IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2016] SGHC 112

Suit No 605 of 2015 (Registrar's Appeal No 3 of 2016)

Between

(1) Mann Holdings Pte Ltd
(2) Chew Ghim Bok

… *Plaintiffs*

And

Ung Yoke Hong

… *Defendant*

GROUNDS OF DECISION

[Civil Procedure] — [Forum non conveniens]

Mann Holdings Pte Ltd and another
v
Ung Yoke Hong

[2016] SGHC 112

High Court — Suit No 605 of 2015 (Registrar's Appeal No 3 of 2016)
Lai Siu Chiu SJ
1 February 2016

8 June 2016

Lai Siu Chiu SJ:

Introduction

1 Ung Yoke Hong ("the defendant") applied in Summons No. 4599 of 2015 ("the application") for a stay of proceedings on the ground of *forum non conveniens* of the claim made against him by Mann Holdings Pte Ltd ("the first plaintiff") and Chew Ghim Bok ("the second plaintiff") in Suit 605 of 2015 ("this Suit").

2 The application was dismissed with costs by Assistant Registrar Paul Chan ("the AR") in December 2015. The defendant appealed against the decision of the AR in Registrar's Appeal No. 3 of 2016 ("the Appeal") which Appeal came on for hearing before this court. I too dismissed the Appeal with

costs. As the defendant has filed a notice of appeal against my decision (in Civil Appeal No 42 of 2016), I shall now set out the reasons therefor.

The background

3 The first plaintiff is a Singapore investment company. One of the first plaintiff's investments is a Singapore company called Enviro Investments Pte Ltd ("Enviro"). The second plaintiff is a Singaporean and is also an investor in Enviro. Enviro is a wholly-owned subsidiary of a Singapore listed company called Enviro-Hub Holdings Ltd ("Enviro-Hub").

4 The defendant is a Malaysian citizen who holds 50% of the issued shares in a Malaysian company called Metahub Industries Sdn Bhd ("Metahub") and is also its managing-director. Metahub is in the business of recycling, waste management, tin refining and manufacturing.

5 In or about November 2014, Enviro's shareholders (including the plaintiffs) commenced negotiations to buy all the shares in Metahub from its shareholders. The key persons from Enviro who negotiated with the defendant on its intended purchase were Raymond Ng Ah Hua ("Raymond") and Ung Yoke Hooi (known as "William") who is the defendant's brother and a close friend of Raymond. Besides being a shareholder of Enviro, Raymond is also a substantial shareholder in Enviro-Hub.

6 Negotiations on behalf of Metahub were conducted by the defendant and one Kevin Chee ("Chee"), who is another shareholder of the company. The negotiations between the parties took place between November 2014 and March 2015.

7 It was contemplated that should Enviro acquire Metahub, the first and second plaintiffs would each own 20% of Metahub's shares while William would hold 9% of the shares.

8 The plaintiffs contended that from the outset, they had made it clear to the defendant and Chee that neither Enviro nor Enviro-Hub was in a position to pay any deposit or make an advance payment for the proposed acquisition unless certain conditions precedent were fulfilled by Metahub, including completion of the due diligence process by the purchasers.

9 The defendant however was adamant from the start of negotiations that either Enviro or Enviro-Hub must pay a deposit before a due diligence exercise could be carried out. Consequently, negotiations came to a deadlock and this continued until December 2014 when the defendant contacted Raymond. The defendant apparently told Raymond he was facing cash-flow problems and he needed some short term loans to tide him over. He added that if his problem could be resolved he would allow Enviro or Enviro-Hub to carry out the due diligence process on Metahub.

10 In December 2014, Raymond arranged a meeting in Johor between the defendant and Tan Poh Hua ("Sam Tan"), a director of the first plaintiff and the second plaintiff, who is a close friend of Raymond. In that meeting and at subsequent discussions, the defendant confirmed his cash flow problems and the fact that he needed a loan of RM 5m, which he represented that he would be able to repay in full after a few months.

