

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2020/0028

BETWEEN:

CHEN MEI-HUAN

Appellant

and

**[1] VICTORY SUCCESS HOLDINGS LIMITED
[2] PECKSON LIMITED
[3] MACAU HOTEL DEVELOPERS LIMITED**

Respondents

Before:

The Hon. Mde. Louise Esther Blenman
The Hon. Mr. Gerard St. C. Farara
The Hon. Mr. Dennis Morrison

Justice of Appeal
Justice of Appeal [Ag.]
Justice of Appeal [Ag.]

Appearances:

Mr. John McDonnell, QC and Ms. Dancia Penn, QC for Appellant
Mr. Charles Béar, QC with him Mr. Andrew Willins for the First Respondent
Mr. Grant Carroll and Ms. Rosamund Baker for the Second and Third Respondents

2021: May 31 and June 1;
September 22.

Interlocutory appeal – Commercial appeal – Appellate court’s review of trial judge’s exercise of discretion – Interim injunction – American Cyanamid principles – Threshold test for the grant of an interim injunction – Serious issue to be tried – Whether judge’s conclusion that material before him disclosed no serious issue to be tried was correct – Failure of witness to be cross-examined – Appellate court’s entitlement to exercise discretion afresh – Locus standi – Whether appellant had standing to make application for the interim injunction – Locus standi of shareholder to apply for interim injunction – Balance of convenience – Whether balance of convenience favoured the grant of interim injunction – Disclosure – Duty to make full and frank disclosure of all material facts to court – Whether interim injunction should be discharged on the ground that appellant was guilty of material non-disclosure on

ex parte application – *Forum non conveniens* – Whether judge’s decision to stay action was correct

This appeal arises out of the latest in an extended series of litigation, over the beneficial ownership of the New Century Hotel (“the Hotel”) in Macau. The appellant (“Madam Chen”) is the beneficial owner of 80% of the issued shares of the second respondent (“Peckson”), a company incorporated in the Territory of the Virgin Islands (“the BVI”) under the **International Business Companies Act**. Peckson is the registered holder of virtually all the shares in the third respondent (“Empresa”), a company incorporated under the laws of Macau, and which holds the lease for the Hotel. In brief, Madam Chen beneficially owned 80% of Empresa through her 80% shareholding in Peckson.

The current dispute between the parties arises from their divergent accounts of the events surrounding the transfer of Peckson’s shares to the first respondent (“Victory Success”), a company incorporated in the BVI under the **Business Companies Act**. In Madam Chen’s account, Mr. Xu Xhao-ji (“Mr. Xu”), a close associate who had signing rights on behalf of Empresa, was kidnapped and threatened by associates of Victory Success in October 2015. As a result of these threats, Mr. Xu executed a power of attorney in favour of one Mr. Alan Zhan (“Mr. Zhan”), so that Mr. Zhan could sign a *datio in solutum*, a deed of compromise, on behalf of Empresa. Mr. Zhan did sign this deed of compromise on behalf of Empresa, which among other things, had the effect of transferring title of the Hotel to Victory Success.

However, Madam Chen’s case is that the transfer of the Hotel to Victory Success effected by way of a power of attorney, executed by Mr. Xu, was done so under duress, and accordingly, the *datio in solutum* is void, or in the alternative, voidable; ineffective to transfer title to the Hotel to Victory Success. It is on this basis that, Madam Chen filed a claim seeking declarations to that effect; an order that Victory Success re-transfer the Hotel to Empresa by way of restitution; damages for conspiracy and, for the benefit of Mr. Xu, damages for assault and false imprisonment. Madam Chen later filed an *ex parte* notice of application in April 2019, seeking an interim injunction restraining Victory Success, until after judgment or further order in the meantime, from (a) disposing or attempting to dispose of the Hotel; (b) creating or granting or attempting to create or grant any interest or right whether real or personal in or over the Hotel; or (c) denying or preventing access to the Hotel by Peckson, Empresa and others.

Madam Chen was successful in her *ex parte* application and in April 2019, by order of Adderley J, was granted an interim injunction in the terms asked for, with the addition of an order also preventing Victory Success from carrying out any demolition works or construction works on the Hotel pending trial. After an *inter partes* hearing on 8th May 2019, the interim injunction was continued until a later date for hearing.

However, in an application filed on 15th May 2019, Victory Success applied for a declaration that the BVI is not the convenient forum within which the action should be suitably tried, and an order staying the proceedings. In its application Victory Success, rejected Madam Chen’s account and presented an alternative case, where Empresa and Victory Success entered the *datio in solutum* to transfer the Hotel, to resolve Empresa’s financial woes, and write off the HK\$1.5 billion lent to it, together with all the accrued interest. This application was heard

by Jack J (Ag.) (“the judge”), who also heard the application for continuation of the interim injunction, that had at that time come up for hearing.

In a judgment delivered in November 2020, the judge refused the application for continuation of the interim injunction. He found that Madam Chen had failed to satisfy the threshold test for the grant of an interim injunction by showing that there was a serious question to be tried. The principal bases of this finding were that the witness statements of Mr. Xu were not admissible; and that, even if they were, they failed to establish that there was a serious question to be tried on the facts. The judge further considered that, even if he was wrong in this conclusion, the application also failed on the further grounds that Madam Chen lacked standing to apply for the interim injunction; the balance of convenience was against continuing it; and Madam Chen had been guilty of material non-disclosure on the *ex parte* application before Adderley J. On the forum application, the judge made an order staying the substantive action on the ground that the BVI is *forum non conveniens*.

Madam Chen, being dissatisfied with the judge’s decision, has appealed to this Court, relying on several grounds of appeal. This is supported by Peckson and Empresa, although named as respondents to the appeal. The appeal raises the following five issues for determination before this Court: (i) whether the judge’s conclusion that the material before him disclosed no serious issue to be tried was correct; (ii) whether Madam Chen had standing to make the application for the interim injunction; (iii) whether the balance of convenience favoured the grant of the interim injunction; (iv) whether the judge was correct in his finding that, in any event, the interim injunction should be discharged on the ground that Madam Chen was guilty of material non-disclosure on the *ex parte* application before Adderley J; and (v) whether the judge’s decision to stay the action was correct, given the settled principles on the issue of *forum non conveniens* in this jurisdiction.

Held: dismissing the appeal; affirming the judge’s order staying the action on the ground of *forum non conveniens*; and awarding costs to Victory Success to be assessed by a judge of the Commercial Court at no more than two thirds of the costs in the court below, unless agreed between the parties within 21 days of this order, that:

1. Where the decision of a trial judge is based on the exercise of discretion, provided that he has not failed to take into account relevant matters, has not had regard to irrelevant factors and has not reached a decision that is plainly irrational, an appellate court should exercise restraint in its review of the decision. In particular, where an appeal arises from a decision on an application for an interlocutory injunction, an appellate court should defer to the judge’s exercise of his discretion and should only interfere with it if it can be shown to be 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. This need for appellate caution also arises in relation to appeals against a judge’s decision on forum applications. As it is pre-eminently a matter for the trial judge, the appellate court should also be slow to interfere.

Hadmor Productions Ltd and others v Hamilton and another [1983] 1 AC 191 applied; **In the matter of the Insolvency Act 2003; In the Matter of Fairfield Sentry Limited (In Liquidation), Fairfield Sigma Limited (In Liquidation); In the matter of Fairfield Lambda Limited (In Liquidation); ABN Amro Fund Services (Isle of Man) 24 Nominees Limited formerly Fortis (Isle of Man) Nominees Limited) and others v Kenneth Krys and others**, [2017] ECSCJ No. 255, (delivered 20th November 2017) followed; **Ming Siu Hung and others v J F Ming Inc and another** [2021] UKPC 1 applied; **In re B (A Child) (Care Proceedings: Threshold Criteria)** [2013] 1 WLR 1911 applied; **Spiliada Maritime Corporation v Cansulex Ltd (“Spiliada”)** [1987] 1 AC 460 applied

2. The **American Cyanamid** principles provide that in granting interlocutory injunctions, the court must be satisfied that there is a serious question to be tried. The court's function at this stage of the litigation is not to embark upon anything resembling a trial of the action upon conflicting affidavits in order to evaluate the strength of either party's case. However, this does not suggest that the judge on the interlocutory application should not scrutinise the evidence carefully. The **American Cyanamid** principles have a degree of flexibility and they do not prevent the court from giving proper weight to any clear view which the court can form at the time of the application for interim relief as to the likely outcome at trial. In this matter, Madam Chen's entire case is entirely dependent on Mr. Xu's evidence. At the trial, it will require careful scrutiny from the trial judge in order to determine its truth. This includes assessing how Mr. Xu fares in the face of what is bound to be vigorous cross-examination. However, the judge failed to avail himself of the advantage of Mr. Xu's presence at the virtual hearing and acknowledged that, in the circumstances of this case, cross-examination of Mr. Xu was plainly indicated. This failure impacted the trial judge's credibility assessment of Mr. Xu, a critical component for determining whether there was a serious issue to be tried. It revealed a clear misunderstanding of the guidance laid down in **American Cyanamid**. Accordingly, the judge's approach to Mr. Xu's evidence, and by extension determination of the issue whether Madam Chen had demonstrated that there was a serious question to be tried, was flawed. The Court is therefore entitled to set aside the judge's exercise of his discretion and exercise its own afresh.

American Cyanamid Co. (No. 1) v Ethicon Ltd [1975] AC 396 applied; **Guardian Media Groups PLC and others v Associated Newspapers Ltd** [2000] Lexis Citation 2114 applied; **Hollington v F. Hewthorn and Company, Limited, and Another** [1943] 1 KB 587 considered; **Series 5 Software Ltd v Clarke and others** [1996] 1 All ER 853 considered.

3. Company law dictates that a company is a separate legal entity, with its own rights and liabilities, and no cause of action is therefore vested in the shareholder to recover damages for the diminution in the value of the shares.

It is the court's unequivocal conclusion that, from the standpoint of company law, the shareholder does not suffer any personal loss. In this case, the question of whether Madam Chen has *locus standi* to maintain her claim for an interim injunction, gives rise to the discrete issue of company law which requires it to be considered as a separate matter. Even if it is possible to segment Madam Chen's claims in the manner contended, that is, to distinguish between the claim for declaratory relief and the other claims, it is clear that, her action is one brought on behalf of Empresa, rather than on her own behalf. It is also clear that Madam Chen's application for an injunction was premised on Empresa's right of ownership of the Hotel, hence the claim for an order transferring the Hotel to Empresa by way of restitution. However, the loss was suffered by Empresa. Madam Chen therefore does not possess the *locus standi* to apply for the interim injunction. Further, section 22 of the **West Indies Associated States Supreme Court (Virgin Islands) Act**, is not determinative of Madam Chen's *locus standi* to apply for the interim injunction in this case. Section 22 of the **West Indies Associated States Supreme Court (Virgin Islands) Act**, means no more than that an action or proceeding shall not be open to objection on the ground **only** that a declaratory judgment is sought thereby. The judge's conclusion on the question of standing was one which he was fully entitled to reach, and there is therefore no basis to disturb it.

Guaranty Trust Company of New York v Hannay & Company [1915] 2 KB 536 considered; **Prudential Insurance Company Ltd v Newman Industries Ltd and Others (No. 2)** [1982] 1 All ER 354 applied; **Sevilleja v Marex Financial Ltd** [2021] 1 All ER 585 applied; **West Indies Associated States Supreme Court (Virgin Islands) Act** Cap. 80 of the Revised Laws of The Virgin Islands considered.

4. In this case, the grant of the interim injunction to preserve the *status quo* would hardly improve Madam Chen's position. Victory Success would still be a secured creditor in respect of a debt which neither the debtor, Empresa, nor Madam Chen had any means or prospect of repaying. In any event, an interim injunction preventing sale of the Hotel would not maintain the true *status quo* but would impermissibly worsen Victory Success's position pending trial by comparison with its status, on admitted facts, as a mortgagee entitled to repayment. Victory for Madam Chen on the duress issue could only have the effect of rolling back the transfer of the Hotel to Victory Success, which would remain a secured creditor. In these circumstances, it is clear that the balance of convenience could not possibly favour continuation of the interim injunction, and absolutely no basis has been shown to interfere with the judge's exercise of his discretion in this regard.

American Cyanamid Co. (No. 1) v Ethicon Ltd [1975] AC 396 applied.

5. An applicant for *ex parte* relief has a positive duty to make full and frank disclosure of all material facts to the court, including not only those known to him, but those which may have been discovered by the making of reasonable enquiries. The duty encompasses both facts which weigh in his favour as well

as those which may weigh against him, as well as matters of law. The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application; (b) the order for which application is made and the probable effect of the order on the defendant; and (c) the degree of legitimate urgency and the time available for the making of inquiries. A breach of this duty will normally, though not inevitably, lead to a discharge of an injunction obtained *ex parte*. However, it is not for every omission that the injunction will be automatically discharged. A *locus poenitentiae* may sometimes be afforded, as the court has a discretion, notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the *ex parte* order, nevertheless to continue the order, or to make a new order on terms.

Brink's Mat Ltd v Elcombe [1988] 1 WLR 1350 applied; **Gee on Commercial Injunctions** 6th. edn, para 9-005 applied; **Enzo Addari v Edy Gay Addari**, [2005] ECSCJ No. 59, (delivered 23rd September 2005) followed; **Thelma Paraskevaides and another v Citco Trust Corporation Limited and others**, [2020] ECSCJ No. 107, (delivered 30th March 2020) followed.

6. Victory Success' complaints of Madam Chen's non-disclosure as it related to, forum, *locus standi*, the strength of her case, the effect of her claim succeeding, her financial position and the fact that the interim injunction would impede urgent remedial work to the Hotel, when considered and upon application of the authorities, are amply justified and the judge was indeed fully entitled to discharge the interim injunction. While a *locus poenitentiae* may sometimes be afforded to the applicant, thereby allowing the court in its discretion to either continue the order, or make a new order on terms, nothing was placed before the Court to suggest that the judge ought to have either continued or re-imposed the interim injunction in this case. The duty of responsible disclosure had clearly not been met in this case and, the judge was entitled to discharge the interim injunction on that basis.
7. A stay will only be granted where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action. The court will take into consideration factors affecting convenience and expense but also other factors such as the law governing the relevant transaction, and the places in which the parties respectively reside or carry on business, to determine the appropriate forum for the trial of the action. In general, the burden of proof rests on the defendant to persuade the court to exercise its discretion to grant a stay. However, if the court is satisfied that there is another available forum which is *prima facie* the appropriate forum for the trial of the action, the burden will then shift to the claimant to show that there are special circumstances by reason of which justice requires that the trial should nevertheless take place in the country. If the court concludes at that stage that there is no other available forum which is clearly more appropriate for the trial of the action, it will ordinarily refuse a stay. If, however

the court concludes at that stage that there is some other available forum which prima facie is clearly more appropriate for the trial of the action, it will ordinarily grant a stay unless there are some circumstances by reason of which justice requires that a stay should nevertheless not be granted.

Spiliada Maritime Corporation v Cansulex Ltd (“Spiliada”) [1987] 1 AC 460 applied; **IPOC International Growth Fund Limited v LV Finance Group Limited and others** [2005] ECSCJ No. 58, (delivered 19th September 2005) followed; **Livingston Properties Inc and Others v JSC MCC Eurochem and Another** [2020] UKPC 31 considered.

