**IN THE APPELLATE DIVISION OF**
**THE HIGH COURT OF THE REPUBLIC OF SINGAPORE**

**[2024] SGHC(A) 10**

Originating Application No 42 of 2023

Between

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

… *Applicants*

And

Cheong Jun Yoong

… *Respondent*

In the matter of 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 joint liquidator of Three Arrows Capital Ltd)

(3) Russell Crumpler (in his capacity as a duly appointed joint liquidator of Three Arrows Capital Ltd)

… *Defendants*

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# JUDGMENT

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[Civil Procedure — Appeals — Leave]
[Civil Procedure — Service — Leave for service out of jurisdiction]

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# v
# Cheong Jun Yoong

**[2024] SGHC(A) 10**

Appellate Division of the High Court — Originating Application No 42 of 2023
Debbie Ong JAD and Valerie Thean J
28 February 2024

12 April 2024

**Valerie Thean J (delivering the judgment of the court):**

## Introduction

1 This is an application for permission to appeal against the decision of a Judge of the General Division of the High Court (the "Judge") to dismiss the following: (a) an application to set aside an order of court granting the respondent permission for service of an originating claim out of Singapore on the applicants; and (b) an application to set aside such service of the originating claim on the applicants.

2 For the reasons that follow, we dismiss the application for permission to appeal.

**Background**

3 The first applicant, Three Arrows Capital Ltd ("Three Arrows"), an investment fund in the business of trading in cryptocurrency and other digital assets, is a company incorporated in the British Virgin Islands ("BVI"). It was placed under liquidation by a BVI court on 27 June 2022 (the "BVI Liquidation Proceedings"). The second and third applicants are its joint liquidators (collectively, the "Liquidators").

4 On 22 August 2022, the Liquidators obtained an order under HC/OA 317/2022 ("OA 317") for the BVI Liquidation Proceedings to be recognised in Singapore as a foreign main proceeding.

5 The respondent, Mr Cheong Jun Yoong ("Mr Cheong"), a Singapore citizen, managed a portfolio of assets in Three Arrows that he contends is a standalone fund, named as "DeFiance Capital" (the "DC Fund"). On 4 November 2022, Mr Cheong filed HC/SUM 4002/2022 ("SUM 4002") as a non-party for permission to commence and/or continue proceedings against Three Arrows to assert proprietary rights in respect of the assets in this DC Fund (the "DC Assets").

6 About 12 hours later on the same date in the BVI, the Liquidators filed an application in the BVI Liquidation Proceedings for directions from the BVI court as to whether the DC Assets comprised part of Three Arrows' estate, on the basis of signed fund documents and the investment structure therein (the "Parallel BVI Proceeding").

7 Permission as prayed for in SUM 4002 was granted by the High Court on 25 January 2023. Mr Cheong subsequently commenced HC/OC 231/2023

(the "Singapore Claim") on 18 April 2023. On 8 May 2023, Mr Cheong applied under HC/SUM 1370/2023 ("SUM 1370") for approval to serve the Originating Claim, Statement of Claim and other court papers in OC 231 on the applicants in the BVI. Approval was granted on 9 May 2023, as stated in HC/ORC 2117/2023 ("ORC 2117"), for the Originating Claim, Statement of Claim and other court papers for OC 231 to be served on the applicants in the BVI.

8 Around the same time, in the BVI, Mr Cheong applied on 3 February 2023 to set aside the BVI court order granting the Liquidators permission to serve the Parallel BVI Proceeding ("BVI Setting Aside Application") on Mr Cheong in Singapore. The BVI court heard the application on 18 and 19 July 2023 and reserved its judgment.

9 On 11 July 2023, the applicants applied under HC/SUM 2078/2023 ("SUM 2078") for the service of court documents in the Singapore Claim on them in the BVI pursuant to ORC 2117 to be set aside. In essence, the applicants contended that: (a) the requirements for grant of permission for service out of jurisdiction had not been satisfied as: (i) Mr Cheong had not shown that Singapore (as opposed to the BVI) was the *forum conveniens*; (ii) Mr Cheong had not shown a good arguable case that there was sufficient nexus to Singapore; and (iii) Mr Cheong had not shown that there was a serious question to be tried on the merits of OC 231; and (b) that Mr Cheong had failed to make full and frank disclosure of all material facts when he applied *ex parte* for permission to serve OC 231 out of jurisdiction by way of SUM 1370.

