IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2024] SGHC 21

Originating Claim No 231 of 2023 (Summons No 2078 of 2023)

Between

Cheong Jun Yoong

… *Claimant*

And

(1) Three Arrows Capital Ltd
(2) Christopher Farmer (in his capacity as a duly appointed liquidator of Three Arrows Capital Ltd)
(3) Russell Crumpler (in his capacity as a duly appointed liquidator of Three Arrows Capital Ltd)

… *Defendants*

GROUNDS OF DECISION

[Civil Procedure — Service]
[Conflict of Laws — Natural forum]

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Cheong Jun Yoong
v
Three Arrows Capital Ltd and others

[2024] SGHC 21

General Division of the High Court — Originating Claim No 231 of 2023
(Summons No 2078 of 2023)
Chua Lee Ming J
8 August 2023

26 January 2024

Chua Lee Ming J:

Introduction

1 This was an application by the defendants to set aside an order of court granting the claimant approval to serve this Originating Claim out of Singapore on the defendants, and, consequently, to set aside the service of the Originating Claim that was effected on the defendants pursuant to the order of court. One of the issues raised was where cryptoassets are situated.

2 The first defendant, Three Arrows Capital Ltd (the "Company") was incorporated on 3 May 2012 in the British Virgin Islands ("BVI") as an investment fund in the business of trading and dealing in cryptocurrency and other digital assets. On 27 June 2022, a BVI court placed the Company under liquidation (the "BVI Liquidation Proceedings") and appointed the second

defendant, Mr Christopher Farmer, and the third defendant, Mr Russell Crumpler, as the liquidators (together, the "Liquidators").[1]

3 At the material time, the claimant, Mr Cheong Jun Yoong, managed a portfolio of assets in the Company. In this action, the claimant claims that the portfolio of assets managed by him constituted a standalone fund carrying the brand "DeFiance Capital" (the "DC Fund") and that the assets in the DC Fund (the "DC Assets") were held on trust by the Company for the benefit of the claimant and other investors in the DC Fund (the "DC Investors").

Background

The 3AC Group

4 The Company was set up by Mr Su Zhu ("SZ") and Mr Kyle Livingston Davies ("KD") and registered as a "Professional Fund" with the Financial Services Commission of the BVI (the "BVI FSC").[2]

5 Until September 2021 the Company's investment manager was Three Arrows Capital Pte Ltd ("TACPL"), a company incorporated in Singapore; in September 2021, ThreeAC Ltd ("3ACL"), a company incorporated in the BVI, took over as the Company's investment manager.[3]

6 The Company operated a master-feeder fund structure:[4]

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1 1st affidavit of Russel Crumpler ("Crumpler's 1st affidavit"), at pp 102–108.

2 Statement of Claim ("SOC"), at para 4; Crumpler's 1st affidavit, at para 11.

3 Crumpler's 1st affidavit, at paras 21–22.

4 Crumpler's 1st affidavit, at paras 12–13 and 16–17.

(a) The Company was the master fund. It had an offshore feeder fund and an onshore feeder fund. The *offshore* feeder fund was Three Arrows Fund Ltd ("TAF Ltd"), which was incorporated in BVI and also registered as a "Professional Fund" with the BVI FSC. The *onshore* feeder fund was Three Arrows Fund, LP ("TAF LP"), a Delaware limited partnership.

(b) Investors invested in the master fund via the feeder funds, *ie* by subscribing for (i) shares of various classes offered by TAF Ltd, or (ii) limited partner interests offered by TAF LP. Contractually, the investors' relationship was with the feeder funds.

(c) The feeder funds in turn invested substantially all their assets in the master fund (*ie* the Company) by subscribing for shares of the Company.

7 TAF Ltd was the more significant feeder fund. As of 31 December 2021, 99% of the equity in the Company was owned by TAF Ltd; the remaining 1% was held by TAF LP (the onshore feeder fund).[5]

8 The Company, TAF Ltd, TAF LP, TACPL and 3ACL are referred to in these grounds as the "3AC Group".

9 As stated earlier, on 27 June 2022, the Company was placed under liquidation. On 27 January 2023, TAF Ltd was placed into voluntary liquidation in BVI by its sole member, TACPL.[6]

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5 Crumpler's 1st affidavit, at para 20, p 160.

6 Crumpler's 1st affidavit, at para 18, p 141.

How the DC Fund came about

10 The claimant began investing in cryptocurrency-related investments in 2017. By April 2018, the claimant was managing cryptocurrency-related investments for himself and on behalf of a group of friends and ex-colleagues. The investments were held in cryptocurrency wallets and/or accounts which belonged to the claimant.[7] By November 2019, the claimant was managing about US$900,000 worth of investments and he wanted to formally set up a fund for the investments that he was managing.[8]

11 Between November 2019 and early 2020, the claimant, SZ and KD discussed an arrangement pursuant to which the claimant would use the assets managed by him to launch an independent and standalone fund on the 3AC Group platform, which would be owned and controlled by the claimant (the "Independent Fund Arrangement").[9]

12 According to the claimant, by early 2020, it was agreed that the salient features of the Independent Fund Arrangement would be as follows:[10]

> (a) SZ and KD would procure the entities within the 3AC Group to provide him and his fund access to the 3AC Group's middle and back-office infrastructure/platform, including access to fund administrators and auditors. In consideration for the procurement of such services, he would pay SZ and KD 25% of the management and performance fees that his fund would collect.

