1MALAYSIA DEVELOPMENT BERHAD

v.

PATRICK ANDREW MARC MAHONY & ANOR

High Court Malaya, Kuala Lumpur
Leong Wai Hong J
[Writ Summons No: WA-22NCC-294-05-2024]
20 January 2026

Civil Procedure: *Service — Setting aside service out of jurisdiction — Alleged fraudulent scheme in corporate exercises involving plaintiff and 2 other entities — Claim against 2nd defendant for dishonest assistance and conspiracy to injure by unlawful means — 2nd defendant seeking declaration that Malaysian Court had no jurisdiction over it and alternatively, stay of proceedings on basis that the Malaysian Court was not the proper forum — Whether plaintiff must show Malaysian Court had jurisdiction over 2nd defendant under both s 23(1) of the Courts of Judicature Act 1964 ('CJA') and O 11 of the Rules of Court 2012 ('ROC 2012') — Whether O 11 of the ROC 2012 required plaintiff to show for each cause of action, that it had good arguable case that one of jurisdictional gateways in O 11 r 1(1)(a) to (m) of the ROC 2012 applied, that there was serious issue to be tried and that Malaysia was the appropriate forum — Whether plaintiff failed to make full and frank disclosure — Whether plaintiff's suit should be stayed on basis of forum non conveniens*

The plaintiff, 1Malaysia Development Berhad ('1MDB') was a state fund set up by the Government of Malaysia with its then Prime Minister, Dato' Seri Najib Razak ('Najib Razak'), as Chairman of its Board of Advisors. The instant suit by 1MDB vide Kuala Lumpur High Court Writ Summons ('Suit 294') concerned alleged fraud in 2 corporate exercises (Good Star phase) relating to 1MDB's joint venture with PetroSaudi International Ltd and its wholly owned subsidiary, PetroSaudi Holdings (Cayman) Ltd ('PetroSaudi entities'), and the subsequent restructuring of 1MDB's stake in the joint venture. The 1st defendant ('Patrick Mahony') who was alleged to have been at the heart of the fraudulent scheme, was at the material time, *inter alia*, the Chief Investment Officer of PetroSaudi International Ltd and also the business partner of one Tarek Obaid who was the Chief Executive Officer and shareholder of PetroSaudi International Ltd, and the sole director of PetroSaudi Holdings (Cayman) Ltd. The 2nd defendant, White & Case LLP ('White & Case') had acted as solicitors for the PetroSaudi entities in the joint venture and in the restructuring of 1MDB's stake in the joint venture, and was alleged to have drafted the documentation for the fraud pursuant to Patrick Mahony's instructions. 1MDB sued White & Case for dishonest assistance and conspiracy to injure by unlawful means. The writ was served out of jurisdiction on Patrick Mahony and White & Case at their respective addresses in the United Kingdom. White & Case applied (encl 58) to set aside the service out of jurisdiction and sought a declaration

that the Malaysian Court had no jurisdiction over it and in the alternative, that the proceedings against it be stayed on the ground that Malaysia was not the proper forum for the dispute in relation to it. 1MDB had also applied (encl 66) for the present suit to be consolidated with Kuala Lumpur Suit 337 ('Suit 337') wherein it sued Tarek Obaid, PetroSaudi International Ltd and PetroSaudi Holdings (Cayman) Ltd for *inter alia* conspiracy to injure it via unlawful means in respect of the Good Star phase. The consolidation application was allowed despite objections from White & Case, which has since appealed against the said decision to the Court of Appeal. In support of encl 58, White & Case contended, *inter alia*, that 1MDB must show that the Malaysian Court had jurisdiction over it under both s 23(1) of the Courts of Judicature Act 1964 ('CJA') and O 11 of the Rules of Court 2012 ('ROC 2012'); that O 11 of the ROC 2012 was not merely an alternative to s 23(1) of the CJA; that s 23(1) of the CJA and O 11 of the ROC 2012 did not operate interchangeably; that O 11 of the ROC 2012 was not satisfied for either of 1MDB's claims against White & Case; that O 11 of the ROC 2012 required 1MDB to show for each cause of action that 1MDB had a good arguable case that one of its jurisdictional gateways in O 11 r 1(1)(a) to (m) of the ROC 2012 applied; that there was a serious issue to be tried on the merits; and that Malaysia was the appropriate forum to hear the claim. White & Case submitted that none of the aforesaid requirements were met for either of 1MDB's claims. The issues that arose for determination were:

(i) whether 1MDB must show the Malaysian Court had jurisdiction over White & Case both under s 23(1) of the CJA and O 11 of the ROC 2012. ('Issue 1');

(ii) whether the Malaysian Court had jurisdiction over White & Case under s 23(1) of the CJA for 1MDB's claim against White & Case for dishonest assistance. ('Issue 2');

(iii) whether the Malaysian Court had jurisdiction over White & Case under s 23(1) of the CJA for 1MDB's claim against White & Case for conspiracy to injure by unlawful means. ('Issue 3');

(iv) whether the Malaysian Court had jurisdiction over White & Case under O 11 of the ROC 2012 for 1MDB's claim against White & Case for dishonest assistance. ('Issue 4');

(v) whether the Malaysian Court had jurisdiction over White & Case under O 11 of the ROC 2012 for 1MDB's claim against White & Case for conspiracy to injure by unlawful means. ('Issue 5');

(vi) whether O 11 of the ROC 2012 required 1MDB to show for each cause of action, that 1MDB had a good arguable case that one of the jurisdictional gateways in O 11 r 1(1)(a) to (m) of the ROC 2012 applied; that there was a serious issue to be tried on the merits; and that Malaysia was the appropriate forum to hear the claim. ('Issue 6');

(vii) whether 1MDB had failed to make full and frank disclosure. ('Issue 7'); and

(viii) whether the suit should be stayed on the basis of *forum non conveniens*. ('Issue 8')

Held (dismissing White & Case's encl 58 application):

(1) As was held by the Supreme Court in *Malayan Banking Berhad v. International Tin Council And Anor Appeal ('International Tin Council')*, Apart from O 11 r 1 of the ROC 2012, s 23(1)(b) of the CJA provided extra-territorial jurisdiction to the High Court and that s 23(1)(a) did not impose any condition relating to cause of action or the nature of the prayers being sought before the High Court could assume jurisdiction. The Court of Appeal in *Matchplan (M) Sdn Bhd v. William D Sinrich & Anor ('Matchplan')* in following *International Tin Council* held that the Malaysian High Court could exercise jurisdiction over a non-resident under either of 3 categories, i.e., personal service within the jurisdiction; or where any of the conditions under s 23(1) of the CJA were satisfied; or where a plaintiff was able to obtain leave of court under O 11 of the ROC 2012 to serve a defendant who was outside the jurisdiction of the court; and that it did not matter which of these provisions were relied on to found jurisdiction. The said authorities clearly demolished the argument that 1MDB must show that the Malaysian Court had jurisdiction over White & Case under both s 23(1) of the CJA and O 11 of the ROC 2012. (paras 98, 101, 104, 105, 106, 107, 108 & 109)

(2) Process out of jurisdiction should no longer be viewed as an 'exorbitant' jurisdiction that the courts should be reluctant to exercise. The words of s 23 of the CJA must be construed without being constrained by the existing state of common law on the jurisdiction of the courts. Once the court was seized with extra-territorial jurisdiction by virtue of s 23(1) of the CJA, O 11 of the ROC 2012 ceased to be of jurisdictional relevance. It was clear from *International Tin Council* that O 11 of the ROC 2012 assumed jurisdictional importance only in cases falling outside the scope of s 23(1) of the CJA. The phrase 'accordingly in cases where s 23(1) applies, O 11 of the ROC becomes a mere procedural formality to enable a plaintiff to effect service abroad' in *Petrodar Operating Co Ltd v. Nam Fatt Corporation Bhd & Anor* which followed *Matchplan*, did not mean that a plaintiff must satisfy both s 23 of the CJA and O 11 of the ROC 2012. (para 116)

(3) Applying the substance test propounded in *Metall und Rohstoff AG v. Donaldson Lufkin & Jenrette Inc* and *Distillers Co Ltd v. Thompson* and the factors outlined in *China Agri Products Exchange Ltd v. Wang Xiu Qun And Another*, 1MDB's cause of action for dishonest assistance against White & Case fell within s 23(1)(a) of the CJA as 1MDB was a company incorporated in Malaysia, the alleged key players in the fraud committed against it were Malaysians, the fraud's centre of gravity was Malaysia, and as White & Case had provided the legal documentation to be used in Malaysia. Additionally, the Malaysian Court

had jurisdiction over White & Case under s 23(1)(c) of the CJA as the facts on which the proceedings were based, existed or were alleged to have occurred within the local jurisdiction of the court. (paras 138, 141 & 142)

(4) Section 23(1)(c) of the CJA should be given its ordinary meaning. So long as some of the facts on which the suit was filed existed or were alleged to have occurred within the local jurisdiction, the Malaysian Court should have jurisdiction. It could not be said, as was stated in *Dato Ho Seng Chuan v. Rabobank Asia Ltd* that for s 23(1)(c) of the CJA to be satisfied, 'all the facts on which the proceedings were based must have occurred in Malaysia' as that would involve reading in the word 'all' in the said section. (paras 147-148)

(5) Applying the substance test and the factors outlined in *Grupo Torras SA And Another v. Sheikh Fahad Mohammed Al-Sabah And Others; Fouad Khaled Jaffar v. Grupo Torras SA And Another*, and based on the facts which were assumed to be true for the purposes of service out of jurisdiction, 1MDB's cause of action against White & Case for conspiracy to injure by unlawful means fell within s 23(1)(a) of the CJA (where the cause of action arose). Additionally, the Malaysian Court had jurisdiction over White & Case under s 23(1)(c) of the CJA (the facts on which the proceedings were based existed or are alleged to have occurred within the local jurisdiction of the court) for 1MDB's claim for conspiracy to injure by unlawful means. (paras 141, 142, 162, 163, 164, 165 & 166)

(6) The court could take into account events occurring after leave was granted *ex parte* when a defendant applied to set aside service out of jurisdiction. (para 177)

(7) For the same reasons given in respect of Issue 3, the Malaysian Court had jurisdiction over White & Case under O 11 of the ROC 2012 in respect of 1MDB's claim against it for conspiracy to injure by unlawful means. (para 192)

(8) For the same reasons given in respect of Issue 4, 1MDB could rely on O 11 r 1(1)(j) of the ROC 2012 for the consolidation application, which had yet to be allowed by the court. (para 194)

(9) The words 'good cause of action' in O 11 r 4(1) of the ROC 2012 mean 'good arguable case'. Hence, the plaintiff need not satisfy the court that it was right, and need not prove its case beyond reasonable doubt. The burden which the rule imposed on the plaintiff was to make it sufficiently appear that the case was a proper one for service out of jurisdiction, while falling short of the standard of proof which must be attained at the trial. (para 209)

(10) There was a serious issue to be tried on the merits on the issue of whether or not 1MDB's claims were time-barred because s 29(1) of the Limitation Act 1953 applied to postpone the limitation period and time did not start to run until 1MDB's causes of action against White & Case were discovered by 1MDB or could with reasonable diligence have been discovered by 1MDB which was not

until at least some time after Najib Razak's party lost the 14th General Election and a new Government was formed on 10 May 2018. (para 215)

(11) There was also a serious issue to be tried on the allegation that 1MDB's pleadings did not set out a coherent case that White & Case acted dishonestly or that 1MDB's claim for conspiracy to injure by unlawful means was not made out, or that 1MDB would not be entitled to recover the majority of the sums sought in the suit. (para 216)

(12) Even if there had been a failure to make full and frank disclosure, the jurisprudence now was not to set aside the *ex parte* order that was granted pursuant to the application to serve out of jurisdiction. A failure to make full and frank disclosure would carry consequences, such as setting aside only if it was an *ex parte* Anton Piller order which was a draconian order with serious consequences to the defendant when obtained *ex parte*. (paras 219 & 222)

(13) On the facts, Malaysia was the forum that had real and substantial connections with the suit. There was therefore no need to go to the Stage 2 analysis of whether 'it would be unjust to the plaintiff to confine him to remedies elsewhere'. (paras 231-236)

Case(s) referred to:

1Malaysia Development Berhad & Ors v. Datuk Seri Najib Tun Abdul Razak & Ors [2023] MLRHU 543 (refd)

1Malaysia Development Berhad v. Deutsche Bank (Malaysia) Berhad & Ors [2025] MLRHU 3349 (distd)

1Malaysia Development Berhad & Ors v. Low Taek Jho & Ors [2025] MLRHU 3337 (refd)

Abela v. Baadarani [2013] 1 WLR 2043 (refd)

American Express Bank Ltd. v. Mohamad Toufic Al-Ozeir & Anor [1994] 1 MLRA 439 (refd)

Bunga Lawas Shipping Agencies Sdn Bhd v. Nusantara Worldwide Insurance (Malaysia) Bhd & Ors [1999] 1 MLRH 384 (folld)

Castle Inn Sdn Bhd v. Bumiputra-Commerce Bank Bhd [2007] 2 MLRH 395 (refd)

Castree v. ER Squibb & Sons Ltd [1980] 1 WLR 1248 (refd)

Cordoba Shipping Co Ltd v. National State Bank, Elizabeth, New Jersey [1984] 2 Lloyd's Rep 91 (refd)

China Agri Products Exchange Ltd v. Wang Xiu Qun And Another [2021] HKCFI 137 (folld)

Dato' Ho Seng Chuan v. Rabobank Asia Ltd [2002] 1 MLRH 594 (not folld)

Diamond v. Bank Of London And Montreal Ltd [1979] QB 333 (refd)

Distillers Co Ltd v. Thompson [1971] AC 458 (folld)

George Monro Ltd v. American Cyanamid And Chemical Corporation [1944] KB 432 (refd)

Goodness For Import And Export v. Phillip Morris Brands Sarl [2016] 5 MLRA 181 (refd)

Grains And Industrial Products Trading Pte Ltd v. State Bank Of India [2019] SGHC 292 (refd)

Grupo Torras SA And Another v. Sheikh Fahad Mohammed Al-Sabah And Others; Fouad Khaled Jaffar v. Grupo Torras SA And Another [1999] All ER (D) 698 (folld)

IM Skaugen SE And Another v. MAN Diesel & Turbo SE And Another [2018] SGHC 123 (refd)

Joseph Paulus Lantip & Ors v. Unilever Plc [2012] 6 MLRA 614 (refd)

Lim Tuck Sun v. Celcom Malaysia Berhad & Ors And Another Appeal [2025] 4 MLRA 86 (refd)

Malayan Banking Berhad v. The International Tin Council & Anor & Another Case [1989] 1 MLRA 184 (folld)

MAN Diesel & Turbo SE And Another v. IM Skaugen SE And Another [2019] SGCA 80 (refd)

Matchplan (Malaysia) Sdn Bhd & Anor v. William D Sinrich & Anor [2003] 2 MLRA 412 (folld)

Metall und Rohstoff AG v. Donaldson Lufkin & Jenrette Inc [1990] 1 QB 391 (folld)

NML Capital Ltd v. Republic Of Argentina [2011] 2 AC 495 (folld)

Oliver Tim Axmann v. Celcom (Malaysia) Berhad & Anor And Another Appeal [2014] MLRAU 58 (refd)

Petrodar Operating Co Ltd v. Nam Fatt Corporation Berhad & Anor & Another Appeal [2014] 2 MLRA 21 (folld)

Poh Kee Lock & Anor v. Ivan Goh-Lee En Tatt & Anor [2025] MLRHU 3319 (refd)

Re Busfield [1886] 32 Ch D 123 (refd)

Satfinance Investment Ltd v. Athena Art Finance Corp [2020] EWHC 3527 (Ch) (refd)

Siti Nur Aishah Ishak v. Golden Plus Holdings Berhad [2017] 4 MLRA 418; [2017] 2 SSLR 31 (folld)

Siskina (Cargo Owners) v. Distos SA [1979] AC 210 (refd)

Spiliada Maritime Corp v. Cansulex Ltd The Spiliada [1986] 3 All ER 843 (refd)

The Hagen [1908 — 1910] All ER Rep 21 (refd)

World Triathlon Corporation v. SRS Sports Centre Sdn Bhd [2018] 5 MLRA 80 (refd)

Legislation referred to:

Courts of Judicature Act 1964, s 23(1)(a), (b), (c)

Limitation Act 1953, s 29(1)

Rules of Court 2012, O 1A, O 2, O 11 rr 1(1)(a), (b), (c), (d), (e), (f), (g) (h), (i), (j), (k), (l), (m), 4(1), (2), O 12 rr 9, 10(1), (2), O 18 r 19

Rules of High Court 1980, O 12 r 7

Other(s) referred to:

Adrian Briggs, *Civil Jurisdictions and Judgments*, 7th Edn [2021], para 24.05

Counsel:

For the plaintiff: Lim Chee Wee (Elizabeth Lau, Hazel Siau, Soh Lip Shan, Lynnette Wong & Lee Jie Kai with him); M/s Lim Chee Wee Partnership

For the 2nd defendant: Christopher Leong Sau Foo (Shamala Devi Balasundaram, Siow Poh Ching, Ranjit Singh Harbinder Singh & Yuki Lim Jieny with him); M/s Chooi & Company

JUDGMENT

[Set Aside Service Of Writ Out Of Jurisdiction Or Stay Proceedings]

Leong Wai Hong J:

Good Practice For Reply Written Submissions

[1] Both counsel, in their reply written submissions, failed to identify the specific paragraphs to which they were responding. Instead, the replies were structured around topics.