11 The two plaintiffs eventually agreed to extend a loan of RM4m ("the loan") to the defendant while William would separately extend a loan of RM1m to the defendant. Raymond instructed solicitors to draft a loan

agreement for the plaintiffs. Sam Tan signed the loan agreement on behalf of the first plaintiff.

12 The loan agreement was executed on or about 6 January 2015 ("the loan agreement") by the plaintiffs and the defendant. Amongst the salient provisions in the loan agreement are the following:[1]

(a) Clause 1.2 – the loan was to be repaid in full after two months or upon completion of the acquisition of shares in Metahub whichever was the earlier;

(b) Clause 1.3 – in the event the acquisition of shares was terminated, the loan would be repaid in full immediately; and

(c) Clause 2 – the defendant would charge 20% of the shares he held in Metahub to the plaintiffs as security for the loan.

13 On the same day, the second plaintiff on behalf of himself and the first plaintiff remitted the loan to the defendant via telegraphic transfer to the defendant's Malaysian bank account. The defendant executed transfer forms in blank to charge 20% of his shares in Metahub to the plaintiffs. The transfer documents are currently in the custody of the Chief Financial Officer of Enviro-Hub Ms Tan Lay Mai ("Ms Tan"). Sam Tan subsequently forwarded a copy of the loan agreement to the defendant by email on 23 January 2015 at the defendant's request.

14 According to the plaintiffs (but denied by William) on or about 22 January 2015, William separately remitted RM1m to the defendant.

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[1] See exhibit TPH-1 of Sam Tan's affidavit dated 9 October 2015

15 The proposed acquisition of Metahub's shares was subsequently aborted on or around 26 March 2015 apparently due to Enviro's inability to procure the requisite financing from either Malaysian or Singapore banks. By email dated 27 March 2015, Sam Tan demanded repayment of the loan from the defendant.[2]

16 The defendant refused to repay, contending that the loan (together with the RM1m from William) was a non-refundable deposit for the intended acquisition of shares in Metahub and not a loan. He further ignored the letters of demand sent to him by the plaintiffs' and William's solicitors in April and May 2015 respectively.[3] Instead, the defendant deposed in his second affidavit that the plaintiffs' solicitors had no authority from William to send him the second letter of demand dated 6 May 2015 (for RM1m) and his solicitors had written to the plaintiffs' solicitors on or about 16 September 2015 to demand an explanation. The defendant claimed he had checked with William and was told that William had not authorised the plaintiffs' solicitors to act for William.

The application

17 Consequently, the plaintiffs filed the writ of summons and statement of claim in this Suit on 19 June 2015 claiming repayment of the loan pursuant to cl 1.3 of the loan agreement (*infra* [12]) which they alleged the defendant had breached.

18 On 18 September 2015, the defendant filed the application along with his supporting affidavit ("the defendant's first affidavit"). The plaintiffs filed

[2] See exhibit UYH-14 of the defendant's first affidavit

[3] See exhibit UYH-15 of the defendant's first affidavit

two affidavits on 9 October 2015 to contest the application, one by Sam Tan and the other by Ms Tan. In response to the plaintiffs' affidavits, the defendant filed a second affidavit on 23 October 2015 ("the defendant's second affidavit).

The affidavits filed for the application

19 In the defendant's first affidavit, he asserted that the loan and William's RM1m was a deposit towards the agreed purchase price of RM50m for all the shares in Metahub ("the share transaction"). In support of his contention, the defendant proffered a draft sale and purchase agreement ("the draft agreement") for the share transaction.[4] The defendant relied on cl 3.02(i) therein which stated a deposit of RM4m followed by a further deposit of RM1m were payable upon the execution and within 14 days of signing of the document respectively. I note that he produced another three versions of this draft agreement in his first affidavit.[5]

20 The defendant further claimed in his first affidavit that the loan agreement was only meant to acknowledge that payment of RM4m had been made to him and nothing more. The defendant alleged that Raymond had repeatedly assured him that the loan agreement was not meant to be binding but it was necessary as the board of Enviro-Hub said that Enviro as the proposed purchaser could not formally sign any sale agreement until due diligence was completed.[6] Raymond had further assured the defendant that the intended acquisition of Metahub by Enviro was on track. The defendant

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[4] See exhibit UYH-2 of the defendant's first affidavit

[5] See exhibits UYH-3, UYH-4 and UYH-5 of the defendant's first affidavit

[6] The defendant's first affidavit, paras 20-21

alleged he relied on Raymond's assurances and was thereby induced to sign the loan agreement.

