not only show that Singapore is not the natural or appropriate forum for the trial, but establish that there is another available forum which is clearly or distinctly more appropriate than Singapore ("stage one of the *Spiliada* test," *per* Lord Goff at 477). If the court concludes at this stage of the inquiry that there is no other available forum which is clearly more appropriate for the trial of the action, it will ordinarily refuse a stay. If it concludes that there is some other available forum which *prima facie* is clearly more appropriate for the trial of the action, it will ordinarily grant a stay unless the plaintiff can show that there are circumstances by reason of which justice requires that a stay should nevertheless be refused ("stage two of the *Spiliada* test," *per* Lord Goff at 478). At stage two, the court will consider all the circumstances of the case, going beyond those taken into account when considering connecting factors with other jurisdictions.

Stage one: whether there exists a clearly more appropriate forum

24 The "natural forum" is "that with which the action [has] the most real and substantial connection." (*The Abidin Daver* [1984] AC 398 at 415 *per* Lord Keith) The connecting factors include the law governing the relationship between the parties, the parties' places of residence or business, and those factors affecting convenience or expense, such as the availability of witnesses.

25 As discussed above, the defendant has admitted that she diverted monies paid by MOGE and meant for the plaintiff (receiving the monies in its Singapore account) to her personal accounts. The issue is not the factual one of *whether* she did so, but the quite straightforward question of whether she was justified in doing so and whether thereafter she applied the monies properly for the plaintiff's purposes. This clarifies what evidence, including documents and witnesses' testimony, will be relevant at the trial and will thus constitute connecting factors pointing to its natural forum.

26 The Court of Appeal held in *Rickshaw Investments Ltd v Nicolai Baron von Uexkull* [2007] 1 SLR 377 ("*Rickshaw*") at [19] that:

> the importance of the location and the compellability of the witnesses depends on whether the main disputes revolve around questions of fact. If they do, and for example, the judge's assessment of a witness's credibility is crucial, then the location of the witnesses takes on greater significance because there would be savings of time and resources if the trial is held in the forum in which the witnesses reside and where they are *clearly* compellable to testify.

27 As the plaintiff argued, the location and compellability of the defendant's witnesses would not be a critically important connecting factor to Myanmar. Given that the claim is for an account of how the defendant dealt with the moneys diverted, the testimony of witnesses such as the former chief directors of MOGE does not appear relevant since "there is *no claim* for conspiracy in relation to whatever arrangements the defendant may have made with MOGE that allowed her to divert payments by MOGE to accounts owned or controlled by her". Similarly, the defendant did not state what evidence the finance directors of MOGE would have to offer, or whether they would be compellable even in Myanmar, and the relevance of their testimony also seems doubtful.

28 As for the alleged courier conspiracy, the plaintiff's case that Singapore is the appropriate forum to hear this dispute might have been stronger had KMA been joined as a defendant. However, considering that the amount in dispute is only approximately $180,000, the alleged courier conspiracy forms only a small part of the plaintiff's claim and the fact that Singapore is clearly the natural forum to hear this claim is a contributing but not determinative factor.

29 The circumstances surrounding the diversions of the moneys are relevant to determining whether the defendant was in breach of fiduciary duty. However, the relevant witnesses whose testimony would determine whether the diversions were justified would be Unni Christen and the defendant, and perhaps the plaintiff's other employees, all of whom can be examined equally here or in Myanmar. MOGE's directors do not have to testify because it is not in dispute that MOGE agreed to the diversion by the defendant. As the plaintiff points out, that the diversion "happened with the cooperation of [MOGE's officers] U San Lwin and U Myint Kyi is a fact but beyond that whatever views they may have to offer in this regard are clearly irrelevant".

The law governing the defendant's alleged breach of fiduciary duty

30 In *Rickshaw* ([26] *supra*) at [42], the Court of Appeal affirmed the general principle that where a dispute is governed by a foreign *lex causae*, the forum would be less adept in applying this law than

the courts of the jurisdiction from which the *lex causae* originated. It would save time and resources for a court to apply the law of its own jurisdiction to the substantive dispute. The Court of Appeal in *Rickshaw* also discussed at length (at [74]-[84]) and with some approval Professor Yeo Tiong Min's thesis that the concept of equity is not a separate and distinct category itself for choice of law purposes; rather equitable rights and remedies arise from foundational sources such as contract and tort which would more helpfully point to the applicable law. The Court of Appeal nevertheless limited its holding at [81] to the proposition that:

> where equitable duties (here, in relation to both breach of fiduciary duty and breach of confidence) arise from a factual matrix where the legal foundation is premised on an independent established category such as contract or tort, the appropriate principle in so far as the choice of law is concerned ought to be centred on the established category concerned.

