

John Reginald Stott Kirkham and Others v Trane US Inc and Others
[2009] SGCA 32

Case Number : CA 103/2008
Decision Date : 15 July 2009
Tribunal/Court : Court of Appeal
Coram : Chao Hick Tin JA; V K Rajah JA
Counsel Name(s) : Rajah Chelva Retnam SC and Chew Kei-Jin (Tan Rajah & Cheah) for the appellants; Kanapathi Pillai Nirumalan (Niru & Co) for the respondents
Parties : John Reginald Stott Kirkham; Solutions Pte Ltd; PT Tatasolusi Pratama — Trane US Inc; Trane International Inc; Trane Export LLC

Civil Procedure – Injunctions – Anti-suit injunction – Elements to be considered – Amenability to jurisdiction of Singapore court – Natural forum – Vexation or oppression of plaintiff if foreign proceedings continued – Injustice to defendant as injunction deprived defendant of advantages sought in foreign proceedings – Institution of foreign proceedings in breach of agreement between parties

Civil Procedure – Natural forum – Anti-suit injunction – Singapore to be shown to be clearly more appropriate forum – Onus on applicant for anti-suit injunction – Appellate court slow to interfere with lower court's decision – Place where tort occurred strong but not conclusive indicator – Governing law relevant consideration

Conflict of Laws – Restraint of foreign proceedings – Comity – Anti-suit injunction – Inconsistent with comity to restrain party from proceeding in foreign court solely on basis of natural forum – Not for court to pass judgment on competence or independence of judiciary of foreign court or legal system

Conflict of Laws – Restraint of foreign proceedings – Vexatious and oppressive conduct – Anti-suit injunction – Clear case of vexation and oppression justify anti-suit injunction – Not for court to pass judgment on competence or independence of judiciary of foreign court or legal system – No presumption that multiplicity of proceedings vexatious

Injunctions – Anti-suit injunction – Elements to be considered – Amenability to jurisdiction of Singapore court – Natural forum – Vexation or oppression of plaintiff if foreign proceedings continued – Injustice to defendant as injunction deprived defendant of advantages sought in foreign proceedings – Institution of foreign proceedings in breach of agreement between parties

15 July 2009

Chao Hick Tin JA (delivering the grounds of decision of the court):

Introduction

1 Civil Appeal No 103 of 2008 ("CA 103"), was an appeal by the defendants ("the Appellants") against the decision of the High Court judge ("the Judge") in Summons No 5248 of 2007 ("SUM 5248"), in which the Judge granted the plaintiffs ("the Respondents") an injunction (otherwise known as an "anti-suit injunction") to restrain the Appellants from continuing with the Indonesian proceedings which the Appellants had brought against the Respondents ("the Indonesian Action"). CA 103 was heard together with Civil Appeal No 128 of 2008 ("CA 128"), which was an appeal by the Appellants against the Judge's dismissal of their application in Summons No 5167 of 2007 ("SUM 5167") for a stay of the action which the Respondents had instituted in Singapore against the Appellants ("the Singapore Action") on the ground of *forum non conveniens*. The reasons for the

Judge's decisions in SUM 5248 and SUM 5167 can be found in his grounds of decision, viz, *Trane US Inc v Kirkham John Reginald Stott* [2008] SGHC 240 ("the GD").

2 After hearing the parties, we allowed the appeal in CA 103 but dismissed the appeal in CA 128. The present grounds of decision are issued solely in relation to CA 103 to explain why we have allowed that appeal.

The parties

3 Trane US Inc ("the First Respondent") is a company incorporated in Delaware, USA. It is in the business of providing air conditioning systems and services under the Trane name ("the Products"). The First Respondent and Trane International Inc ("the Second Respondent"), a company also incorporated in Delaware, are wholly-owned subsidiaries of American Standard Companies Inc, a company incorporated in Delaware as well. Trane Export LLC ("the Third Respondent"), which is a wholly-owned subsidiary of the Second Respondent, is a company incorporated in Delaware and is a provider of the Products.

4 John Reginald Stott Kirkham ("the First Appellant") is a director of Solutions Pte Ltd ("the Second Appellant") and one of the three commissioners of PT Tatasolusi Pratama ("the Third Appellant"), an Indonesian company. Under Indonesian company law, a company must have a two-tier board, consisting of directors that manage the company and commissioners that supervise the policies of the directors in managing the company. The First Appellant is a Singapore citizen, and is also a director and majority shareholder of Amazon Investments (Singapore) Pte Ltd, the sole shareholder of the Second Appellant. The Respondents claimed that the First Appellant was the alter ego of the Second Appellant and the Third Appellant. They further claimed that the Second Appellant and the Third Appellant were merely corporate manifestations of the First Appellant. The Second Appellant, which is a company incorporated in Singapore, is in the business of making investment, as well as the provision of management and administrative support services, and has an 88% shareholding in the Third Appellant. The Third Appellant, which is a trading company incorporated in Indonesia with a branch registered in Singapore, was, before the dispute arose which formed the basis of the Indonesian Action, distributing the Products in Indonesia.

Background facts

5 On 15 May 1990, the First Respondent incorporated TAC Distribution Pte Ltd ("TAC") which had the object of distributing the Products in Singapore, Malaysia, Indonesia and Brunei. On 23 July 1990, the First Respondent and the Second Appellant entered into a shareholders' agreement in relation to TAC ("the Shareholders' Agreement"), which was to be governed by Singapore law and under which the parties agreed to submit to the non-exclusive jurisdiction of the Singapore courts. Pursuant to the Shareholders' Agreement, TAC would distribute and sell the Products in Singapore. It was envisaged that separate subsidiaries of TAC would eventually be incorporated for the distribution of the Products in Malaysia, Indonesia and Brunei. Once such a subsidiary was incorporated in any of those territories, the distributor agreement and the trade mark agreement that would be entered into subsequently between TAC and the First Respondent would cease to apply to the country in question, and a separate distributor agreement and trade mark agreement, identical to the original distributor agreement and trade mark agreement, would be entered into between the First Respondent and the subsidiary in question. It was further agreed in the Shareholders' Agreement that the First Respondent would hold no less than 30% of the share capital of TAC while the Second Appellant would hold up to 70% of the share capital of TAC.

6 Pursuant to the Shareholders' Agreement, on 17 August 1990, the First Respondent and TAC

entered into a distributor agreement for TAC to distribute and sell the Products in Singapore, Malaysia and Brunei ("the Distributor Agreement"). Under this agreement, TAC was appointed by the First Respondent to be its exclusive distributor of the Products in these three countries for an indefinite term, unless terminated due to material breach or change in capacity, or if 12 months' written notice was given by either party to the other in the event of a fundamental disagreement between them. The rights granted under the Distributor Agreement to TAC were non-transferable. All trade secrets and other intellectual property rights made available to TAC were not to be disclosed to third parties. Like the Shareholders' Agreement, the Distributor Agreement provided that it was to be governed by Singapore law.

7 On 18 November 1991, a separate distributor agreement was entered into with regard to the distribution of the Products in Malaysia ("the Malaysian Distributor Agreement") following the formation of a subsidiary of TAC in that country. The Malaysian Distributor Agreement was essentially similar to the Distributor Agreement, except for the choice of law clause, which provided that the agreement was to be governed by Malaysian law.

8 Under the Distributor Agreement, TAC's distributorship of the Products did not extend to Indonesia, as at that time, an Indonesian company known as PT Unitrade had the rights to distribute the Products in that country. However, it was contemplated that TAC would eventually be the distributor of the Products in Indonesia. Thus, on 4 August 1990, a memorandum was signed between TAC and the First Respondent recording the parties' acknowledgement that efforts would be made to accommodate PT Unitrade and to restructure PT Unitrade's distributorship so as to permit TAC to be a distributor of the Products in Indonesia. This led to a settlement agreement between the First Respondent and PT Unitrade for the cessation of PT Unitrade's distribution rights for the Products in Indonesia.

