EXHIBIT 78

R. M. S. VEERAPPA CHITTY.

v.

M. P. L. MOOTAPPA CHITTY.

[SINGAPORE.]

Foreign Judgment—Judgment in default of appearance against a Defendant who although served in the foreign country was neither resident in nor a subject of that country.

A judgment of a foreign Court obtained in default of appearance against a Defendant cannot be enforced by action in the Courts of this Colony where the Defendant although served with the writ of summons whilst temporarily present in the foreign country on business, was not a subject of nor resident in such foreign country for there exists nothing imposing on the Defendant any duty to obey the judgment. *Kader Nina Marican v. Kader Meydin* (S. S. L. R. [1893] 4) distinguished.

Quaere, whether a judgment of the Supreme Court of Johore will be enforced by the Courts of this Colony.

BONSER, C. J.
1893.
Oct. 10 & 17.

THIS was an action on a judgment obtained by the Plaintiff against the Defendant in the Supreme Court of Johore.

Donaldson & Napier, for the Plaintiff.

Nanson & Delay, for the Defendant.

The facts and the arguments are sufficiently set forth in the judgment. In addition to the cases noticed in the judgment the following cases were cited; *Buchanan v. Rucker* (1 Camp 63); The *Delta* (L. R. 1 P. D. 393); *Jackson v. Spittall* (L. R. 5. C. P. 542); *General Steam Navigation Co., v. Guillon* (1 M. & W. 894).

C. A. V.

BONSER, C. J.

This is an action brought upon a judgment of the Court of Johore for $20,000. The Defendant is a British Indian subject residing in Singapore. The proceedings in the Johore Court were commenced on the 6th March 1893 by the issue of a summons in the Malay language by the Johore Commissioner of Police, requiring the Defendant to attend with his books and papers at the Police Court, which is the only Court in Johore, and where all cases, civil and criminal alike, are tried. The summons was served on the Defendant in Johore,

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whither he had gone for the day on business. The Defendant is not a Johore subject nor has he ever resided there nor was he present in Johore when the summons was issued.

The Defendant did not appear on the summons, either personally or by agent, and on the 25th of March judgment was given against him in his absence for the full amount claimed. Upon that judgment this action is brought. The Defendant raises (amongst other defences) the defence that a judgment thus obtained in his absence imposes no duty on him to obey it. The Plaintiff on the other hand contends that the fact that the Defendant was served with the summons during his temporary presence in Johore constrains this Court to enforce the judgment. The question is one of considerable importance to the mercantile community of this Settlement, for if the contention of the Plaintiff be correct, every merchant who spends a Sunday in Johore renders himself liable to have his business rights and obligations adjudicated upon by a Mohammedan judge administering Mohammedan law.

The cases in which English Courts will enforce the judgments of foreign Courts obtained against British subjects and others in their absence are enumerated by Fry, J. in *Rousillon v. Rousillon*, (14 Ch. D. p. 371), in the following words :—

" What are the circumstances which have been held to impose upon the defendant the duty of obeying the decision of a foreign Court? Having regard to the case of *Chilsby v. Westenholz* (L. R. 6 Q. B. 155) and to *Copin v. Adamson* (L. R. 9 Exch. 345) they may, I think, be stated thus. The Courts of this country consider the defendant bound where he is a subject of a foreign country in which the judgment has been obtained; where he was a resident in the foreign country when the action began: where the defendant in the character of plaintiff has selected the forum in which he is afterward sued: where he has voluntarily appeared; where he has contracted to submit himself to the forum in which the judgment was obtained; and possibly, if *Becquet v. MacCarthy* (3 B. & A. 951) be right, where the defendant has real estate within the foreign jurisdiction, in respect of which the cause of action arose whilst he was within that jurisdiction."

It would seem therefore that in order to impose on a defendant the obligation of fulfilling a foreign judgment obtained against him in his absence, the defendant must either be a subject of the foreign

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state or have so conducted himself as to warrant the inference that he has or ought to have submitted himself to the jurisdiction of the Courts. For instance, if he is domiciled or, short of being domiciled, is a more or less permanent resident in the foreign state, he will be taken to owe submission to the jurisdiction of the Court in return for the protection which he enjoys, or as it has been expressed, he owes a qualified or temporary allegiance to that country. Another example is where the plaintiff has elected to sue in the foreign court and perhaps where, as defendant, he has voluntarily appeared before the foreign court and taken the chance of a judgment in his favour. Now can it be inferred from the fact that a man goes to Johore for the day that he intends to submit himself to the jurisdiction of the Johore Court? To my mind such an inference would be in the highest degree unreasonable. Then is there anything unconscientious in this Defendant saying to the Plaintiff, 'If you have a claim against me I desire to have it decided in the Court of this Colony where we both reside and carry on business, and I decline to obey the judgments of the Johore Court?' In my opinion there is not. I can see nothing in the circumstances of this case nor in the conduct of the Defendant, which leads me to the conclusion that the Defendant has in fact submitted to the jurisdiction or that he ought to have done so. But whether or not the principle which I have suggested be the true one, the fact remains that no case can be found in which an English Court has enforced a foreign judgment against a British subject obtained under circumstances like the present. A case, however, of *Kader Nina Merican v. Kader Meydin*, (S. S. L. R., [1893], p 4,) has been cited, which was decided in this Court by Sidgreaves, C, J., as far back as 1876 but only reported this year, and by which it is said I am bound. Sir Thomas Sidgreaves in giving judgment said :—

"It was next objected that the Court of Johore had no jurisdiction to try this case inasmuch as the defendant was not resident in and had no property in Johore. The defendant himself however according to his own account went to Johore for the express purpose of opposing the present plaintiff and according to the plaintiff when he applied for a warrant in the first instance against the defendant, the defendant appeared in Court to oppose the application and was so far successful that the warrant was refused and only a summons issued against him. The objection to the jurisdiction of the Court

hardly comes with a good grace from him. I have no hesitation in deciding however that the Johore Court had jurisdiction to try the case and that the temporary presence of of the defendant in Johore was sufficient to give the Court jurisdiction. Actions are either local or transitory and the present action was of the latter class. *Debitum et contractus sunt nullius loci* and it is upon this principle that actions are constantly tried in the Courts here."

It might be sufficient to say that there were facts in that case which do not exist in the present, from which it might be inferred that the defendant had submitted himself to the jurisdiction of the Johore Court, but the learned Judge clearly rests his decision on the ground that inasmuch as this Court asserts jurisdiction over defendants who are temporarily present, so it will recognise the right of foreign courts to do the same. But this ground was expressly repudiated by the Court of Queen's Bench in *Godard v. Gray*. (L. R. 6 Q. B., 139,) and *Schibsby v. Westonholz*, (L. R. 6 Q. B. 155,) in which latter case Blackburn, J., says, delivering the judgment of the Court :—

"We are much pressed on the argument with the fact that the British Legislature has by the Common Law Procedure Act 1852 (15 and 16 Vic. c. 76 ss. 18 and 19) conferred on our Courts a power of summoning foreigners under certain circumstances to appear and in case they do not, giving judgment against them by default. It was this consideration principally which induced me at the trial to entertain the opinion which I then expressed and have since changed. And we think that if the principle on which foreign judgments were enforced was that which is loosely called 'comity' we could hardly decline to enforce a foreign judgment given in France against a resident of Great Britain under circumstances hardly if at all distinguishable from those under which we, *mutatis mutandis*, might give judgment against a resident in France: but it is quite different if the principle be that which we have just laid down."

The decision of Sidgreaves, C. J. therefore, unless it can supported on the grounds which I have suggested, is inconsistent with the decisions of the Court of Queen's Bench in *Godard v. Gray* (L. R. 6 Q. B. 139) and *Schibsby v. Westonholz*, (L. R. 6 Q. B. 155) and, also with the subsequent decision of the Court of Exchequer in *Copin v. Adamson*, (L. R. 9 Exch. 345) which followed and adopted these decisions; and is not binding on me. It may be remarked that none of these cases

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Another objection was raised by the Defendant that the Court in Johore was not a Court whose judgment could be recognised by this Court. It appears that in the Court of Johore the law is Mohammedan law administered by a native Mohammedan Judge. That law was stated by the Johore lawyer who was called for the Plaintiff to be the law of the Koran supplemented by the edicts or ordinances of the Ruler, but he added that any such edict or ordinance, unless in accordance with the law of the Koran, was *ipso facto* void. So far as I am aware there is no case except the one above referred to, of *Kadir Nina Merican v. Kadir Meydin* (S. S L. R. [1893] 3) in which an English Court has recognised the judgment of a Mohammedan Court as binding on British subjects. This may be accounted for by the fact that in the great majority of Mohammedan, and indeed Oriental countries, the subjects of European Powers are exempted by treaty from the jurisdiction of the local Court and can only be sued in Courts of their own nationality.

The rules of private international law are rules which have been evolved from the law and practice of the Courts of the great family of European nations and are primarily intended to govern the relations *inter se* of the members of that family. I doubt whether the State of Johore is yet in a position to assert its title to be received into that family and successfully insist that this Court shall accord to the judgments of its Courts an effect and force which are not accorded to the judgments of the Courts of the Kingdoms of Persia and Siam, and of the Empires of Turkey, China and Japan. But it is not necessary in the view which I take of this case to decide that point. At the same time I wish carefully to guard myself against its being supposed that I entertain any doubts as to the good faith of the Johore Court or its competence or ability to decide questions arising between Johore subjects, and that I desire to speak in any terms but those of the greatest respect of that Court. It was indeed alleged by the Defendant that the judgment in the present case was contrary to natural justice, but there was nothing in the evidence to support that allegation and I do not believe that there was any foundation for it.

With regard to the costs of the action the Defendant has placed on the record a charge of fraud which he has not attempted to substantiate. This being so I shall not give him any costs. But he has further disputed the fact that the summons was served on him in

Johore and has sworn that the service took place in Singapore and has brought witnesses to swear the same thing. I do not believe him or his witnesses and I regret that I cannot make him pay the costs of the action. I can however make him pay the costs of the issue as to the place of service, and I do so.

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Judgment will be for the Defendant, without costs, and the Defendant must pay to the Plaintiff the costs I have mentioned.

Solicitors for the Plaintiff—*Drew & Napier.*

Solicitors for the Defendant—*S. R. Groom.*

MOHAMED MEYDIN *v.* SYED AHMED.

[SINGAPORE.]

Statute of Limitations.—Clause 9 of Indian Act XIV of 1859.—Amendment at trial.

The Plaintiff sued the Defendant to recover a sum of money paid by him in satisfaction of a judgment obtained against him and the Defendant upon their joint and several promissory note which the Plaintiff had signed as surety for the Defendant.

The judgment was obtained in 1886. The judgment debt was paid by the Plaintiff in March 1889 and the present action was not commenced till September 1893. The Defendant contended that the period of limitation was that provided by clause 9 of Indian Act XIV of 1859 namely 3 years and the claim was therefore barred.

Held that clause 9 was not intended to apply to a claim framed in accordance with the *common indebitatus* counts for money had and received except in the cases mentioned in the clause namely "for money lent" or "for interest" and that the following words "for the breach of any contract" do not include an action brought upon an implied contract and that consequently there being no express provision for the case it fell under Clause 16.

Radhanath Dutt v. Govind Chunder Chatterjee (4 W.R.S.C. 19) followed.

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1893.
Oct. 20, 27 & 30.

THIS was a Small Cause in which the Plaintiffs' claim as endorsed on the writ was as follows:—

$442.26 for money paid to P.P.L. Raman Chitty as surety for the Defendant, being the amount of a judgment dated 9th September 1886 obtained by the said Raman Chitty against the Plaintiff and Defendant in an action on a promissory note.

The Defence filed was a plea of payment and satisfaction but at the trial Counsel applied for leave to amend by pleading the Statute of Limitations which was granted.

The facts of the case sufficiently appear in the judgment.

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The Asian Plutus; Owners of Cargo lately laden on board the Ship or Vessel 'Asian Plutus' v Owners and other persons interested in the Ship or Vessel 'Asian Plutus'

HIGH COURT (SINGAPORE) — ADMIRALTY IN REM NO 106 OF 1988
YONG PUNG HOW J
15 MAY 1990

Conflict of Laws — Foreign jurisdiction clause — Plaintiff starting action in Singapore in breach of clause — Whether court should stay action — Procedural disadvantages in Japanese lawsuit — Possibility of connected lawsuits in two different courts — High Court (Admiralty Jurisdiction) Act (Cap 123, 1985 Ed), s 3(1)(g) — Civil Law Act (Cap 43, 1985 Ed), s 5

Shipping — Bill of lading — Japanese jurisdiction clause — Damage to goods in transit — Plaintiff owner of goods starting action in rem in Singapore against owners of ship

Civil Procedure — Stay of action — Foreign jurisdiction clause in contract — Whether desirable for connected suits to be tried in different jurisdictions

By a bill of lading issued by them, the defendants acknowledged shipment on board their vessel 'Asian Plutus' of cargo for carriage to and delivering at Singapore to the plaintiffs. Among the clauses in the bill of lading it was provided that the bill of lading shall have effect subject to the International Carriage of Goods by Sea Act 1957 of Japan ('the Japanese COGSA'). Also, the contract contained in the bill of lading shall be governed by Japanese law, and any action against the carrier thereunder shall be brought before the Tokyo District Court in Japan.

After the vessel arrived in Singapore, the cargo was found to be seriously damaged. The plaintiffs commenced an action in rem against the vessel. The defendants applied to the court for the plaintiffs' action to be stayed, on the ground that the contract of carriage upon which the plaintiffs' claim was brought expressly provided for any action against the carrier under the contract to be brought in the Tokyo District Court in Japan. The registrar ordered that the plaintiffs' action be stayed. The plaintiffs appealed to the judge-in-chambers against the registrar's order.

Held, dismissing the plaintiffs' appeal:

(1) Although the contract of carriage was governed by the Japanese COGSA, it was not in dispute that the local court had jurisdiction under s 3(1)(g) of the High Court (Admiralty Jurisdiction) Act (Cap 123, 1985 Ed) to decide the case.

(2) Prima facie, where there is a foreign jurisdiction clause, effect should be given to it. The parties must be deemed to have agreed to the jurisdiction of the foreign court, presumably with knowledge of how it works and what it can or cannot do. But a court has discretion to refuse an application for a stay if the facts and circumstances of the case are so exceptional as to amount to strong cause and to warrant such a refusal. There was no contention in the present case that the law to be applied should be any other than that chosen by the parties in their contract.

(3) While it may be that a court in Singapore, working in English, will not be precluded from deciding questions of Japanese law, it need hardly be said that it is very much more satisfactory for the law of Japan to be decided by the courts of that country, with a view to ensuring that justice is done.

(4) If the parties have chosen the jurisdiction, the burden of proving that there is strong cause for not granting a stay rests on the plaintiff; where no such choice has been made, the burden of proof (including proving that there is another clearly more appropriate forum) rests on the defendant.

(5) If the action was brought in the Tokyo District Court, there would be communication problems. While this is a factor which has had to be considered in many such cases, the court found it difficult to attribute much weight to it. Similarly, the inconvenience and expense to the plaintiffs in having the case heard in Japan is not a sufficiently telling factor especially when matched against the inconvenience and expense to which the defendants in turn would be subject if the action were allowed to be continued in Singapore.

Cases referred to

1 *The 'Eleftheria'* [1969] 1 Lloyd's Rep 237 (folld)
2 *Austrian Lloyd Steamship Co* v *Gresham Life Assurance Society Ltd* [1903] 1 KB 249 (folld)
3 *Kirchner & Co* v *Gruban* [1909] 1 Ch 413 (folld)
4 *The 'Cap Blanco'* [1913] P 130 (folld)
5 *The 'Athenee'* (1922) 11 Lloyd LR 6 (folld)
6 *The 'Media'* (1931) 41 Lloyd LR 80 (folld)
7 *The 'Fehmarn'* [1957] 2 Lloyd's Rep 551; [1957] 1 Lloyd's Rep 511 (folld)
8 *The 'Adolf Warski'* [1976] 2 Lloyd's Rep 241 (refd)
9 *The 'Makefjell'* [1976] 2 Lloyd's Rep 29 (refd)
10 *Trendtex Trading Corp* v *Credit Suisse* [1980] 3 All ER 721 (refd)
11 *The 'Bernarty'* [1984] 2 Lloyd's Rep 244 (refd)
12 *The 'El Amria'* [1981] 2 Lloyd's Rep 119 (refd)
13 *Amerco Timbers Pte Ltd* v *Chatsworth Timber Corp Pte Ltd* [1977] 2 MLJ 181 (folld)
14 *The 'Atlantic Star'* [1973] 2 Lloyd's Rep 197 (distd)
15 *MacShannon* v *Rockware Glass LH* [1978] AC 795 (distd)
16 *The 'Abidin Daver'* [1984] 1 Lloyd's Rep 339 (distd)
17 *The 'Epar'* [1985] 2 MLJ 3 (distd)
18 *The 'Sidi Bishr'* [1987] 1 Lloyd's Rep 42 (distd)
19 *The 'Spiliada'* [1987] 1 Lloyd's Rep 1 (distd)
20 *The 'Maldive Importer'* [1986] 1 MLJ 12 (refd)

Legislation referred to

Civil Law Act (Cap 43, 1985 Ed) s 5
High Court (Admiralty Jurisdiction) Act (Cap 123, 1985 Ed) s 3(1)(g)
International Carriage of Goods by Sea Act 1957 [Japan]

NK Pillai (*Liew Teck Huat* with him) for the plaintiffs.
Loo Dip Seng for the defendants.

Cur Adv Vult

Yong Pung How J: By a bill of lading dated 2 May 1987 issued by them in Osaka, Japan, the defendants acknowledged shipment on board their vessel 'Asian Plutus' at Kobe, Japan, of four steel boxes containing a lathe machine for carriage to and delivery at Singapore to the

plaintiffs. Among the large number of clauses in the bill of lading were the following:

> 2 Clause Paramount. As far as this bill of lading covers the carriage of the goods by water, this bill of lading shall have effect subject to the provisions of the International Carriage of Goods by Sea Act 1957 of Japan, unless it is adjudged that any other legislation of a nature similar to the International Convention for the Unification of Certain Rules relating to Bills of Lading signed at Brussels on 25 August 1924 compulsorily applies to this bill of lading, in which case it shall have effect subject to the provisions of such legislation, and the said Act or legislation (hereinafter called the Hague Rules legislation) shall be deemed to be incorporated herein. If any provision of this bill of lading is held to be repugnant to any extent to the Hague Rules legislation or any laws, statutes or regulations applicable to the contract evidenced by this bill of lading, such provision shall be null and void to such extent but no further.
>
> 3 Governing Law and Jurisdiction. The contract evidenced by or contained in this bill of lading shall be governed by Japanese law except as may be otherwise provided for herein, and any action against the carrier thereunder shall be brought before the Tokyo District Court in Japan.

The vessel arrived in Singapore on 11 May 1987 and the cargo including the steel boxes containing the lathe machine was duly discharged from it into a warehouse to be unstuffed for delivery. The warehouse known as Keppel Block 37 belonged to the Port of Singapore Authority, and was leased to the carrier's agents, Integrated Agency Pte Ltd, and operated by them. Later, while the boxes were still in the possession of the carrier's agents and were being unstuffed, the machine was found to be seriously damaged.