8. In applying those principles, the judge’s first step was to consider where was the most appropriate forum for the trial of the action in this case. In concluding that this was Macau, the judge took into account the various connecting factors to Macau, such as the location of the Hotel, the presence of the witnesses and the relevant documents, all of which are in either Chinese or Portuguese, both languages which the Macau courts are well equipped to handle. The judge also considered that the relevant law of duress would be either Macau law or the law of the People’s Republic of China. The burden then shifted to Madam Chen to establish that there were special circumstances why justice required that the trial should nevertheless take place in the BVI. In turn, the judge made the unassailable decision to grant a stay. There is therefore no basis for this Court to interfere with the judge’s conclusions that the natural forum for the action is Macau and that there is no evidence that Macau could not do substantial justice between the parties.

JUDGMENT

Introduction

- [1] **MORRISON JA [AG.]**: The appellant (“Madam Chen”) is a resident of Macau, which is a Special Administrative Region of the People’s Republic of China (“PRC”).
- [2] The first respondent (“Victory Success”) is a company incorporated in the BVI under the Territory of the Virgin Islands (“the BVI”) **Business Companies Act**.¹
- [3] The second respondent (“Peckson”) is a company incorporated in the BVI under the **International Business Companies Act**.²

¹ Act 16 of 2004, Laws of the Virgin Islands.

² Cap. 291, Revised Laws of the Virgin Islands 1984

- [4] Madam Chen is the beneficial owner of 80% of the issued shares of Peckson (“the Peckson shares”). Nothing turns on the ownership of the remaining 20% of the Peckson shares and it is common ground that at all times material to this appeal Peckson was controlled by Madam Chen.
- [5] The third respondent (“Empresa”) is a company incorporated under the laws of Macau. Empresa holds the Macau Government Lease of the New Century Hotel (“the Hotel”), which is the underlying asset in dispute in these proceedings. Peckson is the registered holder of virtually all the shares in Empresa.³
- [6] In circumstances which Madam Chen strenuously challenges in this litigation, the Peckson shares were transferred to Victory Success in or around October 2015 by one Alan Zhan. Mr. Zhan purportedly acted under a Power of Attorney given on behalf of Peckson by Mr. Xu Xhao-ji (“Mr. Xu”), a close associate of Madam Chen.
- [7] In an action filed on 1st April 2019, Madam Chen sought declarations that the transfer of the Hotel to Victory Success was void *ab initio*; or, alternatively, has been validly avoided, by virtue of it having been procured by extreme duress. Madam Chen accordingly sought an order that Victory Success re-transfer the Hotel to Empresa, “by way of Restitution”, damages for conspiracy and, for the benefit of Mr. Xu, damages for assault and false imprisonment, including damages for acute mental distress, aggravated and exemplary damages.⁴
- [8] By an *ex parte* notice of application filed on 1st April 2019, Madam Chen sought an order restraining Victory Success, until after judgment or further order in the meantime, from (a) disposing or attempting to dispose of the Hotel; (b) creating or granting or attempting to create or grant any interest or right whether real or personal

³ Peckson is the registered holder of 14,999,000 of the Empresa shares, while the remaining 1,000 shares are registered in the name of Mr. Ng Man-sun, a former associate of Madam Chen. In the Statement of Claim filed on 1st April 2019, Madam Chen avers that Mr. Ng holds these shares as Peckson’s nominee – see para 9.

⁴ Claim Form dated 25th March and filed 1st April 2019.

in or over the Hotel; or (c) denying or preventing access to the Hotel by Peckson, Empresa and others.

- [9] The application was supported by Madam Chen's Affirmation dated 25th March 2019, in which, among other things, she explained that:⁵

"... all I am asking the Court for on this *Ex parte* Application is for Victory Success to be ordered not to dispose of the Hotel until after the Trial of this Action or further Order in the meantime. The need to obtain such an Order urgently and without alerting Victory Success beforehand is that well-informed sources have told me that Victory Success are hoping to sell on the Hotel for HK\$3.5 billion to one or the other of two possible purchasers who are both very substantial and interested in gaming and who might be in a position to claim to be *bona fide* purchasers without notice of the claims which I am making in this Action."

- [10] By an order made on 10th April 2019, Adderley J granted an *ex parte* interim injunction ("the Interim Injunction") in the terms asked for, with the addition of an order also preventing Victory Success from carrying out any demolition works or construction works on the Hotel pending trial.⁶
- [11] On 8th May 2019, after an *inter partes* hearing, Adderley J continued this order to a date described in his order as "the Adjourned Return Date".
- [12] In an application filed on 15th May 2019, Victory Success applied for a declaration that the BVI is not the convenient forum within which the action should be suitably tried, and an order staying the proceedings accordingly ("the forum application").
- [13] As it turned out, the application for continuation of the injunction until trial, did not come on for hearing until 3rd November 2020, when it was heard, together with the forum application, by Jack J (Ag.) ("the judge").

⁵ Affirmation of Madam Chen dated 25th March 2019, para 30.

⁶ This order was added as a result of information given to the court of steps preparatory to the carrying out of building works at the Hotel. That information was contained in the Second Affirmation of Chin Choon Onn, one of the receivers, dated 11th April 2019. The affidavit, which was unfiled at the time of the hearing, was subsequently filed on 12th April 2019, in fulfillment of an undertaking given to the Court by Madam Chen's counsel.

- [14] In a judgment given on 30th November 2020,⁷ the judge refused the application for continuation of the interim injunction. He found that Madam Chen had failed to satisfy the threshold test for the grant of an interim injunction by showing that there was a serious question to be tried. The principal bases of this finding were that the witness statements of Mr. Xu were not admissible; and that, even if they were, they failed to establish that there was a serious question to be tried on the facts.
- [15] The judge further considered that, even if he was wrong in this conclusion, the application also failed on the further grounds that Madam Chen lacked standing to apply for the interim injunction; the balance of convenience was against continuing it; and Madam Chen had been guilty of material non-disclosure on the *ex parte* application before Adderley J.
- [16] Finally, on the forum application, the judge made an order staying the substantive action on the ground that the BVI is *forum non conveniens*.
- [17] This is therefore Madam Chen's appeal against all aspects of the judge's judgment. Although named as respondents to the appeal, Peckson and Empresa also support Madam Chen in this appeal.
- [18] The appeal raises the following five issues:
- (i) whether the judge's conclusion that the material before him disclosed no serious issue to be tried was correct, particularly bearing in mind the well-established principle that, as the judge himself acknowledged, "it is not appropriate to carry out a mini-trial when considering whether to grant or extend an interlocutory injunction";⁸

⁷ [2020] ECSCJ No. 391, (delivered 30th November 2020) ("Judgment").

⁸ Judgment at para. [44], citing in support the decision of Pereira CJ in *Gryspeerd v Clico Investment Bank Limited* [2017] ECSCJ No. 205, (delivered 8th September 2017) at para. 11.

- (ii) whether Madam Chen had standing to make the application for the interim injunction;
- (iii) whether the balance of convenience favoured the grant of the interim injunction;
- (iv) whether the judge was correct in his finding that, in any event, the interim injunction should be discharged on the ground that Madam Chen was guilty of material non-disclosure on the *ex parte* application before Adderley J; and
- (v) whether the judge's decision to stay the action was correct, given the settled principles on the issue of *forum non conveniens* in this jurisdiction

[19] For the reasons which follow, I have come to the conclusion that Madam Chen succeeds on issue (i) but fails on all four remaining issues. I would therefore order that her appeal be dismissed, with costs to Victory Success. Unless agreed between the parties within 21 days of this order, the costs shall be assessed by a judge of the Commercial Court at no more than two thirds of the costs in the court below.

Previous litigation⁹

[20] This appeal arises out of the latest in an extended series of litigation over the beneficial ownership of the Hotel, in which Madam Chen has been a constant throughout. In 2012, in what the judge described¹⁰ as “a piece of epic litigation”, Madam Chen's former business and life partner, Mr. Ng Man-Sun (“Mr. Ng”), sought an order that he was the beneficial owner of the Hotel.

⁹ I have gratefully adapted this summary from the Affidavit of Rosalind Nicholson, sworn to on 5th December 2019, paras 7-10.

¹⁰ Judgment at para [4].

[21] On 14th November 2013, after a week-long trial, Bannister J (Ag.) dismissed Mr. Ng's claim, making declarations that (i) Madam Chen was the sole legal and beneficial owner of 80% of the Peckson shares; and (ii) Mr. Ng had no right in or title to either the shares or Peckson.¹¹ But, notwithstanding Madam Chen's success in the action, Bannister J (Ag.) did not find her an impressive witness. He observed that, "[a]rgumentative and evasive, she failed to inspire any confidence that it would be wise to rely upon anything that she said unless it was against her interests or corroborated".¹² [22] Mr. Ng's appeal to this Court succeeded,¹³ thereby reversing Bannister J (Ag.)'s decision. However, Madam Chen succeeded in a further appeal to the Privy Council and, by an order made on 15th November 2017, the Board allowed the appeal, set aside the judgments of both Bannister J (Ag.) and this Court (for the most part), and directed that there should be a new trial before a different judge. On 29th November 2017, after hearing submissions from the parties (during which it was argued on Madam Chen's behalf that, if she were permitted by the receiver to do so, she could cause Peckson to sue Victory Success in Macau to recover the Hotel on the basis of duress),¹⁴ the Board ordered that Mr. Ng transfer his shares in Peckson to two receivers. The receivers were appointed for the purpose of holding the shares pending the outcome of the new trial, or further order of the Eastern Caribbean Supreme Court. The Board's order also made detailed provisions relating to the powers of the receivers and other matters.

[22] The new trial duly took place before Adderley J in early 2019 and, by his judgment given on 28th February 2019, Madam Chen again prevailed. A second appeal to this Court was subsequently settled on terms which left Madam Chen the ultimate victor in her prolonged contest with Mr. Ng.

¹¹ Ng, Man Sun (also known as Ng Wei) v Peckson Limited (a BVI Company) and Chen, Mei Huan [BVIHAC (COM) 88 Of 2012] (delivered 14th November 2013, unreported).

¹² Ibid at para [8].

¹³ By an order pronounced on 2nd October 2015.

¹⁴ See transcript of Privy Council hearing on 30 October 2017, pages 10-13

Background to the current proceedings

- [23] Subject to the transactions which are impugned in this litigation, Empresa's only significant asset is the Hotel, which is, by all accounts, a very valuable property. It is not now in operation, having been closed by Macau Government authorities on public health grounds in 2016. However, it was once, as the judge described it,¹⁵ "an up-market five-star establishment", the attractions of which included the valuable concession of a casino.
- [24] On 30th November 2013, that is, just over two weeks after Bannister J (Ag.)'s judgment in her favour, Madam Chen caused Peckson to appoint Mr. Xu and Mr. Chan In-fo ("Mr. Chan") as general managers of the Hotel. On 9th December 2013, Madam Chen transferred her shares in Peckson to Mr. Xu and appointed him sole director in her place. And, on the same day, Mr. Xu executed a declaration of trust confirming that he held the shares in trust for Madam Chen.
- [25] As will presently emerge, Mr. Xu plays a central role in the events with which this appeal is concerned.
- [26] On 16th December 2013, Peckson and Empresa entered into a joint venture agreement¹⁶ with Victory Success, whereby the latter would advance a total of HK\$1.5 billion to or on Empresa's behalf. In separate agreements entered into as security for the loan, Peckson pledged its shares in Empresa to Victory Success,¹⁷ and Empresa in turn gave Victory Success a mortgage over the Hotel.¹⁸
- [27] There is a still unresolved dispute between the parties as to the actual amount disbursed by Victory Success to Empresa under the loan facility. Victory Success maintains that the full amount of HK\$1.5 billion was disbursed by early 2014, while

¹⁵ Judgment, para [3].

¹⁶ Described as a 'Commitment for Co-operation Agreement'.

¹⁷ Loan and Pledge Contract dated 5th January 2014.

¹⁸ Mortgage dated 25 January 2014.

Madam Chen contends that only HK\$618.8 million or thereabouts has been disbursed to date.¹⁹

[28] The current dispute between the parties arises from their divergent accounts of certain events which took place late in 2015, at which time the Hotel was still being managed on Madam Chen's behalf by Mr. Xu. I cannot improve, and therefore gratefully adopt, the judge's admirable summary of their respective positions.²⁰

[29] First, as regards Victory Success:

"[15] ... Victory Success's case is this. It says that in order to resolve Empresa's financial misère, a compromise was reached whereby Empresa transferred the Hotel to Victory Success and Victory Success wrote off the HK\$1.5 billion lent together with all the accrued interest ... On 22nd October 2015 Empresa and Victory Success entered a deed of compromise, known in Macau law as a *datio in solutum*. By this Victory Success waived its claim to HK\$1.5 billion and interest and Empresa transferred legal title to the Hotel to Victory Success ..."

[30] And second, as regards Madam Chen:

"[16] Madame Chen's case on the facts is very different. Her case is that Mr. Xu, who had signing rights on behalf of Empresa, was kidnapped by associates of Victory Success and Alvin Chau Cheok-wa ("Mr. Chau"), who is said to stand behind Victory Success. As a result of these threats, Mr. Xu executed a power of attorney in favour of the second defendant ("Mr. Zhan"), so that Mr. Zhan could sign the *datio in solutum* on behalf of Empresa and various other documents. The *datio in solutum* is accordingly void, or in the alternative, voidable. It is thus ineffective to transfer title to the Hotel to Victory Success. Madame Chen is entitled to an injunction ... Alternatively, if technically the cause of action against Victory Success is vested in Empresa or Peckson, it is easy to substitute those companies for her as claimant in this action."

[31] After some delay, Victory Success finally took possession of the Hotel on 20th March 2019. This in turn gave rise to this action, which, as I have indicated, was filed on 1st April 2019.

¹⁹ The actual figure which Madam Chen acknowledges is HK\$618,891,262.06: see Statement of Claim filed 1st April 2019, para 20.

²⁰ Judgment at paras [15]-[16].

The principle of appellate restraint

[32] Before coming to the issues raised by the appeal, I must first note at the outset, as Mr. Béar, QC for Victory Success reminded us, that this is an appeal from a decision on an application for an interlocutory injunction. Accordingly, this Court will usually defer to the judge's exercise of his discretion and will only interfere with it if it can be shown to be 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”.²¹

[33] Mr. Béar referred us to, among other authorities to the same effect,²² the very recent decision of the Privy Council in **Ming Siu Hung and others v J F Ming Inc and another**,²³ an appeal from this Court, in which this well-known principle of appellate restraint was revisited and reaffirmed by the Board in a judgment given by Lord Briggs. Cautioning against “undue appellate activism”,²⁴ Lord Briggs drew attention to the earlier decision of the United Kingdom Supreme Court in **In re B (A Child) (Care Proceedings: Threshold Criteria)**,²⁵ in which Lord Kerr of Tonaghmore JSC reiterated the position in these terms:

“Where what is under review by an appellate court is a decision based on the exercise of discretion, provided the decision-maker has not failed to take into account relevant matters and has not had regard to irrelevant factors and has not reached a decision that is plainly irrational, the review by an appellate court is at its most benign. Truly, in that instance, an appellate court which disagrees with the challenged decision of the judge will be constrained to say, even though we would have reached a different conclusion, we cannot interfere.”

²¹ Per Lord Diplock in *Hadmor Productions Ltd and others v Hamilton and another* [1983] 1 AC 191 page 220. The principle was restated with approval by Pereira CJ in the decision of this Court in *The matter of the Insolvency Act 2003; In the Matter of Fairfield Sentry Limited (In Liquidation), Fairfield Sigma Limited (In Liquidation); In the matter of Fairfield Lambda Limited (In Liquidation); ABN Amro Fund Services (Isle of Man) 24 Nominees Limited formerly Fortis (Isle of Man) Nominees Limited and others v Kenneth Krys and others*, [2017] ECSCJ No. 255, (delivered 20th November 2017) at para [60].