9 Subsequently, on 8 November 1991, the First Respondent and TAC agreed to an amendment to the Distributor Agreement ("the Distributor Agreement Amendment"), which extended the territories covered by the Distributor Agreement to Indonesia. This agreement, which was also governed by Singapore law, had a clause, *viz*, cl B, which provided that the distributorship of the Products in Indonesia would be undertaken by either a joint venture subsidiary if and when it was permissible under Indonesian law for the First Respondent to be a shareholder in such an entity, or, in the alternative, by another company designated by TAC provided certain conditions were met. Clause B is reproduced below:

The [First Respondent and TAC] agree that they will form a joint venture operating subsidiary in Indonesia only when it is permissible under Indonesian law for [the First Respondent] to be a shareholder in such company. However, in the event that TAC wishes to designate another company in Indonesia to be its distributor, then, it shall assure that:

- i) If [the First Respondent] so requests, H.K. Aditirto shall be offered the right to subscribe to up to 20% of the shares of that company, and
- ii) TAC shall procure for itself the right to subscribe to the balance of such shares, or it shall procure for [the First Respondent] the right to subscribe to shares in such company up to 30% of the balance, at a price not to exceed the book value of such shares.
- iii) It shall comply with all applicable Indonesian laws and ordinances.

10 The Appellants claimed that the Third Appellant, which was incorporated in Indonesia in 1993, was designated by TAC to be the distributor company pursuant to cl B, and that the conditions

stipulated had been met, and since 1993, the Third Appellant was the exclusive distributor of the Products in Indonesia. In contrast, the Respondents claimed that cl B was never put into effect. As regards the role of the Third Appellant, the Respondents submitted that while no Indonesian entity was formally appointed as a distributor, informal arrangements were made with the Third Appellant for the Third Appellant to distribute the Products in Indonesia on an *ad hoc* basis as a stop-gap measure until a subsidiary was incorporated pursuant to cl B.

11 On 16 October 1998, the First Respondent became the sole shareholder of TAC after it acquired all the shares in TAC from the Second Appellant. The Respondents submitted that by reason of this event, the Shareholders' Agreement ceased to have effect. After the First Respondent became the sole shareholder of TAC, the First Respondent made a proposal to the Third Appellant to appoint it as a non-exclusive distributor of the Products in Indonesia. On 29 October 1999, the First Respondent sent a draft distributor agreement between the Third Respondent and the Third Appellant ("the Draft Distributor Agreement") to the First Appellant and the Second Appellant. The Draft Distributor Agreement provided for a non-exclusive and non-transferable distributorship for five years to be followed thereafter by automatic one-year renewals, and was to be governed by Indonesian law. The Draft Distributor Agreement also provided for termination by either party by giving the other party 12 months' written notice of its intention to terminate. Upon termination, all proprietary information would be returned to the Third Respondent with no right in the Third Appellant to retain any copy of the same. However, the Draft Distributor Agreement was never signed due to, *inter alia*, the Appellants' belief that the Third Appellant already had existing exclusive distribution rights for the Products in Indonesia.

12 Although the Draft Distributor Agreement was not signed, the Third Appellant continued to distribute the Products in Indonesia. For convenience, the distributorship arrangement that subsisted will be referred to as "the Indonesian Distributor Arrangement". In regard to the Indonesian Distributor Arrangement, what was disputed was whether or not it was an exclusive distributorship or a non-exclusive distributorship. In this respect, the Respondents claimed that they regarded the Third Appellant as the First Respondent's non-exclusive distributor of the Products in Indonesia, with such distributorship renewable annually at the First Respondent's sole discretion. As the certificates of appointment stated that the Third Appellant was "a representative of the Trane Company in Indonesia"[\[note: 1\]](#) and these certificates were granted annually, the Respondents contended that there was conclusive proof that the appointment of the Third Appellant as a distributor of the Products was both non-exclusive and on an annual renewable basis. In contrast, the Appellants contended that the Third Appellant was the exclusive distributor of the Products in Indonesia, and that the Third Appellant had, under Indonesian law, acquired various rights from the Respondents as the distributor of the Products. The Appellants asserted that documents such as the announcement made by Trane Asia in an undated letter to its customers that "[o]ur representative in Indonesia is PT. Tatasolusi Pratama [*ie*, the Third Appellant]"[\[note: 2\]](#) were evidence that the Third Appellant was the exclusive distributor of the Products in Indonesia.

13 The First Respondent decided not to renew the Indonesian Distributor Arrangement with the Third Appellant after June 2004. Thereafter, any further distribution of the Products by the Third Appellant was only on an *ad hoc* basis. By a solicitors' letter dated 4 October 2005, the First Respondent sought to terminate the *ad hoc* arrangements with the Third Appellant with immediate effect with provisions for a winding-down of existing orders. All outstanding arrears due from the Third Appellant to the First Respondent or its related company were to be paid within 30 days from 4 October 2005. The Third Appellant was also to return to the First Respondent all documents and materials relating to the Third Appellant's list of customers for the Products and to cease using the Respondents' trade mark and logo. The reason for the termination of the *ad hoc* arrangements,

according to the Respondents, was the discovery by the Respondents that the Third Appellant was also distributing a direct competitor's (*viz*, McQuay) products. This allegation was, however, denied by the Appellants who averred that the Respondents simply wanted to take over and/or wrestle the distributorship of the Products in Indonesia away from the Third Appellant.

The Indonesian Action

14 On 5 June 2007, the Second Appellant and the Third Appellant commenced an action, *ie*, the Indonesian Action, in the District Court of South Jakarta, Indonesia, against the First Respondent and parties related to the First Respondent. The Indonesian Action, according to the Appellants, was based on rights acquired by the Third Appellant under Indonesian law arising out of its distributorship of the Products in Indonesia. The Second Appellant and the Third Appellant, as stated in the originating process that was filed, claimed damages based on four grounds. The first ground was that the defendants in the Indonesian Action had, *inter alia*, "unlawfully conspired to take over customers"^[note: 3] of the Third Appellant and "unlawfully... terminated"^[note: 4] the appointment of the Third Appellant as distributor of the Products. The second ground was that the sixth and seventh defendants in the Indonesian Action (with the approval and knowledge of the First Respondent) had taken over the existing and potential customers of the Second Appellant and the Third Appellant by "releasing misleading statements and lies"^[note: 5] to the effect that the Third Appellant was not the distributor of the Products in Indonesia. The third ground was that the defendants had, *inter alia*, violated the Shareholders' Agreement and "other supplemental documents."^[note: 6] The fourth (and last) ground was that the fourth defendants (with the consent and knowledge of the First Respondent) had, *inter alia*, announced to the public that the new distributor of the Products in Indonesia would be "PT Trane Indonesia"^[note: 7] when that name was used by the Third Appellant.

15 Upon the Judge's granting of the anti-suit injunction in SUM 5248, the Indonesian Action was dismissed by the Indonesian court. However, the Appellants submitted that the Second Appellant and the Third Appellant would be in a position to recommence the Indonesian Action if they were to succeed in this appeal against the grant of the anti-suit injunction (*ie*, CA 103) being allowed.