After a lapse of almost one year, the plaintiffs commenced an action in rem against the vessel. The bill of lading showed that the carrier was Interasia Lines Ltd of Japan, and the shipper Yamazen Co Ltd of Osaka, Japan. An exhibit to one of the plaintiffs' affidavits disclosed that Lloyd's Register of Ships (1985-1986) showed the Port of Registry of the vessel as Panama, and Lloyd's List of Shipowners (1983-1984) showed the owners as Fairwind Navigation SA with its principal place of business in Panama City, Republic of Panama. In the writ which was filed on 9 May 1988, the plaintiffs were described as the owners of cargo lately laden on board the ship or vessel 'Asian Plutus', and the defendants as the owners of and other persons interested in the vessel. The writ carried the following indorsement:

> The plaintiffs as the owners of cargo lately laden on board the defendants' ship or vessel 'Asian Plutus' of the Port of Panama, and/or as holders and/or indorsees of the bill of lading whereunder the said cargo was shipped, claim damages from the defendants for loss of and/or damage to the said cargo during the voyage from Kobe, Japan to Singapore in or about the month of May 1987, sustained by reason of the defendants' breach of contract and/or duty and/or negligence in and about the carriage thereof.

On 27 May 1989, the defendants applied to the court for the plaintiffs' action to be stayed, on the ground that the contract of carriage upon which the plaintiffs' claim was brought expressly provided for any action against the carrier under the contract to be brought in the Tokyo District Court in Japan. On 15 September 1989, the registrar ordered that the plaintiffs' action be stayed on condition (1) that the defendants provide security acceptable to all parties for the plaintiffs' action to be brought in the Tokyo District Court in Japan; (2) that the defendants refrain from raising time bar as a defence in the action in the Tokyo District Court, if the plaintiffs commence the action there within four months; and (3) that the defendants appoint a firm of solicitors to accept service of process in the proceedings to be commenced in the Tokyo District Court. The defendants complied with the conditions, and in due course the period for commencing the action in the Tokyo District Court was also extended. On 18 September 1989, the plaintiffs appealed to the judge-in-chambers against the registrar's order.

Although the contract of carriage under this bill of lading is to have effect under the International Carriage of Goods by Sea Act 1957 of Japan ('the Japanese COGSA') to the extent that it is not otherwise affected by the Hague Rules, it is not in dispute that this court has jurisdiction to entertain in Singapore the plaintiffs' claim against the defendants under s 3(1)(g) of the High Court (Admiralty Jurisdiction) Act (Cap 123, 1985 Ed) which provides as follows:

> The admiralty jurisdiction of the High Court shall be as follows, that is to say, jurisdiction to hear and determine any of the following questions or claims:
>
> (g) any claim for loss or damage to goods carried in a ship;

The question for this court to decide is simply whether the appeal against the Registrar's order that the action be stayed in view of the foreign jurisdiction clause in the bill of lading should be allowed or dismissed.

Except in countries in which a foreign jurisdiction clause is void per se under local legislation, courts have exercised a wide discretion in deciding whether they will hear the parties to an action or whether they will uphold a foreign jurisdiction clause and stay an action. In deciding such questions in the absence of a relevant local law, a Singapore court has recourse to English law and the practice followed by the courts in England, subject only to such modifications and adaptations as may be necessary to suit local circumstances in Singapore. This is by virtue of s 5 of the Civil Law Act (Cap 43, 1985 Ed), the relevant part of which reads as follows:

> 5(1) Subject to this section, in all questions or issues which arise or which have to be decided in Singapore with respect to the law of partnerships, corporations, banks and banking, principals and agents, carriers by air, land and sea, marine insurance, average, life and fire insurance, and with respect to

mercantile law generally, the law with respect to those matters to be administered shall be the same as would be administered in England in the like case, at the corresponding period, if such question or issue had arisen or had to be decided in England, unless in any case other provision is or shall be made by any law having force in Singapore.

(3) For the purposes of this section —

(a) the law of England which is to be administered by virtue of subsection (1) shall be subject to such modifications and adaptations as the circumstances of Singapore may require;

A convenient starting point in considering the English law on the subject is the leading judgment of Brandon J in *The 'Eleftheria'*[1] at p 242 in which he summarized what appeared to him to be the principles established by six authorities on this class of case which had been cited to him: *Austrian Lloyd Steamship Co* v *Gresham Life Assurance Society Ltd*;[2] *Kirchner & Co* v *Gruban*;[3] *The 'Cap Blanco'*;[4] *The 'Athenee'*;[5] *The 'Media'*;[6] and *The 'Fehmarn'*.[7] These principles were enunciated by him as follows:

(1) Where plaintiffs sue in England in breach of an agreement to refer disputes to a foreign court, and the defendants apply for a stay, the English court, assuming the claim to be otherwise within the jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not.

(2) The discretion should be exercised by granting a stay unless strong cause for not doing so is shown.

(3) The burden of proving such strong cause is on the plaintiffs.

(4) In exercising its discretion the court should take into account all the circumstances of the particular case.

(5) In particular, but without prejudice to (4), the following matters, where they arise, may be properly regarded:

(a) In what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and foreign courts.
(b) Whether the law of the foreign court applies and, if so, whether it differs from English law in any material aspects.
(c) With what country either party is connected, and how closely.
(d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages.
(e) Whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would (i) be deprived of security for that claim; (ii) be unable to enforce any judgment obtained; (iii) be faced with a time bar not applicable in England; or (iv) for political, racial, religious or other reasons be unlikely to get a fair trial.

The legal basis for these principles was the presumption that contracts freely entered into must be upheld and given full effect unless their enforcement would be unreasonable and unjust. The manner in which these principles have been applied in England in later cases has not always produced uniform decisions. As extreme examples, in *The 'Adolf Warski'*,[8] the Court of Appeal in applying these principles upheld a decision by Brandon J to refuse a stay when the foreign jurisdiction was Polish; but, on the same day and on very similar facts the same Court of Appeal upheld another decision by Brandon J in *The 'Makefjell'*[9] to grant a stay when the foreign jurisdiction was Norwegian. Notwithstanding the lack of uniformity at times in the results of their application, the principles enunciated by Brandon J in *The 'Eleftheria'*[1] have been consistently applied by English courts in later cases in considering foreign jurisdiction clauses; *Trendtex Trading Corp* v *Credit Suisse*[10] at pp 735-737; *The 'Benarty'*[11] and in particular *The 'El Amria'*.[12]

With only some changes of wording to which I shall refer, Brandon J's views which he stated in *The 'Eleftheria'*[1] were adopted in their entirety by the Court of Appeal in Singapore in *Amerco Timbers Pte Ltd* v *Chatsworth Timber Corp Pte Ltd*.[13] In delivering the judgment of the court on the principles of law on which an application to stay an action on the ground of a foreign jurisdiction clause should be decided in Singapore, Kulasekaram J echoed Brandon J's views as follows:

> The law concerning an application for a stay is clear. Where a plaintiff sues in Singapore in breach of an agreement to submit their dispute to a foreign court, and the defendant applies for a stay, the Singapore Court, assuming the claim to be otherwise within its jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not. The court in exercising its discretion should grant the stay and give effect to the agreement between the parties unless strong cause is shown by the plaintiff for not doing so. To put it in other words the plaintiff must show exceptional circumstances amounting to strong cause for him to succeed in resisting an application for a stay by the defendant. In exercising its discretion the court should take into account all the circumstances of the particular case. In particular, the court may have regard to the following matters, where they arise:
>
> (a) In what country the evidence on the issues of fact is situated or more readily available, and the effect of that on the relative convenience and expense of trial as between the Singapore and foreign courts.
> (b) Whether the law of the foreign court applies and, if so, whether it differs from Singapore law in any material respects.
> (c) With what country either party is connected and, if so, how closely.
> (d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages.
> (e) Whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would:
> (i) be deprived of security for their claim;
> (ii) be unable to enforce any judgment obtained;
> (iii) be faced with a time bar not applicable here; or
> (iv) for political, racial, religious or other reasons be unlikely to get a fair trial.

In view of the changes in wording, it is of interest and significance that the Court of Appeal in effect thought fit to clarify what amounts to 'strong cause' by emphasizing

the 'exceptional circumstances' which the plaintiff must show to succeed. This means that prima facie, where there is a foreign jurisdiction clause, effect should be given to it. The parties must be deemed to have agreed to the jurisdiction of the foreign court, presumably with knowledge of how it works and what it can or cannot do. But a court has discretion to refuse an application for a stay if the facts and circumstances of the case are so exceptional as to amount to strong cause and to warrant such a refusal.

In the present case, the nature of the dispute before the court was set out in eight affidavits and the documents exhibited to them. The affidavits unfortunately contained more argument than fact, with which they should have been mainly concerned. Three of them dated 5 July 1989, 22 August 1989 and 11 September 1989 were filed by Mr Yan Chuan Chee, the claims manager of Spica Services (S) Pte Ltd, the Singapore correspondents for The United Kingdom Mutual Steamship Assurance Association (Bermuda) Ltd which was the Protection and Indemnity Club in which the defendants' vessel 'Asian Plutus' was entered. Four affidavits dated 27 July 1989, 6 September 1989, 15 September 1989 and 23 October 1989 were filed by Mr Liew Teck Huat, an advocate and solicitor in the employ of the plaintiffs' solicitors; and another affidavit dated 27 November 1989 was filed by Mr Kanapathi Pillai Nirumalan, an advocate and solicitor who described himself in the affidavit as the sole proprietor of the plaintiffs' solicitors' firm and is also known as Mr N K Pillai, the plaintiffs' counsel in the instant case.

Counsel for the plaintiffs accepted that the burden was on him to show exceptional circumstances amounting to strong cause before the plaintiffs could succeed in their appeal against the stay obtained by the defendants. In doing so, he relied on several arguments. First, as his main argument, he contended that the major issues as to liability would revolve around the questions touching on two matters: in whose care, custody and possession was the machine when the damage to it occurred; and what was the direct and proximate cause of the damage. He contended that the damage was incurred in Singapore, 'during the voyage', and not in Japan. Since the plaintiffs had pleaded in the indorsement on the writ that the damage was incurred 'during the voyage from Kobe, Japan to Singapore', he contended that this was a standard form of indorsement and that, in relation to the cargo, the term 'voyage' properly construed extended to cover the whole of the period after the vessel arrived in Singapore until the time the cargo was delivered to consignees. A landing report by Nikkanen Services Pte Ltd, and an outward survey report between the parties, both done in Singapore, indicated that there were in Singapore surveyors, freight forwarders, PSA officials and experts whom the plaintiffs would want to call as witnesses. He contended therefore that the relevant evidence that was available on these matters, including all relevant documentary evidence and the witnesses whom the plaintiffs proposed to call, was almost exclusively to be found in Singapore. If these witnesses had to be taken to Japan, the plaintiffs would suffer substantial inconvenience and expense. The evidence of these witnesses would also have to be interpreted and the documents translated into Japanese, causing further inconveniene and expense.

This was not a completely one-sided argument, however, as the defendants' counsel drew the court's attention to the fact that, apart from the foreign jurisdiction clause providing for the action to be brought in the Tokyo District Court, there was the agreement by the parties that the contract should be governed by Japanese law, in particular the Japanese COGSA. Japanese law would be best administered by the Japanese court. The port of shipment was Kobe, in Japan, the shippers and their forwarders were Japanese. The defendants claimed that, if the dispute continued to be tried in Singapore, they would in their turn have to bring into Singapore Japanese lawyers and several witnesses from Japan, and would suffer similar inconvenience and expense. It was by no means accepted by them, to put it at its weakest, that the damage to the machine had taken place in Singapore. In fact, the plaintiffs themselves had not formally claimed this, because the indorsement to their writ claimed damages from the defendants for loss of and for damage to the cargo 'during the voyage from Kobe, Japan to Singapore', and in this connection the defendants did not accept the stretched definition of 'voyage' contended by the plaintiffs. The damage might have been caused 'pre-shipment', and evidence on this which was available in Japan was called for. There was also other material evidence on the defendants' side which was in Japan, and not in Singapore. The reports prepared in English in Singapore could readily be translated into Japanese.

To begin with, therefore, in considering and determining this appeal, there is for the court the prima facie case for a stay arising from the foreign jurisdiction clause. A party must be bound by a foreign jurisdiction clause which he has agreed to, unless he can show exceptional circumstances amounting to strong cause to the contrary, and thereby discharge the burden placed on him. In *The 'Eleftheria'*,[1] Brandon J said at p 245:

> First, as to the prima facie case for a stay arising from the Greek jurisdiction clause. I think it is essential that the court should give full weight to the prima facie desirability of holding the plaintiffs to their agreement. In this connection, I think that the court must be careful not just to pay lip service to the principle involved, and then fail to give effect to it because of a mere balance of convenience.

Apart from the dispute over jurisdiction, there was no contention in the present case that the law to be applied should be any other than that chosen by the parties in their contract. A factor which was therefore pressed on me very

strongly by counsel for the defendants was that cl 3 of the bill of lading provided that the contract of carriage is governed by Japanese law which, even on the affidavits and exhibits to them, appears to be not in all material aspects the same as English law. While it may be that a court in Singapore, working in English, will not be precluded from deciding questions of Japanese law on the basis of expert evidence from Japanese lawyers, assisted by competent interpreters, it need hardly be said that it is very much more satisfactory for the law of Japan to be decided by the courts of that country, with a view to ensuring that justice is done. This is so much a matter of common sense that no authority should be necessary.

In this context, I should add that counsel for the plaintiffs referred the court to a string of authorities in which the House of Lords and other English courts have explained the principles to be followed in deciding on the subject of litigation in foreign jurisdictions: *The 'Atlantic Star'*;[14] *MacShannon* v *Rockware Glass Ltd*;[15] *The 'Abidin Daver'*;[16] *The 'Epar'*;[17] *The 'Sidi Bishr'*;[18] and *The 'Spiliada'*.[19] These authorities really deal with the subject of forum non conveniens, rather than the question of whether a court should consider a stay to enforce a foreign jurisdiction clause, and are not of the same relevance in deciding on the issues in the present case, in which the parties have by their contract of carriage agreed beforehand to the jurisdiction of a foreign court. One major difference between the two groups of cases is in the burden of proof. If the parties have chosen the jurisdiction, the burden of proving that there is strong cause for not granting a stay rests on the plaintiff; where no such choice has been made, the burden of proof (including proving that there is another clearly more appropriate forum) rests on the defendant.

Assuming for the time being that the plaintiffs are right in their interpretation of the period of time covered by the term 'voyage', an anomalous problem which they have created for themselves by over-reliance on the use of standard forms and which they will have to resolve when the case goes to trial, the plaintiffs' main argument was based on their contention that the damage occurred in Singapore, and that there are witnesses in Singapore, and documents in the English language. In my opinion, the purely geographical location of the accident can be of relatively minor significance. It does lead inevitably to some connexion with that location, as a large number of such claims would be for damage discovered after discharge, and much of the evidence would be in the country of discharge. But, so far as the transportation of witnesses is concerned, it must be borne in mind that this is an unavoidable problem which may arise in every case where a foreign jurisdiction clause is applied. With the ever improving means of travel between countries, this is not normally a problem which causes insuperable difficulties. In the present case, it appeared to me to be very much a neutral factor. Second, counsel for the plaintiffs contended that the relevant documentary evidence and the oral evidence were essentially based on the English language. If the action was brought in the Tokyo District Court, and conducted in the Japanese language, there would be language communication problems, and much time and effort would be taken up in ensuring that the evidence and the notes of the proceedings were properly and accurately recorded. In view of this, the plaintiffs' position could be unfairly prejudiced. While this is a factor which has had to be considered in many such cases which have come before the courts in England, I find it difficult to attribute much weight to it in a court in the multi-lingual society of Singapore, where from our own experience the use of interpreters in court proceedings can be an established daily routine.

On the contention that the plaintiffs' position could be unfairly prejudiced if legal proceedings had to take place in Japan, affidavit evidence by a Japanese lawyer on certain aspects of Japanese civil procedure was filed by the plaintiffs which purported to show some disadvantages in using a Japanese forum as compared to a forum like Singapore which follows English law and civil procedure. Thus, reference was made to the fact that it generally takes two to three years for an admiralty action to be tried in the Tokyo District Court; that a hearing before this court could be followed by hearings before the Appeal Court, and before the Supreme Court; that this court only hears two or three cases a year involving the Japanese COGSA; that in Japanese proceedings the rules relating to discovery and interrogatories are very restrictive compared to the English rule followed in Singapore; and, although a Japanese court may issue a subpoena to compel the attendance of witnesses in a civil case, this is very rarely done, and the Japanese lawyer who provided the evidence was himself unaware of a case where a subpoena had been issued. In my opinion, where parties have agreed beforehand on the choice of jurisdiction, they must be deemed to have done so with sufficient knowledge of how it works, and what it can and cannot do, and to accept the situation for what it is. If the parties have chosen to submit their disputes to the exclusive jurisdiction of a foreign court, it is difficult to see how either party can in ordinary circumstances complain of the procedure of that court, whether it be that the process of discovery is much restricted or that the process for the issue of subpoenas is not what is followed elsewhere; by choosing the court, they have chosen the procedure.

It may well be that, in very exceptional cases, really serious defects in the procedure of a foreign court, if clearly established by cogent evidence, may justify a Singapore court taking another view of the matter; but this is clearly not the position in the present case, where it is the Tokyo District Court which is concerned, for Japan is a leading maritime country, whose courts must be well versed in such commercial disputes. Even in such exceptional

cases, a Singapore court would need to be cautious about taking the same approach as English courts have been wont to take in the past. With several centuries of legal development and history behind them, and a well deserved reputation for justice which is second to none, English judges and courts have sometimes tended to assume an English court to be the natural forum of choice for foreign litigants. In the process, they have not been averse to rejecting a foreign jurisdiction clause and deciding in favour of exercising an English jurisdiction, even though this has meant that an English court must apply a foreign law. In administering the law of England by virtue of s 5(1) of the Civil Law Act (Cap 43, 1985 Ed), it will often be more appropriate, because of the different circumstances of Singapore, for courts in Singapore to avoid adopting this lofty perspective and to seek instead to apply the law of England with the modifications and adaptions permitted by s 5(3)(a). It is of significance that even in England there has been a discernible movement away from this partiality in recent years. Judicial chauvinism is said by the House of Lords to have been replaced by judicial comity. As an example, in *The 'Atlantic Star'*,[14] Lord Reid said at p 200, in response to a suggestion that England was a very good place for a foreign party to go forum shopping:

> It is said that the right of access to the Queen's Court must not be lightly refused. In the present case Lord Denning MR said:
>
> 'No one who comes to these courts asking for justice should come in vain ... This right to come here is not confined to Englishmen. It extends to any friendly foreigner. He can seek the aid of our courts if he desires to do so. You may call this 'forum shopping' if you please, but if the forum is England, it is a good place to shop in both for the quality of the goods and the speed of service.'
>
> My Lords, with all respect that seems to me to recall the good old days, the passing of which many may regret, when inhabitants of this island felt an innate superiority over those unfortunate enough to belong to other races.

In addition to their claim in the present case, counsel for the plaintiffs drew my attention to the fact that, as the plaintiffs considered that liability for the loss could fall either on the defendants or on their servants or agents, they have also commenced an action in Singapore against the defendants' agents, Integrated Agency Pte Ltd, for breach of duty as bailees and for negligence, in which both the statement of claim and the defence should closely mirror the corresponding pleadings in the present case. The plaintiffs contend, therefore, that there are two actions in Singapore arising out of the same facts, and revolving around the same issues, and requiring investigations and presentation of identical evidence. In the circumstances, if the plaintiffs were forced to institute proceedings in the Tokyo District Court, it would result in a highly undesirable situation of two actions based on the same issues and evidence being tried in two different forums. Since, in exercising its discretion, the court must take into account all the circumstances of the case, this multiplicity of proceedings is a consideration which must also be taken into account. Plaintiffs' counsel cited the case of *The 'El Amria'*,[12] in which the plaintiffs' cargo of spring crop potatoes was carried by the defendants' vessel from Egypt to Liverpool and was found to be in a deteriorated condition on being unloaded. The plaintiffs issued a writ against the defendants claiming damages for breach of contract and for negligence in and about the stowage, custody and care of their potatoes on board the vessel. The defendants having alleged that the deterioration of the cargo had occurred as a result of the unreasonably slow discharge of the cargo, the plaintiffs issued another writ against the Mersey Docks and Harbour Company. This circumstance was considered by Brandon LJ on appeal as one of the subsidiary reasons relied on by the judge in the Admiralty Court for dismissing the defendants' application for a stay, and he said at p 128:

> I agree entirely with the learned judge's view on that matter, but would go rather further than he did in the passage from his judgment quoted above. By that I mean that I do not regard it as merely convenient that the two actions, in which many of the same issues fall to be determined, should be tried together; rather that I regard it as a potential disaster from a legal point of view if they were not, because of the risk inherent in separate trials, one in Egypt and the other in England, that the same issues might be determined differently in the two countries.

