IN THE SINGAPORE INTERNATIONAL COMMERCIAL COURT OF THE REPUBLIC OF SINGAPORE

[2020] SGHC(I) 22

Suit No 4 of 2020
Summons No 55 of 2020
Summons No 62 of 2020
Summons No 64 of 2020

Between

(1) Tamar Perry
(2) Solid Fund Private Foundation

… *Plaintiffs*

And

(1) Bonnet Esculier Servane Michele Thais
(2) Jacques Henri Georges Esculier

… *Defendants*

GROUNDS OF DECISION

[Civil Procedure] — [Interpleader]
[Civil Procedure] — [Striking out]
[Civil Procedure] — [Pleadings] — [Amendment]
[Civil Procedure] — [Rules of court] — [Offshore case]
[Civil Procedure] — [Further arguments]

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Perry, Tamar and another
v
Esculier, Bonnet Servane Michele Thais and another

[2020] SGHC(I) 22

Singapore International Commercial Court —Summons No 55 of 2020; Summons No 62 of 2020; Summons No 64 of 2020
Simon Thorley IJ
25 September 2020

30 October 2020

Simon Thorley IJ:

Introduction

1 This judgment relates to three Summonses in this action. The first, SIC/SUM 55/2020 dated 7 August 2020, is brought by the Plaintiffs seeking leave to amend the Writ and Statement of Claim. The second, SIC/SUM 62/2020, dated 28 August 2020 is brought by the Defendants seeking an order that certain paragraphs of the existing Statement of Clam should be stuck out. Since the two raise a common issue it was convenient to hear the two together.

2 The third summons, SIC/SUM 64/2020 dated 2 September 2020 is brought by the Plaintiffs seeking a decision pursuant to O 3 r 4 and O 110 r 36 of the Rules of Court (Cap 332, R 5, 2014 Rev Ed) ("ROC") that this case is an "Offshore case".

3 The summonses were heard together at a hearing on 25 September 2020. At the conclusion of the hearing I indicated that leave to amend the Writ and the Statement of Claim (in certain respects) would not be granted, and that the application to strike out succeeded. Further, I acceded to the request that this case be designated an Offshore case. These are my reasons for those decisions.

Background

4 For the purposes of these applications the background facts and allegations can be recited relatively briefly. The full facts will have to be ascertained at trial.

5 Both the Plaintiffs and Defendants were investors in funds administered by a group of companies trading under the name "Lexinta". The activities of these companies appear to have been directed by a Spanish citizen resident in Switzerland, Bismark Antonio Badilla Rivera ("Badilla"). In her affidavit dated 6 August 2020 the first Plaintiff ("TP") asserts that Badilla, through the Lexinta group, was running a fraudulent Ponzi scheme.

6 The Defendants, both French citizens, were, apparently, relatively early investors in the scheme in April 2014. The agreed date for return of the fruits of this investment was in April 2016 and, following demands made on the Defendants' behalf, over a period of months between August 2016 and February 2017 sums amounting to around US$10 million were credited by Lexinta to the first Defendant's bank account with DBS Bank Ltd ("DBS") in Singapore (the "Disputed Monies").

7 Between April 2016 and August 2017 the Plaintiffs, or persons from whom the Plaintiffs claim to derive title, assert that they deposited in excess of US$24 million with Lexinta (the "Plaintiffs' fund") and that instead of investing that fund as agreed, Lexinta dissipated it as part of the Ponzi scheme to earlier investors including the Defendants.

8 In March 2018, TP and another person, Yachel Baker ("YB"), obtained *ex parte* discovery orders from the Hong Kong courts against DBS for the banking records of the Lexinta group, claiming to have been victims of the fraudulent Ponzi scheme. This order resulted in TP becoming aware of the sums paid by Lexinta to the first Defendant's DBS bank account. The Plaintiffs assert that those sums were the result of a back-to-back transfer by Lexinta of some of the Plaintiffs' fund such that, in law, those sums belonged to the Plaintiffs and not the Defendants. Accordingly, in May 2018 TP's lawyers in Hong Kong demanded that DBS transfer the Disputed Monies to her. In consequence, at some date thereafter, DBS froze the Singapore bank account.

9 In April 2018, Badilla was arrested in Switzerland and is now awaiting trial for fraud on the basis that he had been operating a Ponzi scheme.

10 It was not, however, until March 2019 that the Defendants became aware that the funds in the DBS Singapore account had been frozen and that TP had demanded that the sums involved be transferred to her. Discussions between the parties then ensued, which failed to result in agreement as to the ownership of the Disputed Monies.

11 Faced with the conflicting claims to the Disputed Monies, DBS availed itself of the interpleader proceedings provided for by O 17 ROC. The Editorial

Introduction to that Order in the *Singapore Civil Procedure 2020* vol 1 (Chua Lee Ming gen ed) (Sweet & Maxwell, 2020) ("*Singapore Civil Procedure*") reads:

> Interpleader is a proceeding by which a person, from whom two or more persons claim the same property or debt, and who does not himself claim the property or dispute the debt, can protect himself from legal proceedings by calling upon the two claimants to interplead, that is to say, claim against one another, so that the title to the property or debt may be decided by the court.

12 Such a procedure can only be invoked in relation to property, such as the Disputed Monies, which is located in Singapore and the persons claiming to own the property can be brought before the courts in Singapore regardless of their nationality or place of residence. There is no requirement to obtain leave to serve interpleader proceedings out of the jurisdiction. The fact that a party has laid claim to the property in question is sufficient to justify making that person a party to the proceedings.