²² See, for instance, *G v G* [1985] 1 WLR 647; and *Deripaska v Cherney* [2009] 2 CLC 408.

²³ [2021] UKPC 1.

²⁴ *Ibid* at para [20].

²⁵ [2013] 1 WLR 1911 at para 112.

[34] And lastly, specifically with reference to the appeal against the judge's decision on the forum application, Mr. Béar directed us to the following statement by Lord Templeman in **Spiliada Maritime Corporation v Cansulex Ltd** ("**Spiliada**"):²⁶

"... it seems to me that the solution of disputes about the relative merits of trial in England and trial abroad is pre-eminently a matter for the trial judge. Commercial court judges are very experienced in these matters ... An appeal should be rare and the appellate court should be slow to interfere."

[35] With these cautionary words in mind, I come now to the issues.

Issue (i) – is there a serious question to be tried?

[36] I will first consider the statement of claim, Mr. Xu's first witness statement, an affidavit in response sworn to by Rui Sousa, a Macau lawyer acting on behalf of Victory Success, Mr. Xu's second witness statement, and Victory Success's response to the application.

[37] As I have indicated, Madam Chen's case is that the transfer of the Hotel to Victory Success was effected by way of a power of attorney executed by Mr. Xu under duress. In the statement of claim filed on her behalf, the case is put in this way:

"26. On 16 October 2015 Mr. Xu was kidnapped at gun-point in Shenzhen, a city in Guangdong Province on the border of the Hong Kong Special Administrative Region of the PRC, by a gang of men including the 2nd above-named Defendant ("Alan Zhan"). He was taken to a vacant office in Zhuhai, a city on the Southern coast of Guangdong Province, where he was kept for a week under guard by six men. He was shown documents which he was told he had to sign or else his children would be killed; and he was shown photographs of his children and given details of their daily lives showing that the gang already had them under surveillance. Mr. Xu agreed to sign the documents to save the lives of his children.

27. Those documents included a Power of Attorney in favour of Alan Zhan authorising him to act on behalf of Mr. Xu as General Manager of Empresa for the purpose of transferring the Hotel to Victory Success in lieu of repayment of the Loan which was stated to be outstanding in the amount of HK\$1.5 billion and interest ("the Power of Attorney").

²⁶ [1987] 1 AC 460 page 465.

28. On 19 October 2015 Mr. Xu was taken by his kidnappers to the office of a Public Notary in Zhuhai where the Power of Attorney was executed by himself and Alan Zhan.
29. Other documents which Mr. Xu executed while he was being held by his kidnappers and under the same threats were a purported Receipt for HK\$1.5 billion falsely dated 29 April 2014 and witnessed by Alan Zhan and a purported Notice of a General Meeting of Empresa be held on 25 September 2015 to approve the Transfer to Victory Success in lieu of repayment and purported Minutes of such a Meeting on that date. No such Meeting had ever taken place.
30. On 22 October 2015 Alan Zhan executed before Macau Notary in reliance on the Power of Attorney a Transfer of the Hotel to Victory Success (described as a "Notarial Deed of *Datio in Solutum*") which included an acknowledgement that Empresa was indebted the Victory Success for HK\$1,500,000,000.00 and delay interest of HK\$108,184,932.00 that the value of the Hotel was HK \$1,508,184,932.00 .00and that that indebtedness had been completely liquidated by the transfer."

[38] Mr. Xu's account of the alleged kidnapping was originally given in a witness statement dated 21st July 2016 and filed in the Macau proceedings. His witness statement in these proceedings was dated 24th September 2020 and it is this statement which I will describe as 'Mr. Xu's first witness statement'.

[39] After recounting the history of Peckson/Madam Chen's dealings with Victory Success, Mr. Xu gave details of the alleged kidnapping at some length. I hope that I do it no disservice by summarising the relevant parts in this way. In October 2015, he visited Shenzhen (which is in Guangdong Province at the border between Hong Kong and the rest of China) with a view to discussing the Hotel's financial situation with a group of investors. While there, he stayed as he usually did with his friend Wang Bin and his wife Wang He. During that visit, on 16th October 2015, he was kidnapped in the following circumstances. Upon his return to from a shopping trip in his own car, he was met by Wang He, who opened the car door for him. Two men grabbed him and dragged him into another car and drove off. Other men in other cars surrounded them and there was no chance to escape. Blindfolded by his captors, one of whom had a gun, he was taken to a vacant office in Zhuhai, a city

on the southern coast of Guangdong Province. He was kept there for a week under the guard of six men. He was shown documents which he was told he must sign, as his kidnappers had his two children under surveillance and they would both be killed immediately if he refused to do so. The men described his children (a son who lived in China and a daughter who lived in the United States of America) and gave accurate details of their daily lives. He considered that he had no choice but to sign the documents, as he believed the kidnappers' threats that his children would be killed if he did not do so.

[40] On 19th October 2015, he was taken to a Zhuhai notary who notarised the documents. They included a Power of Attorney in favour of Mr. Zhan authorising him to sign various other documents on Mr. Xu's behalf, including a transfer of the Hotel to Victory Success by way of repayment of the loan of HK\$1.5 billion. Among the other documents were 21 receipts for cash, a purported receipt for HK\$1.5 billion witnessed by Mr. Zhan, and a purported notice of an Empresa general meeting to approve the transfer of the Hotel to Victory Success in lieu of repayment. He was thereafter held at different locations for several more days before being finally released on 18th November 2015 after 33 days in captivity.

[41] Mr. Xu's first witness statement elicited a response by way of an affidavit sworn to on 28th October 2020 by Rui Sousa, a Macau lawyer. Mr. Sousa, whose firm had previously acted for Victory Success in other matters, stated that Mr. Xu attended a meeting at the firm's offices in Macau on 21st April 2016, at which various loans from Victory Success to Empresa were discussed. At that meeting, on Mr. Sousa's account, Mr. Xu acknowledged the receipt by Empresa of the HK\$1.5 billion loan from Victory Success, stating that it had been paid to individual creditors of Empresa. Mr. Xu then produced some 21 receipts evidencing this. These receipts were signed by him together with a receipt for the total loan amount of HK\$1.5 billion, also signed by him. According to Mr. Sousa, "[a]t no stage during that meeting did Mr. Xu claim to have been kidnapped or that he had been coerced into signing any documents".

- [42] Responding to Mr. Sousa's affidavit in a second witness statement,²⁷ Mr. Xu stated that he did not question the truthfulness of Mr. Sousa's account of the meeting of 21st April 2016. However, he continued, "the person who was introduced to him and his colleagues ... as being me was not in fact me and must have been an impostor".²⁸ Mr. Xu then referred to and produced Chinese Border Control Records of his departures from China, to demonstrate that, after his kidnapping in October 2015, he did not leave China again until 27th October 2017, when he travelled to Hong Kong, *en route* to London for the Privy Council hearing of Madam Chen's appeal in her case against Mr. Ng. He stated that he had never heard of Mr. Sousa before, nor had he ever met him or the colleagues who were said to be at the 21st April 2016 meeting.
- [43] In advance of the virtual hearing before the judge, Madam Chen's attorneys-at-law advised the court and the other side that Mr. Xu would be available for cross-examination.²⁹ However, although Madam Chen maintains that he was in fact present at the hearing, accompanied by a Chinese interpreter, he was not cross-examined on either of his witness statements.
- [44] To date, Victory Success has not filed a defence to the claim. However, in a first affidavit filed on behalf of Victory Success in support of the application to discharge the interim injunction and in support of the forum application,³⁰ Mr. Paulo Ramalho Goncalves, a Macau lawyer acting on behalf of Victory Success, described Mr. Xu's account of his alleged kidnapping as "an improbable allegation ... Victory Success denies (in the strongest possible terms) any involvement with it if it did occur". Mr. Goncalves also stated³¹ that he understood from the directors of Victory Success "that they regard the kidnapping allegations as preposterous, and with it the suggestion that they had any involvement in the alleged plot".

²⁷ Filed 3rd November 2020.

²⁸ Second Witness Statement of Xu Zhao-ji at para [3].

²⁹ See Witness statement of Astra Penn filed 31st August 2020 at para 15.

³⁰ Affidavit of Paulo Ramalho Goncalves filed 1st April 2020 at para 12(vii).

³¹ Affidavit of Paulo Ramalho Goncalves filed 1st April 2020 at para 62.

[45] In a second affidavit filed some months later,³² Mr. Goncalves further stated that “[i]f Mr. Xu was kidnapped (which I believe to be improbable) then I am informed and believe that Victory Success had no knowledge of it whatsoever”.

[46] The judge approached the question of whether the material before him established that there was a serious question to be tried by, first, undertaking a detailed analysis of Mr. Xu’s evidence in comparison with other evidence in the case. So, for instance, he compared Mr. Xu’s evidence of the circumstances of the kidnapping and the date on which it allegedly took place (16th October 2015), with Madam Chen’s recollection of telephone calls received from Wang He on 17th October 2015,³³ a report allegedly made by Wang He to the Shenzhen Police, in which the date of the kidnapping was stated as 17th October 2015, and the evidence of an alleged witness to the incident in proceedings in Macau (“Mr. Yang”), who also gave the date as 17th October 2015. This exercise led the judge to the view that:³⁴

“[24] These two accounts clearly relate to completely different incidents. First, there is the difference of date. Second, on Mr. Xu’s account, the kidnapping occurred outside Wang Bin’s apartment, where Mr. Xu had been staying, whereas Mr. Yang says it was outside a restaurant where Mr. Xu had been eating. Third, Mr. Xu says that Madame Wang opened his car door on his return from shopping, whereas Mr. Yang says there was no woman present at all when Mr. Xu emerged from the restaurant. No attempt has been made to account for these discrepancies. Mr. Yang has not given evidence in these proceedings, but no explanation for his failure to do so is advanced.

[25] Madame Wang has given no evidence in these proceedings. Mr. Xu says that is because she and her husband are in fear of those behind Victory Success, but there is no independent evidence of this.”

[47] The judge also commented adversely on the fact that it did not appear that Mr. Xu had ever reported the kidnapping to the police, either in mainland China or in Macau;³⁵ the absence of any Chinese version of Mr. Xu’s witness statements, or any evidence about their translation or who produced the English language versions

³² Affidavit of Paulo Ramalho Goncalves filed 28th October 2020 at para 66

³³ Madam Chen’s Fifth Affidavit sworn to on 11th July 2016.

³⁴ Judgment, paras [24] and [25].

³⁵ Judgment, para [26].

of them (given the evidence that Mr. Xu spoke no English);³⁶ the fact that some parts of Mr. Xu's witness statements are "clearly not his words";³⁷ the fact that "the signing page of each of the witness statements is clearly a separate document from the body of the witness statements";³⁸ the fact that, even without expert evidence, there was some indication that the signatures on the witness statements were not Mr. Xu's; and the fact that Bannister J (Ag.) had commented adversely on Madam Chen's truthfulness at the trial against Mr. Ng.³⁹

[48] Lastly in his general comments, the judge identified what he described as a number of problems with the immigration records produced by Mr. Xu in support of his denial that he attended the meeting described by Mr. Sousa.⁴⁰ Having considered the records (which were all in Chinese and not translated), the judge observed⁴¹ that he was told in argument "that the page does not in fact mention Mr. Xu's name at all". The judge then considered what he described as "a critical problem with the information" contained in the document, having to do with the reconciliation of the various dates referred to in it, before concluding that, "even if the other problems with the document were overcome, the record would not show that Mr. Xu had an alibi for 21st April 2016".⁴²

[49] Ultimately, the judge considered that Madam Chen had failed to establish that there was a serious question to be tried for two reasons. Firstly, Victory Success had shown an arguable case that the witness statements were not in truth made by Mr. Xu and there was "a real possibility that Mr. Xu's witness statements are complete inventions which have never been seen by Mr. Xu at all, still less approved by him".⁴³ In the judge's view:⁴⁴

³⁶ Judgment, paras [27] and [38].

³⁷ Judgment, para [28].

³⁸ Ibid.

³⁹ Judgment, para [30].

⁴⁰ See para [42] above

⁴¹ Judgment, para [35].

⁴² Judgment, para [36].

⁴³ Judgment, para [31].

⁴⁴ Judgment, paras [38]-[42].

[38] ... witness statements and affidavits are normally self-proving, in the sense that they are assumed to have been made by the person who purports to make them. It would put an unfair burden on a party challenging their genuineness to have to prove on balance of probabilities that the document was forged. This is particularly so, since it will normally be straightforward for the party challenged to prove that the person who purported to make the witness statement or affidavit was that person. Even in an international case like the present, it would be easy for Mr. Xu to go to a notary and prove his *bona fides*. In my judgment it suffices that the party challenging admissibility raises an arguable case. The burden then shifts to the party challenged to show the genuineness of the witness statement or affidavit.

[39] Has Victory Success shown an arguable case that the witness statements are not in truth those of Mr. Xu? In my judgment they have. Firstly, there is some evidence the signatures of Mr. Xu on the witness statements are not his. There is no expert evidence, but just as a lay person can say in plain cases that an English signature is not genuine, so too a lay person can say a Chinese ideogram is not that of the person purportedly signing. Secondly, the evidence (albeit weak evidence) that Mr. Xu is in prison has not been disproved, as it could easily have been. Thirdly, no explanation is given as to how Mr. Xu, who speaks no English, comes to give evidence solely in English.

[40] Although those considerations are enough in my judgment in themselves to raise an arguable case for Madame Chen to answer, I think I am entitled as well to have regard to the ease with which Madame Chen could disprove the allegation. Going to a notary in Shanghai, where Mr. Xu says he lives, would have been easy. (I think I can take judicial notice of the fact that China has been very effective in suppressing the coronavirus, so that notarial services would have been available. However, even if I am not entitled to take judicial notice of that fact, no evidence has been adduced that Mr. Xu could not visit a notary.) Even just exhibiting his passport and a household utility bill would have provided some evidence that he was making the witness statements. No attempt has been made, as it so easily could have been. [41] Accordingly, Victory Success have shown an arguable case that the witness statements purportedly [sic] by Mr. Xu are not in fact his. Madame Chen has adduced no evidence to gainsay that. I therefore hold that Mr. Xu's witness statements are not admissible.

[42] It follows that Madame Chen has failed to show a serious question to be tried and her application for an injunction fails *in limine*."

[50] And secondly, the judge considered that Mr. Xu's evidence had in any event failed to reach "a minimum threshold of cogency", for the following reasons:⁴⁵

"Firstly, the discrepancies between Mr. Xu's account of the kidnapping and Mr. Yang's show that one or both of them are lying. Given

⁴⁵ Judgment at para [52].

that both were witnesses of Madame Chen, there is a more than realistic possibility that both were lying. Secondly, Mr. Xu has never complained to the police about his kidnapping. Thirdly, Mr. Xu lied about not attending the meeting with Advocate Sousa and sought to support his case with a false alibi. Fourthly, Advocate Sousa's evidence is strong that the full amount of the loan was advanced and that the *datio in solutum* was a properly executed compromise of the claims between Victory Success and Empresa. Fifthly, there was no reason for Victory Success to arrange Mr. Xu's kidnapping; it had adequate security and could foreclose if it wished to. Given my starting point that Mr. Xu's allegation of having been kidnapped is improbable, Madame Chen has not shown that his evidence is sufficiently cogent to overcome the inherent improbability of his account of events."

