TGT *v* TGU
[2015] SGHCF 10

Case Number : Registrar's Appeal (Family Courts) No 22 of 2015

Decision Date : 22 October 2015

Tribunal/Court : High Court

Coram : Foo Tuat Yien JC

Counsel Name(s) : Gloria James-Civetta and Shen Luda Genesis (Gloria James-Civetta & Co) for the appellant; Koh Tien Hua and Thian Wen Yi (Harry Elias Partnership LLP) for the respondent.

Parties : TGT — TGU

Conflict of laws – Natural forum

Family law – Maintenance – Child

22 October 2015 Judgment reserved.

Foo Tuat Yien JC:

1 This is a father's appeal against a district judge's refusal to stay a mother's application for maintenance of their son, R, under s 5 of the Guardianship of Infants Act (Cap 122, 1985 Rev Ed) ("the Guardianship of Infants Act"), on the ground of *forum non conveniens*. The father contends that the Hong Kong Special Administrative Region is a clearly more appropriate forum.

2 The mother and R are citizens of and reside in Hong Kong. R, who was born out of wedlock, is now over 21 years old. He is autistic and has been diagnosed with obsessive compulsive disorder. The father is a British citizen who holds permanent residencies in Hong Kong and Singapore. He is currently employed and resides in Singapore.

3 The mother's case is that she was driven to make the application in Singapore because she had not done so in Hong Kong and is out of time under Hong Kong law. The mother's Hong Kong solicitors have advised that s 12A of the Hong Kong Guardianship of Minors Ordinance (Chapter 13) ("the HK Guardianship of Minors Ordinance") provides that an application to a Hong Kong court for child maintenance must be made *before* a child becomes 18 years old, the age of majority in Hong Kong. While the Hong Kong Matrimonial Proceedings and Property Act (Chapter 192) allows applications for child maintenance to be made after a child reaches 18 years of age, this avenue is only open for child maintenance for a *legitimate* child and not a child born out of wedlock. [note: 1] Both ordinances empower a court, in specified circumstances, to order child maintenance to continue beyond 18 years of age.

4 In contrast, an application for child maintenance under s 5 of the Guardianship of Infants Act in Singapore may be made in respect of *any* child before he reaches 21 years of age, the age of majority in Singapore. The mother applied for maintenance for R in Singapore on 5 February 2015, which is about one month shy of R's 21st birthday. It must also be noted that under s 69 of the Women's Charter (Cap 353, 2009 Rev Ed) ("the Women's Charter"), an application for child maintenance (whether for a child of the marriage or one born out of wedlock) may be filed after a child attains the age of 21 years and the court may make an order for child maintenance beyond that age in certain

circumstances.

5 The learned district judge, applying the two-stage test in *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460 ("the *Spiliada*"), found Hong Kong to be the more appropriate forum at the first stage. At the second stage, she was satisfied that a stay would deprive R of a right of action in maintenance against the father. An application for R's maintenance under the HK Guardianship of Minors Ordinance was out of the question as the mother had not applied before R became 18 years old. The learned district judge held that Singapore law regarded the child's welfare as the paramount consideration. The issue of comity of nations was also not engaged as there was no competing law suit in Hong Kong. She therefore declined to grant a stay.

6 This appeal raises three related questions. First, whether Hong Kong is an available forum within the meaning of the *Spiliada* test. Second, if Hong Kong is an available forum, whether it is clearly more appropriate than Singapore. Third, whether a stay should in any event be refused to prevent denial of substantial justice.

7 I agree with the learned district judge that Hong Kong is an available and clearly more appropriate forum. My view, however, is that there will be no denial of substantial justice if the proceedings in Singapore are stayed. I therefore allow the appeal and grant an unconditional stay of proceedings in Singapore. These are my reasons.

The facts

The parties

8 The father is 62 years old and is the regional head at the Singapore branch of a foreign bank. His monthly salary is about $26,000 inclusive of bonus, based on figures from 2013. [note: 2] He owns a family home in the UK and lives in a rented apartment in Singapore. He claims he is due to retire in three years, [note: 3] and will return to the UK thereafter. [note: 4]

9 The mother is 57 years old. She has been unemployed since February 2014, save for three months between October and November 2014. She was previously employed by banks, including investment banks. Her tax documents indicate she was paid a substantial salary. She earned HK$2,729,915 (about S$500,000) in the 2011/2012 financial year, HK$2,382,507 (about S$430,000) in the 2012/2013 financial year, and HK$1,857,280 (about S$330,000) in the 2013/2014 financial year. [note: 5] She has made job applications, including to Goldman Sachs and Sumitomo Nikko with interviews in London on separate occasions, [note: 6] and Credit Suisse in Hong Kong. [note: 7] Her applications were, however not successful. The mother owns a family home in Hong Kong and an apartment in London, that she bought in 2013 for the elder daughter, who is studying there. [note: 8] The mother claims she borrowed money from her sister and ex-husband to buy the latter property. She is not servicing any bank loans for the properties. [note: 9]

The relationship

10 The father and mother became intimate in July 1988 after meeting at their workplace in a bank in Hong Kong. The father was her supervisor, and both were then married with children. The father remains so married. The father and mother had two children together but never married. An elder daughter was born to them in 1992, and R, in 1994. The mother divorced her husband only later in 1999. [note: 10]

11 Parties dispute when their relationship broke down. According to the father, it deteriorated in the mid-1990s and ended in 1998 or 1999. The mother says their relationship "continued ... until June 2014". [note: 11] The father's position is credible and consistent with his departure from Hong Kong in 1998 and the correspondence between them in 1995 through their respective Hong Kong solicitors. The correspondence acknowledged "the relationship between them [was] at an end" and canvassed arrangements for the children's provision. [note: 12] The father objected when the mother wanted to announce their children's births to his family members. He wanted to save his marriage and afford to his wife and family protection from the mother's harassment. [note: 13] Their negotiations on the maintenance and setting up of a trust fund for the children were inconclusive and trailed off when the mother did not respond to the father's proposal in November 1995. I will come back to this correspondence and deal with it in greater detail later.