The Singapore Action

16 More than four months after the Indonesian Action had been commenced, the Respondents, on 23 October 2007, filed a writ of summons in the High Court of Singapore and commenced the Singapore Action. The First Respondent, in the statement of claim, prayed for a declaration that the Appellants do not have any proprietary interests/rights or other interests/rights in the distribution of the Products, whether arising from the Shareholders' Agreement, the Distributor Agreement or the Distributor Agreement Amendment (collectively referred to hereafter as "the three documents"). The First Respondent also prayed for an injunction to restrain the Appellants from commencing or continuing with any proceedings in Indonesia or elsewhere, directly or indirectly, relating to the sale and distribution of the Products or to any rights of any kind whatsoever arising out of the three documents, or otherwise, including the court action already filed in Indonesia (*ie*, the Indonesian Action). The First Respondent further prayed for an order for the delivering up of its hardware and software relating to the Products and an injunction restraining the First Appellant and the Third Appellant from using such hardware and software. The Second Respondent claimed damages against the First Appellant and/or the Third Appellant, and prayed for an injunction restraining them from using its trade mark and logo. The Third Respondent also claimed the sum of US\$1,249,632.46 for outstanding arrears against the First Appellant and/or the Third Appellant.

SUM 5248

17 By way of SUM 5248, the First Respondent applied for an order that the Appellants be restrained from commencing or continuing the Indonesian Action, or proceedings elsewhere, directly or indirectly relating to the sale, distribution or dealings in the Products, or relating to any rights of any kind whatsoever arising out of the three documents or otherwise, pending the trial of the Singapore Action, or until further order. On 1 July 2008, this application was allowed by the Judge, subject to the usual undertaking as to damages, for the following reasons (see the GD at [37]–[44]):

(a) In determining whether an anti-suit injunction should be granted, the natural and proper forum was one of the factors to consider (*Koh Kay Yew v Inno-Pacific Holdings Ltd* [1997] 3 SLR 121 (“*Koh Kay Yew*”) at [18]–[19], quoted in the GD at [37]). Once the issue of the natural forum had been considered, the court should take into account all the relevant circumstances in the case and consider the injustice each party might suffer in determining whether the injunction should be granted or not (*Koh Kay Yew* at [19]). The injustice to each party would be the main consideration in determining whether or not the proceedings in the foreign court were vexatious or oppressive (*ibid*). Should the court then come to the conclusion that the foreign proceedings were indeed vexatious or oppressive, the court should exercise its discretion to grant an injunction restraining the party who had commenced the foreign proceedings from continuing with it (*ibid*).

(b) The Appellants had submitted “a formidable list of connecting factors seemingly pointing to Indonesia as the natural forum for trying this dispute” (the GD at [39]). These included the fact that the subject of the dispute related to things done in Indonesia; the Respondents were foreign companies not incorporated in Singapore while the Third Appellant was an Indonesian company; the majority of witnesses and relevant documents were likely to be located in Indonesia; there was no express choice of law governing the distributorship arrangements of the Third Appellant and since the place of performance was Indonesia, the governing law should be that of Indonesia; the Appellants’ claims in the Indonesian Action were in tort and the general rule was that the place where the tort occurred was the natural forum; no dispute arose from the three documents, and therefore the relevant clauses there on the governing law being Singapore law and the non-exclusive choice of jurisdiction being Singapore were irrelevant; the three documents were merely background facts; and there were no connecting factors to Singapore besides the fact that the First Appellant is a Singapore citizen and the Second Appellant is a Singapore company (*ibid*).

(c) However, it could be said that the three documents were significantly connected to the claims of the Second Appellant and the Third Appellant. The Judge stated at [40]:

[W]hen one examines the factual matrix in which the [Second Appellant] and the [Third Appellant] launched their claims, the [three documents] are inextricably linked to their claims. They are not merely backdrop issues but are integral to understanding and determining the relationships of the different parties involved. The court looking at these agreements would have to construe their proper meaning and effect and decide whether or not they could conceivably give life to any other legal rights not residing in these agreements before considering the factual evidence relating to such non-contractual rights. If the [Respondents] are correct in their contentions, the inquiry may not even proceed beyond this point. The governing law would therefore have a vital role to play and the governing law is Singapore law. There can be little doubt that the forum best suited to decide questions of Singapore law is the Singapore court. There is also the additional factor of Singapore having been named as one of the jurisdictions of choice in one of the agreements.

(d) The significance of the fact that the Second Appellant was a Singapore company was

generally cancelled out by the fact that the Third Appellant was an Indonesian company (the GD at [41]). The Respondents were foreign companies with a presence both in Singapore and in Indonesia and so this factor was accordingly neutral (*ibid*). The Second Appellant and the Third Appellant were the plaintiffs in the Indonesian Action while the First Respondent was only one of several defendants in the Indonesian Action (*ibid*). However, all of the other defendants in the Indonesian Action were related to the Respondents (*ibid*). Thus, on the whole, the same parties were before the courts in both jurisdictions and it would not be the case that some third party would be affected if an anti-suit injunction is granted (*ibid*). Furthermore, the documents indicated that the First Appellant, who is a Singapore citizen and who has residence in Singapore, was a key party to the dispute, and that he played a significant role in the relationship between the parties (the GD at [42]).

(e) Taking all the relevant factors into account, the conclusion to be arrived at would be that the most appropriate forum would be the Singapore court. The Judge stated at [43]:

Looking at all the relevant factors here, I am of the view that the most appropriate forum is the Singapore court. As stated earlier, should the court here decide that no other rights could emanate from outside the parameters of the [three documents], the inquiry need go no further. Accordingly, it would not be appropriate for the Indonesian court to have to decide the contention whether liability exists independently of contract. This issue would have to be determined first before proceeding to the question whether a tort has indeed been committed on the facts and the court most suited to try this precedent issue is the Singapore one. It would be highly undesirable if different conclusions are reached by the two jurisdictions. It would therefore be vexatious or oppressive for the [Respondents] in this case to have to content with the [Appellants'] allegations in the Indonesian [A]ction concurrently with the claims in the Singapore [A]ction.

(f) There would be no real prejudice to the Appellants if the Indonesian Action was to be put on hold temporarily. In the circumstances, there was a compelling case for the granting of anti-suit injunction. The Judge stated at [44]:

It is not in dispute that the Indonesian [A]ction is still at a very early stage and substantial energy and time have not yet been expended in its pursuit. Further, the injunction sought is only up to the time the Singapore court gives its decision in this action or until further order. There is therefore no real prejudice to the [Appellants] if the Indonesian [A]ction is put on hold temporarily. In the circumstances here, I think the reasons for granting the injunction are sufficiently strong and compelling ones and I grant the injunction to the [Respondents] accordingly.

The submissions of the parties

The Appellants' submissions

18 The Appellants submitted that Singapore is not the natural forum for the claims in the Indonesian Action, as the Third Appellant's rights to sell and distribute the Products related to Indonesia, the Respondents sold the Products to the Third Appellant directly from the United States, the Third Appellant paid for the Products directly to the United States, the Products were sold in Indonesia, the Respondents are not Singapore companies, and the remedies, rights and cause of action claimed by the Second Appellant and the Third Appellant arise under Indonesian law. The three documents served only as the backdrop to the relationship between the parties. The claims of the Second Appellant and the Third Appellant in the Indonesian Action were based in tort arising under

Indonesian law, and did not arise out of any breach of any rights emanating from the three documents. In the circumstances, the Indonesian Action has an indisputable connection with Indonesia and has hardly any connection with Singapore. In short, the Singapore connection merely provided the background as to how the Third Appellant came to become the distributor of the Products in Indonesia.

