

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

[2024] SGHC 143

Originating Application No 258 of 2024 (Registrar's Appeal No 87 of 2024)

In the matter of Sections 3, 4(1) and 4(2) of the Evidence (Civil Proceedings
in Other Jurisdictions) Act 1979 (2020 Rev Ed)

And

In the matter of Order 55 Rules 2 and 4 of the Rules of Court 2021

And

In the matter of a Letter of Request dated 20 November 2023 from the United
States District Court for the Southern District of Texas for International
Judicial Assistance pursuant to the Hague Convention of 18 March 1970 on
the Taking of Evidence Abroad in Civil or Commercial Matters

- (1) Carlo Giuseppe Civelli
- (2) Aster Capital SA (Ltd) Panama

... Appellants

FOUNDATIONS OF DECISION

[Civil Procedure — Witnesses — Whether the appointment of a private
examiner to conduct a pre-trial examination is a step that can be taken by way
of obtaining evidence for the purposes of domestic civil proceedings]

[Evidence — Witnesses — Attendance — Compelling attendance of witness to take evidence for foreign proceedings]

[International Law — Conventions — Obligations under the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters]

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Re Civelli, Carlo Giuseppe and another

[2024] SGHC 143

General Division of the High Court — Originating Application No 258 of 2024

Kwek Mean Luck J

17 May 2024

31 May 2024

Kwek Mean Luck J:

Introduction

1 The central question that arose in this appeal was whether the Evidence (Civil Proceedings in Other Jurisdictions) Act 1979 (2020 Rev Ed) (“ECPOJA”) precluded the appointment of a private examiner to take evidence for foreign proceedings, and instead required the examination to be conducted by either the Registrar or a Judge. I held that the ECPOJA did not preclude the appointment of a private examiner. As there did not appear to be any local decision on this point of law, I set out the grounds for my decision below.

Applications in OA 258

2 In Originating Application No 258 of 2024 (“OA 258”), the appellants applied, pursuant to ss 3, 4(1) and 4(2) of the ECPOJA and O 55 rr 2 and 4 of the Rules of Court 2021 (“ROC”), for orders to examine Mr Gerard Rene Jacquin (“Mr Jacquin”). In Summons No 1029 of 2024 (“SUM 1029”), the

applicants sought leave to amend their prayers in OA 258. The learned Assistant Registrar (“AR”) dismissed OA 258 and SUM 1029. The appellants appealed against this decision in Registrar’s Appeal No 87 of 2024 (“RA 87”).

3 The application was based on a Letter of Request dated 20 November 2023 from the United States District Court for the Southern District of Texas (“Texas Court”) for international judicial assistance (“Letter of Request”), pursuant to the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (18 March 1970), 847 UNTS 231 (entered into force 7 October 1972), accession by Singapore 26 October 1978 (“Hague Convention”) and the Agreed Order dated 12 April 2024 issued by the Texas Court.

4 The application, with the proposed amendments in SUM 1029, sought various orders, including that:

- (a) Mr Jacquin attend in person at the office of Prolegis LLC before Ms Dianne Fischer (“Ms Fischer”) to be orally examined under oath by the appellants’ counsel on the topics described in section 10 of the Letter of Request; and
- (b) Mr Jacquin’s oral testimony be subject to the United States Federal Rules of Evidence and Federal Rules of Civil Procedure.

5 The AR held that he was bound by the ECPOJA to dismiss the application for two main reasons:

- (a) Sections 5(1)(a), 5(2) and 5(3) of the ECPOJA support the view that the Act provides that the Singapore Court is to be involved in and regulate the process for the taking of foreign evidence. Section 5(1) of

the ECPOJA states that a person is not compelled by an order under s 4 of the ECPOJA to give evidence they could not be compelled to give in Singapore civil proceedings or in the civil proceedings of the jurisdiction of the requesting court. Such a claim to privilege should be determined by the Singapore courts, which should retain oversight over the taking of foreign evidence.

(b) Section 4(3) of the ECPOJA provides that the Court may only order the taking of steps which can be ordered to be taken to obtain evidence in domestic civil proceedings. Ordering evidence to be taken from a witness through a process in which the Court plays no role is not a step that can be ordered to be taken in domestic civil proceedings. The application seeks an order for a process in which the Court plays no role. It is not a step which could have been ordered to be taken to obtain evidence in domestic civil proceedings.