[2] By way of analogy, this is akin to a football match between Liverpool and Manchester United in which Liverpool insists on playing only at Anfield, while Manchester United insists on playing only at Old Trafford.

[3] Such an approach makes it difficult for the court to ascertain counsel's response to a particular fact or issue raised by the opposing party. Counsel should assist the court by, *inter alia*, adopting a paragraph-by-paragraph reply and clearly identifying the paragraph of the opposing submissions to which the response is directed.

Introduction

The 1MDB Saga

[4] On 7 May 2024, the plaintiff, 1Malaysia Development Berhad ["1MDB"] filed a suit in the High Court Of Malaya at Kuala Lumpur against the 1st Defendant, Patrick Andrew Marc Mahony ["Patrick Mahony"], for the sums of US$1,830,000,000.00 and US$33,000,000.00; and against the 2nd Defendant, White & Case LLP ["White & Case"], for the sum of US$1,830,000,000.00. [See encl 2 Statement of Claim dated 7 May 2024].

[5] This is one of the many suits that arose from what is called the 1Malaysia Development Berhad scandal. In short, the 1MDB saga or 1MDB scandal.

[6] 1MDB was set up as a state fund by the Government of Malaysia with its then Prime Minister Dato' Seri Najib Razak ["Najib Razak"] as Chairman of its Board of Advisors.

[7] 1MDB was set up with the noble intention to make strategic investments and alleviate poverty. Unfortunately, allegations have been made and civil suits as well as criminal suits have been filed against various parties alleging that its funds have been embezzled, with assets diverted globally.

Fraud In The Good Star Phase

[8] The suit before me concerns 1MDB's allegation that fraud took place in two corporate exercises in what is called the Good Star phase. Firstly, it concerned 1MDB's joint venture with PetroSaudi International Ltd and its wholly-owned subsidiary, PetroSaudi Holdings (Cayman) Ltd, 1MDB's eventual joint venture partner, in 2009 ["PetroSaudi Entities"]. Secondly, the subsequent restructuring of 1MDB's stake in the said joint venture in 2010.

1st Defendant Patrick Mahony

[9] 1MDB alleged the 1st Defendant in this suit, Patrick Mahony, was at the heart of the fraudulent scheme. Patrick Mahony at the material time was, *inter alia*, the Chief Investment Officer of PetroSaudi International Ltd and also the business partner of one Tarek Obaid.

2nd Defendant White & Case

[10] The 2nd Defendant in this suit is White & Case. They acted as solicitors for PetroSaudi Holdings (Cayman) Ltd/PetroSaudi International Ltd in both the joint venture and the restructuring of 1MDB's stake in the joint venture.

[11] 1MDB sues White & Case for dishonest assistance and conspiracy to injure by unlawful means. 1MDB contends the documentation for the fraud was drafted by White & Case pursuant to Patrick Mahony's instructions. 1MDB further contends that White & Case, i.e., the solicitors doing the work, knew that the joint venture was a sham and part of a fraudulent scheme.

Civil Suit No: WA-22NCC-294-05/2024 ["Suit 294"]

Service Of Writ Out Of Jurisdiction

[12] On 7 May 2024, 1MDB filed the suit before me, i.e., Suit 294, against Patrick Mahony and White & Case.

[13] On 5 June 2024, 1MDB filed an application (i.e., encl 6) for leave to serve these proceedings out of jurisdiction on the defendants. Leave was granted to 1MDB on 1 July 2024.

[14] The Notice of Writ, the Writ and the Statement of Claim were served on Patrick Mahony and White & Case.

White & Case Applied To Set Aside Service Of Writ Out Of Jurisdiction And/Or To Stay Proceedings

[15] On 26 February 2025, White & Case filed a Notice of Application under O 12 r 10 Rules of Court 2012 ["ROC"] [a replacement for O 12 r 7 of the old Rules of High Court 1980] in encl 58 for:

i. A declaration that the proceedings herein have not been duly served on White & Case;

ii. A declaration that the Malaysian Courts have no jurisdiction over White & Case; and

iii. Further or in the alternative, an order that the proceedings against White & Case be stayed on the ground that Malaysia is not the proper forum for the dispute in respect of White & Case.

[16] Initially, White & Case took the position that there had been no effective service of the legal proceedings on them. White & Case has since abandoned this position and dropped prayer 1 of encl 58.

[17] I heard encl 58 on 1 October 2025, 10 October 2025, and on 17 November 2025. On 3 December 2025, I dismissed encl 58 with costs of RM75,000.00 to be paid by White & Case to 1MDB, subject to allocatur.

[18] In gist, my reasons were that:

i. The Malaysian Court has jurisdiction over White & Case under O 11 r 1(1)(h) and (j) of the ROC and s 23(1) of the Courts of Judicature Act 1964 ["CJA"];

ii. The order for service of process out of jurisdiction was properly granted under O 11 r 1 ROC; and

iii. Malaysia is also the appropriate forum for the dispute.

Application In Encl 66 To Consolidate Suit 294 Here With Another Suit 337

[19] For completeness, I should mention here that 1MDB has also filed an application [in encl 66] to consolidate Suit 294 here with another suit in Kuala Lumpur High Court Suit No: WA-22NCvC-337-05/2021 ("Suit 337") [*1Malaysia Development Berhad v. Deutsche Bank (Malaysia) Berhad & Ors* [2025] MLRHU 3349] and to proceed as one action and that the title of Suit 337 be amended by adding thereto the title of Suit 294. ["Consolidation Application"].

[20] Suit 337 is against Tarek Obaid, PetroSaudi International Ltd and PetroSaudi Holdings (Cayman) Ltd for, amongst others, conspiracy to injure 1MDB via unlawful means in respect of the Good Star Phase.

[21] On 3 December 2025, I had allowed the Consolidation Application with costs against White & Case after hearing submissions from 1MDB and despite opposition from White & Case.

[22] On 4 December 2025, White & Case has appealed to the Court of Appeal against both my decisions. These are my Grounds of Decision for encl 58. My Grounds of Decision for the Consolidation Application will be in a separate Grounds of Decision.

Background Facts

Parties In Suit 294 Before Me

[23] The plaintiff, 1MDB, is a company incorporated under the laws of Malaysia having a registered address at Level 5, Suite 5.01, Menara IMC, No 8, Jalan Sultan Ismail, 50250 Kuala Lumpur. 1MDB is a strategic investment and development company wholly owned by the Federal Government of Malaysia, through the Minister of Finance (Incorporated).

[24] The 1st Defendant, Patrick Mahony, is an individual of British and Swiss nationality with a last known address at No 27, Ladbroke Square, London W11 3NB, United Kingdom.

[25] He was the Chief Investment Officer of PetroSaudi International Ltd, a company incorporated in Saudi Arabia and the business partner of Tarik E.A. Obaid @ Tariq Isam Ahmed Obaid @ Tarik Essam Ahmad Obaid @ Tarek Obaid, who is the Chief Executive Officer and shareholder of PetroSaudi International Ltd and the sole director of PetroSaudi Holdings (Cayman) Ltd ["Tarek Obaid"].

[26] The 2nd Defendant, White & Case, is a limited liability partnership registered in England & Wales under number OC324340 practising as solicitors in providing legal services with an address at No 5 Old Broad Street, London, EC2N 1DW, United Kingdom.

[27] As mentioned above, the crux of the claim in Suit 294 against Patrick Mahony and White & Case revolves around the fraud that took place in the Good Star phase, which concerned 1MDB's joint venture with PetroSaudi in 2009 and the eventual restructuring in 2010 of 1MDB's stake in the joint venture.

Proceedings Against Other Wrongdoers Instituted By 1MDB

[28] Before I go deeper into Suit 294 before me, I would like to mention several proceedings against other alleged wrongdoers instituted by 1MDB.

[29] I begin by setting out the names of these other wrongdoers sued by 1MDB in various proceedings so that the various suits can be better understood.

Names Of Other Wrongdoers Sued By 1MDB In Various Proceedings

[30] 1MDB Management/Employees:

i. Najib Razak, Chairman of the 1MDB Board of Advisors from 2009 until 31 May 2016 and the Prime Minister of Malaysia and Minister of Finance of Malaysia from 3 April 2009 until 9 May 2018;

ii. Beng Huat Koh, Vice President, Investment of 1MDB from 15 June 2009 and was promoted to Director, Investments of 1MDB on 1 March 2010, subsequently promoted to Chief Investment Officer of 1MDB on 1 September 2013 and his final employment date with 1MDB was on 31 August 2016 ["Vincent"];

iii. Datuk Shahrol Azral bin Ibrahim Halmi, Director of 1MDB from 23 March 2009 until 31 May 2016 ["Shahrol Azral"];

iv. Kelvin Tan Kay Jin, Director, Investments of 1MDB from 17 August 2009 until he was transferred to CEO's Office as Director, 1MDB Research on 1 November 2011 ["Kelvin"];

v. Tang Keng Chee, Executive Director, Business Development of 1MDB from 1 April 2009 to 31 March 2011 ["Casey Tang"];

vi. Tan Sri Dato' Seri Che Lodin bin Wok Kamaruddin, Chairman and Non-Executive Director of 1MDB from 20 October 2009 to 31 May 2016 ["Lodin"];

vii. Tan Sri Dato' Paduka Ismee bin Haji Ismail, Non-Executive Director of 1MDB from 23 March 2009 to 31 May 2016 ["Ismee"];

viii. Tan Sri Azlan bin Mohd Zainol, Director of 1MDB from 11 August 2009 until 11 January 2010 ["Azlan"];

ix. Ashvin Jethanand Valiram, Non-Executive Director of 1MDB from 2 February 2010 to 31 May 2016 ["Ashvin"]; and

x. Ong Gim Huat, Non-Executive Director of 1MDB from 12 January 2010 to 31 May 2016 ["Ong"].

[31] PetroSaudi Entities & Their Representatives:

i. Tarik E.A. Obaid @ Tariq Isam Ahmed Obaid @ Tarik Essam Ahmad Obaid @ Tarek Obaid, Chief Executive Officer and shareholder of PetroSaudi International Ltd and the sole director of PetroSaudi Holdings (Cayman) Ltd ["Tarek Obaid"];

ii. PetroSaudi Holdings (Cayman) Limited, a company incorporated in the Cayman Islands on or about 18 September 2009 ["PetroSaudi Holdings (Cayman) Ltd"];

iii. PetroSaudi International Limited, a company incorporated in Saudi Arabia ["PetroSaudi International Ltd"]; and

iv. PetroSaudi International, a company incorporated in Cayman Islands ["PetroSaudi International Cayman"].

[32] Financial Institutions:

i. AmBank (M) Berhad, a licensed financial institution in Malaysia ["AmBank"];

ii. BSI SA, a financial institution in Switzerland ["BSI Bank"];

iii. Coutts & Co Ltd, a company incorporated in Switzerland providing banking services, wealth management solutions, trust and fiduciary services ["Coutts"];

iv. Deutsche Bank (Malaysia) Berhad, a licensed financial institution in Malaysia ["Deutsche Bank"]; and

v. J.P. Morgan (Switzerland) Ltd, a company incorporated in Switzerland providing asset management, private banking, investment banking, investor services and treasury services ["JP Morgan"].

[33] Others:

i. 1MDB PetroSaudi Ltd, a company incorporated in the British Virgin Islands on or about 18 September 2009 ["JVCo"];

ii. Good Star Ltd, a company incorporated in Seychelles on or about 18 May 2009 ["Good Star"]; and

iii. Low Taek Jho, alleged to be Najib Razak's agent and/or proxy in relation to 1MDB's affairs ["Jho Low"].

Various Legal Proceedings Against Other Wrongdoers

[34] As mentioned above, besides Suit 294 against White & Case and Patrick Mahony, 1MDB has also instituted proceedings against other alleged wrongdoers. These are:

i. In Kuala Lumpur High Court Suit No: WA-22NCC-212-05/2021 ("Suit 212") [*1Malaysia Development Berhad & Ors v. Datuk Seri Najib Tun Abdul Razak & Ors* [2023] MLRHU 543] against Najib Razak and the former directors and members of 1MDB's management at the material time, including Casey Tang, Vincent

and Kelvin for amongst others, breach of fiduciary duties and conspiracy to injure 1MDB via unlawful means, in respect of the fraudulent acts committed and the misappropriation of funds in respect of the four (4) phases widely known as: (a) The Good Star Phase; (b) The Aabar-BVI Phase; (c) The Tanore Phase; and (d) The Options Buyback Phase;

ii. In Suit 337 against Deutsche Bank, Coutts, JP Morgan, PetroSaudi International Ltd, PetroSaudi Holdings (Cayman) Ltd, Tarek Obaid and Patrick Mahony, for amongst others, a conspiracy to injure 1MDB via unlawful means in respect of the Good Star Phase; and

iii. In Kuala Lumpur High Court Suit No WA-22NCvC-330-05/2021 ("Suit 330") [*1Malaysia Development Berhad & Ors v. Low Taek Jho & Ors* [2025] MLRHU 3337] against Jho Low and his family members for conspiracy to injure the plaintiffs via unlawful means and improper receipt of the plaintiffs' funds in amongst others, the Good Star Phase.

[35] Suit 337 is of relevance here as in encl 66, i.e., the Consolidation Application, 1MDB has filed an application to consolidate Suit 294 here with Suit 337 and to proceed as one action and that the title of Suit 337 be amended by adding thereto the title of Suit 294. 1MDB is relying on the Consolidation Application as one of its grounds to oppose encl 58.

[36] In Suit 337, Tarek Obaid, PetroSaudi International Ltd and PetroSaudi Holdings (Cayman) Ltd have entered appearances and have submitted to the jurisdiction of the Malaysian Courts.

Suit 294 Before Me — The Basis For 1MDB's Suit

[37] To recap, the crux of the claim in Suit 294 against White & Case and Patrick Mahony revolves around the fraud that took place in the Good Star phase which concerned 1MDB's joint venture with PetroSaudi in 2009 and the eventual restructuring in 2010 of 1MDB's stake in the joint venture.

[38] At all material times, White & Case acted as solicitors for PetroSaudi Holdings (Cayman) Ltd/PetroSaudi International Ltd in respect of the joint venture and in respect of the restructuring of 1MDB's stake in the joint venture.

The Joint Venture In September 2009

[39] 1MDB contends that the PetroSaudi Entities lied about having injected assets ["PSI Assets"] that were worth more than US$1.5 billion into the JVCo to induce 1MDB into paying US$1 billion to subscribe 40% shares in the JVCo pursuant to a joint venture agreement dated 28 September 2009 with PetroSaudi Holdings (Cayman) Ltd ("the JVA").

[40] The PSI Assets comprise energy interests in Turkmenistan ["Turkmenistan Assets"] and energy interests in Argentina ["Argentinian Assets"].

[41] The PSI Assets that were injected in the JVCo [by PetroSaudi Holdings (Cayman) Ltd selling its shares in PetroSaudi International Cayman (which supposedly held the PSI Assets) to the JVCo] were pursuant to a share purchase agreement dated 25 September 2009 between the JVCo and PetroSaudi Holdings (Cayman) Ltd ("Share Purchase Agreement dated 25 September 2009").

Share Purchase Agreement Dated 25 September 2009 Was Fraudulent

[42] The Share Purchase Agreement dated 25 September 2009 was drafted by White & Case. 1MDB contends this was pursuant to Patrick Mahony's instructions. 1MDB further contends that White & Case knew of the fraudulent scheme when they drafted the agreement.

[43] 1MDB contends that the Turkmenistan Assets were worthless. 1MDB further contends that White & Case knew that the PSI Assets were worthless.

[44] 1MDB also contends that fraudulent misrepresentations pertaining to the joint venture were also made by certain members of the 1MDB management which caused the then 1MDB board to approve the joint venture. [for details see plaintiff's Reply Written Submission encl 114 at para 16].