19 The Appellants also submitted that even if Singapore was the natural forum, the Indonesian Action could not be said to be oppressive and/or vexatious, as, *inter alia*, the Appellants did not commence concurrent proceedings in Indonesia as well as in Singapore and the claims in the Indonesian Action were entirely connected to Indonesia. The Judge had erroneously held that whenever a party was made a defendant in a foreign action, he could commence an action in Singapore and if the court in Singapore should find that Singapore was the natural forum, it would be vexatious or oppressive for that party to have to contend with the foreign action while pursuing the Singapore action because there would be the possibility of the foreign court reaching a different finding from the Singapore court. Furthermore, there was no evidence that the Appellants have no cause of action under Indonesian law. The Respondents had, in response to the Appellants' expert evidence that there was a cause of action under Indonesian law, only made bare assertions that the Appellants have no such cause of action.

20 Before us, counsel for the Appellants, Mr Chelva Rajah SC ("Mr Rajah"), further submitted that the damages claimed under the four heads in the Indonesian Action were alternative and cumulative. The damages claimed under the first and last heads, Mr Rajah said, would be the largest by far. The damages claimed under the second head would be the smallest, and the damages claimed under the third head, *viz*, the ground which had a reference to the Shareholders' Agreement and other related agreements, would only total up to US\$500,000. In the course of the hearing, Mr Rajah expressed his clients' willingness to undertake that they would not rely on or refer to the three documents in any way except for background purposes in the Indonesian Action.

The Respondents' submissions

21 The Respondents submitted that the appeal hinged on the validity and veracity of the Indonesian Action, and that its case was that there was no basis whatsoever for the Indonesian Action. They contended that the Appellants had not adduced any reliable expert evidence of any value on the legal basis for the Indonesian Action and that the Appellants had not disclosed what rights they were relying on. The Indonesian Action was commenced for the sole purpose of extracting a juridical advantage to press for a favourable settlement from the Respondents.

22 The Respondents further submitted that the Judge had not erred in holding that the three documents were inextricably linked to the Appellants' claims. If the Appellants claimed rights in tort, the question that would have to be determined at the outset would be whether such rights could arise from the three documents, and as these agreements were governed by Singapore law, the local courts would clearly be the most appropriate forum. This question of whether the Appellants have rights in tort arising from the three agreements should also not be litigated both in Indonesia and Singapore. It would be vexatious and oppressive for the Respondents to face such a multi-pronged attack. Moreover, the Indonesian Action is bound to fail and the Appellants have never stated categorically what rights they have or how such rights came about. The fact that the Appellants denied that the Indonesian Action is based on the Shareholders' Agreement even though the Indonesian Action is clearly based on the Shareholders' Agreement should be viewed with suspicion as well.

The appellate court's role

23 At this juncture, it should be noted that where interlocutory injunctions are concerned, it is trite law that the function of an appellate court is one of review. In general, the appellate court must not exercise an independent discretion of its own and must defer to the lower court's exercise of discretion. This position was explained in the following *dicta* of Lord Diplock in *Hadmor Productions Ltd v Hamilton* [1983] AC 191 ("*Hadmor*"), a passage adopted by this court in, *inter alia*, *Chiarapurk Jack v Haw Par Brothers International Ltd* [1993] 3 SLR 285 (at 292, [16]) and *Asian Corporate Services (SEA) Pte Ltd v Eastwest Management Ltd (Singapore Branch)* [2006] 1 SLR 901 (at [13]). In *Hadmor*, Lord Diplock stated (at 220):

An interlocutory injunction is a discretionary relief and the discretion whether or not to grant it is vested in the High Court judge by whom the application for it is heard. Upon an appeal from the judge's grant or refusal of an interlocutory injunction the function of an appellate court, whether it be the Court of Appeal or your Lordships' House, is not to exercise an independent discretion of its own. It must defer to the judge's exercise of his discretion and must not interfere with it merely upon the ground that the members of the appellate court would have exercised the discretion differently. The function of the appellate court is initially one of review only. It may set aside the judge's exercise of his discretion on the ground that it was based upon a misunderstanding of the law or of the evidence before him or upon an inference that particular facts existed or did not exist, which, although it was one that might legitimately have been drawn upon the evidence that was before the judge, can be demonstrated to be wrong by further evidence that has become available by the time of the appeal; or upon the ground that there has been a change of circumstances after the judge made his order that would have justified his acceding to an application to vary it.

General legal principles relating to anti-suit injunctions

24 The fundamental principles relating to anti-suit injunctions in Singapore is well settled (*Regalindo Resources Pte Ltd v Seatrek Trans Pte Ltd* [2008] 3 SLR 930 at [12] and *VH v VI* [2008] 1 SLR 742 at [37]). They may be found in the *dicta* of Lord Goff of Chieveley ("*Lord Goff*") in the decision of the Privy Council in *Société Nationale Industrielle Aerospatiale v Lee Kui Jak* [1987] AC 871 ("*Société Nationale Industrielle Aerospatiale*").

25 In *Société Nationale Industrielle Aerospatiale*, Lord Goff restated the applicable principles on this question to be as follows (at 892):

The law relating to injunctions restraining a party from commencing or pursuing legal proceedings in a foreign jurisdiction has a long history, stretching back at least as far as the early 19th century. From an early stage, certain basic principles emerged which are now beyond dispute. **First**, the jurisdiction is to be exercised when the "ends of justice" require it: see *Bushby v. Munday* (1821) 5 Madd. 297, 307, *per* Sir John Leach V.-C.); *Carron Iron Co. v. Maclaren* (1855) 5 H.L. Cas. 416, 453, *per* Lord St. Leonards (in a dissenting speech, the force of which was however recognised by Lord Brougham, at p. 459). This fundamental principle has been reasserted in recent years, notably by Lord Scarman in *Castanho v. Brown & Root (U.K.) Ltd.* [1981] A.C. 557 and by Lord Diplock in *British Airways Board v. Laker Airways Ltd.* [1985] A.C. 58, 81. **Second**, where the court decides to grant an injunction restraining proceedings in a foreign court, its order is directed not against the foreign court but against the parties so proceeding or threatening to proceed. As Sir John Leach V.-C. said in *Bushby v. Munday*, 5 Madd. 297, 307:

"If a defendant who is ordered by this court to discontinue a proceeding which he has commenced against the plaintiff, in some other Court of Justice, either in this country or

abroad, thinks fit to disobey that order, and to prosecute such proceeding, this court does not pretend to any interference with the other court; it acts upon the defendant by punishment for his contempt in his disobedience to the order of the court;...”

There are, of course, many other statements in the cases to the same effect. **Third**, it follows that an injunction will only be issued restraining a party who is amenable to the jurisdiction of the court, against whom an injunction will be an effective remedy: see, e.g. *In re North Carolina Estate Co. Ltd.* (1889) 5 T.L.R. 328, per Chitty J. **Fourth**, it has been emphasised on many occasions that, since such an order indirectly affects the foreign court, the jurisdiction is one which must be exercised with caution: see e.g., *Cohen v. Rothfield* [1919] 1 K.B. 410, 413, per Scrutton L.J., and, in more recent times, *Castanho v. Brown & Root (U.K.) Ltd.* [1981] A.C. 557, 573, per Lord Scarman.

[emphasis added in bold italics]

26 These principles have been referred to and adopted by several local cases, including those of this court. In *Bank of America National Trust & Savings Association v Djeni Widjaja* [1994] 2 SLR 816, this court applied those principles to restrain a plaintiff, an Indonesian, who having commenced an action in Singapore and which action had reached the stage of being set down for trial, from discontinuing the Singapore proceedings and starting fresh proceedings in Indonesia. This court again applied those principles in the later case of *Koh Kay Yew* ([17] *supra*).