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7 SOC, at paras 8–10.

8 Claimant's 1st affidavit, at para 24.

9 SOC, at para 11.

10 SOC, at para 12; Claimant's 1st affidavit, at para 31.

(b) The claimant's fund (eventually, the DC Fund) would be branded as "DeFiance Capital" and would be an independent fund. SZ and KD would procure the Company and other entities in the 3AC Group to keep the assets in the claimant's fund (eventually, the DC Assets) segregated in designated accounts and/or cryptocurrency wallets under the claimant's control.

(c) The claimant would have full control over the assets in his fund, including full control to move the assets out of the 3AC Group platform at any time. SZ and KD would procure that the Company and other entities within the 3AC Group would not deal with the assets without the claimant's approval and/or instructions.

(d) The assets in the claimant's fund would be siloed and the insolvency of either the fund or the 3AC Group would not affect each other.

(e) The claimant and the DC Investors would sign standard form fund documents to invest in the claimant's fund.

13 The Company created sub-accounts for the claimant (the "DC Sub-Accounts") within the Company's main accounts on two cryptocurrency exchanges, Binance and FTX.[11]

14 TAF Ltd created a class of shares called "Class Defiance Shares" and TAF LP created a class of interests called "Class Defiance Interests".

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11 SOC, at para 13; Claimant's 1st affidavit, at para 34.

15 The claimant and the DC Investors subscribed for Class Defiance Shares in TAF Ltd and Class Defiance Interests in TAF LP by entering into subscription agreements with TAF Ltd or TAF LP (the "Subscription Agreements").[12] The Subscription Agreements incorporated the terms set out in the offering memorandum and the memorandum and articles of association of the relevant feeder fund.[13]

16 The claimant and the DC Investors paid for the Class Defiance Shares and Class Defiance Interests by transferring cryptocurrencies and fiat currencies to the DC Sub-Accounts. By May 2022, the claimant had transferred or procured the transfer of USDT 22.3m (cryptocurrency) and further amounts of cryptocurrencies and fiat currencies valued at US$93.8m to the DC Sub-Accounts.[14]

17 The DC Assets thus comprised the cryptocurrencies and fiat currencies that were transferred to the DC Sub-Accounts and other assets that these cryptocurrencies and fiat currencies were used to acquire. These other assets included simple agreements for future equities ("SAFEs") and simple agreements for future tokens ("SAFTs"). The SAFEs and SAFTs were entered into between the Company and various third-party portfolio companies.[15] Under a SAFE, an investor pays an up-front investment and obtains the right to be issued a certain number of shares in the company in future, which is typically triggered upon the occurrence of a specific event. A SAFT is similar except that

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12 Crumpler's 1st affidavit, at para 32.

13 Crumpler's 1st affidavit, at para 38.

14 Claimant's 1st affidavit, at paras 34 and 36.

15 Claimant's 1st affidavit, at paras 42–46.

under a SAFT the investor acquires a right to future tokens (cryptoassets) rather than shares.[16]

Management and administration of the DC Fund

18 The claimant had sole discretion and control over the management of the DC Fund. Only the claimant and his employees knew the passwords that were required to access the DC Sub-Accounts.[17] The claimant sourced a co-working space for himself and his employees.[18]

19 As the DC Fund did not exist as a legal entity, the claimant managed the DC Fund initially as an employee of the Company's then investment manager, TACPL, and subsequently as an employee of TAC Research Pte Ltd ("TRPL"), another company set up by SZ and KD.[19] Where necessary, the claimant instructed the Company's officers, employees or representatives to effect his investment decisions, *eg*, decisions to enter into SAFEs or SAFTs, which had to be entered in the Company's name.[20]

20 The DC Assets were accounted for as forming a separate portfolio of assets associated with the Class Defiance Shares and Class Defiance Interests (at the feeder fund level) and with those shares in the Company that the feeder funds had subscribed to (at the master fund level). In short, the DC Assets were earmarked for the Class Defiance Shares and Class Defiance Interests. In this way, the benefit of any increase in the value of the DC Assets accrued solely to

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16 Crumpler's 1st affidavit, at para 92.

17 SOC, at para 16(c).

18 Claimant's 1st affidavit, at para 38.

19 Claimant's 1st affidavit in OA 317, at para 111.

20 Claimant's 1st affidavit, at para 42.

the holders of the Class Defiance Shares and Class Defiance Interests (*ie*, the claimant and the DC Investors).

21 The claimant also claimed that as a matter of fact, the DC Fund's operations were kept separate from the Company's operations.

22 In October 2021, the Company entered into a licence agreement with Fireblocks Ltd ("Fireblocks"), a proprietary digital assets custody solutions provider, pursuant to which the Company stored cryptocurrency tokens. The Company set up a workspace on the Fireblocks platform solely for the claimant's use to store the cryptocurrency tokens that were part of the DC Assets (the "DC FB Workspace"). Only the claimant and his representatives could access the DC FB Workspace.[21] Apart from the DC Sub-Accounts and the DC FB Workspace, the claimant also stored the DC Assets in "cold wallets" which belonged to him.[22] Cold wallets are wallets that are kept offline (usually on a physical device) for security.