[45] As a result of the fraudulent misrepresentations and the conspiracy by the various wrongdoers, on 30 September 2009, 1MDB paid US$1 billion to subscribe for a 40 per cent share in the JVCo.

Loan Agreement Dated 25 September 2009 Was A Sham

[46] Out of the US$1 billion, US$700 million was paid to Good Star, a company controlled by Jho Low, to purportedly repay the JVCo's loan of US$700 million from PetroSaudi International Holdings (Cayman) Ltd pursuant to a loan agreement dated 25 September 2009 ("Loan Agreement dated 25 September 2009").

[47] The Loan Agreement dated 25 September 2009 was drafted by White & Case. 1MDB contends this was pursuant to Patrick Mahony's instructions. 1MDB further contends that certain solicitors in White & Case knew of the fraudulent scheme when they drafted the agreement.

[48] 1MDB also contends that the US$700 million loan pursuant to the Loan Agreement dated 25 September 2009 was a sham and did not exist.

[49] 1MDB contends that the whole point of creating the sham loan of US$700 million owed by the JVCo was to enable US$700 million out of 1MDB's investment of US$1 billion to be immediately siphoned away upon completion.

Tarek Obaid

[50] 1MDB further contends that out of the US$700 million that was siphoned from 1MDB to Good Star, Good Star paid US$ 85 million to Tarek Obaid (the Chief Executive Officer of PetroSaudi) on 5 October 2009 pursuant to a Fee Letter dated 30 September 2009 as broker fees for his work in relation to "future investments from the Middle East". In short, the Fee Letter was an agreement between Jho Low and Tarek Obaid to share the monies that they had siphoned from 1MDB.

[51] Tarek Obaid is one of the 7 defendants in Suit 337, the suit to be consolidated with Suit 294 in the Consolidation Application before me in encl 66.

White & Case Drafted Earlier Iteration Of The Fee Letter

[52] An earlier iteration of the Fee Letter ("the Earlier Draft Fee Letter") was drafted by White & Case. 1MDB contends this was pursuant to Patrick Mahony's instructions on 25 September 2009. 1MDB further contends that this fact is relevant to show that White & Case knew that the joint venture was a fraud.

[53] Therefore, 1MDB contends it suffered loss and damage of US$1 billion as a result of the sham joint venture.

Restructuring Of Equity Stake In The JVCo — 2010

[54] In 2010, 1MDB's equity stake in the JVCo was sold back to the JVCo in exchange for debt notes pursuant to the Share Sale Letter Agreement by 1MDB to the JVCo and the Murabaha Facility Agreement ("MFA").

[55] 1MDB contends these agreements were executed sometime in June 2010, but backdated to 31 March 2010.

[56] As a result of this restructuring, in less than a year after 1MDB had paid US$1 billion for the subscription of shares in the JVCo in September 2009:

i. 1MDB sold its 40 per cent equity interest in the JVCo back to the JVCo for US$1.2 billion ("the Purchase Price"), in exchange for debt notes issued by the JVCo for the same amount. In this regard, 1MDB would not be receiving the Purchase Price for its sale of shares until 11 years later; and

ii. 1MDB also agreed to make available facilities of up to US$1.5 billion to the JVCo under the MFA.

[57] 1MDB contends arising from this restructuring a total of US$830 million was further misappropriated from 1MDB.

1MDB's Causes Of Action Against White & Case

[58] 1MDB's claim against White & Case is for dishonest assistance and conspiracy to injure by unlawful means.

[59] I begin with dishonest assistance.

1st Cause Of Action — Dishonest Assistance

White & Case Assisted In Structuring The Fraudulent Joint Venture

[60] 1MDB contends the following facts set out below.

[61] PetroSaudi Holdings (Cayman) Ltd was represented by White & Case as its solicitors in relation to its joint venture with 1MDB.

[62] White & Case drafted the Share Purchase Agreement dated 25 September 2009 and the Loan Agreement dated 25 September 2009 that gave rise to the sham loan/advance of US$700 million which formed the wrongdoers' scheme to siphon US$700 million from 1MDB.

[63] White & Case knew that the loan of US$700 million pursuant to the Loan Agreement dated 25 September 2009 was a sham and part of the fraudulent scheme. [For details, see encl 114 plaintiff's Reply Written Submissions para 36].

White & Case Knew That The PSI Assets Were Worthless

[64] It is 1MDB's case that White & Case knew that the PSI Assets were worthless. [For details, see encl 114 plaintiff's Reply Written Submissions paras 39-45].

White & Case Assisted In Concealment & Furtherance Of Fraud — Restructuring Of Joint Venture

[65] It is 1MDB's case that White & Case also assisted in the concealment and furtherance of fraud in restructuring the joint venture. Several lawyers from White & Case have been identified by 1MDB as involved. I do not need to name here. [For details see encl 114 plaintiff's Reply Written Submissions paras 46-55, in particular paras 51-54].

2nd Cause Of Action — Conspiracy To Injure By Unlawful Means

[66] It is also 1MDB's case that White & Case together with various wrongdoers such as Najib Razak, Jho Low, Casey Tang, Kelvin, Vincent, Tarek Obaid and Patrick Mahony conspired to injure 1MDB through unlawful means. [for details see encl 114 plaintiff's Reply Written Submissions paras 57-58]

Basis For The Setting Aside And/Or Stay Application By White & Case

Order 12 Rule 10 ROC

[67] With the background facts set out, I now move to consider the basis for the setting aside and/or stay application by White & Case under O 12 r 10 ROC. To recap, White & Case seeks under O 12 r 10 ROC for:

i. A declaration that the Malaysian Courts have no jurisdiction over White & Case; and

ii. Further or in the alternative, an order that the proceedings against White & Case be stayed on the ground that Malaysia is not the proper forum for the dispute in respect of White & Case.

[68] Order 12 r 10(1) ROC [a replacement for O 12 r 7 of the old Rules of High Court 1980] allows and states a defendant who intends to dispute the jurisdiction of the court in the proceedings by reason of any irregularity as is mentioned in r 9 ROC or on any other ground shall enter an appearance and, within the time limited for serving a defence, apply to the court for, *inter alia*, an order setting aside the writ or service of the writ on him.

[69] Order 12 r 10(2) ROC allows and states that a defendant who wishes to contend that the court should not assume jurisdiction over the action on the ground that Malaysia is not the proper forum for the dispute shall enter an appearance and, within the time limited for serving a defence, apply to the court for an order to stay the proceedings.

[70] To better understand counsel's submissions, I shall now set out the relevant Malaysian statute and rules of court governing service of a Notice of Writ out of jurisdiction.

Legislation Governing Service Of A Notice Of Writ Out Of Jurisdiction

[71] The relevant statute is s 23(1)(a), (b) and (c) of the CJA.

[72] The relevant ROC is O 11 r 1(1)(h) and (j) of the ROC.

Section 23(1)(a), (b) And (c) Of The CJA

[73] Section 23(1)(a), (b) and (c) of the CJA reads as follows:

23.(1) ... the High Court shall have jurisdiction to try all civil proceedings **where**:

(a) the cause of action arose;

(b) the **defendant or one of several defendants resides or has his place of business**;

(c) **the facts on which the proceedings are based exist or are alleged to have occurred;**

within the local jurisdiction of the court ....

[Emphasis Added]

Order 11 Rule 1(1)(h) And J Of The ROC

[74] Order 11 r 1(1)(h) and (j) of the ROC read as follows:

Principal cases in which service of notice of writ out of the jurisdiction is permissible (O 11 r 1)

1.(1) Where the writ does not contain any claim for damage, loss of life or personal injury arising out of:

...

service of a notice of a writ out of the jurisdiction is permissible with the leave of the Court in the following cases:

(H) **if the action** begun by the writ **is founded on a tort committed within the jurisdiction;**

...

(J) if the action begun by the writ **being properly brought against a person duly served within the jurisdiction, a person out of the jurisdiction is a necessary or proper party thereto.**

[Emphasis Added]

White & Case's Contentions

[75] Lead Counsel for White & Case Mr Christopher Leong Sau Foo, passionately contends that [encl 102 D2's Written Submissions at paras 3 to 9]:

i. 1MDB must show the Malaysian Court has jurisdiction over White & Case under both s 23(1) of the CJA and O 11 of the ROC;

ii. it is not sufficient for 1MDB to show that the Malaysian Court has jurisdiction over White & Case under s 23(1) of the CJA 1MDB must still show the Malaysian Court has jurisdiction over White & Case under O 11 ROC as O 11 ROC is not merely an alternative to s 23(1) of the CJA. Section 23(1) CJA and O 11 ROC therefore do not operate interchangeably;

iii. Order 11 ROC is not satisfied for either of 1MDB's claims against White & Case (ie, for dishonest assistance and unlawful means conspiracy); and

iv. Order 11 ROC requires 1MDB to show, for each cause of action, that: (i) 1MDB has a good arguable case that one of the jurisdictional gateways in O 11 r 1(1)(a) to (m) ROC applies; (ii) there is a serious issue to be tried on the merits; and (iii) Malaysia is the appropriate forum to hear the claim. None of these requirements is met for either of 1MDB's claims.

1MDB's Contentions

[76] Lead Counsel for 1MDB, Dato Lim Chee Wee, and his co-counsel Ms Elizabeth Lau, disagree with White & Case's contentions.

Issues

[77] The issues before me are:

i. Whether 1MDB must show the Malaysian Court has jurisdiction over White & Case under both s 23(1) of the CJA and O 11 of the ROC;

ii. Whether the Malaysian Court has jurisdiction over White & Case under s 23(1) of the CJA for 1MDB's claim against White & Case for dishonest assistance;

iii. Whether the Malaysian Court has jurisdiction over White & Case under s 23(1) of the CJA for 1MDB's claim against White & Case for conspiracy to injure by unlawful means;

iv. Whether the Malaysian Court has jurisdiction over White & Case under O 11 ROC for 1MDB's claim against White & Case for dishonest assistance;

v. Whether the Malaysian Court has jurisdiction over White & Case under O 11 ROC for 1MDB's claim against White & Case for conspiracy to injure by unlawful means;

vi. Whether O 11 ROC requires 1MDB to show, for each cause of action, that: (i) 1MDB has a good arguable case that one of the jurisdictional gateways in O 11 r 1(1)(a) to (m) ROC applies; (ii) there is a serious issue to be tried on the merits; and (iii) Malaysia is the appropriate forum to hear the claim;

vii. Whether 1MDB failed to make full and frank disclosure; and

viii. Whether this suit should be stayed on the basis of *forum non conveniens.*

[78] I shall consider each issue one by one based on the following written submissions filed:

i. Enclosure 102 White & Case's Written Submissions;

ii. Enclosure 114 1MDB's Reply Written Submissions; and

iii. Enclosure 126 White & Case's Reply Written Submissions.

[79] I start with issue 1.

Issue 1 — Whether 1MDB Must Show The Malaysian Court Has Jurisdiction Over White & Case Under Both Section 23(1) Of The CJA And Order 11 Of The ROC

White & Case's Contentions

[See Encl 102 White & Case's Written Submissions At Paragraphs 3, 12 And 14-16b]

Exercise Of Extra-Territorial Jurisdiction By A State Court Is Exceptional

[80] White & Case submits that pursuant to the principle of territoriality, the jurisdiction of state courts is principally limited to the territory of that state. The exercise of extra-territorial jurisdiction by a state court is therefore exceptional.

[81] White & Case cites a decision from the Malaysian Federal Court, *Joseph Paulus Lantip & Ors v. Unilever Plc* [2012] 6 MLRA 614 at [35] ["*Joseph Paulus Lantip*"] and a decision of the English Court of Appeal *The Hagen* [1908 — 1910] All ER Rep 21, 26 in support of its proposition.

The Malaysian Court Must Have Jurisdiction Over White & Case Under Both Section 23(1) Of The CJA And Order 11 Of The ROC

[82] White & Case also contends 1MDB must show the Malaysian Court has jurisdiction over White & Case under both s 23(1) of the CJA and O 11 of the ROC. White & Case submits that s 23(1) CJA merely sets out the circumstances in which the High Court has extra-territorial jurisdiction over civil proceedings. It does not provide for service of process on a foreign defendant. A foreign defendant must also be validly served. Service out of jurisdiction is the exclusive remit of O 11 ROC. Section 23(1) CJA and O 11 ROC therefore do not operate interchangeably.

[83] For the above propositions, White & Case cites the decisions in *Petrodar Operating Co Ltd v. Nam Fatt Corporation Berhad & Anor & Another Appeal* [2014] 2 MLRA 21 at [20] ["*Petrodar*"], *Goodness For Import And Export v. Phillip Morris Brands Sarl* [2016] 5 MLRA 181 at [28] ["*Goodness*"], and *1Malaysia Development Berhad v. Deutsche Bank (Malaysia) Berhad & Ors* [2025] MLRHU 3349, an Unreported High Court Judgment dated 26 March 2024 in the High Court Of Malaya At Kuala Lumpur Civil Suit No: WA-22NCvC-337-05/2021 at [32-38 in particular at 37] ["*1Malaysia Development Berhad v. Deutsche Bank*"].

1MDB's Contentions

[84] 1MDB disagrees and relies on the Court of Appeal case of *Matchplan (Malaysia) Sdn Bhd & Anor v. William D Sinrich & Anor* [2003] 2 MLRA 412 at para [8]. ["*Matchplan*"] [See encl 114 1MDB's Reply Written Submissions at para 88].

[85] I cannot find 1MDB's counsel's submissions distinguishing *Petrodar*, *Goodness* and *1Malaysia Development Berhad v. Deutsche Bank* that were relied on by White & Case.

Court's Analysis

White & Case's Contention That The Exercise Of Extra-Territorial Jurisdiction By A State Court Is Exceptional

[86] To recap, White & Case contends that pursuant to the principle of territoriality, the jurisdiction of state courts is principally limited to the territory of that state. The exercise of extra-territorial jurisdiction by a state court is therefore exceptional. White & Case cites in support *Joseph Paulus Lantip* at [35] and *The Hagen* [1908 — 1910] All ER Rep 21, 26, English Court of Appeal.

[87] In *Joseph Paulus Lantip* at [35], the Federal Court noted that extra-territorial jurisdiction "is a discretionary jurisdiction which must be exercised with caution and biased against invading the sovereignty of another state".

[88] In *The Hagen* [1908 — 1910] All ER Rep 21, 26, 14 the English Court of Appeal noted that even if the court can assume jurisdiction extra-territorially, it should consider whether it "ought to put a foreigner, who owes no allegiance here, to the inconvenience and annoyance of being brought to contest his rights in this country."

[89] On the principle advanced by White & Case, I have a few observations to make.

[90] Firstly, I do not disagree with the views expressed in the two cases but if a suitable case arises on the facts, the Court should and must allow for service out of jurisdiction on a foreigner.

[91] Since the decisions in *The Hagen* in 1908 and in *Joseph Paulus Lantip* in 2012, the world in 2026 has changed much due to globalisation. Funds can now move easily across jurisdictions. The courts too must move with the times. This is particularly so if the elements of the cause of action allegedly took place in multiple jurisdictions, as is alleged here by 1MDB.

[92] The trend now is to move to a pragmatic interpretation of the 'gateways to jurisdiction'. 'Gateways to jurisdiction' is now the preferred terminology replacing the earlier term "*Heads of jurisdiction*". [See the book *Civil Jurisdictions and Judgments* by Adrian Briggs 7th edn 2021 at 24.05].

[93] The author in the book *Civil Jurisdictions and Judgments* by Adrian Briggs, 7th edn 2021 at 24.06 opined:

> In *Abela v. Baadarani*, the Supreme Court said, and appeared to mean, that the adoption of the principle of forum conveniens, and the fact that 'litigation between residents of different states is a routine incident of modern commercial life', meant that the decision to allow service out 'is generally a pragmatic one in the interests of the efficient conduct of litigation in an appropriate forum'.

