Sun Jin Engineering Pte Ltd *v* Hwang Jae Woo
[2011] SGCA 4

Case Number : Civil Appeal No 73 of 2010

Decision Date : 21 January 2011

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; Andrew Phang Boon Leong JA

Counsel Name(s) : A Rajandran (A Rajandran) for the appellant; Haresh Kamdar (KhattarWong) for the respondent.

Parties : Sun Jin Engineering Pte Ltd — Hwang Jae Woo

Civil Procedure

[LawNet Editorial Note: The decision from which this appeal arose is reported at [2010] 3 SLR 684.]

21 January 2011 Judgment reserved.

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

Introduction

1 This is an appeal against the decision of the High Court judge ("the Judge"), who upheld the decision of the assistant registrar ("the AR") to grant a stay of proceedings in Suit No 379 of 2009 ("the Singapore Action"), an action commenced in Singapore by the appellant, Sun Jin Engineering Pte Ltd ("the Appellant"), against the respondent, Hwang Jae Woo ("the Respondent"). The grounds of decision of the Judge may be found at *Sun Jin Engineering Pte Ltd v Hwang Jae Woo* [2010] 3 SLR 684 ("the GD").

The background

2 To better appreciate the circumstances giving rise to the Singapore Action, we will first set out the facts of the case. The Appellant is a company incorporated in Singapore. Its majority shareholder and director is one Seung Yong Chung ("Seung"), who is also a substantial shareholder and director of a Malaysian company known as Sun Jin Engineering (M) Sdn Bhd ("SJM"). The Respondent is a South Korean citizen who was the acting project director for projects undertaken by SJM in the Republic of Maldives ("the Maldives"). The exact legal relationship between the Appellant and the Respondent is in dispute, [note: 1] although the Judge was tentatively of the view that the Respondent was in fact employed by the Appellant at the material time, albeit seconded to work for SJM in the Maldives (see the GD at [31]; see also [12] below). On the factual matrix of the present case, we do not see how we can disagree with this finding.

3 The Respondent worked in the Maldives from 27 August 2006 to 1 February 2008. When the Respondent arrived in the Maldives on 27 August 2006, he was given a letter of employment dated 15 August 2006 from SJM. The authenticity of this letter is disputed by the Appellant. During the period while the Respondent was working in the Maldives, he was the country representative, project director and project manager of SJM. It is undisputed that the directors of SJM passed a resolution on 3 May 2007 appointing the Respondent as its country representative in the Maldives. The work permit

issued by the Maldivian authorities showed the Respondent as an employee of SJM.

4 The Appellant brought the Singapore Action against the Respondent, claiming that the latter had (*inter alia*) acted in breach of his duty to the Appellant by effecting certain unauthorised payments to third parties, thereby causing the Appellant to suffer loss. In accordance with the Rules of Court (Cap 322, R 5, 2006 Rev Ed), the Respondent should have filed his defence to the Singapore Action by 27 May 2009. Pursuant to an oral understanding between the parties' solicitors, the time for filing the Respondent's defence was extended to 5 June 2009. The Respondent filed his defence on that date, but the document filed was rejected as the wrong suit number was stated in it. The Respondent subsequently re-filed his defence (this time, successfully) on 8 June 2009. Thereafter, it was only on 31 July 2009 – approximately one month and three weeks after the extended deadline for filing the defence – that the Respondent applied (via Summons No 4061 of 2009 ("the Stay Application")) for a stay of the Singapore Action in favour of proceedings to be instituted in the Maldives as well as for an extension of time to file the application. The Respondent also sought, as an alternative to a stay of the Singapore Action, an order striking out paras 3–23 of the Appellant's statement of claim ("the Statement of Claim"), which constitute substantially the whole of the Statement of Claim, under O 18 r 19 of the Rules of Court.

5 The main unauthorised payments alluded to at [4] above, which form the bases of the Singapore Action, are the following:

(a) a payment of US$175,000 as alleged commission to one Ahmed Shahid ("Shahid"); and

(b) a payment of US$101,982.37 to one Son Chang Ju ("Son"), a former employee of the Appellant.