This factor was also alluded to in a Singapore case, *The 'Maldive Importer'*[20] although it does not appear to have been the main reason for the court's decision. In that case, the vessel struck a reef off an island in the Maldives and sank with a total loss of the cargo on board. The plaintiffs who were owners of some of the cargo commenced proceedings against the owners of the vessel, who applied for the proceedings to be stayed on the ground that the parties were bound by a foreign jurisdiction clause in the bills of lading. In refusing a stay, Lai Kew Chai J held that 'it is crystal clear that practically all the evidence is in Singapore with which the transactions to be investigated will have the closest nexus', and that 'the application for a stay should be refused as it was made purely to obtain a procedural advantage which the respondents are not entitled to in all the circumstances'. In doing so, however, he also expressed the view that 'it is clearly desirable that two or more actions, in which many of the same issues fall to be determined, should be tried by the same tribunal'.

The court's observations in *The 'El Amria'*[12] and those in *The 'Maldive Importer'*[20] deserve of course the greatest respect. It is relevant to note, however, on the subject of multiplicity of actions, that in *The 'El Amria'*,[12] the plaintiffs had been induced to bring a similar action against another party the Mersey Docks and Harbour Company by the defensive stand taken by the defendants. In *The 'Maldive Importer'*,[20] because the vessel sank with the total loss of the cargo on board, there were 24 other

admiralty actions arising out of the accident, which had already been commenced in the High Court in Singapore by other cargo interests. In the instant case, however, the other action which has been commenced in the High Court in Singapore has been commenced by the plaintiffs against the servants or agents of the defendants in circumstances in which, on the bare facts which have been made available to this court, it is not possible to be convinced that the action against the servants or agents need have been taken at all. While the existence of more than one action in different jurisdictions will cause difficulties and can be a relevant factor in deciding whether or not to grant a stay, the plaintiffs should be precluded in the present case from using this circumstance to their advantage when it has been brought about by them. It requires little more effort to commence the second action, and to take this circumstance into account in their favour would be to allow the plaintiffs to choose another preferred forum to that previously agreed to by them in entering into the contract of carriage.

Whether to grant a stay or not is a matter for the discretion of the court. I have considered the factors which have been used by the plaintiffs in their attempt to rebut the prima facie case for a stay, and the very lengthy and detailed arguments which have been urged upon me by counsel for the plaintiffs over several days. In my judgment, this was a dispute which the parties had expressly agreed under the bill of lading should be decided by the Tokyo District Court, and decided in accordance with Japanese law. The choice of Japanese law tied to the choice of a Japanese court as the selected forum are strong factors in upholding the jurisdiction clause. The parties are therefore bound by the jurisdiction clause in the bill of lading to which they have agreed unless exceptional circumstances amounting to strong cause to the contrary can be shown. The inconvenience and expense to the plaintiffs in having to transport witnesses to Japan, and having to use the Japanese language instead of English, is not a sufficiently telling factor, especially when matched against the inconvenience and expense to which the defendants in turn would be subject if the action were allowed to be continued in Singapore. While the vessel is shown by the plaintiffs to have been owned some two or three years before the accident by a Panamanian entity, with its principal place of business in Panama City, the carriers and the shippers were Japanese; on the other hand, the plaintiffs have not proved that they themselves have any real connection with Singapore, and even all five of their affidavits were filed by their solicitors. Neither has it been seriously suggested, as in *The 'Maldive Importer'*,[20] that the defendants do not genuinely desire trial in Japan or are only seeking procedural advantages. The existence of another action which has been commenced by the plaintiffs in the High Court in Singapore is in my judgment not of sufficient relevance to affect the prima facie case for a stay. In all the circumstances, I have therefore come to the conclusion that the plaintiffs have not discharged the burden of proof which was placed on them, and have not proved the exceptional circumstances amounting to the strong cause which they must prove if the court is to refuse a stay. Accordingly, the appeal is dismissed with costs.

Appeal dismissed.

Solicitors: *Niru & Co; Ang & Partners.*

Reported by *Terence Tan Bian Chye*

Borneo Motors (S) Pte Ltd v William Jacks & Co (S) Pte Ltd

HIGH COURT (SINGAPORE) — SUIT NO 1651 OF 1983
THEAN J
14 MAY 1990

Landlord and Tenant — Payment for utilities — Tenant to pay electricity and water bill — Whether landlord's computation was correct — Tenant seeking to recover amounts overpaid in respect of such bill — Onus of proving that landlord's computation incorrect

Equity — Estoppel — Payment of bills over a long period of time — Whether payer estopped from claiming that bills were incorrect

The plaintiffs were the tenants and the defendants were the landlords of the premises comprising the front portion of the ground of the building complex ('the premises'). These were let by the defendants to the plaintiffs for a term of three years under a lease.

At all material times the Public Utilities Board ('PUB') did not install separate meters for each of the defendants' tenants; two substation meters were installed by PUB to measure consumption of electricity for the whole of the complex, including the premises. There was no separate meter for measuring electricity consumed in the premises and, accordingly, it was agreed that the plaintiffs should install a meter for measuring their own consumption of electricity.

The basis of the plaintiffs' claims is that overpayments were made for utilities under mistakes of fact; they were mistaken as follows: that the bills rendered by the defendants were proper bills, whereas, in fact, they were not, and that they were under a misconception that the units recorded in the meter had to be multiplied five times for the purpose of equating the rates for such units to the rates charged by PUB.

The claim was disputed by the defendants who amongst other things raised the defence of estoppel, ie that the plaintiffs were estopped from alleging that the method or manner of computation of the electricity charges was incorrect.

Held, dismissing the plaintiffs' claim:

(1) The multiplication by a factor of five was to cover two items, which were not otherwise charged to the plaintiffs: water

EXHIBIT 80

(2004) 8 SYBIL 1–22

ARTICLES

CROSSING THE RIVER BY FEELING THE STONES: RETHINKING THE LAW ON FOREIGN JUDGMENTS

by ADRIAN BRIGGS*

The common law on the recognition and enforcement of foreign judgments is characterised by immobility in most jurisdictions, but has recently undergone significant development in Canada. The decision of the Supreme Court of Canada in *Beals v. Saldanha* provides a perfect opportunity to evaluate the new directions in which Canada is seeking to take the common law; and to ask whether some of the received authority of the common law is, quite apart from the work being done in Canada, not now due for reconsideration. The submission is that cautious and incremental development of the law on foreign judgments, especially by reference to broad and general principles of the common law, has much to recommend it. An assessment of the state of the common law world is made in at attempt to see where the common law may improve itself from within its own resources, the better to serve the interests of those who obtain, and those who are on the receiving end of, foreign judgments.

I. INTRODUCTION

The *Singapore Year Book of International Law* is a new venture. It is hoped that it will offer, among other things, a forum[1] for conflicts lawyers from various jurisdictions[2] to cast an eye over selected component parts of their subject, and to ask whether the law is serving the needs of the common law world as well as it should. Perhaps because it shows the common law in a condition of semi-creative tension, the law on the recognition and enforcement of foreign judgments is a good place to start. In England the common law is characterized by a formidable degree of inertia. No significant judicial development can be expected below the level of the House of Lords,[3] this perhaps contributed to by a curious perception that statutory development is rather more important.[4] The common law in Australia does not show much sign of recent growth, but in Canada the Supreme Court has started to make radical departures from the traditional English version of the common

* Professor of Private International Law, University of Oxford; Barrister (Middle Temple); and formerly Visiting Professor of Law at the National University of Singapore. The valuable suggestions of my colleague Yeo Tiong Min, and the Editor's seductive encouragement to contribute to this first edition, are acknowledged with great pleasure.

1 In the experience of the writer, a *forum conveniens*.

2 Including those, like the writer, who have time and again enjoyed the academic and social hospitality of the Dean and Faculty of Law of the National University of Singapore.

3 In *Adams v. Cape Industries plc.* [1990] Ch. 433 (Eng. C.A.), the Court of Appeal was confined to the task of discerning the law on jurisdictional competence, not changing it. In *Owens Bank Ltd. v. Bracco* [1992] 2 A.C. 443 (Eng. H.L.), the House of Lords considered that it was too late even for it to alter the received common law on fraud as a defence to recognition and enforcement.

4 *Owens Bank Ltd. v. Bracco*, *ibid.* at 489. The oddness is all the more marked when one recalls that judgments from the courts of the United States are enforced at common law or not at all. These must constitute a large part of the class of judgments presented for recognition and enforcement, in England at least.

law. One opportunity for English lawyers is to consider whether any of this new foreign material, judicially road-tested as some of it has been, offers a principled and practical improvement on the law so far established. Another is presented by the burgeoning law on agreements on jurisdiction, and the perception that it may have significance at the end as well as at the beginning of the litigation. The opportunity for the courts of Singapore lies along the same lines: to consider how to develop the commercial common law of a modern state. In one narrow respect, as we shall see, the Singapore Court of Appeal has shown some sympathy with sentiment that the English common law has passed its use-by date. Whether it was wise to do this, and whether it would be wise to go further down the road of judicial reform of the law, is the subject of this paper. The perspective of the enquiry is not particularly Singaporean, but rather is that of a common lawyer looking at the menu of choices now presented by this branch of his subject. The perspective is also more practical than theoretical, on the footing that judicial development of the common law is unlikely to be influenced[5] by game theory, however much this may have to offer those who do their work outside the courts.[6] The conclusion will be that the basic instincts and ambitions of the common law are still predominantly sound, but that its approach to the foreign judgments is coming under some pressure. This in turn is leading some courts to move in new directions. There is nothing wrong with this as long as they move thoughtfully, incrementally, pragmatically: crossing the river by feeling the stones.[7]

It is helpful to begin the analysis by stating the questions to be considered. We will first ask which courts should be acknowledged as competent to give judgments which will in principle be recognized; and will then ask which points of objection should be admissible to prevent the recognition or enforcement[8] of a judgment which issued from a court competent in this sense. But this will in turn raise the question whether the defences to recognition and enforcement are indifferent to the particular ground on which the foreign court was jurisdictionally competent; the question whether the grounds of competence are untouched by developments elsewhere in the laws of civil jurisdiction; and the question whether the acceptance of new bases of jurisdictional competence should entail the development of new defences tailored specifically to them. Put shortly, the big issue is the extent to which the law on the recognition and enforcement of foreign judgments is itself self-contained, and its component parts neatly compartmentalized.[9] The conclusions will be tentative, but will seek to show that some significant realignment of the material is called for.

5 For the better, at any rate.

6 The challenging analysis put forward by Dr. M. Whincop, "The Recognition Scene: Game Theoretic Issues in the Recognition of Foreign Judgments" (1999) 23 Melb.U.L.R. 416 will, therefore, not be discussed here.

7 Deng Xiaoping, speaking on China's economic reform programme, is reported to have said that they were "crossing the river by feeling the stones".

8 A judgment cannot be enforced unless it is recognized as making the cause of action *res judicata*; the principles of issue estoppel are analogous. From this perspective it will be more accurate to talk in this paper about recognition rather than enforcement. But proceedings before the courts in which these questions arise for decision are most frequently actions brought to enforce a judgment. In this context it would be artificial to speak in terms of recognition rather than enforcement. So this paper uses the term most appropriate to the context; if it is important that one be used rather than the other, the reason is pointed out.

9 A singular contribution to the debate was made by Y.L. Tan, "Recognition and Enforcement of Foreign Judgments" (Singapore Conferences on International Business Law VIII: Current Legal Issues in International Commercial Litigation, November 1996) in K.S. Teo., ed. *Current Legal Issues in International Commercial Litigation* (Singapore: Faculty of Law, National University of Singapore, 1997). He argued with considerable force that jurisdictional competence, as traditionally understood or more recently modified, was a wrong-headed foundation for the recognition of judgments. He advocated instead a test of local finality coupled with a broader range of defences, generally based on the justice or not of enforcing the judgment against the defendant. It seems that the courts, and some writers, remain obstinately in error in continuing their labour of refining the law on jurisdictional competence; but are closer Tan's position in seeing any change to the "which judgments?" question as calling for re-examination of the defences allowed to a defendant seeking to resist recognition or enforcement.

II. The Jurisdictional Competence of a Foreign Court

Terminology and tradition must come first. The court in which the trial has taken place will be referred to as the "foreign court"; the court before which it is argued that the trial has made the cause of action a *res judicata*, and by whose order the judgment may be enforced, is the "receiving court". The common law holds that a judgment from a foreign court should be recognized by the receiving court as making the issue between the parties *res judicata* if the foreign court was one which, in the eye of the receiving court, had "international jurisdiction", or "jurisdiction in the international sense". This is constituted by the submission of the defendant to the jurisdiction of the foreign court by appearance or by agreement; or by the presence of the defendant within the territorial jurisdiction of the foreign court. *Quoad ultra*, as one may say, nothing more is required and nothing less will do.

As to submission by appearance, there is at first sight little to be said about the principle of the matter, though there is rather more to say about the detail. If a defendant elects, voluntarily, to appear and to defend in the foreign court, he can hardly complain if the result goes against him and he is held bound by the outcome, though the devil lies in the detail of "voluntarily".[10] As a defendant who has appeared in the proceedings would manifestly have taken the benefit of a decision in his favour, he cannot be heard to disavow the outcome when it goes against him. The common sense legal principles of *volenti non fit injuria*, of not being allowed to blow hot and cold, and probably others, encapsulate the broad reason why such a defendant should be bound to accept the outcome in the foreign court. Of course, one may question the detail, or pick at the edges of the principle. Suppose the defendant appeared under some form of constraint, or handicap; or sought to contest the jurisdiction of the foreign court;[11] or found that the claim was amended by the addition of new causes of action or new parties only after he had entered an appearance.[12] The question whether these are consistent or inconsistent with the plea that he submitted to the jurisdiction of the foreign court is an interesting, and not necessarily a minor, one. But the principle is that those who submit by appearance are bound by their appearance; and its broad effect is clear enough. Our first jurisdictional question will therefore be whether submission by appearance in the foreign court should be as conclusive as it currently is on the recognition of foreign judgments; the answer will be rather short.

The common law also has it that those who submit by contract or agreement to the jurisdiction of a foreign court are bound to accept the outcome just as clearly and certainly as if they had submitted by appearance. The fact that the defendant failed to answer the summons to the foreign court, even though he had contracted to do so, is regarded as irrelevant: his submission to the judgment is just as effective as if he had appeared in the proceedings themselves. Issues may arise as to the scope of the agreement,[13] or as to its continuing legal effectiveness; and sub-issues may derive from the question whether the receiving court is obliged to follow the view of the foreign court on the scope and effect of the agreement to submit.[14] But the principle is clear enough: submission by agreement is enough to constitute submission to the jurisdiction of the foreign court. Our second jurisdictional question is to ask whether this is quite right, and what it actually means.

The third basis on which the jurisdiction of the adjudicating court may be rested is that the defendant was present within the jurisdiction of the foreign court when the proceedings

[10] Compare *Henry v. Geoprosco International* [1976] Q.B. 726 (Eng. C.A.); *Civil Jurisdiction & Judgments Act 1982* (UK), 1982, s. 33; *WSG Nimbus Pte. Ltd. v. Board of Control for Cricket in Sri Lanka* [2002] 3 Sing.L.R. 603 (Sing. H.C.).

[11] See the cases in the previous note.

[12] *Murthy v. Sivajothi* [1999] 1 W.L.R 467 (Eng. C.A.).

[13] *S.A. Consortium General de Textiles v. Sun & Sand Agencies Ltd.* [1978] Q.B. 279 (Eng. C.A.).

[14] From England, compare *Civil Jurisdiction and Judgments Act 1982* (UK), 1982, ss. 32, 33 with *Desert Sun Loan Corp. v. Hill* [1996] 2 All E.R. 842 (Eng. C.A.).

were instituted.[15] Where the institution of proceedings depends on the service of the writ, and in deference to the ineradicable popular belief that process is served when, but not unless, the defendant is touched with it, this is known as "tag" jurisdiction. Though there has been some uncertainty whether the rule was formulated in terms of presence or residence within the jurisdiction of the foreign court, and some support for the view that either one or the other will do,[16] the tradition of the common law is to regard this as sufficient and to leave it at that, no matter that the presence of the defendant at the institution of the proceedings was the only connection between the dispute and the foreign court. Here also one may question the details, such as whether the defendant's physical connection is enough to constitute presence: a significant issue when the defendant is an artificial person whose presence is in some sense a legal fiction. But this will be our third jurisdictional question: should presence of the defendant be a condition sufficient to establish the jurisdiction of the foreign court?

And there is no other basis on which the common law, traditionally at least, recognized the jurisdictional competence of the foreign court. The fourth jurisdictional question to be considered is, therefore, whether there should be further grounds on which the receiving court in a common law jurisdiction should acknowledge as sufficient the connection with the foreign court. Of course, the fact that a judgment will not be recognized in the receiving state, or in any receiving state, does not make it any the less a judgment so far as the foreign court is itself concerned. Indeed, there is much to be said for the view that if a plaintiff wishes to obtain a judgment which will be of effect only within the territory of the foreign court, and if the foreign court is being asked to render a judgment which will have only this territorially-limited effect, the rules of jurisdiction which it operates may be justifiably different. But that is a story for another day.[17] We will proceed to look at the four jurisdictional questions.

III. The Bases of Acceptable International Jurisdiction

The aim of this section is to give further thought to some aspects of the common law's approach to what constitutes international[18] competence on the part of the foreign court. We will start with the most straightforward one.

A. *Submission by Appearance*

What could be more natural than the proposition that, if a defendant voluntarily[19] appears in the foreign proceedings and defends the claim, he will be held to accept the decision of the court if it goes against him? The decision to appear cures all potential objections to the

[15] For this as the material time, see *Adams v. Cape Industries plc.* [1990] Ch. 433, 518 (Eng. C.A.).

[16] In England, at least, presence is sufficient: *Adams v. Cape Industries plc.*, *supra*; and residence will probably suffice as well: *State Bank of India v. Murjani Marketing Group* (27 March 1991) (Eng. C.A.).

[17] Until recently in England, and possibly still elsewhere, originating process could be issued and marked as being "not for service out of the jurisdiction". Maybe the law should develop the idea that a plaintiff should be able to institute proceedings for a judgment not to be enforced out of the jurisdiction. If this were possible, any application for leave to serve out on a defendant not within the jurisdiction would not obviously require the forum to be the natural one for the trial of the action (as *Spiliada Maritime Corp. v. Cansulex Ltd.* [1987] A.C. 460 (Eng. H.L.) would otherwise require).

[18] That is, competence for the purposes of recognition of judgments. No attention will be directed to the question whether the court was competent as a matter of its own domestic law.

[19] The detailed definition of "voluntary" is not examined here. Of course, if it has a meaning which incorporates too much pretty unwilling appearance, (*cf. Henry v. Geoprosco International* [1976] Q.B. 705 (Eng. C.A.), before this was reversed by *Civil Jurisdiction and Judgments Act 1982* (UK), 1982, s. 33.) the arguments made here will need modification.

jurisdiction of the foreign court,[20] and even in those countries which have moved far away from the traditional common law, there is very little questioning the absolute sufficiency of an appearance to establish the jurisdiction of the foreign court. Writing for the majority of the Supreme Court of Canada in *Beals v. Saldanha*,[21] Major J. put it this way:[22]

> In light of Canadian rules of conflict of laws, [D] attorned to the jurisdiction of the Florida court when he entered a defence to the second action. His subsequent procedural failures under Florida law do not invalidate that attornment. As such, irrespective of the real and substantial connection analysis, the Florida court would have had jurisdiction over [D] for the purposes of enforcement in Ontario.