31 Thus in the absence of a contract between the parties specifying the governing law, the law that should govern equitable claims is to be determined by the legal source of the equitable claim in question. In this case, the basis of the plaintiff's claim for an account due to alleged breach of fiduciary duties is the defendant's relationship with the plaintiff as its director. The law that governs this relationship is BVI law, the plaintiff having been incorporated in BVI. In *Base Metal Trading Ltd v Shamurin* [2005] 1 WLR 1157, the English Court of Appeal (*per* Tuckey LJ) held at [56]:

> The equitable duty arises from and only from the director's relationship with the company. If it does not relate to the constitution of the company, it must I think relate to its internal management. A director's duties to his company are inextricable bound up with these matters and must therefore be governed by the place of the company's incorporation. Any other result would create huge uncertainty and hamper the requirement for good corporate governance and proper regulatory control.

32 While Tuckey LJ was reluctant to reach this conclusion because it meant that under English choice of law rules the common-law duty and the equitable duty could be determined by different laws, this must be the correct position: "the duty of care in tort is not company specific, whereas the equitable duty is. The company provides the context in which the director assumes responsibility but is not crucial to the existence of the common law duty." (*Base Metal* at [57]) As Arden LJ observed at [67], "[t]he principle of conflicts of law that the law of the place of incorporation applies to matters of substantive company law [had] been applied by the English courts" prior to the Rome Convention's entry into force. Arden LJ reasoned at [69]:

> …the law of the place of incorporation applies to the duties inherent in the office of director and it is irrelevant that the alleged breach of duty was committed, or the loss incurred, in some other jurisdiction. Accordingly, these duties can only be modified by contract to the extent that the law of the place of incorporation allows. It is not open to the company and the director to contend that they have contractually varied the liabilities imposed by the law of the place of incorporation by the terms of a contract for the appointment of the director governed by some other law, unless it is also shown that the law of the place of incorporation would allow this. In the matter of directors' duties – which are essential to good corporate governance and to any effective system of law regulating companies – party autonomy is the exception not the rule, and its scope is always a matter for the law of the place of incorporation.

33 Although Singapore is not a party to the Rome Convention on the Law applicable to Contractual Obligations, the court's reasoning is equally salient here. The plaintiff was incorporated in the BVI, and the defendant is a director rather than a mere employee of the Myanmar branch office. The applicable law with regard to the alleged breach of fiduciary duty must thus be BVI law, which is materially

similar to the common law in Singapore, or at least no more similar to Myanmar law than Singapore law. Thus this too is a neutral factor, or even, considering, according to the evidence of U Nyi Nyi, the defendant's Myanmar lawyer, that Myanmar jurisprudence contains "no reported decision of the Myanmar courts where the causes of action known as the action for '*breach of fiduciary duty*' and the action for '*conspiracy to injure by unlawful means*' have been adjudicated in the Myanmar courts", perhaps indicates that a trial in Singapore might be more efficient. I should, however, add that it was also U Nyi Nyi's evidence that the causes of action would be maintainable in Myanmar as the Burma Laws Act recognises the applicability of "justice equity and good conscience" to situations that are not specifically governed by Buddhist, Muslim or Hindu law.

34 As for the law applicable to the alleged courier conspiracy, the Court of Appeal, citing with approval Goff LJ's reasoning in *Cordoba Shipping Co Ltd v National State Bank, Elizabeth, New Jersey (The Albaforth)* [1984] 2 Lloyd's Rep 91 at 96, affirmed in *Rickshaw* ([26] *supra*) at [37] and [40] the general rule that "the place where a tort occurred is *prima facie* the natural forum for determining the claim," though "this is only one of the factors to be taken into account in the overall analysis, albeit a significant one." I accept the plaintiff's submission that, the precise details of the alleged conspiracy not having yet been alleged, the alleged kickback of 3% to the defendant's Singapore bank account from payments for cash couriered to the plaintiff's Singapore bank account by a Singapore courier company, constitutes an alleged tort that occurred in Singapore. This renders the double-actionability rule moot since the *lex fori* and the *lex loci delicti* are the same: see *Rickshaw* at [59]. Thus the law applicable to the alleged courier conspiracy must be Singapore law. Though this is a small claim in comparison with the claim for breach of fiduciary duty, it is one factor pointing to Singapore as the natural forum. On balance, therefore, Singapore is the more appropriate forum to hear the trial of the action, as far as the applicable laws governing the plaintiff's claims are concerned.