27 In determining where the balance of the justice of the case lies, the Privy Council in *Société Nationale Industrielle Aerospatiale* held that where a remedy is available in both England and the foreign court, the English court would, in general, only restrain the plaintiff from pursuing proceedings in the foreign court if the pursuit would be vexatious or oppressive (see *Dicey, Morris & Collins on The Conflict of Laws* vol 1 (Sir Lawrence Collins gen ed) (Sweet & Maxwell, 14th Ed, 2006) (“*Dicey on The Conflict of Laws*”) at para 12-072). The English court must also take into account the injustice to the defendant if the plaintiff is allowed to pursue the foreign proceedings, and also the injustice to the plaintiff if he or she is not allowed to do so (*ibid*).

28 In *Evergreen International SA v Volkswagen Group Singapore Pte Ltd* [2004] 2 SLR 457 (“*Evergreen International SA*”), Belinda Ang Saw Ean J (“Ang J”) stated that she had to consider the following elements in determining whether an anti-suit injunction ought to be granted in the case (at [16]):

- (a) whether the defendants are amenable to the jurisdiction of the Singapore court;
- (b) the natural forum for resolution of the dispute between the parties;
- (c) the alleged vexation or oppression to the plaintiffs if the foreign proceedings are to continue; and
- (d) the alleged injustice to the defendants as an injunction would deprive the defendants of the advantages sought in the foreign proceedings.

29 In our view, this is as good a list as any with only one qualification, which would constitute a fifth element – whether the institution of the foreign proceedings is in breach of any agreement between the parties (see *South Carolina Insurance Co v Assurantie Maatschappij “De Zeven Provinciën” NV* [1987] AC 24). Where there is such an agreement, the court may not feel diffident about granting an anti-suit injunction as it would only be enforcing a contractual promise and the

question of international comity is not as relevant (see *The Angelic Grace* [1995] 1 Lloyd's Rep 87 at 96 and *WSG Nimbus Pte Ltd v Board of Control for Cricket in Sri Lanka* [2002] 3 SLR 603 at [91]). However, as far as the present case was concerned, this element did not come into play as there was no such agreement between the parties. That said, we will now examine each of these elements in relation to the facts and circumstances of the present case, although one could say that the third and fourth elements are really quite closely related, being two sides of the same coin.

Amenability to the jurisdiction of the Singapore court

30 In *Koh Kay Yew* ([17] *supra*), this court considered, *inter alia*, the issue of the circumstances under which a party would be considered to be amenable to the jurisdiction of the Singapore court. There, Yong Pung How CJ ("Yong CJ"), who delivered the grounds of decision of the court, said (at [17]):

... LP Thean JA stated in [*Djoni Widjaja*] that, as long as a party submitted to the jurisdiction of the courts, by seeking relief in the local High Court or otherwise, this would answer the question whether the party was amenable to the jurisdiction of the court. In our opinion, the same would apply if the party was validly served with the required court documents as required by the present Rules of Court finding jurisdiction in Singapore (see s 16 of the Supreme Court of Judicature Act (Cap 322)). Being amenable to the jurisdiction of the local courts simply means being liable or accountable to this jurisdiction. As such, so long as any local courts have *in personam* jurisdiction over a party, either through the proper service of documents or through submission to the jurisdiction, this first criteria [*sic*] would be satisfied.

31 In contrast to the situation in *Koh Kay Yew*, in *People's Insurance Co Ltd v Akai Pty Ltd* [1998] 1 SLR 206, the defendant, who had had taken no steps in the Singapore proceedings except to defend the application for an anti-suit injunction, was held not to be amenable to the jurisdiction of the Singapore court (at [9]).

32 In the present case, the fact that the Singapore court has *in personam* jurisdiction over the parties is not disputed. Indeed, it would appear that the following observations of Yong CJ on the amenability of the appellant in *Koh Kay Yew* to the jurisdiction of the Singapore court would aptly describe, to a large extent, the position of the Appellants in the present case (at [30]):

In the present case, the appellant did not appear to have challenged the jurisdiction of the Singapore courts at any time or at all until the hearing of the appeal. It was not disputed that service of the originating process, with his consent, was effected on his solicitors on his behalf. This clearly indicated that the appellant had no objections to be subjected to the jurisdiction of the Singapore court. Furthermore, the appellant defended his action in the court below without taking any further steps to set aside the action for lack of jurisdiction. It is trite law that in order to challenge the jurisdiction of the courts, one had to do so before any fresh steps were taken before the court hearing commenced. This was not the case here. In such a case, we had no doubt that the appellant had made himself liable to the jurisdiction of our courts. He had contested, through his solicitors, the present proceedings in the court below, and he was now bound by its jurisdiction. He could not turn around and say that he was not amenable to the jurisdiction of the Singapore court.

We would hasten to add that the Appellants are *a fortiori* amenable to the jurisdiction of the Singapore court as unlike the appellant in *Koh Kay Yew*, the Appellants here not only did not challenge the jurisdiction of the Singapore court at the hearing below, they did not even challenge it at the hearing of this appeal.

The natural forum of the dispute

General principles

33 In *Koh Kay Yew* ([17] *supra*), this court stated (at [18]) that the principles to be applied with regard to determining the natural and proper forum (when considering an application for an anti-suit injunction) would be the principles as stated in the seminal judgment of Lord Goff in *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460 ("*Spiliada*"). In *Spiliada*, Lord Goff framed the test for determining the natural forum as the forum with which the dispute has the most real and substantial connection. In the context of the present case, it must not only be shown that Singapore is an appropriate forum, but that Singapore is clearly the *more* appropriate forum. The onus of showing that Singapore is clearly the more appropriate forum should logically fall on the applicant for the anti-suit injunction. In this regard, although there appears to be a lack of case law on point, first principles dictate that the applicant should bear the burden of proof, as it is axiomatic that he who asserts should prove. Moreover, this is consistent with, firstly, the fact that the antithesis of an application for an anti-suit injunction – an application for a stay on the basis of *forum non conveniens* – requires the applicant to establish that another available forum is clearly more appropriate than Singapore, and secondly, the fact that the burden of showing that Singapore is clearly the appropriate forum falls on the applicant for leave to serve out of jurisdiction.

34 In determining the issue as to whether Singapore is clearly the more appropriate forum, the court will take into consideration all relevant factors, including factors relating to convenience or expense (such as the availability of witnesses) and factors such as the law governing the transaction and the places where the parties respectively reside or carry on business (see Adrian Briggs, *The Conflict of Laws* (Oxford University Press, 2002) at p 95 and David McClean & Kisch Beevers, *Morris on the Conflict of Laws* (Sweet & Maxwell, 6th Ed, 2005) at para 5-014). However, the process of taking into consideration all the relevant factors is not mechanical. As had been stated in *CIMB Bank Bhd v Dresdner Kleinwort Ltd* [2008] 4 SLR 543 ("*CIMB Bank Bhd*") by this court, "weighing the various connecting factors is not a numbers game" (at [85]). In a similar vein, V K Rajah J ("*Rajah J*") (as he then was), in *Peters Roger May v Pinder Lillian Gek Lian* [2006] 2 SLR 381 ("*Peters Roger May*"), stated (at [20]):

A court has to take into account an entire multitude of factors in balancing the competing interests. The weightage accorded to a particular factor varies in different cases and the ultimate appraisal ought to reflect the exigencies dictated by the factual matrix. Copious citations of precedents and *dicta* are usually of little assistance and may in reality serve to cloud rather than elucidate the applicable principles.

Likewise, in *Andre Ravindran S Arul v Tunku Ibrahim Ismail bin Sultan Iskandar Al-Haj* [2001] SGHC 209, Choo Han Teck JC (as he then was) held (at [8]):

The determination of the appropriate forum is not an exercise carried out merely by adding the sum total of all the relevant connecting factors. The court has to apportion a value to each factor and consider its place in the overall picture.

