Q & M Enterprises Sdn Bhd v Poh Kiat
[2005] SGHC 155

Case Number : Suit 35/2005, RA 75/2005

Decision Date : 31 August 2005

Tribunal/Court : High Court

Coram : Andrew Phang Boon Leong JC

Counsel Name(s) : Lim Soo Peng (Lim Soo Peng and Co) for the plaintiff; Tan Siak Hee (S H Tan and Associates) for the defendant

Parties : Q & M Enterprises Sdn Bhd — Poh Kiat

Conflict of Laws – Natural forum – Forum non conveniens – Whether action commenced in Singapore courts should be stayed on ground Malaysian courts more appropriate forum – Applicable principles

Conflict of Laws – Natural forum – Forum non conveniens – Whether action may be stayed even where plaintiff claiming to be entitled to summary judgment – Whether considerations of international comity prevailing over possible availability of summary judgment to plaintiff – Order 14 Rules of Court (Cap 322, R 5, 2004 Rev Ed)

31 August 2005

Andrew Phang Boon Leong JC:

Introduction

1 The facts of the present case were simple, but they raised interesting points of law – especially with regard to the relationship between conflict of laws principles relating to the stay of actions on the one hand and those relating to the grant of summary judgments under O 14 ("O 14") of the Rules of Court (Cap 322, Rule 5, 2004 Rev Ed) on the other.

2 In this case, the plaintiff brought an action against the defendant for payment of a sum allegedly due on a written (and personal) guarantee ("the Guarantee") given by the latter to the former. The Guarantee was a simple and straightforward one. It was dated 24 April 2001 and reads as follows:

> In consideration of you entering into a Settlement Agreement ("Settlement Agreement") dated 24th April 2001 with Applied Components and Tools (M) Sdn Bhd (Co. No. 1955059-U) ("The Company") by way of your letter dated 24.4.2001 to the Company and the countersigned by the Company. I HEREBY GUARANTEE the payment by the Company to you, of each of the sum stipulated in the Settlement Agreement Provided Always that the Company shall have already defaulted in its payment of not less than three (3) of the consecutive instalments set out in the Settlement Agreement.

3 The plaintiff claimed that the Guarantee had been drafted by the defendant and had been signed by the defendant at the plaintiff's office in Singapore. However, the defendant vigorously disputed this claim, and claimed, instead, that he had signed the guarantee in Johor Baru, West Malaysia.

4 The plaintiff also asserted the following further facts (which he rather disingenuously, in my view, described in his written submissions as "not disputed"):

(a) Firstly, the plaintiff's operations as well as assets are located in Singapore.

(b) Secondly, the plaintiff's managing director who had dealt with the defendant in relation to the Guarantee is a Singaporean who resides in Singapore.

(c) Thirdly, the original copies of the Guarantee and settlement agreement, referred to in [2] above ("the Settlement Agreement"), as well as documents relating to the principal debt are in possession of the plaintiff in Singapore.

(d) Fourthly, the defendant is a Singaporean residing in Singapore, and his assets are also in Singapore. The plaintiff further alleged that the defendant held many directorships and was also a shareholder in many Singapore companies, as well as the managing director of a public-listed Singaporean company.

5 The defendant's version of the facts brings some balance to the overall picture:

(a) The plaintiff is in fact a Malaysian registered company which is engaged in the business of selling and distributing industrial plating chemicals. All relevant transactions and payments were entered into in Malaysia and, hence, the defendant argued that the plaintiff could not now lift the corporate veil by arguing that its operations were in fact in Singapore and that the plaintiff company itself was a mere remittance centre for the Singapore company. The plaintiff was in fact a properly constituted private limited company incorporated in Malaysia which had commenced legal proceedings against the principal debtor, Applied Components and Tools (M) Sdn Bhd ("ACT"), without any problems (these proceedings have in fact since been concluded: see para (n) below).

(b) ACT, the principal debtor, is a manufacturing company in Malaysia.

(c) Both the plaintiff and ACT have had a long and substantial business relationship.

(d) In fact, in so far as the present proceedings are concerned, the relevant transactions between the plaintiff and ACT were entered into in Malaysia. All relevant documents are also located in Malaysia.

(e) The defendant is the group managing director of Teamsphere Limited which owned Fine Components Pte Ltd which, in turn, owned a majority of the shares in ACT. The defendant, though, was never a director of ACT. The fact that the defendant is a Singaporean residing in Singapore is, the defendant argues, insufficient, *per se*, as a real and substantial connecting factor in the context of the present proceedings.

(f) ACT owed the plaintiff a total of RM1,289,988 as at 1 April 2001.

(g) ACT negotiated the Settlement Agreement with the plaintiff to pay it RM1,289,988 in 18 monthly instalments, with the first payment due on 10 September 2001.

(h) The Settlement Agreement was signed by the plaintiff in Singapore and sent to ACT in Malaysia, whereupon it was signed by ACT in Malaysia. This Settlement Agreement in fact constitutes the underlying transaction upon which the defendant's principal defences rest (see especially paras (l) and (m) below).

(i) The plaintiff requested that the defendant sign a personal guarantee for the sum stated

in para (f) above. This is the Guarantee which constitutes the nub of the present proceedings. As we have seen (at [3] above), there is some dispute as to where the defendant signed the Guarantee. The defendant claims to have signed it at a coffee house in Johor Baru, West Malaysia.

(j) On 11 December 2001, Teamsphere Limited sold all its shares in Fine Components Pte Ltd to Prudent Dimension Sdn Bhd.

(k) The defendant received, on 13 February 2004, a letter from the plaintiff which claimed that ACT had failed to pay all the 18 monthly instalments due. Such alleged default occurred in Malaysia and the cause of action against the defendant, so the argument runs, therefore also arose in Malaysia.

(l) The defendant subsequently obtained, from a former executive director of ACT, documents which purported to show invoices with respect to both the above guaranteed debts as well as purchases of goods by ACT from the plaintiff after the date of the Settlement Agreement. These formed the basis for the defendant's argument with respect to the rule in *Clayton*'s case (see generally [53]–[58] below) to the effect that the guaranteed debt had, applying this rule, been fully paid by ACT on 27 November 2002, and that there was therefore no basis for the present claim by the plaintiff against him.

(m) There was, according to the defendant, an alleged variation of the Settlement Agreement by the plaintiff to the detriment of the defendant. Hence, the defendant's liability as surety will, if this allegation is true, be discharged. The defendant also claims in this regard that he had at no time consented in writing to any variation of the terms of the settlement agreement.

(n) ACT was wound up by the Malaysian High Court on 24 February 2005 and its affairs, together with the company's documents, are now within the jurisdiction of the (Malaysian) Official Receiver.

(o) All the defendant's witnesses (comprising personnel from ACT) and documents are in Malaysia. If the witnesses are unable or refuse to attend court, the Malaysian court, so the defendant argues, would be in a much better position to compel their attendance.