12 The father left for Singapore in 1998, went to the UK in 2006 and returned to work in Singapore in 2012. The mother remained in Hong Kong with the children. Their relationship would seem to have been cordial after the breakdown. They and the children met up for meals or outings on occasion when they were both in Hong Kong, Singapore or the UK. The father's current employment and residence here are essentially the only connecting factors to Singapore.

The children

13 Both children are Hong Kong citizens who were born and raised there. The elder daughter, who is 23 years old, left Hong Kong in 2005 to attend boarding school in the UK and is reading for a degree in architecture at a London university. [note: 14] The mother pays for the daughter's tuition and expenses, but received sporadic payments from the father for that purpose. [note: 15] The mother bought an apartment in London in 2013 for the daughter to stay.

14 R has lived in Hong Kong his entire life. He was diagnosed with autism and later with obsessive compulsive disorder. The mother says he is unable to look after himself and is also difficult to look after. [note: 16] He is non-verbal, excitable, easily distracted, and prone to outbursts on occasion. He is on medication and has to attend treatment and therapy sessions with psychiatrists and speech therapists. The mother is currently maintaining three household helpers, including a driver, as this is necessitated by R's condition. [note: 17] She claims his condition caused six previous household helpers to resign in less than one year.

The maintenance application

15 The mother claims she applied for maintenance in Singapore only in February 2015 when she began to face financial difficulty having been unemployed since February 2014. She has "resorted to borrowing from various banks" [note: 18] to tide herself and R over. She is "amassing a huge debt" [note: 19] to pay for the son's living expenses, and needs financial assistance from the father. Her affidavit suggests this is the first maintenance application she has made. [note: 20] This contrasts with the father's position that she had made two such applications in Hong Kong in 1995 and 1996, but allowed both to lapse. [note: 21]

16 The mother claims she receives funds on an *ad hoc* basis from the father and had received some funds between February and June 2014. [note: 22] It appears that until as recently as June 2014, the father would have been willing to continue to provide funds for the family but only on condition that the mother signed an agreement not to disclose his payments for the purpose of legal

proceedings or to third parties. [note: 23] The mother refused to do so.

The law

17 The applicable principles as set out by the House of Lords in the *Spiliada*, have been accepted by the Singapore Court of Appeal (see *Rickshaw Investments Ltd and another v Nicolai Baron von Uexkull* [2007] 1 SLR(R) 377 at [12]–[15]). The test is the practical outworking of a singular unifying principle, that is, the identification of the court which should adjudicate the dispute most suitably for the "interest[s] of the parties and the ends of justice": *PT Hutan Domas Raya v Yue Xiu Enterprises (Holdings) Ltd and another* [2001] 1 SLR(R) 104 at [17].

18 The first stage is identification of the most appropriate forum for the trial of the action. The onus is on the defendant to establish that there is a clearly more appropriate forum than Singapore. If the defendant succeeds, then a stay will ordinarily be granted. At the second stage, the plaintiff may persuade the court to refuse to grant the stay if the plaintiff can establish that he will be denied of substantial justice if he is forced to pursue his claim in the more appropriate foreign court.

19 The *Spiliada* principles have been applied to matrimonial proceedings (see *Sanjeev Sharma s/o Shri Sarvjeet Sharma v Surbhi Ahuja d/o Sh Virendra Kumar Ahuja* [2015] 3 SLR 1056 at [12]) and applications relating to children or maintenance (see *TDX v TDY* [2015] 4 SLR 982 ("*TDX v TDY*") at [14]; *BDA v BDB* [2013] 1 SLR 607 ("*BDA v BDB*") at [21]). These cases involved situations with parallel proceedings in Singapore and a foreign forum.

Whether Hong Kong is not an available forum within the meaning of the *Spiliada* test

20 The legal opinion of the mother's Hong Kong solicitors have been outlined at [3] above. The father does not dispute that the courts in Hong Kong do not have jurisdiction to hear a maintenance application if the application is filed after a child born out of wedlock reaches the age of 18 years. He was offered (by the learned district judge), but declined the opportunity to seek his own legal opinion. The mother argues Hong Kong is not an available forum because she had "not commenced any maintenance application in Hong Kong, and there is no possibility of the Mother commencing maintenance proceedings in Hong Kong now". [note: 24]

21 The question of when a foreign court is available in such circumstances has been given only cursory treatment in the literature and case law. A foreign court will be available if it has "competent jurisdiction" (see J J Fawcett and J M Carruthers, *Cheshire, North & Fawcett's Private International Law* (Oxford University Press, 14th Ed, 2008) at p 429) or "it is open to the plaintiff to institute proceedings as of right in that forum" (see *Hindocha and ors v Gheewala and ors* [2004] 1 CLC 502 at [22] *per* Lord Walker of Gestingthorpe). The question of whether a foreign court is an available forum must be approached in a "practical manner": *Lubbe and others v Cape plc* [2000] 1 WLR 1545 ("*Lubbe v Cape*") at 1564E *per* Lord Hope of Craighead. Thus in *Lubbe v Cape*, a defendant's undertaking to submit to the jurisdiction of a foreign court was sufficient to establish that the forum was available even though the defendant was otherwise not subject to the *in personam* jurisdiction of the foreign court.