6 We should add that legal proceedings in connection with the above two payments were earlier commenced in the Maldives, and judgments have already been given by the courts there. The judgments in those proceedings (which are different from the contemplated Maldivian proceedings mentioned at [4] above) include:

(a) a judgment obtained by Shahid against SJM for payment of US$175,000; [note: 2] and

(b) a judgment obtained by Son against SJM for payment of US$101,982.37. [note: 3]

7 At this juncture, we should further add that the Respondent has successfully sued SJM in the Maldives (in Case No 733/MC/2008 ("the Maldivian profit suit")) for wrongful termination of employment and compensation. [note: 4] In that action, the Civil Court of the Maldives found that the Respondent was an employee of SJM [note: 5] (see [30] of the GD, and *cf* the Judge's tentative view (at [31] of the GD) that the Respondent was an employee of the Appellant). Although SJM is a separate legal entity from the Appellant, Seung is a substantial shareholder and director of both companies (see [2] above). In the circumstances, this begs the question: if the Respondent had indeed made unauthorised payments to Shahid and Son, why did SJM not raise that as a counterclaim in the Maldivian profit suit?

Issues before the court below

8 Before the Judge, broadly, two main issues were raised:

(a) first, whether the Respondent, given that he had taken steps in the Singapore Action and,

further, had filed the Stay Application long after the deadline prescribed by O 12 r 7(2) of the Rules of Court, was precluded from applying for a stay of the Singapore Action ("the First Issue"); and

(b) second, if the Respondent were not so precluded, whether a stay of the Singapore Action should be granted on the ground of *forum non conveniens* ("the Second Issue").

The Judge answered the First Issue in the negative and the Second Issue in the affirmative.

Decision of the Judge

The First Issue

9 Apropos the First Issue, the Judge applied *Chan Chin Cheung v Chan Fatt Cheung and others* [2010] 1 SLR 1192 ("*Chan*") in holding that the Respondent, despite having taken steps in the Singapore Action (by, *inter alia*, filing his defence) and despite having made the Stay Application late, was not precluded from applying to stay the Singapore Action since there had not been any prejudice to the Appellant which could not be compensated by costs (see the GD at [10]–[11]). However, the Judge also expressed some reservations about the decision in *Chan* (see the GD at [12]–[19]; see also [32] below). He seemed to be of the view that:

(a) this court's decision in *Chan* was open to question because it was based on case law which involved factual circumstances that were significantly dissimilar to those found in *Chan* (see the GD at [12]–[13]); and

(b) the test of prejudice adopted in *Chan* for determining whether a defendant who had taken steps in the proceedings and who was also late in applying for a stay should be precluded from making a stay application – namely, the test of "whether there was any prejudice to the [plaintiff] which could not be compensated by costs" (see the GD at [10]), which test the Judge found to be applicable to the case before him (see the GD at [11]) – was unsatisfactory because it could lead to unsatisfactory results in the context of stay applications (see the GD at [15] and [19]).

10 In expressing his reservations about *Chan*, the Judge suggested that the test of prejudice should not be the sole or primary factor for determining whether a defendant should be granted an extension of time to file a stay application as such a test "place[d] an unfair burden on the plaintiff to show good reasons why a defendant should not be allowed to make his application for a stay late". Instead, the Judge opined, "[t]he burden should be on the party who [was] making the late application [for a stay of proceedings] to adduce good reasons to show why he should be allowed to make his application although he [was] out of time" (see, likewise, [16] of the GD).

The Second Issue

11 Turning to the Second Issue, the Judge applied what is commonly called "the *Spiliada* test" – *ie*, the test laid down by the House of Lords (now known as the Supreme Court of the UK) in *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460 ("*Spiliada*") – to determine whether a stay of the Singapore Action should be granted on the ground of *forum non conveniens*. Under the first stage of that test, the question which the court has to consider is whether there is *prima facie* some other available forum having competent jurisdiction that is more appropriate for the trial of the dispute in question. In this regard, the connecting factors raised in the present case by counsel for the respective parties and considered by the Judge were the following:

(a) the governing law of the dispute between the Appellant and the Respondent ("the Dispute");

(b) the identity of the employer of the Respondent under his employment contract at the material time ("the Employment Contract");

(c) the place where the Respondent carried out his work under the Employment Contract;

(d) the place where the Respondent's alleged breaches of the Employment Contract took place; and

(e) the availability of key witnesses in the Maldives.