21 The defendant further contended that he had agreed with the plaintiffs in principle that the share transaction would be speeded up because of his health problems (for which he provided no details whatsoever). He deposed that several meetings took place in Johor between the parties either at Metahub's premises or at the office of Maybank Johor (whom Enviro had hoped could fund the share transaction), with a view to signing the proposed sale agreement by 18 December 2014. He claimed that in a telephone discussion he had with Raymond on or about 30 December 2014, he had informed the latter that he required a non-refundable deposit first before he and the other shareholders of Metahub would agree to conducting a due diligence exercise. He claimed that Raymond eventually agreed to arrange to pay a deposit of RM5m to the defendant prior to the due diligence exercise being conducted on Metahub and before the formal signing of the sale agreement.

22 More than three quarters of the sixty-seven paragraphs in the defendant's first affidavit were devoted to dealing with the draft sales agreement, which was not strictly relevant to the application. In comparison, a mere six paragraphs in the defendant's first affidavit was devoted to the grounds for the application. He deposed that Malaysia is a more appropriate forum than Singapore for the plaintiffs' claim for the following reasons:

(a) The plaintiffs and their representatives always travelled to Malaysia to meet him as he lives and resides in Johor;

(b) He has not visited Singapore for the last ten years or so;

(c) All the documentation relating to the share transaction was intended to be signed in Malaysia;

(d) The proposed acquisition was of a Malaysian entity and the consideration was in Malaysian Ringgit;

(e) The RM5m was paid into the defendant's bank account in Malaysia;

(f) The key witnesses, the staff of Metahub who were interviewed by Sam Tan after the loan had been extended, are all in Malaysia. These witnesses would prove that Sam Tan had met them in Malaysia, had informed them that Enviro had taken over Metahub and that he had sought their confirmation whether they intended to remain with the company after the change of management.

23 The defendant added that the only factor pointing to Singapore as the forum was the non-exclusive jurisdiction clause in the loan agreement in favour of Singapore courts, which he argued was only one of the factors that a court takes into consideration in determining whether Singapore or Malaysia is the more appropriate forum. He added that costs consideration also favoured Malaysia over Singapore and no prejudice would be suffered by the plaintiffs if this Suit was stayed in favour of Malaysia where he has all his assets.

24 Not surprisingly, the plaintiffs opposed the application. The affidavits of Sam Tan and Ms Tan addressed the defendant's allegations on the nature of the RM4m that was remitted to the defendant – they asserted it was not a non-refundable deposit for the share transaction but a loan as documented in the loan agreement.

25 Sam Tan denied that he had informed the staff of Metahub that Enviro had already taken over the company; he had only informed the staff that there was a prospect of Enviro taking over Metahub and in that event, there would be a change in the higher management.

26 On the merits of the application, Sam Tan deposed that Singapore was a more appropriate forum than Malaysia for the following reasons:

(a) Clause 10 of the loan agreement provided for the non-exclusive jurisdiction of the Singapore courts;

(b) Clause 10.1 of the loan agreement provided for Singapore law to be the governing law;

(c) The first plaintiff is a Singapore company while the second plaintiff is a Singapore citizen;

(d) Raymond, who will be a key witness, is also a Singapore citizen and resident;

(e) The fact that due diligence was conducted in Malaysia by personnel from KPMG Transaction & Restructuring Sdn Bhd ("KPMG") and lawyers from M/s Zain Megat & Murad ("Zain Megat") did not mean that those persons needed to testify. The fact that the due diligence exercise was carried out on behalf of Enviro was not disputed and the findings were not relevant to the dispute in this Suit;

(f) The employees of Metahub resident in Malaysia had no involvement in or knowledge of the loan or the loan agreement. In any event, even if they had to be called as witnesses by the defendant, he would have no difficulty procuring their attendance

as the defendant is the managing director and major shareholder of their employer Metahub.