Transfer of the DC Fund out of the 3AC Group

23 In February 2022, SZ and KD told the claimant that they intended to relocate the 3AC Group's operations to Dubai. The claimant decided to continue operating the DC Fund from Singapore. On 9 May 2022, he incorporated DeFiance Ventures Pte Ltd ("DVPL") and on 14 May 2022, he incorporated DeFiance Capital Pte Ltd ("DCPL").[23]

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21 Claimant's 1st affidavit, at para 40.

22 Claimant's 1st affidavit, at para 41.

23 Claimant's 1st affidavit, at paras 54–56.

24 On 14 June 2022, the Company transferred all its rights and interests in the DC FB Workspace, and all the DC Assets that were in the DC Sub-Accounts, to DCPL.[24] These assets comprise cryptoassets in the form of tokens and non-fungible tokens ("NFTs") and are particularised in Schedule 3 to the statement of claim (the "Schedule 3 Assets").

25 Certain DC Assets were not transferred to the claimant and/or DCPL and remain in the Company's possession and/or control. These comprise:[25]

(a) rights and interests in various SAFTs and SAFEs, particularised in Schedule 1 to the statement of claim ("Schedule 1 Assets"); and

(b) shares issued to the Company pursuant to certain SAFEs, particularised in Schedule 2 to the statement of claim ("Schedule 2 Assets").

26 On 20 June 2023, DCPL novated the DC FB Workspace to DVPL because DCPL had commenced operations as the investment manager of a separate new fund that the claimant had established.[26]

The Company's application for recognition of the BVI Liquidation Proceedings

27 On 9 July 2022, the Liquidators filed HC/OA 317/2022 ("OA 317") in which they applied for the BVI Liquidation Proceedings to be recognised in Singapore as a "foreign main proceeding" within the meaning of Article 2(*f*) of the UNCITRAL Model Law on Cross Border Insolvency as adopted in

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24 SOC, at para 22.

25 SOC, at para 24.

26 Crumpler's 1st affidavit, at pp 1132–1138.

Singapore by way of s 252 and the Third Schedule of the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed).[27]

28 On 22 August 2022, the High Court made orders (among other things) recognizing the BVI Liquidation Proceedings as a "foreign main proceeding" in Singapore and staying the commencement and continuation of individual proceedings concerning the property, rights, obligations or liabilities of the Company.[28]

29 On 4 November 2022, the claimant filed an application in OA 317 seeking, among other things, permission to commence proceedings against the Company in connection with the DC Assets.[29] On 25 January 2023, the High Court granted the claimant leave to commence action against the Company in connection with the DC Assets.[30]

The Parallel BVI Proceedings

30 On 4 November 2022, the Liquidators filed an application in the BVI Liquidation Proceedings seeking orders that the DC Assets were assets of and beneficially owned by the Company (the "Parallel BVI Proceedings").[31] The third defendant has stated that the claimant's application for leave to commence proceedings against the Company was *filed after* the Parallel BVI Proceedings had been filed.[32] This was incorrect. The claimant's application was filed on 4

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27 Crumpler's 1st affidavit, at pp 111–114.

28 Crumpler's 1st affidavit, at pp 115–117.

29 Crumpler's 1st affidavit, at pp 478–480.

30 Claimant's 1st affidavit, at p 237 (lines 7–10).

31 Crumpler's 1st affidavit, at pp 312–317.

32 Crumpler's 1st affidavit, at para 48.

November 2022 at 8:55am (Singapore time).[33] While the Parallel BVI Proceedings were stated to have been *submitted* on 3 November 2022 at 4:00pm, they were only *filed* on 4 November 2022 at 8:30am (BVI time),[34] *ie* at 8:30pm (Singapore time) since Singapore is 12 hours ahead of BVI.

31 On 3 February 2023, the claimant filed an application to set aside the BVI court order granting the Liquidators permission to serve the Parallel BVI Proceedings on the claimant in Singapore.[35] The application was heard on 18 and 19 July 2023; judgment was reserved.

The present action and the defendants' application to set aside ORC 2117

32 Pursuant to the leave granted by the High Court, on 18 April 2023, the claimant filed this Originating Claim, in which he claims as follows:

(a) Pursuant to the Independent Fund Arrangement, the Company became a trustee of the trust over the DC Assets.

(b) The Company

(i) holds the Schedules 1 and 2 Assets (see [25] above) as trustee, and

(ii) held the Schedule 3 Assets (see [24] above) as trustee prior to 14 June 2022 (*ie*, the date that these assets were transferred to DCPL),

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33 Crumpler's 1st affidavit, at p 478.

34 Crumpler's 1st affidavit, at p 312.

35 Crumpler's 1st affidavit, at pp 319–325.

under an express trust, resulting trust, *Quistclose* trust and/or common intention constructive trust for the DC Investors as the ultimate beneficial owners.

33 By way of HC/ORC 2117/2023 ("ORC 2117") filed on 10 May 2023, the court gave its approval for the claimant to effect service of the Originating Claim, the statement of claim, Form 10 (Notice of Intention to Contest or Not to Contest) and a sealed copy of the order (the "Court Papers") on the defendants in the BVI.

34 Service was effected on the defendants between 12 May 2023 to 16 May 2023,[36] and on 11 July 2023, the defendants filed the present application to set aside ORC 2117 and the service of the Court Papers on the defendants.