35 In relation to an appellate court's review of a lower court's decision that a particular jurisdiction is the natural forum for determining a dispute, it is trite law that the appellate court will be slow to interfere with such a decision. As was stated in *CIMB Bank Bhd* by this court in relation to an application to stay proceedings on the basis of *forum non conveniens* (which necessarily requires a determination of the natural forum) (at [84]):

It is clear that in determining whether or not to grant a stay of proceedings, the judge will be exercising a discretion. Such an exercise of discretion should not be interfered with by an appellate court unless the judge had misdirected himself on a matter of principle, or he had taken into account matters which he ought not to have taken into account or had failed to take into account matters which he ought to have taken into account, or his decision is plainly wrong (see *The Abidin Daver* [1984] AC 398 at 420 *per* Lord Brandon of Oakbrook).

36 Turning to the factors raised in the present case, four main factors can be distilled from the submissions of the parties. The first factor would be the location/residence of the parties. The second factor would be the location of the witnesses. The third factor would be the location of the evidence, *viz*, relevant documents. The fourth main factor would be the location of the tort and choice of law issues. These factors will be considered in turn.

The location/residence of the parties

37 The Respondents are foreign companies not incorporated in Singapore, the other defendants in the Indonesian Action are not located in Singapore, and the Third Appellant is an Indonesian company. However, the Respondents have a presence in Singapore (as demonstrated by the fact that TAC, which is wholly owned by the First Respondent, distributes and sells the Products in Singapore), the other defendants in the Indonesian Action are related to the Respondents, and the Second Appellant is a Singapore company. Thus, the circumstances concerning this factor do not all point in one direction and may conceivably be construed as being neutral. This case can usefully be contrasted with the case of *Ang Ming Chuang v Singapore Airlines Ltd* [2005] 1 SLR 409, where the location of the parties was clearly a factor pointing towards a finding that Taiwan was the natural forum, as the applicant operated only in Taiwan, while the respondent operated worldwide, including in Taiwan (see [17]).

The location of the witnesses

38 The Appellants submitted that the majority of the witnesses reside in Indonesia. However, it is readily observable that the likely key witnesses for the Appellants, *viz*, the First Appellant and his son-in-law, one Justin Michael Taylor ("Taylor"), are both Singapore citizens and reside in Singapore. From the First Appellant's affidavits, it can be inferred that he is a key witness for the Appellants in the dispute. He had, for example, played key roles in most of the material events (see first affidavit of the First Appellant dated 8 January 2008). Similarly, Taylor, a director of the Second Appellant and a commissioner of the Third Appellant, is also likely to be a key witness for the Appellants in the dispute. That having been said, according to this court in *CIMB Bank Bhd* ([34] *supra*) and *Rickshaw Investments Ltd v Nicolai Baron von Uexkull* [2007] 1 SLR 377 ("*Rickshaw Investments*"), the location of witnesses is only really significant in relation to third-party witnesses who are not in the employ of the parties as it could give rise to issues of compellability (*CIMB Bank Bhd* at [69] and *Rickshaw Investments* at [19]). In the present dispute, the only third-party witnesses that might be called would be, on the Appellants' evidence, customers of the Third Appellant (see second affidavit of Taylor dated 8 January 2008 at para 27). The reason for their being called as witnesses, however, is not apparent on the evidence. It is not denied that the other witnesses would be employees and executives of the parties themselves. On the whole, therefore, the location of the witnesses would also appear to be a neutral factor.

39 It might be added that video-linked evidence, as Rajah J observed in *Peters Roger May* ([34] *supra*), of "unprecedented clarity and life-like verisimilitude" is now readily available at relatively affordable costs; even cross-examination can be carried out readily by video-link as long as the court is satisfied that the witness is not being prompted (at [26]). Rajah J's observations, which were cited

with approval by this court in *Good Earth Agricultural Co Ltd v Novus International Pte Ltd* [2008] 2 SLR 711 ("*Good Earth Agricultural*") (at [21]), in full, are as follows (*Peters Roger May* at [26]):

The easy and ready availability of video link nowadays warrants an altogether different, more measured and pragmatic re-assessment of the need for the physical presence of foreign witnesses in stay proceedings. Geographical proximity and physical convenience are no longer compelling factors nudging a decision on *forum non conveniens* towards the most "witness convenient" jurisdiction from the viewpoint of physical access. Historically, the availability and convenience of witnesses was a relevant factor as it had a bearing on the costs of preparing and/or presenting a case and, most crucially, in ensuring that all the relevant evidence was adduced before the adjudicating court. The advent of technology however has fortunately engendered affordable costs of video-linked evidence with unprecedented clarity and life-like verisimilitude, so that the importance of this last factor recedes very much into the background both in terms of relevance and importance. In other words, the availability and accessibility of video links coupled with its relative affordability have diminished the significance of the "physical convenience" of witnesses as a yardstick in assessing the appropriateness of a forum. I myself have on several occasions experienced the use of video links to hear testimony and to assess witnesses. As long as the court is satisfied that a witness is not being prompted, cross-examination can take place as readily and easily as in a courtroom; see also my observations in *Cheong Ghim Fah v Murugian s/o Rangasamy* [2004] 1 SLR 628 at [39]. I also find it heartening that my preferred approach in endorsing the convenience, affordability and reliability of video-linked evidence is amply supported by some observations made in the very recent House of Lords decision in *Polanski v Condé Nast Publications Ltd* [2005] 1 WLR 637. Lord Nicholls of Birkenhead observed at [14]:

Improvements in technology enable Mr Polanski's evidence to be tested as adequately if given by VCF [video conferencing] as it could be if given in court. Eady J, an experienced judge, said that cross-examination takes place "as naturally and freely as when a witness is present in the court room". Thomas LJ ... said that in his recent experience as a trial judge, giving evidence by VCF is a "readily acceptable alternative" to giving evidence in person and an "entirely satisfactory means of giving evidence" if there is sufficient reason for departing from the normal rule that witnesses give evidence in person before the court: [2004] 1 WLR 387, 402.

And *per* Lord Slynn of Hadley at [45]:

As between the parties, if all other questions of policy are ignored, it seems that the use of video link could be efficient and fair and contribute to the economic disposal of the litigation. If indeed there is any disadvantage it may be to the person asking for video link evidence and *it is not established that the defendants would be adversely affected by the use of video link evidence.*

[emphasis added in original]

The location of the relevant documents

40 The Appellants submitted that a significant number of the relevant documents of both parties are likely to be located in Indonesia. Properly viewed in its context, however, the fact that a significant number of the relevant documents are located in Indonesia would similarly not be a strong factor towards Indonesia being the natural forum, as documentary evidence is, in this modern age,

easily transportable between jurisdictions. In this regard, as was observed by this court in *Good Earth Agricultural* (at [23]) and the High Court in *Novus International Pte Ltd v Good Earth Agricultural Co Ltd* [2007] 4 SLR 402 (at [34]), it might be said that this is a consideration that can be dealt with by an appropriate order for costs and disbursements. In any event, the location of documents should not be a weighty factor when even the location of witnesses overseas would not pose a problem (*Good Earth Agricultural* at [23]).