27 As for Ms Tan, the purpose of her affidavit was to correct "the inaccurate account of the background and facts relating to the dispute and the loan agreement between the [p]laintiffs and the [d]efendant for the [p]laintiffs to lend the defendant RM 4 million"[7] as given in the defendant's first affidavit. She deposed that from the outset and throughout the negotiations, Enviro had consistently conveyed to the defendant and Chee that neither Enviro nor Enviro-Hub was in a position to make any advance or deposit payment in respect of the proposed acquisition until and unless several conditions precedent were met, including completion of the due diligence process. This was an issue of proper corporate governance given that Enviro-Hub is a public listed company. The defendant however had insisted on a deposit payment.

28 Ms Tan repeated the facts in [9] to [13] above. She explained that William did not see the need to require his brother, the defendant, to execute a formal loan agreement. Hence, William's loan of RM1m ("William's loan") was not documented.

29 Ms Tan highlighted that under cl 2.3 of the loan agreement, the defendant was obliged to and did provide to her two executed but undated share transfer forms; each form was to transfer 100,000 shares in Metahub to the first and second plaintiff respectively. The defendant further provided to Ms Tan a signed waiver of pre-emption rights by two shareholders in Metahub namely, Yee Kwong Yik and Tan Hwa Yeong. According to the various draft

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[7] Ms Tan's affidavit, para 4

agreements that were produced in court, these persons each held either one share or 10,000 shares in Metahub.

30 Ms Tan deposed that after the plaintiffs' remittance of RM4m to the defendant, they managed to conduct due diligence on Metahub, through the services of KPMG and Zain Megat. KPMG also participated in Metahub's stock-taking exercise in January 2015. Ms Tan also deposed that she together with Raymond and other representatives of Enviro, made several trips to Johor to oversee the due diligence exercise, sometimes accompanied by Sam Tan.

31 Unfortunately, Enviro was unable to secure the necessary financing for the share transaction. Accordingly. Ms Tan informed Chee by email on 6 March 2015 that Enviro needed to review alternative funding structures. In his email reply of 9 March 2015, Chee seemed to suggest that the loan and William's loan constituted a deposit toward the purchase price under the share transaction. Ms Tan replied on the same day as follows:[8]

> First of all we would like to clarify that the RM5m is currently in form of loan to Mr Vincent [the defendant] not a deposit payment for the acquisition (you may refer relevant agreement).

She repeated the above position in her email to the defendant on 26 March 2015 when the share transaction was aborted. Ms Tan added that Raymond had also informed her that contrary to the defendant's claim made in [20] above, Raymond had never told the defendant that the loan agreement was just for appearance's sake. She pointed out that the loan agreement had been executed by the time the loan was made, whereas the draft agreement was not finalised and was never executed.

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[8] The defendant's first affidavit, page 165

32 Ms Tan repeated Sam Tan's reasons set out earlier in [26] for opposing the application.

33 Finally, I turn to the defendant's second affidavit. He denied the version of events set out in the affidavits of Sam Tan and Ms Tan, repeating his version and accusing the two of lying and/or of fabricating facts. The defendant claimed he never intended to and never did, take any loan from the plaintiffs nor did he require a loan. He produced a statutory declaration from William[9] dated 21 October 2015 in which William declared,*inter alia,* that:

(a) there was no loan from him to the defendant;

(b) he paid Raymond S$200,000 as his contribution towards the deposit for the acquisition of the defendant's shares in Metahub;

(c) the loan was part of the non-refundable deposit of RM5m for Enviro's acquisition of the defendant's shares in Metahub;

(d) the loan agreement was merely for acknowledgement according to Raymond's assurance to the defendant when the document was signed on 6 January 2015 in William's presence;

(e) he did not instruct the plaintiffs' solicitors to send a letter of demand to the defendant, let alone to act for him.

In essence, William corroborated the defendant's version of events and the circumstances whereby the defendant came to sign the loan agreement, a document that they both asserted was never meant to be enforceable.