13 Interpleader proceedings have to be commenced by an Originating Summons ("OS") and DBS did this in the Singapore High Court on 8 August 2019. HC/OS 1016/2019 ("OS 1016") naming the first Defendant ("SEB"), TP and YB as the first, second and third defendants respectively.

14 OS 1016 first came on for hearing before Judicial Commissioner Dedar Singh Gill (as he then was) on 10 January 2020. YB renounced any claim to the Disputed Monies and therefore played no further part in the proceedings. Paragraph 2 of the Order of 30 January 2020, which was made pursuant to O 17 r 5(1)(b) ROC provided:

> 2. The 1st Defendant [SEB] and the 2nd Defendant [TP] shall proceed to have their respective claims to the Disputed Monies

> determined, with the 2nd Defendant [TP] to be the plaintiff in such further proceedings (the **"Further Proceedings"**) and the 1st Defendant [SEB], the defendant. The 3rd Defendant [YB] shall not be a party to the Further Proceedings.

15 Paragraph 3 of the Order directed that TP should file a Statement of Claim in the Further Proceedings by 31 January 2020. Orders were made for a cross-undertaking in damages from TP and for security for costs and paragraph 7 dispensed with DBS's attendance at any further hearings of the Further Proceedings. Finally, paragraph 8 reserved the costs of the OS and paragraph 9 gave all parties liberty to apply.

16 The effect of the Order was thus to direct that a new action (the "new action") should be commenced involving the parties to the OS who maintained a claim to the Disputed Monies, TP and SEB. This would serve to determine who was the legal owner of the Disputed Monies without involving DBS. Once the claims in the new action were resolved, the OS could be restored under the liberty to apply provision so that DBS could be directed to pay the Disputed Monies to the successful party, any claims under the cross-undertaking could be considered and the issue of the costs of the OS resolved.

17 Again, there was no requirement for leave to serve the writ in the new action on SEB out of the jurisdiction. The creation of the new action was justified on the basis of the presence of the property, the Disputed Monies, in Singapore and was thus a creature of O 17 ROC, commenced for the purpose of resolving the competing claims without DBS incurring any further expense. It was, in effect, a proceeding within the interpleader proceedings to enable the interpleader proceedings to be resolved quickly and efficiently.

18 Thereafter a measure of confusion arose because TP did not commence a new action but sought to file a Statement of Claim in the OS. The OS returned before Gill JC on 17 March 2020 when he ordered that SEB's husband, the second Defendant ("JE"), be added as a party to the OS as the fourth Defendant and Solid Fund Private Foundation, ("SFPF") a Curacao company controlled by TP, should be added as the fifth Defendant to the OS.

19 By paragraph 2 of the Order, TP was ordered to commence a suit against SEB and JE by "filing and serving a Writ of Summons, attaching the Statement of Claim dated 12 February 2020 (as originally filed in OS 1016) (the "**Suit**")". Paragraph 4 was in the following terms:

> 4. The Statement of Claim dated 12 February 2020 filed in the Suit be amended according to the draft annexed to HC/SUM/901/2020 (the "**Amended Statement of Claim**"), and the Amended Statement of Claim be filed and served by 20 March 2020; …

20 The Order made further provisions in relation to the cross-undertaking and security for costs consequent upon the joinder of SFPF and ordered that a defence be served in the Suit by 3 April 2020.

21 There was apparently no discussion at that hearing concerning the contents of the Amended Statement of Claim, which in fact included not only details of the proprietary claim to the disputed monies made by TP and SFPF but also included a claim against SEB and JE personally on the basis of unjust enrichment.

22 On 19 March 2020 the writ in the new action was issued in the High Court (HC/S 259/2020) naming TP and SFPF as Plaintiffs and SEB and JE as

Defendants. The Amended Statement of Claim was served on 20 March 2020, which included in paragraph 39 a claim in unjust enrichment.

> *Claim in unjust enrichment*
>
> ~~33.~~39. Further or alternatively, the Plaintiff~~s~~ have ~~has~~ a claim in restitution based on the Defendants' unjust enrichment in respect of the US$10,240,843.69 ~~US$1,499,588~~ to the detriment of the Plaintiff~~s~~.

23 The Defence and Counterclaim of both Defendants was served on 3 April 2020. Paragraphs 2 and 30–32 read as follows:

> 2. This Defence and Counterclaim is filed without prejudice to:
>
> > (a) the Defendants' right to amend the Defence and Counterclaim after further and better particulars of the Amended SOC, discovery and/or the administration of interrogatories; and
> >
> > (b) the Defendants' position that the Plaintiffs' claims are scandalous frivolous, vexatious and/or disclose no reasonable cause(s) of action, and/or are otherwise an abuse of process of the Court.
>
> 30. At all material times, the Defendants had no notice or knowledge of any purported trust arrangement in favour of the Plaintiffs; fund transfer by the Plaintiffs to the Lexinta Group; and/or breach of trust or fiduciary duty on the part of the Lexinta Group or Badilla, as alleged at paragraphs 37 and 38 of the Amended SOC or at all, all of which are in any event, not admitted. Further:
>
> > (a) In respect of paragraphs 37 and 38 of the Amended SOC, it is not admitted that the monies in the Defendants' DBS Accounts constitute identifiable or traceable proceeds against which the Plaintiffs can assert any alleged equitable proprietary right; and
> >
> > (b) In respect of paragraph 39 of the Amended SOC, it is denied that the Defendants have been enriched at the expense of the Plaintiffs, that any such enrichment was unjust, or that the Plaintiffs have any valid restitutionary claim against the Defendants.