The law on service out of jurisdiction

35 Order 8 r 1(1) of the Rules of Court 2021 ("ROC 2021") provides that an originating process may be served out of Singapore with the Court's approval if it can be shown that "the Court has the jurisdiction or is the appropriate court to hear the action". The claimant's application for approval to serve out of the jurisdiction was based on the Singapore Court being the appropriate court to hear the action.

36 The question of whether Singapore is the more appropriate forum for the action only arises for determination if the court is first satisfied that there is at least another available forum: *Oro Negro Drilling Pte Ltd and others v Integradora de Servicios Petroleros Oro Negro SAPI de CV and others and*

[36] Memorandum of Service dated 20 June 2023.

another appeal (Jesus Angel Guerra Mendez, non-party) [2020] 1 SLR 226 ("*Oro Negro*") at [80(a)].

37 Paragraph 63(2) of the Supreme Court Practice Directions 2021 ("SCPD 2021") provides that for purposes of showing why the Singapore Court is the appropriate court to hear the action, the claimant must show that:

(a) there is a good arguable case that there is sufficient nexus to Singapore; sufficient nexus may be shown by reference to any of the non-exhaustive list of factors set out in para 63(3);

(b) Singapore is the *forum conveniens*; and

(c) there is a serious question to be tried on the merits of the claim.

38 Where a defendant applies to set aside an order for service out of jurisdiction, the burden remains on the plaintiff to demonstrate that the three requirements set out above are satisfied: *Zoom Communications Ltd v Broadcast Solutions Pte Ltd* [2014] 4 SLR 500 ("*Zoom Communications*") at [71], [72] and [75].

39 With respect to showing sufficient nexus to Singapore, the position under the ROC 2021 largely reflects that under the Rules of Court 2014 (Cap. 322, R 5, 2014 Rev Ed) ("ROC 2014"), for which, see *MAN Diesel & Turbo SE and another v IM Skaugen SE and another* [2020] 1 SLR 327 ("*MAN Diesel*") at [27], where the Court referred to *Zoom Communications* at [26] and *Oro Negro* at [54]. One difference is that the list of factors set out in para 63(3) of the SCPD 2021 are non-exhaustive. In contrast, previous case law had treated the list of corresponding factors set out in O 11 r 1 of the ROC 2014 as exhaustive such that a claim "must come within the scope of one or more" of

factors set out in O 11 r 1: see Ian Mah and Aaron Yoong, "Service out under the new Rules of Court" (2023) 35 SAcLJ 174 at para 23.

40 With respect to the requirement that Singapore is the *forum conveniens*:

(a) The claimant has to demonstrate that Singapore is, on balance, the more appropriate forum; Singapore would be the more appropriate forum if it has the most real and substantial connection with the disputes raised: *Oro Negro* at [80(b)] and [80(c)].

(b) It is not sufficient for the claimant to show that Singapore is one of the multiple forums which are comparatively equal; Singapore must be shown to be the more appropriate forum: *Kuswandi Sudarga v Sutatno Sudarga* [2022] SGHC 299 at [37]–[41].

(c) The court is primarily concerned with the quality, rather than the quantity, of the connecting factors: *MAN Diesel* at [128].

41 A claimant must provide full and frank disclosure of all material facts when applying for approval for service out; a failure to do so may be a sufficient basis to set aside the order granting such approval: *Oro Negro* at [54], citing *Zoom Communications* at [68]–[69].

Whether there was sufficient nexus to Singapore

42 The claimant relied on the following factors to establish sufficient nexus to Singapore:

(a) Relief was sought against the Company which was ordinarily resident or carrying on business in Singapore: SCPD para 63(3)(a).

(b) The claim was made to assert, declare or determine proprietary rights in or over movable property, or to obtain authority to dispose of movable property, situated in Singapore: SCPD para 63(3)(i).

(c) The claim was founded on a cause of action arising in Singapore: SCPD para 63(3)(p).

The claimant only had to show a good arguable case with respect to any one of the above factors.

Whether the Company was ordinarily resident or carrying on business in Singapore

43 The residency of a company is where the central management and command or control of the company is exercised: *Wishing Star Ltd v Jurong Town Corp* [2004] 1 SLR(R) 1 at [4]; *Lim Chee Twang v Chan Shuk Kuen Helina and others* [2010] 2 SLR 209 at [99].

44 It was not disputed that the Company had carried out its operations and conducted its trading activities from its Singapore premises.[37] This ceased after the Company was placed under liquidation.

45 The defendants argued that:

(a) The Company was ordinarily resident in the BVI because various courts including the Singapore court have found that the BVI was the Company's centre of main interest, *ie*, where its central administration took place.

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37 Crumpler's 1st affidavit in OA 317, at para 32.

(b) The Company ceased to carry on business in Singapore since it was placed under liquidation.

46 The claimant noted that there was no reported decision on the relevant time at which to assess residency in the context of a company under liquidation. The claimant submitted that the residency of an insolvent company had to be assessed by reference to when it was alive and flourishing. The claimant argued that otherwise, a Singapore court would never be able to find jurisdiction in a claim against an insolvent foreign company even where, at all material times prior to its insolvency, the company was resident in Singapore.

