IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2022] SGCA(I) 7

Civil Appeal No 70 of 2021

(1) BCS Business Consulting Services Pte Ltd
(2) Marcus Weber
(3) Renslade Holdings Limited

… *Appellants*

And

Michael A Baker (executor of the estate of Chantal Burnison, deceased)

… *Respondent*

In the matter of SIC/SUM 37/2021 in SIC/S 3/2018

Between

Michael A Baker (executor of the estate of Chantal Burnison, deceased)

… *Plaintiff*

And

(1) BCS Business Consulting Services Pte Ltd
(2) Marcus Weber
(3) Renslade Holdings Limited

… *Defendants*

JUDGMENT

[Civil Procedure] — [Injunctions] — [Anti-suit injunction]
[Conflict of Laws] — [Natural forum]
[Conflict of Laws] — [Restraint of foreign proceedings] — [Comity]

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v
Baker, Michael A (executor of the estate of Chantal Burnison, deceased)

[2022] SGCA(I) 7

Court of Appeal — Civil Appeal No 70 of 2021
Steven Chong JCA, Belinda Ang Saw Ean JAD and Arjan Sikri IJ
26 July 2022

21 September 2022 Judgment reserved.

Steven Chong JCA (delivering the judgment of the court):

Introduction

1 An anti-suit injunction ("ASI") is essentially an order of court compelling a party who is amenable to the jurisdiction of the court to refrain from instituting or continuing with proceedings abroad. It may be granted for a variety of reasons, such as to protect a legal right not to be sued in a foreign court, where the dispute is governed by an arbitration clause or is subject to an exclusive jurisdiction clause. It may also be granted in exercise of the court's equitable jurisdiction, in circumstances where the commencement or pursuit of the foreign proceedings is tantamount to conduct that is vexatious and oppressive. Another ground that justifies the grant of an ASI in exercise of the inherent jurisdiction of the court centres on the prevention of abuse of the forum's court process and the protection of the court's jurisdiction and

judgments. This is especially so where the forum court's judgment is undermined in the foreign proceedings.

2 The present appeal concerns an ASI which was sought and granted on the basis of protecting the processes and judgments of the Singapore court. A judgment on liability had already been issued here, the subject matter of which the defendants to the ASI (the "appellants") sought to continue to litigate in the foreign jurisdiction. The question before us is whether, in such a situation, the requirement of natural forum and the issue of whether the foreign proceedings were concurrent or consecutive to the forum court's proceedings should continue to be relevant and accorded primacy. As we will explain below, the principles and considerations are different depending on whether the ASI is granted in exercise of the court's equitable jurisdiction, or in exercise of the court's inherent jurisdiction to protect the court's processes, jurisdiction and judgments. Suffice it to say for now that the court's exercise of discretion in the case of its equitable jurisdiction focuses on the effect of the foreign proceedings on the litigant seeking an ASI whereas in contrast, when the court's inherent jurisdiction is invoked, the focus is on the disruption the foreign proceedings might have to the forum's proceedings and judgments from the perspective of the court.

3 The respondent, Mr Michael A Baker, had commenced proceedings as executor on behalf of the estate of Ms Chantal Burnison (the "Estate" and "Chantal") in Singapore alleging, amongst other things, that the appellants had breached their fiduciary duties as trustees under an oral trust or oral agreement (the "Trust" or "Trust Agreement") to hold and manage assets (the "Trust Assets") for Chantal. While the proceedings were pending before the Singapore International Commercial Court (the "SICC"), the first appellant, BCS Business

Consulting Services Pte Ltd ("BCS") commenced proceedings in California (the "Californian Proceedings") against the respondent and one of Chantal's companies in the United States (the "US"), BCS Pharma Corporation ("BCS Pharma"). The respondent prevailed before the SICC. Significantly, after the appeal against the decision of the SICC was dismissed by this court, the first appellant amended its complaint in the Californian Proceedings to add additional defendants and to introduce additional causes of action including a claim in judicial estoppel, premised on representations that Chantal had made in certain Ch 11 bankruptcy proceedings in the US (the "US Bankruptcy Proceedings"). It thus sought a declaratory judgment to estop the respondent as well as the other defendants in the Californian Proceedings from asserting the existence of the Trust.

4 The respondent then applied *vide* SIC/SUM 37/2021 ("SUM 37") for an ASI to restrain BCS from prosecuting or continuing to prosecute the Californian Proceedings. This was granted by the SICC in so far as these proceedings relate to the existence, validity and/or enforceability of the Trust. The appellants were also restrained from prosecuting such proceedings in the US and anywhere else in the world against the respondent or the beneficiaries of the Estate in so far as these relate to the same subject matter.

5 The appellants appealed against the grant of the ASI. We heard the present appeal together with CA/CA 3/2022 ("CA 3"), which is a related appeal against another decision of the SICC in respect of sums due on the taking of accounts. Our decision on CA 3 may be found in *Baker, Michael A (executor of the estate of Chantal Burnison, deceased) v BCS Business Consulting Services Pte Ltd and others* [2022] SGCA(I) 8.

Background facts

6 The background leading to the present appeal has been detailed in *Baker, Michael A (executor of the estate of Chantal Burnison, deceased) v BCS Business Consulting Services Pte Ltd and others* [2022] 3 SLR 103 (the "Judgment") at [6]–[42]. It suffices to briefly highlight the salient facts. For reasons which will be apparent below, the chronology of the events, in particular the key developments in the SICC and Californian Proceedings, is crucial in the final analysis.

7 BCS is a company incorporated in Singapore on 31 March 1999. The second appellant, Mr Marcus Weber ("Weber"), is a director and the sole shareholder of BCS. Weber is a Swiss National who became a permanent resident of Singapore in 2003. The third appellant, Renslade Holdings Limited ("Renslade (HK)"), is a company incorporated in Hong Kong and Weber is its sole shareholder.

8 Chantal was the co-inventor of a compound named "Ethocyn", which was used in various cosmetic and beauty products. The rights to the inventions and patents of Ethocyn (the "Ethocyn Rights") were initially assigned to Californian companies controlled by Chantal (the "Chantal Companies"). Subsequently, the Chantal Companies' assets, including its intangible intellectual property rights such as the patent rights, licenses, trademarks, customer lists and rights to the patented compounds that included Ethocyn were sold to a New Zealand corporation, Renslade Holdings Limited ("Renslade (NZ)"), following the US Bankruptcy Proceedings against the Chantal Companies. Sometime between 2000 and 2001 or 2002, the Ethocyn Rights were transferred to a Singapore company, Renslade Singapore Pte Ltd ("Renslade (S)"), and finally to BCS on 1 April 2002.

9 Over the years, the Ethocyn Rights yielded substantial income and profits, mainly under a supply and distribution agreement dated 26 June 2003 between BCS and Nu Skin International Inc ("Nu Skin"). Under the agreement, BCS agreed to supply Ethocyn to Nu Skin for its use and distribution, and Nu Skin would make direct payments to BCS in return. These payments formed the bulk of moneys generated from the Ethocyn Rights (the "Trust Moneys"). In or around 2007, the bulk of the Trust Moneys was transferred from BCS to Renslade (HK).

10 In October 2016, Chantal passed away, and the respondent was appointed the executor of the Estate. Chantal is survived by her two daughters, Ms Heika Burnison ("Heika", born in 1987) and Ms Birka Burnison ("Birka", born in 1990). They are the only beneficiaries of the Estate.

Suit 3

11 In November 2017, the respondent commenced SIC/S 3/2018 ("Suit 3") on behalf of the Estate against the appellants for: (a) breach of fiduciary duties as trustees of the Trust, and (b) breach of a loan agreement of CHF9.5 million payable with 3% interest per annum. Renslade (HK) was sued for dishonestly assisting BCS and Weber in their breach of fiduciary duties. The appellants were also sued for conspiring and acting together with the intention of injuring Chantal and/or the Estate.

12 The appellants denied that there was any kind of agreement between Chantal and Weber for Weber to acquire and hold the Ethocyn Rights and any income or proceeds generated on trust for Chantal. Further, the alleged Trust was governed by California law under which no valid trust could have been created due to a lack of intention to create a trust, a lack of identified

beneficiaries, and the fact that the settlor and beneficiary were the same person. Furthermore, the alleged Trust would be for an illegal purpose, and would additionally be illegal, void or unenforceable as being contrary to the public policy of Singapore since on the respondent's case, Chantal had in the course of the US Bankruptcy Proceedings made certain statements which served to conceal her assets and the existence of the alleged Trust. This amounted to perjury, fraud on the court, and breaches of Crimes and Criminal Procedure 18 USC (US) §§ 152 and 157 (see *Baker, Michael A (executor of the estate of Chantal Burnison, deceased) v BCS Business Consulting Services Pte Ltd and others* [2020] 4 SLR 85 (the "Suit 3 Judgment") at [43]–[47]). In reply, the respondent averred that Singapore law was the governing law of the Trust Agreement and the Trust and that, even if California law applied, the arrangements were valid and the Trust was not for an illegal purpose (see the Suit 3 Judgment at [55]–[56]).