10 SUM 2078 was dismissed by the Judge on 8 August 2023 with brief oral reasons. The applicants applied, by AD/OA 42/2023, for permission to appeal against this decision. This is the application before us.

11 In the meantime, and while this application for permission to appeal was pending, the BVI court dismissed Mr Cheong's BVI Setting Aside Application on 12 December 2023: *Russell Crumpler et al. v Cheong Jun Yoong et al.* BVIHC (COM) 2023/0003; 2022/0119 (the "BVI Judgment"). An application for permission to appeal against that decision is pending. In addition, the Judge released his written grounds of decision for his decision in SUM 2078 on 26 January 2024: *Cheong Jun Yoong v Three Arrows Capital Ltd and others* [2024] SGHC 21 (the "Singapore GD"). The parties made further submissions on various aspects of the Singapore GD and the BVI Judgment thereafter, and we deal with these matters in the present judgment.

**The Singapore Claim**

12 In the Singapore Claim, Mr Cheong contends that the DC Assets were held on trust for his benefit and that of fellow investors in the DC Fund (the "DC Investors"). The same claim is in issue in the Parallel BVI Proceeding.

13 The DC Assets comprise: (a) contracts for equities or cryptoassets entered into in Three Arrows' name; (b) shares held in Three Arrows' name; and (c) cryptoassets held in sub-accounts of accounts in Three Arrows' name. Categories (a) and (b) included simple agreements for future equities ("SAFEs"), simple agreements for future tokens ("SAFTs"), and shares issued to Three Arrows pursuant to certain SAFEs. These SAFEs and SAFTs were entered into between Three Arrows and various third-party portfolio companies.

14 Three Arrows' fund structure is known as a "master-feeder fund structure". Under this structure, the company had two feeder funds. These were investment funds that aggregated investor capital to invest in a master fund. One feeder fund was based offshore in the BVI (registered as a "Professional Fund"

with the Financial Services Commission of the BVI) and another onshore in Delaware, US). Investors would invest in these feeder funds, which then invested substantially all their assets in Three Arrows, the master fund. Three Arrows, along with the feeder funds and related entities, are collectively referred to as the "3AC Group".

15 Mr Cheong first began investing in cryptocurrency-related investments in 2017. He subsequently began managing assets on behalf of his friends and ex-colleagues. By November 2019, Mr Cheong's portfolio of assets had grown substantially, and he desired to formally establish a fund for managing his and his friends' investments. Following discussions with the Three Arrows' founders, an "Independent Fund Arrangement" was made to launch the DC Fund on the 3AC Group's platform, promising privileges such as independent control and separate management. Thus, the DC Fund was purportedly managed independently by Mr Cheong, with its assets and operations kept distinct from the Three Arrows' other activities. Investments in the DC Fund were made through specific classes of shares and interests in the feeder funds, with assets held in designated sub-accounts and crypto-currency wallets controlled by Mr Cheong. A workspace on the platform of Fireblocks Ltd, a digital assets custody solutions provider, was set up solely for Mr Cheong's use to store the cryptocurrency tokens that were part of the DC Assets (the "DC FB Workspace").

16 In May 2022, Mr Cheong incorporated DeFiance Ventures Pte Ltd ("DVPL") and DeFiance Capital Ltd ("DCPL"). On 14 June 2022, Three Arrows 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. On 20 June 2023, DCPL novated the DC FB Workspace to DVPL. Other interests held in Three

Arrows' name, primarily those in SAFTS and SAFEs and shares issued to Three Arrows pursuant to certain SAFEs, were not transferred to Mr Cheong or his entities.