47 I disagreed with the claimant. In my view, the question as to whether the Company was ordinarily resident or carrying on business in Singapore had to be determined at the time that the application for service out of jurisdiction was filed or heard. The court's jurisdiction is primarily territorial in nature. Jurisdiction over a defendant who is outside the territory is asserted by way of service of the originating process on him. Such service is possible only with the approval of the court. Where an application for approval for service out of jurisdiction is grounded on the defendant being ordinarily resident or carrying on business in Singapore, it seemed to me that in principle, the ground relied upon ought to be satisfied at the time when the application is filed or heard.

48 My conclusion finds support (at least, in part) in *Chellaram and another v Chellaram and others (No 2)* [2002] 3 All ER 17 ("*Chellaram*"). One of the issues in that case concerned the Civil Procedure Rules (UK) ("CPR") 6.20(11). Permission may be granted under CPR 6.20(11) to serve out of the jurisdiction if:

> a claim is made for any remedy which might be obtained in proceedings to execute the trusts of a written instrument where

> – (a) the trusts ought to be executed according to English law, and (b) the person on whom the claim form is to be served is a trustee of the trusts.

The English High Court decided (at [151]) that the condition that the "trusts ought to be executed according to English law" must be fulfilled when permission to serve out is sought. In *Halsbury's Laws of Singapore – Conflict of Laws Vol 6(2)* (LexisNexis, 2020 Reissue) at para 75.035, relying on *Chellaram*, the learned author also commented that the connection of ordinary residence or carrying on business in Singapore must be established "at the time leave is sought [to serve out of jurisdiction]".

49 By the time the claimant filed his application for approval to serve out of jurisdiction, the Company had been placed under liquidation. It was no longer carrying on business and the central management and control of the Company was no longer being exercised in Singapore. I concluded therefore that the ground based on the Company's residency or carrying on of its business was not satisfied.

Whether the claim involved property situated in Singapore

50 The Liquidators had repatriated all moneys held by the Company to the BVI. The Company's office premises in Singapore were repossessed by the landlord in October 2022. The Liquidators submitted that the Company did not have any property in Singapore.

51 The claimant submitted that he was asserting a proprietary claim with respect to the DC Assets that comprised cryptoassets stored in the DC FB Workspace under a licence owned by DVPL (see [22], [24] and [26] above). DVPL was a Singapore company in which the claimant was the sole

shareholder. The DC Assets also included shares and rights in the SAFEs and SAFTs but the cryptoassets constituted the majority in value of the assets.

52 The question was where are cryptoassets situated? The claimant informed me that there was no reported Singapore decision on the *situs* of cryptoassets.

53 The claimant submitted that there was a good arguable case for the principle that the presumptive owner of cryptoassets would be whoever controlled the wallet linked to the cryptoasset and that the *situs* of a cryptoasset would be where its owner was resident. The claimant submitted therefore that the DC Fund's cryptoassets were situated in Singapore since DVPL (and by extension, the claimant) controlled the private key to the assets. Both DVPL and the claimant are resident in Singapore.

54 The claimant relied on *Tulip Trading Ltd (a Seychelles company) v Van Der Laan and others* [2022] 2 All ER (Comm) 624 ("*Tulip Trading (HC)*"). In that case, the claimant claimed that it owned a substantial amount of digital currency assets and that its private keys were removed as a result of a computer hack. The defendants challenged the order granting permission to serve out of the jurisdiction. The English High Court set aside the order granting permission to serve out of the jurisdiction on the ground that the claimant had not established a serious issue to be tried on the merits (at [171]). However, the High Court also decided (in passing) that there was a good arguable case that the claimant was resident in the jurisdiction and that the digital assets were located in the jurisdiction (at [158]). I noted that the question of control over the digital assets did not arise in that case because the claimant's ownership was not disputed. While the English Court of Appeal overruled the decision of the High Court, there was no dispute in the appeal that there was a good arguable case

that the claimant was resident in the jurisdiction and that the property was located in the jurisdiction: *Tulip Trading Ltd (a Seychelles company) v Bitcoin Association for BSV and others* [2023] 2 All ER (Comm) 479 (at [7]).

55 The defendants submitted that the DC Fund's cryptoassets should not be considered as being located in Singapore because there is significant uncertainty on how the location of digital assets is to be determined.[38] The defendants referred to *Tulip Trading (HC)* and to the following cases:

(a) In *Lavinia Deborah Osbourne v Persons Unknown and another* [2022] EWHC 1021 (Comm) ("*Osbourne [2022]*"), the English High Court decided that cryptoassets are to be treated as located at the place where the owner is *domiciled* (at [15]–[16]).

(b) In *Lavinia Deborah Osbourne v Person Unknown Category A and others* [2023] EWHC 39 (KB), the claimant was domiciled in the jurisdiction. The English High Court referred to, among others, the decision in *Osbourne [2022]* and accepted that there was a good arguable case that two NFTs were located in the jurisdiction when they were in wallets linked to the claimant's account with a cryptoasset management platform (at [31]–[32]).

(c) In *Bybit Fintech Ltd v Ho Kai Xin and others* [2023] SGHC 199 ("*Bybit*"), the High Court decided that USDT were choses in action (at [4]). The defendants in the present case submitted that on this basis, the USDT may be treated as being located in the country where the right to redeem it could be enforced. This was consistent with the general principle that choses in action are regarded as situated where they are

[38] Liquidators' Written Submissions, at para 71.

properly recoverable or can be enforced: *Dicey, Morris & Collins on the Conflict of Laws* (Lord Lawrence Collins and Professor Jonathan Harris KC gen ed) (Sweet & Maxwell, 2022, 16th Ed) ("Dicey") at para 23-025.