35 Alternatively, a more general conception of the plaintiff's claim as an action based on unjust enrichment also points to Singapore as the natural forum. *Dicey, Morris and Collins on The Conflict of Laws* (Sweet & Maxwell, 14th Ed, 2006) ("*Dicey, Morris and Collins*") at [34-030] state:

> [I]n the absence of a prior relationship between the parties to which reference may be made, or which may contribute to the identification of the proper law of the obligation to make restitution, the law of the place where the enrichment occurred may be expected to be that which has the best claim to be applied to any obligation to restore.

36 I have found that the breach of fiduciary duty, if any, would stem from the parties' relationship as company and director, the applicable law governing that relationship being the law of the plaintiff's place of incorporation – BVI law. Nevertheless, an alternative analysis based on unjust enrichment conceptually buttresses the appropriateness of having the trial in Singapore. Citing this extract from *Dicey, Morris and Collins* at [58], the Court of Appeal in *CIMB Bank Bhd v Dresdner Kleinwort Ltd* [2008] SGCA 36 observed at [59] that "in view of the diverse situations in which a restitutionary claim may arise, the place of enrichment may not always be the place with which the claim has the closest connection." For example, in *Arab Monetary Fund v Hashim* [1996] 1 Lloyd's Rep 589 at 597, the English Court of Appeal held that the applicable law to govern the recovery of a bribe received by an employee in Switzerland was that of Abu Dhabi, because Abu Dhabi law governed the employment relationship and it was in Abu Dhabi that the building contract in question was awarded to the briber as a result of the dishonest abuse of the briber's and the employee's relationship with the employer. The court did not consider it significant in the circumstances that the bribe was paid in Switzerland.

37 In the present case, however, the fact that the defendant was allegedly enriched in Singapore when the diverted moneys and the kickback from the alleged courier conspiracy were deposited into her Singapore bank accounts, is not outweighed by any more determinative or significant fact relating

to her alleged breach of fiduciary duty or the conspiracy. Rather, the fact that Singapore is the place of the defendant's enrichment is but a prelude to the real crux of the present dispute – the defendant's use or retention of the moneys after they came into her possession. Singapore is thus the place of the defendant's wrongful conduct in refusing to account for or return the moneys, and on this basis too it has the most real and substantial connection to the claim.

The defendant's complaint and civil suit in Myanmar

38 The defendant states in her affidavit at [12] that the present action "has its origins in a dispute between [Unni Christen] and [the defendant] in 2005 arising from his refusal/inability to account for about US$2.5m that [was] drawn by him from [the plaintiff's] UOB account." She alleges that the specific payments were US$2,012,208.76 received by Unni Christen, US$575,673.27 paid to one Peter Rowson, and US$15,000 paid to M/s Baker & McKenzie. As a result of her queries regarding these amounts, the defendant alleges that Unni Christen "took a defensive position and with his control of [the plaintiff's] UOB account, did not release any monies towards [its] operations." (Defendant's affidavit at [13]) The defendant states that she has since lodged a complaint in the Bahan Township Court against Unni Christen, and commenced a civil action in the Divisional Court in Yangon to recover the monies. (The plaintiff, on the other hand, avers that the defendant "caused a complaint to be lodged with the police in Myanmar the purpose of which was to scare off [Unni Christen] from coming to Yangon."[note: 1])

39 The defendant, referring to a meeting on 11 August 2005 between MOGE and the plaintiff (represented by the defendant and Unni Christen), states that Unni Christen agreed to return the monies paid to Peter Rowson and M/s Baker & McKenzie, but did not subsequently make good this promise. The translated minutes of the meeting read:

> Daw Aye Aye Soe speaks that Unni shall pay Lawyer's fees US$15000 at his owned money so that Unni has to reply that he shall repay the Lawyer's fees US$15,000 and US$565,673 which was paid to Peter, to EFL's accounts.