**The Judge's decision**

17 The Judge dismissed SUM 2078.

18 Under O 8 r 1(1) of the Rules of Court 2021 ("ROC 2021"), an originating process may be served out of Singapore with the court's approval if it can be shown that "the [c]ourt has the jurisdiction or is the appropriate court to hear the action". Paragraph 63(2) of the Supreme Court Practice Directions 2021 ("SCPD 2021") provides that for the purposes of showing why the Singapore Court is the appropriate court to hear the action, the claimant must show the following:

(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) of the SCPD 2021;

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

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

19 The Judge found that all three requirements for service out of jurisdiction were satisfied. There was sufficient nexus to Singapore based on two factors set out in para 63(3) of the SCPD 2021:

(a) There was a good arguable case that the claim was made to assert proprietary rights in or over movable property situated in Singapore, as

required under para 63(3)(i) of the SCPD 2021. The DC Assets were situated in Singapore because they were controlled by DVPL and/or Mr Cheong himself, which were both resident in Singapore (Singapore GD at [57]). The location of a cryptoasset was best determined by looking at where it was controlled (Singapore GD at [60]). In determining the location of the person who controls the cryptoassets, the appropriate test is residence rather than domicile since residence is more indicative of the place of control (Singapore GD at [63]).

(b) Alternatively, there was a good arguable case that the claim was founded on a cause of action arising in Singapore, as required under para 63(3)(p) of the SCPD 2021. The cause of action arose in Singapore because the trust arose in substance in Singapore. The trust arose due to the Independent Fund Arrangement, the agreement and discussions of which took place in Singapore. Furthermore, among other things, the initial transfer of cryptoassets occurred when Three Arrows was headquartered in Singapore and Three Arrows' investment manager was then a Singapore company (Singapore GD at [69]).

20 On the question of whether Singapore was the *forum conveniens*, the Judge found that Singapore was the more appropriate forum compared to the BVI. In arriving at this conclusion, the Judge considered several factors. First, the Judge considered that most of the relevant witnesses were in Singapore (Singapore GD at [72]) and could be compelled to give evidence and furnish the relevant documents, which were also in Singapore (Singapore GD at [77]). Second, even though BVI law applied to the transactions, this was a neutral factor which would not in any event outweigh the other factors in favour of Singapore as the more appropriate forum (Singapore GD at [78]–[79]). Third,

the Judge rejected the applicants' submission that the issues in the case would be more appropriately dealt with by the BVI court as they concerned the Liquidators' administration of Three Arrows' liquidation. The fact that Three Arrows' creditors would participate through the BVI proceedings was irrelevant since the dispute over the DC Assets was between Three Arrows and Mr Cheong (Singapore GD at [80]–[81]). Lastly, the Parallel BVI Proceeding was not a significant factor given the early stage of those proceedings (Singapore GD at [82]).

21 The Judge considered that there was a serious question to be tried as to the existence of the trust (Singapore GD at [83]). A series of messages on Telegram and email correspondence supported Mr Cheong's trust claim (Singapore GD at [83]–[84]).

**The applicants' case on seeking permission to appeal**

22 In the present application, the applicants seek permission to appeal on the three grounds set out in *Lee Kuan Yew v Tang Liang Hong and another* [1997] 2 SLR(R) 862 at [16]: (a) that there are questions of general principle decided for the first time; (b) that there are questions of importance upon which further argument and a decision of a higher tribunal would be to the public advantage; and (c) that the Judge had committed a *prima facie* case of error. A common requirement to all three grounds is that the denial of permission must result in a miscarriage of justice: *Soo Hoo Khoon Peng v Management Corporation Strata Title Plan No 2906* [2023] SGHC 355 ("*Soo Hoo Khoon*") at [6] and [16].

***The BVI Judgment***

23 In this context, the applicants rely also on the BVI Judgment. Mr Cheong argued that this judgment ought to be disregarded, because it arose after the date on which the applicants applied for permission to appeal. We disagree. The Court of Appeal has held that an appellate court will generally be open to consider new arguments where these involve questions of law that can be assessed without further evidence: see *Rothstar Group Ltd v Leow Quek Shiong and other appeals* [2022] 2 SLR 158 at [16]; *Liew Kit Fah and others v Koh Keng Chew and others* [2020] 1 SLR 275 at [14]. It follows as a logical matter, that if an appellate court is able to consider new points of law, the issue of such potential points of law would be relevant to an application for permission to appeal to that appellate court.