[94] In *Abela v. Baadarani* [2013] 1 WLR 2043 UK Supreme Court, Lord Sumption JSC (with whom Lord Neuberger Of Abbotsbury PSC, Lord Reed and Lord Carnwath JJSC agreed) said:

> 53. In his judgment in the Court of Appeal, Longmore LJ described the service of the English court's process out of the jurisdiction as an "exorbitant" jurisdiction, which would be made even more exorbitant by retrospectively authorising the mode of service adopted in this case. This characterisation of the jurisdiction to allow service out is traditional, and was originally based on the notion that the service of proceedings abroad was an assertion of sovereign power over the defendant and a corresponding interference with the sovereignty of the state in which process was served. This is **no longer a realistic view of the situation**. The adoption in English law of the doctrine of forum non conveniens and the accession by the United Kingdom to a number of conventions regulating the international jurisdiction of national courts, means that in the overwhelming majority of cases where service out is authorised there will have been either a contractual submission to the jurisdiction of the English court or else a substantial connection between the dispute and this country. Moreover, there is now a far greater measure of practical reciprocity than there once was. **Litigation between residents of different states is a routine incident of modern commercial life**. A jurisdiction similar to that exercised by the English court is now exercised by the courts of many other countries...
>
> **It should no longer be necessary to resort to the kind of muscular presumptions against service out which are implicit in adjectives like "exorbitant". The decision is generally a pragmatic one in the interests of the efficient conduct of litigation in an appropriate forum**.
>
> [Emphasis Added]

[95] Lord Clarke (with whom Lord Neuberger of Abbotsbury PSC, Lord Reed and Lord Carnwath JJSC agreed) agreed with the views expounded by Lord Sumption:

> 45. I do not agree that for the court to make an order under r 6.15(2) is "to make what is already an exorbitant power still more exorbitant". **I recognise of course that service out of the jurisdiction has traditionally been regarded as the exercise of an exorbitant jurisdiction**. That is a consideration which has been of importance in determining whether permission to serve out of the jurisdiction should be granted, although **in**

> **this regard I agree with the approach set out by Lord Sumption JSC in his judgment**.
>
> [Emphasis Added]

[96] Secondly, the Malaysian Supreme Court in *Malayan Banking Berhad v. The International Tin Council & Anor & Another Case* [1989] 1 MLRA 184 ["*International Tin Council*"] had said that s 23 of the CJA is a new legislation on extra-territorial jurisdiction introduced by legislature, and its words must be construed without being constrained by the then existing state of the common law on the jurisdiction of the High Courts.

[97] The Malaysian Supreme Court further noted that there is no equivalent statutory provision in England to our s 23(1)(b) CJA.

[98] This is what the Malaysian Supreme Court in *International Tin Council* said through Mohamed Azmi SCJ:

> We have been reminded that **under English law, jurisdiction of the courts is based on presence within the jurisdiction, and there is no equivalent statutory provision in England as our s 23(1)(b)**.
>
> ...
>
> **In our view, service is not solely the foundation of jurisdiction of our High Courts. Apart from O 11 r 1, s 23(1)(b) of the Courts of Judicature Act 1964 provides extra-territorial jurisdiction to the High Court** ...
>
> ...
>
> **In interpreting s 23(1)(b) of the Courts of Judicature Act, we must in general assume that the legislature knows the then existing state of the law on the jurisdiction of the High Courts** under the Courts Ordinance 1948, and in construing an Act of Parliament where the words used by the legislature are precise and unambiguous, then the literal and strict construction rules should apply. **There can be no doubt here that Parliament intends to confer on the High Court extra-territorial jurisdiction** in cases where more than one defendants are being sued, so long as one of the several defendants resides or has his place of business within Malaysia. As stated by Lord Halsbury LC in the *Salomon case* [1897] AC 22 at p 29, the court has 'no right to add to the requirements of the statute, nor to take from the requirements thus enacted. The sole guide must be the Act itself'. **The provision of s 23(1)(a) does not impose any condition relating to cause of action or the nature of the prayers being sought before the High Court can assume jurisdiction**. In our opinion, the learned judge erred in law in refusing to give any meaningful interpretation to the statutory provision by concluding that it was a mere restatement of the principle underlying O 11 r 1 of the RHC 1980 based on English Law. As stated by Lord Selborne LC in *AG v. Great Eastern Railway Co* (1879-80) 5 App Cas 473 at p 479, 'It would, however, be contrary to sound principle to imply such a condition, not expressed in the clause, if the words, as they stand would be sensible and operative without it.'
>
> [Emphasis Added]

[99] I now move on to consider the next point made by White & Case which is that the Malaysian Court must have jurisdiction over White & Case under both s 23(1) of the CJA and O 11 of the ROC.

Whether The Malaysian Court Must Have Jurisdiction Over White & Case Under Both Section 23(1) Of The CJA And Order 11 Of The ROC

[100] The issue posed by White & Case has been raised and expressly, if not implicitly, rejected by our highest courts in *International Tin Council* and in *Matchplan*.

[101] I begin by observing that nowhere in *International Tin Council* and in *Matchplan* did the courts hold that the Malaysian Court must have jurisdiction under both s 23(1) of the CJA and O 11 of the ROC before a foreign defendant can be validly served out of jurisdiction.

International Tin Council

[102] In *International Tin Council*, the Registrar had granted leave to the appellants to serve out of jurisdiction a notice of concurrent writ of summons on the International Tin Council ["ITC"] in London. On appeal, the High Court had set aside the Registrar's order on the basis that the jurisdiction of the High Court is restricted to those upon whom its process may be served within the territorial jurisdiction and to this general rule the only exception is to be found in O 11 of the Rules of the High Court 1980 [the predecessor of our present O 11 ROC]. The learned High Court Judge rejected the argument that s 23(1)(b) of the CJA creates another exception to the general rule on extra-territorial jurisdiction of our courts.

[103] On appeal, the Malaysian Supreme Court, which was the apex court then, allowed the appeal. The Malaysian Supreme Court said:

> In setting aside the Registrar's order, **the learned judge came to the conclusion** that in Malaysia, the jurisdiction of the High Court is restricted to those upon whom its process may be served within the territorial jurisdiction of the courts, **and to this general rule the only exception is to be found in O 11 of the Rules of the High Court 1980 ['RHC 1980']**. This conclusion is based on such English authorities as *Siskina (Cargo Owners) v. Distos SA* [1979] AC 210 at p 254F, and *Re Busfield* [1886] 32 Ch D 123. **The learned judge rejected the argument that s 23(1)(b) of the Courts of Judicature Act 1964 creates another exception to the general rule on extra-territorial jurisdiction of our courts…**
>
> ...
>
> We need only concern ourselves with whether the learned judge was correct in law in holding that s 23(1) of the Courts of Judicature Act 1964 had no legal effect whatsoever other than to embody the principle based on English law that the jurisdiction of the Malaysian High Courts is territorial. The main bone of contention of Mr Pradhan is that sub-para (b) of s 23(1) provides another

exception to the general principle and confers extra-territorial jurisdiction on the High Court, ...

...

In our view, service is not solely the foundation of jurisdiction of our High Courts. Apart from O 11 r 1, s 23(1)(b) of the Courts of Judicature Act 1964 provides extra-territorial jurisdiction to the High Court …

…

The registrar was accordingly correct in law in granting the order that he did, and in the result, these two appeals should in our opinion, succeed.

[Emphasis Added]

Matchplan

[104] In *Matchplan*, the Malaysian Court of Appeal followed the Malaysian Supreme Court decision in *International Tin Council* and clearly said that the Malaysian High Court may exercise jurisdiction over a non-resident defendant under either of three categories:

i. personal service within the jurisdiction; or

ii. where any of the conditions set out in s 23(1) of the CJA are satisfied; or

iii. where a plaintiff is able to obtain leave of court to serve a defendant who is outside the jurisdiction of the court under O 11 ROC.

[105] Gopal Sri Ram JCA (delivering majority judgment) said:

[8] ... In Malaysia, the High Court is seised of jurisdiction over a dispute in **any** of the following three cases:

(i) where the defendant is served with the writ or other originating process within the jurisdiction; or

(ii) where any of the conditions set out in**s 23 of the Courts of Judicature Act 1964 ('the CJA')** are satisfied; **or**

(iii) where a plaintiff is able to obtain leave of court to serve a defendant who is outside the jurisdiction of the court **pursuant to O 11 of the RHC**.

...

[10] **It is now settled by binding authority that the High Court may exercise jurisdiction over a non-resident defendant pursuant to s 23(1) of the CJA** (see *Malayan Banking Berhad v. The International Tin Council & Anor & Another Case* [1989] 1 MLRA 184) ...

...

> [11] In *Malayan Banking Berhad v. International Tin Council*, it was held (per Mohd Azmi SCJ) that in Malaysia service is not solely the foundation of jurisdiction of the High Court and that **apart from O 11 r 1, s 23(1)(b) of the CJA confers extra-territorial jurisdiction** on the High Court in cases falling within the section. **In that case, the facts fell within s 23(1)(b)**. In the present case, the relevant provisions are both paras (b) and (c) of s 23(1). In other words, for the appellants to succeed in the instant appeal they must show one of two things. Either that the tort of libel of which they complain was committed within the jurisdiction. Or, that the facts on which their action in tort is based are alleged to have occurred within the High Court's jurisdiction. **If they demonstrate either of these things, then they would *ex debito justitiae* entitled to have their writ served pursuant to O 11 r 1 of the RHC. Once the court is seised of extra territorial jurisdiction by virtue of s 23(1), O 11 r 1 ceases to be of jurisdictional relevance**. The decision in *Malayan Banking Berhad v. International Tin Council* makes it plain that **O 11 r 1 assumes jurisdictional importance only in cases falling outside the scope of s 23(1). Accordingly, in cases where s 23(1) applies, O 11 r 1 becomes a mere procedural formality to enable a plaintiff to effect service abroad**.
>
> [12] In the present case, if the plaintiffs are right in their argument on the facts, then this is a case that falls both under s 23(1)(a) and (c) of the CJA as well as under para (h) of O 11 r 1 of the RHC which empowers the court to grant leave to a plaintiff to serve a writ out of jurisdiction 'if the action begun by the writ is founded on a tort committed within the jurisdiction'. **So, it does not really matter which of these provisions is relied upon to found jurisdiction in this case**.
>
> [Emphasis Added]

[106] In *Siti Nur Aishah Ishak v. Golden Plus Holdings Berhad* [2017] 4 MLRA 418; [2017] 2 SSLR 31 ["*Siti Nur Aishah*"], the Malaysian Court of Appeal reviewed *Petrodar*, *Matchplan*, *Goodness* and *International Tin Council* and held that these cases held that the Malaysian High Court is conferred extraterritorial jurisdiction not only under O 11 of the ROC but also by s 23(1) CJA. This is what Mary Lim JCA said:

> [28] In rejecting the 1st defendant's arguments, the Federal Court held that jurisdiction of the High Court was conferred not only under O 11 of the RC 2012, s 23(1) of Act 91 also confers extraterritorial jurisdiction on the High Court. Where jurisdiction is conferred by that section, O 11 r 1 'becomes a mere procedural formality to enable the plaintiff to effect service abroad'. This position was already explained by the Supreme Court in *Malayan Banking Berhad v. The International Tin Council & Anor & Another Case* [1989] 1 MLRA 184 that 'O 11 r 1 assumes jurisdictional importance only in cases falling outside the scope of s 23(1)'; and by the Court of Appeal in *Matchplan (Malaysia) Sdn Bhd & Anor v. William D Sinrich & Anor* [2003] 2 MLRA 412, and further confirmed by the Federal Court in *Petrodar Operating Co Ltd v. Nam Fatt Corporation Berhad & Anor & Another Appeal* [2014] 2 MLRA 21.
>
> [29] At para 29, the Federal Court further approved the Court of Appeal's decision in *Matchplan (M) Sdn Bhd & Anor* where Gopal Sri Ram JCA (as he then was) speaking for the Court of Appeal explained that:

> In Malaysia, the High Court is seised with jurisdiction over a dispute in any of the following three cases:
>
> (a) where the defendant is served with the writ or other originating process within the jurisdiction; or
>
> (b) where any of the conditions set out in s 23 of the Courts of Judicature Act 1964 are satisfied; or
>
> (c) where a plaintiff is able to obtain leave of court to serve a defendant who is outside the jurisdiction of the court pursuant to RHC O 11.

[107] The above extracts clearly demolish the argument of White & Case that 1MDB must show the Malaysian Court has jurisdiction over White & Case under both s 23(1) of the CJA and O 11 of the ROC.

Reductio Ad Absurdum

[108] If White & Case is correct in its submission that 1MDB must show the Malaysian Court has jurisdiction over White & Case under both s 23(1) of the CJA and O 11 of the ROC, *reductio ad absurdum*, it would mean that, conversely if a plaintiff satisfies one of the jurisdictional gateways under O 11 of the ROC that plaintiff must still satisfy s 23(1) of the CJA.

[109] This would lead to absurdity as the jurisdictional gateways under O 11 of the ROC include claims like:

i. (L) if the action begun by the writ is brought under the provisions of any written law relating to carriage by air;

ii. (M) if the claim is brought to enforce any judgment or arbitral award.

Cases Relied On By White & Case

[110] White & Case relies on the decisions in *Petrodar*, *Goodness* and *1Malaysia Development Berhad v. Deutsche Bank*. I shall now consider these cases.

Petrodar

[111] *Petrodar* does not support White & Case. The Federal Court in *Petrodar* expressly followed *International Tin Council* and *Matchplan*.

[112] The Federal Court in *Petrodar* said:

> [10] Question of Law posed in the first appeal
>
> **Whether O 11 Of The Rules Of The High Court 1980 Confers Jurisdiction Or Whether This Is Predicated On s 23 Of The Courts Of Judicature Act 1964 …**
>
> …

[12] In regard to the first part of the question of law posed learned counsel for the 1st defendant submitted that although the case of American Express clearly states that O 11 of the RHC confers jurisdiction, however, the case of *Rama Chandran* is the authority for the proposition that the Rules of the High Court 1980 on its own cannot confer statutory jurisdiction. We have anxiously deliberated on this issue and with respect we find that the 1st defendant's submission on this point is misconceived. **The then Supreme Court case of *Malayan Banking Berhad v. The International Tin Council & Anor & Another Case* [1989] 1 MLRA 184 in considering whether s 23 of the CJA confers extra-territorial jurisdiction had clearly highlighted that O 11 of the RHC is clothed with the same powers**. His Lordship Mohd Azmi SCJ in delivering the judgment of the court held that:

> Apart from O 11 r 1 of the Rules of the High Court 1980, s 23(1) (b) of the Courts of Judicature Act 1964 provides extra territorial jurisdiction to the High Court in cases where oversea foreigners are sued as co-defendants...

[12] From the above quoted passage, it is clear that the then Supreme Court acknowledged the fact that O 11 of the RHC does confer jurisdiction. His Lordship Gopal Sri Ram JCA (as he then was) in the case of *Matchplan (Malaysia) Sdn Bhd & Anor v. William D Sinrich & Anor* [2003] 2 MLRA 412 in referring to the then Supreme Court case of then *Malayan Banking Bhd* took pains to set out how O 11 RHC and s 23 of the CJA are to be construed. **His Lordship has this to say**:

> **Once the court is seized of extra-territorial jurisdiction by virtue of s 23(1) CJA, O 11 r 1 ceases to be of jurisdictional relevance**. The decision in *Malayan Banking Berhad v. International Tin Council* make it plain that **O 11 r 1 assumes jurisdictional importance only in cases falling outside the scope of s 23(1)**. Accordingly, in cases **where s 23(1) applies, O 11 r 1 becomes a mere procedural formality to enable a plaintiff to effect service abroad**. In the present case, if the plaintiffs are right in their argument on the facts, then this is a case that falls both under s 23(1)(a) and (c) of the Courts of Judicature Act as well as under para (h) of O 11 r 1 which empowers the court to grant leave to a plaintiff to serve a writ out of jurisdiction "if the action begun by the writ is founded on a tort committed within the jurisdiction". So it does not really matter which of these provisions is relied upon to found jurisdiction in this case.

[13] **We see no necessity to regurgitate what had been so admirably explained by His Lordship Gopal Sri Ram in the case of *Matchplan (Malaysia)***. As such, premised on the decision of *Malayan Banking Bhd* and *Matchplan (Malaysia)* we are of the considered view that O 11 of the RHC does not only confer jurisdiction but that it **stands independently on its own** and is not predicated upon, s 23 of the CJA 1964.

[Emphasis Added]

Goodness

[113] *Goodness* does not support White & Case. The Federal Court in *Goodness* expressly followed *Petrodar*, *International Tin Council* and *Matchplan*. [See paras 27 to 30 of *Goodness*'s Grounds of Decision].

1Malaysia Development Berhad v. Deutsche Bank

[114] In *1Malaysia Development Berhad v. Deutsche Bank* at 32 — 38 in particular at 37, the High Court held that compliance with s 23(1) CJA alone is not sufficient. There must still be compliance with O 11 ROC:

> [37] On the basis of my analysis of all the above authorities, it appears to me that none of them eliminates the requirements of O 11 of the ROC. Therefore, in this regard, I find that a plaintiff must still comply with the requirements of O 11 r 1 of the ROC so that there is no abuse of process and that a foreign defendant's rights are still protected in order to ensure there is a basis for requiring a foreign defendant to submit to the court's jurisdiction. As such, compliance with O 11 of the ROC is necessary to ensure that all parties' rights are protected or taken care of by the court. In other words, this is not an unjustified imposed measure...