> 31. Further and/or alternatively, by reason of the foregoing, in receiving payment of the said sums of USD 10,240,843.69 and EUR 164,841.26 from the Lexinta Group, the Defendants did so in good faith, for valuable consideration and without notice of any purported claim(s) of the Plaintiffs (which are not admitted), whether as alleged or at all.
>
> 32. Paragraph 39 of the Amended SOC is denied and the Plaintiffs are put to strict proof thereof. The Defendants repeat paragraphs 18 to 31 above. The Defendants further aver, in light of the matters pleaded at paragraphs 33 to 36 below, that the Plaintiffs' claim is not a *bona fide* one and is an abuse of process.

24 The Defendants did not however at this time seek to strike out the claim relating to unjust enrichment as being an abuse of the process and, on 17 March 2020, the Plaintiffs served a Reply and Defence to Counterclaim. Thereafter the parties discussed whether the action should be transferred to the SICC and agreed to consent to transfer. Accordingly, on 9 June 2020, HC/S 259/2020 was transferred to this court.

25 On 19 June 2020 the Defendants notified the Plaintiffs that they proposed seeking leave to amend the Defence and Counterclaim to plead that Swiss law governed the Plaintiffs' claims and that, under Swiss law, the claims were unsustainable. On 30 June 2020 the Plaintiffs notified the Defendants that they proposed seeking leave to amend the Statement of Claim to include a third alternative claim based upon s 73B of the Conveyancing and Law of Property Act (Cap 61, 1994 Rev Ed) (or the equivalent provision under Hong Kong law) (the "CLPA claim") and on 24 July 2020 informed the Defendants of their intention to seek leave to join one of the Lexinta group of companies, Lexinta Group Ltd, a Hong Kong company as a Defendant in the action.

26 The Defendants did not consent either to the amendment or the joinder and required the Plaintiffs to seek leave. This was done by SIC/SUM 55/2020.

Subsequently the Defendants issued SIC/SUM 62/2020 seeking to strike out the unjust enrichment claim, and the Plaintiffs issued SIC/SUM 64/2020 relating to the Offshore case issue.

SIC/SUM 62/2020: Striking out the Unjust Enrichment claim

27 It is convenient first to consider this summons which seeks an order pursuant to O 18 r 19 ROC that the claim based on unjust enrichment should be struck out as being an abuse of the process. Put very simply, the Defendants assert that the new action is not a freestanding action, it is an integral part of the interpleader proceedings, which was ordered to be commenced to determine the rival claims to the Disputed Monies. This was the sole issue directed to be tried in the action, following which the OS would be restored for further hearing for directions to be given to DBS as to how it should deal with the Disputed Monies. The claim in the action was thus a proprietary claim by the Plaintiffs in respect of the Disputed Monies and it was an abuse of the interpleader process for personal claims, such as the unjust enrichment claim, to be brought in these proceedings.

28 The Defendants go on to contend that to permit the unjust enrichment claim to be raised in this action would circumvent the safeguards provided by the ROC to a foreign entity that leave to serve out must be sought before a personal claim against them can be brought in the Singapore Courts. The correct course, if the Plaintiffs wished to bring a personal claim against the Defendants in Singapore, would be to start new proceedings, seek leave to serve out of the jurisdiction and, if granted and, if so advised, to seek leave to consolidate those proceedings with the current action.

29 The Plaintiffs, for their part, contend that the new action is a freestanding action, that the writ and Statement of Claim can be amended to include personal claims as well as the interpleader proprietary claim if such other claims arise from the same factual matrix and should properly be resolved at a single trial. Further, they contend that by consenting to the service of the Amended Statement of Claim in the Order of 17 March 2020, which contained the claim in unjust enrichment, they could not thereafter contend that its inclusion was an abuse of process.

30 I do not accept this latter point. As is clear from the above there was a measure of confusion concerning the form of the new action and the Order of 17 March 2020 was a pragmatic order seeking to move matters along expeditiously so that the new action could be commenced and appropriate case management orders made once pleadings were closed. The question of the allowability of the claims made in the Amended Statement of Claim did not arise for consideration, The Defendants then reserved their rights to apply to strike out in paragraph 2 of their Defence, and in paragraph 31 expressly pleaded that the unjust enrichment plea was an abuse. Thereafter on 28 August 2020 the summons to strike out was issued. It can thus be seen that any consent to the Order of 17 March 2020 was to the manner in which the new action was to be commenced and to the schedule for the service of pleadings, it was not to the allowability of the contents of the pleadings which fell to be decided at an appropriate case management conference thereafter.

31 I turn then to consider the substantive issue on this summons. Is it an abuse of process for a separate personal claim to be raised in an action directed to be commenced by virtue of O 17 r 5(1)(*b*) ROC to resolve a proprietary claim arising in interpleader proceedings?

32 The starting point is the English Court of Appeal decision in *De La Rue v Hernu, Peron & Stockwell, Limited* [1936] 2 KB 164 ("*De La Rue*").