12 After considering the evidence, the Judge came to the tentative view that (as mentioned earlier at [2] above) the Respondent was employed by the Appellant at the material time but was seconded to work for SJM in the Maldives, and that since the alleged breaches of the Employment Contract occurred in the Maldives, Maldivian law was probably the governing law relating to those alleged breaches. Further, and more importantly, as all the relevant witnesses were in the Maldives and were not willing to come to Singapore to testify, on balance, the Judge held, the relevant factors favoured the Maldives as the more appropriate place for the trial of the Dispute.

13 Moving on to the second stage of the *Spiliada* test (which entails a consideration of whether, although there is *prima facie* another forum which is the more appropriate forum for trial based on the first stage of the test, there are circumstances by reason of which justice requires that a stay of proceedings should nevertheless be refused), the Judge considered the following factors raised by the Appellant:

(a) the alleged non-availability of the Maldivian courts as a forum for hearing the Dispute;

(b) the alleged unfair prejudice to the Appellant due to the prior ruling of the Civil Court of the Maldives in the Maldivian profit suit; and

(c) the alleged disparity between Maldivian law and Singapore law in terms of their respective states of development and the number of causes of action which each of these systems of law could independently offer to the Appellant.

The Judge came to the conclusion that the above factors were really without much substance and should not preclude a stay of the Singapore Action from being ordered. He thus affirmed the AR's decision to stay that action on the ground of *forum non conveniens*.

The appeal

14 In the present appeal, the First Issue and the Second Issue are being revisited, with the Appellant arguing that this court should overturn the Judge's decision on both of these issues.

The First Issue

The Respondent's taking of steps in the proceedings

15 We will begin by considering the First Issue, specifically, the significance of the fact that the Respondent filed the Stay Application only after taking steps in the Singapore Action. In *Yeoh Poh San*

and another v Won Siok Wan [2002] 2 SLR(R) 233 at [14], the High Court held that "[t]he very reason why a defendant [was] required to apply for a stay of proceedings before taking any step other than filing an appearance [was] because such … other step [might] be construed as a submission to the court's jurisdiction". The Appellant contends that the Respondent has taken steps in the Singapore Action by including in the Stay Application (*inter alia*) a prayer to strike out substantially the whole of the Statement of Claim as an alternative to a stay of proceedings. In support of this contention, the Appellant cites the case of *Republic of the Philippines v Maler Foundation and others* [2008] 2 SLR(R) 857, where the expression "step in the proceedings" in s 4(3)(*b*) of the State Immunity Act (Cap 313, 1985 Rev Ed) was interpreted and explained. [note: 6] In response, the Respondent argues that for the purposes of O 12 r 7(2) of the Rules of Court, the fact that he has taken a step in the proceedings or has submitted to the jurisdiction of the Singapore courts does not *per se* disentitle him from applying for a stay. [note: 7] The Respondent submits that such conduct would be "fatal only to a challenge to the [c]ourt's jurisdiction under Order 12 Rule 7(1)". [note: 8]

16 In this connection, it must be borne in mind that an application under O 12 r 7(2) for a stay of proceedings on the ground of *forum non conveniens* is not the same as an application under O 12 r 7(1) disputing the jurisdiction of the Singapore courts. A stay application under O 12 r 7(2) accepts that the Singapore courts have jurisdiction over the dispute in question, but asserts that another jurisdiction is the more appropriate forum to try the dispute. This difference between O 12 r 7(1) and O 12 r 7(2) was explained by this court in *Chan* at [22] as follows:

> The appellant [the plaintiff in the originating suit in *Chan*] relies on several cases to argue that an extension of time under O 3 r 4, even if permissible, cannot "cure" the fact that the respondents [the defendants in the originating suit in *Chan*] had already taken steps in the proceedings and submitted to the jurisdiction of the Singapore courts. With respect, this argument is off the mark because whether a litigant has *submitted* to the jurisdiction of the court is relevant only to an application … under O 12 r 7(1), where the litigant is taking the position that the court has *no jurisdiction* to hear the case. In contrast, where the litigant applies for a stay under O 12 r 7(2) on the ground of *forum non conveniens*, he in fact *accepts the court's jurisdiction* and is not to be treated as disputing it … The respondents have undoubtedly participated in the Singapore proceedings by filing their [d]efence. Although this would be a step in the proceeding that might disentitle them from contesting jurisdiction under O 12 r 7(1), this does not mean that they are barred from applying for a stay on the ground of *forum non conveniens*. [emphasis in original]