[115] I am unable, with respect, to agree as the passages in *International Tin Council* and *Matchplan,* which I have highlighted above, were not drawn to the High Court in *1Malaysia Development Berhad v. Deutsche Bank*.

[116] In conclusion, on issue 1, I agree with 1MDB for these reasons:

i. The characterisation of process out of the jurisdiction as an "exorbitant" jurisdiction is a traditional characterisation, and was based on the notion that the service of proceedings abroad was an assertion of sovereign power over a foreign defendant and a corresponding interference with the sovereignty of the state in which process was served. This is no longer a realistic view. The decision now should be based on a pragmatic one in the interests of the efficient conduct of litigation in an appropriate forum. [See *Abela v. Baadarani* [2013] 1 WLR 2043 UK Supreme Court].

ii. Process out of the jurisdiction should no longer be viewed as an "exorbitant" jurisdiction that the courts should be reluctant to exercise. The world has changed much due to globalisation. Fraudsters nowadays operate from multiple jurisdictions. Funds can now move easily across jurisdictions with a single click or tap via digital platforms. The courts too must move with the times. This is particularly so if the elements of the cause of action took place in multiple jurisdictions as is the case before me.

iii. Section 23 of the CJA is a new legislation on extra-territorial jurisdiction introduced by legislature, and its words must be construed without being constrained by the existing state of

the common law on the jurisdiction of the High Courts. [See *International Tin Council*].

iv. The High Court may exercise jurisdiction over a non-resident defendant under either of three categories:

a. personal service within the jurisdiction; or

b. where any of the conditions set out in s 23(1) of the CJA are satisfied; or

c. where a plaintiff is able to obtain leave of court to serve a defendant who is outside the jurisdiction of the court under O 11 ROC.

[See *Petrodar* at [13] which expressly followed *International Tin Council* and *Matchplan* at [8]]

v. Once the court is seized of extra-territorial jurisdiction by virtue of s 23(1) CJA, O 11 ROC ceases to be of jurisdictional relevance. The decision in *International Tin Council* makes it plain that O 11 ROC assumes jurisdictional importance only in cases falling outside the scope of s 23(1). Accordingly, in cases where s 23(1) applies, O 11 ROC becomes a mere procedural formality to enable a plaintiff to effect service abroad.

[See *Petrodar* at [13] which expressly followed *International Tin Council* and *Matchplan* at [8]].

vi. Order 11 ROC does not only confer jurisdiction but it stands independently on its own and is not predicated upon s 23 of the CJA [See *Petrodar* at [14]];

vii. The phrase "Accordingly, in cases where s 23(1) applies, O 11 ROC becomes a mere procedural formality to enable a plaintiff to effect service abroad" used by the courts in *Petrodar* at [13] which expressly followed *Matchplan* at [11] does not mean that a plaintiff must satisfy both s 23 of the CJA and O 11 ROC;

viii. As "Order 11 ROC becomes a mere procedural formality to enable a plaintiff to effect service abroad", in the absence of a specific rule in O 11 ROC, the Malaysian Court will and can invoke its inherent jurisdiction to hold that a plaintiff can effect service abroad under O 11 ROC once s 23(1) CJA has been satisfied by the plaintiff;

ix. The ability of the Courts to invoke inherent jurisdiction in the absence of a specific rule of procedure can be seen from the recent Court of Appeal's decision in *Lim Tuck Sun v. Celcom Malaysia*

Berhad & Ors And Another Appeal [2025] 4 MLRA 86 where the Court of Appeal said:

> [94] Since O 15 r 6(2)(b) of the ROC 2012 is not applicable, the learned HCJ ought to have invoked the Court's inherent jurisdiction and allowed the Appellant to intervene in Suit 610 and Suit 1960. The learned HCJ had wrongly applied the maxim generalia specialibus non-derogant and held that the specific provision O 15 r 6(2)(b) of the ROC 2012 should prevail over **the general provision of O 92 r 4 of the ROC 2012.**
>
> [95] In *R Rama Chandran v. Industrial Court Of Malaysia & Anor* [1996] 1 MELR 71; [1996] 1 MLRA 725, the Federal Court held that **O 92 r 4 of the RHC 1980 is not a "general provision". The powers conferred by the ROC are additional to and not in substitution for the powers arising out of the inherent jurisdiction of the court. The Court can exercise its inherent jurisdiction even in matters which are regulated by statute or by the ROC.**
>
> [96] In explaining the nature and basis of the Court's inherent jurisdiction and its applicability, Edgar Joseph Jr FCJ in *R Rama Chandran's* case referred to "*The Inherent Jurisdiction of the Court [1970] Current Legal Problems* by Sir Jack Jacob QS". His Lordship said this;
>
> > "Explaining the nature of inherent jurisdiction, the learned author said this:
> >
> > > ...**The court may exercise its inherent jurisdiction even in matters which are regulated by statute or by rule of court, so long as it can do so without contravening any statutory provision…**
> >
> > The learned author then distinguished between the Inherent jurisdiction and the statutory jurisdiction, as follows:
> >
> > > The source of the statutory jurisdiction of the court is, of course, the statute itself, which will define the limits within which such jurisdiction is to be exercised, whereas **the source of the inherent jurisdiction of the court is derived from its nature as a court of law**; so that the limits of such jurisdiction are not easy to define, and indeed appear to elude definition.
> >
> > The learned author then directs attention to the point that **the powers conferred by the rules of court are generally additional to and not in substitution of the powers arising out of the inherent jurisdiction of the court**, in these terms:
> >
> > > The inherent jurisdiction of the court may be exercised in any given case, notwithstanding that there are rules of court governing the circumstances of the case. The powers conferred by rules of court are, generally speaking, additional to, and not in substitution of, powers arising out

> of the inherent jurisdiction of the court. The two heads of power are generally cumulative, and not mutually exclusive, so that in any given case, the court is able to proceed under either or both heads of jurisdiction.

Explaining the juridical basis of inherent jurisdiction, the learned author says this (at p 27):

> ... the jurisdiction to exercise these powers was derived, not from any statute or rule of law, but from the very nature of the court as a superior court of law, and for this reason, such jurisdiction has been called inherent'. This description has been criticized as being 'metaphysical', but I think nevertheless that it is apt to describe the quality of this jurisdiction. For the essential characters of a superior court of law necessarily involves that it should be invested with a power to maintain its authority and to prevent its process being obstructed and abused. Such power is intrinsic in a superior court; it is its very life-blood, its very essence, its immanent tribute. Without such a power, the court would have form but would lack substance. The jurisdiction which is inherent in a superior court of law is that which enables it to fulfil itself as a court of law."

Defining inherent jurisdiction, the learned author said this (at p 51):

> ... the inherent jurisdiction of the court may be defined as being reserved or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them."

In explaining the usefulness of the inherent jurisdiction, the learned author said this:

> On the other hand, where the usefulness of the powers under the Rules ends, the usefulness of powers under inherent jurisdiction begins. This is shown under three important respects in which the powers arising out of inherent jurisdiction differ from those conferred by Rules of Court. First, perhaps by their very nature, they are wider and more extensive powers, permeating all proceedings at all stages and filling any gaps left by the Rules and they can be exercised on a wider basis, for example, by enabling the court to admit evidence by affidavit or otherwise in order to examine all the circumstances appertaining to the merits of the case. Secondly, they can be invoked in respect of persons who are not themselves actual litigants in pending proceedings. Thirdly, they can be used to punish the offender by fine or imprisonment."

> [97] A plain reading of the nature and the usefulness of inherent jurisdiction as described in *R Rama Chandran*'s case, **the Court's inherent jurisdiction is wider and more extensive, and can fill any gaps left by the rules** ... In such circumstances, **to say that whenever there is a rule, the inherent jurisdiction is ousted, in our view, is misplaced**.
>
> [Emphasis Added]

[117] I would further echo the words of Lord Phillips in *NML Capital Ltd v. Republic Of Argentina* [2011] 2 AC 495 UK Supreme Court ("*NML Capital*"), cited by Vinodh Coomaraswamy J in *IM Skaugen SE And Another v. MAN Diesel & Turbo SE And Another* [2018] SGHC 123 Singapore HC ["*IM Skaugen*"]:

> 187. In *NML Capital*, Lord Phillips held (at [74]) that "**procedural rules should be the servant not the master of the rule of law**" and that the objective of the rules is to "enable the court to deal with cases justly, and that this involves saving expense and ensuring that cases are dealt with expeditiously".
>
> [Emphasis Added]

[118] In any event, this issue is moot as I am satisfied [for the reasons set out below] that 1MDB has shown the Malaysian Court has jurisdiction over White & Case under both s 23(1) of the CJA and O 11 of the ROC.

[119] I now move to issue 2.

Issue 2 — Whether The Malaysian Court Has Jurisdiction Over White & Case Under Section 23(1) Of The CJA For 1MDB's Claim Against White & Case For Dishonest Assistance

White & Case's Contentions

[See Encl 102 White & Case's Written Submissions At Paragraphs 96-107]

[120] White & Case contends none of the limbs set out in s 23(1) CJA is satisfied in relation to 1MDB's claim for dishonest assistance.

Limb (a) The Alleged Cause Of Action Did Not Arise Within Malaysia

[121] White & Case contends that s 23(1)(a) CJA is not satisfied as the alleged cause of action for dishonest assistance did not arise within Malaysia.

[122] White & Case also contends the correct approach to determine whether a cause of action "arose within the jurisdiction" is to use the substance test laid down by the Privy Council in *Distillers Co Ltd v. Thompson* [1971] AC 458 (PC) ["*Distillers*"], which decision has been followed in Malaysia in *Siti Nur Aishah* at [46].

[123] White & Case further contends that the "act or omission of the defendant must occur within the jurisdiction." White & Case cites in support of this proposition *Metall und Rohstoff AG v. Donaldson Lufkin & Jenrette Inc* [1990] 1 QB 391, 437 English Court of Appeal ["*Metall*"] and *Bunga Lawas Shipping Agencies Sdn Bhd v. Nusantara Worldwide Insurance (Malaysia) Bhd & Ors* [1999] 1 MLRH 384.

[124] White & Case submits that 1MDB has neither pleaded that the specific alleged acts of assistance by White & Case occurred in Malaysia nor disputed the evidence in the 1st Affidavit of Jennifer Paradise (Enclosure 59 at paras 5.2(i), 28, 40.8 and 61) that the matters alleged against White & Case were performed solely in England.

Limb (b) Neither Defendant Resides Or Has Their Place Of Business Within Malaysia

[125] White & Case contends that s 23(1)(b) CJA is not satisfied as 1MDB has (rightly) not pleaded that either Patrick Mahony resides or White & Case has their place of business in Malaysia. And 1MDB has also not disputed the evidence that White & Case does not have and has never had a presence in Malaysia.

Limb (c) The Facts On Which 1MDB's Claims Are Based Did Not Occur In Malaysia

[126] White & Case contends that s 23(1)(c) CJA is not satisfied, as pursuant to s 23(1)(c) CJA, the High Court will have jurisdiction where the facts on which the proceedings are based exist or are alleged to have occurred.

[127] White & Case cites *Dato' Ho Seng Chuan v. Rabobank Asia Ltd* [2002] 1 MLRH 594, where the High Court observed that limb (c) of s 23(1) states "the facts on which the proceedings are based and **not any** facts on which the proceedings are based" [Emphasis original]. Based on the language of the statute, the High Court there held that unless all the facts on which the proceedings are based occurred in Malaysia, s 23(1)(c) CJA will not be satisfied.

[128] White & Case submits that, on the facts in respect of 1MDB's claim for dishonest assistance, none of the matters alleged against White & Case occurred in the jurisdiction. They were performed in England. Accordingly, s 23(1)(c) CJA is not satisfied on the facts.

1MDB's Contentions

[See encl 114 1MDB's Written Submissions At Paragraphs 3.2-3.3]

[129] 1MDB submits by applying the substance test propounded in *Metall,* the tort of conspiracy to injure and the claim for dishonest assistance took place in Malaysia and 1MDB therefore is allowed to rely on O 11 r 1(1)(h) of the ROC and s 23(1)(a) and (c) of the CJA.

[130] 1MDB also submits White & Case is a proper party to 1MDB's claim against Tarek Obaid, PetroSaudi International Ltd and PetroSaudi Holdings (Cayman) in Suit 337 which 1MDB seeks to consolidate the present Suit with in the Consolidation Application, and is allowed to rely on O 11 r 1(1)(j) of the ROC and s 23(1)(b) of the CJA.

Court's Analysis

The Law — Section 23(1)(a) Of The CJA [Where The Cause Of Action Arose]

[131] For the Court to decide where the cause of action arose [s 23(1)(a) CJA] or whether the tort was committed within jurisdiction [O 11 r 1(1)(h) ROC], I note that parties are in agreement that since the elements of the causes of action pleaded by 1MDB against Patrick Mahony and White & Case took place in multiple jurisdictions, the Court must apply the substance test propounded in *Metall* and *Distillers*.

[132] In *Metall*, the English Court of Appeal said at pp 446C-D:

> "In our judgment, **in double locality cases** our courts should first consider whether, by reference exclusively to English law, it can properly be said that a tort has been **committed within the jurisdiction of our courts**. In answering this question, **they should apply the now well familiar "substance" test** previously applied in such cases as *Distillers Co (Biochemicals) Ltd v. Thompson* [1971] AC 458, *Castree v. ER Squibb & Sons Ltd* [1980] 1 WLR 1248 and *Cordoba Shipping Co Ltd v. National State Bank, Elizabeth, New Jersey* [1984] 2 Lloyd's Rep 91."
>
> [Emphasis Added]

[133] Lord Pearson in *Distillers* at p 468E held that the right approach is to look back over the series of events constituting the tort and ask the question, where in substance did the cause of action arise?

[134] Issue 2 is on dishonest assistance. Parties have agreed that dishonest assistance is not a tort. Therefore, O 11 r 1(1)(h) ROC [if the action begun by the writ is founded on a tort committed within the jurisdiction] is not applicable for issue 2.

[135] The only question I have to decide for issue 2 is whether, for 1MDB's claim against White & Case for dishonest assistance, the cause of action arose in Malaysia [s 23(1)(a) CJA] based on the substance test propounded in *Metall* and *Distillers*.

[136] *Distillers* has been followed in Malaysia in *Siti Nur Aishah* at [46], where the Court of Appeal said:

> [46] From the petition, it is apparent **that the alleged facts, assumed to be true for the present purposes**, exist or have all occurred within the local or territorial jurisdiction of the High Court in Malaya. Those facts are sufficient

to sustain a claim that the cause of action arose in the territorial jurisdiction of the High Court in Malaya — **s 23(1)(a)** although **it is not necessary that every ingredient of the cause of action should have occurred within the same jurisdiction** — see *Distillers Co (Bio-Chemicals) Ltd v. Thompson (by her next friend Arthur Leslie Thompson)* [1971] 1 All ER 694. ...

[Emphasis Added]

Examples From Caselaw To Interpret The Substance Test

[137] It is useful to consider how the substance test has been applied in decided cases. The following principles and decided cases are illustrative:

i. in double locality cases, our courts should apply the now well familiar "substance" test. [See *Distillers*, *Metall* at p 446C-D and *Siti Nur Aishah* at [46];

ii. for s 23(1)(a) CJA [where the cause of action arose] to be applicable it is not necessary that every ingredient of the cause of action should have occurred within the same jurisdiction, i.e., Malaysia. [See *Siti Nur Aishah* at [46]];

iii. the view expressed in *George Monro Ltd v. American Cyanamid And Chemical Corporation* [1944] KB 432, 439, by Goddard L.J. (*obiter*) that the words in the rule "tort committed within the jurisdiction" must be limited to a wrongful act committed within the jurisdiction, for all its attractions, has not been adopted in subsequent cases. [See *Metall* at pp 441B-D];

iv. the right approach is to look back over the series of events constituting the tort and ask the question, where in substance did the cause of action arise? [See Lord Pearson in *Distillers* at p 468E cited in *Metall* at p 442 H];

v. the principle by Lord Pearson in *Distillers* at p 466 "that the act on the part of the defendant which gives the plaintiff his cause of complaint must have occurred within the jurisdiction is "inherently reasonable as the defendant is called upon to answer for his wrong in the courts of the country where he did the wrong." But it does not provide a simple answer for all cases. [See *Metall* at p 442 C-D];

vi. In *Diamond v. Bank Of London And Montreal Ltd* [1979] QB 333, it was alleged that fraudulent and negligent misrepresentations had been made by telex or telephone calls originating outside the jurisdiction, which had been received and acted upon by the plaintiff in London. The court held that the action was founded "on a tort committed within the jurisdiction." [See *Metall* at p 442 E];

vii. In *Castree v. ER Squibb & Sons Ltd* [1980] 1 WLR 1248, the plaintiff claimed damages for personal injuries sustained in the course of her employment while using a defective machine. This had been manufactured in Germany but purchased by the defendants in England from a firm which was said to be the sole agent of the manufacturers. The Court held that the plaintiff's cause of action against the manufacturers was founded on a tort committed by the manufacturers within the jurisdiction. Applying the test propounded by Lord Pearson in *Distillers*:

> "The right approach is, when the tort is complete, to look back over the series of events constituting it and ask the question, where in substance did the cause of action arise?"