22 The legal opinion of the mother's Hong Kong solicitors does not elaborate on the context in advising that the Hong Kong court "does not have jurisdiction" to entertain a maintenance application. The precise meaning the word "jurisdiction" bears when it is used in the common law tradition is elusive. Lord Bridge of Harwich said in *In re McC (A minor)* [1985] 1 AC 528 (at 536B–536C) that:

> There are many words in common usage in the law which have no precise or constant meaning. But few, I think, have been used with so many different shades of meaning in the different contexts or have so freely acquired new meanings with the development of the law as the word jurisdiction.

23 The mother's argument [note: 25] confuses the absence of jurisdiction, which renders a forum unavailable with the unavailability of relief under the law that will be applied by that forum. The latter situation does not render a forum unavailable, but rather, is a factor more properly considered in the second stage of the *Spiliada* analysis.

24 R, a citizen of, resident and present in Hong Kong remains subject to a Hong Kong court's jurisdiction. That the mother can no longer apply for his maintenance is a matter going to the Hong Kong court's power. There is no need to go into the technical meanings of "jurisdiction". Instead, adopting the practical approach taken by the authorities at [21] above, my view is that Hong Kong *is* an available forum. This case is akin to cases, where a plaintiff's claim is time-barred in a foreign court, or where a remedy that a plaintiff is seeking is unavailable in the foreign court. Such situations have traditionally been analysed within the second stage, and not on the basis that the foreign court was unavailable, which would foreclose the *Spiliada* inquiry altogether.

25 In *Petroleo Brasiliero SA v Mellitus Shipping Inc and ors* [2001] CLC 1151 ("*Petroleo Brasiliero*"), a time-charterer, Fortum, brought Part 20 proceedings (the English equivalent of third-party proceedings) against a shipper, who sought to set aside service out of jurisdiction for *forum non conveniens*. It was argued before the English Court of Appeal that Saudi Arabia was a clearly more appropriate forum than England. It was common ground that Fortum's claim would fail in Saudi Arabia because Saudi Arabia did not recognise a claim for contribution. Potter LJ, with whom Jonathan Parker and Sedley LJJ agreed, stated in no uncertain terms that the absence of a good claim in Saudi Arabia did not make it an unavailable forum (see *Petroleo Brasiliero* at [35]):

> 35. **It is of course the case that, in principle, Saudi Arabia is an 'available forum' in the *Spiliada* sense, in that there is no physical or administrative barrier to Fortum seeking to take proceedings there, but it is common ground that there would be no point whatever in Fortum doing so, since the remedy it seeks is not available.** It is also correct, as made clear by Mustill LJ in a different context in *The Eras EIL Actions* at p.610, that in a case where the parties between whom a contribution is sought have expressly chosen a foreign substantive or procedural law applicable to all disputes between them, the fact that that law does not include a right to contribution will not be sufficient to persuade the court that the foreign party from whom contribution is claimed should be joined in proceedings in England. …
>
> [emphasis added in bold]

26 In the same vein, Lord Goff of Chieveley in the *Spiliada* thought a plaintiff's claim being time-barred in a foreign forum was a matter to be determined in the second stage of the *Spiliada* analysis. He did not consider it as affecting the availability of the foreign court.

27 *Baridhi Shipping Lines Ltd and another v Sea Consortium Pte Ltd and another* [2002] 2 SLR(R) 269 ("*Baridhi Shipping*") is an example where the Singapore court held that a foreign court, which declined jurisdiction, was an available forum. Lee Seiu Kin JC (as he then was) had stayed a defamation action in Singapore on the ground that Bangladesh was a clearly more appropriate forum. The Bangladesh court, however, declined jurisdiction, stating that the plaintiff should have proceeded in Singapore. Lee JC, in dealing with the plaintiff's application to lift the stay of proceedings, said "[t]he burden rests on the defendants to show that Bangladesh is the more appropriate forum ... [o]n

the evidence before me, they have clearly not done so": *Baridhi Shipping* at [15]. Lee JC's statement on the defendant's failure to show that Bangladesh was the more appropriate forum appears to have rested on the basis that it was then still an available forum.

28 The approach I have taken is also consistent with that expressed in *Dicey, Morris and Collins on the Conflict of Laws* vol 1 (Sweet & Maxwell, 15th Ed, 2015) (gen ed Lord Collins of Mapesbury) ("*Dicey, Morris and Collins*") at para 12-032, and by Professor Yeo Tiong Min in *Halsbury's Laws of Singapore* vol 6(2) (LexisNexis, 2013 Reissue) ("*Halsbury's Laws of Singapore*") at p 80:

> A third difficulty is *whether the plaintiff who has no claim no remedy or would face a complete defence, under the choice of law rules applied by the foreign court, has an 'alternative' forum to resort to*. It is clear that if the plaintiff's claim is time-barred under the law applied by the foreign court, the foreign court nevertheless remains an alternative forum, and the issue of time-bar is considered under the question of substantial justice. It [is] also clear that the natural forum principle is premised on justice to *both* parties, and should not favour either party to the litigation. *These principles imply that the answer to the question posed is that the plaintiff does have an alternative forum, and that these factors should be considered under the question of substantial justice*. [emphasis added]

I respectfully agree with Professor Yeo's analysis. I therefore reject the mother's argument that Hong Kong is not an available forum within the first stage of the *Spiliada* analysis.