(p) There is *no express choice of law clause* in *either* the Settlement Agreement *or* the Guarantee. The defendant has also obtained an expert opinion from Malaysian counsel to the effect that the proceedings are governed by the Malaysian Contracts Act.

(q) An action has in fact already been commenced by the defendant against the plaintiff in the High Court of Malaysia at Kuala Lumpur seeking, *inter alia*, a declaration that the Guarantee ought to be avoided and/or cancelled on the ground, *inter alia*, of misrepresentation. The plaintiff has filed a Defence in these proceedings.

6 The learned Deputy Registrar had in fact ordered that the present proceedings commenced by the plaintiff in the Singapore courts be stayed. I affirmed this decision and dismissed the plaintiff's appeal. The plaintiff is dissatisfied with my decision and has appealed. I now give the detailed grounds for my decision.

***Forum non conveniens* and stay of proceedings**

The Spiliada case

7 Counsel for both parties agreed that the governing decision in the present proceedings was that of the House of Lords in *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460 ("the *Spiliada* case").

8 The principles embodied in the *Spiliada* case are to be found in the following oft-cited summary by Lord Goff of Chieveley (at 476):

> (a) The basic principle is that a stay will only be granted on the ground of forum non conveniens where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, i.e. in which the case may be tried more suitably for the interests of all the parties and the ends of justice.
>
> (b) [I]n general the burden of proof rests on the defendant to persuade the court to exercise its discretion to grant a stay … It is however of importance to remember that each party will seek to establish the existence of certain matters which will assist him in persuading the court to exercise its discretion in his favour, and that in respect of any such matter the evidential burden will rest on the party who asserts its existence. Furthermore, if the court is satisfied that there is another available forum which is prima facie the appropriate forum for the trial of the action, the burden will then shift to the plaintiff to show that there are special circumstances by reason of which justice requires that the trial should nevertheless take place in this country.

9 It is clear beyond peradventure that the principles in the *Spiliada* case are now firmly part of the Singapore legal landscape. Indeed, in the Singapore Court of Appeal decision of *Brinkerhoff Maritime Drilling Corp v PT Airfast Services Indonesia* [1992] 2 SLR 776, Chao Hick Tin JA, delivering the judgment of the court, observed at 784, [35], as follows:

> Lord Goff, who delivered the judgment of the House [in the *Spiliada* case], to which the other four Law Lords agreed, restated the law (and in so restating, took into account the Scottish authorities as well) which is summarized in the third cumulative supplement to *Dicey & Morris on Conflict of Laws* (11th Ed) at para 393–395 as follows:
>
> (a) the basic principle is that a stay will only be granted on the ground of forum non conveniens where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, ie in which the case may be tried more suitably for the interest of all the parties and the ends of justice;
>
> (b) the legal burden of proof is on the defendant, but the evidential burden will rest on the party who asserts the existence of a relevant factor;
>
> (c) the burden is on the defendant to show both that England is not the natural or appropriate forum, and also that there is another available forum which is clearly or distinctly more appropriate than the English forum;
>
> (d) the court will look to see what factors there are which point to the direction of another forum, as being the forum with which the action has the most real and substantial connection, eg factors affecting convenience or expense (such as availability of witnesses), the law governing the transaction, and the places where the parties reside or carry on

business;

(e) if at that stage the court concludes that there is no other available forum which is clearly more appropriate it will ordinarily refuse a stay;

(f) if there is another forum which prima facie is clearly more appropriate the court will ordinarily grant a stay unless there are circumstances by reason of which justice requires that a stay should not be granted, and, in this inquiry the court will consider all the circumstances of the case. But the mere fact that the plaintiff has a legitimate personal or juridical advantage in proceeding in England is not decisive; regard must be had to the interests of all the parties and the ends of justice.

10 The *Spiliada* case has since been confirmed in a number of other decisions, including the Singapore Court of Appeal decisions of *Oriental Insurance Co Ltd v Bhavani Stores Pte Ltd* [1998] 1 SLR 253 and *PT Hutan Domas Raya v Yue Xiu Enterprises (Holdings) Ltd* [2001] 2SLR 49 ("the *PT Hutan* case").

11 One approach towards the application of the *Spiliada* case is to construe the decision as comprising two basic limbs. In the *PT Hutan* case, for example, Chao Hick Tin JA, who delivered the judgment of the court, observed thus (at [16]):

> *The Spiliada* was a case concerning the granting of leave under O 11 r 1(1) of the Rules of the Supreme Court to serve proceedings out of the jurisdiction. But the House of Lords held that the principles governing the grant of such leave were the same as those applicable to a stay of English proceedings. The main judgment there was delivered by Lord Goff. The correct approach which a court should take in such a case is as follows. The first stage is for the court to determine whether, prima facie, there is some other available forum, having competent jurisdiction, which is more appropriate for the trial of the action. The legal burden of showing that rests on the defendant. In determining that issue the court will look to see what factors there are which point in the direction of another forum as being the forum with which the action has the most real and substantial connection, eg availability of witnesses, the convenience or expenses of having a trial in a particular forum, the law governing the transaction and the places where the parties reside or carry on business. Unless there is clearly another more appropriate available forum, a stay will ordinarily be refused. If the court concludes that there is such a more appropriate forum, it will ordinarily grant a stay unless, in the words of Lord Goff, 'there are circumstances by reason of which justice requires that a stay should nevertheless not be granted. In this inquiry the court will consider all the circumstances of the case, including circumstances which go beyond those taken into account when considering connecting factors with other jurisdictions' (hereinafter referred to as 'the unless question' or 'unless proviso' as may be appropriate in the context). One such factor which would warrant a refusal of stay would be if it can be established by objective cogent evidence that the plaintiff will not obtain justice in the foreign jurisdiction. But the mere fact that the plaintiff has a legitimate personal or juridical advantage in proceedings in Singapore is not decisive; regard must be had to the interests of all the parties and the ends of justice. We would emphasis[e] that in determining the 'unless question' all circumstances must be taken into account, including those taken into account in determining the question of the more appropriate forum. However, in this stage of the inquiry the burden shifts to the plaintiff.

12 The views just set out suggest a two-stage process. However, in the paragraph immediately following, Chao JA observed thus (at [17]):

> Whether we consider the process contemplated by Lord Goff in *The Spiliada* to be a two-stage process or a one-stage process, telescoping two into one, as was suggested in the case *Charm Maritime Inc v Kyriakou* [1987] 1 Lloyd's Rep 433 at 447, *does not really matter.* The ultimate question remains the same: where should the case be suitably tried having regard to the interest of the parties and the ends of justice. [emphasis added]

13 As we shall see (at [20] and [23] below), counsel for the plaintiff in the present proceedings adopted a two-stage process or approach (see also *Dicey and Morris on the Conflict of Laws* (Sweet & Maxwell, 13th Ed, 2000) at p 385). As has just been pointed out, there is no impediment to adopting such an approach which is also consistent with the language utilised by Lord Goff in the *Spiliada* case (see [8] above and see also, by the same judge, the House of Lords decision of *Connelly v RTZ Corporation Plc* [1998] AC 854 at 871–872 ("the *Connelly* case")). However, as Chao JA pertinently emphasised, the "ultimate question" must always be borne in mind, and it is to ascertain "where should the case be suitably tried having regard to the interest of the parties and the ends of justice".