13 The parties agreed to bifurcate the trial into liability and quantum tranches, and that foreign law would be determined via submissions from registered foreign lawyers. The respondent called Heika, the Estate's lawyer, Mr Wayne Johnson, and himself as witnesses. After they gave their evidence, the appellants submitted that there was no case to answer and elected not to call evidence. The parties then filed their written submissions, and the registered US counsel filed their affidavits and submissions on California law. Order 110 r 25(1) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) (now O 16 r 8(1) of the Singapore International Commercial Court Rules 2021), provides for "any question of foreign law [to] be determined on the basis of submissions (which may be oral or written or both) instead of proof".

14 The SICC heard legal submissions from the parties' respective US

counsel on California law in February 2020 on issues relating to bankruptcy, trusts and illegality. The SICC also heard closing submissions from Singapore counsel on the facts and the law, including Singapore law on trusts, illegality (and the unenforceability of a trust tainted by illegality) and public policy in relation to, *inter alia*, the effect of a foreign illegality (see the Judgment at [20]).

15 On 29 April 2020, the Suit 3 Judgment was delivered in which the SICC found that the respondent had established, on a *prima facie* basis, the existence of the Trust Agreement and that the Trust was validly constituted (see the Suit 3 Judgment at [187]–[188]). It found that Singapore law governed the Trust Agreement, under which there was a valid express trust (see the Suit 3 Judgment at [214]–[226]). Alternatively, a resulting trust arose on the facts (see the Suit 3 Judgment at [227]–[230]). Under California law, which was considered for completeness, it was also found that Chantal intended to and did create an express trust (see the Suit 3 Judgment at [232]–[240]).

16 The SICC found that the Trust was enforceable notwithstanding the appellants' allegations of illegality. The appellants claimed that Chantal had orchestrated Renslade (NZ)'s purchase of the Ethocyn Rights, provided the funds to acquire the same and arranged for Weber to acquire the Ethocyn Rights from Renslade (NZ) and hold the same and any income or proceeds generated from them on trust for her. However, she made the following false declarations on 23 September 1999, in support of a joint motion in the US Bankruptcy Proceedings to approve the sale of the Ethocyn Rights to Renslade (NZ) (see the Suit 3 Judgment at [242]):

> 9. … None of the [Chantal Companies'] insiders are owners, officers or directors of Renslade or its affiliates.
>
> …

> 12. … I did not ask Renslade (NZ) to require that the patents be transferred as part of the [Chantal Companies'] sale of their rights or assets.

Chantal had also exhibited a proposed order authorising and approving the sale of the Ethocyn Rights, wherein it was falsely stated that Renslade (NZ) (see the Suit 3 Judgment at [243]):

> … has an arm's length relationship with the [Chantal Companies], all terms and conditions of the transactions contemplated by the Sale Motion and the Sale Agreement have been fully disclosed and [Renslade (NZ)] is purchasing the Assets in good faith.

17 The appellants also relied on a stipulation of settlement filed by Chantal in May 2001, which brought an end to a class action suit that had been commenced against her and one of the Chantal Companies. A clause of the settlement stated that Chantal "hereby represents and warrants" that her net worth as of 1 May 2001 was "less than [US]$350,000". However, as the appellants did not produce any evidence of the value of Renslade (NZ) or the Ethocyn Rights at that point in time, the SICC was unable to find that the statement was false without more (see the Suit 3 Judgment at [247]).

18 The appellants further claimed that certain statements made by Chantal were false at the time when the Bankruptcy Court approved the buyout by Renslade (NZ) of the Chantal Companies' rights to the Ethocyn royalties in 2002. This was rejected by the SICC, which found them to be true instead (see the Suit 3 Judgment at [248]).

19 As regards the enforceability of the Trust under Singapore law, the SICC applied the approach in *Ochroid Trading Ltd and another v Chua Siok Lui (trading as VIE Import & Export) and another* [2018] 1 SLR 363, and found

that the Trust Agreement was not prohibited under any Singapore statute or under any established head of common law public policy. As Chantal's false declarations to the US Bankruptcy Court were undoubtedly part of the basis upon which the court had approved the sale of the Ethocyn Rights to Renslade (NZ) and she had intended to conceal her interests at the material time, the SICC found that "the corpus of the Trust was obtained partly through making false declarations" (see the Suit 3 Judgment at [258]–[261]). However, it would be disproportionate to refuse to enforce the Trust Agreement (see the Suit 3 Judgment at [263]–[267]). There was also no issue of stultification, as the Estate laying claim to the Trust Assets would not undermine or make a mockery of the US Bankruptcy Proceedings (see the Suit 3 Judgment at [268]).

20 Turning to the enforceability of the Trust under California law, the SICC considered the four factors set out in *In re Torrez*, 827 F 2d 1299 (9th Cir, 1987) ("*In re Torrez*") at 1301, in deciding whether to enforce an illegal trust:

> [T]he completed nature of the transaction, such that the public can no longer be protected by invocation of the rule that illegal agreements are not to be enforced; the absence of serious moral turpitude …; the likelihood that … the party asserting the illegality [will] be unjustly enriched at the expense of the other party; and disproportionality of forfeiture as weighed against the nature of the illegality.

The SICC held that all four factors favoured enforcement of the Trust (see the Suit 3 Judgment at [282]):

(a) The bankruptcy proceedings were concluded 20 years ago;

(b) Chantal's conduct did not involve serious moral turpitude. She did not use the Trust to hide assets, and she did not attempt to purchase the Trust Assets until after the creditors' committee appointed by the

United States Trustee for the Chantal Companies, with professional assistance, was unable to find another buyer;

(c) If Weber were allowed to keep the Trust Assets, he would be unjustly enriched by as much as US$41m;

(d) This would in turn be greatly disproportionate, in comparison with Chantal's false declarations in the US Bankruptcy Proceedings.

21 It was additionally considered that Chantal's misrepresentations did not rise to the level of a fraud on the court that would violate California public policy (see the Suit 3 Judgment at [286]–[289]).

22 Having found the Trust Agreement to be valid and enforceable, the SICC held that (see the Suit 3 Judgment at [299]):

(a) The appellants had breached their fiduciary duty to Chantal by failing to provide an account of the Trust and the Trust Moneys;

(b) The appellants had breached the Trust Agreement by unilaterally increasing the commission due to them as trustees from 5% to 10% in or around 2016, without Chantal's knowledge and consent;

(c) Weber breached his fiduciary duty to Chantal by failing to procure BCS or Renslade (HK) to return the Trust Assets, and breached his contractual obligation vis-à-vis Chantal to return the CHF9.5m borrowed from the Trust payable with 3% annual interest; and

(d) The appellants, having claimed both legal and beneficial ownership over the Trust Assets and Trust Moneys, conspired with the intention of injuring Chantal and/or the Estate.

The SICC therefore made orders in relation to the respondent's claims for relief, including the taking of accounts.

Proceedings in California and Singapore

23 After Suit 3 was filed in November 2017, BCS commenced the Californian Proceedings on or around 8 August 2019. On 3 October 2019, the respondent and BCS Pharma (the defendants in the Californian Proceedings) applied for those proceedings to be dismissed on the basis of *forum non conveniens*. This, however, was disallowed by the US District Court on 17 April 2020.

24 On 24 June 2020, the respondent, BCS Pharma and BCS agreed via a joint stipulation to stay the Californian Proceedings pending the appeal against the Suit 3 Judgment *vide* CA/CA 76/2020 ("CA 76"), which was filed on 8 May 2020. On 30 June 2020, the US District Court ordered that the Californian Proceedings be stayed pending the resolution of CA 76.

25 CA 76 was dismissed by this court on 19 January 2021. In March 2021, the respondent, BCS Pharma and BCS filed a joint status report in the Californian Proceedings, and a joint report proposing timelines for the Californian Proceedings. The stay on the Californian Proceedings was lifted by the US District Court later that month, with the case schedule set. On 27 April 2021, BCS filed a "First Amended Complaint" in the Californian Proceedings, adding Heika, Birka, Grey Pacific Labs LLC ("Grey Pacific Labs") and Grey

Pacific Science, Inc (together with Grey Pacific Labs, the "Grey Pacific Companies); and a "Second Amended Complaint" on 27 August 2021.

26 It is significant that the proceedings in Singapore for the taking of the accounts continued apace in the lead up to and following the dismissal of CA 76. After the Suit 3 Judgment was issued, the appellants were unsuccessful in their application to stay the execution pending the disposal of CA 76. Weber therefore filed affidavits on behalf of the appellants to account for the Trust Assets and Trust Moneys. Eventually, on 14 May 2021, the respondent filed SIC/SUM 25/2021 ("SUM 25") for payment due on the taking of the accounts. The SICC rendered its decision in SUM 25 on 27 December 2021 and part of that decision is the subject of CA 3.

27 For the purpose of the present appeal, the respondent filed an application to adduce fresh evidence pertaining to matters that occurred following the decision by the SICC to grant the ASI. This was in the form of the "Third Amended Complaint", filed by BCS in the Californian Proceedings on 7 April 2022. The application was not seriously challenged by the appellants other than asserting that it was not relevant for this appeal. We allowed the respondent's application at the hearing of the appeal with costs in the appeal.