[51] The judge accordingly concluded that Madam Chen had failed to show a serious question to be tried on the facts.

[52] By notice of appeal filed on 14th December 2020, Madam Chen challenged this decision on a number of grounds:

(1) The judge disregarded the guidance in *American Cyanamid v Ethicon* as to the correct approach to the question whether Madam Chen had shown "a serious question to be tried".

(2) The judge misinterpreted the evidence as to the kidnapping of Mr. Xu.

(3) The judge wrongly treated the Witness Statements of Mr. Xu as not having been made by him despite the fact that Mr. Xu was present at the virtual hearing with an interpreter and ready to be cross-examined or answer any questions put to him by the judge.

(4) The judge's criticisms of Mr. Xu's Witness Statements were all unfounded.

(5) The judge was not entitled to find that Madam Chen was not a truthful witness on the basis of the findings of Bannister J (Ag.) in his Judgment at the first trial of BVIHC (COM) 88 of 2012 because (1) that Judgment had been set aside by Order in Council on 15th November 2017 and (2) it would not have been admissible in any event.

(6) Furthermore, Madam Chen was entitled to be treated as a witness of truth in the light of the further corroborative evidence which she gave or adduced at the new trial and the treatment of her evidence by Adderley J.

(7) The judge's finding that Mr. Xu attended the meeting described in Advocate Sousa's Witness Statement was not justified by the evidence.

[53] Mr. McDonnell QC, who also appeared for Madam Chen before the judge, referred us at the outset to Lord Diplock's well-known guidance on the proper approach to applications for interlocutory injunctions in **American Cyanamid Co. (No. 1) v Ethicon Ltd**⁴⁶ ("**Cyanamid**"):

"... The court no doubt must be satisfied that the claim is not frivolous or vexatious, in other words, that there is a serious question to be tried.

It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial ...

So unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought.

[54] Mr. McDonnell submitted that, in his approach to the serious question to be tried issue, the judge disregarded Lord Diplock's guidance. Instead, he trawled through Mr. Xu's evidence, comparing it to that given by various witnesses, all given on paper, as though he were evaluating evidence at the end of a trial after cross-examination. In accordance with **Cyanamid**, the judge ought to have left the resolution of discrepancies and inconsistencies to the trial. In any event, the judge did not carry out his evaluation of the evidence accurately, finding inconsistencies when on close analysis there were in fact none. It was "a flagrant injustice"⁴⁷ for the judge to have concluded that Mr. Xu's witness statements were not his without putting that to him, despite his presence at the hearing. The judge's approach to the proof of witness statements was wrong, given the fact that, under rule 29.8(1) of the **Civil Procedure Rules, 2000** ("CPR"), a witness statement can only be relied on if the witness is called to give evidence. In this case, Mr. Xu was present and available to give evidence. The judge's comments on Madam Chen's veracity were wrong and could not be sustained in light of the principle in **Hollington v F. Hewthorn and**

⁴⁶ [1975] AC 396 page 407.

⁴⁷ Appellant's written submissions filed 31st May 2021 at para 13.

Company, Limited, and Another⁴⁸ (“**Hollington v Hewthorn**”), which is that the conclusion of a court in different proceedings is not admissible as proof of the same fact in subsequent proceedings. In any event, the judgment in which doubts had been cast on Madam Chen’s veracity had been set aside by the Privy Council and therefore could not be relied on even in subsequent stages of the same action. In general, the judge’s conclusions on the truthfulness of Madam Chen’s case were unfair and vitiated by his failure to take advantage of Mr. Xu’s presence at the hearing.

- [55] Mr. Béar submitted that, even applying **Cyanamid** principles, the court can and should consider the merits of the case in relation to the prospects of success of an applicant for an interim injunction. So, there is no need for the court to go on to consider the balance of convenience if “the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial”. In **Series 5 Software Ltd v Clarke and others**,⁴⁹ Laddie J held that **Cyanamid** did not exclude consideration on an interlocutory application of “any clear view the court may reach as to the relative strengths of the parties’ cases”. In this regard, the judge was entitled to take into account that (i) Victory Success, as a secured creditor who “admittedly was on any view owed many hundreds of millions of HK dollars”,⁵⁰ would have had no motive for participating in the criminal conspiracy described by Mr. Xu; (ii) there were irreconcilable versions of the circumstances of the alleged kidnapping; and (iii) Mr. Xu made no report of the kidnapping to the police in the PRC or in Macau, despite the fact that the principals were all known to him. Against this background, the judge was right to subject Madam Chen’s factual case to close scrutiny and to insist that it had to reach a certain minimum standard of cogency in order to show a serious question to be tried on the facts of the case. An appeal is not a forum for rearguing the case on the facts, and “[w]hether or not the appeal court itself would itself come to the same conclusion

⁴⁸ [1943] 1 KB 587.

⁴⁹ [1996] 1 All ER 853 at 865.

⁵⁰ Victory Success’ updated written submissions filed 28th May 2021 at para 49a.

is neither here nor there”.⁵¹ The only issue on appeal is therefore whether the judge’s conclusion was supported by material capable of leading to that conclusion.

[56] Finally, Mr. Béar directed our attention to the judge’s subsequent judgment given on 12th February 2021 on Madam Chen’s application for a stay of execution of the judgment now on appeal,⁵² in which he stated that he was “totally unaware” of the fact that Mr. Xu had been present at the virtual hearing before him in November 2020. Had he known (or remembered) that, the judge observed,⁵³ “then obviously I would have asked counsel for Victory Success whether they wanted to cross-examine him and heard submissions on the matter”.

[57] In considering these submissions, I will take all the grounds of appeal together.

[58] Both counsel naturally accept that, on an application such as this, as Lord Diplock explained in **Cyanamid**,⁵⁴ the court “is not justified in embarking upon anything resembling a trial of the action upon conflicting affidavits in order to evaluate the strength of either party’s case”.

[59] But, as Mr. Béar pointed out, it is clear that Lord Diplock was not meaning to suggest that the judge on the interlocutory application should not scrutinise the evidence carefully. In **Guardian Media Groups PLC and others v Associated Newspapers Ltd**,⁵⁵ to which Mr. Bear also referred us, Robert Walker LJ observed that:

“The *American Cyanamid* principles have a degree of flexibility and they do not prevent the court from giving proper weight to any clear view which the court can form at the time of the application for interim relief (and without the need for a mini-trial on copious affidavit evidence) as to the likely outcome at trial. That is particularly so when the grant or withholding of interim relief may influence the ultimate commercial outcome.”

⁵¹ Victory Success’ updated written submissions filed 28th May 2021 at para 48.

⁵² Chen Mei-Huan v Victory Success Holdings Ltd and another [2021] ECSCJ No. 474, (delivered 12th February 2021).

⁵³ Ibid para 8.

⁵⁴ Supra n.46 at page 409.

⁵⁵[2000] Lexis Citation 2114 at para 18.

[60] It seems to me that at the interlocutory stage much will therefore depend on the nature of the evidence and the general circumstances of the case. In this matter, Madam Chen's entire case is wholly dependent on Mr. Xu's evidence. There can be no doubt that that evidence describes a startling and wholly unusual tale. At the trial, it will obviously require careful scrutiny from the trial judge in order to determine its truth. In arriving at that judgment, the trial judge will, of course, be fully entitled to consider, as the judge did in this case, the extent to which, if at all, that evidence is internally consistent and consistent with the other evidence in the case. But a major part of the judge's task at the trial will also be to assess how Mr. Xu fares in the face of what is bound to be vigorous cross-examination. If, as Victory Success suggested, and the judge clearly accepted, the witness statements filed in Mr. Xu's name were not in fact made by him at all, the trial judge's credibility assessment will have to include consideration of Mr. Xu's response to that suggestion when put to him. So in this regard, in addition to everything else, considerations of fairness also come into play.

[61] Madam Chen's complaint was that the judge failed to avail himself of the advantage which Mr. Xu's presence at the virtual hearing afforded him to ask questions and seek clarification of any troubling features of his evidence. Standing by itself, there is in my view much force in that complaint, particularly given the judge's ultimate finding that the statements were not made by Mr. Xu. I accept that this complaint may lose its force somewhat in light of the judge's subsequent position that he simply did not know that Mr. Xu was present at the hearing, particularly since there is nothing on the record to show that it was brought to his attention at the time. However, the judge's response when told subsequently that Mr. Xu was in fact present, which was that, had he known, he would "obviously" have invited counsel for Victory Success to cross-examine Mr. Xu and heard submissions on the matter,⁵⁶ strikes me as a clear acknowledgment by the judge that, in the circumstances of this case, cross-examination of Mr. Xu was plainly indicated.

⁵⁶ See para. [42] above.

- [62] In my view, therefore, the judge's approach to Mr. Xu's evidence, and by extension determination of the issue whether Madam Chen had demonstrated that there was a serious question to be tried, was flawed. The judge in fact conducted a mini-trial, but one from which the critical component of cross-examination was missing.
- [63] As regards Madam Chen's complaint about the judge's adverse comments on her veracity, I am inclined to doubt that the rule in **Hollington v Hewthorn** is strictly apposite, since there was no question in this case of the judge treating a prior finding by Bannister J (Ag) in the earlier proceedings as proof of a fact in issue in this case. However, it is clear that whatever view Bannister J (Ag.) may have formed of Madam Chen's credibility has been overtaken by the fact that his judgment was set aside on appeal and that, perhaps more to the point, when the case was retried subsequently, Adderley J found her to be a witness of truth.
- [64] I therefore think that Madam Chen has made good on grounds 1, 3, 5, and 6, all of which challenge the process by which the judge considered the serious question to be tried issue. Accordingly, I do not think that it is necessary – or desirable - to deal with grounds 2, 4, and 7, all of which invite us to, as the judge did, make findings on the factual issues at this still preliminary stage of the proceedings. But the judge's flawed approach, as I have attempted to demonstrate, revealed a clear misunderstanding of the guidance laid down in **Cyanamid** and therefore entitles this Court to set aside the judge's exercise of his discretion and exercise its own in its stead.
- [65] In my view, if believed at trial, Mr. Xu's evidence, as startlingly unusual a history as it described, will clearly entitle Madam Chen to at least some of the reliefs she seeks on the basis of duress. On this basis, it seems to me, it discloses that there is indeed a serious question to be tried.

Issue (ii) – The question of standing

- [66] The judge gave this question short shrift. He found that Madam Chen had no cause of action against Victory Success for unjust enrichment: if any loss was suffered as a result of the transfer of the Hotel to Victory Success under the Power of Attorney allegedly obtained from Mr. Xu by duress, that loss was Empresa's, and not Madam Chen's.⁵⁷
- [67] In a single ground of appeal on this point, Madam Chen contends that this finding was wrong⁵⁸ and, in his written submissions, Mr. McDonnell put the argument on two principal bases.⁵⁹ First, Madam Chen clearly has a strong interest in the declaration which she claims that the Power of Attorney given by Mr. Xu under duress and the transfer of the Hotel to Victory Success in reliance on it were void. And second, her claims for the re-transfer of the Hotel to Empresa by way of restitution of an unjust enrichment and for damages for conspiracy and for the assault and false imprisonment of Mr. Xu, her nominee and trustee, are not objectionable under the rules against recovering "reflective loss".
- [68] Mr. Béar submitted that the judge was right, for the reasons he gave. Madam Chen's action and the injunction application were an attempt to bring action against Victory Success for an injury suffered by Empresa. In such a case, the proper plaintiff is the victim. Even if Madam Chen had her own claim against Victory Success for conspiracy, her only remedy would be in damages, not an injunction.
- [69] Mr. McDonnell referred us to **Guaranty Trust Company of New York v Hannay & Company**⁶⁰ ("**Guaranty Trust**"), a leading older case on the court's jurisdiction to grant declaratory judgments, while both counsel referred us to **Prudential**

⁵⁷ Judgment at para [54].

⁵⁸ Ground of appeal 8.

⁵⁹ Madam Chen's submissions in support of the appeal filed 31st May 2021 at para 40.

⁶⁰ [1915] 2 KB 536.

Insurance Company Ltd v Newman Industries Ltd and Others (No. 2)⁶¹ (“**Prudential**”) and **Sevilleja v Marex Financial Ltd**⁶² (“**Marex**”).

[70] In **Guaranty Trust**, the United Kingdom (“UK”) Court of Appeal held (by a majority), applying the then Order XXV., r.5., that the court has the power to make a declaration at the instance of a plaintiff though he has no cause of action against the defendant. As Pickford LJ put it, “the effect of the rule is to give a general power to make a declaration whether there be a cause of action or not, and at the instance of any party who is interested in the subject-matter of the declaration”.⁶³

[71] On this basis, Mr. McDonnell submitted that, applying the analogous section 22 of the **West Indies Associated States Supreme Court (Virgin Islands) Act**,⁶⁴ which provides that “[n]o action or proceeding shall be open to objection on the ground that a declaratory judgment decree or order is sought thereby”, Madam Chen clearly had standing to apply for the interim injunction in this case, given the declarations sought by her.

[72] For his part, Mr. Béar relied on **Prudential**, in which the UK Court of Appeal⁶⁵ referred to what it described as “the elementary principle” that –

“... A cannot, as a general rule, bring an action against B to recover damages or secure other relief on behalf of C for an injury done by B to C. C is the proper plaintiff because C is the party injured, and, therefore, the person in whom the cause of action is vested. This is sometimes referred to as the rule in *Foss v. Harbottle* (1843) 2 Hare 461 when applied to corporations, but it has a wider scope and is fundamental to any rational system of jurisprudence.”

[73] **Prudential** was a case in which the plaintiff, who was a minority shareholder in a company, sought declaratory relief, as well as damages, in its own right for conspiracy against the wrongdoers, who were directors of the company. It was held

⁶¹ [1982] 1 All ER 354.

⁶² [2021] 1 All ER 585.

⁶³ Supra n.60 at page 562.

⁶⁴ Cap. 80 of the Revised Laws of The Virgin Islands.

⁶⁵ Joint judgment of Cumming-Bruce, Templeman and Brightman L.JJ. in [1982] 1 All ER 54 at page 210.

that the company was a separate legal entity, with its own rights and liabilities, and no cause of action therefore vested in the shareholder to recover damages for the diminution in the value of the shares. The rationale for the decision, as the court explained,⁶⁶ was that:

“When the shareholder acquires a share he accepts the fact that the value of his investment follows the fortunes of the company and that he can only exercise his influence over the fortunes of the company by the exercise of his voting rights in general meeting.”

[74] This rationale was endorsed by the Supreme Court in **Marex**, in which, speaking for the majority, Lord Reed said that:⁶⁷

“Accordingly, in a situation where a shareholder claims that his shares have fallen in value as a result of a loss suffered by the company, and the company has a right of action in respect of that loss, the shareholder can exercise such rights of control over its decision-making as have been granted to him by the articles of association. These normally provide for the ultimate control of the company’s affairs by a majority of the shareholders voting at a general meeting. A minority shareholder has other remedies available to him if the company’s management is acting improperly, including a derivative action and an application for relief against unfairly prejudicial conduct.”

[75] Mr. McDonnell’s reply to Mr. Bear’s submissions based on **Prudential** was that they overlooked the fact that “the primary reliefs sought by Madam Chen is two Declarations which she is clearly entitled to ask for under the jurisdiction explained by the English Court of Appeal in [**Guaranty Trust**] ...”.⁶⁸

[76] In support of this submission, Mr. McDonnell relied on Lord Reed’s concluding comment on **Prudential** in **Marex**:⁶⁹

“The rule in *Prudential* is limited to claims by shareholders that, as a result of actionable loss suffered by their company, the value of their shares, or of the distributions they receive as shareholders, has been diminished. Other claims, whether by shareholders or anyone else, should be dealt with in the ordinary way.”