Only LeBel J., who dissented in the result, cast any doubt at all:[23]

> Another example is the common law rule that an appearance solely for the purpose of challenging the jurisdiction was an attornment to its jurisdiction .... Circumstances such as these may not amount to a real and substantial connection, and in my view they should not continue to be recognized as bases for jurisdiction just because they were under traditional rules.

Even he seems to rest his objection on the proposition that submission by appearance is not sufficient to establish jurisdictional competence when the appearance was made only to challenge the jurisdiction.[24] The overwhelming balance, perhaps the totality, of authority is that submission by appearance is enough, at least when that appearance is not limited to the sole purpose of challenging the jurisdiction. Even so, if one accepts that voluntary appearance is a basis for finding submission, does it follow that this submission is to be seen as unconditional,[25] and as submission not just to the adjudication but also to the subsequent enforcement of the judgment? It may be contended that the submission is to the foreign court's adjudication, but is not a submission to enforcement of the judgment once given. The point is developed further in relation to submission by agreement.

B. *Submission by Agreement*

Hardly any more authority exists to question the basic proposition that if there is an agreement which nominates the foreign court as one with jurisdiction to adjudicate, a judgment from that court, which falls within the four corners of the agreement, will be entitled to recognition at common law. One explanation for this phenomenon is that the prior agreement is taken to be of the same force and effect as a submission by appearance, which was what the defendant promised to make. For this, two justifications may be proposed. First, it may be said with some force that the defendant cannot be heard to derive advantage from the legal wrong done by his failing to appear in the foreign proceedings. Secondly, but rather less convincingly,[26] if equity looks on as done that which ought to be done, it should treat the defendant as though he had submitted by appearance, or prevent the unconscionable results of his claiming a personal or juridical advantage by his breach. Nothing which follows in this section denies the force of the arguments just set out. But there is another, rather less straightforward, way of looking at it, which has its roots in the law on

[20] As it does in relation to appearance in domestic proceedings.
[21] (2004) 234 D.L.R. (4th) 1.
[22] *Ibid.* at para. 34.
[23] *Ibid.* at para. 209.
[24] Canada lacks legislation corresponding to the *Civil Jurisdiction and Judgments Act 1982* (UK), 1982, s. 33.
[25] But it cannot be completely so: *Murthy v. Sivajothi* [1999] 1 W.L.R. 467 (Eng. C.A.), *supra* note 12, identifies a context in which one has to identify the limits on what a party has submitted to by appearing to the foreign writ, and where the answer is not that if he has submitted he has submitted without limit.
[26] For equity does not specifically apply to the recognition and enforcement of foreign judgments.

jurisdiction agreements, and which pays closer attention to the purely contractual aspect of such agreements, asking precisely what the parties have agreed to, it causes rather more in the way of difficulty.

Suppose that the parties made a contract, the validity of which is not impugned, and which provided that the courts of Ruritania were to have exclusive jurisdiction over any disputes arising out of it. There are some more elaborate precedents in the books,[27] but very few make specific reference to the enforcement of foreign judgments. Suppose that a judgment is obtained in default of the defendant's appearance before the foreign court, and it is presented to the receiving court. Suppose that the receiving court then enquires into exactly what the defendant had contractually agreed to do. Did his agreement that the courts of Ruritania were to have jurisdiction necessarily mean that the defendant has promised also to abide by any judgment issued by the courts of Ruritania outside the territory of Ruritania? The answer is not obvious; the matter calls for further inspection.

Conflict of laws orthodoxy, as it applies to agreements on jurisdiction, accepts that the interpretation of an agreement on jurisdiction is a matter for the proper law of the contract in which it is contained; and that when it comes to the enforcement of these agreements, a court is likely but it not bound to grant specific enforcement of the agreement.[28] A developing jurisprudence in England considers that breach of a jurisdiction agreement may also lead to a damages remedy: at least, this is the view of the English courts in relation to a jurisdiction agreement for the English courts which has been broken by taking proceedings in another court.[29] Now cases in which the English courts encounter jurisdiction clauses nominating the English courts, the agreement will usually be governed by English law, and the enthusiasm for specific enforcement reflects the view that where the parties have chosen an English court, the court should do what it may to bolster that choice. It is also well established that where English law is the *lex contractus*, the scope of the agreement on jurisdiction will tend to be given a broad and generous construction, rather than a narrow and restrictive one.[30] But when one is dealing with the recognition of a foreign judgment from a prorogated court, the English court *qua* receiving court will usually be dealing with a foreign jurisdiction agreement, and any question as to its construction will be for a *lex contractus* which may not be English law. What if this law is clear that the agreement on jurisdiction does not connote any agreement to the recognition of judgments?

When it comes to the enforcement of judgments, two further questions therefore arise. First, does a jurisdiction agreement for the courts of Ruritania amount to or include an enforceable contractual promise that the defendant will not only accept that jurisdiction, but will accept or acquiesce in the enforcement of the judgment in any jurisdiction and by order of any court from China to Peru? And does it matter if the answer is no? Secondly, does a jurisdiction agreement amount to a promise to pay any sums adjudged due, even without a further judicial order by way of enforcement of the judgment, with the consequence that the foreign judgment debt could, for example, be proved in an insolvency without further ado? And so circumvent some of the restrictions on the enforcement of foreign judgments

[27] If one may be forgiven the self-reference, A. Briggs & P. Rees, *Civil Jurisdiction & Judgments* 3rd ed. (London: Lloyds of London, 2002), Appendix VII, examines such a clause.

[28] Many cases have said so, but *Donohue v. Armco Inc.* [2002] 1 Lloyd's Rep. 425, [2001] UKHL 64 (Eng. H.L.), a case on enforcement by injunction, is in effect the leading case on enforcement by decree of specific performance.

[29] *Union Discount Co. Ltd. v. Zoller* [2002] 1 W.L.R. 1517, [2001] EWCA Civ 1755, (Eng. C.A.); *A/S D/S Svendborg D/S of 1912 v. Akar* [2003] EWHC 797 (Eng. H.C.): and see D. Tan & N. Yeo, "Breaking promises to litigate in a particular forum: are damages an appropriate remedy?" [2003] L.M.C.L.Q. 435; C. H. Tham. "Damages for breach of English jurisdiction clauses: more than meets the eye" [2004] L.M.C.L.Q. 46.

[30] *The Pioneer Container* [1994] 2 A.C. 324 (H.K.P.C.), but which is taken to be conclusive as a matter of English law also. In this respect, English law may well be at some distance from those civilian systems which traditionally place greater weight on a defendant's right to defend at home, and which take a more wary view of jurisdiction agreements.

under the law of the receiving court, such as those preventing the enforcement of judgments for multiple damages?[31]

1. *An agreement to abide by the judgment and to not oppose enforcement?*

As to the first of these, that the agreement on jurisdiction is to be read as or as containing a contractual agreement to abide by and not challenge the judgment of the nominated court, there is room for doubt. Though it would involve a question of construction, an agreement that a court has jurisdiction seems most naturally to mean that its jurisdiction to adjudicate will not be put in dispute before that court. But agreeing a court's jurisdiction to adjudicate does not necessarily connote an acceptance of the enforceability of the judgment in courts outside the chosen one. A party may even be willing to agree to the jurisdiction of a court precisely because he has no local assets, believing that a judgment against him will not be easily enforceable. Alternatively, he may not have agreed to enforcement in a country of the plaintiff's choice where (for example) execution may deprive him of the tools of his trade, or even his personal liberty. The simple point is this: to accept that a court shall have jurisdiction is to accept that it is entitled to adjudicate. What happens after that may also be the subject of further contractual agreement, but if this is not expressly dealt with in the jurisdiction agreement, it is necessary to identify the proper legal basis for construing or implying anything about the enforcement of judgments into a simple agreement on jurisdiction. And it is all the more difficult if one considers the defences which may be raised to answer an action brought on the judgment. There is no current doubt that a receiving court in a common law country will allow a defence of fraud to be pleaded (though precisely what is admissible under this head will vary from country to country, as we shall see), and it is certain that defences founded on natural justice and public policy may be raised as well. Does this mean that the agreement on jurisdiction is to be construed as an agreement to accept the enforceability of the judgment in any court, subject to the right to raise such defences as may be available under the law of the receiving court? If it is, it is still hard to see that all this can be implied into a concise and standard form agreement on jurisdiction: neither the officious bystander, nor the regulator of business efficacy, seems likely to say so. Of course, if the parties agree that a judgment from the courts of Ruritania may be enforced in another country, then even if this may not bind the courts of such other country, it will pave the way for an argument that it is a breach of his contractual promise for the defendant to resist enforcement on these jurisdictional grounds, with the possibility of an action for damages for breach of contract if enforcement is resisted. But if the clause adds wording such as that the party concerned, "agrees that a judgment or order of a [Ruritanian] court in a dispute falling within this agreement on jurisdiction is conclusive and binding on [X] and may be enforced against him in the courts of any other jurisdiction"[32] there should be little difficulty in concluding that the defendant is contractually obliged to accept the enforceability of the judgment against him. But it bears repetition[33] that if that express contractual agreement is absent, and one asks a precise question which seeks to discern what the defendant has actually bound himself to, the answer may be that he agreed to

[31] Such as *Protection of Trading Interests Act 1980* (UK), 1980. But there will be limits: it was held in *Government of India v. Taylor* [1955] A.C. 491 (Eng. H.L.) that the exclusionary rule which prevents a court enforcing the penal or revenue laws of another state did also serve to prevent a claim by a foreign government to prove in an insolvency when the debt owed was by way of taxes.

[32] See further *supra* note 27 at 629.

[33] Because no-one seems to stop to ask the question. Also see, in the context of waiver of state immunity and the extent to which it operates, *Duff Development Co. Ltd. v. Government of Kelatan* [1924] A.C. 797 (Eng. H.L.); *State Immunity Act 1978* (UK), 1978, s. 13(3); *State Immunity Act* (Cap. 313, 1985 Rev. Ed. Sing.), s. 15(3). I am indebted to Andrew Dickinson for drawing this potential analogy to my attention.

jurisdiction but made no agreement concerning enforcement of the judgment. Why should it be treated as being more than it was?

On the other hand, and in support of a cruder view, Mustill & Boyd assert that where parties have entered into an arbitration agreement, "every submission to arbitration contains an implied promise by each party to abide by the award of the arbitrator, and to perform his award".[34] No authority is cited to vouch for this proposition, which is presumably limited to arbitration agreements governed by English law where English notions of construction and implication are at home. It is far from clear that, even if this were generally true of arbitration agreements, it is correct to regard arbitration and jurisdiction agreements as being fully interchangeable; and doubts are therefore not resolved by this observation.[35]

2. *An agreement to pay sums adjudicated which may be proved in insolvency without further ado?*

If parties make a contract of sale which provides for the price to be determined by an arbitrator in default of agreement, there is no doubt that when the arbitrator has fixed a price, the contract is valid and binding in those terms.[36] Now if the parties make a contract which provides for arbitration of differences, the award of the arbitrator may most commonly be enforced by bringing judicial proceedings to give it the additional force and effect of a judgment which may in turn be enforced as a judicial order.[37] The position is similar[38] where the parties have agreed to confer exclusive jurisdiction on a foreign court and it has adjudicated. But legal proceedings to obtain judgments based on prior arbitrations or foreign adjudications are not always successful. Is it open to a plaintiff to contend that the award of the arbitrator or the decision of a foreign court where that foreign court was given jurisdiction by the parties' contract, creates a contractual debt which may be enforced by admission to proof in insolvency without the need to obtain a confirmatory judicial order or *exequatur*? A contractual analysis may suggest that it should.[39] Does the fact that the decision on liability to pay has been made in a commercial arbitration, or by a foreign court, make any significant difference? It is no answer to say that a foreign judgment has no effect as such in England, for the present hypothesis does not seek to accord it the effect of a *judgment*, entitled to be enforced by execution, but the status of a contractual debt. So far as is known, no reported case deals with this in the context of foreign judgments.[40] But the principle does not look a difficult one. It suggests that the law on jurisdiction clauses as this has developed in disputes at the outset of litigation has yet to be fully worked out and applied to the same issues where these arise for consideration after judgment.

3. *Provisional conclusions about submission by agreement and by appearance*

The previous reflections were a partial diversion from the main course of the argument. But they do suggest that the law on foreign judgments may have more to learn from the

34 M. Mustill & S. Boyd, *Commercial Arbitration* 2nd ed. (London: Butterworths, 1989) at 26.

35 See also on this general point, C. H. Tham, "Damages for breach of English jurisdiction clauses: more than meets the eye." [2004] L.M.C.L.Q. 46.

36 *Foley v. Classique Coaches Ltd.* [1934] 2 K.B. 1 (Eng. C.A.).

37 In England, *Arbitration Act 1996* (UK), 1996, Pt III; in Singapore, *International Arbitration Act* (Cap. 143A, 2002 Rev. Ed. Sing.), Pt III; and generally pursuant to national legislation implementing the New York Convention.

38 Though the legal basis for the application for an order will be different.

39 Though if the debt arises under a foreign penal or revenue law, it will not be admitted to proof: *Government of India v. Taylor* [1955] A.C. 491 (Eng. H.L.).

40 The point does not appear to be dealt with in I. Fletcher, *Insolvency in Private International Law: National and International Approaches* (Oxford: Clarendon Press, 1999).

law on civil jurisdiction, and even from the contractual doctrine of certainty of terms, than is sometimes supposed. One therefore has to ask whether the true reason for regarding submission by agreement as a sufficient reason to enforce a judgment is (a) that it follows as a matter of common law from any agreement to submit, or (b) that it may follow,[41] but only as a matter of construction from the parties' agreement. It is suggested that the current trend of authority in relation to such agreements as they affect civil jurisdiction to adjudicate is to pay primary attention to their construction. To conclude that when parties stipulated for an effect before the courts of country *A* they also made an agreement in respect of the courts of country *B* may be rather too bold for comfort. The argument has not yet been successfully advanced to a court; it may be that a judge worth his or her salt would find a way to deal with its potential awkwardness. Even so, submission by agreement may be more puzzling than is currently acknowledged. At its heart, the traditional learning seems to suppose that the agreement to submit is accompanied, in law if not also in fact, with an agreement to accept the enforceability of the judgment. It is questionable whether this should be accepted; but until the point is taken by a defendant and accepted by a court, it is enough to say that those who choose to submit in advance are bound by the consequences of their choice.

On the other hand, if the point is taken that the legal effect of a submission depends upon the scope of the submission, and it is seen to have some merit, the argument about the scope of submission will apply also to those who submit by appearance, for it may also be said of these defendants that they submitted to the adjudication of the foreign court but frankly did not agree to accept the international enforcement of any judgment given against them. The real foundation for the analysis may be the traditional view[42] that a foreign judgment is enforceable by reason of the "doctrine of obligation". This is all well and good until one asks exactly what it means. If the obligation is generated by the behaviour of the losing party in submitting, one way or another, to the jurisdiction of the foreign court, any argument which tends to show that he did not so submit, or that his submission was limited in scope, will be reflected in the obligation which arises from it. Of course, if one shifts the goalposts, and retorts that the obligation is not created by the parties or their actions, it is very hard to understand what kind of obligation we are talking about. There is work for someone to do in looking at the nature of the obligation to obey a foreign judgment; in the present context to pursue it further would be too much of a diversion. For now, it is enough to note that the law on submission by appearance and by agreement is not so well thought out that it needs no further thought.

C. *Jurisdiction by Presence*

If the basis for enforcing a foreign judgment is that there was enough of a connection between the claim and the foreign court to warrant giving its judgment international effect, one has to wonder how the presence, which may be only fleeting, of a defendant is sufficient. It was rejected in the early days of the law's development by the Supreme Court of the Straits Settlements.[43] A British merchant resident in Singapore had crossed the straits to Johore, where he had been served with a summons, which he had not answered. Rejecting the argument

41 And will be problematic when it does not, as it may not.

42 Often said to be traced to *Godard v. Grey* (1870) L.R. 6 Q.B. 288 (Eng. Ex. Ct.) and *Schibsby v. Westenholz* (1870) L.R. 6 Q.B. 155 (Eng. Ex. Ct.), but where it was used to justify the propositions that error by the foreign court was not reviewable, and reciprocity was not a basis for recognition of international jurisdiction. The court did not articulate the theoretical basis for the obligation, preferring instead simply to assert its existence and its sufficiency. In fact, Parke B. had articulated the proposition in *Williams v. Jones* (1845) 13 M.&W. 628, 633, 153 E.R. 262, 265 (Eng. Ex. Ct.) to explain why an action of debt lay on the judgment of a local county court. It does not appear than anyone troubled to enquire as to the theoretical basis of the obligation.

43 *RMS Veerappa Chitty v. MLP Mootappa Chitty* [1894] II S.S.L.R. 12 (Straits Settlements. S.C.).

that the defendant's presence sufficed to give the Johore court international jurisdiction, the Chief Justice observing that were it otherwise, "every merchant who spends a Sunday in Johore renders himself liable to have his business rights and obligations adjudicated upon by a [foreign] judge applying [foreign] law".[44] The Chief Justice saw the principle in terms of whether the defendant had submitted to the foreign court, and declined to infer submission from the bare fact of a day trip. His reference to the need to find a submission has a strikingly modern ring to it; but perhaps because the case was not widely known, his principled objection to recognition on the basis of presence made no impact on the common law, which came to persuade itself that presence was enough. But such a rule lends itself to use or abuse in several ways, by plaintiffs as well as by defendants. Where liability is alleged to be owed by a corporation, a claimant may find that the proper defendant to his claim is not present within the jurisdiction, and that an entity which is present is not the proper defendant. *Adams v. Cape plc.*[45] presents the classic illustration of a corporate group organizing its affairs so that the asset-bearing company was not present where the lethal business activity[46] was carried on and the plaintiff was injured, and that whatever was present within the place where the injury was sustained was not the part of the organization which the plaintiff wishes to sue. But a plaintiff may take advantage of the rule also, and if a defendant is served while only transiently within the jurisdiction, it is clear from this same authority that as far as English law[47] is concerned, the international jurisdiction of the foreign court is sufficiently established.

It is not only in English law that this proposition finds support. Not even the Supreme Court of Canada has cast serious doubt on it. In *Morguard Investments Ltd. v. De Savoye*[48], it was expressly accepted that "tag" jurisdiction remained a sufficient establishment of a foreign court's jurisdiction. As LaForest J. put it:

> The question that remains, then, is when has a court exercised its jurisdiction appropriately for the purposes of recognition by a court in another province? This poses no difficulty where the court has acted on the basis of some ground traditionally accepted by courts as permitting the recognition and enforcement of foreign judgments—in the case of judgments *in personam* where the defendant was within the jurisdiction at the time of the action, or when he submitted to its judgment whether by agreement or attornment. In the first case the court had jurisdiction over the person, and in the second case by virtue of the agreement. No injustice results.

The majority in *Beals v. Saldanha*[49] did not express a contrary view. Only LeBel J., whose dissent has already been referred to, saw the need to reconsider the old law:[50]

> In some cases, however, the traditional grounds may be more arbitrary and formalistic than they are fair and reasonable. Under traditional rules, for example, jurisdiction could be acquired by serving a defendant who was present within the jurisdiction, even if her presence was only fleeting and was completely unconnected to the action, and in the absence of any other factor supporting jurisdiction …

Aside from this, there is almost nothing in the case-law to lend support to the view that presence ought to be de-recognised as a basis for international jurisdiction. It seems to be

[44] For the submission advanced by the plaintiff was not restricted to the enforceability of a judgment in respect of activity carried on in Johore. On a separate and personal note, the writer is, at the time of writing, a British subject resident from time to time in Singapore and who is, when there, rather partial to visiting Johor on a Sunday. It is undeniable that the views of the former Chief Justice have a strikingly comforting aspect.