Appellants' submissions

6 The appellants submitted that nothing in ss 3 or 4 of the ECPOJA precluded the appointment of a private examiner or required a Singapore judicial officer to be an examiner. On the contrary, the power granted to the court under s 4(1) of the ECPOJA was a broad one.

7 Order 55 r 4(1) of the ROC expressly provided that the examiner may be any fit and proper person nominated by the applicant. The examiner need not be the Registrar. Ms Fischer was a fit and proper person as she was an experienced US lawyer familiar with the US Federal Rules of Evidence and Rules of Civil Procedure. Further, the parties to the Texas action agreed to her appointment as examiner.

8 Sections 5(1)(a) and 5(3) of the ECPOJA did not prevent the appointment of a private examiner. The plain words of the provisions did not prohibit the appointment of a private examiner. The practical operation of these provisions was not compromised by the appointment of a private examiner. Witnesses could refuse to answer by invoking s 5 of the ECPOJA, and such a claim of privilege could be determined by the Singapore court even where the examiner appointed was a private one: see *Staravia Ltd v Consolidated Aeronautics Corp* [1989] 2 SLR(R) 292 (“*Staravia*”). Mr Jacquin had appointed Singapore lawyers to act for him in OA 258, and OA 258 included an order for Mr Jacquin’s counsel to be permitted to attend his examination.

9 The Singapore parliamentary debates concerning the passing of the Evidence (Civil Proceedings in Other Jurisdictions) Bill (Bill No 19/1979) in 1979 did not evince any intention for the Act to be confined to situations where the examiner is a Singapore judicial officer: Singapore Parliamentary Debates, Official Report (7 September 1797) vol 39, (Mr EW Barker, Minister for Law and Science and Technology) (“*ECPOJA Parliamentary Debates*”) at cols 405–406.

10 The appellants also pointed to precedents in which private examiners had been appointed in applications to give effect to letters of request issued by courts in the US. In Singapore, there was precedent for the appointment of a private examiner in HC/ORC 4407/2020. In England and Hong Kong, which are parties to the Hague Convention, the legislations governing applications to give effect to letters of request in relation to civil proceedings in other jurisdictions were similar to the Singapore legislation. In particular, there were precedents for the appointment of private examiners in:

- (a) England, in *Securities and Exchange Commission v Credit Bancorp Ltd and others* [2001] Lexis Citation 1212 (Queen’s Bench Division) (“*Credit Bancorp*”) where the English court specifically discussed s 2(3) of the English Evidence (Proceedings in Other Jurisdictions) Act 1975, the equivalent of s 4(3) of the ECPOJA, and was content to appoint a non-judicial officer as examiner and in *Regina v Rathbone, Ex parte Dikko Noga Commodities (Overseas) Inc and another v Rijn Maas-en Zeescheepvaartkantoor N.v. and others* [1985] 2 WLR 375 (Queen’s Bench Division) (“*Rathbone*”); and
- (b) Hong Kong, in *AB v X and others* [2022] 2 HKC 406 (Court of First Instance) (“*AB*”) and *Angela Chen also known as Angela C. Sabella v Vivien Chen & another* [2011] HKCU 2382 (Court of First Instance) (“*Angela Chen*”).

Decision

The applicable law

11 The regime enabling the High Court to assist in obtaining evidence required for the purposes of civil proceedings in other jurisdictions is contained in the ECPOJA and the ROC.

12 Sections 3 and 4 of the ECPOJA provide:

Application to General Division of High Court for assistance in obtaining evidence to be used abroad

3. Where an application is made to the General Division of the High Court for an order for evidence to be obtained in Singapore and the General Division of the High Court is satisfied that —

- (a) the application is made pursuant to a request issued by or on behalf of a court or tribunal (called in

this Act the requesting court) exercising jurisdiction in a country or territory outside Singapore; and

(b) the evidence to which the application relates is to be obtained for the purposes of civil proceedings which either have been instituted before the requesting court or whose institution before that court is contemplated,

the General Division of the High Court has the powers conferred on it by this Act.

Power of General Division of High Court to give effect to application for evidence

4.—(1) Subject to this section, the General Division of the High Court has power, on any such application referred to in section 3, by order to make such provision for obtaining evidence in Singapore as may appear to the General Division of the High Court to be appropriate for the purpose of giving effect to the request pursuant to which the application is made; and any such order may require a person specified in the order to take such steps as the General Division of the High Court may consider appropriate for that purpose.

...