24 In brief, the BVI court considered the requirements for service out of jurisdiction to have been met. On the requirement of a serious issue to be tried, this was undisputed by Mr Cheong (BVI Judgment at [55]). On the requirement of a good arguable case that the claim falls within one or more classes of cases in which permission for service out of jurisdiction may be given, the BVI court was satisfied that the sole gateway engaged was that found in the Eastern Caribbean Supreme Court Civil Procedure Rules 2000 ("CPR") 7.3(10) concerning a claim made "under any enactment which confers jurisdiction on the court, and the proceedings are not covered by any of the other grounds referred to in this rule". The BVI court accepted that the applicable enactment would be ss 186 and 274A of the Insolvency Act 2003 (No 5 of 2003) (BVI) ("BVI Insolvency Act") (BVI Judgment at [139]–[143]).

25 Of relevance for present purposes is the BVI court's decision that it was "clearly or distinctly the appropriate forum" at the time when permission was given for service out of jurisdiction. The BVI court found that by submitting a claim for a loan in the insolvency jurisdiction, Mr Cheong had submitted to the BVI court's jurisdiction. This submission to the BVI court was a factor of "overwhelming significance when it comes to assessing whether BVI is the more appropriate forum" (BVI Judgment at [167(1)]). The fact that the Parallel BVI Proceeding was an application in existing BVI insolvency proceedings, concerning the affairs and assets of a BVI company in liquidation, made under two sections of the BVI Insolvency Act and that the application concerned assets which were legally held by a BVI company pointed to an "obvious" connection to the BVI (BVI Judgment at [167(4)]). The funds were invested by Mr Cheong and others under BVI-law-governed subscription agreements and the transactions had been implemented through a BVI investment structure. Having chosen BVI law to govern the investments, the BVI court opined that it could well be that the issue of whether a trust arises is governed by BVI law. The system of law with the closest connection to any alleged trust was likely the BVI because of this, irrespective of where the day-to-day control of the relevant assets took place (BVI Judgment at [167(7)]). The BVI court considered the substantive dispute to be broader than simply the beneficial ownership claim between Mr Cheong and the Liquidators, and thought that there was a distinct advantage of continuing the proceedings in the BVI, where all BVI creditors of Three Arrows could participate (BVI Judgment at [167(10)(2)]).

26 The BVI court found that the relevance of potential witnesses to Mr Cheong's cases lacked any real weight in the analysis. It was not obvious which witnesses would be relevant. Evidence was capable of being given

remotely and in any event, the only key witnesses appeared to be Mr Cheong and the founders of Three Arrows; if the founders were to give evidence, the court's view was that they should be made to do so in the BVI (BVI Judgment at [167(9)]). While it was highly undesirable that there be multiple judgments on the same or very similar issues from different courts where they have been invoked by and against the same parties, the fact that the Liquidators had obtained recognition of the BVI liquidation proceedings as a foreign main proceeding in Singapore, and that there was a cross-border insolvency protocol between the Singapore and BVI courts ("CBIP"), did not grant Singapore with a form of appropriate jurisdiction status that it would not otherwise have(BVI Judgment at [167(5)]). The BVI court also noted that it was already seized of issues relating to the effect of the Subscription Agreements and constitutional documents in related proceedings. Consistent resolution of the issues as to the effect and meaning of the relevant documents was desirable (BVI Judgment at [167(8)]).

## Our decision

27 The applicants' arguments for permission to appeal involving points of law are related and we deal with these together.

### *Questions of general principle or importance*

28 The questions of general principle submitted by the applicants to be decided for the first time are the following:

(a) How the jurisdictional location of cryptoassets are determined, what is the significance of their jurisdictional location in determining

whether there is sufficient nexus to Singapore and whether Singapore is *forum conveniens*.

(b) The significance of the applicable regulatory law in the *forum conveniens* analysis.

(c) The relevance of the differing nature of competing proceedings in different jurisdictions, where the same issues are contested in insolvency proceedings in the centre of main interests in one forum and civil proceedings in another forum.

29 The questions of importance were asserted to be the following:

(a) The test for determining where a trust arises and the significance of the underlying context of the trust in that inquiry.

(b) Where foreign law documents are executed as part of an agreement to establish a trust, whether the governing law of the contract and investment structure ought to be considered to be the applicable law of the trust.

(c) The relevance of the fact that the defendant's claims are premised on foreign law and should the fact that the claims are based on BVI contract and company law be given weight in the *forum conveniens* analysis.

(d) The significance of a party's submission to jurisdiction in related foreign proceedings in the *forum conveniens* analysis.