Whether Hong Kong is clearly more appropriate than Singapore for the trial of the action

29 At the first stage, where the court determines the forum with which the dispute has the most real and substantial connection, factors of convenience and expense are involved. It is relevant to consider Lord Goff's statements in the *Spiliada* (at 477F–478B):

> ... Since the question is whether there exists some other forum which is clearly more appropriate for the trial of the action, the court will look first to see what factors there are which point in the direction of another forum. These are the factors, which Lord Diplock described in *MacShannon*'s case [1978] A.C. 795, 812, as indicating that justice can be done in the other forum at "substantially less inconvenience or expense." Having regard to the anxiety expressed in your Lordships' House in the *Société du Gaz* case, 1926 S. C. (H.L.) 13 concerning the use of the word 'convenience' in this context, I respectfully consider that it may be more desirable, now that the English and Scottish principles are regarded as being the same, to adopt the expression used by my noble and learned friend, Lord Keith of Kinkel, in *The Abidin Daver* [1984] A.C. 398, 415, when he referred to the "natural forum" as being "that with which the action had the most real and substantial connection." So it is for connecting factors in this sense that the court must first look; and these will include not only factors affecting convenience and expense (such as availability of witnesses), but also other factors, such as the law governing the relevant transaction (as to which see *Credit Chimique v James Scott Engineering Group Ltd.*, 1982 S.L.T. 131), and the places where the parties respectively reside or carry on business.

30 In a family case with international elements, a forum court first determines which court is the most appropriate to deal with the matter. In *TDX v TDY*, a wife applied for custody, care and control of the child of the marriage under s 3 of the Guardianship of Infants Act. The husband applied to stay the wife's application in Singapore on the ground of *forum non conveniens*. Divorce proceedings were already afoot in Hong Kong, and the husband argued Hong Kong was clearly more appropriate than Singapore. The husband appealed the district judge's decision refusing to stay the Singapore proceedings.

31 Debbie Ong JC allowed the appeal and granted the stay. Her discussion of the interaction between the *Spiliada* principles and the welfare principle, which has been described as the "golden thread" in proceedings affecting the interests of children (see *BNT v BNS* [2015] 3 SLR 973 at [19]), is instructive. Ong JC said it was not inconsistent with the welfare principle to "allow a court with substantial connection to the dispute to determine the matter": *TDX v TDY* at [13]. The proper approach was not for the forum court to assess what the welfare of the child required, but to determine *which court* was more appropriate to determine the welfare of the child (at [20]–[22]):

> 20 ... In my view, the District Judge focused too heavily on the factors relating to the child's welfare in the domestic sense and did not give sufficient consideration to the other factors which are in fact highly relevant in a case involving international elements and *forum non conveniens*. ... This is an application for a stay of proceedings. The welfare principle remains paramount but the court must properly apply the doctrine of *forum non conveniens* in this case and decide if Singapore is the more appropriate forum to decide the matter before going on to make fresh orders on its merits.
>
> 21 I find the exposition made by Lord Donaldson of Lymington MR in *Re F (A Minor) (Abduction: Custody Rights)* [1991] Fam 25 helpful in explaining this (at 31):
>
> > The welfare of the child is indeed the paramount consideration, but it has to be considered in two different contexts. The first is the context of which court shall decide what the child's best interests require. The second context, which only arises if it has first been decided that the welfare of the child requires that the English rather than a foreign court shall decide what are the requirements of the child, is what orders as to custody care and control and so on should be made.
>
> 22 It is only in Lord Donaldson's *second context* – after the court has decided that Singapore is the more appropriate forum to decide the matter – that it may make orders upon a fresh determination on the merits. ...
>
> [emphasis in orginal]

Ong JC thought Hong Kong, where the child was habitually resident, was clearly more appropriate (see *TDX v TDY* at [51]). Hong Kong, the "seat" of the parties' relationship, was where the husband and wife met, had an intimate relationship, and had a child (see *TDX v TDY* at [55]).

32 The mother has not advanced any arguments why Hong Kong is *not* clearly more appropriate than Singapore beyond saying she is not able to apply for R's maintenance in Hong Kong. She makes extensive reference to *BDA v BDB*, where Chao Hick Tin JA refused to grant a stay of a wife's maintenance application against her husband under s 69 of the Women's Charter because the defendant had not shown that India was a clearly more appropriate forum than Singapore.

33 In *BDA v BDB*, the parties were Indian nationals, who married in India and moved to live in Singapore. The son was born in Singapore. When the relationship broke down, the wife returned to India with the son, after having been in Singapore for almost three years. The husband continued to live and work in Singapore. After the wife applied for maintenance in Singapore, the husband filed for divorce in India one or two months later. He argued that the wife's maintenance application should be stayed in favour of the Indian proceedings.

34 Chao JA refused the stay. He held that the proceedings in India and Singapore were each distinct and did not cover the same ground. If the husband were to succeed in his divorce petition,

the marriage would end and the wife would be entitled to apply for post-divorce maintenance. The wife's maintenance application under s 69 of the Women's Charter, however, was premised on the subsistence of the marriage. While an Indian court would have been better placed to determine the cost of living of the wife and son in India, the wife's maintenance application would also involve determining "the standard of living enjoyed by the Wife and the son *before* the Husband's neglect or refusal to maintain them" [emphasis in original]: *BDA v BDB* at [33]. That, a Singapore court would be better placed to do, because the parties were then living in Singapore: *BDA v BDB* at [32]. He accepted that the wife intended to return to live in Singapore. Moreover, the husband's income was derived from his work in Singapore and he maintained bank accounts in Singapore. Chao JA concluded India was not clearly more appropriate than Singapore for the determination of the maintenance application.