14 There is, of course, another (and *divergent*) line of authority in the Australian context, first enunciated in the Australian High Court decision of *Oceanic Sun Lines Special Shipping Co Inc v Fay* (1988) 165 CLR 197 ("the *Oceanic Sun Lines* case"). This last-mentioned decision contained a wide spectrum of views and was in fact decided by a bare three to two majority of the court itself. It has been the subject of not inconsiderable criticism (see, for example, Adrian Briggs, "Wider still and wider: the bounds of Australian exorbitant jurisdiction" [1988] LMCLQ 216 and, by the same author, "Forum Non Conveniens in Australia" (1989) 105 LQR 200), with whatever support being voiced by an ostensible minority only (see, for example, Peter Prince, "Bhopal, Bougainville and OK Tedi: Why Australia's *Forum Non Conveniens* Approach is Better" (1998) 47 ICLQ 573). However, the Australian position has since been confirmed by subsequent Australian High Court decisions – notably, in *Voth v Manildra Flour Mills Proprietary Limited* (1990) 171 CLR 538 and, most recently, in *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491. Indeed, in the last-mentioned case, the Australian position has only, it appears, been more firmly entrenched (see generally Adrian Briggs, "The Legal Significance of the Place of a Tort" [2002] OUCLJ 133). Be that as it may, the Singapore Court of Appeal, in *Eng Liat Kiang v Eng Bak Hern* [1995] 3 SLR 97 (affirming the decision of Judith Prakash J in [1995] 1 SLR 577) ("*Eng Liat Kiang*"), rejected the argument that the principles in the *Spiliada* case should be disregarded and those in the *Oceanic Sun Lines* case be adopted instead. LP Thean JA, delivering the judgment of the court, observed thus (at 105, [26]):

> On authority and on principle we cannot agree [with the argument]. The *Spiliada* has been considered and approved in *Brinkerhoff* and we can see no reason for departing from that authority. … *It has a more liberal approach which cut down local parochialism as regards judicial adjudication and attaches greater importance to consideration of international comity*. [emphasis added]

15 Indeed, the view *against* local parochialism is firmly established in the case law of other jurisdictions as well – most notably, perhaps, in England (see, for example, the House of Lords decisions of *Amin Rasheed Shipping Corporation v Kuwait Insurance Co* [1984] AC 50 at 67 and *The Abidin Daver* [1984] AC 398 at 411).

16 This view is also reiterated and underscored, in the academic literature, by an eminent expert in the field, who has put it in no less direct a fashion: Prof Adrian Briggs referred to the majority decision in the *Oceanic Sun Lines* case as one that could only be characterised as "that of always letting the plaintiff have his way, or that of naked and open chauvinism" and which was therefore "unacceptable" (see Briggs, "Wider still and wider: the bounds of Australian exorbitant jurisdiction"

([14] *supra*) at 222). In the Australian context itself, Prof Michael Pryles, in commenting on the same decision, observed in a similar vein (see Michael Pryles, "Judicial Darkness on the Oceanic Sun" (1988) 62 ALJ 774 at 786–787; see also at 791):

> Teachers of Conflict of Laws or Private International Law often refer to the homeward bound trend of judges. Judges feel most comfortable with their own law and formerly there was a view that the local courts dispensed superior justice to that of foreign courts. But in an interdependent world such as exists in the latter part of the twentieth century there must be a degree of international respect and comity. Local parochialism in the legal sphere can be as disruptive to the international system as political or economic parochialism. In an international legal dispute it does not follow that a court which has jurisdiction, sometimes under exorbitant bases should, and must, exercise that jurisdiction. Countervailing considerations such as the lack of any significant connection between the litigation and the forum may dictate that the litigation should be determined in a different venue. It is not answer to this simply to assert that local justice is superior for this will be disruptive to the international system and will, in the end, harm all countries, including the forum. We have to co-exist in an interdependent world and part of that co-existence requires a tolerance towards foreign legal systems and courts and an ability to recognise that some actions which may be litigated in the local forum do not properly belong there. The principle of forum non conveniens is concerned with such cases and is a necessary device to enable a court to stay a proceeding, of which it is seized, where it is inappropriate for the court to hear the case.

17 And, in a leading textbook in the field, this is what the learned authors have to say when reviewing developments stemming from the *Spiliada* case (see Peter North & J J Fawcett, *Cheshire and North's Private International Law* (Butterworths, 13th Ed, 1999) at pp 346–347 (footnotes omitted)):

> The concern to reduce the weight to be attached to the advantage to the claimant is a development to be welcomed. Although there has been considerable judicial condemnation of the practice of forum shopping, it appears in the past that the more that the claimant had to gain from this practice the more likely he was to be allowed to continue his action in England. *This may seem curious, but it has to be borne in mind that there is a public interest in allowing trial in England of what are, in essence, foreign actions. When foreigners litigate in England this forms a valuable invisible export, and confirms judicial pride in the English legal system. The emphasis in the House of Lords is now very much on chauvinism being replaced by judicial comity. However, the extent to which this new spirit has filtered down to lower courts is questionable. In many cases the courts have concluded that the interests of justice demand that a stay be refused, even though the clearly most appropriate forum is abroad.* As has been seen, there are numerous recent examples of cases where English courts have held that there would be positive injustice in trial abroad or an important advantage to the claimant in trial in England. [emphasis added]

18 The views just quoted are, if I may say so, commendably balanced. What is clear, however, is that there can no longer be that parochialism which is now wholly anomalous in a thoroughly interconnected world. That this is acknowledged by a leading work from a jurisdiction that literally gave the Commonwealth (including Singapore) its initial legal foundation is, in my view, both significant and timely. As significant is the warning that comity is to be observed in deed, and not merely in word.

19 This point from international comity is an extremely important one, and I shall therefore return to it later. Indeed, this point, as important as it was when *Eng Liat Kiang* was decided, has, as we

shall see, become even more important. This merely cements, further, the already well-established status of the *Spiliada* case in the Singapore context. Hence, counsel for the plaintiff in the instant proceedings began his submissions with the focus on the principles embodied in the *Spiliada* case itself – an approach that was, in my view, entirely appropriate and correct.

Analysis

Introduction and the importance of international comity

20 It is highly significant, in my view, that counsel for the plaintiff *conceded* (at *both* hearings before me) that his client could not possibly succeed under the first limb in the *Spiliada* case.[note: 1] These concessions are, in fact, all the more telling as counsel for the plaintiff had himself argued that there were factors connected with Singapore as well. It might be added that it would be an understatement to say that such concessions are in fact not without legal significance (see, for example, the *Connelly* case ([13] *supra*) at 864 and the *Bayer Polymers* case ([42] *infra*), where there were concessions along similar lines).