(e) Whether the CBIP would apply to parallel civil and insolvency proceedings in different jurisdictions, and if so, how it would apply.

*Location of the cryptoassets in the jurisdictional gateway inquiry*

30 The Judge found that there was a good arguable case that the DC Funds were situated in Singapore because they were controlled by DVPL and/or Mr Cheong himself, which are both resident in Singapore. In other words, the Judge decided that the location of cryptoassets should be ascertained by reference to the residence of the *controller* of the cryptoassets. In support of its argument that the Judge's decision discloses a novel issue which would benefit from a decision by a higher tribunal, the applicants submit that the BVI Judgment took a different approach from the Judge in the determination of the location of cryptoassets where it instead looked to the residence of the *owner* of the cryptoassets, *ie*, Three Arrows. The significance of this submission is that, in determining whether a question is of such importance that a decision of a higher tribunal would be to the public advantage, our courts have previously considered: (a) whether there has been a local decision on the issue; and (b) whether there is a lack of clarity on the issue from foreign jurisdictions: *Anil Singh Gurm v J S Yeh & Co and another* [2018] SGHC 221 at [53].

31 We do not accept this submission for two reasons. First, the applicants have, with respect, mischaracterised [152]–[154] of the BVI Judgment. As a preliminary matter, the issue before that court was whether the *situs* of the cryptoassets should be determined by reference to the domicile or residence of its owner (BVI Judgment at [59]–[64]). It was in this context that the BVI court concluded (at [152]) that the "place of central management and control" (*ie*, residence) was the key determining factor. Thus, *if* Three Arrows was the owner of the cryptoasset, the *situs* of the cryptoassets would be determined by reference to Three Arrows' place of residence. However, the court did not conclude that Three Arrows was the owner of the cryptoasset. Instead, it

seemingly accepted the principle that the presumptive owner of a cryptoasset is the person who acquired lawful control over it (BVI Judgment at [148]–[150]). This was why the BVI court described the control of a private key as an "important issue" (at [153]). In that connection, the court noted (at [153]) that the *respondent* had control over the private keys in Singapore. In our view, the court did not have to decide on whether the *situs* of a cryptoasset should be determined by reference to its owner or controller. This was because the court relied on the *presumption* that a cryptoasset's controller was also its owner, and this presumption was not displaced. Accordingly, the BVI Judgment does not provide a differing approach from that taken by the Judge.

32 Second, this issue does not affect the outcome of the Judge's decision. We highlight that an applicant who seeks leave to appeal a decision must also show that the denial of leave may conceivably result in a miscarriage of justice: *Soo Hoo Khoon* ([22] *supra*) at [6] and [16]. Permission to appeal is not granted over an issue that will not alter the outcome of the case: *Luckin Coffee Inc v Interactive Digital Finance Ltd and others* [2024] SGHC(A) 7 at [25]. In this regard, the applicants argue that the *situs* of a cryptoasset should not be a significant factor in determining whether a claim has sufficient nexus to Singapore under para 63(2) of the SCPD 2021, given that cryptoassets are situated virtually on a decentralised blockchain. However, the Judge only considered the *situs* of the cryptoassets in the jurisdictional gateway inquiry (Singapore GD at [50]–[65]). The Judge found that *two* jurisdictional gateways could be established on the facts: (a) para 63(3)(i) of the SCPD 2021, which concerned property situated in Singapore; and (b) para 63(3)(p) of the SCPD 2021, which concerned a claim founded on a cause of action arising in Singapore. As rightly noted by the Judge (Singapore GD at [42]), the respondent only had to establish *one* ground to succeed in his application. Accordingly, this

issue would not change the outcome of the decision below. For reasons elaborated on below (at [33]), there is no valid point raised in relation to the second jurisdictional gateway.

*The test for determining where a trust arises in the jurisdictional gateway inquiry*

33 This leads to the applicants' argument on the trust over the cryptoassets. The Judge concluded that the jurisdictional gateway in para 63(3)(p) of the SCPD 2021 was satisfied as he found that there was a good arguable case that the trust arose in substance in Singapore. The applicants contend that it would be to the public advantage for a higher tribunal to decide on the significance of the "underlying context", such as the BVI investment structure in the present case, in the determination of where a trust arises in substance. In our view, whether, where and when the alleged trust arose are questions of a factual character, not principle. Further, the Judge, in accepting that there was a good arguable case that the trust arose in Singapore, was fully cognisant of the fund structure and stated that it did not change his conclusion that there was a good arguable case that the trust arose in substance in Singapore (Singapore GD at [70]). This issue had been duly considered by the Judge.