(3) An order under this section must not require any particular steps to be taken unless they are steps which can be required to be taken by way of obtaining evidence for the purposes of civil proceedings in the General Division of the High Court (whether or not they are proceedings of the same description as those to which the application for the order relates); but this subsection does not preclude the making of an order requiring a person to give testimony (either orally or in writing) otherwise than on oath where this is asked for by the requesting court.

...

(5) A person who, by virtue of an order under this section, is required to attend at any place is entitled to the like payment for expenses and loss of time as on attendance as a witness in civil proceedings before the General Division of the High Court.

13 Order 55 rr 4 and 5 of the ROC provide that:

ORDER 55 OBTAINING EVIDENCE FOR FOREIGN COURTS, ETC.

...

Person to take and manner of taking examination (O. 55, r. 4)

4.—(1) Any order made in pursuance of this Order for the examination of a witness may order the examination to be taken before any fit and proper person nominated by the person applying for the order or before the Registrar or before such other qualified person as to the Court seems fit.

(2) Subject to any special directions contained in any order made in pursuance of this Order for the examination of any witness, the examination must be taken in the manner provided by Order 9, Rule 24, and an order may be made under Order 9, Rule 24 for payment of the fees and expenses due to the examiner, and that Rule applies accordingly with the necessary modifications.

...

Dealing with deposition (O. 55, r. 5)

5. Unless any order made in pursuance of this Order for the examination of any witness otherwise directs, the examiner before whom the examination was taken must send the deposition of that witness to the Registrar, and the Registrar must —

(a) give a certificate sealed with the seal of the Supreme Court for use out of the jurisdiction identifying the documents annexed to the certificate, that is to say, the letter of request, certificate, or other document from the court or tribunal out of the jurisdiction requesting the examination, the order of the Court for examination and the deposition taken in pursuance of the order; and

(b) send the certificate with the documents annexed thereto to the Permanent Secretary to the Minister, or, where the letter of request, certificate or other document was sent to the Registrar by some other person in accordance with a Civil Procedure Convention, to that other person, for transmission to that court or tribunal.

14 Order 9 r 24 of the ROC provides:

Pre-trial examination (O. 9, r. 24)

24.—(1) Where it is necessary in the interests of justice to record the evidence of any witness in or out of Singapore before a trial, a party may apply to the Court to make an order for pre-trial examination.

...

(6) A pre-trial examination in Singapore must be before a Judge or the Registrar and must be conducted according to the rules governing trials.

...

(8) A pre-trial examination outside Singapore must be conducted by the examiner appointed by the Court and in the manner directed by the Court and the examiner must not do anything that is contrary to the law of that place.

15 Section 4(1) of the ECPOJA gives the General Division of the High Court (“GDHC”) the power to, by order, make provision for the obtaining of evidence pursuant to which the request is made, and to require a person specified in the order to take such steps as the GDHC considers appropriate.

16 This is caveated in s 4(3) of the ECPOJA, which states that the order “must not require any particular steps to be taken unless they are steps which can be required to be taken by way of obtaining evidence for the purposes of civil proceedings” in the GDHC.

The court’s power to make orders under s 3 of the ECPOJA has been invoked

17 The High Court’s jurisdiction to make an order under the ECPOJA was engaged here as the conditions in s 3 of the ECPOJA was satisfied. The three requirements were that: (a) there was an application to the GDHC for an order

for evidence to be obtained in Singapore; (b) the request was made by a court or tribunal exercising jurisdiction in a country outside Singapore; and (c) the evidence was to be obtained for the purposes of civil proceedings which have been instituted before the requesting court, or whose institution before that court was contemplated: *Rio Tinto Zinc Corporation and others v Westinghouse Electric Corporation* [1978] AC 547 at 633.

18 The three requirements had been satisfied, in that: (a) OA 258 was the application; (b) the request was made by the Texas Court, which exercised jurisdiction in a country outside Singapore; and (c) the evidence was to be obtained for the purposes of civil or commercial proceedings before the Texas Court, *ie*, the foreign proceeding *Civelli et al v JP Morgan Chase et al* No. 3:17-cv-03739.

19 The Agreed Order also authorised Mr Civelli “to make the necessary application(s) on behalf of [the Texas Court] to give effect to the Letter of Request” as required under O 55 r 2(1) of the ROC.

The court may order a pre-trial examination before a private examiner

20 In my view, the court may order a pre-trial examination to take place before a private examiner for the purposes of obtaining evidence in civil proceedings in Singapore.