21 It is, indeed, clear that the majority of the real and close connecting factors were located in *Malaysia*. These include the underlying transaction upon which the defendant is basing his defences, the material witnesses as well as the documents of ACT (which had, as already mentioned, since been wound-up as a result of proceedings initiated by the plaintiff itself in Malaysia). It is important to note that it is not the mere literal or factual geographical connections that are important (which the plaintiff raised in the context of Singapore). There must be legal significance, so that the mere number of geographical connections *per se* is not conclusive by any means. Besides, the concessions by counsel for the plaintiff also militate against the success of his case.

22 In the circumstances, therefore, I found that the Malaysian courts were clearly more appropriate for the trial of the action. It is also significant, in my view, that there are substantial similarities (and even complete overlaps) between the relevant principles of Singapore and Malaysian law, respectively.

23 Not surprisingly, therefore, counsel for the plaintiff sought to rely, instead and in the main, on the *second* limb in the *Spiliada* case. In this regard, and in accordance with the principles enunciated by Lord Goff in that case itself, the burden of proof was clearly on the plaintiff. In particular, counsel for the plaintiff argued that if there was no arguable defence to the action, then, save in an exceptional case, there being no issues to be tried either before the Singapore or foreign (here, Malaysian) courts, judgment ought to be given for the plaintiff.

24 What, in effect, counsel for the plaintiff was arguing was this: That whenever there was a situation before the local courts where summary judgment would be granted under O 14, the action concerned should *never* be stayed and that judgment *must* be given for the plaintiff. What this amounted to, in substance, was that an O 14 situation in favour of the plaintiff would *always trump* considerations of comity. This appeared to me to be wrong in principle, particularly given the increased and increasing, interconnectedness of nations and the need, more than ever before, to be sensitive to considerations of comity – a point which has already been noted above (at [18]–[19]), and which (because of its signal importance, requires further elaboration at this juncture.

25 The importance of international comity cannot be underestimated. The domestic courts of each country must constantly remind themselves of this point – if nothing else, because of the natural tendency towards favouring domestic law over foreign law. In days of yore, the domestic legal system was probably the main – if not sole – focus simply because in those days, jurisdictions on the

whole were less interconnected. So it is understandable if the focus was on the domestic law, simply because the law of foreign jurisdictions was, in the nature of things then, rarely raised. This is no longer the case. Nevertheless, it ought to be emphasised that the signal importance of the domestic legal system cannot be gainsaid either. Extreme positions on either side of the legal spectrum ought to be avoided. For example, international comity ought *not* to be accorded if to do so would offend the public policy of the domestic legal system (here, of Singapore). However, that having been said, legal parochialism must also be eschewed. Such tunnel vision is, as I have mentioned, no longer an option. It will only cause the legal system adopting such a limited vision to atrophy, even in the medium-term, not to mention the long-term. This will, of course, have detrimental effects on the broader social structures, of which the law is an integral part.

26 In the present case, one can argue that the case for international comity ought to be one that is, to use a familiar Latin phrase that has not gone out of style, *a fortiori*. The foreign legal system concerned is the Malaysian legal system. Common geographical, political and even legal ties in the past (witness, as just one particular instance, the development of the law in the Straits Settlements, of which Singapore was a part) support the proposition just made.

27 Fortunately, as we shall see in a moment, international comity has in fact been preserved in so far as fact situations such as those which exist in the present proceedings are concerned – by way of Singapore Court of Appeal decisions which I will be considering in a moment.

Forum non conveniens versus exclusive jurisdiction clauses

2 8 Counsel for the plaintiff argued, as we have seen, that there ought not to be a stay of proceedings in the instant case because the second limb in the *Spiliada* case operated in his client's favour. In particular, so the argument ran, this particular limb was triggered by virtue of the fact that the defendant had no arguable defence to his client's claim.

29 It should be noted that there was no exclusive jurisdiction clause involved in the present proceedings. In this regard, in the Singapore Court of Appeal decision of *Golden Shore Transportation Pte Ltd v UCO Bank* [2004] 1 SLR 6 ("the *Golden Shore Transportation* case"), Chao Hick Tin JA, who delivered the judgment of the court, was of the view (at [34]) that in that case, where an exclusive jurisdiction clause was in fact present, the plaintiff's "burden [was] more than just establishing that Singapore is the more convenient forum to hear the case". However, and this is the critical point for the purposes of the present case, the learned judge proceeded to observe (*ibid*) that "[t]he principles applicable to a case involving an exclusive jurisdiction clause are *different from* those applicable to determining *forum non conveniens*" [emphasis added].

30 Since an initial draft of the present judgment was prepared, the Singapore Court of Appeal delivered, very recently, a judgment which confirmed its views set out in the preceding paragraph and therefore negatives the argument tendered by counsel for the plaintiff in no uncertain terms. This is one of those rare occasions where a decision of a higher court is rendered in the interim period and is directly in point, and which clearly confirms, beyond peradventure, the decision already made. I am referring to the decision of *The Rainbow Joy* [2005] SGCA 36 (affirming [2005] 1 SLR 589). Chao Hick Tin JA, who delivered the judgment of the court observed (in the key passage) thus (at [27]):

> Admittedly, while the circumstances which the court should take into account in determining whether an action commenced in Singapore should not be stayed in spite of an exclusive jurisdiction clause are, to some extent, similar to those which the court would take into consideration in determining whether the action should be stayed on the ground of *forum non conveniens*, they are *not the same*. In weighing the balance of convenience under the doctrine

of *forum non conveniens*, *the issue of whether there is a defence to the claim is not a relevant consideration as the court should not be required to go into the merits*. This is because the juridical basis of a stay based on *forum non conveniens* is different from that of a stay based on an exclusive jurisdiction clause. Under the doctrine of *forum non conveniens*, the object is in determining which forum is the more appropriate forum. On the other hand, for a party to be excused from his commitment to the exclusive jurisdiction clause he must show exceptional circumstances, and the averment that the defendant has no defence to the claim could constitute exceptional circumstances to enable the court to excuse the appellant from complying with the jurisdictional clause. [emphasis added]

31 This view is, in fact, echoed by a leading textbook in the area: see Adrian Briggs & Peter Rees, *Civil Jurisdiction and Judgments* (LLP, 3rd Ed, 2002) at para 4.25.

32 It follows, from the principles laid out above by Chao JA in both the *Golden Shore Transportation* case and *The Rainbow Joy* that the argument by counsel for the plaintiff, to the effect that there was no defence to his client's action, must necessarily fail. Put succinctly, the present proceedings involve the issue as to whether the action should be stayed on the ground of *forum non conveniens*. Further, there is no exclusive jurisdiction clause present. In the circumstances, and in the words of the learned judge in the latter case at [30], "[i]n weighing the balance of convenience under the doctrine of *forum non conveniens*, the issue of whether there is a defence to the claim is *not a relevant consideration as the court should not be required to go into the merits*" [emphasis added]. This is sufficient to resolve the present decision in favour of the defendant.