The location of the tort and choice of law issues

41 The Appellants' claims in the Indonesian Action are in tort and the general rule is that the place where the alleged tort occurred, which in the present matter would be Indonesia, is the natural forum. In *The Albaforth* [1984] 2 Lloyd's Rep 91, it was stated that the place where a tort occurred is *prima facie* the natural forum for determining the claim (at 96). This principle was accepted by the House of Lords in *Berezovsky v Michaels* [2000] 1 WLR 1004 as well as by the English High Court in *Caltex Singapore Pte Ltd v BP Shipping Ltd* [1996] 1 Lloyd's Rep 286 and *The Xin Yang and An Kang Jiang* [1996] 2 Lloyd's Rep 217, and has been applied locally by the High Court in the case of *Evergreen International SA* ([28] *supra*) and this court's decision in *Rickshaw Investments* ([38] *supra*). However, it has to be emphasised that the fact that the alleged tort occurred in Indonesia would be a weighty factor, but not, by any means, a conclusive factor that points in favour of Indonesia as the natural forum (*Rickshaw Investments* at [40]).

42 Thus, the fact that the Respondents' alleged torts were committed in Indonesia does point towards Indonesia as being the natural forum to hear the dispute, but this is only one of the factors, albeit a significant factor, to be taken into account in the overall analysis (*ibid*). On our reading of the GD, it appeared to the Judge that, this factor (*ie*, the location of the tort) was, in the circumstances, nullified and superseded by the choice of law clauses in the three documents (see the GD at [40]; quoted above at [17]). We did not share the Judge's perception of the relevance of the three documents, which had essentially nothing to do with the Third Appellant's claim in tort in the Indonesian Action which was premised on the fact that it was the distributor of the Products there from 1993 to 2004 even though no formal written agreement was entered into between the Third Appellant and the Respondents. The Third Appellant was not even a party to the three documents. The Appellants did not seek to rely on the three documents other than as background to show why the Third Appellant was set up and was appointed the distributor, and submitted to the Judge that the three documents were not the bases for the Indonesian Action (see [18] above). In this respect, we noted that the third basis of the Indonesian Action referred to the Shareholders' Agreement and "other supplemental documents."^[note: 8] Thus, during the course of the hearing of the appeal before us, counsel for the Appellants affirmed, and gave an undertaking on behalf of his clients that in the Indonesian Action they would not be relying on the three documents for their claims save for the purposes of establishing the background to the matter. We therefore could not, with respect, accept the Judge's opinion (at [40] of the GD) that the Singapore court was the natural and proper forum for determining the dispute in the Indonesian Action because it would be necessary for a court to look at the three documents to see whether or not they could conceivably give life to any other legal rights not residing in the three documents. We further, and again with respect, could not accept his view (at [43] of the GD) that "it would not be appropriate for the Indonesian court to have to decide the contention whether liability exists independently of contract." We did not understand why it was inappropriate for an Indonesian court to decide a claim in tort which occurred there, especially as the Second Appellant and the Third Appellant were not even parties to the three documents.

43 The law that governed the Indonesian Distributor Arrangement was therefore a matter of great significance. The question of the rights that had accrued to the Appellants from the Indonesian Distributor Arrangement, if any, would, inevitably have to be considered in the course of the

Indonesian Action. There is little evidence on the Indonesian Distributor Arrangement, other than the claims by the Respondents that it led to the Third Appellant becoming the non-exclusive distributor of the Products in Indonesia as evidenced by the certificates of appointment issued to the Third Appellant. However, the fact of the matter is that the Indonesian Distributor Arrangement was in relation to the sales of the Products in Indonesia. Accordingly, the *prima facie* governing law of the arrangement would be Indonesia, as it would be the system of law with which the arrangement had its closest and real connection (see *Overseas Union Insurance Ltd v Turegum Insurance Co* [2001] 3 SLR 330 at [82]). Moreover, there were also other circumstances which showed that that was always the intention of the parties to the arrangement. First, the Draft Distributor Agreement, which was intended to be executed (but was not) between the Third Appellant and the Third Respondent, provided that it was to be governed by Indonesian law. Second, the Draft Distributor Agreement was prepared by the Respondents and, as such, they can hardly be heard to aver that Indonesian law was not the intended law. Third, the Malaysian Distributor Agreement provided that it was to be governed by Malaysian law and the (Singapore) Distributor Agreement was governed by Singapore law. These circumstances were clear indications that the parties, and in particular the Respondents, intended all their distributorship agreements to be governed by the law of the country where the distributorship was to be undertaken.

44 In *Rickshaw Investments* ([38] *supra*), it was opined that the governing law is a relevant consideration to the question of the natural forum (at [42]). The relevance of the governing law in an enquiry regarding the natural forum lies in the general proposition that where a dispute is governed by a foreign *lex causae*, the forum would be less adept in applying the law than the courts of the jurisdiction from which the *lex causae* originates (*ibid*). Furthermore, while it is true that the courts of a country can apply the laws of another country to a dispute, there will clearly be savings in time and resources if a court applies the law of its own jurisdiction to the substantive dispute (*ibid*). Hence, the governing law would be a significant factor in determining the appropriate forum to hear a dispute (*ibid*).

Our finding on natural forum

45 In the light of the foregoing analysis of the relevant factors, it was our view that the factors present were far from pointing towards Singapore as being clearly the more appropriate forum to adjudicate the claims in the Indonesian Action. In passing, we ought to add that, had we found that Singapore was the natural forum to adjudicate the claims in the Indonesian Action, it did not follow that the Indonesian Action should *ipso facto* be restrained as one should not overlook the caution uttered by Lord Goff in *Société Nationale Industrielle Aerospatiale* ([24] *supra*) when he said that it would be inconsistent with comity to restrain a party from proceeding in a foreign court solely on the ground that England was the natural forum (at 895).

Vexation or oppression

46 In *Koh Kay Yew* ([17] *supra*), this court emphasised that "it must be only in the clearest of circumstances that the foreign proceedings are vexatious or oppressive before an injunction can be granted and justified" (at [25]). Otherwise any injunction so granted would not only be against Lord Goff's principles but also a deprivation of the rights of a party to sue in the jurisdiction which is most convenient for him and which he is clearly entitled to (*ibid*). In *Société Nationale Industrielle Aerospatiale*, after setting out the fundamental principles relating to anti-suit injunctions, Lord Goff went on to refer (at 894) with approval to the words of caution of Bowen LJ in *McHenry v Lewis* (1882) 22 Ch D 397 ("*McHenry*") and to say, in their light, that it was, firstly, "wise to remember the breadth of the jurisdiction" of the court to grant an anti-suit injunction, *ie*, being to restrain not merely where proceedings were vexatious, in the sense of frivolous or useless, but also where they

were oppressive, and, secondly, that everything depended on the circumstances of the particular case. In *McHenry*, Bowen LJ had stated (at 407–408):

I agree that it would be most unwise, unless one was actually driven to do so for the purpose of deciding this case, to lay down any definition of what is vexatious or oppressive, or to draw a circle, so to speak, round this court unnecessarily, and to say that it will not move outside it. I would much rather rest on the general principle that the court can and will interfere whenever there is vexation and oppression to prevent the administration of justice being perverted for an unjust end. I would rather do that than attempt to define what vexation and oppression mean; they must vary with the circumstances of each case.

47 We would observe that the courts have held that there is vexation or oppression in situations such as the following: where a party is subjected to oppressive procedures in the foreign court; bad faith in the institution of the foreign proceedings; commencing the foreign proceedings for no good reason; commencing proceedings that are bound to fail; and extreme inconvenience caused by the foreign proceedings (*Dicey on The Conflict of Laws* ([27] *supra*) at para 12-073). These situations can also be suitably described by the word *unconscionable*. In this respect, the following *dicta* of Ang J in *Evergreen International SA* ([28] *supra*) is helpful (at [41]):

The question for consideration is whether the conduct of the defendants in continuing with the Belgium proceedings is vexatious or oppressive and is hence unconscionable. Lord Hobhouse in *Turner v Grovit* [2002] 1 WLR 107 at 117 explained that the power to make the restraining order is dependent upon there being wrongful (“unconscionable”) conduct of the party to be restrained of which the applicant is entitled to complain and has a legitimate interest in seeking to prevent. He said that the word “unconscionable” is derived from English equity law. Injunctive relief is based on equity. The words “vexatious” or “oppressive” have been used in relation to the conduct of the party to be restrained. They are derived from “the basic principle of justice”. As the complaint is that unconscionable, vexatious or oppressive conduct lies in the pursuit of proceedings in Belgium, an assessment or evaluation of the conduct complained of and the nature of the plaintiffs’ rights or interests that are being infringed or threatened is needed.