[45] [1990] Ch. 433 (Eng. C.A.); and see also *Lubbe v. Cape plc.* [2001] 1 W.L.R. 1545 (Eng. H.L.).

[46] Asbestos production leading to employee death from dust-related diseases.

[47] And the rest of the common law world.

[48] [1990] 3 S.C.R. 1077 (S.C.C.). The quotation is from 1103–4.

[49] (2004) 234 D.L.R. (4th) 1.

[50] *Ibid.* at para. 209.

irrelevant that if the facts were reversed, the receiving court would not accept that it had, or would on application refrain from exercising, jurisdiction over a defendant. The English courts have noticed the apparent oddness of this, but with a degree of calm which can seem almost complacent.[51] The Canadian courts, which is rather more surprising, risk suggestions of incoherence. In *Morguard*, LaForest J. accepted that "tag" jurisdiction was sufficient to establish the international jurisdiction of the foreign court. In *Beals*, however, the point was not addressed by the majority. Major J. did say that a fleeting connection with a foreign jurisdiction was insufficient to establish jurisdictional competence, but it is clear that he was referring to ephemeral business activity within the jurisdiction of the foreign court, not with fleeting presence for the purpose of personal service.[52] Yet in *Amchem v. British Columbia Workers' Compensation Board*,[53] Sopinka J. had said, in effect, that if a foreign court failed to observe the standards and requirements of *forum non conveniens*, this would pave much of the way to the grant of an anti-suit injunction to restrain the respondent from proceeding in that foreign court. Taken together, this means that if the foreign court has asserted jurisdiction without regard to the standards of *forum non conveniens*, it would be possible for an applicant to obtain an anti-suit injunction to restrain the proceedings, but if such relief is not granted, the foreign judgment will be recognised as having come from a jurisdictionally competent court. If these propositions sit together, it is only very uncomfortably that they do.

One solution to any problem which is acknowledged to follow from the rule that presence establishes jurisdictional competence may be to merge the basis of jurisdiction by presence into a larger category of jurisdiction by reason of a real and substantial connection, or jurisdiction because the court was the natural forum.[54] This would have the effect that jurisdiction based on presence would require the defendant to have a specified connection to the court, as well as requiring the court having a specified connection to the claim. Or, to put it another way, the principle of the natural forum, or of a court's having a real and substantial connection, would be used to narrow, rather than to widen, the jurisdictions recognized as sufficient for competence.[55] We will return to this below.

D. *No Other Basis of Jurisdictional Competence*

And according to the traditional common law, that is that. There are no other grounds of jurisdictional competence. So the fact that the defendant has carried on business within the jurisdiction of the foreign court at the time the claim arose, taking advantage of the legal and economic conditions in that country, even when coupled with the fact that the claim arose out of that activity, is apparently irrelevant to the jurisdictional competence of the foreign court. This seems odd. So also does the fact that even though the foreign court would have been recognised as the natural forum for the resolution of the dispute, this is irrelevant to the recognition and enforcement of its judgment in England. It is as if those vivid principles which have revolutionized the jurisdiction of courts in common law countries,[56] and which have even been used in Canada to rationalize the law on anti-suit injunctions, have no bearing whatever on the receiving court's assessment of whether a foreign court had international jurisdiction to adjudicate. In this respect, the traditional common law is surely open to sustained question.

[51] See *Adams v. Cape plc.* [1990] Ch. 433 (Eng. C.A.) at 518, where the court observes that arguments which it notes might justify an international convention.

[52] *Supra* note 49 at para. 32.

[53] [1993] 1 S.C.R. 897 (S.C.C.)

[54] As to which, see further below in the analysis of *Beals v. Saldanha*.

[55] An argument ventured many years ago by the present writer: A. Briggs, "Which Foreign Judgments should we recognise today?" (1987) 36 I.C.L.Q. 240.

[56] *Spiliada Maritime Corp. v. Cansulex Ltd.* [1987] A.C. 460 (Eng. H.L.).

But as a matter of Canadian law, it suffices that the foreign court was one which had a real and substantial connection to the dispute. This radical departure from the common law, in *Morguard Investments Ltd. v. De Savoye*, and *Beals v. Saldanha*, has not yet been adopted by any other common law jurisdiction, but then cases on the recognition of foreign judgments do not come along everywhere and every day before a court with authority to strike out along a new path. However, the common law in Australia has not departed from the conservative English model on the jurisdictional competence of a foreign court. The statement of Australian law by Nygh and Davies[57] is entirely consistent with English law. The only discoverable occasion in recent years on which a court in Australia had cause even to examine the rules on jurisdiction was the decision of the District Court of Queensland in *Martyn v. Graham*,[58] where the summary in Nygh and Davies was simply adopted as entire and correct. The New Zealand Law Commission[59] has raised the question, in the context of the law on electronic commerce, whether received common law rules for the recognition of judgments should be altered by legislation in New Zealand, but it is clear from its question that it finds the common law in New Zealand also to be entirely in accordance with the English model. So far as can be discovered, neither Ireland, nor Singapore or Malaysia,[60] has departed from English law on what is required to establish the jurisdictional competence of a foreign court.

Yet the strength of the criticism from the Supreme Court of Canada, and the inconsistencies which otherwise exist within the law, requires one to reconsider the direction which the law should take. To begin with, one should ask whether the rules on recognition should be widened, following what was done in Canada in *Morguard* and *Beals*. Suppose that the plaintiff has instituted proceedings in a foreign court which of all courts has the closest connection to the facts of and in the dispute,[61] or which may be regarded as the natural forum for the resolution of the dispute. The plaintiff will have sued in the court in which, perhaps, it was most proper for him to sue in, but also in the court in which the interests of justice can best be served. If the defendant has elected not to appear, and judgment has been entered in default of appearance or defence, what good reason is there to withhold recognition from the judgment?

IV. *BEALS v. SALDANHA*

Beals v. Saldanha[62] provides a convenient set of facts upon which to test the arguments. Saldanha, resident in Ontario, purchased a plot of land in Florida for US$4,000, and a couple of years later, sold it to Beals, resident in Florida, for US$8,000. There was some confusion as to the actual plot which had been sold,[63] with the result that Beals started to build on land which he thought he owned but did not. When the error came to light, and Beals discovered what he had actually been sold, he sued Saldanha for rescission of the contract of sale and for damages.[64] For reasons which included various misunderstandings

57 P. Nygh & M. Davies, *The Conflict of Laws*, 7th ed. (Australia: Butterworths, 2002) at 169.

58 [2003] Q.D.C. 447, November 13th 2003 (Qld. D.C.).

59 N.Z., Law Commission, *Electronic Commerce Part One: A Guide for the Legal and Business Community*, Report No. 50, October 1998 at Chapter 6.

60 Nor any other common law jurisdiction, always excluding the United States.

61 On the question of exactly what (parties? dispute? facts? any combination of these?) needs to satisfy the real and substantial connection to the foreign court, see LeBel J. in *Beals v. Saldanha*, *infra* at paras. 177 and 182, concluding that one looks for "the totality of the connections between the forum and aspects of the action".

62 (2004) 234 D.L.R. (4th) 1.

63 Saldanha had two plots of land lying adjacent to each other.

64 He also sued various local Florida parties, but settled with them (secretly), leaving his grotesque claim to be advanced against Saldanha alone.

of the procedural law of the state of Florida,[65] Saldanha did not defend the action. The Florida court, on the advice of the jury, gave judgment for Beals for reimbursement of sums paid (US$14,000), plus loss of profit (US$56,000). It then trebled this sum to US$210,000. To this it added punitive damages of US$50,000; and ordered interest at 12%.[66] By the time the case reached the Supreme Court of Canada, the judgment debt had grown to US$750,000.[67] By a majority of six to three, the Supreme Court of Canada held that the judgment was entitled to be enforced in Canada, dismissing with costs the appeal from the Ontario Court of Appeal.[68] The outcome beggars belief. No lives were lost. The land was neither dangerous nor defective. There is plenty of other land in Florida, and a rampantly free market on which it could be bought. The defendants were ordered by a court in Florida to pay back the purchase price thirty times over, plus interest at a rate which is staggering when compared to market rates for the time. But disgraceful though the decision was it provides an excellent basis for a review of the past and future of the law on the recognition and enforcement of foreign judgments.

The dissenters[69] focused on the practical and procedural difficulties faced by Saldanha, and the issues of natural justice and public policy which they touched: these will be looked at below. But there was general agreement that Florida was to be seen as a foreign court of competent jurisdiction: the dispute had a real and substantial connection to Florida, for by owning[70] and selling land in Florida, Saldanha could not claim to be taken by surprise, or to be affronted, when a Florida court exercised jurisdiction over a dispute concerning the sale of that land. Indeed, if one were to go further and to ask whether Florida was the natural forum for the resolution of the dispute, the answer would also be yes.

So was there any good reason to deny the jurisdictional competence of the Florida court? An affirmative answer can really only be given if the test is intrinsically unsuitable for adoption, or because in its practical operation it places an unfair burden on one of the parties to the litigation. The first suggestion is unsustainable. It is thirty years too late[71] to deny the primacy of the natural forum as the keystone of the common law's rules on jurisdiction and the exercise of jurisdiction, and even if the Canadian preference in this context for a court which has *a*[72] real and substantial connection may be slightly less likely to point to "the" right place in which to sue and be sued, it is unlikely to diverge very far from a natural forum test. The connection to the foreign court must be substantial;[73] at it appears that it must be satisfied in relation to the foreign court, the subject matter of the action and the parties to it.[74] There was no real reason to doubt that, however the test was to be worded, the facts of *Beals v. Saldanha* would satisfy it.

More problematic, perhaps, was the dilemma of the informed and conscientious defendant. Saldanha was a relatively uninformed defendant, who had not had legal advice until late in the day,[75] and whose decision not to defend an action supposed to be trivial was

65 For example, that each time the plaint was amended, a fresh denial or defence had to be entered, the old one having lapsed.

66 At least, this was Binnie J.'s analysis of the matter: at para. 97. It is not clear from para. 246 that LeBel J. altogether agreed; and Major J. did not go into the details of the assessment of damages.

67 At a notional conversion rate of C$4 = US$3. Binnie J. regarded the result as "Kafka-esque": at para. 88.

68 Below: (1998) 42 O.R. (3d) 127 (Ont. Ct. Gen. Div.), (2001) 54 O.R. (3d) 641 (Ont. C.A.).

69 Binnie J. (with whom Iacobucci J. agreed), and LeBel J.

70 Major J. at para. 33 considered that it was the original purchase by Saldanha of land in Florida, rather than the sale of it to Beals, which exposed Saldanha to the international jurisdiction of the Florida court.

71 *The Atlantic Star* [1974] A.C. 436 (Eng. H.L.) is where it all began, except for Scots, in whose case the principle is into its second century.

72 How many more than one does this suggest may exist in any given case?

73 Major J., at para. 32.

74 Major J., at para. 34, but *cf.* LeBel J. at paras. 177 and 182.

75 In fact, not till after the judgment in default, at which point his advice was that the judgment could not be enforced in Canada so need not be set aside in Florida. This legal advice, from an Ontario lawyer, is implicitly criticized at various points: Major J. at paras. 10 and 69; Binnie J. at para. 90; and LeBel J. at para. 260 who

not hard to understand. But what of a defendant who, served with a writ and given a tight timetable for appearance, is unable to predict with any confidence whether the foreign court is, or (which is the real test of it) will be held long after the event to have been, the natural forum? Is it fair and reasonable to structure a legal test which may be so hard for reasonable and conscientious people to operate by? Major J. avoided the issue, preferring to hold that the test was fair and appropriate in the instant case, and leaving for decision another day the case where it may not be so clear. The dissenters did not take a very different view, for even LeBel J. would have asked whether it was "fair" to enforce a foreign judgment from a court which had the connection which it did to the dispute, before concluding that there was enough of a real and substantial connection to the dispute. None of this helps a defendant who may wish to know, and quickly, whether he should appear in the foreign proceedings. It is no answer to tell him that if the foreign court has a real and substantial connection to the dispute he would do well to appear before it. This is not the sort of advice one pays for.

The question is therefore whether the defendant's dilemma furnishes a reason which is sufficient to overcome the attractions of the *Morguard* and *Beals* principle. More directly, the question is whether the defendant's dilemma will be seen by a judge, faced with an enforcement claim against a local[76] defendant and judgment debtor, as sufficient to close the door to *Morguard*. Some may suspect that an English judge may approach the point by considering the impact of the law on an English defendant, and may be sympathetic to his dilemma. But the Supreme Court of Canada was prepared to see Saldanha, and anyone else who has interacted with the law and society of a foreign country, as undeserving of any such sympathy. One cannot say that a judge simply will not expose a defendant to such a risk. The Supreme Court of Canada just did.

V. Jurisdictional Competences and Individual Defences

If *Beals* establishes that the common law can in principle live with the enforcement of judgments from the natural forum, or from a court which had a sufficiently real and substantial connection, it remains to ask whether this should be accompanied by the development of equally new defences to accompany the change in the law of jurisdiction. This depends on how the question in *Beals* was to be framed. Was it "should we accept a new basis of jurisdictional competence, assuming the defences to recognition stay as they are?" Or was it "should we accept a new basis of jurisdictional competence and develop any new defences which should accompany it?" It would be curious to say that one may develop a new basis of jurisdictional recognition without regard to the defences which will condition its application in practice. These defences,[77] which have remained surprisingly constant, all date from a century ago; but it would be ambitious to claim that they were eternal and universal. The defences were, as a matter of historical fact, developed alongside the traditional rules

said, without apparent irony, that the advice "turned out to be erroneous". So far as one can tell from the judgments, the criticism is well wide of the mark. The lawyer had, in early 1992, advised that a Florida default judgment was not enforceable in Ontario, and that therefore there was no need for Saldanha to apply to the Florida court to have it set aside. As it turned out in 2003, this advice was rendered inaccurate by and only by the decision of the Supreme Court. But it was surely defensible when it was given. The decision of the Supreme Court of Canada in *Morguard Investments Ltd. v. De Savoye* [1990] 3 S.C.R. 1077 had been handed down only a year earlier; it had been concerned with the recognition of judgments from other Canadian provinces, and had said nothing to indicate whether its principles would apply to judgments from foreign countries. The advice was not inaccurate when it was given, unless one adheres to the quaint fable that Canadian common law had always been as *Beals* declared it in December 2003. Any conflicts lawyer in private practice, reading this, should ask what he or she would have advised Saldanha to do in 1992: to go to Florida, submit, and throw away any defensive shield, or just give Florida a wide berth in the future. Those professional indemnity insurance policies really must be kept up to date, particularly in Canada.

[76] The most likely case for an enforcement claim.

[77] Apart from fraud, which is discussed separately.

of jurisdiction under the common law. They were not developed in cases where a basis of jurisdictional competence was a real and substantial connection with the foreign court or for a case where the foreign court was the natural forum. What was the correct approach for the Supreme Court of Canada to adopt when considering the defences to recognition open to Saldanha?

What it did was plain enough. Major J. for the majority came close[78] to ruling out the possibility that new defences to recognition could be created. Binnie J. found that the effect of Florida's rules of procedure in the actual case was such as to produce a lack of natural justice,[79] which seems to suggest that the traditional defences were applied to the new ground of jurisdiction. But LeBel J. saw the point clearly; and proposed that if a new head of jurisdictional competence was to be devised, new defences, or new versions of old defences, were called for.[80] In a judgment which may be regarded as the best piece of common law[81] craftsmanship in this area for a very long time, he saw that if one is to alter one part of the law on foreign judgments, one cannot avoid asking whether consequential alteration is called for elsewhere. He thought that it should and, subject to one small point, it is submitted that he was right.

But the effect of the majority judgment is that the new jurisdictional basis for recognition will be applied to produce only the recognition of default judgments. This is because Major J. accepted that the test of real and substantial connection would serve to widen recognition to cases not covered by the existing rules of presence, submission, or appearance. Binnie J. did not explore the issue; LeBel J. would have applied this new rule in substitution for the traditional rules, and would therefore have utilized the real and substantial connection test even where the defendant was present, or had submitted, or had appeared. One would have thought that Major J. would have seen the greatest need to consider the development of defences, as only he reserved the new jurisdictional rule for cases falling outside the traditional rules for recognition. But he was unwilling, at least on the facts of the case, to explore the issue of which defences should be available. By contrast, one might have expected LeBel J. to have accepted that as many cases will simply be transferred from an old jurisdictional rule to a new one, there will be less need to reconsider defences. But he was willing to go further and reconsider all the defences to see how they should be applied, on the express basis that *Morguard* had "greatly expanded"[82] the category of enforceable judgments. This expansion can only have been by incorporating default judgments into the scheme (the contraction arguably brought about by regarding the traditional grounds as not necessarily sufficient to establish a real and substantial connection is not material to this point); and it is the recognition of default judgments which is therefore real trigger for the review of defences. But as will be seen, the submission advanced here is that the material distinction should not be between default and non-default judgments, but between consenting and unconsenting defendants.

VI. Consenting and Unconsenting Defendants

If a defendant appears in the proceedings, or if the defendant has (on a true construction of his contract) agreed to be sued in a foreign court and has agreed to accept the enforcement of the judgment elsewhere, he has in a very clear sense bound himself to accept and live with the consequences of the litigation of his dispute in the foreign court. In a sense he should

78 *Supra* note 62 at para. 42. He also held that none of the existing defences did avail Saldanha.

79 On which ground alone he decided the case: not a new defence, but the application (as he saw it) of established principle.

80 In some respect echoing a view expressed by Tan (*supra* note 9).

81 It is one of life's little ironies that LeBel J. was appointed to the Supreme Court of Canada from the courts of Québec, and not from one of the common law provinces.

82 *Supra* note 62 at para. 214.

be taken to know, and broadly to accept, what he has let himself in for, for he has taken a decision at the outset to litigate a specific dispute before a particular court.[83] The common law takes this view in relation to jurisdiction and agreements on jurisdiction. A defendant seeking to escape from his obligation to litigate in the court he has agreed to, by seeking to resist a stay of English proceedings brought in breach of contract and scrambling to avoid being consigned to the foreign court, will not easily be heard to complain about the quality of substantive or procedural justice available to him from that court. It was never better put than by Yong Pung How J. (as he then was) in *The Asian Plutus*,[84] when he said that "[i]f parties have chosen to submit their disputes to the exclusive jurisdiction of a foreign court, it is difficult to see how either party can in ordinary circumstances complain of the procedure of that court … by choosing the court they have chosen the procedure". It is a regrettable fact that some courts have fallen[85] short of taking so robust and clear-minded a view of the matter, and have been heard to utilize "yes, but …" reasoning. But the forthright view of the Chief Justice of Singapore works equally well when a defendant complains about the enforcement of a foreign judgment. If the defendant has agreed, or has done the equivalent of agreeing, to the jurisdiction of the foreign court, the receiving court should be distinctly slow to admit evidence of failures[86] and shortcomings alleged to reduce the status of the judgment to one not entitled to recognition. It should be slow to construct general defences which will be easy to access; it should tell the defendant that he is estopped by his contract or his conduct, as the case may be, from seeking to oppose recognition of the judgment. But if the defendant neither agreed in advance to, nor appeared before, the foreign court,[87] recognition of the foreign judgment will proceed on some basis other than his consent to the particular proceedings: the justificatory basis of his informed consent (actual or deemed) to the proceedings taking place in that court will be absent.