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[9] See the defendant's second affidavit, exhibit UYH-18

34 In the court below, the AR in dismissing the application had held, *inter alia,* that the presence of witnesses in Malaysia for the defendant and in Singapore for the plaintiffs was an inconclusive factor in considering the issue of *forum non conveniens*. Further, as one side's version of facts was vastly different from that of the other, it undermined the factors which the defendant presupposed supported his case that Malaysia was the appropriate forum. The converse was also true of the plaintiffs' case that Singapore was the more appropriate forum.

35 The AR therefore decided the application based on the one undisputed fact, *viz.,* that the non-exclusive jurisdiction clause in the loan agreement provided for Singapore courts to determine any disputes. Hence he dismissed the application and ordered the defendant to file his defence within 14 days from the date of the dismissal.

The submissions for the Appeal

36 The defendant's submissions were essentially a rehash of the contents of his first affidavit.

37 On the law, his counsel relied on the seminal case of *Spiliada Maritime Corporation v Cansulex Ltd* [1987] 1 AC 460 ("The *Spiliada*") as well as on local decisions that applied the two stage test propounded by the House of Lords in *The Spiliada* to determine *forum non conveniens*. In particular, counsel for the defendant relied on *CIMB Bank Bhd v Dresdner Kleinwort Ltd* [2008] 4 SLR(R) 543, *Orchard Capital v Ravindra Kumar Jhunjhunwala* [2012] 2 SLR 519 ("*Orchard Capital*"), *JIO Minerals FZC v Mineral Enterprises Ltd* [2011] 1 SLR 391 ("*JIO Minerals*") and *Chan Chin Cheung v Chan Fatt Cheung* [2010] 1 SLR 1192.

38 On his part, counsel for the plaintiffs relied not only on *The Spiliada* and the other cases cited by his opponent but also on *UBS AG v Telesto Investments Ltd* [2011] 4 SLR 503 and *Rickshaw Investments Ltd v Nicholai Baron von Uexkull* [2007] 1 SLR (R) 377 ("*Rickshaw Investments Ltd*").

The decision

39 The two stage test in *The Spiliada* which has been consistently applied by our courts (see *CIMB Bank Bhd v Dresdner Kleinwort Ltd* (*infra* [37]) can be summarised as follows:

(a) The defendant bears the initial burden to show that there is some other available and more appropriate forum (in this case, Malaysia) than Singapore. It is not sufficient for the defendant to show there is another available forum. He has to prove that the alternative available forum is clearly or distinctly more appropriate than Singapore;

(b) Once the defendant has discharged the burden to prove there is another and more appropriate forum than Singapore, the burden shifts to the plaintiffs to show exceptional circumstances why a stay of proceedings in Singapore should nonetheless be refused.

40 It would be appropriate at this juncture to look at cl 10 in the loan agreement which the plaintiff relied on as favouring Singapore as the forum. It states:[10]

Governing law and jurisdiction

[10] Sam Tan's affidavit, page 11

> 10.1 – This loan agreement shall be governed by and interpreted in accordance with the laws of Singapore
>
> 10.2 – The courts in Singapore shall have non-exclusive jurisdiction over any dispute arising from this loan agreement.

41 The defendant had instead relied on cl 10.03 in the draft agreement of which four versions were produced by him in his affidavits (see [19] above):

> This agreement shall be governed by and construed in accordance with the laws of the States of Malaya and the parties hereto (i) irrevocably submit to the non-exclusive jurisdictions of the Courts of the States of Malaya (ii) waive any objection on the ground of venue or forum non conveniens or any similar grounds and (iii) consent to service of process by mail or in any other manner permitted by the relevant law.

42 His counsel pointed to *Orchard Capital* as one case where our appellate court refused to enforce a non-exclusive jurisdiction clause (in favour of Hong Kong) and urged the court to do the same here.

43 The defendant's submissions ignored the fact that he was requesting the court to give effect to an exclusive jurisdiction clause in a draft agreement of which various versions were produced without evidence of which one was meant to be the final or engrossed version, and to ignore a jurisdiction clause in an executed loan agreement that provided for Singapore law to apply. When the court inquired of his counsel whether the defendant could sue for specific performance of the unsigned draft agreement, his surprising answer was in the affirmative.