17 In the present case, the Respondent is applying for a stay of proceedings under O 12 r 7(2); he is not disputing the jurisdiction of the Singapore courts pursuant to O 12 r 7(1). Indeed, the fact that the Respondent has submitted to the jurisdiction of the Singapore courts cannot be challenged as he has already filed his defence to the Singapore Action (and has also since amended his original defence). As can be seen from the passage from [22] of *Chan* just quoted above, the filing of the defence by the Respondent does not in itself disentitle him from applying for a stay of the Singapore Action.

The Respondent's late filing of the Stay Application

18 In our view, the more pertinent question which we must address *vis-à-vis* the First Issue concerns the fact that the Respondent filed the Stay Application out of time. Order 12 r 7(2) of the Rules of Court states that an application for a stay of proceedings on the ground of *forum non conveniens* must be filed "within the time limited for serving a defence". The Respondent should thus have filed the Stay Application either by 27 May 2009 (the original deadline for filing his defence) or, at the latest, by 5 June 2009 (the mutually-agreed extended deadline for filing the defence). This in

turn raises the question of what considerations the court should take into account in deciding whether to exercise its discretion to extend the time for filing a stay application.

19 Under the Rules of Court, the *substantive* effect of a procedural default or irregularity is provided for in O 2 r 1(2), which reads:

> ... [T]he Court *may*, on the ground that there has been such a [procedural default] as is mentioned in [O 2 r 1(1)], and on such terms as to costs or otherwise as it thinks just, set aside either wholly or in part the proceedings in which the [procedural default] occurred, any step taken in those proceedings or any document, judgment or order therein or exercise its powers under these Rules to allow such amendments (if any) to be made and to make such order (if any) dealing with the proceedings generally as it thinks fit. [emphasis added]

Order 2 r 1(2) clearly confers a wide discretion on the court to deal with procedural defaults as it does not specify the considerations which the court should take into account in exercising that discretion. That said, how this discretion should be exercised raises important questions as to the relationship between procedural justice and substantive justice in our civil litigation system.

20 Apropos these questions, our courts have in several cases consistently advocated one principle, namely, the need to strike a balance between, on the one hand, instilling procedural discipline in civil litigation and, on the other, permitting parties to present the substantive merits of their respective cases to the court notwithstanding some procedural irregularities (see, *eg*, *United Overseas Bank Ltd v Ng Huat Foundations Pte Ltd* [2005] 2 SLR(R) 425 ("*UOB v Ng Huat Foundations*") at [4]–[9], *Lee Hsien Loong v Singapore Democratic Party and others and another suit* [2008] 1 SLR(R) 757 ("*Lee Hsien Loong*") at [36] and *Lee Chee Wei v Tan Hor Peow Victor and others and another appeal* [2007] 3 SLR(R) 537 at [82]). In a similar vein, *Singapore Court Practice 2009* (Jeffrey Pinsler SC gen ed) (LexisNexis, 2009) ("*Pinsler 2009*") states at para 2/1/1:

> While sanctions are necessary to ensure that the parties do not disregard [procedural] rules with impunity, the court's reaction to non-compliance must be tempered by the equally important principle that the rules of procedure serve the substantive law, and that a party should not be automatically deprived of his substantive rights by procedural error.