To some extent, the analysis of the English Court of Appeal in *Adams v. Cape Industries plc.*[88] goes against this. Its justification for retaining presence as a basis of international jurisdictional competence was that if a defendant is present within the territory of the foreign court, he is taking the benefit of the local environment, and if summoned to court, must take the rough with the smooth,[89] as though his presence is akin to a submission to the jurisdiction of the foreign court. This is unconvincing,[90] except in the context of a judicial need to prop up a rule the court felt unable to depart from. It may explain why the defendant cannot complain that the foreign court had no business summoning him. It does not explain why this has any necessary ramification outside the territory of the foreign court. Certainly it cannot be said that it is akin to an agreement with the plaintiff to accept litigation in the foreign court. For this reason it seems to lie on the unconsenting side of the line. Of course, if the defendant acknowledges service and enters an appearance,[91] he becomes a consenting

83 This is a Big Point in the context of the present submission.

84 [1990] 2 M.L.J. 449 (Sing. H.C.). See also *British Aerospace plc. v. Dee Howard Corp.* [1993] 1 Lloyd's Rep. 369 (Eng. H.C.).

85 No citation of authority will be helpful, as there may always be several factors in play which give colour to the argument that proceedings should be heard in the local court despite the agreement to proceed elsewhere.

86 Including a "failure" to spot that the plaintiff was a crook.

87 That is to say, appeared for a purpose other than solely to contest the jurisdiction of the court.

88 [1990] Ch. 433, (Eng. C.A.).

89 *Ibid.* at 519. There was also some rather feudal observation about his owing temporary allegiance to the sovereign, and that being another reason why the competence of the foreign court should be recognized. This does sound a little odd, even in England. In a modern republic one hopes that such medieval nonsense would not be given a hearing. No doubt when in Rome, one does as Romans do, and that includes going to court when summoned. But it is quite another matter to say that this bespeaks choice, consent, or voluntariness on the part of the defendant; and quite different from saying that it establishes a nexus of agreement between the parties if one does not answer the summons.

90 It was the very argument rejected by the Supreme Court of the Straits Settlements in *RMS Veerapa Chitty v. MLP Mootappa Chitty* [1894] II S.S.L.R. 12 (*supra* note 43).

91 Or who takes such other step as local law requires.

defendant, and crosses the line. Until he does, and all the while he refuses to acknowledge the summons, he is manifestly unconsenting to the jurisdiction of the court over him as defendant to the claim instituted by the plaintiff.

If the defendant is nevertheless to be bound by the judgment, it is for some other reason than his being *volens* as to the risks of litigation. So should the defences to recognition available to the defendant who agreed to be bound to litigation in the foreign court be identical to those which may be taken by a defendant who never did? Put in those terms, the answer must be negative. There is much to debate in defining the extent of the differences, but the defences available to the two classes of defendant cannot in principle be completely congruent. If one takes the cases on stays of proceedings seriously, and applies their logic here, it is obvious that the admissible defences for an unconsenting defendant must be more in number or wider in scope, or both. The two classes of defendant are not *in pari materia*. The traditional common law does not acknowledge this, but it should, whether or not it accepts the principle in *Morguard* and *Beals*.

VII. Defences and the Unconsenting Defendant

If we suppose that a judgment should be enforced because of a real and substantial connection between the dispute and the foreign court, there is no reason to withhold any of the defences currently admissible to defendants generally. The question is what further concession, if any, we should make to balance the fact that though there was a strong connection to the court, the defendant did not consent to litigate there. Four possibilities might be (1) a broader defence of natural justice, (2) a broader defence of public policy, (3) a requirement of clean hands or good faith, (4) a greater willingness to review the evidence and reasoning used by the foreign court. We then need to ask whether the defendant whose jurisdictional liability was his presence within the territorial jurisdiction of the foreign court should be treated any differently; and the submission is that he should not be. And while we are about it, it may be appropriate to stop referring to these defendants as being "in default". It may have a technical meaning which is precisely applicable to the facts, but it has connotations of wrongdoing or of wrongly not doing; and this may inhibit the proper evaluation of the defences which should be provided for. The foreign court may well regard the absent defendant as being in default: it is that court's summons, and it is its law which establishes whether there is default. But from the point of view of the receiving court the merits of appearance or non-appearance before the foreign court are different. Inexcusable absence, where the defendant consented to the jurisdiction but then went back on his word, is blameworthy and fully deserves to be called default. But excusable absence, where the defendant did not agree to attend court, or did not represent that he would, is different in quality. It is not obviously blameworthy, and it does not place the defendant in the same poor light. It is default only in a technical sense. If the available defences do depend on some rough assessment of who may be in the right and who in the wrong, this seems to be a distinction which has a good claim to respect. We will therefore proceed to explore the proposition that there is a basic distinction to be drawn between consenting and unconsenting defendants

As to (1), the justification for allowing an unconsenting defendant a broader or more ample defence of natural justice would be that a complaint by the defendant that did not have a fair opportunity to defend himself should be generally inadmissible from the defendant who contracted to defend himself in that court or who volunteered to appear in the proceedings, but admissible with more generosity of interpretation where he did not submit to the jurisdiction of the court. In the former cases he agreed to be there, or was there, to guard his legitimate interests; but if he was not and cannot be criticized for it the law should be more solicitous. This reflects a basic truth already well established in the law of stays of proceedings: a defendant will not be heard to complain of shortcomings in the law or practice of a court when he had contracted to litigate in that court and the factor complained

of could or should have been foreseen by him at the date of the contract. But if he made no such agreement, he will be permitted to lead evidence to show the court why it would be unfair to consign him to the foreign forum for an adjudication of his rights and liabilities. It is perfectly true that there is a distinction between (on the one hand) a prediction by an applicant that he will not get proper justice from a foreign court, and (on the other) an assertion by a defendant that he did not get justice for a particular demonstrable reason, but the principle is still the same even if the latter submission, being more concrete, may be easier to put to a judge. In any event, the test applied by Major J. in *Beals*, that as long as the foreign court applied "minimum standards of fairness",[92] there is nothing to complain about seems well short of the mark when applied to the unconsenting defendant. As to (2), however, it is more difficult to see how the operation of public policy—a matter which is not defined by what the parties did or thought, but is instead a matter of pure law in the receiving court—could be affected by whether the defendant agreed to participate in the foreign proceedings.

As to point (3), which was proposed by LeBel J.,[93] a requirement of clean hands or good faith, especially when the defendant is not in court, has much to commend it. In the final analysis it is futile to tell a judge that he or she must reach a conclusion which is offensive to justice as he or she sees it. The primary judge in *Beals* had applied what he called, in wonderfully unpretentious language, a "judicial sniff test" in an attempt to widen the scope of public policy far enough to refuse enforcement of the Florida judgment. But what passes muster in the rough and tumble of a court of first instance risks being seen as being beneath the dignity of a court of final appeal. The majority in Supreme Court of Canada therefore eschewed the notion altogether, but LeBel J. preferred to reformulate it as a requirement to come to court with clean hands and to act in good faith. This does capture the essence of what was to some minds objectionable about enforcing the judgment in *Beals*.

And it is critically important to remember this. Whether by means of a sniff test, or the examination of the judgment-creditor's hands and conscience, all the receiving court is doing is determining whether the judgment may be enforced within its territorial jurisdiction. It is obviously not sitting on appeal from the foreign court, or purporting to reverse the judgment of the foreign court. It is not seeking to prevent the enforcement of that judgment within the territory of the foreign court or anywhere else. There is, some may like to think, no particular need for embarrassment if a court tells a plaintiff that he may enforce his judgment anywhere he pleases, but if he wants to do so by means of a local judicial order, it must come within touching distance of local standards of propriety. Only a trickster would suggest that this will disparage, still less will make a pretence of knowing better than, the foreign court. That would put the focus in quite the wrong place. Instead, it insists on the equal application of laws to all those who seek relief from a local court, not excluding those cases in which the local court sits as receiving court. Requirements of good faith and clean hands apply in principle to all. It ought to go without saying that, whenever enforcement within the territory of the receiving court requires a judicial order from the receiving court, that court is entitled to prefer and entitled to apply its own standards of propriety. It would be an extraordinary proposition to argue that a plaintiff may excuse or justify his operating to a lower standard of good faith or procedural propriety, or may subject a defendant to a lower and therefore unequal degree of protection, by the stratagem of taking proceedings first in a court where the playing field is not level, and then inviting a receiving court to find that the foreign court had done "minimum justice", hinting at the meretricious and menacing point that if the receiving court goes farther than this it is

[92] *Supra* note 62 at para. 60.

[93] *Supra* note 62 at para. 218. It is hard to tell whether this is a rule of Canadian equity, or an adaptation of a civilian rule that rights may not be exercised abusively or in bad faith.

offending the requirements of comity by disrespecting the foreign court.[94] True, it may be unhelpful to regard this as a matter of public policy. It is preferable to be open about it, and to acknowledge the right of a receiving court to review before approving a judgment which, however one chooses to convey it, risks leaving a fish-like smell in the nostrils and a nasty taste in the mouth.

VIII. FRAUD

A similar approach should be taken to point (4), the defence of fraud. It has been the tradition of the common law, distinct in this respect from civilian systems,[95] to undertake no general review of the reasoning of the foreign court. No-one could rationally assert that this should remain the law, for otherwise our law would provide for the relitigation, rather than the recognition, of foreign judgments. But where the jurisdiction of a foreign court is recognized on a basis which does not connote the agreement or consent of the defendant to that exercise of jurisdiction, there is reason to reconsider the limits of the defence of fraud. The common law's principal tool for reviewing the merits of the claim is the proposition that the foreign judgment was procured by fraud.[96] Now it is fair to say that the tide of modern opinion is rather more hostile than it used to be to the proposition that the receiving court, confronted by a defendant who alleges that the foreign judgment was procured by fraud, may investigate the merits of the plea and hence the merits of the objection. In part this may proceed from the uncertain but probably rather wide scope of fraud, which is not restricted to beguiling and deceiving the foreign court, but extends to attenuated forms of malpractice or misbehaviour.[97] Though in England the principle is still accepted and understood to mean that the receiving court may be invited to look again at evidence which was placed before and rejected by the foreign court, or look at evidence which could perfectly well have been placed before the foreign court but which never was,[98] there is still sniping from those who consider this to show disrespect to the foreign court presumed to be incompetent to detect and suppress fraud practiced in its face.[99] In Australia, a difference of opinion between primary judges, unresolved by any appellate

[94] The point has been made by the European Court of Human Rights in *Pellegrini v. Italy* (2002) 35 E.H.R.R. 2 (E.Ct.H.R.). An Italian wife found her marriage annulled by a medieval and secretive process operated by a tribunal of the Vatican City (technically a state, but one which does not subscribe to mundane concerns like the securing of human rights) to which her husband had made application. The question arose whether the Italian courts were permitted to recognise this curial order, and to do so without regard to her right, enshrined in Article 6 of the European Convention to which the Italian Republic was a party, to be accorded a fair hearing. The European Court of Human Rights ruled that the Italian court was obliged to apply the standards of Article 6 to its decision whether to make the recognition order applied for, and could not shelter behind the proposition that the Vatican tribunal was the court of a foreign state, entitled to behave unjustly and without regard to human rights if it felt like it. If Article 6 of the European Convention imposes that standard of review on a receiving court in Europe, it is inconceivable that the common law will do less, and will be incapable of allowing its own standards of propriety and equality of treatment to be applied, to like effect (*cf.* Lord Bingham of Cornhill in *Lubbe v. Cape plc.* [2001] 1 W.L.R 1545 (Eng. H.L.), or that it will allow a constitutional guarantee of equality before the law (*cf. Constitution of the Republic of Singapore* (1999 Rev. Ed.), art. 12) to be circumvented by the shabby device of first suing before a tribunal which does not take these matters seriously.

[95] At least (for example, with French law) for the purpose of ascertaining that the decision of the foreign court was sufficiently reasoned, and that it applied the correct choice of law rule.

[96] At least when there is prima facie evidence that the foreign court was taken in by fraud on the plaintiff's part. This will allow the threshold standard to vary in accordance with the quality of the foreign court.

[97] *Jet Holdings Inc. v. Patel* [1990] 1 Q.B. 335 (Eng. C.A.).

[98] A line of appellate authority from *Abouloff v. Oppenheimer* (1882) 10 Q.B.D. 295 (Eng. C.A.) to *Owens Bank Ltd. v. Bracco* [1992] 2 A.C. 443 (Eng. H.L.) establishes the point.

[99] *House of Spring Gardens v. Waite* [1990] 1 Q.B. 335 (Eng. C.A.); *Owens Bank Ltd. v. Etoile Commerciale S.A.* [1995] 1 W.L.R. 44 (St. Vincent. P.C.). The ground on which the objection is usually rested is that an abuse of process is committed by the party seeking to rely on evidence of fraud.

tribunal, leaves it unclear whether a party opposing recognition by pleading fraud may recycle old evidence.[100] By contrast, the Singapore Court of Appeal has committed itself to the view that old evidence is not admissible and that the English approach is wrong;[101] and the provincial Courts of Appeal in Ontario[102] and British Columbia[103] agree. In an extremely instructive review of the law in these and other countries of the common law,[104] Mr Garnett concludes that the while overall state of the common law is unsettled, fraud is "the defence that refuses to die". This did not prevent the Supreme Court of Canada in *Beals v. Saldanha* making another attempt on its life. Major J. approved the views of the provincial Courts of Appeal, that fresh evidence was required before the defence of fraud was admissible, but went further when he required that "the 'new and material facts' discussed in [*Jacobs v. Beaver Silver Cobalt Mining Co.*] must be limited to those facts that a defendant could not have discovered and brought to the attention of the foreign court through the exercise of reasonable diligence"[105] Can he have been serious? The Supreme Court was considering the limited question whether a foreign judgment may be enforced by judicial order within the territory of the receiving state Ontario. It was not sitting on appeal from the foreign court whose judgment may be enforced, so far as Canadian law is concerned, in any country of the world without Canadian encouragement or impediment. It had placed before it prima facie evidence of fraud, the evidence of which was not before the foreign court because the defendant was not before the foreign court; and this evidence was not in fact in the defendant's grasp because he was not there to obtain it. If the defendant is nevertheless to be blamed for negligence in failing to unearth the evidence which tends to show fraud, the Canadian court will be taking the side of the fraudster against his negligent opponent. All the instincts of a common lawyer, never mind conscience, should rebel against such depravity. In a contest between the careless and the corrupt, the decent money is on the careless. One assumes that the Supreme Court has not uttered its last word on this point.

However that may be, the manner in which the fraud defence operates could justifiably differ as between (on the one hand) the defendant who agreed in advance to the jurisdiction of the foreign court, or who appeared at the trial, and (on the other) the defendant who was merely present when proceedings were instituted or who was sued in a court which had a real and substantial connection to the dispute but before which he did not appear. Such a differentiation may reflect divergent standards as to whether evidence needs to be not previously discoverable, or need only be newly discovered, or may be second-hand. An approach which regards the defence of fraud as available or not but without paying attention to the jurisdictional basis on which the judgment is to be recognised against the defendant to begin with, does not seem to reflect the material differences in moral balance between categories of defendant. Some should be allowed their chance; others should be taken to have forfeited it. An undiscriminating approach to the defence of fraud falls far

[100] *Keele v. Findley* (1990) 21 N.S.W.L.R. 444 (N.S.W.S.C.): new evidence required; *Close v. Arnot* (21 November 1997) (N.S.W.S.C.): old evidence admissible; *Yoon v. Song* [2000] N.S.W.S.C 1147 (N.S.W.S.C.): old evidence admissible; *De Santis v. Russo* (2001) 27 Fam.L.R. 414 (Qld. S.C.): old evidence admissible. The Queensland Court of Appeal reversed the decision below without reference to this point: [2001] QCA 457, October 26th 2001 (Qld. C.A.).

[101] *Hong Pian Tee v. Les Placements Germain Gauthier Inc.* [2002] 2 Sing.L.R. 81 (Sing. C.A.), though it not clear that all the relevant authority was placed before the Court. The decision departs from the earlier and traditional view expressed in *Ralli v. Anguilla* [1915–23] XV S.S.L.R. 33 (Straits Settlements. C.A.), and is noted by D. Tan, "Enforcement of Foreign Judgments: should fraud unravel all?" (2002) 6 Sing.J.I.C.L. 1043.

[102] *Jacobs v. Beaver Silver Cobalt Mining Co.* (1908) 17 O.L.R. 496 (Ont. C.A.).

[103] *Roglass Consultants Inc. v. Kennedy, Lock* (1984) 65 B.C.L.R. 393 (BC. C.A.).

[104] R. Garnett, "Fraud and Foreign Judgments: The Defence That Refuses to Die" (2002) 1(2) Journal of International Commercial Law 1.

[105] *Supra* note 62 at para. 50. The extent to which LeBel J. shared this view at paras. 233–234 is uncertain. Binnie J.'s conclusion that there was a want of natural justice meant that he did not deal with the defence of fraud.

short of the ideal. In *Beals* it should surely have permitted the blamelessly absent and unconsenting defendant to allege and seek to establish fraud by the plaintiffs; it should not have debarred him from making the plea by reason of any lack of diligence, and (in the present submission) it should not have debarred him even if it the evidence was not new. But more generally, it should have led to the conclusion that whilst one might take a stringent view against the defendant who chose, or who chose to participate before, the foreign court, it is inappropriate to expose the defendant who is legitimately absent to the same lack of sympathy. He should still be given a fair opportunity to be heard.

IX. Conclusions

The common law on the recognition and enforcement of foreign judgments was designed and constructed, predominantly, in the England of a century ago. Most English jurisprudence since then has contented itself with confirming the continuing validity of old truths. This has encouraged some courts in some countries outside England to be suspicious of the cultural assumptions in which these foundations lie: this is just as it should be. If, as Hartley says, "the past is a foreign country, they do things differently there",[106] Victorian England is, when seen from Canberra, Ottawa, or Singapore, doubly foreign. But it has also led some courts in some countries outside England to suppose that this legal heritage must be fundamentally at odds with modern values: this is not quite so sensible. Those who cleave to this sceptical view increasingly proclaim that foreign courts and foreign judgments are to be treated as the equivalent of local ones, and that a foreign judgment should be regarded as having the same conclusiveness, the same likelihood of being correct, and the same immunity from challenge as a local judgment does. It is submitted that this *bien-pensant* cast of mind is based more on sentiment and optimism than on reason and analysis. The price which is paid for giving spurious equality of treatment to local and foreign judgments is paid by those individuals who seek relief from a local court in its adjudicating and receiving functions. These are the ones exposed to inequality of treatment. Though there may be no bright line which marks the transition from comity to political correctness, some cases plainly cross it. In the present submission, *Beals v. Saldanha* lies far to the wrong side of it, and how it got there teaches a lesson which needs to be learned. Saldanha was sued in a Florida court, which operated under rules of procedure which were not intrinsically unfair[107] but which had a remarkable potential for allowing local plaintiffs and their lawyers to wrongfoot unwary foreigners. He was faced with a choice between paying a fortune[108] to defend a case which appeared trivial and which was, so far as one can tell, far from obviously meritorious, or going down by default and steering clear of Florida in the future. He chose the latter, as well he might. In reviewing his legitimate expectations and deserved liabilities, LeBel J. referred to the "increased vulnerability of Canadian residents to nuisance lawsuits in other countries".[109] As well he might. Political correctness can be a self-indulgent luxury for a court; for Saldanha it was a catastrophe of someone else's making. Had he agreed to the jurisdiction of the Florida courts in advance; had he appeared voluntarily in the proceedings,

[106] L.P. Hartley, *The Go-Between* (Hamish Hamilton, 1953).

[107] Weird, though, much like the local rules for casting and recording electoral votes.

[108] Not liable to be compensated in costs if they won.