56 The defendants further submitted that in the absence of a physical location, the location of the person who controls the private keys to the digital assets or the jurisdictional location of the digital assets should only be relevant when considering the enforceability of any orders made.

57 I agreed with the claimant that there was a good arguable case that the DC Funds cryptoassets were situated in Singapore because the cryptoassets were controlled by DVPL and/or the claimant and both are resident in Singapore.

58 It cannot be seriously disputed that cryptoassets constitute property, the proprietary rights to which may be enforced in court: *CLM v CLN and others* [2022] 5 SLR 273 ("*CLM*") at [46]; *Bybit* at [33] and [36].

59 A cryptoasset has no physical identity and is not associated with any physical object; it exists as a record in a network of computers associated with it: *ByBit* at [31]; *CLM* at [10]. Hence, its location cannot be determined by its physical presence.

60 I agreed with the claimant that the location of a cryptoasset is best determined by looking at where it is controlled. Given the fact that a cryptoasset has no physical presence and exists as a record in a network of computers, in my view, it best manifests itself through the exercise of control over it.

61 It was clear that control over a cryptoasset is with the person who controls the private key to the cryptoasset linked to that key. As explained in Kelvin FK Low and Ernie GS Teo, "Bitcoins and Other Cryptocurrencies as Property?" (2017) 9(2) Law, Innovation and Technology 235 (cited with approval in *CLM* at [10]):

> (a) A holder of bitcoin possesses a public address and a private cryptographic key. The public bitcoin address serves a similar function to an account number; all that is needed to receive bitcoins is the public bitcoin address.
>
> (b) The private cryptographic key is mathematically linked to the public address so that it is not possible to change the private key (unlike a conventional password).
>
> (c) To transfer a cryptoasset, one requires both the public address and the private key.

The public address is also known as the "wallet" or "crypto wallet".

62 The next question then was whether the location of the person who controls the private key should be determined according to his domicile or residence? I agreed with the claimant that the residence of the person who controls the private key should be treated as the *situs* of the cryptoasset linked to that private key.

63 In my view, residence is the more appropriate test. The *situs* of cryptoassets is being determined based on the exercise of control over such assets. The residence of the person is a better indicator of where the control is being exercised. In addition, where the person resides is normally where he can

be sued. Further, it was also suggested in Dicey that for the *situs* of cryptoassets, the test of residence (or place of business) may be more appropriate "given the uncertainties around identification of domicile in difficult cases" (Dicey, at para 23–050).

64 As for *Bybit*, the question as to the *situs* of cryptoassets did not arise in that case. In any event, it seemed to me that treating cryptoassets as choses in action would lead the *situs* analysis to the person who controls the private key. As a chose in action, a cryptoasset would be properly recoverable or can be enforced where the person who controls the private key to the cryptoasset resides and can be sued.

65 As the defendants pointed out, there were other cases that decided that the location of cryptoassets should be the domicile, rather than the residence, of the owner. However, I saw no reason why the differing decisions (as to whether the test should be domicile or residence) had to lead to the conclusion (as the defendants submitted) that the DC Fund's cryptoassets should not be considered to be located in Singapore. Cryptoassets are a new type of property which have no physical presence. Courts have to adapt and evolve rules to ascribe a *situs* to them, not unlike how courts evolved rules ascribing a *situs* to choses in action which were once said to have no location (see Dicey, at para 23-025). It is no surprise that in the process in which the rules evolve, different judges have arrived at different conclusions.

Whether the claim was founded on a cause of action arising in Singapore

66 It was common ground that as the claim was a trust claim, the cause of action arose where in substance the trust in favour of the claimant arose: *Karaha*

Bodas Co LLC v Pertamina Energy Trading Ltd and another [2005] 2 SLR(R) 568 at [15].

67 The claimant submitted that in substance the trust over the DC Assets arose in Singapore because the trust over the DC Assets came to fruition in Singapore.

(a) At the material times, the Company had its headquarters in Singapore and the claimant was resident in Singapore.

(b) Discussions on the Independent Fund Arrangement between November 2019 and August 2020 did not only take place over messages exchanged on online messaging platforms but included physical meetings in Singapore.

(c) Meetings where the salient features and framework of the Independent Fund Arrangement were discussed took place in Singapore.

(d) The Company agreed to the Independent Fund Arrangement in Singapore.

68 The defendant submitted that the trust arose in the BVI because:

(a) More than 96% in value of the transfers of the Schedules 1, 2 and 3 Assets from the claimant and the DC Investors was made to TAF Ltd (the Company's offshore feeder fund).

(b) These transfers were made pursuant to the Subscription Agreements which the claimant and the DC Investors entered into with TAF Ltd. These Subscription Agreements were governed by BVI law.

(c) In consideration of the transfers, the DC Investors and the claimant received Class Defiance Shares in TAF Ltd.

(d) The Schedules 1, 2 and 3 Assets were then transferred by TAF Ltd to the Company (a company incorporated in the BVI) as the final leg in the 3AC Group's BVI-domiciled master/feeder fund structure.