28 The Initial Complaint, First Amended Complaint and Second Amended Complaint have been set out in the Judgment at [30]–[40]. We note that the Third Amended Complaint is substantially similar to the Second Amended Complaint, save for several changes concerning complaints which related to a settlement agreement entered into between Nu Skin and BCS on 28 May 2020 (the "Settlement Agreement"), in respect of which the respondent (in his personal capacity) had allegedly held himself out as having the authority to enter

(see the Judgment at [37]–[40]). It is alleged under the Settlement Agreement, BCS's claims against Nu Skin were settled and discovery regarding these claims was barred, in exchange for payment from Nu Skin. The claims made under the Second and Third Amended Complaints can essentially be grouped into four categories (see the Judgment at [35] and [66]):

(a) the "Intercepted Payment Claims", in relation to BCS Pharma's interception of US$2m which Nu Skin was supposed to pay to BCS pursuant to an amendment to the supply and distribution agreement between BCS and Nu Skin. It was claimed that the respondent had contacted Nu Skin and improperly instructed it to make payment to BCS Pharma instead of BCS (see the Judgment at [30]);

(b) the "Trademark Claims", in relation to the respondent's signing of a master trademark agreement which purported to convey the Ethocyn Rights belonging to BCS to Grey Pacific Labs; and the subsequent exploitation of the same by the Grey Pacific Companies (with the effect of cutting BCS out of business and contracts) (see the Judgment at [33(d)]);

(c) the claim in judicial estoppel, in respect of Chantal's prior statements in the US Bankruptcy Proceedings that the sale of the Ethocyn Rights to Renslade (NZ) was above board, and that Chantal retained such rights after the sale (see [29] below); and

(d) the "Wrongful Settlement Claims", with respect to the respondent's negotiation and conclusion of the Settlement Agreement (see the Judgment at [40]).

29 As stated in the appellants' written submissions, the principal focus of their appeal is on the judicial estoppel claim. In oral submissions before us, however, they confirmed that their appeal is against the whole of the decision of the SICC in SUM 37. Yet, in both their written and oral submissions, they did not explain why the SICC had erred in its findings in relation to other claims that were also the subject of the Californian Proceedings. As explained below, this apparently limited scope of the appeal was on the premise that if BCS is successful in its judicial estoppel claim, it will effectively prevent the defendants in the Californian Proceedings (the "US Defendants") from relying on the Trust as a defence to the various claims pursued by BCS in those proceedings.

30 On that note, we now consider the judicial estoppel claim which was first introduced in the First Amended Complaint. The claim reads as follows (as in the Third Amended Complaint):

> **TWELFTH CLAIM FOR RELIEF**
>
> **(Declaratory Judgment Estopping Defendants from Asserting Existence of a Trust, pursuant to 28 U.S.C. §§ 2201, 2202)**
>
> **(Against All Defendants)**
>
> …
>
> [190] Defendants have asserted the existence of a trust for Chantal Burnison in their Answer. …
>
> [191] As detailed above, in bankruptcy proceedings, Chantal Burnison asserted that the sale of the Ethocyn rights and assets was an arms-length transaction, that neither she nor her companies were insiders of the purchaser, and that they had not been given or promised any interest or role in the purchaser of the rights.
>
> [192] Chantal Burnison prevailed on this position, the sale was subject to lower scrutiny by the bankruptcy court, received

> additional bankruptcy benefits and protections, and was approved.
>
> [193] This position was not taken as a result of ignorance, fraud, or mistake.
>
> [194] Chantal Burnison also asserted in securities litigation that her net worth was significantly less than the value of the Ethocyn rights and assets, disclaiming her interest therein.
>
> [195] Chantal Burnison benefitted from this position and reached an approved dismissal of the securities litigation.
>
> [196] This position was not taken as a result of ignorance, fraud, or mistake.
>
> [197] Both of the positions were taken in judicial proceedings in this District.
>
> [198] An actual, present, and justiciable controversy has arisen between Plaintiff and Defendants concerning the ownership of the Ethocyn rights and assets, and the existence of a trust relating thereto.
>
> [199] Plaintiff seeks a declaratory judgment from this Court that, on the basis of the Defendants' prior statements in judicial proceedings to the contrary, Defendants are judicially estopped from asserting the existence of a trust, that the sale of the Ethocyn rights in the bankruptcy action was anything other than an arms-length transaction, and that Burnison retained any rights in Ethocyn after the sale.
>
> WHEREFORE, Plaintiff prays for declaratory judgment in its favor judicially estopping Defendants from asserting the existence of a trust related to the Ethocyn rights and assets in this action, and asks the Court for any such other and further relief to which Plaintiff may be entitled.

31 We note at the outset that the references to Chantal's false declarations in the US Bankruptcy Proceedings as well as the false representations on her net worth were similarly raised by the appellants in Suit 3, on which findings were expressly made by the SICC (see [16]–[18] above).

SUM 37

32 In light of the ongoing Californian Proceedings, on 16 June 2021, the

respondent applied before the SICC (the "forum court") for an ASI seeking, *inter alia*: (a) that BCS be restrained from prosecuting, or continuing to prosecute, the Californian Proceedings; and (b) that the appellants be restrained from commencing other proceedings in the US or anywhere else in the world against the respondent, which have the same or similar subject matter as Suit 3.

The decision below

33 The SICC applied the general principles relating to the grant of an ASI (*Lakshmi Anil Salgaocar v Jhaveri Darsan Jitendra* [2019] 2 SLR 372 ("*Lakshmi*") at [49]; as derived from the Privy Council's decision in *Société Nationale Industrielle Aerospatiale v Lee Kui Jak* [1987] AC 871 ("*Lee Kui Jak*")):

> (a) The jurisdiction is to be exercised when the 'ends of justice' require it.
>
> (b) Where the court decides to grant an anti-suit injunction, its order is directed not against the foreign court but against the parties so proceeding or threatening to proceed.
>
> (c) An injunction will only be issued to restrain a party who is amenable to the jurisdiction of the court, against whom an injunction will be an effective remedy.
>
> (d) Since such an order indirectly affects the foreign court, the jurisdiction is one which must be exercised with caution.

34 Further, the SICC observed that there are five non-exhaustive key factors that the court will consider in deciding whether to grant such an injunction (*Lakshmi* at [50]; *John Reginald Stott Kirkham and others v Trane US Inc and others* [2009] 4 SLR(R) 428 at [28]–[29]) (the "*Kirkham* factors"):

> (a) whether the defendants are amenable to the jurisdiction of the Singapore court;
>
> (b) the natural forum for resolution of the dispute between the parties;

> (c) the alleged vexation or oppression to the plaintiffs if the foreign proceedings are to continue;
>
> (d) the alleged injustice to the defendants as an injunction would deprive the defendants of the advantages sought in the foreign proceedings; and
>
> (e) whether the institution of the foreign proceedings is in breach of any agreement between the parties.

35 It was observed that the ASI sought by the respondent in SUM 37 was not contractual in nature, since there was no contractual obligation on BCS to sue in any particular forum (see the Judgment at [47]). That being the case, the SICC observed that the hallmark of a non-contractual ASI as sought by the respondent was vexatious and oppressive conduct on the part of the appellants (see the Judgment at [48]).

36 The SICC then proceeded to draw a distinction within the category of non-contractual ASIs between *consecutive* and *concurrent* proceedings. In the former situation where the forum court had already issued a judgment, it would be vexatious and oppressive for an ASI defendant to commence foreign proceedings, so as to relitigate issues that had been decided by the forum court, and thus undermine a judgment with *res judicata* effect (see the Judgment at [49]). Moreover, while a court would be slow to interfere with the foreign court's determination of how its judgment should be treated, nonetheless mounting a challenge against a court's judgment in a foreign jurisdiction would amount to vexatious and oppressive conduct which must be restrained. Such protection of a court's own judgment and processes was "a matter properly for [the SICC] to determine" (see the Judgment at [53]).

37 It found that the appellants were amenable to the jurisdiction of the Singapore court, given that BCS is a Singapore corporation and Weber is a

Singapore permanent resident carrying out at least some of his business in Singapore and Hong Kong. He is also the sole shareholder and director of BCS and the sole shareholder of Renslade (HK). Furthermore, the appellants had submitted to the jurisdiction of the Singapore courts by appearing in the proceedings without objecting to or otherwise challenging the court's jurisdiction (see the Judgment at [62]).

38 As for the natural forum requirement, the court observed that the requirement was not an invariable one. It took the view that in consecutive proceedings such as the present, the forum court would have sufficient interest in the matter, given the need to protect its judgment from a collateral attack which was occasioned by the ASI defendant commencing proceedings abroad (see the Judgment at [65]).

39 The SICC found that the Intercepted Payment Claims and the Trademark Claims were an attempt by BCS to relitigate matters that had been put in issue and decided by the court (see the Judgment at [67]). In relation to the latter however, there were additional alleged issues of the respondent fraudulently holding out that he was an officer of BCS, and allegedly conspiring with Heika and Birka to incorporate the Grey Pacific Companies in order to facilitate the transfer and use of the Ethocyn Rights which belonged to BCS to the Grey Pacific Companies. This was all not before the SICC in Suit 3 (see the Judgment at [68]).