21 While this principle of striking a balance between the competing interests of procedural justice and substantive justice is simple to state, it is by no means easy to apply in practice. In *UOB v Ng Huat Foundations*, it was held by the High Court that:

> 8 The quest for justice … entails a continuous need to balance the procedural with the substantive. More than that, it is a continuous attempt to ensure that both are *integrated*, as far as that is humanly possible. Both *interact* with each other. One cannot survive without the other. There must, therefore, be – as far as is possible – a fair and just procedure that leads to a fair and just result. This is not merely abstract theorising. It is the *very basis* of what the courts do – and ought to do. ...
>
> 9 It is true, however, that in the sphere of practical reality, there is often a *tension* between the need for procedural justice on the one hand and substantive justice on the other. The task of the court is to attempt, as I have pointed out in the preceding paragraph, to resolve this tension. There is a further task: it is to actually attempt, simultaneously, to integrate these two conceptions of justice in order that justice in its fullest orb may shine forth.
>
> [emphasis in original]

22 A general test which is often employed to address this tension between ensuring compliance with procedural requirements and ensuring that substantive justice is done is the test of prejudice. Thus, in *The "Tokai Maru"* [1998] 2 SLR(R) 646 ("*The Tokai Maru*"), this court held at [23]:

> …
>
> (b) The rules of civil procedure guide the courts and litigants towards the just resolution of the case and should of course be adhered to. Nonetheless, a litigant should not be deprived of his opportunity to dispute the plaintiff's claims and have a determination of the issues on the merits as a punishment for a breach of these rules *unless the other party has been made to suffer prejudice which cannot be compensated for by an appropriate order as to costs*.
>
> (c) Save in special cases or exceptional circumstances, it can rarely be appropriate then, on an overall assessment of what justice requires, to deny a defendant an extension of time where the denial would have the effect of depriving him of his defence because of a procedural default which, even if unjustified, has caused the plaintiff no prejudice for which he cannot be compensated by an award of costs.
>
> [emphasis added]

23 Similarly, in *Chan* at [25], this court, citing the decision in *The Tokai Maru*, held:

> … [E]xtensions pertaining to matters that touch upon the substantive merits of a party's case (and where [the application] does not relate to the filing of [a] notice of appeal out of time) should generally be granted *unless the other party would suffer prejudice that could not be compensated by costs* … [emphasis added]

24 At this juncture, we ought to refer to another provision in the Rules of Court which is pertinent to the issue of whether the timeline for filing the Stay Application should be extended. This is O 3 r 4, which reads:

> **Extension, etc., of time (O. 3, r. 4)**
>
> **4**.—(1) The Court may, on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorised by these Rules or by any judgment, order or direction, to do any act in any proceedings.
>
> (2) The Court may extend any such period as is referred to in paragraph (1) although the application for extension is not made until after the expiration of that period.

Order 3 r 4 is relevant in this appeal because, as mentioned at [4] above, in the Stay Application, the Respondent, apart from seeking a stay of the Singapore Action, also asked for an extension of time to file that application. We should also add that under para 7 of the First Schedule to the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed), the High Court is conferred "[p]ower to enlarge or abridge the time prescribed by any written law for doing any act or taking any proceeding, whether the application therefor [*sic*] is made before or after the expiration of the time prescribed".

25 Like O 2 r 1(2) of the Rules of Court, O 3 rr 4(1) and 4(2) do not spell out how the court's discretion to extend or abridge time should be exercised, although O 3 r 4(1) does state that the discretion should be exercised "on such terms as [the court] thinks just". As is to be expected, case law also does not provide definitive guidance as to how this discretionary power ought to be

exercised, although broad considerations can be gleaned from the authorities. Much would depend on the circumstances of each case. Obviously, a consideration which is materially significant in one set of circumstances may not necessarily have the same significant effect in a different set of circumstances. In some cases, the courts have made judicial pronouncements which appear to be relatively liberal, such as the statement by Mustill LJ in *Erskine Communications Ltd and Another v Worthington and Others* [1991] TLR 330 (at 330 itself) that:

> … [I]t would be absurd to say that every instance of overstepping the time limit without excuse, however short and however lacking in harmful consequence to the defendant, should be punished by the loss of the action.

In other cases, the courts appear to have taken a stricter approach. For instance, in *Thamboo Ratnam v Thamboo Cumarasamy and Cumarasamy Ariamany d/o Kumarasa* [1965] 1 WLR 8, the Privy Council stated at 12:

> The rules of court must prima facie be obeyed, and in order to justify a court in extending the time during which some step in procedure requires to be taken there must be some material upon which the court can exercise its discretion. If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules, which is to provide a time table [*sic*] for the conduct of litigation.