35 The case before me is very different from *BDA v BDB*. Almost all the connecting factors point to Hong Kong. Apart from the factors outlined earlier, the Hong Kong courts will be better placed to determine a reasonable amount of maintenance for R that is appropriate to Hong Kong's socio-economic context. R has been issued with a Hong Kong government card for disabled persons, which the father says confers on R benefits and privileges that are in his best interests [note: 26]. The mother has also said she cannot afford to and is unable to travel to Singapore to give evidence because she needs to take care of R. [note: 27]

36 Hong Kong is clearly more appropriate than Singapore for the determination of the mother's maintenance application for the son. A *prima facie* case for a stay of the maintenance application in Singapore therefore arises.

Whether a stay should in any event be refused to prevent the denial of substantial justice

37 At the second stage, the court assesses whether there will be a denial of substantial justice if the proceedings are stayed. The learned district judge's decision to refuse the stay has been outlined at [5] above.

38 The mother argues there are "special circumstances" for refusal of a stay. [note: 28] Her arguments appear to centre on the paramountcy of the welfare of the child [note: 29] and the father's failure to take responsibility for R. [note: 30] The father argues that there would be "fundamental injustice" to him if there is no stay, because the court will "unilaterally alter the rights and obligations of Hong Kong nationals who are rightly under the protection of its laws". [note: 31]

39 In my view, there is no denial of substantial justice to parties if the application in Singapore is stayed. That the mother is not likely to be successful in applying for maintenance for R in Hong Kong does justify a refusal to stay the maintenance application in Singapore.

40 The following five cases illustrate how the courts considered whether there would be a denial of substantial justice if a plaintiff had to pursue proceedings in a more appropriate foreign court where: (a) the plaintiff's claim would have been time-barred; (b) the plaintiff would have been limited to a less favourable remedy; or (c) the defendant would have had a good and complete defence to the plaintiff's claim. Whilst these cases all arose in a commercial context, and are not entirely on point, they are nonetheless instructive in their approach to the question of denial of substantial justice. Each case is, of course, context and fact specific.

The authorities

41 The first case is the *Spiliada*, where Lord Goff discussed the issue of achieving practical justice, where a plaintiff's claim would be time-barred in a clearly more appropriate foreign forum. He emphasised that a plaintiff who *acted reasonably* should be entitled to take advantage of a more generous time bar in England even though a time bar in a clearly more appropriate forum would defeat his claim (at 483F–484A):

> ... Now, to take some extreme examples, suppose that the plaintiff allowed the limitation period to elapse in the appropriate jurisdiction, and came here simply because he wanted to take advantage of a more generous time bar applicable in this country; or suppose that it was obvious that the plaintiff should have commenced proceedings in the appropriate jurisdiction, and yet he did not trouble to issue a protective writ there; in cases such as these, I cannot see that the court should hesitate to stay the proceedings in this country, even though the effect would be that the plaintiff's claim would inevitably be defeated by a plea of the time bar in the appropriate jurisdiction. Indeed a strong theoretical argument can be advanced for the proposition that, if there is another clearly more appropriate forum for the trial of the action, a stay should generally be granted even though the plaintiff's action would be time barred there. *But, in my opinion, this is a case where practical justice should be done. And practical justice demands that, if the court considers that the plaintiff acted reasonably in commencing proceedings in this country, and that, although it appears that (putting on one side the time bar point) the appropriate forum for the trial of the action is elsewhere than England, the plaintiff did not act unreasonably in failing to commence proceedings (for example, by issuing a protective writ) in that jurisdiction within the limitation period applicable there, it would not, I think, be just to deprive the plaintiff of the benefit of having started proceedings within the limitation period applicable in this country*. ... [emphasis added]

Although there are questions as to whether Lord Goff's statement is readily reconcilable with the doctrine of the natural forum as a matter of principle (see *Halsbury's Laws of Singapore* at p 95; *Lewis v King* [2004] EWCA Civ 1329 at [38]), this *dictum* has nonetheless received widespread acceptance both in Singapore (see *Brinkerhoff Maritime Drilling Corp v PT Airfast Services Indonesia* [1992] 2 SLR(R) 345 at [38]–[39]) and abroad.

42 A time bar situation (see the *Spiliada* at 484D–484E) may be overcome by a defendant providing an undertaking not to rely on the time bar. This is not open to the father in this case. The power of the Hong Kong court to award child maintenance under the HK Guardianship of Minors Ordinance appears to be restricted to applications made before a child reaches 18 years of age. There is also the issue of whether the mother acted reasonably in not filing any maintenance action in Hong Kong at all.

43 The second case is *Herceg Novi (Owners) v Ming Galaxy (Owners)* [1998] CLC 1487 ("*Herceg Novi v Ming Galaxy*"), a decision of the English Court of Appeal. The *Herceg Novi* collided with the *Ming Galaxy* and sank off the coast of Singapore. Her owners ("the *Herceg* owners") commenced proceedings in the English High Court against the owners of the *Ming Galaxy*, who applied for a stay of the English proceedings in favour of Singapore on the ground of *forum non conveniens*. The limit of the *Ming Galaxy*'s liability in England (under the applicable English legislation giving effect to the 1976 Convention on Limitation for Maritime Claims ("the 1976 Convention")) was about $5.8m, while the limit in Singapore (under the applicable Singapore legislation giving effect to the 1957 Convention on Limitation for Maritime Claims ("the 1957 Convention")) was only $2.9m. It was not in dispute that Singapore was a clearly more appropriate forum than England. The *Herceg* owners argued that the stay of English proceedings in favour of Singapore should have been be refused because they would be denied substantial justice in Singapore, where the limit on the amount recoverable was lower. Clark J in the English High Court refused to stay the English proceedings.