40 Significantly, the SICC found that the claim in judicial estoppel was an attempt by BCS to relitigate the issue of Chantal's declarations to the US Bankruptcy Court. The SICC agreed with the respondent that it was vexatious and oppressive to not just relitigate issues which had been decided by the forum

court, but also to litigate issues which could, and should, have been brought before the forum court but were not (see the Judgment at [69]–[70]). The claims in illegality and public policy in Suit 3 and judicial estoppel in the Californian Proceedings were not just closely related but were the same "aspects which fall within the overlapping area of two intersecting circles" (see the Judgment at [71]–[76]). The fact that BCS only added the judicial estoppel claim after CA 76 was dismissed suggested that it was strategically concealed by it, to be deployed if CA 76 did not end in its favour (see the Judgment at [77]).

41 As regards the argument that the claim in judicial estoppel could not have been raised in Singapore, the court held that since there was no legitimate reason for BCS not to have raised it in Suit 3, it would be vexatious and oppressive to permit BCS to drip feed issues in multiple fora, in line with the doctrine in *Henderson v Henderson* (1843) 3 Hare 100 (see the Judgment at [79] and [82]). Nor did it assist the appellants to argue that judicial estoppel claim is a matter of procedure governed by the *lex fori, ie*, Singapore law, and Singapore law does not recognise such a doctrine. It was open to the appellants to raise the facts relating to the judicial estoppel claim and raise the question of characterisation before the court. Besides, the appellants had made extensive submissions in Suit 3 about California law through their US counsel, and there was no reason why the judicial estoppel claim could not be raised as another reason why the California Court would not find there to be a valid trust (see the Judgment at [81]–[82]).

42 However, the SICC found that the Wrongful Settlement Claims did not amount to an attempt to relitigate issues already decided by the SICC. The facts giving rise to these claims were only uncovered by BCS *after* the conclusion of CA 76, and the respondent did not contend that these facts could have been

discovered by BCS with reasonable diligence. The crux of the claims also did not rest on the ownership of the Ethocyn Rights, but with the respondent's misrepresentation to Nu Skin that he was a representative of BCS. BCS would therefore be entitled to pursue the Wrongful Settlement Claims against the respondent in his personal capacity (see the Judgment at [83]–[84]).

43 As for the scope of the ASI, the court found that although some of the US Defendants, namely Heika, Birka and the Grey Pacific Companies, were not parties to Suit 3, BCS should nevertheless be restrained from claiming against them in the Californian Proceedings. The forum court has the power to enjoin an ASI defendant from litigating, in foreign proceedings, against those who were not party to the proceedings before the forum court (see the Judgment at [87]–[88]). The US Defendants were clearly parties who should have the benefit of the Suit 3 Judgment even if they were not strictly privy to the same. The attempt to bring these claims against them amounted to an attempt to denude the Suit 3 Judgment of any real practical effect since, if successful, BCS's argument would mean that Heika and Birka (as beneficiaries of the Estate) could not rely on the court's findings that the Estate was the beneficiary of the Trust (see the Judgment at [90]).

44 Taking into account that not all of the claims pursued by BCS in the Californian Proceedings were attempts at relitigating the issues already decided in the Suit 3 Judgment, the SICC granted the ASI on the following terms (see the Judgment at [91]–[93]):

> (a) BCS would be restrained from prosecuting, or continuing to prosecute the Californian Proceedings, against the respondent both in his individual and personal capacity as well as his capacity as the

executor of the Estate, and against BCS Pharma, Heika, Birka and the Grey Pacific Companies, insofar as such proceedings relate to the existence, validity and/or enforceability of the Trust in the Ethocyn Rights and assets held on behalf of Chantal and the Estate, and any issues relating to the reliance on and/or assertion of the said Trust or any issues litigated before the Singapore courts in Suit 3 and CA 76.

(b) BCS and Renslade (HK) would be restrained, whether acting by themselves, their officers, their servants or agents or otherwise, and Weber would be restrained, whether acting by himself, his servants or agents or as a director, officer or servant or agent or shareholder of BCS and Renslade (HK) or otherwise, from prosecuting or continuing to prosecute proceedings in the US or anywhere else in the world against the respondent, whether in his personal capacity and/or his capacity as executor of the Estate, Heika and/or Birka, insofar as any such proceedings relate to the existence, validity and/or enforceability of the Trust in the Ethocyn Rights and assets held on behalf of Chantal and the Estate, and any issues relating to the reliance on and/or assertion of the said Trust or any issues litigated before the Singapore courts in Suit 3 and CA 76.

The parties' cases on appeal

The appellants' case

45 First, the appellants submit that the SICC erred in finding that the Californian Proceedings constituted consecutive proceedings, since they were commenced on 8 August 2019, when Suit 3 was still pending and had not yet proceeded to trial. As the Californian Proceedings ought to be characterised as

concurrent and not consecutive proceedings, it was necessary for the respondent to establish that Singapore was the natural forum of the claims in the Californian Proceedings, which he failed to do. In any event, even if the Californian Proceedings are consecutive proceedings, the appellants submit that the SICC erred in considering that sufficient interest in a consecutive proceeding case would arise from the need to protect its judgment from collateral attack. The consideration of California as the natural forum remains a relevant factor and cannot be entirely disregarded. The SICC thus appeared to have erred in disregarding the consideration of natural forum.

46 Second, it is contended that the SICC erred in finding that BCS's pursuit of the claims in the Californian Proceedings, in particular the judicial estoppel claim, was vexatious and oppressive as well as an abuse of process. They argue that the judicial estoppel claim: (a) "in substance … is an issue of enforcement or recognition of the [*Suit 3 Judgment*]" which is to be determined by the US District Court; and (b) addresses the issue of whether *the Trust* is enforceable or should be recognised in the US in view of Chantal's false declarations in the US Bankruptcy Proceedings [emphasis added]. In connection with this, the assessment of the judicial estoppel claim, in contrast with the argument on illegality and public policy which was mounted in Suit 3, involves "two distinct sets of underpinning factors and considerations" that could result in different outcomes. According to the appellants, the judicial estoppel claim therefore does not amount to an assertion that the Trust does not exist, *ie*, the substantive validity and enforceability of the Trust which was determined in the Suit 3 Judgment.

47 Before us, counsel for the appellants, Mr Thio Shen Yi *SC* ("Mr Thio"), rightly accepted that the judicial estoppel claim did not concern the enforcement

of the *Suit 3 Judgment*. Those were not the terms in which the claim was pleaded. As noted at [30] above, the claim referred to a "controversy … concerning the ownership of the Ethocyn rights and assets, and the existence of a trust relating thereto"; and a declaratory judgment was sought that the US Defendants be "judicially estopped from asserting the existence of a trust". The Amended Complaints do not refer to the enforcement of the Suit 3 Judgment. Weber had also deposed that he was "unaware of any attempt by [the respondent] to enforce the [Suit 3] Judgment" in the US.

48 As for the SICC's finding of an abuse of process, the appellants argue that the judicial estoppel claim could not reasonably have been brought in Suit 3, since it was a matter of the enforcement of the Trust and a concept that is exclusive to the US. At the same time, as the ASI extinguishes its only opportunity to be heard on the doctrine, they would suffer serious prejudice and injustice should the ASI continue to be in force.

49 Third, it is argued that the judicial estoppel claim engages issues of US public policy that should properly be determined in the Californian Proceedings. This consideration should be balanced against the interest of the forum court in protecting its judgment from collateral attack. The appellants submit that as a matter of comity, it would be more appropriate for the US courts to consider the claims and issues in the Californian Proceedings, in particular the judicial estoppel claim.

The respondent's case

50 The respondent contends that the SICC correctly observed that the natural forum requirement is not invariable, and that the court may grant an ASI even though it is not the natural forum of the dispute in the Californian

Proceedings, as long as it has sufficient interest in or connection with the matter. That is logically satisfied where foreign proceedings illegitimately interfere with the forum court's processes, jurisdiction or judgments, and it is generally not necessary in such cases to separately satisfy the natural forum requirement. Further, the appellants' distinction between consecutive and concurrent proceedings is of little assistance, since the crucial factor to be considered is whether the court has issued a judgment determining the issues that are being relitigated in another jurisdiction. Thus, BCS should have withdrawn the duplicative claims in the Californian Proceedings following the Suit 3 Judgment.

51 Next, the respondent argues that the SICC correctly found that the illegality and public policy defence as well as the judicial estoppel claim stem from the same factual premise, and the illegality and public policy defence could be characterised as an issue in relation to the enforceability of the Trust. It is submitted that both the illegality and public policy defence and the judicial estoppel claim also seek the same substantive result of depriving the Estate of the ownership of the Trust Assets. Furthermore, the judicial estoppel claim could reasonably have been raised in Suit 3, since the doctrine would affect the existence and enforceability of the Trust. The appellants had also, in the course of Suit 3, relied on several US statutory provisions and US legal doctrines such as fraud on the court, made extensive submissions on US law, and were content for the SICC to rule on those issues. The alleged juridical advantage of a judicial estoppel claim (which purportedly could only be brought in the US) was thus cynically created by the appellants, since it could and should have been raised in Suit 3 but was not.

52 Finally, it is submitted that the fact that issues of US public policy may be engaged by the judicial estoppel claim does not preclude the Singapore courts from examining it. The SICC in Suit 3 had, after all, examined issues of US bankruptcy law and Californian trust law which invariably involved US public policy considerations.