21 I begin by explaining how the applicable sections of the ROC delineate the orders which the GDHC is empowered to make in civil proceedings.

- (a) Under O 9 r 24(8) of the ROC, the court may order for a pre-trial examination to be conducted by an examiner appointed by the court, where such examination takes place outside Singapore. It would follow

that the appointment of a private examiner was a step that could be “required to be taken by way of obtaining evidence for the purposes of civil proceedings” in the GDHC.

(b) Order 9 r 24(6) of the ROC also provides that a pre-trial examination that takes place in Singapore must be before a Judge or a Registrar. Order 55 r 4(2) provides that subject to any special directions contained in the order for examination of any witness, the examination must be taken in the manner provided by O 9 r 24. In the absence of special directions from the court, the examination must take place before a Judge or Registrar.

(c) There was broad discretion for the court to order that the examination need not take place before a Judge or Registrar, under O 3 r 2(1) of the ROC.

22 Read in its totality, O 9 r 24, O 55 rr 4 and 5, and O 3 r 2(1) of the ROC evinced a framework in which a pre-trial examination may be ordered in Singapore for the purposes of obtaining evidence for civil proceedings in the GDHC, where the examiner could be any fit and proper person nominated by a party which the court seems fit.

23 First, O 9 r 24(6) of the ROC applies to trials that would take place in Singapore, whereas the Letter of Request was with respect to a trial that was taking place in the United States. Section 4(3) of the ECPOJA does not require that the order made under s 4(1) of the ECPOJA *mirror* the steps that would be taken by way of obtaining evidence for the purposes of civil proceedings in the GDHC *in Singapore*. It only states that the steps ordered, be steps which *can* be required to be taken for the purpose of obtaining evidence for civil proceedings

in the GDHC. On this analysis, s 4(3) of the ECPOJA does not prohibit an order appointing a private examiner.

24 Second, O 55 r 4 of the ROC is consistent with the above interpretation. Order 55 r 4(1) provides that for the purposes of obtaining evidence for a foreign court, an order be made for a witness to be examined by “any fit and proper person nominated by the person applying for the order or the Registrar” as the court seems fit. This expressly contemplates the possibility of a private examiner. This is reinforced by O 55 r 4(2) which provides for the payment of fees and expenses due to the examiner. This provision would not be necessary if the examination could only be conducted by the Registrar or a Judge. The entire provision in O 55 r 4 would be otiose if the interpretation of the ECPOJA is that examination can only be conducted by a Judge or the Registrar.

25 Third, and moreover, O 55 r 4(2) of the ROC allows for special directions to be contained in the order. In addition, O 3 r 2(1) of the ROC also states that all requirements in the ROC are subject to the Court’s discretion to order otherwise in the interests of justice, even if they are expressed using imperative words. Both provisions allow the court to order the appointment of a private examiner. In my view, even if the deposition before the private examiner did not take place before a Judge or the Registrar, the courts retained judicial oversight over the process. This is because special directions could be contained in the order. In addition, the Registrar must certify the deposition and provide a certificate with the seal of the Supreme Court, before the deposition is transmitted to the requesting court under O 55 r 5 of ROC.

26 Fourth, there are also precedents from England and Hong Kong, where private examiners were appointed by the courts for the purposes of recording evidence for foreign courts: see *Credit Bancorp*, *Rathbone*, *AB* and *Angela*

Chen. Both England and Hong Kong were parties to the Hague Convention, and their respective legislations contained similar provisions to the ECPOJA. In particular, they also had the equivalent of s 4(3) of the ECPOJA and the courts in these cases did not take the view that the equivalent provision prohibited the appointment of private examiners.

27 Fifth and finally, I noted that there was nothing in the Singapore parliamentary debates concerning the passing of the Evidence (Civil Proceedings in Other Jurisdictions) Bill (Bill No 19/1979) in 1979, which suggested that there could not be examination of a witness by a private examiner: *ECPOJA Parliamentary Debates* at cols 405–406.

28 Taking into consideration all of the above, I did not consider s 4(3) of the ECPOJA to prohibit the appointment of private examiners.

The Singapore court retains oversight over claims that evidence is privileged

29 The other issue was whether s 5 of the ECPOJA, which deals with the privilege of witnesses, envisaged close control by the Singapore courts over the process of taking evidence for foreign courts, so as to prohibit the appointment of private examiners.