33 In *De La Rue*, a husband issued a writ against warehousemen claiming that goods deposited with them by his wife were his property. The wife claimed the goods as hers. The warehousemen disclaimed an interest in the goods and issued an interpleader summons. An order was made directing the trial of an issue to determine whether the goods were the property of the husband or the wife and directed that in that issue, the husband was to be plaintiff and the wife, the defendant. The wife appealed, on the ground that such an order could not be made as between husband and wife, as that would be equivalent to an order for an action by a husband against the wife for a tort, which was contrary to the Married Women's Property Acts then in force.

34 The Court of Appeal rejected this argument and considered the status of an action commenced as part of interpleader proceedings. At pp 168–170 Greer LJ said this:

> The whole object of those proceedings was for the purpose of enabling the warehouseman, or a person in the position of a stakeholder, to obtain relief, and get a decision as to which of the two claimants he had to account to for the goods or money that he held; and every part of the interpleader proceedings was a part of proceedings intended for the benefit of the warehouseman, the defendant in the action, who had rival claims made against him. …
>
> …
>
> … and I think [counsel for the husband] is right in saying that the order on the interpleader issue in the form in which it was made in this case is not an action by the husband against his wife, but a proceeding in the action against the warehousemen.
> …
>
> …

> …. Now I think that that this (the contention based on them Married Women's Property Act) is entirely wrong, for this reason: that an interpleader order of this kind, an issue directed under the rules, is not an action for tort brought by the husband against the wife; it is a method provided by the law for the relief of a defendant when two claimants are making claims against him. …
>
> [emphasis added]

35 At pages 172–3 Greene LJ said this:

> In substance, when an interpleader issue is tried, two actions against the person interpleading are being dealt with. Interpleader proceedings are the method of compelling the parties - either one, or both, or neither of whom may have actually issued a writ–to prosecute their claims. As it is the essence of interpleader proceedings that the person who has interpleaded has no title himself he naturally drops out of the suit. But in effect the entire matter is tried out in the presence of all the parties concerned, and the real claimants are compelled to put forward their claims and have them adjudicated upon. The reason for that is not their own benefit, it is for the relief of the person interpleading.
>
> When it is once appreciated that that is the true nature and history of interpleader proceedings, I take the view that it is quite wrong to treat an issue directed under the Interpleader Rules as though it were an action of tort. It is a method to enable the Court to decide the claims between two persons present at the proceedings, and to decide those claims so that the person interpleading will get the relief to which he is entitled.

36 It is for this reason that an action ordered to be commenced as part of interpleader proceedings, although in form is an action between the rival claimants to the property, is in substance a proprietary dispute necessary to resolve the interpleader proceedings. The issue that arises in this case, whether it is an abuse of process to seek to raise in such an action additional claims of a personal nature between the rival claimants, did not arise for decision in *De La Rue*.

37 *De La Rue* was subsequently considered by the High Court in *Precious Shipping Public Co Ltd and others v OW Bunker Far East (Singapore) Pte Ltd and others and other matters* [2015] 4 SLR 1229 ("*Precious Shipping*"). The Judge, Steven Chong J (as he then was), had to consider the scope of interpleader proceedings in actions that were factually highly complex. He made the following observations pertinent to the matters issue in this case.

38 At [17] and [18] he considered the general power of the Court in relation to Interpleader proceedings:

> 17 The power of the High Court to grant interpleader relief is expressly conferred by s 18(2) of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) ("SCJA") read with para 4 of the First Schedule. Paragraph 4 of the First Schedule to the SCJA provides that this court has the power to grant interpleader relief in two circumstances:
>
> > 4. Power to grant relief by way of interpleader —
> >
> > > (*a*) where the person seeking relief is under liability for any debt, money, or goods or chattels, for or in respect of which he has been or expects to be, sued by 2 or more parties making adverse claims thereon; and
> > >
> > > (*b*) where a Sheriff, bailiff or other officer of court is charged with the execution of process of court, and claim is made to any money or goods or chattels taken or intended to be taken in execution under any process, or to the proceeds or value of any such goods or chattels by any person other than the person against whom the process is issued,
> >
> > and to order the sale of any property subject to interpleader proceedings.
>
> The language of para 4 is reproduced in O 17 r 1 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("ROC").
>
> 18 It is important to appreciate the point which is being made here. The power of this court to grant interpleader relief is statutorily conferred and it is *only available* where the conditions precedent set out in para 4 of the SCJA are met. This

> court does not have the power to grant interpleader relief (or exercise any powers within the interpleader process) outside the parameters set out in statute. During the oral hearing, Mr Mohan submitted that the court should adopt a "light-touch, minimal evaluation" approach towards the requirements in O 17 in order that it can "'take the bull by its horns' to bring the dispute to an end once and for all". I do not think such a submission can be accepted. The powers of the court in this area have been delimited by Parliament and these limits demand scrupulous adherence. Adopting a liberal approach towards the grant of interpleader relief might open the floodgates, encouraging claimants who do not legitimately believe that they have a sustainable cause of action to participate in the interpleader summons in order to gauge the court's assessment of their claims. That would not only be improper, it borders on an abuse of process.
>
> [original emphasis in italics; emphasis added in underline]

39 The passages emphasised by the judge are equally important in this case. Parliament has given limited and circumscribed powers to the courts where property in the custody of one party, which claims no proprietary rights therein, finds that more than one person claims ownership of the property. The courts are not empowered to do anything within the interpleader proceedings other than to grant interpleader relief; relief to the custodian of the property to protect it from a claim from one or more of the claimants.