Preliminary points

53 The general principles relating to the granting of an ASI as set out by the SICC (see [33]–[34] above) are not in dispute. However, it is important to note that the issuance of the ASI in the present case can be justified on two jurisdictional bases:

(a) First, interference with the due process of the court: that is, the need to protect the processes, jurisdiction or judgments of the forum court (*South Carolina Insurance Co v Assurantie Maatschappij "de Zeven Provincien" NV* [1987] AC 24 at 41; *Masri v Consolidated Contractors International (UK) Ltd and others (No 3)* [2009] QB 503 ("*Masri*") at [100]; *Beckkett Pte Ltd v Deutsche Bank AG* [2011] 2 SLR 96 ("*Beckkett (CA)*") at [19]). In this case, there is already the Suit 3 Judgment which was affirmed by this court in CA 76. BCS is, in the Californian Proceedings, relitigating matters that were already decided in the Suit 3 Judgment, and in so doing is seeking to undermine the judgment and orders of the court. Indeed, BCS continued to pursue those proceedings even as the taking of accounts ordered in the Suit 3 Judgment was ongoing. We refer to this ground as "abuse of the forum court's process".

(b) Second, vexatious and oppressive conduct: in that it would also be vexatious and oppressive to the respondent for BCS to seek to so relitigate in the Californian Proceedings matters which are already *res judicata* between the parties by reason of the Suit 3 Judgment (*Masri* at [82]).

54 Under the first jurisdictional basis, the grant of an ASI is founded on the inherent power of the forum court to protect the integrity of its processes once set in motion (*Beckkett (CA)* at [19]). This is said to be the counterpart of the court's power to grant a stay of proceedings to prevent its processes from being abused, and the focus is on the disruption by the foreign proceedings to the forum court's processes and judgments (*CSR Ltd v Cigna Insurance Australia Ltd and others* [1997] 146 ALR 402 ("*CSR Ltd*") at 433; Michael Douglas, "Anti-Suit Injunctions in Australia" (2017) 41(1) *Melbourne University Law Review* 66 ("*Douglas*") at 87). On the other hand, where a court grants an ASI under the second jurisdictional basis, this is in the exercise of the court's equitable jurisdiction to restrain unconscionable conduct or the unconscientious exercise of legal rights (*CSR Ltd* at 433–434; Kenny Chng, "Breach of Agreement versus Vexatious, Oppressive and Unconscionable Conduct" (2015) 27 *Singapore Academy of Law Journal* 340 at para 7). This second basis is "directed to the protection of a litigant who is being vexed or oppressed by his opponent" and the focus is on the personal equities between the parties (*Stichting Shell Pensioenfonds v Krys and another* [2015] AC 616 ("*Stichting Shell*") at [24]); Yeo Tiong Min, "The Effective Reach of *in personam* Reasoning in Private International Law", Yong Pung How Professorship of Law Lecture (2009) at para 16).

55 An overlap between these two jurisdictional bases occurs not infrequently as the reported cases do not always distinguish between the precise jurisdictional bases for the grant of an ASI. Nevertheless, an overriding principle of the court's broad power in so granting an ASI – whether in the exercise of its inherent jurisdiction or equitable jurisdiction – is that the injunction will only be granted where it is in the interests of justice to do so, and the categories of cases engaging these two bases are not closed (*Lee Kui Jak* at 892; *CSR Ltd* at 433; *Australian Securities and Investments Commission v AGM Markets Pty Ltd (No 2)* [2018] FCA 1470 at [29]).

56 A related question is whether two of the *Kirkham* factors, namely that of natural forum and legitimate juridical advantage, are relevant where the grant of an ASI post-judgment is based on either jurisdictional basis. Notwithstanding the discussion below on these factors, it should be noted that the second *Kirkham* factor of natural forum is not relevant where an ASI is granted on the basis of an abuse of the forum court's process. As we will elaborate, the forum court naturally has sufficient interest in protecting an abuse of its processes, jurisdiction and judgments, and is the appropriate court for assessing whether such protection is warranted. As for the fourth *Kirkham* factor of legitimate juridical advantage – the alleged injustice to the defendant to an ASI by depriving him of such advantage – while this could militate against the grant of an ASI in equity, where the inherent jurisdiction is invoked, it is the "very existence of an advantage outside the forum which may justify injunctive relief", if those foreign laws have been sought to be utilised in a way that interferes with the processes, jurisdiction and judgments of the forum court (*Bank of Tokyo Ltd v Karoon and another* [1987] AC 45 ("*Karoon*") at 60; *Jones v Treasury Wine Estates Limited* [2016] FCAFC 59 at [29]; M Davies *et al*, *Nygh's Conflict of Laws in Australia* (LexisNexis Butterworths, 10th Ed, 2020)

at para 9.17; *Douglas* at 87–88). For completeness, the first *Kirkham* factor (whether the appellants are amenable to the jurisdiction of the forum court) and the last *Kirkham* factor (whether the institution of foreign proceedings is in breach of any agreement between the parties) are not in issue here.

Our decision

57 We now turn to the key issues that would be dispositive of this appeal.

(A) The claim in judicial estoppel in the Californian Proceedings was in substance raised and decided in Suit 3

58 It cannot be seriously disputed that the appellants' claim in judicial estoppel is premised on Chantal's false declarations in the US Bankruptcy Proceedings and her allegedly false representations about her net worth in the stipulation of settlement filed by her in May 2001. It is pleaded that based on this, and in light of a "controversy" on the ownership of the Ethocyn Rights and assets and the existence of a trust relating thereto, the US District Court should grant a declaratory judgment that the US Defendants are judicially estopped from "asserting the existence of a trust, that the sale of the Ethocyn rights in the bankruptcy action was anything other than an arms-length transaction, and that [Chantal] retained any rights in Ethocyn after the sale". Apart from praying that such estoppel prevents the US Defendants from "asserting the existence of a trust related to the Ethocyn [Rights] and assets in this action", BCS requests the court for "any such [order] and further relief" to which it may be entitled.

59 Before us, Mr Thio argued that while the claim in judicial estoppel was mounted on the basis that the US Defendants should not be allowed to raise the Trust in response to BCS's claim that monies were owing to them, this was to treat the issue of enforcement as a sword as opposed to a shield, the latter being

the case in Suit 3. Furthermore, BCS's claim in judicial estoppel in the Californian Proceedings does not undermine the Suit 3 Judgment, since the appellants had paid the sums that were adjudged by the SICC to be due on the taking of the accounts following that judgment.

60 Both these submissions do not pass muster in our respectful view. The claim in judicial estoppel is, in substance, directed at the enforcement of the Trust. In this regard, we see no reason for the purposes of the present appeal to distinguish between enforcement as a sword or shield. The prevention of the US Defendants in the Californian Proceedings from "asserting the existence of a trust relating to the Ethocyn rights and assets in [that] action", and the appellants' position in Suit 3 that the Trust would be unenforceable under Californian (and Singapore) law, are merely different sides of the same coin. Indeed, in Suit 3, the appellants had relied on precisely the *same factual basis* as in the claim in judicial estoppel to argue that the alleged Trust was illegal as a matter of Singapore law and California law, having been set up for the purpose of defrauding creditors (see the Suit 3 Judgment at [258] and [279]). It was argued that the performance of the Trust Agreement was unlawful as Chantal had made false declarations and continued to conceal her beneficial interest in the Ethocyn Rights (see the Suit 3 Judgment at [258]). The appellants also contended that these false declarations made by her in the US Bankruptcy Proceedings was criminal conduct under Crimes and Criminal Procedure 18 USC (US) §§ 152 and 157 (see the Suit 3 Judgment at [279]). The appellants had argued that because the false declarations constituted a fraud on the court, public policy prohibited the enforcement of the Trust as a matter of California law (see the Suit 3 Judgment at [283]).

61 In Suit 3, the SICC examined whether the Trust Agreement would be invalid or unenforceable by reason of illegality or as against public policy under Singapore law (which was found to govern the Trust Agreement) and California law (which parties had submitted on). It determined that, under Singapore law, the Trust Agreement was not illegal, void or unenforceable as being contrary to public policy, and even if it was, the appellants nevertheless held the Trust Assets and Trust Moneys on a resulting trust for the Estate (see the Suit 3 Judgment at [276]). Further, under California law, the Trust Agreement would be valid and enforceable as an express trust or at the very least a resulting trust (see the Suit 3 Judgment at [290]). In arriving at this determination, it found that this was so even if Chantal's purpose of creating the Trust was illegal, applying the principles in *In re Torrez* (as noted at [20] above; see the Suit 3 Judgment at [282]). Chantal's false declarations in the US Bankruptcy Proceedings also did not rise to the level of a fraud on the court and did not violate US public policy (as noted at [21] above; see the Suit 3 Judgment at [286] and [289]). It is therefore clear to this court that the claim in judicial estoppel was in substance raised and decided in Suit 3.