*Factors in the forum non conveniens analysis*

34 The remaining points concern factors in the *forum non conveniens* analysis and neither raise points of general principle arising for the first time nor points of importance that require adjudication by a higher tribunal.

35 The first issue is the applicants' assertion in their application for permission to appeal that the *situs* of the cryptoasset should not be a "significant factor" in the *forum conveniens* analysis. The applicants have, however,

accepted in their supplementary submissions that the Judge did not expressly consider the *situs* of the cryptoassets in the *forum conveniens* analysis. The point is therefore not relevant.

36 On the issue of the weight that should be given to the applicants' competing claim, which is premised on foreign law, in the *forum conveniens* analysis, the Judge expressly accepted that the transactions which were implemented through a BVI investment structure pursuant to the Subscription Agreements were governed by BVI law. In his view, this was a neutral factor (Singapore GD at [78]–[79]).

37 Turning then to the factor of a foreign governing law, the Judge expressly accepted that the governing law was that of the BVI. The Court of Appeal in *Ivanishvili, Bidzina and others v Credit Suisse Trust Ltd* [2020] 2 SLR 638 observed (at [107]–[111]) that where the legal issues are straightforward or if the competing fora apply substantially similar domestic laws, the identity of the governing law would be of little significance. In the subsequent case of *Lakshmi Anil Salgaocar v Jhaveri Darsan Jitendra* [2019] 2 SLR 372 ("*Lakshmi*"), the Court of Appeal found (at [55]) that on the facts of that case, the governing law of the dispute was of no relevance to the identification of the *forum conveniens* as there was no suggestion that the BVI or Singapore court would apply different principles which would affect the outcome of the dispute. Both were common law jurisdictions and the key issues in dispute were factual and not legal (at [55]–[58]). Similarly in the present case, the Judge was of the view that the main disputes in the Singapore Claim revolve around questions of fact (Singapore GD at [72]). Even if the applicants are correct and the applicable law of the trust is BVI law, it would make little difference in the *forum conveniens* analysis. This was alluded to by the Judge at

[79] of the Singapore GD, where he opined that "[i]n any event, the applicability of BVI law was not sufficient to outweigh the factors in favour of Singapore". We do not think he was wrong in his approach in considering this factor.

38 The applicants' arguments on the regulatory law and competing jurisdictions where the same issues are contested in insolvency proceedings as the centre of main interests and civil proceedings are related and we deal with them in turn. First, in relation to the applicants' argument on regulatory law, the authorities cited by the applicants in their written submissions below for SUM 2078 provide guidance on the importance that a court should accord to the applicable governing law of a dispute when determining the *forum conveniens.* This issue of a foreign regulatory law is not a question of general principle to be decided for the first time. Second, that permission was granted in SUM 4002 for Mr Cheong to commence OC 231 reflects the settled point that the civil domestic courts may well be *forum conveniens* even where the main insolvency proceedings are elsewhere. As observed by the Court of Appeal in *Beluga Chartering GmbH (in liquidation) and others v Beluga Projects (Singapore) Pte Ltd (in liquidation) and another (deugro (Singapore) Pte Ltd, non-party)* [2014] 2 SLR 815 at [99], "the commencement of legal proceedings against a defendant foreign company … is not precluded by the mere fact that insolvency proceedings have been commenced against the company in another jurisdiction".