26 In *Costellow v Somerset County Council* [1993] 1 WLR 256, Sir Thomas Bingham MR laid stress on the importance of the question of prejudice and held that it was the "overall assessment of what justice require[d]" (at 264) which really mattered. A similar approach was taken by the English Court of Appeal in *Finnegan v Parkside Health Authority* [1998] 1 WLR 411. In that case, the plaintiff applied to the English High Court for an extension of time to file an appeal against an order of the master striking out her action for want of prosecution. The judge hearing the application ("the English High Court judge"), who did not think he needed to consider the question of prejudice, refused to grant the plaintiff the extension sought. On appeal by the plaintiff, the English Court of Appeal, taking the view that the question of prejudice was of importance and bearing in mind the overriding principle that justice had to be done, remitted the case back to the English High Court judge for further consideration, with a specific direction to look into the question of prejudice.

27 Another instructive case is *Mortgage Corporation Ltd v Sandoes and Others* [1996] TLR 751 ("*Mortgage Corporation*"), where the plaintiff sought, but was denied, an extension of time for the exchange of witness statements and expert reports. On appeal, the English Court of Appeal said that the correct approach to take was that once a party was in default in complying with a prescribed timeline, it was for that party to satisfy the court that despite its default, the court's discretion to extend time should nevertheless be exercised in its favour; in this connection, the party in default could rely on any relevant circumstances. Millett LJ, in delivering the judgment of the English Court of Appeal, said at 752:

> The court was acutely aware of the growing jurisprudence in relation to the failure to observe procedural requirements. There was a need for clarification as to the likely approach of the court in the future to non-compliance with the requirements as to time contained in the rules or directions of the court. What [the court] said now went beyond the exchange of witness statements or expert reports; it was intended to be of general import.
>
> Lord Woolf, Master of the Rolls and Sir Richard Scott, Vice-Chancellor, had approved the following guidance as to the future approach which litigants could expect the court to adopt to the failure to adhere to time limits contained in the rules or directions of the court:

1 Time requirements laid down by the rules and directions given by the court were not merely targets to be attempted; they were rules to be observed.

2 At the same time the overriding principle was that justice must be done.

3 Litigants were entitled to have their cases resolved with reasonable expedition. The non-compliance with time limits could cause prejudice to one or more of the parties to the litigation.

4 In addition the vacation or adjournment of the date of trial prejudiced other litigants and disrupted the administration of justice.

5 Extensions of time which involved the vacation or adjournment of trial dates should therefore be granted only as a last resort.

6 Where time limits had not been complied with the parties should cooperate in reaching an agreement as to new time limits which would not involve the date of trial being postponed.

7 If they reached such an agreement they could ordinarily expect the court to give effect to that agreement at the trial and it was not necessary to make a separate application solely for that purpose.

8 The court would not look with favour on a party who sought only to take tactical advantage [of] the failure of another party to comply with time limits.

9 In the absence of an agreement as to a new timetable, an application should be made promptly to the court for directions.

10 In considering whether to grant an extension of time to a party who was in default, the court would look at all the circumstances of the case including the considerations identified above.

28 Our local cases appear to draw a distinction between an application (made after a trial) for an extension of time to file a notice of appeal and an application for an extension of time for other purposes, with the courts taking a stricter view *vis-à-vis* the former type of application. This distinction seems to have been recognised in *Lee Hsien Loong*, where this court said at [33]:

> It is clear … that ***the courts will adopt a far stricter approach towards applications for extension of time for the filing and/or serving of a notice of appeal relative to other situations*** . This is not without good reason. The overriding concern in the context of *appeals* is that there be *finality*. Indeed, the one-month deadline for the filing of a notice of appeal is not an arbitrary one. Underlying the concern with finality is the fundamental rationale of *justice and fairness*. The decision concerned has, *ex hypothesi*, gone against the losing party (*ie*, the would-be appellant), and the onus is therefore on it to file an appeal if it feels that the decision is wrong. Correspondingly, the other party (the would-be respondent), having had the decision handed down in its favour, should not be kept waiting – at least, not indefinitely – on tenterhooks to receive the fruits of its judgment. For better or for worse, the applicant must decide whether or not it wishes to appeal. As this court observed in *Ong Cheng Aik* [*v Dayco Products Singapore Pte Ltd (in liquidation)* [2005] 2 SLR(R) 561] at [8]:
>
> In respect of such an application for extension of time [to file or serve a notice of appeal out

> of time], the court takes a rather strict view of things and sufficient grounds must be shown before the court will exercise its discretion. This is because if no appeal is filed and served within the prescribed time of one month, the successful party is justly entitled to assume and act as if the judgment is final.