30 I agreed with the appellants that the plain wording of s 5 of the ECPOJA did not prohibit the appointment of a private examiner. The concerns in the provision regarding privilege, could be met by a witness raising objections to answering questions on the grounds of privilege under ss 5(1) or 5(3) of the ECPOJA, with the assistance of counsel in attendance. In this case, the orders sought under OA 258 included an order for Mr Jacquin’s counsel to be permitted to do so.

31 Should such privilege be invoked by the witness, the onus would be on the appellants to file an application to the Singapore courts for an order for the witness to answer the questions posed, during which the witness would have to substantiate his claim of privilege. This was how privilege was invoked in *Staravia*.

32 Under s 5(2) read with s 5(1)(b) of the ECPOJA, if the privilege claimed was a privilege not available under Singapore law, but under the foreign law, then the Singapore courts might require the witness to provide the evidence, shifting the onus onto the witness to apply to the foreign court for an order that the information is privileged under the laws of the requesting court. In this respect, the Singapore courts continue to retain judicial oversight over matters of privilege.

33 I therefore found that s 5 of the ECPOJA did not prohibit the appointment of private examiners, as the court retained oversight over the exclusion or inclusion of privileged information.

Exercise of the court’s discretion under s 4 of the ECPOJA

The law on international judicial assistance on taking evidence abroad

34 *Singapore Civil Procedure* (Cavinder Bull gen ed) (Sweet & Maxwell, 2024) (“*Singapore Civil Procedure*”) at para 55/2/5 noted that the general principle to be followed, as derived from the English position, was that the Singapore court will ordinarily give effect to a request for international judicial assistance under the Hague Convention as far as is proper and practicable, and to the extent that is permissible under Singapore law. This principle reflected judicial and international comity, and conformed to the spirit of the Hague Convention, which Singapore had acceded to.

35 In this case, I was satisfied that it would be appropriate to give effect, as far as practicable and proper and in accordance with Singapore law, to the Letter of Request. Under O 55 r 4(2) of the ROC, the court may issue special directions in the order for the examination of the witness. Therefore, the court had a broad discretion to make appropriate modifications to the order sought by the appellants.

My decision on the appropriate order to make

36 Having found that it would be appropriate to make an order for Mr Jacquin to be examined, I next considered how the court might impose conditions under O 55 r 4(2) of the ROC to safeguard the examination process. In doing so, it should, amongst other things, have had regard to what was conveyed in the Letter of Request.

37 Paragraph 8 of the Letter of Request requested the High Court to “compel the oral testimony under oath before a diplomatic officer, consular agent or other competent authority recognized by law”. Paragraph 12 of the Letter of Request sought a deposition of Mr Jacquin and that “the diplomatic officer, consular agent or any other competent authority recognized by law must record the testimony by either audio and/or video recording”. It also stated that the recording could be done by a person acting in the presence and under the direction of the diplomatic officer, consular agent or any other component authority recognised by law.

38 In my view, while the Registrar would clearly be a “competent authority recognized by law”, it was questionable whether a private examiner nominated by a litigant and accepted as fit and proper person by the court under O 55 r 4(1) of the ROC, could be said to be a “competent authority recognized by law”. This

was particularly since the phrase “competent authority recognised by the law” is mentioned in paras 8 and 12 of the Letter of Request alongside “diplomatic officer” and “consular agent”, who are government officials. Applying the *noscitur a sociis* canon of construction, which emphasises the importance of construing a word in light of the words with which it is associated, a “competent authority recognized by law” should be construed as an authority with some position officially recognised by Singapore law, and not merely a private examiner recognised as a fit and proper person.

39 Given the nature of the request in the Letter of Request, in particular that the examination should take place before a competent authority recognised by law, I was of the view that Ms Fischer could be allowed to be the private examiner, but that such examination should take place before the Registrar. This would satisfy the Letter of Request’s specification, as the Registrar is a competent authority recognised by Singapore law, and permit the examination to take place before the private examiner specified in the Letter of Request.

40 Therefore, the appeal was allowed. I granted an order in terms of OA 258 as amended by the prayers in SUM 1029, and in line with the proposed further amendments raised by the appellants at the end of the hearing, which included the condition that the private examination before Ms Fischer of Mr Jacquin takes place in the presence of and under the direction of the Registrar in Chambers.

Kwek Mean Luck
Judge of the High Court

Cavinder Bull SC, Woo Shu Yan, Tay Hong Zhi Gerald and Chua
Ying Ying Erin (Drew & Napier LLC) for the appellants.