40 The Judge went on to consider the necessary elements of a justifiable interpleader process as being symmetry, mutual exclusivity, and actual disagreement and turned to consider the decision in *De la Rue*. He concluded in [59] and [60]:

> 59 In other words, interpleader proceedings exist to assist applicants who want to discharge their legal obligations (to pay a debt, deliver up property, *etc*) but do not know *to whom* they should do so. …
>
> 60 The applicant in an interpleader summons is caught between the devil and the deep blue sea – if he discharges his

> obligation to one claimant, he exposes himself to suit from the other. In such a situation, the relief of interpleader comes to his aid by compelling the real claimants to present their cases in order that the court can determine which one of the competing claimants has the legal entitlement to call on the enforcement of the applicant's admitted liability. The applicant, having disclaimed any interest in the subject matter of the dispute, "drops out" and is released from the proceedings (see *De La Rue* at 173). In other words, the object of an interpleader is the determination of the *incidence of liability*: *ie*, it serves to identify the person to whom the applicant is liable. It follows from this that interpleader relief is not available where the applicant is separately liable to both claimants (see *Farr v Ward* (1837) 2 M &W 844; 150ER 1000) because there is no controversy in such a case: there are two obligations both of which the applicant is legally bound to discharge.
>
> [original emphasis in italics; emphasis added in underline]

41 Again, the Judge was emphasising that the function of interpleader proceedings was to assist the custodian to identify the person entitled to the property.

42 For completeness I should also draw attention to [79] and [80] in which the Judge was considering whether the competing claims had to be proprietary in a strict sense.

> 79 As Lai J pointed out, the competing claims in *Tay Yok Swee* and *Thahir* both pertained to competing claims to a sum of money in a bank account. In such a situation, the competing claims had to be proprietary (*ie*, relate to title to the chose in action constituted by the sum of money in the bank account) to satisfy the symmetry requirement. However, it did not mean that this had to be so in *every* case. In summary, the decisions cited – *Tay Yok Swee*, *Thahir*, and *Maler Foundation* – do not stand for the proposition that competing claims in an application for interpleader relief had to be proprietary.
>
> 80 This also appears to be consistent with the decided cases. In *Meynell* … it was held that interpleader relief was available in a situation where the applicant faced competing claims from A on the one hand and a person claiming to be A's undisclosed principal on the other. In *Development Bank of*

> *Singapore Ltd v Eng Keong Realty Pte Ltd* [1990] 1 SLR(R) 265, this court granted interpleader relief in respect of a dispute as to whom the applicant-bank ought to pay a sum of $170,000 under a banker's guarantee. In *Australia and New Zealand Banking Group Ltd v Ding Pei Chai* [2004] 3 SLR(R) 489 ("*Ding Pei Chai*"), this court granted interpleader relief in respect of competing claims to manage a deposit account opened in the name of a company. None of these cases involved an adjudication of competing *proprietary* claims. Instead, the common denominator is all these cases involved an admitted liability (the payment of a contractual debt, the bank's obligation to its customers, etc) and a dispute over the identity of the party to whom the liability is owed. With that, I will now examine whether the competing claims satisfy the three requirements of symmetry, mutual exclusivity, and actual disagreement identified at [61]–[67] above.
>
> [original emphasis in italics; emphasis added in underline]

43 In this respect therefore, interpleader proceedings can be raised in cases which, strictly speaking, are not claims to property, properly so called, but are akin thereto in the sense that there is a dispute over the identity of a person to whom one person owes a duty when rival claims are made. In the present case nothing turns on this as the claim is a claim to a chose in action, the Disputed Monies. It is therefore convenient to use the expression "proprietary claim" to distinguish it from a "personal claim" raised by one litigant against another.

44 The reasoning in *Precious Shipping* reinforces the fact that interpleader proceedings are a statutory creation of a limited nature. The object is (and only is) to assist a mere custodian of property, a person who is accepted to be under a liability to another in relation to that property, to have the court identify to whom that liability is owed. The property in question has to be property over which the court is able to exercise jurisdiction either because of the location of the property or the domicile of the person under the liability but, once satisfied that it has jurisdiction, the court can exercise the statutory powers, there is no

requirement that the custodian should seek leave to serve the proceedings out of the jurisdiction on any of the claimants.

45 As Steven Chong J observed the limits of powers of the court in relation to Interpleader proceedings demand *"scrupulous adherence"*: *Precious Shipping* at [18].

46 This is also consistent with the reasoning of Foskett J in the High Court of England and Wales in *Commonwealth of Australia v Peacekeeper International FZC UAE* [2008] EWHC 1220 ("*Commonwealth of Australia*"). In paragraph 42 he concluded as follows:

> For my part, as the present rule relating to interpleader proceedings stands, it seems to me that there is very little scope within Order 17 itself for the court to transform interpleader proceedings into a substantive action. Rule 8(1) is the nearest one gets to a broad discretion, but it is said expressly to be "Subject to the forgoing rules of this Order" and that, in my judgment, limits the scope of the discretion considerably. Leaving aside the precise words of Order 17, however, *it seems to me, as I have said already, that there is considerable force in the suggestion that the whole purpose of interpleader proceedings is to afford a simple mechanism for the property holder to get the protection of the court from competing claimants. If the procedure of itself is extended to require the property holder to become embroiled in the dispute between the disputing claimants or its consequences, then the essential purpose of the procedure is negated.*
>
> [original emphasis in underline; emphasis added in italics]

47 These authorities lead to me to conclude that this action, ordered to be commenced under O 17 r 5(1)(*b*) ROC is an integral part of the interpleader proceeding. It is not a freestanding action. It has been commenced for the limited statutory purpose of seeking to resolve the rival claims to the ownership of the property and for no other purpose.