44 The English Court of Appeal allowed the appeal. Sir Christopher Staughton, who delivered the judgment of the court, said the *Herceg* owners would not be denied substantial justice in Singapore, principally for three reasons.

(a) First, the 1976 Convention had not received universal acceptance and was not "an internationally sanctioned and objective view of where substantial justice is now viewed as lying".

(b) Second, to find otherwise "would be to deprive sovereign states to a large extent of their right" to choose which regime to adopt. If jurisdiction could be obtained by arresting a ship in a 1976 Convention country, and the action could proceed despite there being a more appropriate forum where the 1957 Convention prevailed, the 1957 Convention country would be "left with no effective use for its own law".

(c) Third, it was impossible to say that substantial justice was not available in Singapore because there was "a significant body of agreement among civilised nations with the law [in the form of the 1957 Convention] as it is there administered".

45 Sir Christopher concluded that it was not open to the English court to decide whether English law was better than Singapore law (at 1494):

> [I]n terms of abstract justice, neither convention is objectively more just than the other. Our task is not to decide whether our law is better than the law of Singapore. It is to decide whether substantial justice will be done in Singapore. In our view it will be. This appeal should be allowed, and an unconditional stay of the English action granted.

46 In the Singapore counterpart to the English decision, *The Owners of the Ship or Vessel Ming Galaxy v The Owners of the Ship or Vessel or Property Herceg Novi* [1998] SGHC 303, the *Herceg* owners sought to persuade the Singapore High Court to grant a stay in favour of proceedings in England. They argued there would be denied substantial justice in Singapore because of the lower limit on the sums recoverable.

47 The *Herceg* owners' argument was rejected by G P Selvam J, who said the denial of substantial justice could not be shown just by weighing the justice of another system of law with that of the system of law in Singapore:

> The true meaning and effect of the [*Herceg* owners'] submission based on the question of substantial justice is that something is lacking in the system of justice of Singapore as regards limitation of liability. I am not aware of a decision anywhere whereby a court has stayed an action legitimately brought before it on the ground that there is something wanting in its system of justice and that better justice will be done in another jurisdiction. For my part it would be wrong in principle to do so because I cannot accept that the law of Singapore is unjust to either party. ...

48 The fourth case is *The "Reecon Wolf"* [2012] 2 SLR 289, where the tables were turned from the two cases above involving the *Herceg Novi*. The plaintiff brought a collision claim in Singapore, which by then, had legislation to effect the 1976 Convention. The defendant wanted the dispute to be resolved in Malaysia, which applied the lower limitation of liability in the 1957 Convention. Belinda Ang Saw Ean J held that Malaysia was the more appropriate forum. She, like the English Court of Appeal in *Herceg Novi v Ming Galaxy*, was not persuaded there would be a denial of substantial justice in Malaysia just because of the lower limitation of liability in force there. Ang J said (at [54]–[55]):

> 54 Mr Seow was unable to point to any personal or juridical advantage in which the plaintiff would be deprived of if this court granted a stay of the Singapore Action. In written submissions, Mr Seow argued that the dichotomy between the two limitation regimes would leave the plaintiff disadvantaged if the Singapore Action was stayed for Malaysia's domestic law gave effect to the 1957 Convention. In other words, the plaintiff's claim would be subject to the lower 1957 limits of liability. This line of argument would invariably draw this court to make comparisons between the merit of the statutory limits in Singapore and Malaysian [*sic*]. I cannot be drawn into making comparisons between the laws of this country and that of another friendly state to do justice in such cases.
>
> 55 Second, the fact that the law in the alternative forum may be less favourable to the plaintiff does not necessarily justify a dismissal of the stay application on the ground of *forum non conveniens*. As stated, the existence of different limitation regimes is not considered a personal or juridical advantage under Stage 2.

She therefore allowed the defendant's application and granted the stay.

49 These three cases have dealt with the situation where the amount of relief obtainable in the foreign court would have been lower than in the forum court. The last case, *Garsec v His Majesty The Sultan of Brunei* [2007] NSWSC 882, is one where the foreign court potentially would not have recognised the plaintiff's claim *at all*. The plaintiff, an Australian corporation, commenced action against the Sultan of Brunei in the New South Wales Supreme Court relating for breach of an alleged agreement for the sale of a rare item. The Sultan applied for a stay of proceedings on the ground of *forum non conveniens*. The plaintiff argued the New South Wales court was not clearly inappropriate. They would be denied substantial justice if the action was tried in Brunei because under the Brunei Constitution, the Sultan enjoyed complete immunity from suit.

50 Two questions were raised. The first was whether those provisions of the Brunei Constitution were to be characterised as substantive or procedural based on New South Wales conflict of laws principles. If they were substantive, a New South Wales court hearing the case would recognise the Sultan's immunity from suit if Brunei law was determined to be the proper law. The Sultan's defence of immunity from suit would prevail whether the case was heard in Brunei or New South Wales. If the provisions were procedural, the Sultan would not have immunity from suit in proceedings before a New South Wales court (because it would not apply the Brunei court's procedure). The plaintiff would thus have an advantage proceeding in New South Wales rather than Brunei.