⁶⁶ Supra n. 61 at page 367.

⁶⁷ Supra n.67 para 36.

⁶⁸ Madam Chen’s Reply submissions filed 16th February 2021 at para 18.

⁶⁹ Supra n. 62 at page 611.

[77] In considering these submissions, I should say at the outset that, with the greatest of respect, I do not find the decision in **Guaranty Trust**, which is the linchpin of Mr. McDonnell's position on standing, of any particular assistance in resolving this question. In my view, in the light of that case, section 22 of the **West Indies Associated States Supreme Court (Virgin Islands) Act**, means no more than that an action or proceeding shall not be open to objection on the ground **only** that a declaratory judgment is sought thereby. That having been said, it is still necessary for a plaintiff seeking a declaration to establish an entitlement to it on the facts of the particular case. This was certainly the approach taken by the majority in **Guaranty Trust**. In that case, having dismissed the defendant's objection that Order XXV, r.5 did not give it jurisdiction to grant a declaration to a plaintiff who had no cause of action against the defendant, the court next went on to consider whether the plaintiff was in fact entitled to the declaration sought, and refused to make it.

[78] In this case, the question whether Madam Chen has *locus standi* to maintain her claim for an interim injunction gives rise to a discrete issue of company law, which requires to be considered as a separate matter. In my view, even if it is possible to segment Madam Chen's claims in the manner contended for by Mr. McDonnell, that is, to distinguish between the claim for declaratory relief and the other claims, it is clear that, in essence, her action is one brought on behalf of Empresa, rather than on her own behalf (save for the in any event rather strange claim "for the benefit of Mr. Xu").

[79] In **Prudential**, in which the plaintiffs' claim also included a claim for declaratory relief, this did not exempt it from the court's unequivocal conclusion that, from the standpoint of company law, "... the personal claim is misconceived".⁷⁰ As the court went on to explain:⁷¹

"The shareholder does not suffer any personal loss. His only 'loss' is through the company, in the diminution in the value of the net assets of the company, in which he has [shares] ... The plaintiff's shares are merely a right of

⁷⁰ [1982] 1 All ER 354 at page 366.

⁷¹ Ibid at pages 366- 367.

participation in the company on the terms of the articles of association. The shares themselves, his right of participation, are not directly affected by the wrongdoing. The plaintiff still holds all the shares as his own absolutely unencumbered property. The deceit practised upon the plaintiff does not affect the shares; it merely enables the defendant to rob the company.”

- [80] It is clear that Madam Chen’s application for an injunction was squarely premised on Empresa’s right of ownership of the Hotel, hence the claim for an order transferring the Hotel to Empresa “by way of restitution”. But, as the judge observed:⁷²

“The difficulty with the unjust enrichment claim is that the subject of supposed unjust enrichment was the Hotel. The Hotel was owned by Empresa, not by Madame Chen. Indeed, she only beneficially owned 80 per cent of Empresa through her 80 per cent shareholding in Peckson. There is in my judgment no arguable basis for saying that Madame Chen had herself a cause of action. The loss was suffered by Empresa. She is not entitled to claim as an indirect shareholder for any reflexive loss: see most recently **Sevilleja v Marex Financial Ltd.**”

- [81] I entirely agree. I would therefore hold that the judge’s conclusion on the question of standing was one which he was fully entitled to reach, and no basis has been shown to enable this court to disturb it.

Issue (iii) - the balance of convenience

- [82] Strictly speaking, my conclusion on issue (ii) suffices to justify the judge’s decision not to further extend the interim injunction. But, in the event that I am wrong about this, I will go on, as the judge did, to consider the balance of convenience.

- [83] The judge also dealt with this issue shortly:⁷³

“[56] ... Madame Chen appears to be impecunious ... Peckson and Empresa are equally impoverished. At present the Hotel is held in a stalemate. It is producing no revenue for anyone and its fabric is deteriorating. Even if Madame Chen were to succeed in the current action and was able to show the transfer of the Hotel was made under duress, the sole effect would be to restore the situation at the outset: Victory Success holding a valid mortgage for HK\$1.5 billion lent under the loan agreement with no repayments of the loan having been made for many years.

⁷² Judgment at para [55].

⁷³ Judgment at paras [56]-[58].

[57] If Madame Chen had a better claim on the merits, there may have been scope for considering whether Peckson or Empresa should give some form of cross-undertaking, possibly backed by some form of fortification. However, the fact is that restoring the *status quo ante*, which is the best Madame Chen could hope to achieve, would bring her no material benefit: Victory Success would be restored to its position of being a secured creditor for an amount which Empresa, Peckson and Madame Chen have no ability to service.

[58] In my judgment the balance of convenience is against continuing the injunction granted by Adderley J ...”

[84] In ground of appeal 7, Madam Chen complained that the judge’s conclusion on the balance of convenience was wrong, in that “it ignored the guidance in *American Cyanamid* and the relevant parts of the evidence before him”.

[85] In support of this ground, Mr. McDonnell’s skeleton argument directed attention in particular to the following well-known passage from Lord Diplock’s judgment in **Cyanamid**.⁷⁴

“... the governing principle is that the court should first consider whether, if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction, he would be adequately compensated by an award of damages ... If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff’s claim appeared to be at that stage. If, on the other hand, damages would not provide an adequate remedy for the plaintiff in the event of his succeeding at the trial, the court should then consider whether, on the contrary hypothesis that the defendant were to succeed at the trial in establishing his right to do that which was sought to be enjoined, he would be adequately compensated under the plaintiff’s undertaking as to damages for the loss he would have sustained by being prevented from doing so between the time of the application and the time of the trial. If damages in the measure recoverable under such an undertaking would be an adequate remedy and the plaintiff would be in a financial position to pay them, there would be no reason upon this ground to refuse an interlocutory injunction.

It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or to both, that the question of balance of convenience arises ... These will vary from case to case.

⁷⁴ Supra n.46 at page 408.

Where other factors appear to be evenly balanced it is a counsel of prudence to take such measures as are calculated to preserve the status quo ... “(Emphasis mine.)

- [86] Reference was also made in the skeleton argument to Madam Chen’s evidence in her Affirmation in support of the original application for the interim injunction. There, she explained the need for *ex parte* relief on the basis that “well-informed sources” had told her that Victory Success was hoping “to sell on the Hotel for HK\$3.5 billion to one or the other of two possible purchasers who ... might be in a position to claim to be bona fide purchasers without notice of the claims which I am making in this Action”⁷⁵.
- [87] Accordingly, so the argument ran, if Victory Success were to make such a disposal, Madam Chen would be highly unlikely to be compensated by an award of damages at trial, unless Victory Success were to undertake or be ordered to keep the proceeds intact by, for example, paying them into court. There was no evidence that Victory Success had any assets other than “its alleged title to the Hotel and its claim to recover what it actually advanced under the Joint Venture Agreement less its liability in damages for its failure to complete it”. So a temporary restraint on Victory Success’ power to sell the Hotel would be unlikely to cause it any damage which could not be adequately compensated under the undertaking as to damages. In any event, after being restrained from selling the Hotel by Adderley J’s *ex parte* order, Victory Success has never claimed to have been prejudiced by that order. And further, Victory Success has not been in legal possession of the Hotel in the eyes of the Macau courts since April 2018, “and thus can never have a claim to be compensated for being restrained from carrying out works of demolition or construction which it could not lawfully have undertaken regardless of the Injunction”. This was therefore a case in which the balance of convenience favoured maintaining the *status quo* by continuing the *ex parte* interim injunction until trial.

⁷⁵ See para [9] above.

[88] Mr. Béar's response to these submissions was direct. Preservation of the status quo is not a principle of law. Rather, as Lord Diplock indicated in **American Cyanamid**, it is "a counsel of prudence" to be followed "where other factors appear to be evenly balanced". In this case, other factors are not evenly balanced. As the judge pointed out, the grant of the interim injunction to preserve the *status quo* would hardly improve Madam Chen's position. Victory Success would still be a secured creditor (at least of the lesser amount of HK\$618.8 million which Madam Chen admitted receiving) in respect of a debt which neither the debtor, Empresa, nor Madam Chen had any means or prospect of repaying. In any event, an interim injunction preventing sale of the Hotel "would not maintain the true status quo but would impermissibly worsen [Victory Success's] position pending trial by comparison with its status, on admitted facts, as a mortgagee entitled to repayment". Therefore, there is no basis for disturbing the judge's balance of convenience assessment.

[89] I agree with Mr. Béar. The alleged kidnapping of Mr. Xu took place in October 2015 and the purported transfer to Victory Success occurred in early 2016. The Hotel has been inoperative since 2016. Since that time, Empresa has done nothing to service even the debt of the HK\$618.8 million which Madam Chen acknowledges receiving. And, as Mr. Béar submitted, there does not appear to be any prospect of it doing so. If there is in fact a relevant status quo, this, as it seems to me, is it. But, in any event, as the judge said, victory for Madam Chen on the duress issue could only have the effect of rolling back the transfer of the Hotel to Victory Success, which would remain a secured creditor as to at least HK\$618.8 million, and, possibly, at most HK\$1.5 billion. In these circumstances, it is clear that the balance of convenience could not possibly favour continuation of the interim injunction, and absolutely no basis has been shown to interfere with the judge's exercise of his discretion in this regard.

Issue (iv) – material non-disclosure

[90] As is well known, an applicant for *ex parte* relief has a positive duty to make full and frank disclosure of all material facts to the court, including not only those known to him, but those which may have been discovered by the making of reasonable

enquiries. The duty encompasses both facts which weigh in his favour as well as those which may weigh against him, as well as matters of law. In this regard, there is generally no distinction between the applicant for *ex parte* relief and his advisers.⁷⁶ A breach of this duty will normally, though not inevitably, lead to a discharge of an injunction obtained *ex parte*.

[91] Applying these principles (to which I will return in due course), the judge accepted Victory Success's complaint that Madam Chen had been guilty of material non-disclosure in a number of respects at the *ex parte* hearing before Adderley J on 10th April 2019. Accordingly, the judge discharged the interim injunction and declined to re-impose it.

[92] Madam Chen contends on this appeal that there is "no substance" in any of the judge's findings that there had been breaches of the duty to make full and frank disclosure on the *ex parte* application to Adderley J.⁷⁷ In light of this complaint, I must first consider briefly the material which was placed before Adderley J on the *ex parte* application.

[93] First, there was the Affirmation of Madam Chen.⁷⁸ In it, Madam Chen rehearsed much of the history of the dispute over the Hotel between Mr. Ng and herself; her ultimate triumph; the then current status of the Hotel; Mr. Xu's account of the kidnapping (which she embraced) in the Macau proceedings; some aspects of the Macau proceedings (including the fact that "the Court refused interlocutory relief in the absence of evidence from Mr. Xu himself")⁷⁹; the conduct of the Receivers appointed pursuant to the Privy Council's order; aspects of Mr. Ng's conduct subsequent to that order (which she regarded as "a gross contempt of this Court in defiance of the

⁷⁶ Gee, Commercial Injunctions, para 9.001-9.002

⁷⁷ Ground of appeal 13

⁷⁸ Sworn 25th March 2019 and filed 1st April 2019.

⁷⁹ Para 16.

Judicial Committee's Order");⁸⁰ and various other matters. Having said all of this, Madam Chen concluded as follows:⁸¹

"But all I am asking the Court for on this *Ex parte* Application is for Victory Success to be ordered not to dispose of the Hotel until after the Trial of this Action or further Order in the meantime. The need to obtain such an Order urgently and without alerting Victory Success beforehand is that well-informed sources have told me that Victory Success are hoping to sell on the Hotel for HK\$3.5 billion to one or the other of two possible purchasers who are both very substantial and interested in gaming and who might be in a position to claim to be *bona fide* purchasers without notice of the claims that I am making in this Action."

[94] Next there was the First Affirmation of Chin Choon Onn,⁸² one of the two receivers of Peckson appointed pursuant to the order of the Privy Council. Mr. Chin rehearsed the corporate structure of Peckson and the long-running litigation between Madam Chen and Mr. Ng as to the ownership of the 80% majority shares in the company, culminating in the decision of the Privy Council and the appointment of the receivers. After summarising the receivers' duties and powers, Mr. Chin laid out the steps which they took after their appointment to secure their formal authority as directors of Peckson. Mr. Chin then gave an account of what he described as the "Macau Main Action",⁸³ which was the parallel litigation in Macau between himself, Victory Success and Empresa over the ownership of the Hotel; the fact that, in the midst of all of this, "Empresa inexplicably signed over the Hotel to Victory Success in mysterious and disputed circumstances";⁸⁴ the progress of the Macau Main Action and the legal advice received in relation to it; the compromise of the Macau Main Action in favour of Victory Success and subsequent events leading to the decision, in consultation with leading counsel for Madam Chen, for her to launch these proceedings in the BVI with the support of the receivers.

⁸⁰ Para 29.

⁸¹ Para 30.

⁸² Sworn and filed 1st April 2019.

⁸³ CV2-16-0008-CAO.

⁸⁴ Para 14.

[95] And finally, there was Mr. Chin's Second Affirmation,⁸⁵ in which he sought to provide "an update in relation to the risk of building works being carried out at [the Hotel]".⁸⁶ He referred to a conversation with a "Mr. Sin" on 20th March 2019, in which "Mr. Sin said (without further elaboration) that Victory Success might start some work on the Hotel in early April".⁸⁷ Then, Mr. Chin continued, "at or around 1900 hours Hong Kong time today (10 April 2019), I was provided with photographs of notices and permits which I am informed relate to construction works at the premises".⁸⁸ The photographs referred to were exhibited to the Affirmation.

[96] As has been seen, Adderley J granted the interim injunction, *ex parte*, on the basis of this evidence on 10th April 2019. At the *inter partes* hearing before the judge, Victory Success advanced 10 complaints of material non-disclosure on Madam Chen's part at the *ex parte* hearing.⁸⁹ The judge found that seven of them, which I summarise below, had been made out:

- (i) The court was not told that Macau was the more convenient forum; nor were any of the factors relevant to the appropriate forum identified to the court or addressed; nor was the court told that the Privy Council had been told that Macau was the forum within which Madam Chen proposed to litigate her claims against Victory Success (complaint (i)).
- (ii) The court was not told that the issue of Madam Chen's standing to bring these proceedings was potentially problematic, but rather was assured that it was purely a technical matter which was easily solved (complaint (ii)).
- (iii) The court was not alerted to the potential weaknesses in Madam Chen's case based on Mr. Xu's evidence (complaint (iii)).

⁸⁵ Sworn and filed 11th April 2019. The affidavit was unsigned at the date of the hearing of the *ex parte* application on 10 April 2019, but was filed the following day pursuant to an undertaking given to the court to do so.

⁸⁶ Para 2.

⁸⁷ Para 8.

⁸⁸ Para 9.

⁸⁹ For the full list, see para [74] of the Judgment.

- (iv) The court was not told that a Macau court had already refused to grant Empresa's application for injunctive relief on the basis of Mr. Xu's evidence (complaint (iv)).
- (v) The court was not told that, even on Madam Chen's case, Victory Success had advanced at least HK\$619 million and that Victory Success's security interest in the Hotel would operate in its favour even if the claim succeeded (complaint (v)).
- (vi) The court was not informed of Madam Chen's poor financial position and that she could not honour her cross-undertaking in damages (complaint (vi)).
- (vii) The court was not told that the grant of an interim injunction would prevent the carrying out of urgent remedial work to ensure public safety and save the Hotel from further decline (complaint (vii)).