Ackner L.J. concluded:

> "The substantial wrongdoing in this case alleged to have been committed by the [manufacturers] is putting on the English market a defective machine with no warning as to its defects. That being, in my judgment, the position, and applying the test which is accepted on all sides to be the appropriate test, namely, to look back over the series of events constituting the tort and to ask the question where in substance this cause of action arose, I would conclude that it arose in this country."

[See *Metall* at pp 442H-443B];

viii. In *Cordoba Shipping Co Ltd v. National State Bank, Elizabeth, New Jersey* [1984] 2 Lloyd's Rep 91, the plaintiffs claimed damages against a New Jersey bank for negligent misstatements contained in a telex sent from New Jersey to London in reliance upon which the plaintiff recipients had acted in [England] to their detriment. The High Court and Court of Appeal both held that the alleged tort was committed within the jurisdiction following *Diamond v. Bank Of London And Montreal Ltd* [1979] QB 333 and Lord Pearson's statement of "the right approach" in *Distillers*. [See *Metall* at pp 443C-D].

Application To Facts

[138] I am of the view for 1MDB's claim against White & Case for dishonest assistance the Malaysian Court has jurisdiction over White & Case under s 23(1)(a) of the CJA [where the cause of action arose].

[139] My reasons are as follows. In *China Agri Products Exchange Ltd v. Wang Xiu Qun And Another* [2021] HKCFI 137 ["*China Agri Products*"] which is a suit for dishonest assistance, the Hong Kong Court similarly applied the substance test in holding that the dishonest assistance by the defendants, based in Mainland China, took place in Hong Kong.

[140] In coming to its decision that the dishonest assistance took place in Hong Kong, the Hong Kong Court took into account the following considerations:

i. Where the injury was sustained by the victim company. The Hong Kong Court held the defendants' acts of falsifying the accounts were clearly directed against persons in Hong Kong or were foreseeably likely to injure persons in Hong Kong (i.e., the investing public in Hong Kong) in order to deceive them as to the true financial position of BSZ. Hence, there can be no question that the injury resulting from the defendants' act of dishonest assistance was sustained in Hong Kong (para 494);

ii. Where the breach of fiduciary duties by the directors of the victim company occurred (para 495);

iii. The nationality of the directors of the victim company who breached their fiduciary duties (para 496); and

iv. Where the victim, ie the company, was listed. The Hong Kong Court held the victim, i.e., the company, is listed in Hong Kong. Hence looking at the matter broadly and taking into account the series of events in question, the court agreed that the substance of the defendants' dishonest assistance was committed in Hong Kong and not in Mainland China. (para 496).

[141] Applying the substance test and the factors outlined in *China Agri Products*, I am of the view 1MDB's cause of action for dishonest assistance against White & Case falls within s 23(1)(a) of the CJA [where the cause of action arose] for the following reasons:

i. The victim company is 1MDB which is a company incorporated in Malaysia;

ii. The key players in the fraud committed against 1MDB are alleged to be, *inter alia*, Najib Razak, Casey Tang and other rogue officers of 1MDB who are all Malaysians;

iii. White & Case is alleged to have dishonestly assisted Najib Razak and Casey Tang in each of their breaches of fiduciary duty and/or breaches of trust owed to 1MDB in Malaysia by providing the legal documentation to be used in Malaysia; and

iv. The fraud's centre of gravity is Malaysia.

Section 23(1)(c) Of The CJA

[142] I am also of the view that for 1MDB's claim against White & Case for dishonest assistance, the Malaysian Court has jurisdiction over White & Case

under s 23(1)(c) of the CJA [the facts on which the proceedings are based exist or are alleged to have occurred within the local jurisdiction of the court].

[143] White & Case contends that s 23(1)(c) CJA is not satisfied. White & Case says in *Dato' Ho Seng Chuan v. Rabobank Asia Ltd* [2002] 1 MLRH 594, the High Court observed that limb (c) of s 23(1) states "the facts on which the proceedings are based and not any facts on which the proceedings are based." Based on the language of the statute, the High Court there held that unless all the facts on which the proceedings are based occurred in Malaysia, s 23(1)(c) CJA will not be satisfied.

[144] White & Case submits that, on the facts in respect of 1MDB's claim for dishonest assistance, none of the matters alleged against White & Case occurred in the jurisdiction. They were performed in England. Accordingly, s 23(1)(c) CJA is not satisfied on the facts.

[145] Unfortunately, 1MDB in its reply written submissions [encl 114] failed to respond at all to White & Case's reliance on *Dato' Ho Seng Chuan v. Rabobank Asia Ltd* [2002] 1 MLRH 594 in 1MDB's reply submissions in encl 114.

[146] 1MDB merely asserts the Court should apply the substance test to s 23(1)(c) CJA without offering any meaningful rebuttal or authorities. [See the comment in encl 126 White & Case RWS para 110].

[147] With respect, I am unable to agree with the proposition in *Dato' Ho Seng Chuan v. Rabobank Asia Ltd* [2002] 1 MLRH 594, that for s 23(1)(c) CJA to be satisfied, "all the facts on which the proceedings are based must have occurred in Malaysia". That would involve reading in the word "all" into the section. Section 23(1)(c) CJA merely said:

> 23. (1) ... the High Court shall have jurisdiction to try all civil proceedings **where:**
>
> **...**
>
> (c) **the facts on which the proceedings are based exist or are alleged to have occurred;**
>
> **within the local jurisdiction of the court** ....
>
> [Emphasis Added]

[148] Section 23(1)(c) CJA should be given its ordinary meaning. As long as some facts on which the suit is filed exist or are alleged to have occurred within the local jurisdiction of Malaysia, the Malaysian Court shall have jurisdiction.

[149] I now move to issue 3.

Issue 3 — Whether The Malaysian Court Has Jurisdiction Over White & Case Under Section 23(1) Of The CJA For 1MDB's Claim Against White & Case For Conspiracy To Injure By Unlawful Means

White & Case's Contentions

[See Encl 102 White & Case's Written Submissions At Paragraphs 141-147]

Limb (a) The Alleged Cause Of Action Did Not Arise Within Malaysia

[150] White & Case contends that s 23(1)(a) CJA is not satisfied as the alleged cause of action for conspiracy to injure by unlawful means did not arise within Malaysia.

[151] White & Case also contends the parties agreed the correct approach to determining whether a cause of action "arose within the jurisdiction" was laid down by the Privy Council in *Distillers* which decision has been followed in Malaysia in *Bunga Lawas Shipping Agencies Sdn Bhd v. Nusantara Worldwide Insurance (Malaysia) Bhd & Ors* [1999] 1 MLRH 384. Accordingly, a cause of action will have arisen in the jurisdiction where "the act on the part of the defendant" giving the plaintiff its cause of action occurred within the jurisdiction. The acts of other alleged wrongdoers are irrelevant.

[152] White & Case further contends in relation to the alleged conspiracy to injure by unlawful means, 1MDB expressly accepts that White & Case's alleged "conspiratorial acts took place outside of Malaysia" [see encl 17 Leave Application Submissions, para 37]. It follows that s 23(1)(a) CJA is not satisfied on the facts.

Limb (b) Neither Defendant Resides Or Has Their Place Of Business Within Malaysia

[153] White & Case contends that s 23(1)(b) CJA is not satisfied as neither Patrick Mahony nor White & Case, being the defendants named by 1MDB in this Suit resides or have their place of business in Malaysia.

Limb (c) The Facts On Which 1MDB's Claims Are Based Did Not Occur In Malaysia

[154] White & Case contends that pursuant to s 23(1)(c) CJA, the High Court will have jurisdiction where the facts on which the proceedings are based exist or are alleged to have occurred within Malaysia. This is plainly not the case in respect of 1MDB's claim for conspiracy to injure by unlawful means.

[155] White & Case also contends that unless all the facts on which the proceedings are based occurred in Malaysia, s 23(1)(c) CJA will not be satisfied. White & Case relies on *Dato' Ho Seng Chuan v. Rabobank Asia Ltd* [2002] 1 MLRH 594.

[156] White & Case further contends 1MDB accepts that White & Case [alleged] "conspiratorial acts took place outside of Malaysia" (See encl 17 Leave Application Submissions, para 37), and there is no allegation that any of White & Case's acts took place in Malaysia.

1MDB's Contentions

[See Encl 114 1MDB's Written Submissions At Paragraphs 3.2 And 3.3]

[157] 1MDB submits by applying the substance test propounded in *Metall* the tort of conspiracy to injure took place in Malaysia and 1MDB therefore, is allowed to rely on O 11 r 1(1)(h) of the ROC and s 23(1)(a) and (c) of the CJA.

[158] 1MDB also submits White & Case is a proper party to 1MDB's claim against Tarek Obaid, PetroSaudi International Ltd and PetroSaudi Holdings (Cayman) in Suit 337 which 1MDB seeks to consolidate the present Suit with in the Consolidation Applications, and is allowed to rely on O 11 r 1(1)(j) of the ROC and s 23(1)(b) of the CJA.

Court's Analysis

The Law — Section 23(1)(a) Of The CJA [Where The Cause Of Action Arose] And Order 11 Rule 1(1)(h) ROC [The Tort Was Committed Within Jurisdiction]

[159] For the Court to decide where the cause of action arose [s 23(1)(a) CJA] or whether the tort was committed within jurisdiction [O 11 r 1(1)(h) ROC], I note that parties are in agreement that since the elements of the causes of action pleaded by 1MDB against Patrick Mahony and White & Case took place in multiple jurisdictions, the Court must apply the substance test propounded in *Metall* and *Distillers*. *Distillers* has been followed in Malaysia in *Siti Nur Aishah* at [46].

[160] The substance test was used for a case of conspiracy to injure by unlawful means in *Grupo Torras SA And Another v. Sheikh Fahad Mohammed Al-Sabah And Others*; *Fouad Khaled Jaffar v. Grupo Torras SA And Another* [1999] All ER (D) 698 ["*Grupo Torras SA*"].

[161] According to the English Commercial Court in *Grupo Torras SA* at pp 160 to 185, these are the factors a Court should take into account when applying the substance test:

i. The identity, importance and location of the conspirators;

ii. The place(s) of any agreement or combination;

iii. The nature and place(s) of the concerted action;

iv. The nature and place(s) of any unlawful act or means; and

v. The plaintiff's location and the place(s) where he or it suffered loss.

Application To Facts

[162] I am of the view that the Malaysian Court has jurisdiction over White & Case under s 23(1)(a) of the CJA [where the cause of action arose] for 1MDB's claim against White & Case for conspiracy to injure by unlawful means.

[163] My reasons are as follows. The substance test was used in a case of conspiracy to injure by unlawful means in *Grupo Torras SA*.

[164] Applying the substance test and the factors outlined in *Grupo Torras SA*, I am of the view 1MDB's cause of action for conspiracy to injure by unlawful means against White & Case falls within s 23(1)(a) of the CJA [where the cause of action arose] based on the following facts which are assumed to be true for the purposes of service out of jurisdiction:

i. This conspiracy was one which took place across at least three (3) jurisdictions including Malaysia, United Kingdom and Switzerland where the monies were siphoned to;

ii. 1MDB's claim for the tort of conspiracy to injure by White & Case is that White & Case conspired with various other wrongdoers such as Najib Razak, Jho Low, Casey Tang, Kelvin, Vincent, Tarek Obaid and the PetroSaudi Entities which took place in Malaysia;

iii. The victim company is 1MDB which is a company incorporated in Malaysia;

iv. The key players in the fraud committed against 1MDB are alleged to be, *inter alia,* Najib Razak, Casey Tang and other rogue officers of 1MDB who are all Malaysians;

v. Najib Razak, Jho Low, Kelvin, Vincent and Casey Tang are Malaysians and have entered appearances in Suit 337;

vi. the key co-conspirators Tarek Obaid, PetroSaudi International Ltd and PetroSaudi Holdings (Cayman) Ltd have submitted to the jurisdiction of the Malaysian Courts and have entered appearances in Suit 337;

vii. the loss is suffered by 1MDB in Malaysia; and

viii. The fraud's centre of gravity is Malaysia.

[165] I now consider whether the Malaysian Court has jurisdiction over White & Case under s 23(1)(c) of the CJA [the facts on which the proceedings are based exist or are alleged to have occurred within the local jurisdiction of the court] for 1MDB's claim for conspiracy to injure by unlawful means.

Section 23(1)(c) Of The CJA

[166] For the same reasons which I have set out for issue 2 above, I am of the view the Malaysian Court has jurisdiction over White & Case under s 23(1)(c) of the CJA for 1MDB's claim against White & Case for conspiracy to injure by unlawful means.

[167] I now move to issue 4.

Issue 4 — Whether The Malaysian Court Has Jurisdiction Over White & Case Under Order 11 ROC For 1Mdb's Claim Against White & Case For Dishonest Assistance

White & Case's Contentions

[See encl 102 White & Case's Written Submissions At Paragraphs 5, 26-29].

[168] White & Case contends the relevant limbs to the issue here in O 11 ROC are O 11 r 1(1)(h) and (j) of the ROC.

Order 11 Rule 1(1)(h)

[169] For dishonest assistance, White & Case contends the Malaysian court has no jurisdiction over White & Case under O 11 r 1(1)(h) of the ROC (i.e., an action based upon a tort committed within the jurisdiction). This is because parties agreed that dishonest assistance is a personal equitable claim and not a tort.

Order 11 Rule 1(1)(j)

[170] White & Case contends only O 11 r 1(1)(j) of the ROC is relevant. It reads as follows:

> (J) if the action begun by the writ **being properly brought against a person duly served within the jurisdiction, a person out of the jurisdiction is a necessary or proper party thereto.**
>
> [Emphasis Added]

[171] White & Case contends that gateway (j) is not satisfied as the only other defendant to the Suit is Patrick Mahony, a British and Swiss citizen who has been served in Switzerland. Patrick Mahony, therefore, cannot be an anchor defendant served within the jurisdiction for the purpose of gateway (j).

[172] White & Case further contends the argument by 1MDB that gateway (j) is satisfied as 1MDB had filed the Consolidation Application, which has yet to be allowed, is unsustainable because:

i. Gateway (J) cannot be satisfied unless the necessary conditions are established at the date of leave for service being granted (See

Satfinance Investment Ltd v. Athena Art Finance Corp [2020] EWHC 3527 (Ch), at [124]);

ii. 1MDB cannot rely on the Consolidation Application as that order has yet to be granted; and

iii. Even if the Consolidation Application were to be granted, that would not negate the fact that this Suit and Suit 337 were commenced on separate writs. Gateway (J) requires that a defendant to a writ must already have been served within the jurisdiction before leave can be obtained to serve another defendant named in the same writ out of the jurisdiction. Accordingly, a consolidation of suits would not result in 1MDB being able to satisfy gateway (j).

1MDB's Contentions

[See Encl 114 1MDB's Written Submissions At Paragraphs 3.2-3.6].

[173] 1MDB submits White & Case is a proper party to 1MDB's claim against Tarek Obaid, PetroSaudi International Ltd and PetroSaudi Holdings (Cayman) in Suit 337 which 1MDB seeks to consolidate the present Suit with in the Consolidation Applications, and is allowed to rely on O 11 r 1(1)(j) of the ROC and s 23(1)(b) of the CJA.

Court's Analysis

[174] Parties are in agreement O 11 r 1(1)(h) of the ROC (ie, an action based upon a tort committed within the jurisdiction) is not applicable as dishonest assistance is a personal equitable claim and not a tort.

[175] The only issue before me is whether 1MDB can rely on O 11 r 1(1)(j) of the ROC relying on the Consolidation Application, which has yet to be allowed by the court.

[176] White & Case says "No", 1MDB says "Yes".