51 McDougall J held that the proper law was Brunei law and characterised the provisions of the Brunei Constitution as substantive. There would be no difference to the outcome whether the action proceeded in Brunei or New South Wales as both courts would have accorded the Sultan immunity from suit. McDougall J nonetheless went on to consider the position if the provisions of the Brunei Constitution were characterised as procedural. He would still (at [129]) have granted the stay because the advantage to the plaintiff in bringing the action in New South Wales was merely the obverse side of the coin of the defendant's disadvantage:

> … I have also concluded that the law of Brunei is the proper law of the alleged contract and the law applicable to the alleged tort. Thus, if the proceedings were heard in this Court, the substantive law of Brunei including those immunities (to the extent that they might be found to be applicable) would be applied. On that basis, the legitimate juridical advantage for which [the plaintiff] contends would disappear. On the other hand, if I am wrong, in both assumptions, then this Court might not have given the Sultan the benefit of the immunities. For the reasons that I have given in para [73] above, that in itself would be would be oppressive. In other words, the

> counterpart of [the plaintiff's] legitimate juridical advantage is an equivalent juridical disadvantage to the Sultan ... In those circumstances, I do not think that the alleged legitimate juridical advantage should be regarded as dispositive.

52 McDougall J's refusal to grant the stay was upheld on appeal: *Garsec Pty Ltd v His Majesty The Sultan of Brunei and another* (2008) 250 ALR 682. This case is cited by *Dicey, Morris and Collins* at para 12-038 as authority for the proposition that:

> ... [I]f the claimant argues that he will win if permitted to sue in England, but will lose if compelled to sue in the foreign court, there is no justification for a presumption that a claimant is entitled to win or that a defendant must be found to be liable. ...

53 I am aware that Australia adopts a different standard for stay applications on the ground of *forum non conveniens*. The person seeking the stay must show that the Australian court is "clearly inappropriate", rather than that there is another clearly more appropriate forum. This difference however does not detract from the need to ascertain whether there is denial of substantial justice or substantial justice is achieved in a situation where a plaintiff's claim would be precluded or met with a good defence in a clearly a more appropriate forum.

My reasons

54 In these five commercial cases, parties must expect exposure to multiple systems of law as part and parcel of operations across borders. Even then, the courts are slow to find there will be denial of substantial justice if a foreign court applies a law unfavourable to a plaintiff. This philosophy applies more so to the case before me, where Hong Kong is the only jurisdiction with which the parent-child relationship has a connection. There will be no denial of substantial justice if the proceedings in Singapore are stayed, for three reasons.

55 First, it was not reasonable for the mother to delay and fail to pursue maintenance in Hong Kong before R reached 18 years of age. R's autism had manifested shortly after birth although his obsessive compulsive disorder came later. The costs for his special care would have been apparent. It would also have been plain to the mother that she was drawing closer to the horizon of her employability and she had to urgently review her longer-term financial situation to see if she should apply for R's maintenance in Hong Kong. Apart from saying that she was busy with work and losing her job in February 2014 (after R became 18 years of age on 17 March 2012), she has not explained why she did not pursue maintenance for R in a Hong Kong court.

56 The mother had held high-paying positions at Hong Kong investment banks and appears capable. She was advised on maintenance by Hong Kong solicitors in 1995. There were detailed proposals supported by spreadsheets, exchanged between the parents' solicitors on financial arrangements. For example, there was a letter of 27 March 1995 from the father's solicitors to the mother's solicitors, [note: 32] to which the mother's solicitors responded on 30 June 1995 seeking maintenance for the children "which totals HK$77,497.67 on a monthly basis to be shared between [the father and mother]". [note: 33] It appears no agreement was reached as the mother did not respond to the father's proposal. It was not reasonable for the mother to have waited *until* February 2015 to take up an application for maintenance, some two decades after having instructed counsel in Hong Kong on this same issue in 1995. The age of majority in Hong Kong was lowered from age 21 years to age 18 years in June 1997.

57 Second, allowing the proceedings to continue in Singapore would be unfair to the father. The laws of Hong Kong provide the reference point for parties to arrange their affairs. The father should

be entitled to expect that his obligations to R should be determined by the laws of Hong Kong. The "seat" of the relationship in this case is Hong Kong (see *TDX v TDY* at [55]). The father and mother had an intimate relationship in Hong Kong and R a Hong Kong citizen, was born and raised in Hong Kong, where he lived with the mother all their lives, subject to the protection of the laws of Hong Kong. It would not be conducive to the interests of justice or achieve practical justice as between the father and mother for the case to be heard before a Singapore court (which both parties have assumed will apply Singapore law). To allow the laws of Singapore to intrude into and augment the father's obligations based solely on the arbitrary fact of his residence and employment here would, in my view, not achieve substantial justice between parties.

58 Third, the mother's argument, reduced to its core, is that as the interests of a child is paramount, it is only fair she should be entitled to pursue her claim for maintenance for R in Singapore as she is out of time in Hong Kong. I reject this argument because it rests on an impermissible premise that requires the court to weigh the quality of justice or the justice of the systems of law available under the Singapore and Hong Kong family justice regimes.

59 There is no suggestion that the family justice regime in Hong Kong is lacking. The different age-limits for applications for maintenance of children born out of wedlock in Hong Kong and Singapore reflect different legislative responses. This is exemplified by Hong Kong's move in 1997 to *reduce* the age of majority from 21 to 18 years with the enactment of the Hong Kong Age of Majority (Related Provisions) Ordinance (Chapter 410). The age of majority in a jurisdiction involves questions of social policy that cannot be divorced from the social, economic and cultural context as manifested in the broader social and legal support systems for families. This would include provisions in a family justice regime relating to children or special needs persons.