39 What the applicants are attempting to argue is essentially that points of principle arise out of the difference of opinion between the Singapore and BVI courts, on which they seek pronouncement from a higher tribunal. Of direct relevance was the difference between the two courts on the issue of Mr Cheong's submission to the BVI court's insolvency jurisdiction. The BVI

court considered that Mr Cheong's submission of a claim form, as trustee of the DC Fund, for a loan in the insolvency proceedings, amounted to his submission to jurisdiction in the Parallel BVI Proceeding, and found this submission to be of "overwhelming significance" in the *forum conveniens* analysis (BVI Judgment at [167(1)]). The applicants contend that the relevance of a party's submission to jurisdiction in the *forum conveniens* analysis is a question of importance. We do not agree. The principles on this issue are well-settled under Singapore law. Submission to jurisdiction may relate to the existence of jurisdiction in that court but another jurisdiction may still be considered the *forum conveniens* in respect of the exercise of jurisdiction. The Court of Appeal's decision in *Sun Jin Engineering Pte Ltd v Hwang Jae Woo* [2011] 2 SLR 196 at [16]–[17] makes this clear. A stay application accepts that the Singapore courts have jurisdiction but asserts that another jurisdiction is the more appropriate forum to hear the claim. In that case, the respondent who submitted to the jurisdiction of the Singapore courts applied successfully to stay the Singapore proceedings in favour of proceedings in the Maldives.

40 These arguments reflect the risk of inconsistent decisions between the Singapore and BVI proceedings. The existence of such a risk is but an aspect of the consideration given to the weightage of the relevant factors, and not a point of principle. The Court of Appeal, in *Lakshmi* (at [59]), observed that the weight to be placed on concurrent proceedings in the local and foreign court is dependent on factors including the degree to which both proceedings have advanced and the degree of overlap in both proceedings, referencing the following excerpt from *Halsbury's Laws of Singapore* vol 6(2) (LexisNexis Singapore, 2016) at para 75.094 as "particularly useful":

> The weight to be given to the fact of existence of parallel proceedings will depend on the circumstances. The degree to

> which the respective proceedings have advanced is an important consideration; … The degree of overlap of issues and parties is another consideration. However, little or no weight will be given to [the] fact that there are foreign proceedings if they are commenced for strategic reasons to bolster the case of a clearly more appropriate forum elsewhere.
>
> …
>
> The risk of conflicting judgments arising from concurrent proceedings is another factor to consider, but it is not decisive and will need to be weighed with other factors. If it is a straight competition between proceedings in the forum and proceedings elsewhere, this factor should carry no weight, because the only question before the court is whether it should exercise its own jurisdiction and it has no control over foreign proceedings. Of course, ideally the trial should be held at only one of the competing fora, but trial in either forum alone will obviate the risk. However, the problem usually arises in the context of complex litigation involving multiple issues and/or multiple litigants.

41 In *Lakshmi*, the comparative degree to which the respective proceedings had advanced was considered largely a neutral factor as there was no substantial difference in the progress of both proceedings (*Lakshmi* at [60]). This point is of relevance in this case. While the degree of overlap – the other factor mentioned in *Lakshmi* – is substantial in the present case, this would not have been a relevant consideration for the Judge, as the BVI Setting Aside Application had not yet been decided at that point. The Judge thus rightly disposed of the point by referring to the early stage of proceedings in the BVI.

42 Lastly, the risk of inconsistent decisions between two parallel proceedings brings us to the issue of whether the CBIP in OA 317 is applicable to the Singapore Claim. The BVI court suggested it may be desirable for the BVI and Singapore courts to utilise the CBIP (BVI Judgment at [168]). The applicants contend that the issue of whether the CBIP applies to the civil proceedings, and the manner of its application, are questions of importance upon

which a decision of a higher tribunal would be to the public advantage. The nub of the applicants' argument is that it is unclear whether the CBIP would apply to the Singapore Claim, given that the CBIP is meant to govern "insolvency proceedings" as defined in the protocol, which in turn encompasses "Singapore proceedings", defined as OA 317 and "all other ancillary proceedings taken out in the Singapore Court in connection with the foregoing". The applicants' question involves the interpretation of the definitions listed within the CBIP, which was drafted by the liquidators and incorporated in a court order. While the CBIP takes reference from the Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters and the Modalities of Court-to-Court Communication by the Judicial Insolvency Network, it is peculiar to the precise factual matrix of the case and its interpretation does not offer a general point of importance in the context of a *forum non conveniens* decision.

43 In sum, there is no issue of general principle or point of importance that should be adjudicated upon by a higher tribunal. Matters concerning the application of established principles do not raise a question of general principle: *Lin Jianwei v Tung Yu-Lien Margaret and another* [2021] 2 SLR 683 at [86]. The applicants' true complaint is that the Judge did not rule in their favour. It is in this context that we turn to their arguments on a *prima facie* case of error.