44 The defendant's case also required the court to believe that a Singapore listed company *viz* Enviro-Hub and/or its wholly owned subsidiary Enviro would pay a non-refundable deposit of RM4m to carry out a due diligence exercise on a company (Metahub) which they may or may not acquire and for which no purchase and sale agreement had been executed. This would mean

that the two companies had disregarded the interests of their shareholders as well as all rules of good corporate governance. The defendant's version of events also ignored the fact that that the plaintiffs here are neither Enviro nor Enviro-Hub.

45 It would be appropriate at this juncture to turn to consider some of the cases cited by the parties other than *The Spiliada*. I start with *Orchid Capital* referred to at [37] where the Singapore courts did not uphold the jurisdiction clause. There, the Court of Appeal reversed the decision of the High Court in granting a stay of proceedings, based on a non-exclusive jurisdiction clause that pointed to Hong Kong as the forum in a settlement agreement made between the parties. The respondent/defendant was a resident of Singapore. In allowing the appellant/plaintiff's appeal and lifting the stay of its Singapore proceedings against the defendant, the Court of Appeal held (at [35]) that the respondent/defendant had failed to discharge the burden under stage one of *The Spiliada* to prove that Hong Kong was clearly or distinctly the more appropriate forum for the hearing of the dispute between himself and the appellant/plaintiff, notwithstanding that he resided in Singapore.

46 In fact, the decision in *Orchard Capital* supports this court's decision that a stay should not be granted merely because the defendant resides in Malaysia. After all, the first and second plaintiffs are a Singapore company and a Singapore resident respectively. The defendant's position in [22] is therefore counterbalanced by the plaintiffs' submission in [26(c) and (d)].

47 I turn next to the issue of witnesses. If the court accepts the plaintiff's position that the claim had nothing to do with the sale transaction, then the employees of Metahub were not necessary witnesses in any event. If indeed they were required to testify in a Singapore court, case-law states that the issue

of compellability does not arise in relation to employees. Assuming *arguendo* that the defendant's position is correct, then a very material witness for him would be his brother William.

48 In this regard it is noteworthy that William had furnished a statutory declaration to the defendant (see [33]) corroborating the defendant's version of events. Equally noteworthy is the fact that William did not require any receipt and/or documentary evidence of his loan of RM1m to the defendant (according to the plaintiffs) or of his payment of $200,000 to Raymond as his contribution to purchase the defendant's shares in Metahub (according to William). Further, why did William not file an affidavit on the defendant's behalf instead of making a statutory declaration? It is also strange that William denied making a loan to the defendant when the defendant admitted to receiving RM5m in total as a non-refundable deposit while the plaintiffs' claim is only for RM4m. Where did the extra RM1m remitted to the defendant come from?

49 The non-compellability of William as a witness in Singapore if the case is not stayed cannot be viewed independently without regard to his relationship to the defendant (as his counsel sought to persuade the court to do). It was absurd to treat William as an independent non-party witness and I declined to do so. As he did not file any affidavit, there was nothing on record to indicate William's unwillingness to testify in a Singapore court on the defendant's behalf as the defendant claimed.

50 The plaintiffs had relied on *Exxon Mobil Asia Pacific Pte ltd v Bombay Dyeing & Manufacturing Co Ltd* [2007] SGHC 137 for their argument that it was not enough for the defendant to merely depose on affidavit, without more,

that William and his proposed witnesses would not cooperate if the trial was held in Singapore; there must be some proof.

51 The defendant on the other hand relied on *JIO Minerals* to argue that the court should consider the legal compellability of William as a witness in Singapore and not his personal relationship with the defendant. It would be instructive to look at that case at this juncture.