[97] In a general comment on what he considered to be the unsatisfactory manner in which the issue of disclosure was dealt with by Madam Chen and her counsel at the hearing of the *ex parte* application before Adderley J, the judge added this:⁹⁰

"[83] As a general rule, practitioners on an *ex parte* application have a section (usually at the end) entitled "Full and Frank Disclosure". Mr. McDonnell QC's skeleton for the 10th April 2019 did not. Nor is there any separate section in his oral submissions to Adderley J in which he, as a discrete matter, address [sic] full and frank disclosure. Mr. McDonnell submits that full and frank disclosure was spread throughout the oral submissions. I do not agree that this was done in respect of the matters where I have accepted Victory Success's points on non-disclosure. Even it [sic] were not so, a judge needs to know what the defendant would say if it were present at the *ex parte*. A fair presentation of the other side's case requires some structure. In particular, even if there was a fair presentation of discrete points (and there was not), a party like Victory Success is entitled to have put to the judge the cumulative effect of the points it would have wished to make. This is why it is important to have all the points on which Victory Success might rely pulled together in one section."

⁹⁰ Judgment at para [83].

[98] Mr. McDonnell submitted that there was no substance in any of the complaints which the judge accepted. I trust that I do his detailed submissions no disservice by summarising them in this way:

“Complaint (i): this complaint “falls away”, as the judge’s reasoning on the *forum non conveniens* point was in any event “fallacious”;⁹¹ further, “the BVI was obviously the appropriate and convenient Forum for an urgent Application without notice for personal relief under BVI Law against a BVI company whose registered office was only a few minutes from the Court”.⁹²

Complaint (ii): the court was not told that the question of standing was a “mere technical matter”; rather what was pointed out to the court was that Peckson and Empresa were willing to be added or substituted as claimants under the relevant rules of the CPR.⁹³

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Complaint (iii): the judge was wrong to say that the fact that Madam Chen’s *ex parte* application for an interim injunction in Macau on the basis of Mr. Xu’s evidence had failed was not drawn to the court’s attention, as it had in fact been referred to by Madam Chen in her evidence and in the skeleton argument filed on her behalf on the *ex parte* application before Adderley J.⁹⁴

Complaint (iv): the judge’s criticism that the potential weaknesses in the claim based on the alleged kidnapping were not brought to Adderley J’s attention lacked force, given the fact that “[the judge’s] own treatment of that evidence was erroneous.”⁹⁵

Complaint (v): the judge’s comment on the effect of Madam Chen’s duress claim succeeding, which was that Peckson would still be indebted to Victory Success in a substantial amount of money, betrayed a misunderstanding of the evidence; in fact, success on the duress claim would restore the *status quo ante*, which was that the Hotel would remain charged to Victory Success for the amount actually advanced, which was in the vicinity of HK\$620 million, but this would be subject to cross-claims by both Peckson and Empresa against Victory Success for wrongful repudiation of the joint venture agreement, under which Victory Success was to provide HK\$1.5 billion in return for a 50% stake in a company holding the Hotel which was to be floated on the Hong Kong Stock Exchange.⁹⁶

Complaint (vi): it was not a fact that Madam Chen was in serious financial difficulties as, by virtue of matters well known to Adderley J from his previous

⁹¹ Appellant’s written submissions at para 64.

⁹² Para 68.

⁹³ Para 77.

⁹⁴ Para 79.

⁹⁵ Para 81.

⁹⁶ Para 82.

exposure to the case, she was in fact the owner of substantial assets, not least of all her 80% beneficial ownership of the Hotel.⁹⁷

Complaint (vii): Madam Chen disclosed everything which was known to her about the nature of the works which the interim injunction sought to prevent.⁹⁸

[99] In response to these submissions, Mr. Béar pointed out that, as the judge had observed, neither Madam Chen's affirmation nor the skeleton argument filed on her behalf for the hearing before Adderley J contained a discrete section on full and frank disclosure, as was the usual practice on *ex parte* applications of this kind. He submitted that it was no answer to a complaint of material non-disclosure to say that the court would have reached the same conclusion even if there had been such disclosure; nor is it good enough to say that the Adderley J would have been aware of the true position. The important point to be brought to the court's attention on the *ex parte* application was not what would happen if Madam Chen succeeded on the duress point, but what would happen if she lost. The *forum non conveniens* point was a fundamental point and ought to have been raised. The duty of responsible disclosure had clearly not been met in this case and, for the reasons he gave, the judge was right to discharge the interim injunction on that basis.

[100] In considering Victory Success's non-disclosure complaints, the judge referred to the oft-cited decision of **Brink's Mat Ltd v Elcombe**,⁹⁹ in which Ralph Gibson LJ set out the governing principles as follows:

- “(1) The duty of the applicant is to make ‘a full and fair disclosure of all the material facts.’
- (2) The material facts are those which it is material for the judge to know in dealing with the application as made: materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers.
- (3) The applicant must make proper inquiries before making the application. The duty of disclosure therefore applies not only to material facts known

⁹⁷ Para 85.

⁹⁸ Para 90.

⁹⁹[1988] 1 WLR 1350 at 1356.

to the applicant but also to any additional facts which he would have known if he had made such inquiries.

- (4) The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application; and (b) the order for which application is made and the probable effect of the order on the defendant ...; and (c) the degree of legitimate urgency and the time available for the making of inquiries.
- (5) If material non-disclosure is established the court will be 'astute to ensure that a plaintiff who obtains [an ex parte injunction] without full disclosure... is deprived of any advantage he may have derived by that breach of duty.'
- (6) Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues which were to be decided by the judge on the application. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented.
- (7) Finally, it 'is not for every omission that the injunction will be automatically discharged. A *locus poenitentiae* may sometimes be afforded.' The court has a discretion, notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the ex parte order, nevertheless to continue the order, or to make a new order on terms

'when the whole of the facts, including that of the original non-disclosure, are before [the court, it] may well grant...a second injunction if the original non-disclosure was innocent and if an injunction could properly be granted even had the facts been disclosed.'

[101] There is no controversy about any these principles, which are well established in the jurisprudence of this court.¹⁰⁰ Mr. Béar also referred us to a few others, which are equally uncontroversial. I will mention three of them.

¹⁰⁰ The judge referred to *Enzo Addari v Edy Gay Addari*, [2005] ECSCJ No. 59, (delivered 23rd September 2005) and *Thelma Paraskevaides and another v Citco Trust Corporation Limited and others*, [2020] ECSCJ No. 107, (delivered 30th March 2020).

[102] Firstly, it is not good enough to place the information in a bundle and leave it to the judge on the *ex parte* application to discern the significance of the material on its own. As the learned editors of **Gee on Commercial Injunctions** explain:¹⁰¹

“It will usually not be a sufficient answer to an allegation of non-disclosure for an applicant to say that the relevant information giving rise to the defence was contained in an exhibit, though not referred to in the body of the affidavit in the context of a possible defence. Exhibits to such affidavits are often voluminous. Because without-notice applications are frequently dealt with comparatively shortly and the judge may not have had the opportunity of considering the papers in detail before the hearing, the applicant has the responsibility of ensuring that all relevant points are presented clearly and distinctly.”

[103] Secondly, whether the *ex parte* judge would have come to the same decision even if the material in respect of which the non-disclosure complaint is made had been brought to his attention “is not a consideration which can relieve an *ex parte* applicant of the duty of disclosure.”¹⁰²

[104] And thirdly, the question of full disclosure may be particularly relevant to the issue of whether the applicant for *ex parte* relief will be able to meet the cross-undertaking as to damages usually required as a condition of such relief. As Gee explains:¹⁰³

“A matter which must be carefully considered is whether the applicant is likely to be good for any damages which he may be required to pay on the cross-undertaking as to damages. Such an undertaking is almost invariably required to be given on an application for an injunction or search order, and will be dispensed with only in special circumstances ... In general, this matter should be expressly dealt with on the application, giving particulars of the applicant’s solvency and worth. If nothing is said and an order is made, then the court will be proceeding on the basis that there is no reason to doubt that the person giving the cross-undertaking will be good for the damages. If facts are disclosed which raise doubts as to the likely worth of the cross-undertaking, should it be called upon, the court may nevertheless, in the exercise of its discretion, decide to grant the application if there are circumstances which make it just to do so.”

¹⁰¹ Gee on Commercial Injunctions, 6th. edn, para 9-005.

¹⁰² Per Nourse LJ in *Behbehani v Salem* [1989] 1 WLR 723 at 738.

¹⁰³ At para 9-009.

- [105] In one respect, as Mr. Béar readily accepted, Mr. McDonnell is entirely correct in saying that the judge overlooked an aspect of the evidence which was before him. Madam Chen's skeleton argument before Adderley J did refer specifically to the decision of the Macau court to refuse the *ex parte* interim injunction sought by her in that jurisdiction on the basis of Mr. Xu's evidence. The judge therefore erred in saying that this had not been disclosed. Complaint (iv) should therefore have failed.
- [106] Save for this, however, it seems to me that the judge was fully justified in the conclusions which he reached on most of the other items of non-disclosure of which Victory Success complained. As regards complaint (i) (forum), the possibility that Macau was the more convenient forum obviously arose, given the connections of the parties, the ongoing litigation in Macau concerning ownership of the Hotel, and the fact that Madam Chen's position before the Privy Council in her dispute with Mr. Ng a few years ago was that she intended to litigate the issue of the alleged duress by Victory Success in Macau. In my respectful view, Mr McDonnell's response to this complaint, which was basically to say that the judge got the forum point wrong anyway, was clearly untenable in light of Madam Chen's duty to bring all reasonable arguments in Victory Success's favour to the court's attention.
- [107] As regards complaint (ii) (standing), while I naturally accept Mr. McDonnell's statement that what the judge was told was that Peckson and Empresa were willing to be added or substituted as claimants, the fact is that the question of Madam Chen's standing to apply for the interim injunction was plainly a live one for consideration by Adderley J on the *ex parte* hearing. It was therefore clearly relevant, in my view, for the judge to have been told what would be the position if, as in fact happened, Peckson and Empresa were not substituted or added as claimants.
- [108] As regards complaint (iii) (the strength of the case), I have already expressed the view that the judge erred in subjecting Mr. Xu's evidence on paper to the kind of scrutiny more appropriate to a trial after cross-examination. However, this conclusion does not detract, in my view, from the clear duty of Madam Chen at the *ex parte*

stage before Adderley J to bring to the court's attention any vulnerable areas of Mr. Xu's evidence.

[109] As regards complaint (v) (the effect of Madam Chen's claim succeeding), irrespective of what possible or contingent claims that Madam Chen may have in the event that her claim based on duress succeeding, the fact is that, upon the resumption of the status quo, Victory Success would be in a position to enforce its interest as a secured creditor in respect of, at the very minimum, the HK\$619 million that Madam Chen admitted receiving. I therefore agree that this is an aspect of the matter that should have been pointed out to Adderley J on the *ex parte* application.

[110] As regards complaint (vi) (Madam Chen's financial position), it is clear that nothing at all was said to Adderley J on this question, in either the material or the submissions placed before him on the *ex parte* application. This was plainly a relevant factor in relation to the cross-undertaking as to damages which she was required to give if the application succeeded.

[111] While there was a fair amount of evidence touching on Madam Chen's financial position, two examples will suffice. First, the unchallenged evidence of Ms. Rosalind Nicholson, a partner in Walkers, Madam Chen's former legal practitioners in the BVI, was that Madam Chen owed the firm the sum of \$1,368,191.80 in respect of outstanding fees.¹⁰⁴ Ms. Nicholson also gave details of an amount of \$159,660.38 which the firm was obliged to pay in respect of accommodation at the Sugar Mill Hotel in Tortola arranged at the request and on behalf of Madam Chen.¹⁰⁵ The effect of Madam Chen's failure to honour the firm's requests for payment was that the firm was left out of pocket in the total amount.

[112] Any doubts that there might have been about the importance of full disclosure by Madam Chen of her financial circumstances were firmly put to rest by the fresh

¹⁰⁴ Affidavit of Rosalind Nicholson sworn to on 5th December 2019, para 16 .

¹⁰⁵ Ibid, para 21.

evidence admitted by consent at the outset of the appeal.¹⁰⁶ That evidence revealed that, by an order of the Macau court made on 21st March 2021, Madam Chen was adjudged and declared bankrupt, for failing to pay a judgment debt of HK\$117 million, together with accruing interest. The judgment related to substantial amounts outstanding from Madam Chen to the judgment creditor, going all the way back to at least May 2012. As the judgment in the bankruptcy proceedings showed, Madam Chen did not dispute the existence of the debt, though she did raise issues concerning interest and limitation.

[113] It is therefore simply not good enough, in my view, for Madam Chen to say at this stage that, as Mr. McDonnell's submitted on her behalf, on the basis of matters well known to Adderley J, she was in fact a person of substantial worth. As an applicant for *ex parte* interim relief what was required of her was full and clear disclosure to the court of her unfavourable financial position, so as to enable Adderley J to make a fair assessment of whether she was in a position to honour the cross-undertaking. Where, as here, there was clear evidence that she might have a challenge in this regard, the duty assumed even greater importance.

[114] And finally, as regards complaint vii (the fact that the interim injunction would impede urgent remedial work to the Hotel), it is clear that, given the circumstances in which a prayer for an injunction to prevent the carrying out of any work on the Hotel was added to the relief sought on the *ex parte* application¹⁰⁷, nothing at all was said to Adderley J about the factors which may have necessitated urgent remedial work.

[115] I accordingly conclude that Victory Success' complaints of non-disclosure were, for the most part, amply justified and the judge was fully entitled to discharge the interim injunction on this basis. I have not lost sight of the fact that the authorities establish that, in these circumstances, a *locus poenitentiae* may sometimes be afforded to the

¹⁰⁶ The fresh evidence, which was admitted by consent on 31 May 2021, was contained in the affidavit of Terence Wyndham Wong filed on 21st May 2021, to which he exhibited the judgment of the Macau Junior Court in Bankruptcy Case No. CV2020-0001-CFI, between Venetian Macau SA and Chen Mei Huan.

¹⁰⁷ As Mr. Bear put it in his skeleton argument (para 77), "[as] an afterthought on the day of the application".

applicant, thereby allowing the court in its discretion to either continue the order, or make a new order on terms. However, nothing was placed before us on the hearing of the appeal to suggest that the judge ought to have either continued or re-imposed the interim injunction in this case.

Issue v – *forum non conveniens*

[116] The grounds of Victory Success's application for a stay on the basis that BVI was *forum non conveniens* were as follows:

- "1. [Madam Chen's] claim seeks to impeach the validity of transactions entered into by a company incorporated in Macau (Empresa) relating to land in Macau.
2. It is alleged that the General Manager of Empresa was kidnapped, and that under duress he executed certain documents which effected the transfer of the land held by Empresa to Victory Success (the Land) and buildings thereon which together constitute [the Hotel]. The alleged kidnapping was of a citizen of the PRC [Mr. Xu], in the PRC, supposedly by PRC citizens, and supposedly directed by persons resident in Macau. The law relating to the validity of steps which the general manager took in relation to land in Macau on behalf of a company in Macau is the law of Macau. The law governing any tort, to the extent that it is actionable at all at the suit of [Madam Chen], is PRC law.
3. It is common ground that [Victory Success] lent substantial sums of money to Empresa. There is a pleaded dispute as to the sums actually paid by Victory Success, and the legal consequences of acknowledgements signed on behalf of Empresa. However, the loan agreement is in the Cantonese language and was entered into in Macau, or the PRC, and executed on behalf of the parties to it by citizens of the PRC, or of Macau. The loan is secured by a mortgage ... which is written in the Portuguese language, was entered into before a Civil Law Notary in Macau, and has been registered against the property register in Macau, and is itself governed by Macau law. The result of the Mortgage is that Victory Success was entitled to obtain title to the Land and the Hotel in any event.
4. To the extent that a claim is made for unjust enrichment, the place where the alleged enrichment occurred was in Macau. The law which governs the enrichment is Macau law. Such an enrichment (even assuming there to have been such) was not unjust, since Victory Success had a right to require the transfer of the title to the Land pursuant to the terms of the Mortgage.