[177] I agree with 1MDB. I am of the view that the Court can take into account events occurring after leave is granted *ex parte* when a defendant applies to set aside service out of the jurisdiction. Recent cases in UK and in Singapore have taken this stand. [See *NML Capital*, *IM Skaugen* upheld on appeal by the Singapore CA in *MAN Diesel & Turbo SE And Another v. IM Skaugen SE And Another* [2019] SGCA 80 Singapore CA ["*MAN Diesel*"] and *Grains And Industrial Products Trading Pte Ltd v. State Bank Of India* [2019] SGHC 292.

[178] In *NML Capital*, Lord Phillips of Worth Matravers PSC said:

> Issue 4: were NML entitled to raise at the *inter partes* hearing the two new points not relied on in the *ex parte* application to serve Argentina out of the jurisdiction?

65. This issue has been described as the gateway issue. It involves consideration of the effect of what I shall describe as the rule in *Parker v. Schuller* [1901] 17 TLR 299.

66. A claimant has always been required by rules of court to include in the application for permission to serve proceedings out of the jurisdiction a statement of the ground for doing so...

68. In *Parker v. Schuller* the plaintiffs obtained leave to serve a writ out of the jurisdiction under RSC O 11 r 1(1)(e) on the ground that the claim was for breach of a contract within the jurisdiction... The plaintiffs sought to persuade the Court of Appeal to uphold the leave given to serve out on the basis of substituting for the original claim a claim for failure to deliver the relevant documents in Liverpool. The Court of Appeal refused to permit this. At p 300 A L Smith MR is reported as saying: It was not until the case came into this court that the plaintiffs set up another cause of action. That could not be allowed. Romer LJ added:

> "an application for leave to issue a writ for service out of the jurisdiction ought to be made with great care and looked at strictly. If a material representation upon which the leave was obtained in the first instance turned out to be unfounded, **the plaintiffs ought not to be allowed**, when an application was made by the defendant to discharge the order for the issue of the writ and the service, **to set up another and a distinct cause of action which was not before the judge upon the original application**."
>
> ...

73. .... Mr Sumption sought to persuade the court to distinguish *Parker v. Schuller*, but at the same time he invited this court to hold that there is no longer any justification for following that decision, if indeed there ever was.

74. I believe that Mr Sumption is correct. **Procedural rules should be the servant not the master of the rule of law**. Lord Woolf, by his Reports on Access to Justice, brought about a sea change in the attitude of the court to such rules. This included the adoption of the **overriding objective with which the new CPR begins. CPR r 1. 1 states that the overriding objective of the Rules is to enable the court to deal with cases justly, and that this involves saving expense and ensuring that cases are dealt with expeditiously.**

75. Where an application is made to amend a pleading the normal approach is to grant permission where to do so will cause no prejudice to the other party that cannot be dealt with by an appropriate order for costs. This accords with the overriding objective. Where all that a refusal of permission will achieve is additional cost and delay, the case for permitting the amendment is even stronger. **I can see no reason in principle why similar considerations should not apply where an application is made for permission to serve process out of the jurisdiction**. It is, of course, highly desirable that care should be taken before serving process on a person who is not within the jurisdiction. But if this is done on a false

basis in circumstances where there is a valid basis for subjecting him to the jurisdiction, **it is not obvious why it should be mandatory for the claimant to be required to start all over again rather than that the court should have a discretion as to the order that will best serve the overriding objective**.

[Emphasis Added]

[179] *NML Capital* was followed by the Singapore High Court in *IM Skaugen* by Vinodh Coomaraswamy J who said:

186. … There is a line of English authority which holds that, in any action where leave to serve a defendant outside the jurisdiction is required, the plaintiff cannot add a new cause of action by amending the pleadings in that action but must instead commence fresh proceedings and seek fresh leave to serve the originating process in those proceedings on the defendant outside the jurisdiction: see *Parker v. Schuller* [1901] 17 TLR 299 and *Metall und Rohstoff AG*.

187. **There is a competing line of English authority which rejects this position**. The leading case in this line is *NML Capital Ltd v. Republic of Argentina* [2011] 2 AC 495 ("*NML Capital*"). In *NML Capital*, Lord Phillips held (at [74]) that "procedural rules should be the servant not the master of the rule of law" and that the objective of the rules is to "enable the court to deal with cases justly, and that this involves saving expense and ensuring that cases are dealt with expeditiously". To that end, Lord Phillips observed that "where there is a valid basis for subjecting [an out-of-jurisdiction person] to the jurisdiction, it is not obvious why it should be mandatory for the claimant [seeking to invoke new grounds] to be required to start all over again rather than that the court should have a discretion as to the order that will best serve the overriding objective": *NML Capital* at [75].

...

189. **This is undoubtedly the correct approach**, subject as it must be to the court's overarching power to prevent an abuse of the process of the court. **The other approach wastes costs and time for both the plaintiff and the defendant**. For the plaintiff, it is a waste of costs and time to require the plaintiff to file a fresh originating process even where there is a good arguable case that the additional causes of action come within a head of jurisdiction in O 11. For the defendant, it also wastes costs and time to require the defendant to take out a second setting aside application based on the fresh originating process.

190. I therefore agree with Lord Phillips' approach in *NML* … I hold that the court has a discretion to take into account evidence of events occurring after leave is granted *ex parte* when a defendant applies to set aside service out of the jurisdiction. It seems to me that time and costs will be wasted if a court assesses a setting-aside application only on the facts and matters as they existed at the time leave was granted. That would leave it open to the plaintiff, upon service being set aside, simply to seek leave to re-serve the writ or to issue a fresh writ and seek leave to serve that writ,

> fortified by the fact that there is now a new factor that tends in his favour. The defendant would then come to court again, presumably, to have the re-service or the fresh writ set aside. Everyone will then be made to go over the entire process again, when this could have been dealt with at the hearing to set aside the first writ.
>
> 191. **It also seems to me that taking into account on a setting aside application supervening events transpiring after leave was granted *ex parte* does not go against the purpose of O 11 of ensuring that both the court and the defendant are given full and proper notice of the basis on which the plaintiff claims the court should exercise jurisdiction over the defendant**. A setting aside application is an inter partes hearing. In the course of that hearing, the defendant will be notified and informed of any supervening events on which the plaintiff intends to rely. If the court's analysis is that the original order granting leave should not have been granted on the material then before the court, but that the material now before the court justifies leave being granted, any prejudice to the defendant can be addressed by an appropriate order as to costs.
>
> [Emphasis Added]

[180] *IM Skaugen* was upheld on appeal by the Singapore CA in *MAN Diesel*. Steven Chong JA (delivering the judgment of the court) said:

> Whether the court is entitled to take into account subsequent developments
>
> > [47] It appears to **be common ground that the court is entitled to take into account subsequent developments after the judge's decision in determining if Singapore is the more appropriate forum…**
> >
> > [50] .... It must be right that the court in a setting aside application is able to take into account subsequent developments after *ex parte* leave was granted. ...
> >
> > [51] We say so for three main reasons—principle, coherence and policy.
> >
> > [Emphasis Added]

[181] Lead Counsel for White & Case Mr Christopher Leong, contends that the above decisions that allowed subsequent developments to be used are confined only to the issue of determining if a venue is the more appropriate forum. While this may be true based on the specific facts in *MAN Diesel*, the rationale can be extended to "gateway issue". [See *NML Capital* at [65]].

[182] Further, our O 1A ROC reads as follows:

> Regard shall be to justice (O 1A)
>
> In administering these Rules, the Court or a Judge shall have regard to the overriding interest of justice and not only to the technical non-compliance with these Rules.

[183] Our O 2 ROC reads as follows:

> Non-compliance with Rules (O 2 r 1)
>
> (1) Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been non-compliance with the requirement of these Rules, the non-compliance shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein.
>
> (2) **These Rules are a procedural code and subject to the overriding objective of enabling the Court to deal with cases justly**. The parties are required to assist the court to achieve this overriding objective.
>
> (3) The Court or Judge may, on the ground that there has been such non-compliance as referred to in paragraph (1), and on such terms as to costs or otherwise as it or he thinks just, **bearing in mind the overriding objective of these Rules**, exercise its or his discretion under these Rules to allow such amendments, if any, to be made and **to make such order, if any, dealing with the proceedings generally as it or he thinks fit in order to cure the irregularity.**
>
> [Emphasis Added]

[184] I now consider issue 5.

Issue 5 — Whether The Malaysian Court Has Jurisdiction Over White & Case Under Order 11 ROC For 1MDB's Claim Against White & Case For Conspiracy To Injure By Unlawful Means

White & Case's Contentions

[See Encl 102 White & Case's Written Submissions At Paragraphs 5, 112-152]

[185] White & Case contends the relevant limbs to the issue here in O 11 ROC are O 11 r 1(1)(h) and (j) of the ROC.

Order 11 Rule 1(1)(h)

[186] For conspiracy to injure by unlawful means, White & Case contends the Malaysian court has no jurisdiction over White & Case under O 11 r 1(1)(h) of the ROC (ie, an action based upon a tort committed within the jurisdiction).

[187] White & Case also contends that the Court must apply the substance test to determine whether the tort of conspiracy to injure by unlawful means was committed within the jurisdiction. That test was set out by the Privy Council in *Distillers* and subsequently explained by the English Court of Appeal in *Metall*.

[188] White & Case further contends that a straightforward application of the substance test dictates that the alleged tort of conspiracy to injure by unlawful means could not have been committed within the jurisdiction of this Court.

Order 11 Rule 1(1)(j)

[189] White & Case contends that gateway (j) is not satisfied as the only other defendant to the Suit is Patrick Mahony, a British and Swiss citizen who has been served in Switzerland. Patrick Mahony, therefore, cannot be an anchor defendant served within the jurisdiction for the purpose of gateway (j).

[190] White & Case further contends that the argument by 1MDB that gateway (j) is satisfied as 1MDB had filed the Consolidation Application is unsustainable because:

i. Gateway (J) cannot be satisfied unless the necessary conditions are established at the date of leave for service being granted (see *Satfinance Investment Ltd v. Athena Art Finance Corp* [2020] EWHC 3527 (Ch), paras 41 and 124);

ii. 1MDB cannot rely on the Consolidation Application as that order has yet to be granted; and

iii. Even if the Consolidation Application were to be granted, that would not negate the fact that this Suit and Suit 337 were commenced on separate writs. Gateway (J) requires that a defendant to a writ must already have been served within the jurisdiction before leave can be obtained to serve another defendant named in the same writ out of the jurisdiction. Accordingly, a consolidation of suits would not result in 1MDB being able to satisfy gateway (j).

Court's Analysis

Order 11 Rule 1(1)(h) Of The ROC

[191] Parties are in agreement that O 11 r 1(1)(h) of the ROC (ie, an action based upon a tort committed within the jurisdiction) is applicable as conspiracy to injure by unlawful means is a tort.

[192] For the same reasons I have set above for issue 3, I am of the view that Malaysian Court has jurisdiction under O 11 r 1(1)(h) of the ROC.

Order 11 Rule 1(1)(j) Of The ROC

[193] The 2nd issue before me is whether 1MDB can rely on the Consolidation Application, which has yet to be allowed by the court.

[194] For the same reasons I have set above for issue 4, 1MDB can rely on O 11 r 1(1)(j) of the ROC for the Consolidation Application, which has yet to be allowed by the court.

[195] I now consider issue 6.

Issue 6 — Whether Order 11 ROC Requires 1MDB To Show, For Each Cause Of Action, That: (i) 1MDB Has A Good Arguable Case That One Of The Jurisdictional Gateways In Order 11 Rule 1(1)(a) To (m) ROC Applies; (ii) There Is A Serious Issue To Be Tried On The Merits; And (iii) Malaysia Is The Appropriate Forum To Hear The Claim

[196] White & Case contends O 11 ROC requires 1MDB to show, for each cause of action, that: (i) 1MDB has a good arguable case that one of the jurisdictional gateways in O 11 r 1(1)(a) to (m) ROC applies; (ii) there is a serious issue to be tried on the merits; and (iii) Malaysia is the appropriate forum to hear the claim.

[197] White & Case also contends that none of these requirements is met for either of 1MDB's claims.

[198] 1MDB has no good arguable case that jurisdictional gateways in O 11 r 1(1)(h) and (j) ROC apply.

[199] There is no serious issue to be tried on the merits, as 1MDB's claim is plainly time-barred. The unlawful means conspiracy cause of action, which arises from events between September 2009 and October 2011, is subject to a six-year limitation period. The claim has therefore been time-barred since October 2017. There is no basis for an extension of the limitation period. There is no basis for a finding that White & Case participated in a combination or agreement between two or more persons.

[200] Even if 1MDB were able to establish that White & Case acted in combination with the alleged co-conspirators and shared their alleged unlawful aim, 1MDB would also need to show that White & Case had an intention to injure it. 1MDB cannot establish such an intention to injure.

[201] Further, and even if there were a serious issue to be tried in respect of 1MDB's claim, 1MDB's claim would be bound to fail for the majority of the sums sought in this Suit.

1MDB's Contentions

[See Encl 114 1MDB's Written Submissions At Paragraphs 3.2-3.6]

[202] 1MDB submits by applying the substance test propounded in *Metall,* the tort of conspiracy to injure and the claim for dishonest assistance took place in Malaysia, and 1MDB therefore is allowed to rely on O 11 r 1(1)(h) of the ROC and s 23(1)(a) and (c) of the CJA.

[203] 1MDB also submits White & Case is a proper party to 1MDB's claim against Tarek Obaid, PetroSaudi International Ltd and PetroSaudi Holdings (Cayman) in Suit 337 which 1MDB seeks to consolidate the present Suit with in the Consolidation Application, and is allowed to rely on O 11 r 1(1)(j) of the ROC and s 23(1)(b) of the CJA.

[204] 1MDB further submits there are serious issues to be tried on the merits in respect of 1MDB's claims against White & Case, as it is clear that White & Case assisted in structuring the fraudulent joint venture between 1MDB and PetroSaudi Holdings (Cayman) Ltd and in fact knew that the PSI Assets which was meant to be injected into the JVCo were worthless, and had assisted in the concealment and furtherance of the fraud on 1MDB.

[205] 1MDB contends 1MDB's claims against White & Case is not time-barred as the six-year limitation period is postponed pursuant to s 29(1) of the Limitation Act 1953 as time does not start to run until 1MDB discovered the fraud or could with reasonable diligence have discovered the fraud, which was not until at least sometime after Najib Razak's party lost the 14th General Election and a new Government was formed on 10 May 2018. Whether 1MDB's claims are time-barred is in any event an issue to be tried at trial.

[206] 1MDB contends Malaysia is the most appropriate forum for various reasons, including the fact that the majority of the witnesses are in Malaysia, the applicable law of 1MDB's claims against White & Case is Malaysian law, and that Malaysia is the forum that has real and substantial connections with this action.

Court's Analysis

[207] In O 11 r 4(1) and (2) of the ROC read as follows:

> **Application for, and grant of, leave to serve notice of writ out of the jurisdiction (O 11 r 4)**
>
> (1) An application for the grant of leave under r 1 or r 2 shall be supported by an affidavit in Form 8 stating the grounds on which the application is made and that in the deponent's belief, the plaintiff has **a good cause of action**, and showing in what place or country the defendant is, or probably may be found.
>
> (2) Such leave shall not be granted unless it is made sufficiently to appear to the Court that the case is a **proper one** for service out of the jurisdiction under this Order.
>
> [Emphasis Added]

Three Conditions Which Must Be Satisfied By A Plaintiff For Leave To Serve Out Of Jurisdiction

[208] Order 11 r 4(1) and (2) of the ROC set out the three conditions which must be satisfied by a plaintiff for leave to serve out of jurisdiction. The three conditions are:

i. the plaintiff has a good cause of action [see O 11 r 4(1)]. Courts have interpreted these words to mean 'good arguable case';

ii. in respect of the merits of the claim there is a serious issue to be tried [see O 11 r 4(2)]; and

iii. Malaysia is the appropriate forum to hear the claim. [see O 11 r 4(2) and O 12 r 10(2) ROC].

[See *Metall* at p 434 G-H and *Oliver Tim Axmann v. Celcom (Malaysia) Berhad & Anor And Another Appeal* [2014] MLRAU 58 at [21]]

'Good Cause Of Action' Means 'good Arguable Case'

[209] In O 11 r 4(1) of the ROC, the words 'good cause of action' mean 'good arguable case'. The plaintiff need not satisfy the court that he is right. The plaintiff need not prove his case beyond reasonable doubt. The burden which the rule imposes on the plaintiff is to make it sufficiently appear that the case is a proper one for service out of jurisdiction while falling short of the standard of proof which must be attained at the trial. [See *Joseph Paulus* at para [37]].