60 Weighing the quality of justice available under these differing legislative responses undermines international comity. Its importance was underscored by Andrew Phang Boon Leong JC (as he then was) in *Q & M Enterprises Sdn Bhd v Poh Kiat* [2005] 4 SLR(R) 494 where he said (at [25]):

> 25 The importance of international comity cannot be underestimated. The domestic courts of each country must constantly remind themselves of this point – if nothing else, because of the natural tendency towards favouring domestic law over foreign law. In days of yore, the domestic legal system was probably the main – if not sole – focus simply because in those days, jurisdictions on the whole were less interconnected. So it is understandable if the focus was on the domestic law, simply because the law of foreign jurisdictions was, in the nature of things then, rarely raised. This is no longer the case. Nevertheless, it ought to be emphasised that the signal importance of the domestic legal system cannot be gainsaid either. Extreme positions on either side of the legal spectrum ought to be avoided. For example, international comity ought *not* to be accorded if to do so would offend the public policy of the domestic legal system (here, of Singapore). However, that having been said, legal parochialism must also be eschewed. Such tunnel vision is, as I have mentioned, no longer an option. It will only cause the legal system adopting such a limited vision to atrophy, even in the medium-term, not to mention the long-term. This will, of course, have detrimental effects on the broader social structures, of which the law is an integral part. [emphasis in original]

This passage was cited with approval by the Court of Appeal in *Good Earth Agricultural Co Ltd v Novus International Pte Ltd* [2008] 2 SLR(R) 711 at [28].

61 The mother's argument that the paramountcy of R's welfare requires the Singapore court to hear the mother's maintenance application, because a Hong Kong court would not be able to grant maintenance, is a non-starter. In *TDX v TDY* (quoted at [31] above), Ong JC said the welfare

principle is paramount but it must be assessed through the lens of the *forum non conveniens* doctrine. In this context, the question always is which forum is *best placed* to determine the welfare of the child. The question is *not* which forum will provide the child the greatest measure of welfare. A Singapore court does not weigh the outcome of the system of justice in the foreign jurisdiction with that in Singapore.

62 The present application is not about *whether* the mother will be able to bear the burden of R's upbringing without the help of the father, but rather, which system of law should govern their rights and obligations in relation to R. This is, at its heart, a tussle between the father and mother over whom should bear the expenses of R's upbringing; it is not over what the welfare of the child requires. In any case, the evidence before me does not suggest the mother would not be able to raise R without support from the father. On the contrary, as outlined earlier, it suggests she is a capable woman of some means.

Conclusion

63 Hong Kong is the more appropriate forum to determine the issue of maintenance for R. The mother and R will not be denied substantial justice if the proceedings in Singapore are stayed. I therefore allow the appeal and grant an unconditional stay of the mother's maintenance application in Singapore.

64 I conclude with an observation. Section 5 of the Guardianship of Infants Act provides only for the maintenance of an infant (*ie*, a child, who is less than 21 years old). Although the mother filed her application one month before R became 21 years old, he is now an adult. Section 5 of the Guardianship of Infants Act does not empower a court to make an order for maintenance of a child beyond the age of 21. This is in contrast to s 12A of the HK Guardianship of Minors Ordinance and s 69 of the Women's Charter, both of which allow a court to make orders for maintenance of a child beyond the age of 18 years (Hong Kong) and 21 years (Singapore).

65 Simply put, the court is no longer empowered to order maintenance in favour of R under s 5 of the Guardianship of Infants Act since he is now above the age of 21. The mother appears to have deliberately chosen to apply for maintenance under the Guardianship of Infants Act *instead* of the Women's Charter after consideration of both provisions. Section 69 of the Women's Charter permits maintenance of a child to continue after the age of 21 in specified circumstances, and also allows such an application to be made even after the child has reached that age.

[note: 1] ROA vol 1 at p 236; ROA vol 2 at p 339.

[note: 2] ROA vol 1 at p 208, para 25.

[note: 3] ROA vol 1 at p 207, para 23.

[note: 4] ROA vol 1 at p 197, para 11.

[note: 5] ROA vol 1 at pp 25–26, paras 23–24.

[note: 6] ROA vol 2 at p 251, para 25.

[note: 7] ROA vol 1 at p 69.

[note: 8] ROA vol 2 at p 354, para 33.

[note: 9] ROA vol 2 at pp 351–353, paras 27–31.

[note: 10] ROA vol 1 at p 20, para 6.

[note: 11] ROA vol 1 at p 20, para 6.

[note: 12] ROA vol 2 at p 315.

[note: 13] ROA vol 2 at pp 315–335.

[note: 14] ROA vol 1 at p 28, para 30.

[note: 15] ROA vol 1 at p 28, para 31; ROA vol 1 at p 209, para 31.

[note: 16] ROA vol 1 at pp 22–25, paras 10–19.

[note: 17] ROA vol 1 at p 23, paras 13 and 14.

[note: 18] ROA vol 1 at p 26, para 25.

[note: 19] ROA vol 1 at p 26, para 26.

[note: 20] ROA vol 1 at p 29, para 32.

[note: 21] ROA vol 1 at p 210, para 35.

[note: 22] ROA vol 1 at pp 29–30, paras 34–36.

[note: 23] ROA vol 1 at p 109.

[note: 24] Mother’s submissions at para 17.

[note: 25] Mother’s submissions at para 20.

[note: 26] ROA vol 1 at p 199, para 18.

[note: 27] ROA vol 2 at p 263, para 8.

[note: 28] Mother’s submissions at para 28.

[note: 29] Mother’s submissions at paras 29–38.

[note: 30] Mother’s submissions at paras 41–42.

[note: 31] Father’s submissions at para 29.

[note: 32] ROA vol 1 at pp 315–316.

[note: 33] ROA vol 2 at pp 319–321.