69 In my view, the claimant had demonstrated a good arguable case that in substance the trusts arose in Singapore. In essence, the claimant's case was that the trusts arose pursuant to the Independent Fund Arrangement. The discussions on the Independent Fund Arrangement took place in Singapore. The agreement on the Independent Fund Arrangement was reached in Singapore. The creation of the DC Sub-Accounts, the initial transfer of cryptocurrencies and fiat currencies to the DC Sub-Accounts, and the issuance of the Class Defiance Shares and Class Defiance Interests took place when the Company was headquartered and operating in Singapore. In addition, TACPL (the Company's investment manager then) is a Singapore company and both the Company and TACPL had common directors.[39]

70 The master-feeder fund structure meant that formally, (a) the claimant and the DC Investors had to transfer their cryptocurrencies and fiat currencies to the feeder funds, in consideration for which the feeder funds issued Class Defiance Shares/Interests, and (b) the feeder funds in turn used the cryptocurrencies and fiat currencies to subscribe for shares in the master-fund, *ie*, the Company. In my view, the formalities of the fund structure did not change my conclusion that *in substance* there was a good arguable case that the trust arose in Singapore.

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39 Claimant's 2nd affidavit, at p 52.

Whether Singapore was the more appropriate forum

71 The claimant submitted that Singapore was the more appropriate forum whilst the defendants submitted that it should be the BVI. Singapore would be the more appropriate forum if it is the forum with which the dispute has the most real and substantial connection. I agreed with the claimant that the relevant factors pointed to Singapore being the more appropriate forum.

Witnesses

72 Most of the relevant witnesses are in Singapore. I agreed with the claimant that, apart from convenience and cost, the compellability of these witnesses to give evidence in the BVI was a significant factor since the main disputes revolve around questions of fact (*eg*, how the Independent Fund Arrangement was set up): see *Rickshaw Investments Ltd and another v Nicolai Baron von Uexkull* [2007] 1 SLR(R) 377 at [19]. There was also no suggestion that the key relevant witnesses would be compellable to give evidence in the BVI.

73 The Independent Fund Arrangement is key to the claimant's case. The witnesses are the claimant, SZ and KD. All three are Singapore citizens. The claimant was and remains resident in Singapore. At the material times, SZ and KD were also resident in Singapore although it was not clear at the time I heard the defendants' application whether they were still present in Singapore or where they were, if not in Singapore.

74 Ningxin, a trader of the 3AC Group whom the claimant dealt with, could give evidence of instructions from SZ and KD regarding the segregation of the DC Assets and how the other assets of the 3AC Group were treated. Ningxin

and her family were believed to be based in Singapore.[40] The claimant dealt with another trader of the 3AC Group, Eric Mak, who was Ningxin's predecessor and could also give evidence concerning the segregation of the DC Assets. However, Eric Mak as a witness was a neutral factor as he was neither based in Singapore nor the BVI, but appeared to be based in Hong Kong.[41]

75 Ascent Fund Services (Singapore) Pte Ltd ("Ascent"), the fund administrator for the DC Fund and the 3AC Group is incorporated in Singapore and its employees who handled the DC Fund and the 3AC Group were understood to be in Singapore. These witnesses could give evidence as to how the DF Fund was operated and on the instructions given by SZ and KD.

76 Oakfield & Associates ("Oakfield"), the auditors of the Company, is a public accounting firm registered in Singapore. Their representatives could give evidence on instructions by SZ and KD as to how the DC Fund was recognised at the Company (master-fund) level.

Documents

77 Relevant documents in the possession of Ascent and Oakfield would be in Singapore. There was no evidence that a BVI court would be able to compel the production of any such documents.

Governing law

78 The defendants relied on the fact that the transactions were implemented through a BVI investment structure pursuant to the Subscription Agreements,

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40 Claimant's 1st affidavit in OA 317, at para 62(j).

41 Claimant's 3rd affidavit in OA 317, at p 686.

which were governed by BVI law. In my view, this was a neutral factor. The claimant did not challenge the fact that he and the DC Investors had been issued Class Defiance Shares and Class Defiance Interests pursuant to the Subscription Agreements. The substance of his case was that the trust was created pursuant to the Independent Fund Arrangement and that SZ and KD procured each entity in the 3AC Group (and their directors, officers, employees, representatives and/or agents) to act in a manner consistent with the Independent Fund Arrangement. In other words, there was a trust notwithstanding the fact that the master-feeder fund structure was used.

79 In any event, in my view, the applicability of BVI law was not sufficient to outweigh the factors in favour of Singapore being the more appropriate forum.

Administration of the Company's liquidation

80 The defendants submitted that the issues in the present case are more appropriately dealt with by the BVI court as they concern the Liquidators' administration of the Company's liquidation. The defendants argued that the Company's creditors' committee had approved the dispute with the claimant being resolved by the BVI court as part of the BVI Liquidation Proceedings.[42] In my view, this was not a relevant consideration. This argument amounted to nothing more than that the Company and/or its creditors preferred the dispute between the Company and the claimant to be litigated in the BVI.