5. The relevant witnesses are based in Macau, or in the PRC. All relevant documents are written in Cantonese or in Portuguese, and are maintained either in Macau or in the PRC.
6. The expense and inconvenience of a trial in the BVI will be considerably greater than a trial in Macau.
7. In support of these proceedings, [Madam Chen] has obtained injunctive relief, which will be the subject of the Discharge Application. That relief purports to operate over land in Macau and to restrain or require acts to be undertaken on that land. It is a violation by this Court of the sovereignty of the Macau Special Administrative Region of the People's Republic of China.
8. Macau is an available forum for the determination of these claims, and it is the suitable and appropriate forum.
9. ...
10. Given the issues of Macau and PRC law which arise in relation to this action, it would be appropriate for leave to be given to rely on the evidence of a lawyer experienced and qualified in the laws of Macau and the PRC.
11. The grounds for this application are further set out in the First Affidavit of Fraser Mitchell to be sworn on 15 May 2019, and in the further evidence which is yet to be filed."

[117] The application was principally supported by the First Affidavit of Mr. Fraser Mitchell, a member of Victory Success's BVI legal team. Mr. Mitchell made a number of points on the question of the appropriate forum, which he summarised in this way:

- "(i) The single factual allegation which underpins this claim is an allegation relating to the alleged kidnapping of Mr .Xu. Mr. Xu is a PRC Citizen, supposedly kidnapped in the PRC, by PRC Citizens and held in the PRC.
- (ii) The relief which [Madam Chen] seeks is to set aside the disposition of the Land and the Hotel by Empresa to Victory Success. But Empresa is a company incorporated in Macau, and the asset which was transferred to Victory Success is real estate in Macau.
- (iii) The law governing the Power of Attorney, and the validity of the powers contained under it, is likely to be that of the law of Macau. The law governing the power of Mr. Xu to act in the name of a Macau company

is Macau law, and the law governing the question of whether or not the disposition took place validly or not, or should be set aside, is the law of Macau.

- (iv) Any claim for trespass (even assuming [Madam Chen] is entitled to maintain such on behalf of Mr. Xu or that he has authorised her to do so) relates to a tort committed in the PRC, suffered by a PRC citizen, which would be governed by the laws of the PRC.
- (v) An alternative claim is made in unjust enrichment; However, the enrichment of Victory Success would appear to have occurred in Macau, with the result that it must be Macau law that governs the question of whether that supposed enrichment was unjust.”

[118] Mr. Mitchell went on to make further points in similar vein, such as that the witnesses in the case, both as to fact and expert, were all based in Macau or the PRC,¹⁰⁸ the relevant documents were all to be found in Macau or the PRC,¹⁰⁹ and their language was either Chinese or Portuguese.¹¹⁰

[119] Mr. Goncalves, a member of Victory Success’s Macau legal team, made similar points,¹¹¹ including that “there are already proceedings between Victory Success and Empresa in Macau ... those proceedings were taken by Empresa in Macau presumably because it recognises that the Courts of Macau are appropriate to decide disputes relating to land in Macau”. Mr. Goncalves also observed that those proceedings “pre-date the commencement of these proceedings, but ... involve exactly the same parties, engage substantially the same issues, as these proceedings in the BVI”.¹¹²

[120] The principal opposition to Mr. Goncalves’ affidavit came from Mr. Francisco Leitão, a Portuguese Advocate and a senior member of a firm of Macau lawyers representing Madam Chen. In his witness statement,¹¹³ he explained

¹⁰⁸ First Affidavit of Mr. Fraser Mitchell at Paras 26-29.

¹⁰⁹ Para 30.

¹¹⁰ Paras 31-32.

¹¹¹ At para 13.

¹¹² Ibid, para 49.

¹¹³ Witness Statement of Francisco Leitão filed on 19th October 2020 at paras 13-15.

what he described as “the legitimate juridical advantages for Madam Chen and Peckson and Empresa of being permitted to continue this Action [in the BVI”]:

“13. Madam Chen, Peckson and Empresa will suffer two unfair disadvantages if the Court stays this Action with a view to the issues being tried in Macau, as proposed by Victory Success. The unfair disadvantages are connected because they both flow from the fact that in December 2015, following Mr Ng’s success in his Appeal from Mr Justice Bannister (Ag) at the original trial ... (“**the 2012 Action**”) the Judicial Committee of the Privy Council allowed Mr. Ng to resume control of Peckson and Empresa, and he was left in control until 12 March 2019 by the Receivers who were appointed by the Judicial Committee on 29 November 2017 after they had directed a New Trial of the 2012 Action.

14. Advocates instructed by Mr. Ng on behalf of Empresa did not pursue the cause of action based on want of authority and duress which my firm had formulated (and which became much stronger when Mr. Xu’s instructions were available). Instead they pleaded that the Transfer to Victory Success was achieved by collusion with Madam Chen and Mr. Xu. But after Madam Chen succeeded at the New Trial of the 2012 Action before Adderley J on 28 February 2019, Mr. Ng appears to have made an agreement with Victory Success behind the backs of the Receivers under which he instructed the Advocates who had been acting for Empresa on his instructions to consent to his abandonment of his own Claim against Victory Success, which he had been causing Empresa to support, on the basis that he had now discovered that the claims by Victory Success were all fully justified.

15. If Madam Chen is not permitted to continue with her Claim in this Action and is compelled to commence new proceedings in Macau, then she and Empresa may both face opposition under Macau Law in adopting a new position.”

[121] In a second affidavit,¹¹⁴ after giving an update on the Macau proceedings, Mr. Goncalves answered Mr. Leitão directly:

“41. I understand Francisco Leitao to take the position that in the event that Madam Chen or Empresa were to take proceedings in Macau in

¹¹⁴ Second affidavit of Paolo Ramalho Goncalves filed 29th October 2020 at paras 41-42.

respect of the kidnapping allegations “*then she and Empresa may both face opposition under Macau Law in adopting a new position.*”

42. In doing so, Mr. Leitaó appears to accept that there is no prohibition upon Madam Chen or Empresa from bringing proceedings, advancing new allegations. I agree that if a new claim were brought, advancing inconsistent allegations, it would then be for the Macau Court to evaluate these allegations and the fact that Madam Chen and Empresa brought wholly inconsistent proceedings previously, and failed to advance the kidnapping allegations timeously, would be significant to the Court’s determination of whether or not those allegations were genuine and should be entertained. Ultimately, however, it would be for the Macau Courts to decide how they approach these allegations and to decide whether or not its earlier findings constituted *res judicata* on any issue or otherwise an abuse of its process.”

[122] Both parties also adduced evidence of Macau law, in particular on the issues of (i) whether Macau courts would assume jurisdiction over the dispute in this case and (ii) the availability of the defence of duress in Macau Law.

[123] Victory Success instructed Mr. Antonio Baguinho, a Portuguese Advocate practicing in Macau.¹¹⁵ In an undated report, Mr. Baguinho stated his conclusions in this way:¹¹⁶

“(i) Macau Courts regard themselves as having exclusive jurisdiction to determine issues relating to rights over immovable assets located in Macau such as [the Hotel] ...; Macau Courts are the proper forum to discuss ownership of [the Hotel] (including its foreclosing) to the exclusion of all other and any decision issued by non-Macau courts will not be enforceable;

(ii) Macau Law contemplates procedures to restore possession of property to owners which possession is threatened, disturbed or that are deprived of their possession, both via injunctions and by way of legal action, self-defence and direct action being permitted to protect possession;

(iii) Duress in Macau means ‘*executed under threat of unlawful harm to oneself or its property*’ and is contemplated in the Macau Civil Code,... Macau Law deems agreements and documents executed under duress as annulable and proper remedies are available to have any such agreement or document annulled and voided in Court. **All rights of legal action to**

¹¹⁵ By email dated 9th November 2019.

¹¹⁶ At para 6.

annul the power of attorney (and even a transfer) on such grounds have expired as any legal action to such effect must be commenced within one year following the cessation of the threat (statute of limitations). Additionally, even if such right of action had not long expired, the results of the annulment would not be opposable/effective against a *bona fide* (good faith) third-party that acquired such property. Good-faith here means ‘*not being aware of the duress*’.” (Emphasis mine)

[124] Madam Chen’s expert, Professor Paula Costa e Silva, also considered that, under Macau law, in the circumstances described by Mr. Xu, the Power of Attorney would be void and of no effect. And so too would be “the *datio in solutum* deal, whereby the Hotel was transferred to offset an obligation ...” In light of the fact that the coercion of which Mr. Xu complained in this case was physical, as distinct from moral or “psychic” (in which case it would merely be voidable and subject to a one-year limitation period), there was no time bar in respect of a claim based on duress.¹¹⁷

[125] The judge approached the matter on the basis of the well-known decision of this Court in **IPOC International Growth Fund Limited v LV Finance Group Limited and others**,¹¹⁸ which itself derived from the celebrated decision of the House of Lords in **Spiliada**. On this basis, as I have indicated, the judge concluded that Macau was the appropriate forum, and stayed the action in the BVI court accordingly.

[126] The judge summarised the accepted approach to the issues posed by this case in this way:¹¹⁹

“(i) The starting point, or basic principle, is that a stay on the grounds of forum non conveniens will only be granted where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action. In this context, appropriate means more suitable for the interests of all of the parties and the ends of justice.

¹¹⁷ See Expert Report of Paula e Silva, dated September 2020.

¹¹⁸ [2005] ECSCJ No. 58, (delivered 19th September 2005), per Gordon JA at para [27].

¹¹⁹ Judgment at para [59].

- (ii) The burden of proof is on the defendant who seeks the stay to persuade the court to exercise its discretion in favour of a stay. Once the defendant has discharged that burden, the burden shifts to the claimant to show any special circumstances by reason of which justice requires that the trial should nevertheless take place in this jurisdiction. Lord Goff opined that there was no presumption, or extra weight in the balance, in favour of a claimant where the claimant has founded jurisdiction as of right in this jurisdiction, save that 'where there can be pointers to a number of different jurisdictions' there is no reason why a court of this jurisdiction should not refuse a stay. In other words, the burden on the defendant is two-fold: firstly, to show that there is an alternate available jurisdiction, and, secondly, to show that that alternate jurisdiction is clearly or distinctly more appropriate than this jurisdiction.

- (iii) When considering whether to grant a stay or not, the court will look to what is the 'natural forum' as was described by Lord Keith of Kinkel in **The Abidin Daver**¹²⁰, 'that with which the action has the most real and substantial connection.' In this connection the court will be mindful of the availability of witnesses, the likely languages that they speak, the law governing the transactions or to which the fructification of the transactions might be subject, in the case of actions in tort where it is alleged that the tort took place and the places where the parties reside and carry on business. The list of factors is by no means meant to be exhaustive but rather indicative of the kinds of considerations a court should have in exercising its discretion.

- (iv) If the court determines that there is some other available and prima facie more appropriate forum then ordinarily a stay will be granted unless there are circumstances by reason of which justice requires that a stay should nevertheless not be granted. Such a circumstance might be that the claimant will not obtain justice in the appropriate forum. Lord Diplock in **The Abidin Daver** made it very clear that the burden of proof to establish such a circumstance was on the claimant and that cogent and objective evidence is a requirement."

[127] Applying these principles, the judge resolved the case as follows:¹²¹

"[60] Step (i) is to consider where the most appropriate forum is. I have no hesitation in saying that the appropriate forum is Macau. The Hotel is there. Any issues of dilapidations at the Hotel are more conveniently dealt with there. All the witnesses are there or in mainland China. All the

¹²⁰ [1984] AC 398.

¹²¹ Judgment at paras [60]-[67].

relevant documents are in Chinese or Portuguese, which the Courts of Macau are able to handle very much more conveniently than this Court. The relevant law of duress will be either Macau law or the law of the People's Republic of China. Again, the Macau courts are much better placed to consider any issues of law which arise. Mr. McDonnell QC argues that this Court will apply the BVI law of duress, if the trial occurs here. I doubt that, but even if it is right, it is a matter of little weight in considering the appropriate forum. Not surprisingly all of the systems of law treat threats to kill as matters which vitiate consent. There is nothing to make this Territory an appropriate venue. The only connection the case has with this jurisdiction is that Victory Success is incorporated here.

[61] Accordingly, under step (ii) the burden shifts to Madame Chen to show some legitimate juridical advantage in suing here. The only matter put forward is an issue as to limitation or prescription. It is common ground that for at least some forms of duress there is a one-year period of prescription. If the one-year period of prescription elapses, then that creates a substantive bar to reliance on duress. As such it is different to the expiry of a period of limitation, which merely creates a procedural bar to any claim. At common law, being a procedural matter, a statute of limitations is treated as a matter for the *lex fori*, so we here in the Virgin Islands would apply our own Limitation Act 1961 ...

[62] Both sides adduced expert evidence of Macau law. There were four views: firstly that there was a one year prescription period, which ran from the date of the execution of the document which was made under duress; secondly that there was a one year prescription period, which ran from the date on which the person who had been under duress ceased to be under duress; thirdly there was a one year prescription period which ran from the time Victory Success obtained legal possession of the Hotel; and fourthly that there was no limitation or prescription period at all. The fullest expert report was given by Prof Paula Costa e Silva, who was instructed on Madame Chen's behalf. She explained that there was a difference between "moral coercion" and "physical coercion". The former made the transaction entered in consequence of the coercion voidable and was subject to the one-year prescription period. The latter rendered the transaction void; there was no limitation or prescription period on this. She considered the threats to kill were a form of physical coercion, so there was no prescription period. Advocate Leitão says that Victory Success, as a result of a Macau injunction obtained by Empresa, does not have legal possession of the Hotel, so time has not started to run.

[63] In fact it makes no odds which expert view is right. The claim form in the current action was issued on 1st April 2019. That is more than year after the making of the power of attorney and the transfer of the Hotel. It is

also more than a year after Mr. Xu ceased to be in fear for the lives of his children. Thus if the claims based on duress were the subject of the one year prescription period from any of those starting points, they were already time-barred when the current proceedings were brought. If the claims are not subject to the one-year prescription period, then time has not yet run. If the prescription period, as Advocate Leitão contends, runs from the date of Victory Success obtaining legal possession of the Hotel, it has not started to run.

[64] Where a party issues proceedings in a forum non conveniens at a time when a limitation period has not expired in the forum conveniens, the Courts will sometimes refuse a stay of the action in the former venue unless the defendant agrees to waive any limitation point in the latter venue. In the current case, however, Madame Chen has no juridical advantage from suing here. Either her claim was statute barred when she issued proceedings here, or there is no period of limitation or prescription, or the time for prescribing has not started to run. This is the same position if she were now to issue proceedings in Macau.