[109] *Supra* note 62 at para. 251, citing J.-G. Castel & J. Walker, *Canadian Conflict of Laws*, 5th ed. (Canada: Butterworths, 2002). It is not just Canadian residents who find themselves on the receiving end of claims, launched in industrial quantities, and which seek to transfer wealth from outside the United States to inside the United States by launching claims in "disputes" which seem preposterous to the point of fantasy (the recent example of claims alleging loss and damage against Lloyd's of London as insurer of ships involved in the slave trade is just the latest in this miserable line). It is a feature of modern life scarcely more edifying than e-mail scams promising vast riches to anyone who will help the sender gain access to and share out large piles of unclaimed money, if only the invitee will send details of his bank account by return.

he would have had no-one to blame for his downfall but himself. But this he did not do. The connection to Florida and to adjudication in its courts was, in a fundamental sense, involuntary; and whether based on presence, or on a real and substantial connection to Florida, or on the footing that Florida was the natural forum for the litigation, it remained a connection which did not have Saldanha's consent. The burden of this paper is that the Supreme Court of Canada was right to do as it did in widening the grounds of acceptable international jurisdictional competence. But at the same time, it should have asked how the defences allowed by Canadian common law needed to respond to this change. Jurisdiction and defence are, in this corner of the law, indissociable. It cannot be right to make radical changes to one while supposing that this has no impact on the other. The recognition of foreign judgments is a machine. It is not a box of unconnected bits and pieces.

The decision to decree recognition or enforcement of a foreign judgment is, in the end, a decision by a receiving court to give its seal of approval to the foreign order. When taking that decision, judicial comity should not be allowed to become the enemy of justice. The interests of all may be better served if we recognise that not all defendants to foreign proceedings are *in pari materia*, and that a principled discrimination between those who can and cannot be said to have brought it on themselves is now long overdue. The common law's unarticulated and unquestioned traditional assumptions, that all bases of jurisdictional competence are equal or equivalent, and that all defences to recognition and enforcement are indifferent to the jurisdictional basis for recognition or enforcement, have prevailed for too long. The judgment of the Supreme Court of Canada in *Beals v. Saldanha* means that we now have something to help us to develop the law by measured steps, and with a greater sensitivity to where we need to get to. It provides the opportunity for us to borrow some of the common law's fundamental, *transferable*, principles about the sanctity and consequences of agreements on jurisdiction, reflects the importance of a distinction between cases of agreement and no agreement, and reminds us that agreements are there to be construed. It allows us to apply these principles in a context where they may rationalize the law. It allows the common law to develop its common sense that where the defendant has only himself to blame for being sued in the foreign court he will not be heard to blame anyone else for his predicament. But it also allows us to deal differently with the defendant who is not in that position and who should not be taken to have forfeited the full and equal protection of the law of the receiving state. Such incremental, intuitive, coherent, development is what the common law does best, and is how the common law conflict of laws works best. There is nothing to be said for plunging ahead with a Great Leap Forward, eyes fixed on the illusion of a far horizon. The common law is at its brilliant best when it proceeds cautiously and pragmatically: when it crosses the river by feeling the stones. And this is what it should now be doing in relation to the law on recognition and enforcement of foreign judgments.

EXHIBIT 81

Tan Chin Seng and others
v
Raffles Town Club Pte Ltd (No 2)

[2003] SGCA 27

Court of Appeal — Civil Appeal No 148 of 2002
Chao Hick Tin JA, Lai Siu Chiu and Tan Lee Meng JJ
22 May; 11 August 2003

Contract *— Contractual terms — Implied terms — Rules of club giving discretion to proprietors to admit as many members as they wanted — Whether discretion must be exercised consistent with object of contract*

Contract *— Misrepresentation — Statements of intention — Representations made about club while club still under construction — Whether representations actionable*

Contract *—Misrepresentation Act — Whether common law position as to what is actionable misrepresentation changed by s 2(1) Misrepresentation Act (Cap 390, 1994 Rev Ed)*

Facts

During the launch of a club owned and managed by the respondent, certain representations as to the club were made through a number of agents. These agents made representations that there were certain advantages with being a founder member of the club, and that such membership would be exclusive. Relying on these representations, the appellants signed up as founder members. After the club opened, the appellants experienced crowdedness at the club premises. It was subsequently discovered that the club had admitted almost 19,000 founder members. The appellants sued for misrepresentation and breach of contract. The trial judge dismissed their action and they appealed.

Held, allowing the appeal:

(1) An actionable misrepresentation was a false statement of existing or past fact. A statement as to a man's intention could be considered a statement of fact. However, a statement as to the future was in truth a promise and was not actionable unless it could be shown to be part of a contract: at [20] to [21].

(2) Section 2(1) of the Misrepresentation Act only changed the law as to the reliefs that could be obtained in the case of any non-fraudulent misrepresentation. It did not alter what constituted an actionable misrepresentation: at [23].

(3) To provide business efficacy for the contract entered into between the parties, it would be necessary to imply into the contract the term that the

respondent would exercise its discretion as provided by the rules in such a manner that there would be no breach of its obligations to provide a premier club: at [31] to [32].

(4) The respondent, by admitting the number of members that it did, was in breach of this term of the contract: at [51].

[Observation (*per* Chao JA): The damages recoverable could not include the depreciation in the price of the club membership caused by the dip in general market conditions: at [55].]

[Editorial note: The High Court decision *of Tan Ching Seng and others v Raffles Town Club Pte Ltd (No 2)* reported at [2002] 3 SLR 403 should be renamed *Tan Ching Seng and others v Raffles Town Club Pte Ltd.* The appeal against that decision was reported at [2002] 3 SLR 345.]

Case(s) referred to

140 Pub Company Ltd v Hoare (Ch Div, unreported judgment dated on 21 March 2001) (folld)

Brown v Raphael [1958] Ch 636 (distd)

Edgington v Fitzmaurice (1885) 29 Ch D 459 (folld)

Forum Development Pte Ltd v Global Accent Trading Pte Ltd [1995] 1 SLR 474 (distd)

G Scammell and Nephew Ltd v Ouston [1941] AC 251 (folld)

Livesey v Jenkins [1985] AC 424 (folld)

Shirlaw v Southern Foundries (1926) Ltd [1939] 2 All ER 113 (folld)

Wales v Wadham [1977] 2 All ER 125 (folld)

Legislation referred to

Misrepresentation Act (Cap 390, 1994 Rev Ed) s 2(1)

Molly Lim SC, Roland Tong and Wang Shao-Ing (Wong Tan & Molly Lim LLC) for the appellants;
K Shanmugam SC and Candace Ler (Allen & Gledhill) for the respondent.

11 August 2003

Chao Hick Tin JA (delivering the judgment of the court):

1 This appeal is brought by the appellants (ten in all) for themselves, as well as for 4,885 other members of the Raffles Town Club ("the Club" or "RTC" as may be appropriate), against a decision of the High Court dismissing the action which they instituted against the respondent, Raffles Town Club Pte Ltd ("RTC Ltd"), for misrepresentation and breach of contract.

The background

2 RTC Ltd is a private exempt company. It was incorporated to own and manage the Club as a proprietary club. It erected the Club premises at the junction of Dunearn Road and Whitley Road.

3 In November 1996, while the Club premises were still at the drawing board stage, RTC Ltd initiated an introductory launch to invite selected members of the public to join the Club as founder members at the discounted price of $28,000. A number of financial institutions and other bodies were enlisted as agents to carry out the launch. Each of these agents wrote to its own customers stating, in each instance, that the addressee was specially selected and invited to apply for the founder membership. The invitees were told that after this launch, people would have to pay $40,000 to become members. Enclosed with each invitation letter were the following documents:

(a) a glossy brochure describing the Club facilities ("the brochure");

(b) a document containing questions and answers to give more information to the invitee ("Q&A sheet"); and

(c) a Priority Application Form.

The invitation letter and the above three documents will hereinafter be referred to collectively as "the promotional materials".

4 Each of the appellants, having received such an invitation letter, applied for membership, paying a down-payment of $3,000, with the balance to be paid in 48 instalments. They duly became founder members.

5 What subsequently upset them was that they learnt in March 2001, from the evidence adduced in an unrelated action in the High Court between the shareholders of RTC Ltd, that in total some 18,992 persons had been admitted as founder members and another 56 persons as "ordinary" members, paying the increased membership fee of $40,000, making a grand total of 19,048 members. Before then, while they had experienced crowdedness at the Club premises, they did not know the size of its membership.

6 Relying on certain statements in the brochure and the Q&A sheet, the appellants alleged that they were induced to become founder members by those statements and prayed for a rescission of the contract and the refund of the membership fee they had paid. In the alternative, they averred that there were breaches of contract and asked for damages.

7 At the High Court, S Rajendran J ruled that there were no merits in both claims and dismissed the action. He held that there was no actionable representation. While he found that the representations made in the promotional materials that the Club would be a premier club with first class facilities were the basis upon which the appellants had joined the Club and

that they were properly to be implied into the contract, he did not think, on the evidence presented, that there was any breach of these implied terms of the contract.

Issues

8 In the light of the submissions made by the parties in their respective cases, the main issues which arise for the consideration of this court may be categorised as follows:

(a) Whether any of the statements in the promotional materials constitutes a representation;

(b) If they are not representations, whether any of the statements would nevertheless form a term of the contract subsequently entered into between the parties; and

(c) If the answer to (b) is in the positive, whether RTC Ltd has breached any of the terms of the contract.

These are largely the same issues canvassed in the court below.

The representations

9 The appellants alleged that in the promotional materials, the following express representations were made:

(a) It was planned that the Club would have nearly 600 car park lots for the use of the members;

(b) "Club members will enjoy unparalleled privilege and facilities";

(c) "The Club's exclusive and limited membership will be fully transferable ... the most prestigious private city club ... of Singapore";

(d) The Club would be constructed to have a total built-up area in excess of 400,000 sq ft catering for the "business, entertainment, networking, socialising, personal and family leisure requirements" of members. The Club would have "separate formal, casual, sporting, children's and family facilities" for members;

(e) A supplementary card would be issued to the spouse or fiancé of each member with full membership privileges and benefits at no additional cost;

(f) The Club would be "without peer in terms of size, facilities and sheer opulence"; and

(g) There would be two categories of individual members. First, a limited number of exclusive transferable founder members at the entrance fee of $28,000, who should submit their applications no

later than 30 November 1996. Second, the ordinary members and this would include those who should submit their applications after 30 November 1996 at the price of $40,000, as well as those who did not succeed under the initial launch.

10 The appellants contended in their Amended Statement of Claim that by these representations, they understood that they would be joining "an exclusive and premier club" and that "the total number of members would be limited such that at any given time no member and the supplementary card-holder would be shut out from or be unable to use the facilities of the Club ... in the manner or up to the standard as represented in the prospectus".

Nature of the statements

11 We should, at this juncture, observe that no fraud is alleged against RTC Ltd or its promoters. It is, therefore, necessary to determine the nature of the statements. Do they constitute representations?

12 A representation is a statement which relates to a matter of fact, which may be a past or present fact. But a statement as to a man's intention, or as to his own state of mind, is no less a statement of fact and a misstatement of the state of a man's mind is a misrepresentation of fact: *per* Bowen LJ in *Edgington v Fitzmaurice* (1885) 29 Ch D 459 at 483.

13 The point that a statement as to intention could be a statement of fact was further elucidated by Tudor Evans J in *Wales v Wadham* [1977] 2 All ER 125 at 136:

> A statement of intention is not a representation of existing fact, unless the person making it does not honestly hold the intention he is expressing, in which case there is a misrepresentation of fact in relation to the state of that person's mind.

Although an aspect of the decision in *Wales v Wadham* was overruled by the House of Lords in *Livesey v Jenkins* [1985] AC 424, this statement of Tudor Evans J was upheld and it remains valid to date.

14 Of course, it will be difficult to prove what was the state of a person's mind at any particular point in time. Nevertheless, that is a matter of proof and it should not be confused with the substantive principles of law.

15 Considerable reliance was placed by counsel for the appellants on the case of *Brown v Raphael* [1958] Ch 636 which involved the sale by auction of a certain property, namely, an absolute reversion to the whole of a trust fund on the demise of a certain lady. The sale was subject to all death and other duties which might become payable. The particulars of sale which were prepared by a solicitor's managing clerk stated that a sum had been set aside to pay an annuity to the lady and that as regards estate duty, which would be payable on the death of the annuitant, it was believed she had "no aggregable

estate". The plaintiff, relying on those particulars, entered into the contract to purchase the property. But before completion, the purchaser found that the statement that the annuitant was believed to have no aggregable estate was not true and he sought to rescind the contract of purchase on the ground of misrepresentation. The High Court held that there was an innocent misrepresentation which entitled the purchaser to rescind and this was upheld by the Court of Appeal.

16 In that case it was argued that the statement that it was believed that the annuitant had no "aggregable estate" was a statement of opinion. Lord Evershed MR, applying the principles enunciated by Bowen LJ that where the vendor's knowledge or means of knowledge was far superior to that of the purchaser, such a statement of opinion could very often involve a statement of material "fact". He said at 644:

> I am, therefore, entirely of the same opinion as was the judge, that this is a case in which the representation was not merely confined to the fact that the vendor entertained the belief but also, inescapably, *there goes with it the further representation that he, being competently advised, had reasonable grounds for supporting that belief.* [emphasis added]

17 It seems to us clear that the statement in *Brown v Raphael* was quite distinct from that in our present case. So were the circumstances under which it was made. The statement there related to a matter of fact, namely, whether the annuitant had "aggregable estate" though it was expressed with the use of the word "believed". The representation there was that there were reasonable grounds to express that belief. Here, what RTC Ltd had promised the invitees were matters as to the future: a premier club with first class facilities. RTC Ltd has delivered the facilities but the problem lies in it accepting too many founder members.

18 Next, a decision of this court, *Forum Development Pte Ltd v Global Accent Trading Pte Ltd* [1995] 1 SLR 474, was also cited by the appellants to substantiate their contention that a promise as to future actions could constitute actionable representation. There, the owner of a shopping mall, in negotiating a lease with a prospective tenant, represented that the existing wall in front of the premises to be leased would be demolished and replaced by a glass wall by the end of the year. Based on that representation, the tenant took up a lease of the premises. The wall was never demolished and the tenant vacated the premises and sued for rescission of the lease on the ground of innocent misrepresentation. The employee of the owner who made the representation really thought that the wall would be coming down. This court held that the tenant was entitled to rescission on the ground of innocent misrepresentation. The court found at 480 that the employee "had no factual basis for representing that the brick wall would be replaced by a 'glass wall' by December 1990". By making the representation, the employee had, in fact, also represented that plans were in place to carry out the replacement by

December 1990, which was not the case. This court there added that, had the employee taken the trouble to inquire from those who were directly concerned with the planning and programming of the works, she would not have made the representation. This feature distinguishes the position in *Forum Development* from that in our case where the problems came about because RTC Ltd accepted too many people who applied for founder membership.

19 It seems to us quite clear that while some of the statements in the promotional materials are salesman's pitch, the message that came across clearly was that RTC Ltd would deliver a premier club with first class facilities. True, at that stage, the club premises were still on the drawing board. The appellants had not alleged that RTC Ltd, in making those statements, had no honest belief in them or had no intention to fulfil them. Plans were indeed afoot for such a club. What were eventually delivered, when the Club finally opened its doors to members, some 15 months behind schedule, were posh and elegant club premises with substantially what RTC Ltd had promised. The trial judge had, in fact, made a visit to the Club's premises and inspected the facilities and his conclusion was that they were "opulent". The crux of the appellants' complaint is that RTC had admitted too many people, almost 19,000, as founder members. This, they said, caused a squeeze on the facilities which were available to members and the Club could no longer be considered to be an "exclusive" or "premier" club offering first class facilities. More on this aspect will be touched on later when we come to the third issue on breach.

20 *Anson's Law of Contract* (28th Ed, 2002) states at p 237 that an actionable misrepresentation is as follows:

> An operative misrepresentation consists in a false statement of *existing or past fact* made by one party (the "misrepresentor") before or at the time of making the contract, which is addressed to the other party (the "misrepresentee") and which induces the other party to enter into the contract. [emphasis in original]

21 There is also a need to differentiate between actionable representation and future promise and this is elucidated in Andrew Phang's *Law of Contract (Second Singapore and Malaysian Edition)* (1998) as follows at pp 444 to 445:

> A representation, as we have seen, relates to some existing fact or some past event. It implies a *factum,* not a *faciendum*, and since it contains no element of futurity it must be distinguished from a statement of intention. An affirmation of the truth of a fact is different from a promise to do something *in futuro*, and produces different legal consequences. This distinction is of practical importance. If a person alters his position on the faith of a representation, the mere fact of its falsehood entitles him to certain remedies. If, on the other hand, he sues upon what is in truth a promise, he must show that this promise forms part of a valid contract. The distinction is well illustrated by *Maddison v Alderson* [(1883) 8 App Cas 467], where the plaintiff, who was prevented by the Statute of Frauds

from enforcing an oral promise to devise a house, contended that the promise to make a will in her favour should be treated as a representation which would operate by way of estoppel. The contention, however, was dismissed, for:

> The doctrine of estoppel by representation is applicable only to representations as to some state of facts alleged to be at the time actually in existence, and not to promises *de futuro*, which, if binding at all, must be binding as contracts. [see (1883) 8 App Cas 467 at 473].

22 There is one other aspect which we should address before moving on to the second issue. The appellants have also sought to frame their claim on the basis of s 2(1) of the Misrepresentation Act (Cap 390, 1994 Rev Ed). We think there is a misconception on the scope and effect of s 2(1). That provision does not alter the law as to what is a representation. This can be seen from its opening words, "[w]here a person has entered into a contract after a misrepresentation has been made to him by another party thereto and as a result thereof he has suffered loss". The change effected by that subsection is that it enables a party who suffers loss on account of a non-fraudulent misrepresentation to claim for damages which he would not be entitled to do under the then existing law; for such a misrepresentation, rescission was the only remedy. However, the subsection allows the representee to claim damages for any non-fraudulent misrepresentation, subject to the proviso that the representor need not pay damages if he could prove that he had reasonable grounds to believe, and did believe, up to the time the contract was made, that the facts represented were true.

23 Thus s 2(1) only alters the law as to the reliefs to be granted for a non–fraudulent misrepresentation but not as to what constitutes an actionable misrepresentation. *Chitty on Contracts, Vol 1* (28th Ed, 1999) at para 6-001 put the position quite clearly as follows:

> Prior to the enactment of the Misrepresentation Act 1967, the position broadly speaking was that a misrepresentation which induced a person to enter into a contract gave the representee the right to rescind the contract, subject to certain conditions, but generally gave him no right to damages unless the misrepresentation was fraudulent, or, in some cases, negligent, or unless the misrepresentation had contractual force. Since the coming into force of the Misrepresentation Act the representee will always be able to claim damages for negligent misrepresentation in circumstances in which he could have recovered damages had the misrepresentation been fraudulent. ... The Act of 1967 does not, however, alter the rules as to what constitutes an effective misrepresentation.

Whether statements constituted terms of contract

24 The next question we have to consider is whether any of those statements made in the promotional materials formed a part of the terms of the contract which each appellant has entered into with RTC Ltd.

25 In applying to become a member, each of the appellants filled in and submitted the Priority Application Form. Besides giving personal particulars, the form ended with a number of declarations which each applicant had put his signature to and one of the declarations was the following:

> I, the undersigned, undertake at all times to comply with and be bound by the rules and regulations as may be prescribed and/or varied from time to time by Raffles Town Club Limited (the "Proprietor"). I understand that the current rules and regulations as prescribed by the Proprietor may be viewed by me at the office of the Proprietor at 2 Nassim Road, Singapore 258370. I further understand that a copy of the same will be sent to me upon acceptance of my application.