52 In *JIO Minerals*, the plaintiff was an Indian company that sued the defendants/appellants in Singapore on an investment agreement relating to iron ore mining concessions in Indonesia. The plaintiff had paid the purchase price for shares in the first defendant into the Singapore bank accounts of the second and third defendants. The first defendant was incorporated in the United Arab Emirates ("UAE") while the second and third defendants, who were the first defendant's licensees, were resident in Indonesia. The investment agreement did not have an express governing law clause although a related exclusive mining agreement was governed by the laws of the UAE. The High Court had reversed an Assistant Registrar's order granting a stay on the ground of *forum non conveniens* against which decision the defendants appealed.

53 The Court of Appeal allowed the defendants' appeal holding, *inter alia,* that Indonesia was the place where all the parties had some connection that was relevant to the dispute and was therefore a distinctly more appropriate forum than Singapore. On the issue of witnesses, the appellate court held:

> (a) In determining the availability of non-party witnesses, two factors should be analysed separately: (i) the convenience in having the case decided in the forum where the witnesses were ordinarily resident

(the Witness Convenience Factor); and (ii) the compellability of those witnesses (the Witness Compellability Factor);

(b) In analysing the Witness Convenience Factor, the court should not predetermine the witnesses that the parties should call. It was sufficient for a defendant to show that evidence from foreign witnesses was at least arguably relevant;

(c) In relation to the Witness Compellability Factor, it would have been preferable to have had evidence on whether the Indonesian witnesses were compellable to testify in an Indonesian court.

54 The appellate court went on to add (at [70]):

> As for the second consideration (ie Witness Compellability Factor) we note that this court in Chan Chin Cheung v Chan Fatt Cheung [2010] 1 SLR 1192 held (at [35]) that the availability of witnesses should not be a significant factor if the witnesses are from Malaysia because of the proximity of Singapore to Malaysia. This consideration applies with equal force to Indonesia which (as the Respondent has argued) is also relatively near to Singapore.

55 The appellate court took the view that the fact that the Investment Funds were paid into Singapore bank accounts was not relevant in stage one of the *Spiliada* test because those connections were not relevant to the claims the plaintiffs had framed. Similarly, the fact that the RM 4m for the loan was paid into the defendant's Malaysian bank account is not a relevant consideration.

56 The issue of witness compellability was also considered by the Court of Appeal in an earlier case on *forum non conveniens* namely *Rickshaw Investments Ltd.* There the issue was whether the Singapore suit commenced by the plaintiffs should be stayed in favour of concurrent proceedings in Germany commenced by the defendant. The court had this to say at [25]:

> With respect, we disagree with the judge [who had held that the location of witnesses was not an important factor], as we find that the location of the key witnesses is an important factor to be considered, and the fact that key witnesses are located in Singapore is a factor that points towards Singapore being the most natural forum to hear the substantive disputes. The assessment of the respective witnesses' credibility is also crucial – especially in so far as the claim for fraudulent misrepresentation or deceit is concerned. Indeed, in so far as the claims for breach of fiduciary duty and breach of confidence are concerned, the principal witnesses (as we have already noted in [23] above) are located in Singapore. It is significant, in our view that they are *clearly* compellable to testify in the Singapore proceedings, whereas this is not the case in so far as the German proceedings are concerned.

Here, both plaintiffs are based in Singapore and so too are their witnesses Sam Tan, Raymond and Ms Tan. I find that they are important witnesses. As observed earlier, the defendant's witnesses who are based in Malaysia are not essential or crucial witnesses to the case. Taken together with this court's earlier observations (at [43]) on the non- enforceability of an exclusive jurisdiction clause in the unsigned sale agreement as opposed to the enforceability of a non-exclusive jurisdiction clause in the signed loan agreement which was the subject matter of the plaintiffs' claim, the issue of compellability of witnesses weighed in favour of Singapore as a more appropriate forum than Malaysia.

Conclusion

57 Consequently, I shared the view of the AR that the defendant had failed to discharge the burden of proof under the first stage of *The Spiliada* test. Hence, I dismissed the Appeal.

Lai Siu Chiu
Senior Judge

Joseph Tay Weiwen and Tan Aik Thong (Shook Lin & Bok LLP)
for the plaintiffs;
Mulani Prakash, Yang Yaxin Kimberly and Tanya Thomas Vadaketh
(M & A Law Corporation) for the defendant.