33 The decisions in the *Golden Shore Transportation* case and (especially) *The Rainbow Joy*, which are binding on the present court, are in fact consistent with the other reasons that had prompted me to dismiss the appeal in the first instance (see, for example, the distinction between jurisdiction and substantive merit, below at [38]). It is to those reasons that I now turn. Indeed, the analysis which follows merely underscores the inherent strength of the principles set out in both the *Golden Shore Transportation* case and, in particular, *The Rainbow Joy*.

Forum non conveniens and O 14

No "backdoor" to summary judgment under O 14

34 One clear difficulty I had with the argument proffered by counsel for the plaintiff to the effect that there was no defence to the present action was this. What was before me was the issue of whether or not the proceedings in the Singapore courts should be stayed. It was not the task of the present court to decide whether or not the plaintiff was entitled to summary judgment under O 14. Indeed, under the present Rules of Court, it was clear that all the prerequisites (as to which see generally *Singapore Civil Procedure 2003* (Sweet & Maxwell Asia, 2003) at para 14/1/4) for the court to even consider an application for summary judgment under O 14 had not been satisfied. By relying on the second limb in the *Spiliada* case, counsel for the plaintiff was, in effect, seeking to obtain summary judgment by the "backdoor". I do not think that this was counsel's intention, but the court deals with the objective factual as well as legal scenarios and this was, in the final analysis, precisely the pith and marrow of counsel for the plaintiff's arguments in this particular regard. Indeed, it is significant, in my view, that the second limb in the *Spiliada* case has invariably centred on injustice in the quite different context where the plaintiff or plaintiffs would otherwise fail to establish an otherwise valid claim because of the lack of financial assistance as well as expert scientific evidence in a complex case in the foreign court, whereas appropriate resources in the form of legal aid or the benefit of a conditional fee arrangement were available in the domestic court (see, for

example, the House of Lords decisions in the *Connelly* case and *Lubbe v Cape Plc* [2000] 1 WLR 1545 (the latter case concerning group litigation); the position with regard to conditional fee arrangements, it should be noted in passing, is of course quite different in the Singapore context).

35 It is significant, in my view, that the position in so far as applications for summary judgments under O 14 in Singapore are concerned is now quite different from that in England. It is significant because counsel for the plaintiff cited, in support of his argument that a stay of proceedings ought to be granted if there was no arguable defence, a number of *English* cases. In *England*, an application for summary judgment can be filed at *any* time and, hence, the plaintiff need not wait till the Defence is filed before filing an O 14 application. If so, and if the defendant then applies for a stay of proceedings, it is possible for an *English* court to hear both the O 14 application *and* the application for stay of proceedings *at the same time*. It is clear that, unlike the Singapore position, the English position does *not* entail any "backdoor" application in so far as O 14 is concerned. As we have just seen, *both* applications (for O 14 judgment and stay of proceedings) are heard by the court *at the same time* (practically speaking, though, one application must of course be, literally, heard first: see, for example, *per* Judge Raymond Jack QC in the English High Court decision of *Merill Lynch, Pierce Fenner & Smith Incorporated v Raffa,* The Times, 14 June 2000 (unreported; full transcript available on Lexis)).

36 Turning to the Singapore position in so far as an O 14 application is concerned, it is clear that, since 2002, such an application cannot be filed until the Defence is served (see the Rules of Court (Amendment No 4) Rules 2002 (S 565/2002)). Tay Yong Kwang J, in the Singapore High Court decision of *United Engineers (Singapore) Pte Ltd v Lee Lip Hiong* [2004] 4 SLR 305 at [23], explained the rationale behind the amendment as turning on the need to facilitate the litigation workflow by allowing plaintiffs to "pinpoint the specific defences of defendants" (see also Jeffrey Pinsler, *Singapore Court Practice 2003* (LexisNexis, 2003) at p vi). Hence, in the context of the facts of the present proceedings, no application for an O 14 judgment could in fact be filed by the plaintiff. In other words, since an O 14 application cannot be made before the filing of the Defence, if the defendant decides (as is the case in the present proceedings) to apply for a stay of proceedings, then it is procedurally impossible for the plaintiff to file an O 14 application unless the application for a stay of proceedings is dismissed and the defendant has then to file its Defence. Indeed, in the Singapore Court of Appeal decision of *Samsung Corp v Chinese Chamber Realty Pte Ltd* [2004] 1 SLR 382 ("the *Samsung Corp* case"), it was emphatically confirmed that while a stay application is pending, no application under O 14 should be made. This buttresses my view above to the effect that the plaintiff ought not to be permitted to obtain what is, in effect, a summary judgment under O 14 by wholly indirect means.

37 But what if the defendant's application for a stay of proceedings was motivated precisely by an illegitimate intention to stymie the plaintiff's application for summary judgment? In other words, what if the defendant calculatingly applied for a stay before filing his Defence in order to prevent the plaintiff from being even legally eligible to apply for summary judgment?

38 It is important to emphasise, at this juncture, that the issue of jurisdiction is, in principle, quite different from that of substantive merit. It is true that both are, in the final analysis, related. However, it is important to realise that they are, nevertheless, distinct issues (and see *per* Lord Goff in the *Connelly* case ([13] *supra*) at 871). Hence, the issue as to whether or not proceedings in an action should be stayed deals with jurisdiction and is logically prior to that dealing with the substantive merits (which would include, *inter alia*, questions relating to summary judgment under O 14). This is now established law in the Singapore context (see, for example, the Singapore Court of Appeal decision of *The Jarguh Sawit* [1998] 1 SLR 648, the Singapore High Court decision of *Yeoh Poh San v Won Siok Wan* [2002] 4 SLR 91, and the *Samsung Corp* case). Indeed, in *The Jarguh Sawit*, Karthigesu JA, delivering the judgment of the court, observed thus (at [30]):

> [W]hether or not a court has jurisdiction is, of necessity, a question logically prior to the substantive dispute of the parties. Unless and until a court is properly seized, it cannot adjudicate on the matter. If the appellants were right to characterise a dispute over jurisdiction as a substantive issue, and that they were entitled to raise it as a substantive defence, then they would in effect be arguing this at trial: 'Our case is that this court has no jurisdiction to decide substantive issues; could you then please give a ruling on a substantive issue?' The defect in logic is self-apparent. Thus, our law provides that a party disputing jurisdiction may appear before the court to argue the question of jurisdiction (which we hold to be a procedural issue) without thereby submitting to the court's jurisdiction to determine substantive issues.