48 What the Plaintiffs have sought to do by including the claim for unjust enrichment into the action is to elevate the action not only into a dispute over ownership of the property but to raise a personal claim against the Defendants in the event that the interpleader proceedings are decided in the Defendants' favour. If the interpleader proceedings are decided in the Plaintiffs' favour the claim in unjust enrichment must fall away. Equally, if those proceedings are decided in the Defendants' favour, it is difficult to see how the proceedings in unjust enrichment could succeed. But that it not a matter of concern on this Summons.

49 On this Summons the sole matter I have to decide is whether the court has power to allow a claim in unjust enrichment, which it is not disputed is a personal claim against the Defendants, to be brought in an action brought pursuant to O 17 r 5 ROC. For the reasons given, I am satisfied that it does not and hence it follows that the addition of the claim in the Statement of Claim served pursuant to the Order in OS 1016 of 17 March 2020 was an abuse of the process of the court.

50 I am reinforced in that view by considerations relating to the need to obtain leave to serve out of the jurisdiction. This was an issue that also arose for consideration by Foskett J in *Commonwealth of Australia* ([46] *supra*) when he observed at paragraph 47:

> My attention has not been drawn to any case where the invocation by a foreign party of the interpleader jurisdiction has resulted in the court permitting substantive claims to be made within, or indeed allied to, those proceedings. Indeed in *Eschger Co v Morrison, Kekewich Co* (see paragraph 40 above) Lord Esher MR said this of the circumstances in that case:
>
> > "The effect of the order of the Divisional Court has been to make a foreign firm, wholly domiciled abroad, defendants without observing any of the conditions

> which the law required to be observed before making a foreigner a defendant in an independent action. The court ought not to allow itself to mix up modes of procedure for the purpose of doing that which they had no power to do in a direct way. The order of the Divisional Court could not be justified and must be set aside, and it followed that the original order for an interpleader issue stood."

[emphasis added]

51 In this case, the Defendants are foreign nationals. If the Plaintiffs had sought to bring the unjust enrichment proceedings in a separate action in Singapore, they would have had to have sought leave to serve out under O 11 ROC. By pleading it in this action, if permissible, they would have circumvented that requirement. The raising of the interpleader proceedings by DBS compelled the Defendants to submit to the jurisdiction of the court but only, in my judgment, for the limited purpose of those proceedings.

52 Accordingly, under SIC/SUM 62/2020 the claim for unjust enrichment in paragraph 39 of the Statement of Claim and the consequential prayer for relief will be struck out.

SIC/SUM 55/2020: The Application for leave to amend the Writ and Statement of Claim

53 By this summons the Plaintiffs seek leave to amend the existing Writ and Statement of Claim in three respects. First, they seek to amend and clarify various of the particulars relating to the proprietary claim to the Disputed Monies and no objection is raised to those amendments which are allowed. Secondly, they seek to add Lexinta Group Ltd, a Hong Kong Company, "Lexinta" as a party to the action and thirdly they seek to add the CLPA claim referred to in [25] above.

54 Lexinta has made no claim in respect of the Disputed Monies and therefore cannot be a proper party to the Interpleader proceedings. Under O 15 r 6(2)(*b*)(i) ROC, a party can be joined whose presence is necessary to ensure that all matters in the action can be effectually and completely determined. The presence of Lexinta is not necessary for the purpose of resolving the interpleader dispute.

55 Under O 15 r 6(2)(*b*)(ii) ROC, a party can be joined in circumstances where the court considers that it is just and convenient to determine a question or issue arising out of or relating to or connected with any relief or remedy claimed in the action. The relief sought against Lexinta is as follows:

(a) Under paragraph 1 of the Prayer for relief, that Lexinta accounts to the Plaintiffs in respect of the US$10 million which forms the Disputed Monies. There is no issue between the Plaintiffs and Lexinta in this regard.

(b) Under paragraph 2, a Declaration that the Plaintiffs are entitled to the beneficial ownership of the Disputed Monies. Again, there is no issue between the Plaintiffs and Lexinta in this regard. A Declaration against the current Defendants will suffice to resolve the interpleader issues.

(c) Under paragraph 3, that Lexinta pay the Disputed Monies to the Plaintiffs. The same comment applies.

(d) Under paragraph 4A, an order setting aside the transfers from Lexinta to the Defendants by way of restitution. If such an order could be made in the Interpleader proceedings it would be made against the

current Defendants. There is no need for Lexinta to be a party for this to be effective.

(e) Under Paragraph 4C, relief is sought in relation to a personal claim against Lexinta for fraudulent breach of trust. The same reasoning in relation to the personal claim in relation to unjust enrichment against the current Defendants applies. If the Plaintiffs wish to seek to bring such a claim in the Singapore courts against Lexinta, they should issue a separate writ and seek leave to serve out.