62 The appellants contend that the Suit 3 Judgment cannot be undermined by the Californian Proceedings since they have already paid the amounts due on the taking of accounts. That argument is plainly misconceived, when one has regard to the breadth of the claims pursued by BCS in the Californian Proceedings. The US$2m payment claimed by BCS in those proceedings (the subject of the Intercepted Payment Claims) is indubitably part of the Trust Moneys, being monies said to be owed to BCS pursuant to the supply and distribution agreement between BCS and Nu Skin. Further, BCS takes the position in those proceedings that it "owns all trademark rights related to Ethocyn", and has on that basis commenced the Trademark Claims relating to

conversion and breach of fiduciary duty. BCS also pursues claims under the Racketeer Influenced And Corrupt Organizations Act, 18 USC (US) §§ 1962(b) and 1962(c), the California Business & Professions Code (US) §§ 17200 for unfair competition, and civil conspiracy premised on, *inter alia*, the US$2m payment and the alleged fraudulent assigning of those trademark rights related to Ethocyn. Pursuant to all these claims it seeks, amongst other things, injunctive relief to stop the US Defendants from "illegally using Ethocyn trademark rights that should still belong" to BCS, "restitution for all money and trademark rights lost as result of [their] wrongful activities", and punitive damages.

63 It is therefore clear that if BCS succeeds in its claim in judicial estoppel in the Californian Proceedings, this would result in the US Defendants being liable to it for the Trust Assets and Trust Moneys that were determined in Suit 3 to belong to the respondent (see the Suit 3 Judgment at [299]–[300]). It will also fly in the face of the SICC's finding that "throughout each stage of the development of the Ethocyn business, to the date of Chantal's death and beyond … Chantal had always been the beneficial owner of the Ethocyn Rights, the Trust Moneys and the Trust Assets" (see the Suit 3 Judgment at [187]). In the circumstances, we have no doubt that the claim in judicial estoppel pursued by BCS in the Californian Proceedings amounts to an undermining of the key findings in the Suit 3 Judgment as regards the existence and enforceability of the Trust.

(B) Abuse of the forum court's process and vexatious and oppressive conduct as separate grounds for an ASI

64 As mentioned above, the issuance of an ASI in the present case can be justified on both the grounds of an abuse of the forum court's process on the

part of the appellants as well as vexatious and oppressive conduct. Although the distinction between these two grounds may not have been explicitly stated in much of the case law, it is nevertheless implicit; and the cases illustrate how the two grounds, while conceptually distinct, may often arise on the same facts. The present circumstances, where the forum court has already issued a judgment, is a case in point. This was referred to by the SICC as consecutive proceedings, as opposed to concurrent proceedings, where such a judgment has yet to be rendered at the time when the action was commenced in the foreign jurisdiction. We elaborate on these two grounds for the issuance of an ASI and consider the relevance, if any, of the distinction between consecutive and concurrent proceedings, before considering the relevance of the natural forum requirement in the context of this appeal.

65 The instances in which an ASI may be granted on the basis of an abuse of the forum court's process include where, as in the present case, the defendant to an ASI seeks to relitigate abroad a case in which judgment has already been obtained against him in the forum court (*Masri* at [95]); and where insolvency proceedings have been commenced in the forum court, and the defendant attempts by way of the foreign proceedings to obtain an advantage over other creditors (*Lee Kui Jak* at 892–893; Richard Fentiman, *International Commercial Litigation* (Oxford University Press, 2nd Ed, 2015) at paras 16.69, 16.71 and 16.73–16.74).

66 This ground for the issuance of an ASI can also include the defendant to an ASI seeking to litigate abroad issues which *could and should* have been the subject of a decision in the forum court (*Elektrim SA v Vivendi Holdings 1 Corporation* [2009] 1 Lloyd's Rep 59 ("*Elektrim*") at [85]; Thomas Raphael QC, *The Anti-Suit Injunction* (Oxford University Press, 2nd Ed, 2019)

("*Raphael*") at para 4.69). For example, in *Glencore International AG v Exter Shipping Ltd & Ors* [2002] CLC 1090, several shipowners commenced proceedings in the US District Court for the Northern District of Georgia against Glencore International AG ("Glencore") while litigation in England, in which they had fully participated against Glencore, was ongoing. The English High Court observed that in so far as the shipowners sought to pursue claims against Glencore or another party, Metro Trading International Inc ("MTI") in the US, on the basis that the relationship between them amounted to a partnership, those claims "could and should have been raised" prior to the trial at the second phase of the English litigation, where the nature of the said relationship had been exhaustively canvassed, and partly determined therein (at [34] and [38]). Thus, "to cover the same ground for a second time in new proceedings would risk undermining the decisions made in phase 2 and would place an enormous burden on Glencore and (if it chose to participate) MTI" (at [38]). The ASI granted in that case was affirmed on appeal.

67 It is accepted that the courts of two different jurisdictions can have jurisdiction over the same dispute, and concurrent proceedings in different jurisdictions does not necessarily constitute vexatious and oppressive conduct (*Karoon* at 59). But where a judgment on the merits has already been issued, it would be "hardship" for one of the parties to have to litigate matters which have already been determined in its favour before another court (*Arab Monetary Fund v Hashim & Others (No 6)* (1992) Times, 24 July).

68 These dual grounds for the issuance of an ASI were engaged in *Masri*, where the applicant for an ASI had successfully obtained an English judgment for damages for breach of contract against several defendants including two Lebanese companies. However, the Lebanese companies subsequently brought

an action in Yemen for a declaration that they were not liable to the claimant in the English proceedings. Lawrence Collins LJ accepted that it was settled law, at least since the decision in *Booth v Leycester* (1837) 1 Keen 579, that the "fact that the respondent is seeking to relitigate in a foreign jurisdiction matters which are already *res judicata* between himself and the applicant by reason of an English judgment can be sufficient ground for the grant of an [ASI]" (at [82]–[83]). The Lebanese companies were "seeking to relitigate abroad the merits of a case which, after a long trial, they have lost in England": this was a "classic case of vexation and oppression, and of conduct which [was] designed to interfere with the process of the English court in litigation to which the judgment debtors submitted" (at [95]).

69 The principle in *Masri* was subsequently applied by Prakash J (as she then was) in *Beckkett Pte Ltd v Deutsche Bank AG and another* [2011] 1 SLR 524 ("*Beckkett (HC)*"), where the plaintiff company ("Beckkett") had commenced an action against the defendant bank in Singapore in April 2004 seeking, amongst other things, a declaration that the bank's sale of certain shares which had been pledged as security for a loan was invalid and should be set aside. After the High Court had issued its judgment and while the matter was pending decision on appeal, Beckkett brought an action in the South Jakarta District Court claiming the same reliefs as those sought in the Singapore action (*ie*, a declaration that the bank's sale was illegal and legally defective), and relying on the same grounds as those in the Singapore action (*ie*, it was based on *penetapans* or court orders which had been successfully challenged by Beckkett and revoked, and there was therefore a violation of certain provisions of the Indonesian Commercial Code). Prakash J found that the plaintiff had "commenced its course of vexatious conduct" by starting the Indonesian proceedings (at [35]):

> … Beckkett was uncertain of the relief that it would get from the Court of Appeal and therefore sought to secure its position by seeking the same relief from the Indonesian courts. If Beckkett indeed got the relief it prayed for in Indonesia before the Court of Appeal's judgment was given, that must have threatened the jurisdiction, processes and judgments of the Singapore courts and undermined the principle of finality.

Prakash J further opined that "it was an abuse of the process of the Singapore courts for Beckkett to take steps in Indonesia" and that Beckkett had thereby "undermined the processes of the Singapore courts and the principle of finality of litigation" (at [42]–[43]). Accordingly, Prakash J granted an ASI restraining Beckkett from prosecuting or continuing to prosecute the Indonesian action. Prakash J's decision was affirmed on appeal by this court, which considered that Beckkett had thereby engaged in "blatant, opportunistic and egregious abuse", having "stealthily [engaged] in the Indonesian action" after having placed "the substantive merits of the Singapore action before this court" (*Beckkett (CA)* at [20]).

The distinction between consecutive and concurrent proceedings

70 As mentioned above, the SICC drew a distinction between consecutive proceedings, where the forum court has already issued a judgment; and concurrent proceedings, where such a judgment has yet to be rendered at the time when the action was commenced in the foreign jurisdiction. We observe that it is almost inevitable that whenever there are two actions pending before the courts in two different jurisdictions in respect of the same dispute, one of the two courts would issue a judgment before the other. The question then arises as to what significance such a development should play in the exercise of the discretion in deciding whether to grant an ASI. What is clear is that the forum court cannot ignore this development.

71 Where the *foreign court* has issued a judgment, it would ordinarily not be appropriate to order an ASI which would interfere with that judgment by preventing reliance abroad on, or compliance with that judgment (*Masri* at [90]–[94]). So in *E.D. & F. Man (Sugar) Ltd v Yani Haryanto (No. 2)* [1991] 1 Lloyd's Rep 429, where there had been proceedings in England and Indonesia with judgments rendered in both courts, the English Court of Appeal held that while the defendant to the ASI ("Mr Haryanto") would be faced with an issue estoppel in the English proceedings and the foreign judgment would not be enforceable in England if it was inconsistent with a previous decision of a competent English court, it "would be wrong" for an ASI to be issued to prevent the reliance by Mr Haryanto on the Indonesian judgment in Indonesia or any third countries (at 437–438). That consideration, however, does not arise here as we are concerned with a situation where only the *forum court* has issued a judgment. Under such circumstances, the considerations of an abuse of the forum court's process and relitigation in the foreign jurisdiction as outlined at [53]–[54] above would apply.