[emphasis in original in italics; emphasis added in bold italics]

29 The factors which our courts have regard to in determining whether an extension of time to file a notice of appeal should be granted are fourfold, namely: (a) the length of the delay; (b) the reasons for the delay; (c) the chances of the defaulting party (*ie*, the would-be appellant) succeeding on appeal if the time for appealing were extended; and (d) the degree of prejudice to the would-be respondent if the extension of time were granted (see, *inter alia*, *Hau Khee Wee and another v Chua Kian Tong and another* [1985–1986] SLR(R) 1075 at [14], *Pearson Judith Rosemary v Chen Chien Wen Edwin* [1991] 2 SLR(R) 260 at [15], *AD v AE* [2004] 2 SLR(R) 505 at [10], *Lee Hsien Loong* at [18] and *Anwar Siraj and another v Ting Kang Chung John* [2010] 1 SLR 1026 at [29]). It should, however, be noted that these factors have also been applied in some cases which did not concern an application for leave to file an appeal out of time (see, *eg*, *The Oriental Insurance Co Ltd v Reliance National Asia Re Pte Ltd* [2008] 3 SLR(R) 121, which pertained to the late filing of a proof of debt under a scheme of arrangement for a company).

30 In our view, what the aforesaid authorities show is that in each case, the court, in deciding whether to extend the prescribed timeline for an act to be done, has to balance the competing interests of the parties concerned. As the statement of Millett LJ in *Mortgage Corporation* (quoted above at [27]) shows, the factual matrix of the particular case at hand will be paramount. In balancing the parties' competing interests, the court inevitably needs to consider the question of prejudice. Copious citation of case law will not be necessary (and also will not be helpful) as previous decisions will be no more than guides. In determining how the balance of interests should be struck and in applying the four factors mentioned at [29] above, it is the overall picture that emerges to the court as to where the justice of the case lies which will ultimately be decisive.

The Judge's reservations about Chan

31 Before we go on to apply the principles outlined above to the facts of the present case, we wish to address the Judge's reservations about this court's decision in *Chan*. In *Chan*, the defendants – like the Respondent – applied late for a stay of proceedings and did so only *after* they had filed their defence. Because of this factual similarity between the instant case and *Chan*, the Judge felt constrained to apply the test of prejudice in *Chan* to the Respondent's benefit (see the GD at [11]; see also [9] above).

32 However, as alluded to at [9] above, the Judge also expressed reservations about the decision in *Chan* (see the GD at [12]–[19]). In particular, the Judge seemed to be of the view that:

(a) the decision in *Chan* was open to question because this court had referred to *The Tokai Maru*, which involved factual circumstances that were significantly dissimilar to those found in *Chan* (referred to hereafter as "the Judge's first reservation about *Chan*") (see the GD at [12]–[13]); and

(b) the test of prejudice adopted in *Chan* was unsatisfactory because it might lead to unsatisfactory results in the context of stay applications (referred to hereafter as "the Judge's second reservation about *Chan*") (see the GD at [15] and [19]).

33 On the face of it, it seems to us that the Judge expressed reservations about the decision in *Chan* because there appeared (in his view) to be some incongruence between where the equities of the present case lay and the legal result that would follow by applying *Chan*. It appears that the Judge would not have exercised his discretion to extend time to enable the Respondent to make the Stay Application but for the principle enunciated in *Chan*.