48 Our reading of the Judge’s reasons for finding that there was vexation and oppression was that it would, firstly, be inappropriate for the Indonesian court to have to decide that liability exists independently of the three documents, and secondly, it would be highly undesirable if different conclusions were arrived at by the Singapore court and the Indonesian court. With respect, we could not agree with both these concerns. On the first concern, as stated in [41] above, the claim in the Indonesian Action was in tort, based on a series of transactions and dealings between the parties in Indonesia and the reference to the three documents was only to give the background facts. We would have thought that such a claim, based on Indonesian tort law, should rightfully be adjudicated there. As regards the second concern, bearing in mind that the Singapore Action and the Indonesian Action were grounded on different causes and having regard to the undertaking given by counsel for the Appellants that reference to the three documents would only be for the purposes of providing the background, we were unable to see how conflict of decisions would ever arise. Accordingly, we were of the opinion that there were no grounds for alleging that the institution of the Indonesian Action was in any way vexatious or oppressive. We could not see anything unconscionable by letting the Indonesian Action continue as Singapore was not the natural forum to determine the Appellants’ claims. If, as the Respondents alleged, the Appellants’ Indonesian Action had no merits at all, it was open to the Respondents to apply to the Indonesian courts to have the action struck out. As this court had stated in *The Hung Vuong-2* [2001] 3 SLR 146, it is not for this court to pass judgment on the competence or independence of the judiciary of a foreign court or its legal system (at [27]). In passing, we would again refer to *Société Nationale Industrielle Aerospatiale* ([24] *supra*), where Lord

Goff stressed that there is no presumption that a multiplicity of proceedings is vexatious (at 894). Recently, similar sentiments have been expressed by the English Court of Appeal in *Royal Bank of Canada v Coöperatieve Centrale Raiffeissen-Boerenleenbank BA* [2004] 1 Lloyd's Rep 471 (at 474–475 and 479–480) and the English High Court in *Dornoch Limited v The Mauritius Union Assurance Company Ltd* [2005] EWHC 1887 (Comm) (at [128]).

49 The Respondents had also further alleged that the Indonesian Action was commenced in bad faith, and the real intention of the Appellants was to force a settlement. But there was no reason why such questions of alleged bad faith could not be addressed by the Indonesian courts. Suffice it for us to point out that Taylor had deposed in an affidavit dated 8 January 2008 that the Indonesian Action was commenced after the Second Appellant and the Third Appellant had taken their Indonesian lawyers' advice. Also, in a letter dated 4 November 2005, Taylor wrote to the Respondents, stating that "[u]nder Indonesian laws, we are confident of our rights and remedies under the agreements, and under general law and the principle of bad faith as it exists in Indonesia."[\[note: 9\]](#) In contrast, no evidence on Indonesian law was adduced by the Respondents, who had the burden of establishing its case for an anti-suit injunction, to show that the Appellants' case in the Indonesian Action had no merit at all. Here, we would also highlight that the Appellants had consistently, from the outset, made references to their rights in Indonesia and under Indonesian law (see, eg, the letters to the Respondents dated 26 August 2005, 31 August 2005 and 4 November 2005, respectively). Also, the Appellants had made it clear, at an early stage, that Indonesia might be a forum for the dispute to be adjudicated (see, eg, letter to the Respondents dated 27 October 2005).

50 Finally, we would point out that whether an action was first instituted in a foreign country or in Singapore is an immaterial consideration. This was enunciated in *The Coral Isis* [1986] 1 Lloyd's Rep 413 at 417 per Sheen J and *Rickshaw Investments* ([\[38\] supra](#)) at [87] and [88]. Although those two cases related to the issue of *forum non convenience*, we were unable to see why the rationale there on this point should not also apply to a case concerning anti-suit injunction.

51 In the circumstances of the present case, we were of the clear opinion that the continuation of the Indonesian Action would not be vexatious or oppressive. Indeed, if there was any objectionable behaviour, it would have been on the part of the Respondents for blowing hot and cold, as the Respondents' quarterly report filed for the period ending 30 June 2007 stated that "[the Respondents] intend to vigorously contest the allegations raised"[\[note: 10\]](#) in the Indonesian Action, and PT Trane Indonesia's (the new distributor of the Products in Indonesia for the Respondents) letter to customers dated 12 July 2007 stated that the "legal matters at issue [in Indonesia] will be decided in the Indonesian courts."[\[note: 11\]](#)

52 In conclusion, we would refer to the following caution given by this court in *Koh Kay Yew* ([\[17\] supra](#)), which also aptly applied in the present case (at [22] and [23]):

22 ... [I]n dealing with cases such as the present one, where the appellant had only started proceedings in one jurisdiction, the courts should be more cautious than not in granting injunctions compared with situations, in which a party had commenced actions concurrently in two jurisdictions. In the latter situations, it is understandable that any court should feel uncomfortable about allowing both actions to go on. ...

23 However, in the former scenario, as it is with the present case, the situation would be quite the opposite. The party who commenced the foreign proceedings would only have done so in one jurisdiction. He would have in no way abused the systems of justice of various jurisdictions to his advantage. It is the defendant in the foreign proceedings that is complaining about the action

and wants the foreign proceedings stopped. In such a case, we think that as long as the party who commenced the foreign proceedings was entitled to do so, whether or not the foreign courts recognise this, then our courts should be extremely cautious in granting an injunction. ...

Injustice

53 If a *prima facie* case of vexation or oppression had been made out by an applicant for an anti-suit injunction, the respondent in such an application would be entitled to show why it would nevertheless be unjust for an injunction to be granted (*Dacey on The Conflict of Laws* ([27] *supra*) at para 12-073). In light of the above, the question of whether or not, in the present case, it would be unjust for an injunction to be granted was a non-issue. It remains for us to state that the fact that the Respondents had earlier indicated that they would defend the Indonesian Action and later made an about-turn on that point, was hardly the behaviour of someone who was entitled to question the good faith of the Appellants. In any event, we could not see any basis for questioning the good faith of the Appellants in commencing the Indonesian Action.

Conclusion

54 For the foregoing reasons, we allowed the appeal in CA 103. We further ordered costs here and below be given to the Appellants with the usual consequential orders, but with no inquiry as to damages.

[\[note: 1\]](#) Record of Appeal ("RA") (Vol III Part D) at pp 1063–1066.

[\[note: 2\]](#) RA (Vol III Part C) at p 759.

[\[note: 3\]](#) RA (Vol III Part B) at p 565.

[\[note: 4\]](#) *Ibid.*

[\[note: 5\]](#) RA (Vol III Part B) at p 566.

[\[note: 6\]](#) *Ibid.*

[\[note: 7\]](#) RA (Vol III Part B) at p 568.

[\[note: 8\]](#) RA (Vol III Part B) at p 566.

[\[note: 9\]](#) RA (Vol III Part C) at p 676.

[\[note: 10\]](#) RA (Vol III Part E) at p 1344.

[\[note: 11\]](#) RA (Vol III Part E) at p 1345.

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