72 It is therefore crucial for the forum court to examine the status of the two proceedings at the time when the ASI is sought. While we note for completeness that the need to protect the judgments of the forum court extends to anticipated judgments of the court (see, *eg*, *Ardila Investments NV v ENRC NV* [2015] EWHC 1667 (Comm)), such a need is underscored where a judgment has already been issued by the forum court at the time when the ASI is sought. In this regard, it is significant that here, the ASI was only sought by the respondent *after* the disposal of the appellants' appeal in CA 76: that is, after the Singapore courts had *conclusively* determined the enforceability of the Trust, and the rights of the respondent to the Trust Assets and Trust Moneys. To the extent that BCS's claims in the Californian Proceedings sought to challenge or relitigate

the findings in the Suit 3 Judgment, that would clearly constitute an abuse of the forum court's process *and* vexatious and oppressive conduct.

The relevance of the natural forum requirement

73 Where an injunction is sought on the basis that the defendant's conduct constitutes an abuse of the forum court's process, it is not generally necessary to demonstrate that the court is the natural forum for the dispute which is the subject matter in the foreign court (see, *eg*, *Owners of the Ship "Al Khattiya" v Owners and/or Demise Charterers of the Ship "Jag Laadki"* [2018] 2 Lloyd's Rep 243 at [109]–[110]; *Masri* at [83]–[96]; *Raphael* at paras 4.66–4.67). The existence of a sufficient interest on the part of the forum court will "generally be self-evident" in cases where the injunction is necessary for the protection of the processes, jurisdiction or judgments of the forum court (*SAS Institute Inc v World Programming Ltd* [2020] EWCA Civ 599 at [109]). As explained in *Raphael* at para 4.67, with reference to the English court:

> … The logical basis of the injunction is that the English court's jurisdiction needs to be protected, and if that is necessary then an injunction is legitimate *whether or not the English court is the natural forum for the underlying litigation.* The English court is the only appropriate court to assess the question of whether its processes need protection, and clearly has a 'sufficient interest' in doing so. …
>
> [emphasis added]

74 This stands to reason: in issuing an ASI on the basis that the defendant's commencement or continuation of foreign proceedings is vexatious and oppressive, the court typically considers whether it is the natural forum to resolve the dispute because comity requires that the forum court has *sufficient interest* or *sufficient connection* with the case before it grants an ASI (*Airbus Industrie G.I.E. v Patel and others* [1999] 1 AC 119 ("*Airbus Industrie*")

at 138–139; *Halsbury's Laws of Singapore – Conflict of Laws* vol 6(2) (LexisNexis, 2020 Reissue) at para 75.129). This is because the forum court has no superiority over a foreign court in deciding what the justice between the parties requires, and comity suggests that the foreign court should decide whether the action in that court should proceed. There must therefore be "a good reason why the decision to stop the foreign proceedings should be made here rather than there" (*Barclays Bank plc v Homan and others* [1993] BCLC 680 at 687). In the context of ASIs granted on the ground of vexation and oppression, the natural forum requirement is thus merely a proxy for the forum court to establish sufficient interest in the dispute. In other words, the fact that the forum court may not be the natural forum of the dispute does not necessarily mean that the forum court does not have sufficient interest in the dispute.

75 Hence, in alternative forum cases, where the two actions are still pending and the choice is between the forum court in which the ASI is sought and some other foreign court, an ASI is normally granted where the former is the natural forum for the resolution of the dispute and the other requirements for granting an ASI are met. In such cases, there is no infringement of comity (*Airbus Industrie* at 134). But in single forum cases, where an ASI is sought to restrain a party from proceeding in a foreign court which alone has jurisdiction over the relevant dispute, it may nevertheless be possible to establish a sufficient connection with the forum court in which the ASI is sought (*Airbus Industrie* at 139). This may be the case when there is a need to protect the jurisdiction of the forum court in the administration of ongoing insolvency proceedings (*Stichting Shell* at [24]), where the relevant transactions may be considered as predominantly of the character of the forum court (*Airbus Industrie* at 138, citing *Midland Bank Plc v Laker Airways Ltd* [1986] QB 689), or to protect the public policies of the forum (*Airbus Industrie* at 139, citing *Laker Airways Ltd*

v Sabena, Belgian World Airlines 731 F 2d 909 at 926–927). As noted by Lord Goff in *Airbus Industrie*, the single forum cases "demonstrate that any limiting principle requiring respect for comity cannot simply be expressed by reference to the question [of natural forum]" (at 138).

76 Thus, although the requirement for sufficient interest is naturally met where the court issuing the ASI is the natural forum for the proceedings, the converse is not inexorably true. The forum court may still have sufficient interest notwithstanding it may not be the natural forum for the dispute in the foreign proceedings. In *Shell International Petroleum Co Ltd v Coral Oil Co Ltd* [1999] 2 Lloyd's Law Rep 606, the English High Court took the view that although both Lebanon and England could be regarded as a natural forum for the claim, it could not be concluded that England was *the* natural forum for the claim. Nevertheless, the English court had "very strong interest" in ensuring that the plaintiff, who had already obtained an ASI in England restraining the defendant from pursuing a prior related claim in Lebanon, "not [be] subject to further vexatious litigation" in the form of the defendant proceeding on another claim in Lebanon (at 610). Given that the parties were English companies whose previous contractual relationship had been governed by English law and variously provided for the exclusive jurisdiction of the English courts or arbitration in London, the court had "little doubt" that the English court was "*the* natural forum" to determine the question of "whether the claim [in Lebanon] should be treated as vexatious" (at 610) [emphasis in original].

77 In our judgment, in deciding whether the proceedings are consecutive or concurrent, what is relevant is not simply the dates when the two actions were commenced and the status of the two proceedings when they were commenced. Instead, what is material is to examine when the specific claim to which the ASI

is directed to enjoin (as opposed to the action itself) was introduced in the foreign proceedings. Here, at the time when the claim in judicial estoppel was first raised in the Californian Proceedings (on 27 April 2021), the Suit 3 Judgment had already been delivered (29 April 2020) and the appeal against the same dismissed (on 19 January 2021). Therefore, strictly speaking, the Californian Proceedings in so far as the claim in judicial estoppel is concerned was consecutive to the Suit 3 Judgment. And where, as in the present case, a judgment on the merits has been issued in the forum court which is in substance identical to the specific dispute raised in the foreign proceedings, it would be plainly incongruous and perhaps even disingenuous for the party resisting the ASI to suggest that the natural forum for that dispute is nonetheless in some other jurisdiction. In such a situation, the need to protect the judgment of the forum court is even more compelling than simply to examine the sterile question as to whether the natural forum for the dispute is in another jurisdiction.

(C) Whether BCS's pursuit of the Californian Proceedings was an abuse of the forum court's process and/or vexatious and oppressive

78 We next consider the judicial estoppel claim which is the focus of the appellants' appeal before briefly addressing, for completeness, the other claims pursued by BCS in the Californian Proceedings. We note, at the outset, that the claims in the Californian Proceedings substantially rest on the factual premise that: (a) BCS had "obtained the rights to Ethocyn from [Renslade (S)]", with "all rights in Ethocyn … to be owned by [BCS] with no ownership interest retained by [Chantal]"; and (b) BCS "did not hold the rights in trust for [Chantal] or [the Estate]"; yet, (c) the respondent had in Suit 3 "fraudulently alleged" that Chantal had retained ownership of the rights and assets of the Chantal Companies despite the sale of those rights to Renslade (NZ) and its subsequent transfer to Renslade (S) and BCS, and that the appellants were therefore holding

those rights and assets as well as the resulting assets on trust for Chantal and the Estate. It is pleaded that "because Singapore does not apply the doctrine of judicial estoppel … [the respondent] was allowed to proceed and ultimately prevailed at great expense to [BCS]".

79 In our judgment, it is clear that the claim in judicial estoppel directly contradicts the findings by the SICC in Suit 3 that the Ethocyn Rights, which were transferred from Renslade (NZ) to Renslade (S) and later BCS, and all income and proceeds from the exploitation of the same would be held on trust for Chantal, save that Weber was entitled to deduct 5% for his commission (see the Suit 3 Judgment at [223]). The SICC had also found that the Trust would be recognised under California law (see the Suit 3 Judgment at [240]). The Trust was found to be enforceable notwithstanding the appellants' submissions on illegality and public policy, which included the same representations relied on by BCS in support of its claim in judicial estoppel (see the Suit 3 Judgment at [276], [282] and [289]).

The claim in judicial estoppel

80 The appellants additionally argue that they could not reasonably be expected to have raised the doctrine of judicial estoppel in Suit 3, because: (a) the doctrine does not apply here; and (b) the judicial estoppel claim is a matter of procedure governed by the *lex fori*, and would therefore likely have been rejected by the SICC as a procedural rule that is only applicable in the US.