39 To elaborate, having regard to the broader issue of fairness in general and the specific fact situation in the present proceedings in particular, in so far as the issue of jurisdiction is concerned, if the defendant's case can pass muster under the principles laid down in the *Spiliada* case, it seems to me that it has made out an at least initial case that fairness is on its side. This may only be from a jurisdictional standpoint but is nevertheless a point that ought not to be gainsaid. I should add that even if the defendant is successful in its action for a stay of proceedings in the Singapore courts, its case still has to pass muster substantively – albeit in a foreign court. The defendant cannot, in other words, escape the anvil of substantive scrutiny. If it turns out that the most appropriate jurisdiction to test the merits of both the plaintiff's and the defendant's respective cases is one other than the Singapore courts *according to the rules of Singapore law*, then the plaintiff must bring its case in the foreign court instead. I should add that if it turns out that the foreign court concerned operates a system of law that flies in the face of all accepted principles of justice acknowledged by courts in other jurisdictions (including Singapore), it would very probably be the case that the second limb in the *Spiliada* case would operate to torpedo the defendant's arguments for a stay of proceedings in any event. At this juncture, there is a confluence and consistency between both jurisdiction and substantive merits as well as between procedure and substance. This is what makes the entire enterprise of law a holistic, rational as well as principled process.

40 It is noteworthy that, *even in the English context* which (as we have seen) is now quite different from that which obtains in Singapore in so far as applications under O 14 for summary judgments are concerned, the views expressed in *Civil Jurisdictions and Judgments* ([31] *supra*], a leading textbook in the area, are that the argument that the defendant has no defence ought to be viewed with caution. In this regard, the following passage from that work at pp 276–277 is of crucial importance and is therefore set out in full as follows:

> If the claimant alleges that the defendant has no defence to the claim, and is seeking a stay only to harass the claimant in the hope that he will abandon the claim, the court may take the view that the defendant does not seriously seek a trial in the foreign court, and that it would on that account be wrong to stay proceedings. On some occasions the claimant has sought to bolster his contention by applying for summary judgment on the *same date* as the hearing of the stay application. *But there is good reason for a court to be cautious before acting on its impression that the defendant has no defence.* If the motives of the defendant are disreputable, this may be a contributory factor why a stay should be withheld. *But it is wrong to contend that, just because the claimant would have a clear and summary victory in England, that there is no defence to the claim. Another court may apply a different choice of law rule, or may admit different evidence, or may place the burden of proof in a different place; or may for a variety of reasons conclude that the defendant has an arguable or good defence. In such a case it is submitted that it would be inappropriate for an English court to rush to conclude that its assessment of who will win at trial is the only tenable one; the question of who will win may well be affected by the decision where the case is to be fought. To conclude that, because the claimant is going to win, there is no issue as to where the natural forum might be is to put the*

cart before the horse. [emphasis added]

41 However, as we have seen, the Singapore position is, in any event, quite different from the English position. Nevertheless, the views just quoted serve to buttress the approach adopted in the present judgment.

42 I also note that the decision relied upon primarily by counsel for the plaintiff, a first instance judgment from Hong Kong in *Bayer Polymers Co Ltd v The Industrial and Commercial Bank of China, Hong Kong Branch* [2000] 1 HKC 805 ("the *Bayer Polymers* case"), concerned a fact situation similar to that which one might find in England in so far as an application under O 14 is concerned. Further, it was one which did (in contrast to the present case) raise concerns about the justice and impartiality of the foreign tribunal (in that case, the PRC court). In particular, in that case, Stone J expressed the following view towards the end of his judgment at 811:

> I emphasise here that in this judgment I make no criticism of the Chinese legal system. But what I do take into account in the evidence filed on this application are the Working Reports of the Supreme People's Court, which are frank and open reviews of difficulties which have arisen in the legal system and which are in the course of being rectified.

43 It is clear, in this last-mentioned case, that no such problems arise in the context of the Malaysian courts. Indeed, one could argue that the situation was probably quite the contrary (see [22] above).

44 In any event, as we have seen (at [25]–[26] above), the maintenance of international comity is of no mean significance. In this regard, the following observations by Chao Hick Tin JA, delivering the judgment of the court in the Court of Appeal decision of *The Hung Vuong-2* [2001] 3 SLR 146 at [27] are particularly apposite:

> We must point out at once that it is not for this court or any court in Singapore to pass judgment on the competence or independence of the judiciary of another country, all the more so of a friendly country. Comity between nations would be gravely undermined if such a wholly invidious pursuit is embarked upon. We have to disregard entirely such arguments. Equally it is not for this court to say whether the maritime law of Vietnam is sufficiently developed, especially when the parties themselves had agreed that Vietnam law would apply to the [bill of lading]. [emphasis added]

45 Counsel for the plaintiff did, however, attempt to argue that it would be quicker to have the issue resolved in the Singapore courts. As I shall point out below, it did not seem to me to be clear, *in any event*, that the plaintiff was entitled to summary judgment under O 14. More importantly, the second limb of the *Spiliada* case, as I have already pointed out above (at [34]), cannot – and ought not to – be a legal peg on which to hang an application for summary judgment. Even more importantly, the convenience that would accrue to the plaintiff cannot possibly justify such an indirect means of obtaining summary judgment. The Singapore courts are not – and cannot be – a convenient means for obtaining (here, summary) judgment just because the plaintiff is of the view that it would take a longer time to obtain judgment in the foreign court. This is especially the case where (as already pointed out above and as conceded by counsel for the plaintiff himself) the relevant connecting factors actually point towards the foreign court.

46 It is true, however, that Stone J did also state that it was sufficient for his decision that the defendant in the *Bayer Polymers* case had not demonstrated that it had an arguable defence. Counsel for the defendant in that case also cited the English High Court decision of *Adria Services YU*

v Grey Shipping Company Limited (Unreported, Folio 212 of 1993), where Clarke J's (as he then was) views were relied upon by Stone J in the *Bayer Polymers* case (he also cited Clarke J's decision in *Standard Chartered Bank v Pakistan National Shipping Corporation* [1995] 2 Lloyd's Rep 365). I have, with respect, to disagree with such an approach for the reasons I have given above.

47 To recapitulate, the Singapore position is different from the English position (see [35]–[39] above). In any event, a cautious approach is adopted, *even under English law* (see [40] above). The *Bayer Polymers* case, as I have already noted, appears to have encompassed the English situation although there was in fact no O 14 application before the court itself.

48 More importantly, it bears repeating that the present case did *not* relate to an exclusive jurisdiction clause. As the Singapore Court of Appeal emphatically put it in both the *Golden Shore Transportation* case ([29] *supra*) and (especially) *The Rainbow Joy* ([30] *supra*), where situations involving *exclusive jurisdiction clauses* are concerned, the argument to the effect that there is no arguable defence is relevant. In *contrast, however,* where (*as in the present case*) *no* such clause is present, *the argument that there is no arguable defence is not even relevant to begin with* (see [32] above). Looked at in this light, counsel for the plaintiff's rather vigorous reliance in the present proceedings on the Singapore Court of Appeal decision of *The Jian He* [2000] 1 SLR 8 is misconceived as that case related to a situation concerning an exclusive jurisdiction clause (see also the Singapore Court of Appeal decisions of *The Hung Vuong-2* ([44] *supra*) and *The Hyundai Fortune* [2004] 4 SLR 548). This important distinction was not, with respect, in fact considered by Stone J in the *Bayer Polymers* case.