26 Rule 6 of the Rules and Regulations ("the Rules") of the Club relates to membership. The relevant portions of that rule read:

> 6.1 Class: The Club shall comprise Honorary Members, Ordinary Members and Corporate Members ...
>
> The Club shall consist of such number of Members as the Proprietor may in its absolute discretion from time to time decide.
>
> 6.2 Other Classes: The Proprietor may from time to time create new classes or categories of membership on such terms and conditions as the Proprietor may determine.

27 The appellants argued that notwithstanding rule 6.1, the statements made in the promotional materials which enticed the appellants to sign on as members should be implied into the contract. The powers conferred upon the proprietors in rule 6.1 should be exercised in a manner consistent with what RTC Ltd had promised, *ie,* an exclusive and premier club, with first class facilities. They contended that the test is an objective one. Surely, if at the time any of the appellants were to have asked RTC Ltd whether the latter would exercise the discretion in rule 6.1 so as to maintain at all times the premier status of the Club, the answer would be in the affirmative.

28 However, the counter-argument of RTC Ltd is that if any of the statements were to be incorporated into the contract, it would conflict with the Rules. It is wholly unnecessary to imply any such term in the interest of business efficacy. RTC Ltd contended that "entrepreneurs should be given a broad latitude to test the market with different concepts; if this were not allowed, it would stifle innovation in the club industry". Furthermore, the statements are so vague that they are incapable of being contractual terms.

29 In this regard, RTC Ltd relied upon *G Scammell and Nephew Ltd v Ouston* [1941] AC 251 where Lord Wright said (at 268) that there could be no contract where "the language used was so obscure and so incapable of any definite or precise meaning that the court is unable to attribute to the parties any particular contractual intention". As the language used in the promotional materials was so general, RTC Ltd submitted that the statements in those materials were nothing else but puffs: just salesman's talk. As the respondent's expert, Mr Shepherdson said, what was stated in the brochure was just "hype", designed to create a "want".

30 It is not in dispute that the promotional materials did not give any figure as to the number of people whom the Club planned to admit as members. As far as the Rules are concerned, they appear to give absolute discretion to the proprietors to determine the number.

31 The case presented for RTC Ltd rests wholly on the Rules which seem to have vested in the respondent complete discretion in all matters pertaining to the Club, *eg* what facilities should be available and how it should be run. Such an approach was rejected by the trial judge, who said at [62] of his judgment:

> Rule 6.1 would therefore have to be read subject to the defendants' obligations to provide a club with the qualities promised. This will mean that, in exercising their rights under Rule 6.1 to admit members, the defendants will have to ensure that they do not admit so large a number that their obligation to provide and run a premier club would be compromised. The discretion given to the defendants under Rule 6.1 would, to that extent, be curtailed. To put it in alternative way: to give business efficacy to the contract, I would imply as a term of the contract that the defendants would exercise their discretion under Rule 6.1 in such manner that there would be no breach of the defendants' obligations to provide the sort of club promised in the promotional material.

32 As we see it, the way to test the logic and validity of RTC Ltd's argument is to take it to the extreme, and we would stress that it is often by resorting to extreme examples that one would be able to see whether an argument advanced is reasonable and logical. If it is correct that the discretion vested in the Club proprietor is wholly unfettered, it would mean that even if the respondent were to have provided to members a couple of rooms for members to gather and dine and nothing else, the respondent would still have fulfilled their part of the bargain and would not have breached their obligations. That can hardly be correct. A discretionary power in a contract, such as this, must be exercised in furtherance of its object. Therefore, we entirely agree with the views expressed by the trial judge which we have quoted in [31] above.

33 What comes out clearly from the promotional materials is that the public (selected customers of financial institutions who were appointed as agents) were invited to join a club which was to be a premier club, described as "without peer in terms of size, facilities and opulence". That was the central

theme. We accept that a term should not be implied unless it is necessary to give the contract business efficacy, or unless it was a term which was so obvious that if any of the appellants were at the time to have asked RTC Ltd whether, notwithstanding the wide discretionary power conferred upon it, it would exercise those powers to ensure that the Club would, at all times, remain a premier club, unequal in size, facilities and opulence, we would have no doubt that the answer given would be in the affirmative. The latter is the officious bystander test propounded by MacKinnon LJ in *Shirlaw v Southern Foundries (1926) Ltd* [1939] 2 All ER 113. In our view, the answer would also be the same if the business efficacy test were to be applied.

34 In this regard the unreported judgment in *140 Pub Company Ltd v Hoare* (Ch Div and delivered on 21 March 2001) is germane. There the lessors of a public house which was subject to a "beer tie" granted a licence to assign the lease of the premises to the defendants who later became the lessees of the premises. In the licence to assign, the lessees covenanted to comply with all the terms of the lease, including the beer tie. The defendants claimed that, in consideration of their taking an assignment, there was an agreement on the part of the lessors that the premises would be released from the tie by a certain date and that this agreement was made during the negotiations prior to the giving of the licence to assign. The evidence showed that during the negotiations, the lessors' representative produced a brochure and went through it with the defendants. Two sentences in the brochure were particularly significant: "After March 1998, the entire (lessors') estate will be completely free to purchase all products from any supplier" and "By the end of March 1998 all properties owned by the (lessors) will be totally free to purchase all products from any supplier". However, in the brochure it was also provided that, in the event of any inconsistency between what was stated in the brochure and "the current legal documents", the latter should prevail. This proviso notwithstanding, Sir Oliver Popplewell held that the representations in the brochure relating to the release of the beer tie was a term of the contract. He said at para 28:

> I look at the totality of the evidence and ask what a reasonable outside observer would infer from all the circumstances. The Claimants are, of course, entitled to take advantage of any legal point but I cannot help but think that an outside observer would think their conduct somewhat shabby. It is not necessary, having regard to the document, to trash around in the undergrowth nor was there some "chance remark", to quote Lightman J. This was part and parcel of a well presented sales pitch relating to important terms of contract and intended to form part of the contract. I am satisfied that the Claimants, through Mr Hughes and the brochure, did give the promises and assurances; did intend that the Defendants should act on them; did intend them to be part of the contract and the Defendants did act on them. They would not otherwise have entered into

> the contract. The fact that others may also have been the object of the sales pitch seems not to make the slightest difference.

35 In our present case, while we recognise that the term "premier" is not one which can be defined with precision, we do not think it so obscure and vague a term that it should not be implied. It does convey the sense that it will be a club of distinction and pre-eminence, contrasting it to that of a run-of-the-mill type. It differentiates such a club from the ordinary club.

36 Admittedly, what is "premier" could give rise to a difference of opinion. But it hardly follows that just because such a term could generate differences of view that it should thereby be inoperative or of no effect and should not be implied. Even the most common word in the law, the term "reasonable", is not a term which can be defined with precision and the answer would depend very much on the particular circumstances of each case.

37 In our judgment, it must be implied into the contract which each appellant entered into with RTC Ltd that the Club would be a premier club, with first class facilities and that the discretion vested in RTC Ltd by the Rules would always be exercised in a manner consistent with the maintenance of the Club as a premier club.

Was there a breach?

38 We now turn to the third issue as to whether RTC Ltd had breached its contract of providing a "premier" club for its members. We accept that the 19,000 people whom the respondent admitted as members does not *per se* prove a breach. The real question is whether the Club has, by admitting so many members, ceased to be an "exclusive" or "premier" club, having regard to the dimensions of the facilities available.

39 The trial judge, having viewed the physical facilities of the Club said at [63] that:

> The Club was spacious and its facilities ... upmarket ... there can be no doubt that the physical facilities, and ambience matched the adjectives "opulent" and "lavish" used in the promotional materials.

40 He also noted that when the Club was eventually opened, after some 15 months' delay, "large numbers of members or guests turned up at the Club during the initial weeks and months", resulting in overcrowding and congestion. The bulk of the complaints of the appellants related to this initial period. But this was not to say that there was no evidence of overcrowding after the initial period, such as during the weekends or public holidays and festive seasons. Nevertheless, after reviewing all the evidence adduced on the issue of usage, the trial judge came to the conclusion (at [72] and [73]) that:

> [T]he demands on a number of facilities at the Club (especially the Café & Terrace; the Chinese Restaurant; the swimming pool; the gym; and the

> bathing/sauna facilities) were, at times, such that there was considerable pressure on the defendants to cope. This pressure arose because the available facilities had to serve the needs of the large membership of 19,000 persons (and their spouses and their guests) ...
>
> [However] I do not find that that pressure was such that it crossed the line where it could be said that the Club was no longer the premier club that was promised. I would also add, in case the defendants are inclined to admit even more members, that the pressure was very close to that line. Admission of more members can easily result in that line being crossed. In my view, the membership of the Club, as it now stands, is just about the very maximum permissible to sustain the Club as a premier club.

41 First, we will consider the evidence of the experts. Mr Shepherdson, who was called by RTC Ltd, said that a benchmark guide used by the club industry is one seat for every ten members. He drew a table comparing the food and beverage ("F&B") outlets of RTC with those of four other similar social clubs in Singapore. The table is as follows:

	No of seats	No of members	Members per seats
Raffles Town Club	1,540	17,000	11.0
Singapore Recreation Club	600	5,500	9.2
Tower Club Singapore	260	1,500	5.8
Singapore Cricket Club	450	8,000	17.7
NUSS Guild House	800	12,000	15.0

42 We would, however, make three observations on the figures set out in the table in respect of RTC. First, the membership of RTC taken by Mr Shepherdson in preparing these figures, at 17,000, is 2,000 short of the actual number. He gave some explanations on why the number 17,000 was chosen ("to make the mathematics easier"; "trying to give some indications rather than any precise numbers"). Still, we fail to understand why the correct number of 19,000 was not taken. Second, the number of seats which is recorded as available at RTC includes 400 seats in the ballroom (which has a full capacity of 800). However, a witness for RTC told the court that the ballroom was utilised only for special functions or festive seasons such as Chinese New Year. Therefore, it was not normally opened, whether weekdays or weekend, except for special events of the Club or its members, *eg* weddings. When there is such a special event like a wedding, the guests will be relatives and friends of the bride and groom and their families; most guests will probably have nothing to do with the Club. Third, if we should remove the 400 seats in the ballroom from the computation of the seating capacity of RTC, as we think they should be, and adopt the correct membership figure of 19,000, it would give a ratio of 16.66 members to one seat. While, it is still

better than the position of the Singapore Cricket Club, it is way below what Mr Shepherdson said is the benchmark – one seat to ten members. It must be borne in mind that here we are referring to a "premier" club. In this regard, there is one other aspect which we thought is peculiar. The café has an indoor capacity of 136 seats. Yet, the outdoor section (poolside) is said to have a capacity of 420 seats. Of that figure of 420, 70 are deck chairs and 193 seats are without shelter. We are in the tropics where air-conditioned comfort is vital. The ratio between the indoor and outdoor seats is completely out of proportion.

43 Evidence was tendered by Mr Sexton (who was called by the appellants) where he compared the essential facilities available at RTC with those of Pinetree Club, a very similar sort of town club. Both these clubs are located in the same area, as the distance between them is only half a kilometre apart.

	RTC	Pinetree
Gym	354 m^2	332 m^2
Coffeeshop (indoor)	235 m^2	n/p*
Poolside café	420 seats	n/p*
Chinese restaurant	266 m^2	330 m^2
Japanese restaurant	213 m^2	162 m^2
Western restaurant	277 m^2	243 m^2
Bowling	10 lanes	10 lanes
Swimming pool	345 m^2	680 m^2

(* not provided in evidence)

44 The three fine dining restaurants (Chinese, Japanese and Western) at RTC have a capacity of 504, which is very close to that of Pinetree at 490. RTC has a café, with 136 seats (air-conditioned) and another 420 seats at poolside. Here, we would reiterate our point about the large percentage of outdoor seats mentioned above. Though it was not provided in evidence, Pinetree, in fact, also has a café, with an open section by the poolside. Turning to the swimming pool, the pool at RTC is a resort-style pool and has a capacity for only 138 swimmers while that at Pinetree can accommodate 272 swimmers. Bearing in mind that RTC's membership is almost four times the number of Pinetree and its pool size is only about half that of Pinetree, it is clear that the swimming pool facilities are grossly inadequate. Here, we would like to quote what Mr Shepherdson said as to how the pool could cope with the high demand on weekend:

> Assuming a busy Saturday has people using the pool from 10.00am until 7.30pm with an average stay of 75 minutes, the pool can accommodate over 3,000 users (9.5 hours x 60 minutes = 570 minutes ÷ 75 = 7.6 x 400 = 3,040).

Mathematically, the sums are correct. But this assertion assumed two things. First, that members and their family would turn up evenly spread from morning 10.00am to 7.30pm in the evening. Second, it assumed that 400 swimmers could be in the pool at any one time. The pool would be packed the whole day. We can understand this being the condition in a public swimming pool but not at a premier club.

45 When one turns to look at the gym and the bowling alley, RTC has much the same facilities as Pinetree. Its gym is larger than that of Pinetree by only 22 m^2 and it has the same number of bowling lanes as Pinetree. But its membership is four times more.

46 In this regard, usage statistics were furnished by RTC covering the period from March 2000 to May 2002. Charts were plotted showing, in particular, the extent of usage of the Chinese restaurant, with a graph showing the usage on a monthly basis and another on a weekend basis. The difference between the charts of the two parties lies in the fact that the appellants' charts are based on 75% capacity whereas RTC's charts are based on 100% capacity. It seems to us, as between the two bases for plotting the charts, that the basis adopted by the appellants is more likely to be correct. The reason is simple. Take a table meant for ten persons. If eight persons should show up as a group, they will be occupying the table for ten. Similarly, if a table is meant for four persons and if only three persons come, they will occupy the table for four. While it could be said that taking 75% as equivalent to full capacity may be a little on the low side and a more accurate estimation might well be 85%, we would add that even Mr Shepherdson's computation was based on 75% capacity. He stated that, if 75% of the seats in an F&B outlet were taken, it was deemed to be operating at 100% capacity. Lastly, we acknowledge that it is possible for tables to be shared. But the fact is that according to RTC's witness, he had never come across an instance where members were willing to share a table.

47 Furthermore, usage statistics are useful only to an extent as they only show that a certain number of people visited the outlet during the operating hours. But the data does not capture the number of people who visited the facility during the peak hours, 12.00 noon to 2.00pm and 7.00pm to 9.00pm, which are critical. Mr Sexton gave what we thought is a pertinent illustration. A food outlet "with 100 seats which has nobody from 12.00pm to 6.00pm and 300 persons between 7.00pm and 9.00pm may be under the daily capacity but still be an unsatisfactory dining experience for the members".

48 It stands to reason that as far as social clubs are concerned, the test as to the adequacy of their facilities, lies in the evenings on weekdays and also over the weekend, as those would be the periods when most members would have the leisure time to enjoy club facilities. The weekend chart of the appellants does indicate that the demand for the Chinese restaurant, more often than not, exceeded or hovered at the optimum capacity of the restaurant. In this regard, there is one other important factor which must be brought into the equation. Many of the appellants averred that because of the crowded condition they encountered at the Club, at some point they ceased to visit the Club. This attitude would be unlikely to be peculiar only to these appellants. It would hardly surprise us if there were other members who had also ceased to turn up at the Club because of similar bad experiences. Thus, the usage data may not correctly reflect the adequacy of the facilities. This was also the view advanced by Mr Sexton – that usage may not necessarily reflect adequacy.

49 Mr Shepherdson accepted that in considering the question of the adequacy of the facilities, membership size cannot be viewed in isolation but must be related to the size of the facilities. He referred to the Hong Kong Jockey Club ("HKJC") which has 18,000 members, a figure only slightly less than that of RTC, as a comparison. The size of its main clubhouse is only 20,000 m^2 whereas at RTC it is about 38,000 m^2. But we must point out that this 38,000 m^2 includes some 19,000 m^2 of basement car-park plus rest-rooms, and another 2,000 m^2 for 22 suites. The overall facilities of HKJC are clearly larger than those of RTC and spread over three locations. It has, in terms of facilities which members can enjoy, *inter alia*:

(a) two race courses;

(b) 12 restaurants; and

(c) three swimming pools.

50 Bearing in mind that we are here concerned with a "premier" club, it is clear that its facilities are inadequate to cater for the need of 19,000 members (plus their spouses, families and guests) in three major areas, the food outlets, the swimming pool and the gym; and probably also the bowling alley. The test of a premier club must surely be, besides the physical aspect, the ease with which members can gain access to facilities. While the occasional wait, such as on festive seasons, is acceptable, it should not be a regular feature on weekends and public holidays. It is plain logic that where you have a large number of members, the pressure on facilities will naturally increase, even though members may not turn up all at the same time or at the same regular intervals.

51 At 19,000 members, RTC is the biggest club in Singapore and the next biggest club trails very much behind at 11,000 to 12,000. By failing to control the number of people RTC Ltd had admitted as members, it has breached its

obligation of delivering a premier club to those who are admitted. Even the most luxurious of facilities will be turned into a "noisy market place", in the words of some witnesses, if the number of members are just too large. The visit by the trial judge to the Club was on a weekday during office hours where quite naturally the number of members present would be less and it was also after battle lines in the present case had been drawn.

52 We will end the point with two illustrations which are close to the hearts of Singaporeans. While we recognise they are not on all fours with the present dispute, nevertheless they capture the essence of what has led us to think that RTC Ltd has failed to deliver on what it had promised. The first relates to an apartment. It may be very nice and comfortable for four persons but if you should add another four or eight persons into it, it will cease to be so even though the apartment could still physically accommodate all of them (*eg* with double decker beds, *etc*). It is the feel of "space" which is vital. The second example is air travel. Whether one travels in the economy-class cabin or the first class cabin, one gets to the same destination at the same time. The difference lies in the fact that the first class cabin is not crammed with so many seats like the economy-class cabin. Here again, passengers pay more for the feel of space and comfort.

53 Overcrowding or a constant "full house" spoils the ambience which a premier club should have. It is the "quality" in the broadest sense which marks a premier club apart from the ordinary.

54 We appreciate that the finding of the trial judge, that there was no breach, is a finding of fact. However, it is not a finding based on the veracity or credibility of witnesses. It is a finding based largely on inference and perception, an exercise which this court is in as good a position as the trial judge to undertake. It is also clear to us that the trial judge, in coming to his conclusion, did not reach it with great ease. He had hesitated over it.

Judgment

55 Accordingly, we hold that RTC Ltd is in breach of contract even though we recognise that there could be some practical difficulties flowing from this finding. Damages would have to be assessed later and this is a matter that could pose some difficulties, though not insurmountable. Let us explain. In 1996, when the invitation to join RTC was extended, the market for club membership was high. Evidence was adduced showing that while the market price for RTC membership had dropped in 2002 to the level of $11,000, other clubs prices had also similarly fallen. As an example, in 1996–1997, the Singapore Recreation Club membership in the open market fetched some $40,000. But by 2002, its market price was only $13,000. The second is the Fort Canning Country Club where the public signed on at the price of $30,000 and by 2002 it was already in receivership. Of course, the depreciation in the price

of RTC membership which is due to the dip in the general market condition will not be recoverable as against RTC Ltd.

56 Another consequence which the appellants will have to address is what follows after damages have been assessed. The net result might well be the winding up of RTC Ltd, thus affecting even the interests of those members who have not joined in in this action. The appellants would no doubt assess whether they would get a better return from winding up RTC Ltd or selling their memberships in the open market, even at current prices, after reckoning for the transfer fee payable.

57 This judgment does not seek to stifle entrepreneurship or innovation; neither should it. What we seek to ensure is that entrepreneurs who make promises should deliver them. The appellants subscribed to a "premier" club; they should get a "premier" club.

58 On the question of costs, as the appellants have not succeeded on the claim of misrepresentation, they should not be awarded costs for that and taking a broad view of things we rule that they should only be awarded two-thirds costs, here and below. The security for costs, together with any accrued interest thereon, shall be released to the appellants' solicitors.

Appeal allowed.

Reported by Vincent Leow.