81 We reject both arguments. It is inherent in a world with different legal systems that parties may rely on the same subject matter to formulate different causes of action. The different labelling of an underlying cause of action or defence is not decisive in assessing whether the appellants ought to have raised

it in Suit 3. What is crucial is to examine the *substance* of the cause of action or defence raised in the foreign proceedings. In *Elektrim*, in the context of an ASI issued to enforce a "no-action" clause of a bond under Trust Deed (under which the bondholders could only act collectively through the trustees), Collins LJ found that the tortious claim in fraud pursued by the defendant to the ASI (the assignee of the bond) before the court in Florida, US was *in effect* the "mirror image of contractual claims for breach of the Trust Deed" brought in England (at [104]–[105] and [107]). Although the claim in Florida was framed as a *different* cause of action, the English Court of Appeal agreed with the court below that the claim in substance fell within the same "no action" clause. Similarly, here, once the substance of the claim in judicial estoppel is properly examined, there can be no doubt that it is substantially the same as the enforceability of the Trust issue which was raised and importantly decided in Suit 3.

82 Crucially, both of the appellants' arguments ignore the undeniable fact that the doctrine of judicial estoppel was not raised in circumstances where the appellants had already raised other US doctrines (and indeed procedural rules) such as fraud on the court under r 60(d)(3) of the Federal Rules of Civil Procedure (US), which provides that the court may "set aside a judgment for fraud on the court" (see the Suit 3 Judgment at [283]). This was held in *In re Roussos* 541 BR 721 (Bankr C D Cal. 2015) to be a "codification of the Court's inherent power … to investigate whether a judgment was obtained by fraud" (at 729). The appellants had argued that this meant that the sale of the Ethocyn Rights with the sanction of the US Bankruptcy Court would be void *ab initio*; and the doctrine of unclean hands as recognised under California law would "apply to bar [Chantal] or the administrator of her estate, [the respondent], from asserting an interest" in the Trust Assets. These were among the detailed written

submissions of the appellants on both US bankruptcy law and California trusts law (which numbered 54 and 41 pages respectively), whose experts also testified orally before the SICC in February 2020.

83 The SICC was therefore fully justified in finding that it was "entirely unsatisfactory", in light of the parties' extensive submissions on California law in Suit 3, that the appellants did not raise the judicial estoppel claim before it, as well as the question of characterising the same (see the Judgment at [81]–[82]).

84 It is moreover disingenuous of the appellants to claim that they had *bona fide* reasons for not raising the claim in judicial estoppel in Suit 3, because it is a matter of procedure to be raised in the *lex fori*. It is not that they had raised the defence but was disallowed by the SICC on procedural grounds. Instead, it appears to us that the judicial estoppel claim was either an afterthought or kept in reserve. The fact that the appellants had raised numerous US defences to resist the claim in Suit 3, but only brought its claim in judicial estoppel in the Californian Proceedings *after* the conclusion of CA 76, strongly suggests the latter. We therefore agree with the SICC that the timing of the claim suggests that it was "strategically concealed by BCS, to be deployed in the event that [CA 76] did not end in its favour" (see the Judgment at [77]).

85 In connection with this, at the time of the filing of the First Amended Complaint in which the claim in judicial estoppel was added, the proceedings in Singapore for the taking of accounts following the Suit 3 Judgment were ongoing. Yet, as mentioned above, that claim directly contradicts the findings made by the SICC in the Suit 3 Judgment. If BCS were to be successful in its claim in judicial estoppel in the Californian Proceedings, that would have an

impact on the efficacy of any orders made by the SICC in SUM 25. There was therefore clearly an abuse of the forum court's process by BCS in seeking to subvert the proceedings in Suit 3, before the quantum of the appellants' liability to the respondent had been ascertained by the forum court.

86 The fact that the claim in judicial estoppel engages issues of US public policy (and that it would therefore militate against comity to grant an ASI) is also not determinative. While considerations of comity do weigh in the court's determination of whether the injunction should be granted and requires that the jurisdiction be exercised with caution (*Lakshmi* at [108]), the principle of comity must be weighed against the affront to the integrity of the forum court's processes, jurisdiction and judgments. As observed by this court in *Beckkett (HC)* at [45]–[46] and *Beckkett* (CA) at [24], arguments on comity do not assist a plaintiff who commences a "duplicate law suit" in a foreign jurisdiction after a judgment has been handed down, and continues that foreign action even after an appeal on the judgment has been concluded. In that situation, it is the plaintiff's own acts which has placed both courts in an "unhappy position in so far as comity [is] concerned".

The other claims in the Californian Proceedings

87 We agree with the assessment of the SICC that BCS's pursuit of the Intercepted Payment Claims as well as part of the Trademark Claims also amounts to a relitigation of the issues as regards the existence and enforceability of the Trust which were determined in Suit 3. It follows that this would also undermine the Suit 3 Judgment on these key findings.

88 It is clear to us that the US$2m payment that is the subject of the Intercepted Payment Claims is part of the Trust Moneys. In so far as the

Trademark Claims rest on the alleged beneficial ownership of the Ethocyn Rights by BCS, this also contradicts the Suit 3 Judgment, which declares that BCS and/or Renslade (HK) hold on trust for the respondent, *inter alia*, "the intellectual property rights to the inventions and the patents of Ethocyn ('the Ethocyn Rights') and 95% of any income or proceeds generated from the Ethocyn Rights ('the Trust Assets') … and any other income or proceeds generated from the Trust Assets".

89 However, the Wrongful Settlement Claims were not raised in Suit 3, as they relate to the Settlement Agreement which BCS averred it only became aware of in July 2021, when BCS sought information from Nu Skin. In the Third Amended Complaint, BCS pleads that if the Settlement Agreement is valid, then the respondent had "released valid causes of action against [Nu Skin] that rightfully belonged to [BCS]". The respondent had also "transferred certain of [BCS's] rights to [Nu Skin] as a condition of settlement and thereby deprived [BCS] of its property". Further, money that was allegedly paid by Nu Skin to the respondent as part of the agreement "rightfully belongs to [BCS]", and should be paid over to BCS. We note that while the Wrongful Settlement Claims were not raised and therefore not strictly decided in Suit 3, it remains open to the respondent to assert in the Californian Proceedings that the Wrongful Settlement Claims ultimately relate to the Ethocyn Rights that belong to the respondent or the Estate.

90 Accordingly, we find that BCS's pursuit of the Californian Proceedings was indeed an abuse of the forum court's process and vexatious and oppressive, and agree with the scope of the ASI as ordered by the SICC.

(D) Whether the grant of the ASI deprived BCS of any legitimate advantage in California

91 Finally, the appellants argue that the doctrine of judicial estoppel is a juridical advantage that BCS can enjoy only before the US courts, and injustice is occasioned to it as the ASI extinguishes BCS's only opportunity to be heard on that claim. While such an argument does not assist the appellants in the context of an ASI that is granted post-judgment on the basis of an abuse of the forum court's process (see [56] above), in the context of an ASI granted on the basis of vexatious and oppressive conduct, this factor must nevertheless be balanced against whether or not injustice would be caused to the applicants for an ASI by not granting the injunction (*Evergreen International SA v Volkswagen Group Singapore Pte Ltd and others* [2004] 2 SLR(R) 457 at [42]; *VKC v VJZ and another* [2021] 2 SLR 753 ("*VKC*") at [35]).

92 The SICC did not err in issuing the ASI despite the fact that the claim in the *form* of the US doctrine of judicial estoppel would only be actionable in the US. The introduction of that claim in the Californian Proceedings three months after the appeal in CA 76 was dismissed indeed suggests that any such juridical advantage was "cynically created" (*VKC* at [48]). For example, in *VKC*, the appellant, one of 15 beneficiaries of an estate, commenced proceedings in Indonesia. She claimed that certain notices published in Indonesia by the administrators of the estate, which invited all creditors of the next-of-kin interested in or having claims against the estate to contact the respondents, directly affected her rights as a beneficiary of the estate. However, she later negotiated and entered into another settlement agreement with other beneficiaries, which provided that the beneficiaries from another family would be paid first. This undermined the basis for her claims in the Indonesia proceedings in that she must have thought that there would be insufficient

moneys to satisfy her entitlement under a previous settlement agreement. This court therefore rejected her submission that her claim in tort in the Indonesian proceedings was a legitimate juridical advantage that was not actionable in Singapore, as that claim was clearly not pursued in good faith.

93 Similarly, as mentioned above, the timing at which the judicial estoppel claim was introduced in the Californian Proceedings, *after* issues of illegality and public policy had been extensively canvassed in Suit 3, suggests that it is being cynically pursued as another route for the appellants to contest what had already been the subject of the Suit 3 Judgment, which was upheld in CA 76. The SICC was fully justified in issuing the ASI, given that more injustice would be occasioned to the respondent in having to relitigate matters already decided in that judgment, were the injunction not issued.

Conclusion

94 For all the foregoing reasons, we dismiss the appeal. In the light of our decision, the appellants are to take steps to withdraw from the Californian Proceedings the claims which are within the ambit of the ASI.

95 The appellants are to pay to the respondent the cost of the appeal and the application for leave to adduce fresh evidence in the appeal, fixed at S$40,000 inclusive of disbursements. The usual consequential orders will apply.

Steven Chong
Justice of the Court of Appeal

Belinda Ang Saw Ean
Judge of the Appellate Division

Arjan Kumar Sikri
International Judge

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