***Prima facie case of error***

44 The applicants make two arguments on *prima facie* error:

(a) First, the Judge erred in failing to accord sufficient weight to Mr Cheong's pleaded case that the trust was created through the BVI master-feeder fund structure, after parties had agreed to the Independent

Fund Arrangement. The applicants contend that it was incorrect for the Judge to have stated that the respondent's case was that the trust was created pursuant to the Independent Fund Arrangement as there was no transfer of property at the time the Independent Fund Arrangement was agreed upon. This error led the Judge to: (a) determine that the trust claim arose in Singapore; (b) place limited weight on BVI governing law; (c) place limited weight on the applicability of BVI financial regulatory law; and (d) place limited weight on the parallel BVI proceeding.

(b) Second, the Judge also erred in according significant weight to the location of the potential witnesses identified by the respondent (Singapore GD at [72]–[76]) in the *forum conveniens* analysis. This is a *prima facie* error since the evidence of such witnesses were tangential at best, given that the Independent Fund Arrangement was made between the respondent and the founders of Three Arrows. The BVI Judgment found that the same consideration "lacks any real weight or significance" (BVI Judgment at [167(9)]).

45 We reject both contentions. It must be understood that, in order to obtain permission to appeal, any error must be an error of law save where, in exceptional circumstances, the error is one of fact which is obvious from the record: *Rodeo Power Pte Ltd and others v Tong Seak Kan and another* [2022] SGHC(A) 16 at [10].

46 The first contention that the Judge had erred in stating that the trust arose "pursuant to" the Independent Fund Arrangement misunderstands the Judge's decision. The applicants have taken this phrase to mean that the Judge stated

that the trust was *created when* the Independent Fund Arrangement was entered into. In our view, the Judge was merely stating that the trust was constituted in accordance with the parties' agreement in the Independent Fund Arrangement, even if the trust only arose later when the DC Investors transferred cryptocurrencies and fiat currencies when subscribing to the shares in the BVI master-feeder structure. This interpretation coheres with the Judge's finding (at [69] of the Singapore GD) that the trust arose, in substance, in Singapore. In arriving at that conclusion, the Judge considered, amongst other factors, the fact that the initial transfer of cryptocurrencies and fiat currencies to the DC sub-accounts and the issuance of the DeFiance shares and interests occurred when Three Arrows was headquartered and operating in Singapore. This meant that the Judge was cognisant of the fact that the trust was only constituted when the assets were transferred, after the parties had agreed on the Independent Fund Arrangement. Accordingly, the Judge did not make any *prima facie* error.

47 The second contention concerns the weight accorded by the Judge on the location of witnesses in coming to his conclusion that Singapore is the *forum conveniens*. That the location of witnesses is relevant in the *forum conveniens* inquiry is settled law: *Lakshmi* at [71]–[76]. In particular, in factual cases, the compellability of local witnesses is particularly pertinent: *Lakshmi* at [73]. In the present case, aside from Mr Cheong, a trader of the 3AC Group, the auditors of Three Arrows and the fund administrator for the DC Fund and 3AC Group are based in Singapore. Their evidence is relevant to the segregation of the DC Assets. Production could also be ordered of relevant documents.

48 In the *forum conveniens* analysis, where the weightage of matters of fact varies from case to case, the decision is "not a scientific exercise but one of judgment". In such cases, the test of a *prima facie* case of error "would not be

satisfied by the assertion that the judge had reached the wrong conclusion on the evidence": *IW v IX* [2006] 1 SLR(R) 135 at [27] and [20]. It is clear that the Judge took into account the presence of a competing forum, the applicability of BVI law as the governing law and the BVI being the centre of main interests, in holding that Singapore is the more appropriate forum. The BVI Judgment accorded a different weight to these factors. However, this reflects a difference of opinion in the manner in which the law should be applied to the facts, and not a *prima facie* error.

**Conclusion**

49 We therefore dismiss the application. The applicants are to pay Mr Cheong costs. These are fixed, inclusive of disbursements, at $10,000. The usual consequential orders are to apply.

Debbie Ong
Judge of the Appellate Division

Valerie Thean
Judge of the High Court

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