49 Further, as I have pointed out above (at [42]), it seemed to me that Stone J was, in the *Bayer Polymers* case, also heavily influenced by the possible injustice that might result to the appellant in that case if the action concerned was heard in the foreign court. As I have also pointed out, this is clearly not the situation in the present proceedings.

The probable failure of the O 14 application in any event

50 I also found, in any event, that it was probably the case that the defendant had raised sufficient triable issues before me and that the plaintiff was, consequently, probably not, in my view, entitled to summary judgment under O 14 in the first instance.

51 Given that this was not the focus of the present proceedings, I was reluctant to canvass the various issues with regard to the issue of summary judgment, and hence the use of the word "probably" in the preceding paragraph. However, because counsel for the plaintiff's argument with respect to the issue of the stay of the action was so inextricably connected with his argument with respect to the issue of summary judgment, I was of the view that it was appropriate, in these exceptional circumstances, to consider the latter issue as well – at least on a tentative basis.

52 Indeed, the concern as to whether or not the plaintiff had, as his counsel had strenuously argued, a compelling case under O 14 was the primary reason that prompted me to accede to counsel for the plaintiff's request for further arguments. Hearing the further arguments by counsel for both parties merely served to reinforce my view at the original hearing that the defendant had raised a number of issues of fact that ought to go to trial.

53 There was, in the first instance, a rather vigorously disputed point of law. This turned on the applicability of the rule in *Devaynes v Noble* (1816) 1 Mer 572; 35 ER 767 (popularly known as "the rule in *Clayton*'s case"), which counsel for the defendant attempted to pray in aid.

54 Prof Roy Goode has succinctly described this rule as follows (see Roy Goode, *Commercial Law* (LexisNexis UK, 3rd Ed, 2004) at p 636):

> This very important rule says that unless otherwise agreed between the parties, and in the absence of contrary appropriation by either at the time of payment, sums paid to the credit of a current account are to be applied in discharge of the indebtedness in the order in which this was incurred, so that the earliest debit item is to be deemed settled first.

55 Further, although counsel for the plaintiff argued vigorously that the rule in *Clayton*'s case was not applicable outside a banker-customer relationship, it was by no means clear that this was a clearly established point. In particular, in the decision he relied upon, that of the English Court of Appeal in *Barlow Clowes International Ltd v Vaughan* [1992] 4 All ER 22, Woolf LJ (as he then was) expressed the view (at 35) that "*normally* the rule in *Clayton's Case* has to be applied to govern the respective interests of banker and his customer in a bank account" [emphasis added]. This would appear to suggest that there might be at least exceptional situations where the rule concerned would apply outside the banker-customer relationship. This was a point of law that was outside my remit but should, I would imagine, have to be ruled upon by the court deciding the substantive merits of the instant case. That seemed to be a reason, in and of itself, why summary judgment would probably not be granted in favour of the plaintiff.

56 It is true, though, that the rule in *Clayton*'s case has invariably been applied in the context of bank accounts. This is probably due to the fact that such accounts are, by their very nature, running accounts that are, *ceteris paribus*, ideal situations for the operation of this particular rule. However, it is important to note that bank accounts also involve, again by their very nature, *a debtor-creditor relationship*. In this respect, a debtor-creditor relationship could, of course, exist *outside* the banking context. In other words, the former is the genus, of which the latter (in the form of a banker-customer relationship) is a species. The significance of this last-mentioned point is this: If, *outside* the banking context, a debtor-creditor relationship can be shown to exist *and* it can be further shown that such a relationship entails a *running or current account*, might it be possible, then, to argue for the application of the rule in *Clayton*'s case? This is, in fact, one possible interpretation of the situation in the present proceedings. Indeed, as we have seen, counsel for the defendant was in fact attempting to apply the rule in *Clayton*'s case to the facts at hand. It is true that the weight of precedent, as I have just alluded to, appears to militate against this proposed interpretation and, more importantly, apparent extension of the rule in *Clayton*'s case (see, for example, the English Court of Appeal decision of *Barlow Clowes International Ltd v Vaughan* (([55] *supra*), which was, as we have seen, in fact relied upon by counsel for the plaintiff in the instant case) as well as the English Court of Appeal decision of *In re Diplock* [1948] Ch 465 at 555). Indeed, it has been observed that "[t]he modern approach in England has generally not been to challenge the binding nature of the rule [in *Clayton*'s case] but rather to permit it to be distinguished by the reference to the facts of the particular case" (*per* Lindsay J in the English High Court decision of *Russell-Cooke Trust Co v Prentis* [2003] 2 All ER 478 at [55]). This may be due to the fact that a *clear* situation of a current or running account is to be found most commonly and definitively in the context of a banking account. However, it would appear that the real reason for the apparent judicial limitation of the rule in *Clayton*'s case relates to its perceived arbitrariness. But once it is acknowledged that this rule is not a substantive rule of law as such but, rather, an evidential presumption and no more (see, for example, *per* Lord Atkinson in the English House of Lords decision of *Deeley v Lloyd's Bank, Limited* [1912] AC 756 at 771), the misgivings about the rule itself may well diminish, or even vanish. Indeed, much of the dissatisfaction with the rule has stemmed from its attempted application in the trust context, where it has generally been felt that a distinction ought to be drawn between the proprietary aspect (principally in relation to the issue of tracing) and a debtor-creditor situation (see, for example, the oft-cited article by D A McConville, "Tracing and the Rule in *Clayton*'s case" (1963)

79 LQR 388; see also the extremely comprehensive survey and analysis by Campbell J in the New South Wales Supreme Court decision of *Re French Caledonia Travel Service Pty Ltd* (2003) 204 ALR 353, as well as the English High Court decision of *Commerzbank Aktiengesellschaft v IMB Morgan Plc* [2004] EWHC 2771 and the Ontario Court of Appeal decision of *Re Ontario Securities Commission and Greymac Credit Corp* (1987) 30 DLR (4th) 1).

57 In the circumstances, therefore, the issue pertaining to a possible broader application of the rule in *Clayton*'s case is still at least probably open for legal argument – in these very proceedings themselves, provided that the defendant can demonstrate to the satisfaction of the court that there *was* in fact a running or current account between the defendant and the plaintiff. It would seem that this is a legal issue that is not at all trivial. On the contrary, if the court considers it, there would be a definitive ruling in the Singapore context. This would be all to the good even if the court concerned decides that the existing authorities suggesting that the rule in *Clayton*'s case ought not to apply beyond the banking context are also to be applied in the local context. Indeed, the court might even decide to rule more harshly on the legal status of the rule itself, perhaps even going beyond the criticisms found in the present English case law, as briefly alluded to above. It is interesting that even counsel for the plaintiff himself admitted that this particular issue ought to be ruled upon by the court, as evidenced by his response to a question to this effect by the court:[note: 2]

> PC [Plaintiff's counsel]: [*Clayton*'s] case doesn't apply here.
>
> Ct: Not clear that [*Clayton*'s] case is definitely not applicable. Is this not also another issue that has to be ruled on by the court?
>
> PC: Yes.