[210] In *Oliver Tim Axmann v. Celcom (Malaysia) Berhad & Anor And Another Appeal* [2014] MLRAU 58, the Malaysian Court of Appeal said:

> [21] The House of Lords in *Sesaconsar Far East Ltd v. Bank Markazi Jomhouri Islami Iran* [1993] 4 All ER 456 at 467 has laid down the general principle that an applicant for leave to serve out of jurisdiction need only show that **there is an arguable case that the matter falls within one of the limbs of O 11 r 1(1) RHC and that in respect of the merits of the claim there is a serious issue to be tried.**
>
> [Emphasis Added]

A Serious Issue To Be Tried

Allegations Of 1MDB: The Plaintiff In The Statement Of Claim Must Be Assumed To Be True. There Should Not Be A Mini Trial

Law

[211] From the authorities, it is clear that there should not be a trial on the affidavits in determining whether the plaintiff, i.e., 1MDB has established a good arguable case. The allegations of the plaintiff in the statement of claim must be assumed to be true. There should not be a mini trial. The primary consideration at the leave stage is whether or not the court should grant leave

to issue the writ out of jurisdiction, not so much on the merits of the case. [See *Matchplan* at [15], *Joseph Paulus* at [42]] and *Siti Nur Aishah* at [46]].

[212] This is what the Court of Appeal said in *Matchplan*:

> [15] It is elementary law that for the purpose of determining whether the High Court at Kuala Lumpur has jurisdiction over the defendants, **the allegations made by the plaintiffs in their statement of claim must be assumed to be true**. Thus, in *Vanity Fair Mills Inc v. T Eaton Co Ltd* [1956] 25 CPR 6, Waterman J observed as follows:
>
> > Although the parties presented many affidavits, depositions, and exhibits for the consideration of the district court, there has been no trial of facts, and the complaint is unanswered. On an appeal from a judgment granting a motion to dismiss a complaint for lack of federal jurisdiction, **we must assume the truth of the facts** stated in the complaint.
>
> [16] See also *Rediffusion (Hong Kong) Ltd v. A-G of Hong Kong* [1970] AC 1136 per Lord Diplock.
>
> [17] So too here. The merits of the plaintiffs' claim that there was publication are yet to be tried. The mere *ipse dixit* of the defendant that there was no publication cannot be determinative of the matter. **At the risk of repetition, it needs to be said that at the point of determining whether the tort of defamation was committed within the jurisdiction, all the allegations in the statement of claim must be presumed to be true**. At that stage there is no preliminary inquiry through a trial on affidavits as to whether the defamatory material was indeed published within the jurisdiction. Were it otherwise, there is a risk that applications to discharge an order granting leave under O 11 r 1 may turn out to be mini trials without determining the suit on its merits.
>
> [Emphasis Added]

[213] This is what the Court of Appeal said in *Siti Nur Aishah*:

> [46] From the petition, it is apparent that **the alleged facts, assumed to be true for the present purposes**, exist or have all occurred within the local or territorial jurisdiction of the High Court in Malaya. Those facts are sufficient to sustain a claim that the cause of action arose in the territorial jurisdiction of the High Court in Malaya — s 23(1)(a) although it is not necessary that every ingredient of the cause of action should have occurred within the same jurisdiction — see *Distillers Co (Bio-Chemicals) Ltd v. Thompson (by her next friend Arthur Leslie Thompson)* [1971] 1 All ER 694. Or, it may certainly be said that the above facts on which the petition is based exist or have occurred within such territory — s 23(1)(c). The merit of the petition is of course, for the parties to deal with and for the winding up court to determine.
>
> [Emphasis Added]

[214] This is what the Federal Court said in *Joseph Paulus*:

> [42] **From the authorities, it is clear that there should not be a trial on the affidavits in determining whether the plaintiff has established a good**

> **arguable case**. As stated by Gopal Sri Ram JCA in *Matchplan (M) Sdn Bhd & Anor* for the purpose of determining whether High Court at Kuala Lumpur has jurisdiction over the defendants, the allegations of the plaintiffs in the statement of claim must be assumed to be true. The application for leave under O 11 r 4 of the RHC should not be turned into a mini trial. Hence, the primary consideration at the leave stage is whether or not the court should grant leave to issue the writ out of jurisdiction, not so much on the merits of the case.
>
> [Emphasis Added]

Application To Facts

[215] Based on the principle the allegations of 1MDB in the statement of claim must be assumed to be true and that there should not be a mini trial, I am of the view that there is a serious issue to be tried on the merits on the issue whether 1MDB's claims are time-barred or 1MDB's claims are not time-barred because s 29(1) of the Limitation Act 1953 applies to postpone the limitation period and time does not start to run until 1MDB's causes of action against White & Case was discovered by 1MDB or could with reasonable diligence have been discovered by 1MDB, which was not until at least sometime after Najib Razak's party lost the 14th General Election and a new Government was formed on 10 May 2018.

[216] For the same reason there should not be a mini trial, I am also of the view that there is a serious issue to be tried on the allegation that 1MDB's pleadings do not set out a coherent case that White & Case acted dishonestly or that 1MDB's claim for conspiracy to injure by unlawful means has not been made out or that 1MDB would not be entitled to recover the majority of the sums sought in this Suit.

[217] In any event, if White & Case is of the view that they are wrongly joined or there is no cause of action against them, they are at liberty to file an application to strike out under O 18 r 19 ROC. That this is the correct approach can be seen from *International Tin Council* where the Malaysian Supreme Court said:

> The Registrar was accordingly correct in law in granting the order that he did, and in the result, these two appeals should in our opinion, succeed. We are also in agreement with Mr Pradhan that **in the event of the ITC having been wrongly joined as a co-defendant, there is nothing to stop them from applying for both the actions to be struck off for misjoinder of parties.**
>
> [Emphasis Added]

[218] I now consider the submission that in respect of 1MDB's Application to Serve Out, 1MDB failed to make full and frank disclosure of material facts.

Issue 7 — 1MDB Allegedly Failed To Make Full And Frank Disclosure

White & Case's Contentions

[219] White & Case contends that in respect of 1MDB's Application to Serve Out, 1MDB failed to make full and frank disclosure of material facts. Given that the Application to Serve Out was made on an *ex parte* basis, such disclosure was necessary to ensure that the court was in a position to properly determine whether leave to serve out should be granted. As a result of material non-disclosures by 1MDB, the Leave Order is liable to be set aside. (See *Castle Inn Sdn Bhd v. Bumiputra-Commerce Bank Bhd* [2007] 2 MLRH 395 para [8]).

Court's Analysis

[220] With respect, I disagree that 1MDB had failed to raise the issue of limitation as an issue. The other points of alleged non-disclosure are not relevant to the issue of service out of jurisdiction.

[221] In any event, even if I accept that there had been a failure to make full and frank disclosure, the jurisprudence now is not to set aside the *ex parte* order. Setting aside the *ex parte* order on grounds of a failure to make full and frank disclosure would serve little purpose except to waste time and costs. 1MDB would remain entitled to re-apply for leave on the same evidence which is before me now and to have that fresh application adjudicated. Such an approach was taken in *IM Skaugen* at [79].

[222] A failure to make full and frank disclosure would carry consequences such as setting aside only if it's an *ex parte* Anton Piller order as that is a draconian order with serious consequences to the defendant when obtained *ex parte*. [See *Poh Kee Lock & Anor v. Ivan Goh-Lee En Tatt & Anor* [2025] MLRHU 3319 HC].

[223] I now consider White & Case's contention that this suit should be stayed on the basis of *forum non conveniens.*

Issue 8 — Whether This Suit Should Be Stayed On The Basis Of Forum Non Conveniens

[224] White & Case contends that even if the Court were to decide that it has jurisdiction, the Court should exercise its power, pursuant to O 12 r 10(2) ROC, to stay the proceedings on the basis of *forum non conveniens.*

[225] White & Case says England is clearly and distinctly a more appropriate forum than Malaysia for the suit against White & Case and Patrick Mahony. With respect, I disagree.

The Law On *Forum Non Conveniens* In Malaysia

[226] The doctrine of *forum non conveniens* has been recognised for a long time in Scots law prior to its adoption by English courts. It is now also followed in the United States and by other Commonwealth jurisdictions [see the UK

House of Lords case of *Spiliada Maritime Corp v. Cansulex Ltd The Spiliada* [1986] 3 All ER 843 at p 853(c) per Lord Goff. ["*The Spiliada*"]. Our courts have also adopted this doctrine.

[227] The *locus classicus* on the principles governing the grant of a stay of proceedings on the ground of forum non conveniens is *The Spiliada,* where Lord Goff of Chieveley said:

> Held (2) In the case of an application for a stay of English proceedings **the burden of proof lay on the defendant to show** that the court should exercise its discretion to grant a stay. **Moreover, the defendant was required to show** not merely that England was not the natural or appropriate forum for the trial but that **there was another available forum which was clearly or distinctly more appropriate than the English forum**. In considering whether there was another forum which was more appropriate **the court would look for that forum with which the action had the most real and substantial connection, eg in terms of convenience or expense, availability of witnesses, the law governing the relevant transaction, and the places where the parties resided or carried on business**. If the court concluded that there was no other available forum which was more appropriate than the English court it would normally refuse a stay. **If, however, the court concluded that there was another forum which was *prima facie* more appropriate the court would normally grant a stay unless there were circumstances militating against a stay**, eg if the plaintiff would not obtain justice in the foreign jurisdiction...
>
> [Emphasis Added]

[228] The starting point for any analysis of the doctrine of forum non conveniens in Malaysia is the decision of our Supreme Court way back in 1994 in the case of *American Express Bank Ltd. v. Mohamad Toufic Al-Ozeir & Anor* [1994] 1 MLRA 439. Peh Swee Chin SCJ [delivering the judgment of the court] agreed with *The Spiliada* and said:

> The doctrine of *forum non conveniens* appears to have originated in Scotland and has finally found full acceptance by the House of Lords in *Spiliada Maritime Corp v. Consulax Ltd (The Spiliada)* [1986] 3 All ER 843 after a series of decisions, as described and set out so well in that very interesting and readable joint article by R H Hickling and Assoc. Prof. Wu Min Aun i.
>
> The main judgment in *The Spiliada* was delivered by Lord Goff, who adopted the dictum of Lord Kinnear in *Sim v. Robinow* [1892] 19 R (ct. of Sess.) 665, 668 as being the fundamental principle in regard to this doctrine ie. that "there is some other tribunal, having competent jurisdiction, in which, the case may be tried more suitably for the interests of all parties and for the ends of justice." Lord Goff cautioned that the word "conveniens" in forum non conveniens meant suitability or appropriateness of the relevant jurisdiction and not one of convenience. **We are in entire agreement with the fundamental principle so expressed**.
>
> **In our view, where an application by a defendant for stay of proceedings is concerned, in applying the said doctrine, the defendant would have to satisfy the Court that "some other forum is more appropriate"** per Lord

> Templeman in *The Spiliada.* Where on the other hand, leave to issue and serve out of jurisdiction a notice of writ of summons under O 11 r 1 of the RHC is involved then according to the reasoning of Lord Templeman, the plaintiff, (not the defendant, be it noted) would have to satisfy a Malaysian Court that, by comparison, that Malaysian Court is the most appropriate forum to try the action. Thus, it will be seen that in the instant case the burden lay on the bank customers, the plaintiffs to satisfy the High Court below that Malaysia was the most appropriate forum.
>
> Having regard to the reasoning of the learned Law Lords in the *Spiliada* and the learned joint article aforesaid, we are of the considered view that **in all cases of either a defendant's application for stay of proceedings** or a plaintiff's application for leave to serve out of jurisdiction under O 11 r 1 of RHC, or for setting aside such leave, **it will be obligatory for a Malaysian Court to consider in any event, a most important factor ie. whether "it would be unjust to the plaintiff to confine him to remedies elsewhere". It is indispensable when a Malaysian Court considers all cases in connection with *forum non conveniens*.**
>
> The most important factor described above does arise, of course, out of a great variety of factors that a Malaysian Court ought to consider in applying the said doctrine; the prominent one being that whether any particular forum is one with which the action has the most real and substantial connection. One can easily visualize a large number of factors which overlap with one another.
>
> [Emphasis Added]

[229] The above passage of Peh Swee Chin SCJ was expressly approved by the Malaysian Federal Court in *Petrodar Operating Co Ltd v. Nam Fatt Corporation Berhad & Anor & Another Appeal* [2014] 2 MLRA 21, speaking through Raus Sharif PCA at [21].

[230] In the Malaysian Court of Appeal decision of *World Triathlon Corporation v. SRS Sports Centre Sdn Bhd* [2018] 5 MLRA 80, Harmindar Singh Dhaliwal JCA [delivering the judgment of the court] said:

> [18] In establishing the forum which has the most real and substantial connection with the cause of action, Lord Goff observed that the court will look to several factors including **convenience and expense, availability of witnesses, the law governing the relevant transaction, and the places where the parties resided or carried on business**.
>
> [Emphasis Added]

[231] The principles to be applied by a Malaysian court on *forum non conveniens* as distilled from the above cases as well as other cases, are:

i. The doctrine of *forum non conveniens* requires a Malaysian court to decide on a stay application based on a two-stage analysis.

ii. At Stage 1, the burden of proof lies on the defendant to show that the Malaysian court should exercise its discretion to grant a stay.

iii. The defendant is required to show not merely that Malaysia is not the natural or appropriate forum for the trial but that there is another available forum which is clearly or distinctly more appropriate than the Malaysian forum.

iv. The Malaysian court will look for that forum with which the action has the most real and substantial connection, eg in terms of convenience or expense, availability of witnesses, the law governing the relevant transaction, and the places where the parties reside or carry on business. The compellability of the witnesses is also an important factor. The existence of proceedings elsewhere is also a relevant factor as this raises potential issues of duplication of resources as well as the risk of conflicting judgments.

v. If the Malaysian court concludes that there is no other available forum which is more appropriate, then the Malaysian court will refuse a stay. There is no need to go to Stage 2 analysis.

vi. However, if the defendant succeeds at Stage 1, the burden shifts to the plaintiff at Stage 2 to satisfy the Malaysian court that justice nonetheless requires that a stay should not be granted, even though the Malaysian court is not *prima facie* the natural forum. For example, a stay will not be granted if the plaintiff will not obtain justice in the foreign jurisdiction. Generally, delay in foreign courts will be disregarded, but extensive and severe delay may amount to a denial of substantial justice and thus a stay should not be granted.

vii. For the Stage 2 analysis, it will be obligatory for a Malaysian court to consider, a most important factor ie whether "it would be unjust to the plaintiff to confine him to remedies elsewhere". It is indispensable when a Malaysian court considers all cases in connection with forum non conveniens.

Analysis By This Court

Stage 1 Analysis

Convenience Or Expense And Availability Of Witnesses

[232] The majority of the witnesses who would be called for the trial of the action are in Malaysia. Najib Razak is the former Prime Minister of Malaysia and former Minister of Finance of Malaysia. He is a resident in Malaysia. Tarek Obaid, PetroSaudi International Ltd and PetroSaudi Holdings (Cayman) Ltd have submitted to the jurisdiction of the High Court of Malaya and have filed their respective defences in Suit 337.

[233] The introduction in 2020 of new rules and facilities for our courts to hear cases through "remote communication technology" has made the traditional factors of "Convenience or expense and availability of witnesses" less compelling. Witnesses from England and elsewhere can easily testify from overseas via Zoom without the need to travel to Malaysia to testify in situ.

The Law Governing The Suit

[234] 1MDB's causes of action against White & Case are the tort of conspiracy to injure via unlawful means and dishonest assistance, both of which are governed by Malaysian law because the causes of action took place in Malaysia.

[235] The Expert Opinion of Jonathan Harris explains that under English law, 1MDB's claims against White & Case as pleaded in the Statement of Claim would be governed by Malaysian law in an English court. [See para [37] of Jonathan Harris KC's expert report at PDF 22, encl 70 (p 18)].

Malaysia Is The Forum That Has Real And Substantial Connections With The Action

[236] In my view, Malaysia is the forum that has real and substantial connections with the suit. 1MDB is incorporated in Malaysia and is a state-owned entity of the Federal Government of Malaysia. 1MDB's monies in Malaysia were misappropriated and siphoned out from 1MDB's accounts in Malaysia. 1MDB suffered the loss in Malaysia. The main players in the alleged fraud such as Najib Razak, Casey Tang, Kelvin and Vincent are Malaysians and the alleged conspiratorial acts took place in Malaysia.

[237] There is no need to go to Stage 2 analysis.

Decision

[238] For the reasons above, I dismiss encl 58 with costs of RM75,000.00 to be paid by White & Case to 1MDB subject to allocatur.