40 These allegations have no direct bearing on the issues in present action, though they may perhaps be somewhat relevant to the defendant's justification for diverting the plaintiff's moneys to her own accounts. The complaint and civil suit against Unni Christen would involve different factual allegations though parts of the chronology of the dispute may overlap with the present action; but the Myanmar suit does not constitute concurrent proceedings or even a possible counterclaim since the parties are not the same. Even if similar findings of fact would have to be made in the Myanmar suit and the present action, this is no reason in the present case to stay the proceedings here between the plaintiff and the defendant.

41 Parallel proceedings involving trials of the same dispute in different forums are almost certain to be inefficient, expensive, and raise enforcement issues, and should be avoided or prevented. However, the pending suit in Myanmar is not a parallel proceeding in the present case, and accordingly it is not a factor pointing to Myanmar as the natural forum for the trial of the plaintiff's claim.

42 At stage one of the *Spiliada* test, therefore, I found that Singapore was the natural forum having the most real and substantial connection with the action. Myanmar was not as appropriate, much less *clearly or distinctly more* appropriate a forum than Singapore.

Whether there exist circumstances by reason of which justice requires that a stay nevertheless be refused

43 Even if Myanmar was the clearly more appropriate forum than Singapore, the plaintiff may still establish circumstances by reason of which justice requires that a stay should nevertheless not be granted. At stage two of the *Spiliada* test, the court will consider all the circumstances of the case, going beyond those taken into account when considering connecting factors with other jurisdictions. As Lord Goff noted in *Spiliada* ([23] *supra*) at 478, citing Lord Diplock in *The Abidin Daver* ([24] *supra*) at 411, "[o]ne such factor can be the fact, if established objectively by cogent evidence, that the plaintiff will not obtain justice in the foreign jurisdiction." It should be noted, however, that the mere fact that the plaintiff has a legitimate personal or juridical advantage in proceeding in Singapore is not decisive; regard must be had to the interests of all the parties and the ends of justice.

44 The plaintiff confined its submissions to stage one of the *Spiliada* test, except for an odd throwaway assertion that "any judgment obtained in Myanmar will not be enforceable in Singapore where the defendant's assets are located". This is clearly incorrect, and the plaintiff rightly did not pursue the point. The plaintiff did not assert the existence of other circumstances by reason of which justice would require that a stay be refused (even if Myanmar were clearly the more appropriate forum). Despite the dearth of jurisprudence involving issues of breach of fiduciary duty, I gave some credit to the view of the defendant's expert U Nyi Nyi that such an action "may be recognised under section 13(3) of the Burma Laws Act by reason of Myanmar courts' English common law tradition". Accordingly, had the matter reached stage two, I would have found that the plaintiff had failed to satisfy the requirements for preventing a stay.

Conclusion

45 The defendant failed to show that Myanmar or any other forum was clearly or distinctly more appropriate than Singapore. The foremost factors contributing to Singapore being the appropriate forum (at least as appropriate as Myanmar might be) include the fact that the moneys were diverted to the defendant's accounts in Singapore, and the alleged courier conspiracy involved a Singapore company as well as payments into the defendant's Singapore accounts. Most importantly, the defendant's admission that moneys meant for the plaintiff actually were diverted to her accounts did away with the need for evidence on whether any diversions, wrongful or justified, in fact took place. Had the defendant denied taking the moneys, witnesses and documents from MOGE might be needed, and these could have been considered connecting factors pointing to Myanmar as the natural forum. However, this was not the case, and the plaintiff had affirmed that its witnesses would all be able to testify in Singapore.

46 Where more than one forum is appropriate, the plaintiff does not have to affirmatively choose the forum that might be marginally more appropriate than the other(s) to bring its claim. The plaintiff has the right to elect to bring its claim in a forum where the court has jurisdiction, provided only that there be no other forum that is *clearly or distinctly* more appropriate. In the present case, the location of the witnesses and the applicable law were largely neutral factors. Importantly, the bank accounts and relevant evidence were located in Singapore. The appeal was therefore dismissed.

[note: 1]Affidavit of Michael Scott Smith at [78(8)].