58 I should add that there is at least one local Privy Council decision where the rule in *Clayton*'s case was in fact canvassed in a *non*-banking context. This was the decision of *The Firm of A M K M K v M Rm Perianan Chettiar* [1955] MLJ 32 (affirming the Court of Appeal of the Federation of Malaya in [1952] MLJ 195 which affirmed, in turn, the first instance decision of Abbott J in [1951] MLJ 182), which related to an action by one moneylender against another moneylender with respect to dealings between them on current account, and where the rule in *Clayton*'s case was in fact applied. It may well be the case that this decision – and the more general argument for the application of this rule – may not be of assistance to the defendant in the present case, in the final analysis (*cf* the House of Lords decision of *Cory Brothers and Company, Limited v The Owners of the Turkish Steamship "Mecca"(The Mecca)* [1897] AC 286, the English Court of Appeal decision of *In re Sherry, London and County Banking Company v Terry* (1884) 25 Ch D 692 and the English High Court decision of *In re British Red Cross Balkan Fund, British Red Cross Society v Johnson* [1914] 2 Ch 419). I also note, however, that the rule has been embodied, statutorily, in s 62 of the Malaysian Contracts Act (and see generally the Malaysian Federal Court decision of *Heng Cheng Swee v Bangkok Bank Ltd* [1976] 1 MLJ 267). The substantive legal issue raised by counsel for the defendant is not within the purview of the present proceedings. However, it does appear, as I have already noted, that it is not so utterly lacking in foundation as counsel for the plaintiff had wanted me to believe.

59 Nevertheless, it is clear that, even if I leave out of consideration the present issue, the defendant still succeeds based on the grounds which I have already set out earlier in this judgment (see generally at [28]–[33] above).

60 However, could it be argued that I ought, in any event, to have resolved this issue pursuant to O 14 r 12 of the Rules of Court, which reads as follows:

Determination of questions of law or construction of documents (O. 14, r. 12)

12. —(1) The Court may, upon the application of a party or of its own motion, determine any *question of law or* construction of any document arising in any cause or matter where it appears to the Court that —

(*a*)such question is suitable for determination without a full trial of the action; and

(*b*) such determination *will fully determine* (subject only to any possible appeal) the entire cause or matter *or any claim or issue therein*.

(2) Upon such determination, the Court may dismiss the cause or matter or make such order or judgment as it thinks just.

(3) The Court shall not determine any question under this Order unless the parties have had an opportunity of being heard on the question.

(4) Nothing in this Order shall limit the powers of the Court under Order 18, Rule 19, or any other provision of these Rules.

[emphasis added]

61 It is arguable that O 14 r 12 would apply in the context of the present issue, dealing as it does with whether or not the rule in *Clayton*'s case is applicable in the context of a current or running account between a debtor and creditor *not* involving a bank account. *However*, there is at least one obstacle to the successful invocation of this provision (and see generally *Civil Procedure 2003* (Sweet & Maxwell, 2003) at para 14/12/2).

62 Even if I were able to determine this issue of law, it would *not* "fully determine" the particular issue concerned, as there remained, in *addition*, the *factual* inquiry as to whether or not the plaintiff and defendant in the present proceedings had a current or running account between themselves in the first place.

63 In the circumstances, the defendant could not, in my view, be said to be utilising the present action for a stay of proceedings as a mere tactical device devoid of any merit and which would cause injustice to the plaintiff.

64 Indeed, the *defendant* has already commenced proceedings in the Malaysian courts to set aside the guarantee. As I pointed out to counsel for the plaintiff, it would be both logical and reasonable for his client to commence a counterclaim for the alleged sum owing under the guarantee and/or to apply for summary judgment for this same amount in the Malaysian courts. As I have already noted above (at [45]), the plaintiff desired a quicker resolution in the Singapore courts. In the absence of a compelling case of injustice resulting to the plaintiff under the second limb in the *Spiliada* case, such a reason was wholly unacceptable (see [45] above), especially since the relevant Singapore and Malaysian law was very similar. Indeed, *ceteris paribus*, it was clear that I ought to ensure that comity between the courts was maintained as far as it was possible. Besides, the presence of a juridical advantage (even one of no small significance) is by no means conclusive (see, for example, the *PT Hutan* case ([10] *supra*) at [21]). The following observations by Lord Goff in the *Connelly* case ([13] *supra*) at 872–873 (referring to the *Spiliada* case) are also apposite:

[A] general principle may be derived, which is that, if a clearly more appropriate forum overseas

has been identified, generally speaking the plaintiff will have to take that forum as he finds it, even if it is in certain respects less advantageous to him than the English forum. He may, for example, have to accept lower damages, or do without the more generous English system of discovery. The same must apply to the system of court procedure, including the rules of evidence, applicable in the foreign forum. This may display many features which distinguish it from ours, and which English lawyers might think render it less advantageous to the plaintiff. Such a result may in particular be true of those jurisdictions, of which there are many in the world, which are smaller than our own, and are in consequence lacking in financial resources compared with our own. But that is not of itself enough to refuse a stay. Only if the plaintiff can establish that substantial justice cannot be done in the appropriate forum, will the court refuse to grant a stay.

65 In the *Connelly* case itself, the House of Lords had made an exception only because the plaintiff would otherwise have failed to receive substantial justice in the context of a case where the benefit of financial assistance and expert scientific evidence in a complex case could only be obtained via legal aid or through a conditional fee agreement with his (the plaintiff's) solicitor within England itself (which assistance was unavailable in the other forum). These circumstances are of course radically different from those which obtain in the present case.

66 Put simply, where there is a direct clash between international comity on the one hand and mere convenience to one of the parties on the other, the former must surely prevail (see also the *Oriental Insurance Co* case ([10] *supra*), especially at [45]).

Conclusion

67 In all the circumstances, I was of the view that the present proceedings commenced in the Singapore courts ought to be stayed and therefore dismissed, with costs, the appeal by the plaintiff against the learned Deputy Registrar's decision. Quite apart from the fact that the decisions of the Singapore Court of Appeal in the *Golden Shore Transportation* case and *The Rainbow Joy* constituted, in my view, an insurmountable obstacle to the plaintiff's case, I found that, in any event, the other arguments raised by counsel for the plaintiff were, with respect, unpersuasive as well for the reasons I have set out above.

Appeal dismissed.

[note: 1] See generally the *Notes of Evidence* ("NE").

[note: 2] See the NE.