56 Leave to amend the writ by the joinder of Lexinta to seek the above relief is therefore refused.

57 This leaves the CLPA claim which is sought to be raised both against the current Defendants and against Lexinta and is pleaded in paragraphs 39A–D of the proposed re-amended Statement of Claim and paragraph 4B of the relief. This claim invokes s 73B of the CLPA or its equivalent under the law of Hong Kong (s 60 of the Conveyancing and Property Ordinance (Cap 219)) which enables an application to be made to set aside a conveyance of property if it was made with an intent to defraud creditors in certain circumstances. The Defendants claim that such an application operates *in personam* and thus cannot be raised in an interpleader action by parity of reasoning with the unjust enrichment claim.

58 Counsel for the Defendants drew my attention to paragraph 21 of the Judgment of Elias CJ in the Supreme Court of New Zealand in *Regal Castings Ltd v Lightbody* [2008] NZSC 87. This was an action concerning s 60 of the New Zealand Property Law Act 1052 which is in similar terms to s 73B of the CLPA.

59 Elias CJ said this at paragraph 21:

> An application under s 60 to set aside an alienation of property is not a claim in rem. It does not assert "encumbrances, liens, estates, or interests", such as would amount to an attack on the title obtained through registration contrary to s 62 of the Land Transfer Act. It is not properly described as an "action for possession, or other action for the recovery of any land", such as would be in conflict with s 63(1). Nor is it an application to the Court attacking the registered title under the fraud exception contained in s 63(1)(c). An application for remedy under s 60 of the Property Law Act in respect of the conveyance of Land Transfer land with intent to defraud creditors does not assert defect in title. The principles of indefeasibility, in protection of the title created by registration, are not engaged by the statutory remedy under s 60 by which the registered proprietors can be compelled to provide satisfaction to the creditors, including by reconveyance of the property, declaration of trust in respect of it, or appointment of receivers for it. <u>These remedies are granted against the registered proprietors personally</u>. …
>
> [emphasis added in underline]

60 I respectfully agree with the reasoning of Chief Justice Elias. A claim under s 73B of the CLPA is a personal claim and therefore cannot be brought in interpleader proceedings. On this short ground therefore, I refuse leave to amend the writ to join Lexinta on this ground or for the Statement of Claim to be amended to raise the CPLA claim against the current Defendants. Again, the correct approach, if so minded, is for the Plaintiffs to start a separate action and seek leave to serve out.

61 Finally, and for completeness, had there been a valid basis for concluding that there was an issue involving Lexinta which could have been raised in these proceedings, I was unpersuaded on the facts before me that it would have been "just and convenient" to permit it to be determined in this action. There is no evidence that Lexinta is currently a company of any substance or that it has any directors or officers, other than Badilla, capable of

conducting any proceedings brought against it. In those circumstances I cannot see that any useful purpose would result from it being joined. To the contrary, joinder would be likely to increase the cost of the action and cause delay.

62 After I had completed writing this part of the Judgment I received an application by the Plaintiffs requesting further arguments pursuant to s 28B read with s 18C of the Supreme Court of Judicature Act (Cap. 322, 2007 Rev Ed), O 56 r 2 of the ROC and paragraph 103 of the Singapore International Commercial Court Practice Directions ("SICC PD"). Having regard to the extensive submissions, both written and oral, that were presented to me at the hearing I do not consider that it is appropriate to accede to that request. Whilst I can see the benefit to the Plaintiffs in bringing all the claims they now seek to raise in one action, for the reasons I have given I have concluded that this cannot be done in the current interpleader proceedings of which this action forms part.

63 The correct course would be for the Plaintiffs, if so minded, to seek leave to appeal. My provisional view, subject to anything the Defendants might wish to submit, is that it would be appropriate to grant leave to appeal should the Plaintiffs wish to appeal.

SUM/SIC 64/2020: Application under O 110 r 36 ROC

64 The Plaintiffs have made an application under O 110 r 36 ROC for a decision that this action is an "Offshore case". The Defendants contend, first, that it is not an Offshore case and, secondly, if it is, the application is made long out of time and that no extension should be granted.

65 An Offshore case is defined in O 110 r 1(1) of the ROC as being:

> … an action that has no substantial connection with Singapore but does not include any of the following:
>
> > (*a*) Any proceeding under the International Arbitration Act (Cap. 143A) that are commenced by way of any originating process;
> >
> > (*b*) An action in rem (against a ship or any other property) under the High Court (Admiralty Jurisdiction Act (Cap. 123)

66 O 110 r 1(2)(*f*) of the ROC provides that:

> [F]or the purposes of the definition of "offshore case" in paragraph (1), an action has no substantial connection to Singapore where —
>
> > (i) Singapore law is not the law applicable to the dispute and the subject-matter of the dispute is not regulated by or otherwise subject to Singapore law; or
> >
> > (ii) the only connections between the dispute and Singapore are the parties' choice of Singapore law as the law applicable to the dispute and the parties' submission to the jurisdiction of the Court.

67 Counsel for the Defendants submitted that these two requirements were conjunctive. I do not accept this. They are plainly disjunctive as the use of the word "or" indicates. In the present case, it is sub-paragraph (ii) that is relevant.

68 The SICC PD contain guidance as to what constitutes a substantial connection to Singapore in SICC PD 29(3):

> "*Substantial connection to Singapore*"
>
> (3) For the purposes of Order 110, Rule1(2)(f)(ii) of the Rules of Court, the existence of each of the following factors will not, by itself, constitute a substantial connection between the dispute and Singapore:
>
> > (a) any of the witnesses in the case may be found in Singapore;
> >
> > (b) any of the documents that are relevant to the dispute may be located in Singapore;

> (c) funds connected with the dispute have passed through Singapore or are located in bank accounts in Singapore;
>
> (d) one of the parties to the dispute has properties or assets in Singapore that are not the subject matter of the dispute;
>
> (e) where one of the parties is a Singapore party, or where a party is not a Singapore party, but has Singapore shareholders.