81 The defendants also submitted that if any of the Company's creditors wished to intervene and participate, they would look to participate via the BVI

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42 Liquidators' Written Submissions, at para 97.

proceedings. I disagreed with this submission. It was not clear how the creditors would be able to intervene in the dispute over the ownership of the DC Assets. The dispute over the DC Assets was between the Company and the claimant. Further, the fact that the creditors might prefer to intervene in proceedings in the BVI was as irrelevant as the Company's preference to litigate in the BVI.

Parallel BVI Proceedings

82 In my view, the Parallel BVI Proceedings were not a significant factor given the early stage of those proceedings (see [31] above).

Whether there was a serious question to be tried

83 In my view, the evidence showed that there was a serious question to be tried as to the existence of the trust. In particular:

(a) SZ's messages on Telegram to the claimant supported the claimant's case. In these messages, SZ:

(i) suggested a "standalone fund" within the Company's fund structure, "separate" from what the Company did;[43]

(ii) referred to a "siloed reputation/risk model" (a "siloed risk" model could arguably require that the Company's other assets not be at risk of the DC Fund's insolvency);[44]

(iii) stated that the claimant would have "full control to move [his] fund elsewhere" [45] (which was different from the

[43] Claimant's 1st affidavit, at para 30.

[44] Claimant's 1st affidavit, at para 32(a).

[45] Claimant's 1st affidavit, at para 32(b).

> procedures for redemption provided in the Amended and Restated Memorandum of Association of the Company's and TAF Ltd);[46]

(b) The 3AC Group paid the claimant (or his nominees) 75% of the fees collected in connection with the DC Fund and paid the remaining 25% to SZ and KD.[47] This was consistent with the Independent Fund Arrangement (see [12(a)] above). In my view, it was significant that none of these fees were paid to the feeder funds or the Company.

(c) The claimant had sole control over the management of the DC Fund. Although the claimant managed the DC Fund as an employee of TACPL/TRPL, his employment by TACPL/TRPL was necessary only because the DC Fund was not a legal entity. What was more important was that the claimant managed the DC Fund to the exclusion of other officers, representatives or employees of the 3AC Group. In contrast, the claimant separately managed a discrete pool of TAC Ltd's assets in a managed account (over which there was no trust) based on a mandate fixed by SZ and KD.

(d) In his email to the claimant, Eric Mak (a trader of the 3AC Group) confirmed the following:[48]

> As far as [he could] recall, Defiance operated independently from 3AC in terms of management and employees. Exchange subaccounts were held for Defiance Capital and any token transactions between 3AC and Defiance [he] saw were documented as arms

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46 Crumpler's 1st affidavit, at pp 930 and 987.

47 Claimant's 1st affidavit, at para 51.

48 Claimant's 3rd affidavit in OA 317, at para 36(a), pp 686–688.

> length counterparty transactions in terms of loans and trades.

(e) The Company set up the DC FB Workspace solely for the claimant's use to store the DC Assets; only the claimant and his representatives could access the DC FB Workspace (see [22] above).

(f) On 14 June 2022, the Company transferred all its rights and interests in the DC FB Workspace and all the DC Assets that were in the DC Sub-Accounts to DCPL. This was different from the provisions for redemption found in the Amended and Restated Memorandum of Association of the Company and TAF Ltd. Instead, it was consistent with the Independent Fund Arrangement.

84 The claimant's discussions with SZ and KD, the segregation of the DC Assets and the extent to which the claimant had control over these assets to the exclusion of the 3AC Group supported the claimant's trust claim.

85 The defendants' main argument was that the trust claim flew in the face of the BVI-based master-feeder investment structure and that it could not have arisen if the Subscription Agreements meant what they said on their face.[49] In my view, this was not a strong argument. It is not uncommon that a trust is found to exist notwithstanding the fact that it contradicts what relevant legal documents say.

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[49] Liquidators' Written Submissions, at para 132.

Whether there was failure to make full and frank disclosure

86 The defendants submitted that the claimant failed to make full and frank disclosure because:[50]

(a) he "made significant attempts to brush aside the BVI master-feeder investment structure and the Fund Documents which [were] clearly adverse/fatal to his case"; and

(b) in particular, he had not "bothered to explain the BVI-centric master-feeder investment structure".

87 I disagreed with the defendants' submission. I did not think that there was any failure to make full and frank disclosure of material facts. The claimant had disclosed the Liquidators' position that they disagreed that the DC Assets were held on trust and reproduced (quite extensively) the Liquidators' reasons, which referred to the terms of investment into TAF Ltd and the master-feeder investment structure.[51]

Conclusion

88 For the reasons set out above, I concluded that the claimant had demonstrated that:

(a) the claim had sufficient nexus to Singapore,

(b) Singapore was the more appropriate forum, and

(c) there was a serious question to be tried.

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50 Liquidators' Written Submissions, at para 149.

51 Claimant's 1st affidavit, at para 60.

89 I also concluded that there had been no failure to make full and frank disclosure.

90 Accordingly, I dismissed the defendants' application. I ordered the defendants to pay costs to the claimant fixed at $15,000 plus disbursements to be fixed by me if not agreed.

Chua Lee Ming
Judge of the High Court

Blossom Hing Shan Shan, Joshua Chin Tian Hui and Claire Neoh Kai Xin (Drew & Napier LLC) for the claimant;
Lionel Leo Zhen Wei, Daniel Liu Zhao Xiang, Kwong Kai Sheng and T Abirami (WongPartnership LLP) for the defendants.