[65] Accordingly under step (ii), I find Madame Chen has no legitimate juridical advantage from suing here.

[66] Under step (iii), for the reasons I gave under step (i) the “natural forum” for the action is Macau.

[67] As to step (iv), there is no evidence that Macau could not do substantial justice between the parties. Quite the contrary in fact. There have already been no less than six different actions brought in Macau in relation to issues between the parties.

[68] Accordingly, I will order a stay of the current proceedings on the ground that this Territory is forum non conveniens. I will not attach any terms to the stay of the proceedings. Issue (C) is thus determined against Madame Chen as well.”

[128] In her grounds of appeal, Madam Chen contends that the judge’s conclusion that Macau was the appropriate forum was “fallacious: on the evidence before him he was not entitled to find even that it is an available forum (ground of appeal 10); the judge “wrongly assumed that the applicable (or governing) law was the law of Macau instead of the laws of the BVI and PRC (under the requirement of double actionability)” (ground of appeal 11); and the judge “ignored the legitimate juridical advantages which Madam Chen enjoyed in the BVI” (ground of appeal 12).

[129] In support of these grounds, Mr. McDonnell submitted that the judge's conclusion that Macau was the appropriate forum was unjustified. On the evidence, the judge was not entitled to find that Macau was an available jurisdiction, let alone that it was clearly or distinctly more appropriate than the BVI. The judge was completely wrong to hold that the relevant law of duress would be either that of Macau or the PRC, since all the relevant actions in the case (the kidnapping of Mr. Xu, the execution of the Power of Attorney, their notarisation, the conspiracy which Madam Chen alleged and so on) took place either in the PRC or in Hong Kong. Macau law is therefore irrelevant to Madam Chen's claim, since she is not seeking to recover the Hotel but to invalidate the Power of Attorney and the other false documents obtained by duress. As regards the question of legitimate juridical advantage, Madam Chen obtained such an advantage by commencing this action in the BVI because if she had commenced it in Macau, she would have faced the complex limitation or prescription points referred to by the judge. Further such advantages related to the difficulties which Madam Chen might have in Macau in avoiding the consequences of the actions taken by Mr. Ng in the Macau proceedings.

[130] In addition to **Spiliada** and this Court's decision in the **IPOC International Growth Fund** case, Mr. McDonnell referred us to the decision of the Privy Council (on appeal from a decision of this court) in **Livingston Properties Inc and Others v JSC MCC Eurochem and Another** ('Eurochem').¹²² Had the judge had the benefit of the Privy Council's guidance in **Eurochem**, Mr. McDonnell submitted, he may have avoided falling into error in this case.

[131] In response to these submissions, Mr. Béar's first comment was that Mr. McDonnell had failed to identify any real error in the judge's reasoning on the forum issue. He submitted that (i) Macau was clearly an available forum, irrespective of any question of limitation; (ii) there was no basis for challenging the judge's assessment of the connecting factors between the facts of the case and Macau; (iii) Madam Chen had failed to establish that substantial justice could not be done in Macau; (iv) the

¹²² [2020] UKPC 31.

limitation point would not lead to any different result on the facts of this case; (v) Madam Chen had failed to establish any legitimate juridical advantage in the case being tried on the BVI; (vi) **Eurochem** did not assist, as in that case there was no finding that the foreign forum was an available forum; and (vii) in all the circumstances, there was no other reason for the judge to have concluded that the case could not be dealt with properly in Macau.

[132] In considering the authorities, the starting point is, of course, **Spiliada**. As the headnote to the report of the decision of the House of Lords explains, while the actual point at issue in that case was whether leave ought to be granted to serve proceedings in England on a defendant in Canada,¹²³ the court considered it necessary, as in applications for a stay of proceedings founded on the ground of *forum non conveniens*, “to consider in which forum the case could most suitably be tried for the interests of all the parties and for the ends of justice”. It is on this basis that the celebrated judgment of Lord Goff of Chieveley in **Spiliada** quickly came to be regarded, and remains, the leading authority on stay of proceedings on the ground of *forum non conveniens*.

[133] After reviewing the English and Scottish authorities, Lord Goff summarised the applicable principles as follows:¹²⁴

- “(a) The basic principle is that a stay will only be granted ... where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, i.e. in which the case may be tried more suitably in the interests of all the parties and the interests of justice ...
- (b) ... in general the burden of proof rests on the defendant to persuade the court to exercise its discretion to grant a stay ... if the court is satisfied that there is another available forum which is *prima facie* the appropriate forum for the trial of the action, the burden will then shift to the plaintiff to show that there are special circumstances by reason of which justice requires that the trial should nevertheless take place in this country ...

¹²³ Under R.S.C., Ord. 11, r. 4(2).

¹²⁴ [1987] 1 AC 460 at pages 476-478.

- (c) ... the burden resting on the defendant is not just to show that England is not the natural or appropriate forum for the trial, but to establish that there is another available forum which is clearly or distinctly more appropriate than the English forum ...
- (d) Since the question is whether there exists some other forum which is clearly more appropriate for the trial of the action, the court will look first to see what factors there are which point in the direction of another forum ... these will include not only factors affecting convenience and expense (such as the availability of witnesses), but also other factors such as the law governing the relevant transaction ..., and the places in which the parties respectively reside or carry on business.
- (e) If the court concludes at that stage that there is no other available forum which is clearly more appropriate for the trial of the action, it will ordinarily refuse a stay ...
- (f) If however the court concludes at that stage that there is some other available forum which *prima facie* is clearly more appropriate for the trial of the action, it will ordinarily grant a stay unless there are some circumstances by reason of which justice requires that a stay should nevertheless not be granted. In this inquiry, the court will consider all the circumstances of the case, including circumstances which go beyond those taken into account when considering connecting factors with other jurisdictions. One such factor can be the fact, if established objectively by cogent evidence, that the plaintiff will not obtain justice in the foreign jurisdiction ...”

[134] To this summary, Lord Goff added one further consideration, deriving from the Privy Council decision in **MacShannon v Rockware Glass Ltd.**¹²⁵ In that case, Lord Diplock had observed¹²⁶ that, in addition to the defendant showing that there is another forum in which justice can be done at substantially less inconvenience and expense, “the stay must not deprive the plaintiff of a legitimate personal or juridical advantage which would be available to him if he invoked the jurisdiction of the English court”.

[135] But in **Spiliada**, Lord Goff approached the question of a legitimate personal or procedural advantage more guardedly, stating¹²⁷ that, “[c]learly, the mere fact that

¹²⁵ [1978] AC 795.

¹²⁶ *Ibid* at page 812.

¹²⁷ [1987] 1 AC 460 at page 482.

the plaintiff has such an advantage in proceedings in England cannot be decisive". The fundamental principle, Lord Goff explained, is to "consider where the case may be tried 'suitably for the interests of all the parties and for the ends of justice'". Thus, taking as an example a case in which there is a time bar in the foreign forum, but not in England, Lord Goff said this:¹²⁸

"Let me consider how the principle of forum non conveniens should be applied in a case in which the plaintiff has started proceedings in England where his claim was not time barred, but there is some other jurisdiction which, in the opinion of the court, is clearly more appropriate for the trial of the action, but where the plaintiff has not commenced proceedings and where his claim is now time barred. Now to take some extreme examples, suppose that the plaintiff allowed the limitation period to elapse in the appropriate jurisdiction, and came here simply because he wanted to take advantage of a more generous time bar applicable in this country; or suppose that it was obvious that the plaintiff should have commenced proceedings in the appropriate jurisdiction, and yet he did not trouble to issue a protective writ; in cases such as these, I cannot see that the court should hesitate to stay the proceedings in this country, even though the effect would be that the plaintiff's claim would inevitably be defeated by a plea of the time bar in the appropriate jurisdiction."

[136] The **Spiliada** principles have been considered and applied in a number of cases in this jurisdiction. As has been seen, the judge referred specifically to one of the best known, which is the judgment of this court in **IPOC International Growth Fund Ltd**, from which the judge derived his summary of the applicable principles which I have quoted at paragraph [127] above.

[137] To these authorities, it is only necessary to add the recent decision of the Privy Council in **Eurochem**. That was a case in which the claimant ('Eurochem') sued a total of 18 defendants in the BVI. Seven of the defendants were companies registered in the BVI and they were therefore able to be served in this jurisdiction. Permission was given for all of the non-BVI defendants to be served outside of the jurisdiction and, following service, five of them applied to set aside the order for service on them. Of the seven BVI registered companies who had been served

¹²⁸ Ibid at page 483.

within the jurisdiction, six of them applied to stay the proceedings against them on the basis that Russia was a more convenient forum.

[138] Sitting in the Commercial Division of the High Court, Wallbank J dismissed both applications. He considered that, on the evidence available to him, the defendants had failed to prove that the claims could be brought in Russia and that he could not make any finding on the governing law of the claims. In the result, he concluded that the BVI was the appropriate forum. This court reversed his decision in both respects, but Eurochem's appeal to the Privy Council succeeded and the decision of Wallbank J was reinstated.

[139] Giving the judgment of the Board, Lady Arden explained the correct approach to the applications in this way:¹²⁹

"9. In seeking to serve out, Eurochem had firstly to show in relation to the foreign defendants that there was a serious question to be tried on the merits, that is, a substantial question of fact or law. That is not in dispute. Secondly, Eurochem had to show that there was a good arguable case that the claim against the foreign defendants fell within the classes of case for which permission to serve out may be given and that is also not in dispute in this case. Thirdly, Eurochem had to show that the BVI was clearly or distinctly the appropriate forum for the trial of the dispute and that in all the circumstances the court ought to exercise its discretion to permit service out of the jurisdiction. This third requirement reflects the doctrine of forum non conveniens ... It is compliance with that third requirement that is now in issue on the applications to set aside service out of the jurisdiction.

10. In exercise of its discretion the court will consider whether the BVI is a more appropriate forum than any other foreign forum in the interests of all parties and the ends of justice, and, if not, whether justice nevertheless requires that the case should be tried in the BVI.

11. The same principles apply where the defendants seek to obtain a stay of proceedings properly served within the jurisdiction on the basis that there is a more appropriate forum. The onus, however, is on the defendants seeking a stay, and not the claimants, unless the claimants seek to show that, despite the fact that there is another available forum which is prima facie the appropriate forum, there are special circumstances why justice requires that the trial should nevertheless take place in the BVI.

¹²⁹ [2020] UKPC 31 at paras 9-12.

12. When assessing whether there is another more appropriate forum, the court will consider what connecting factors exist in relation to that forum, such as the place where the alleged wrongs were committed and the governing law of the pleaded claims. The governing law is an important factor because it is generally preferable that a case should be tried in the country whose law applies ... If there is no other available forum which is clearly more appropriate the court will ordinarily refuse a stay. In general, the assessment of the factors relevant to forum conveniens is a matter for the trial judge: see per Lord Templeman in the *Spiliada* at p 465.”

[140] In the result, the Board preferred Wallbank J's approach because it considered that there was no reason to disturb his conclusions that (i) given the fact that the evidence about the availability of Russia as an alternative forum was disputed, it had not been shown that Russia was clearly and distinctly the more appropriate forum; and (ii) he was not able to make any finding on the governing law, which therefore remained, as Lady Arden put it,¹³⁰ “a neutral factor”.

[141] The basic principles are therefore not in doubt. And, in light of them, in my view, the judge's approach to the stay application in this case cannot be faulted. As has been seen, the judge's summary of the applicable principles was entirely in keeping with the decision in **Spiliada**. In applying those principles, the judge's first step was to consider where was the most appropriate forum for the trial of the action in this case. In concluding that this was Macau, the judge took into account the various connecting factors to Macau, such as the location of the Hotel, the presence of the witnesses and the relevant documents, all of which are in either Chinese or Portuguese, both languages which the Macau courts are well equipped to handle. The judge also considered that the relevant law of duress would be either Macau law or the law of the PRC. Despite Mr McDonnell's protest that this was wrong, at any rate in relation to Macau law (which I am in any event strongly inclined to doubt), this cannot detract, in my view, from the fact that Macau was plainly the appropriate forum. Madam Chen herself obviously so regarded it when, through her counsel, the Privy Council was advised in 2017 that she would procure Peckson to bring

¹³⁰ [2020] UKPC 31 at para 32.

proceedings in Macau. Further, as the judge observed¹³¹, “[t]he only connection the case has with this jurisdiction is that Victory Success is incorporated here”.

[142] These findings are, in my view, completely unassailable on the clear evidence in the case. I pause to observe that, in light of this, **Eurochem**, upon which Mr. McDonnell so heavily relied, is of no assistance, given the fact that in that case Wallbank J was unable to conclude on the evidence before him whether Russia was even an available, far less appropriate forum.

[143] As the authorities show, the burden then shifted to Madam Chen to establish that there were special circumstances why justice required that the trial should nevertheless take place in the BVI. In this regard, the two principal matters relied on by Madam Chen related to legitimate juridical advantages in respect of, first, the question of limitation or prescription; and second, Mr. Leitão’s suggestion that, should Madam Chen be obliged to litigate this matter in the Macau courts, she might be faced with the difficulty of having to explain the taking of inconsistent positions.¹³²

[144] In the first place, it seems to me that, as Lord Goff pointed out in **Spiliada**, the mere fact of any such advantage is not decisive. It is therefore necessary, in each case, to “consider where the case may be tried ‘suitably for the interests of all the parties and for the ends of justice’”. That question must be answered by reference to objective factors; so that even where, as in this case, the advantage claimed by Madam Chen relates to a more favourable limitation regime in the BVI, the important consideration for the court must be whether Macau is in fact the appropriate forum for the trial of the action.

[145] But in any event, as it turned out, the expert evidence as to limitation did not point conclusively in one direction or another. I therefore think that the judge was correct to conclude that it did not really matter in this case, since, if Mr. Baguinho is correct

¹³¹ Judgment at para [60].

¹³² See para [122] above.

and Madam Chen's action was subject to a one-year time bar, it would already have been time-barred in Macau by the time she issued proceedings in the BVI; while, on the other hand, if Professor Prof Paola Costa e Silva is right, and there is no time bar for claims of this nature in Macau, time would not yet have started to run. Accordingly, it seems to me, the judge's conclusion that Madam Chen had not established any legitimate juridical advantage by suing in the BVI was also correct.

[146] As regards the other advantage of suing in the BVI posited by Mr. Leitão on Madam Chen's behalf, that is, that it obviates the potential embarrassment (my word) of her having to explain away inconsistent positions in litigation in Macau, I am rather inclined to doubt whether this can even be classified as a legitimate juridical advantage. On one view, it is, after all, part of the vagaries of litigation which many litigants must face and surmount from time to time. But, in any event, it seems to me, it must also yield to the overriding consideration of whether, on an objective assessment, Macau is indeed the appropriate forum for the trial of this action.

[147] I therefore consider that no basis has been shown for this court to interfere with the judge's conclusions that the "natural forum" for the action is Macau,¹³³ and that "there is no evidence that Macau could not do substantial justice between the parties".¹³⁴ In this regard, I bear in mind that, as the judge also pointed out, "[t]here have already been no less than six different actions brought in Macau in relation to issues between the parties".

¹³³ Judgment at para [66].

¹³⁴ Judgment at para [67].

Conclusion

[148] In light of my conclusions on issues (ii) to (v), it therefore follows that I would dismiss Madam Chen's appeal and affirm the judge's order staying the action on the ground of *forum non conveniens*.

I concur.

Louise Esther Blenman
Justice of Appeal

I concur.

Gerard St. C. Farara
Justice of Appeal [Ag.]

By the Court

Chief Registrar