[emphasis added]

69 One of the benefits of a decision that a case is an Offshore case is that a party can be represented by a Registered Foreign Lawyer in addition to or instead of local counsel: see SICC PD 26(1)(a). Registered Foreign Lawyer is defined in O 110 r 1(1) of the ROC as being a "*foreign lawyer registered under section 36P of the Legal Profession Act*".

70 In this case the Plaintiffs wish to be represented by a Registered Foreign lawyer, a Barrister practicing in London, in addition to their current team of Singapore lawyers.

71 The question of whether a case is an Offshore case has to be determined by reference to all the surrounding circumstances of the action in question: see *Teras Offshore Pte Ltd v Teras Cargo Transport (America) LLC* [2016] 4 SLR 75 ("*Teras Offshore*") at [10]).

72 Consequential upon the finding that the new action relates solely to the proprietary dispute raised in the Interpleader proceedings, the question of whether or not the new action is an Offshore case has to be decided by reference to the circumstances surrounding that dispute. The subject matter is the Disputed Monies, which are held by DBS in a Singapore bank account. The rival claimants to those sums are the Plaintiffs, TP and SFPF, and the

Defendants, SEB and JE. TP is a Polish citizen resident in England and Israel. SFPF is a Curacao company and SEB and JE are French citizens, resident in Switzerland. The parties did not themselves choose Singapore law as the law applicable to the dispute, this was a choice made by DBS when it started the interpleader proceedings and the parties had to submit to the jurisdiction of the Singapore courts in order to make their claim in those proceedings. None of the parties has any other relevant connection with Singapore.

73 The sole connection with Singapore therefore is the fact that the Disputed Monies are held in a Singapore bank account. The guidelines in SICC PD 29(3)(c) expressly suggest that this factor, of itself, is insufficient to constitute the necessary substantial connection. Counsel for the Defendants suggested that whilst that might be a guideline appropriate in many commercial cases, the same was not a universal rule and should not carry weight in this case. This was because the Disputed Monies are not *"funds connected with the dispute"*, they are the direct subject of the dispute.

74 I accept that the guidelines are just that; they do not have statutory force, but I do not accept that they are only applicable to the types of case referred to be the Defendants' counsel such as Mareva injunctions or funding through Singapore banks. The guidelines proceed on the basis that disputes will arise over monies held in Singapore bank accounts for many different reasons and the guidance is given without drawing any distinction between the various possible reasons why the monies are in Singapore. In my judgment, no rational distinction can be drawn between a dispute over monies held in a Singapore bank account that would serve to pay an award of damages in contractual proceedings and a dispute over monies held in a Singapore bank account that form the subject matter of interpleader proceedings.

75 To my mind the guidelines are equally applicable to both. In this case there is no other factor indicating a connection with Singapore. The parties are all foreign nationals or corporations. The events underlying the alleged Ponzi scheme had no connection with Singapore and the agreements relating thereto are not alleged to be governed by Singapore law. Taking all these matters into account I am satisfied that this action is an "Offshore case"

76 However, the Defendants contend that, notwithstanding this, I should not make the direction sought by the Plaintiffs because the application was made out of time. Order 110 r 36(2) of the ROC requires that in the case of an action begun by writ an application for an Offshore case decision shall be made within 28 days of the close of pleadings. In this case pleadings closed on 4 May 2020, 14 days after service of the Reply and Defence to Counterclaim and the application should therefore have been made by 1 June 2020: see O 18 r 20(1)(a) of the ROC. It was thus made over 3 months too late.

77 However, as noted above, the action was not transferred to the SICC until 9 June 2020 so it would not have been possible for an application to be made under O 110 r 36 of the ROC within the 28-day period. This court has a discretion whether to extend time pursuant to O 3 r 4 of the ROC: see *Teras Offshore* at [4]. Where, as here, pleadings are closed and the 28-day period has expired before the case is transferred to the SICC, it is plainly just that an extension should be granted to enable an application to be made. But this does not mean that an extension will be granted if there is any unreasonable delay in making the application.

78 In the present case, once the action was transferred, a number of matters arose out of the Defendants' indication that they wished to raise a plea based on

Swiss law, the Plaintiffs response based on Hong Kong law together with the proposed amendments to the Statement of Claim and the application to strike out. I do not consider that the Plaintiffs acted unreasonably in taking all these matters into account before concluding that it would be in their best interests to apply for a decision under O 110 r 36 of the ROC. No prejudice to the Defendants has arisen because of the delay as the matter has been handled by the Plaintiffs' Singapore counsel in the meantime.

79 In all the circumstances therefore, I grant the necessary extension of time and decide that this is an Offshore case.

Simon Thorley
International Judge

Yee Mun Howe Gerald, Boey Swee Siang and Jonathan Lim Shi Cao (Premier Law LLC) for the plaintiffs;
Colin Liew (Essex Court Chambers Duxton (Singapore Practice Group)) (instructed), Kam Su Cheun Aurill, Valerie Thio Shu Jun, Lim Rui Hsien Esther (Legal Clinic LLC) for the defendants.