34 *Vis-à-vis* the Judge's first reservation about *Chan*, the Judge appeared to have understood the rationale of the test of prejudice as being *only* to prevent a defaulting party from being deprived of the opportunity to *present its case* to the court on the merits. Accordingly, the Judge found it appropriate to draw a distinction between the instant case and *The Tokai Maru* by stating in the GD that:

> 12 ... [*The*] *Tokai Maru* was not a case in which a defendant had filed his stay application late. In that case, the party was filing an affidavit of evidence-in-chief late and the court was loath to preclude that party from ***presenting its case*** .
>
> 13 In resisting an application for a stay of proceedings, a plaintiff is not seeking to preclude a defendant from ***presenting his case*** . On the contrary, the plaintiff is suggesting that the defendant should do so but that he should do so *in Singapore*.
>
> [emphasis in original in italics; emphasis added in bold italics]

35 With respect, we do not think that the test of prejudice adopted in *Chan* should be so narrowly confined, *ie*, as being applicable only to a situation where a defaulting party would be prevented from presenting its case to the court on the merits if an extension of time were not granted. There is no reason why the test of prejudice cannot apply in other circumstances (*eg*, where the court is confronted with the question of whether it should exercise its discretion to extend time to enable an act to be carried out under the Rules of Court). The need for a party to present its case to the court on the merits is not the *sole* sort of circumstance which the test of prejudice can usefully address. In *Mortgage Corporation* (see [27] above), for instance, the English Court of Appeal held that the question of prejudice was a relevant consideration in determining whether an extension of time for the exchange of witness statements and expert reports should be granted. We should also underscore that in the passage from Millett LJ's judgment in *Mortgage Corporation* at 752 (quoted at [27] above), it was expressly stated that the guidelines set out therein were intended to be of general application and were not limited to the specific situation which arose in that case.

36 It is true that in *Chan*, this court stated at [25] that:

> … [I]t bears noting what this court said in *The Tokai Maru* … at [23], [*ie*,] that extensions [of time] pertaining to matters that touch upon the substantive merits of a party's case (and where [the application] does not relate to the filing of [a] notice of appeal out of time) should generally be granted unless the other party would suffer prejudice that could not be compensated by costs:
>
> > ... The rules of civil procedure guide the courts and litigants towards the just resolution of the case and should of course be adhered to. Nonetheless, a litigant should not be deprived of his opportunity to dispute the plaintiff's claims and have a determination of the issues on the merits as a punishment for a breach of these rules unless the other party has been made to suffer prejudice which cannot be compensated for by an appropriate order as to costs.
> >
> > … *Save in special cases or exceptional circumstances, it can rarely be appropriate then, on*

> *an overall assessment of what justice requires, to deny a defendant an extension of time* where the denial would have the effect of depriving him of his defence *because of a procedural default which, even if unjustified, has caused the plaintiff no prejudice for which he cannot be compensated by an award of costs*.
>
> [emphasis in original]

37 On a plain reading of the above quotation, it seems clear that in *Chan*, this court was doing no more than merely citing *The Tokai Maru* as *one instance* where the test of prejudice was applied, and was *not* intending in any way *to limit* the remit of the application of this test. From the above quotation, it is also clear that in *Chan*, this court was well aware that the circumstances in *The Tokai Maru* (which concerned an application to file an affidavit of evidence-in-chief – a document that "touch[es] upon the substantive merits of a party's case" (*per* [25] of *Chan*) – out of time) were different from those in *Chan* (which concerned a late attempt by the defendants, via a stay application filed out of time, to contend that Malaysia, and not Singapore, was the appropriate forum to try the plaintiff's defamation action against them).

38 We now turn to the Judge's second reservation about *Chan*, which centred on the Judge's concern that the test of prejudice could lead to unsatisfactory results in the context of stay applications. In particular, the Judge was of the view that under the test of prejudice, a defendant could effectively make a plaintiff endure copious interlocutory applications after the defence was filed and yet still escape the fate of being precluded from applying for a stay of proceedings out of time as the test of prejudice "place[d] an unfair burden on the plaintiff to show good reasons why [the] defendant should not be allowed to make his application for a stay late" (see the GD at [16]; see also [15] and [19] of the GD).

39 While we understand these concerns of the Judge, it is, with respect, *not* entirely correct to say that the test of prejudice has the effect of enabling a defendant to make copious interlocutory applications after filing its defence whilst still remaining at liberty to make a stay application out of time. The law certainly would not grant a defendant *carte blanche* to make copious interlocutory applications with impunity (*a fortiori*, as we note at [40] below, where such applications are made in bad faith). In this regard, we note the following observations of Bowen LJ in *Cropper v Smith* (1884) 26 Ch D 700 at 710 (referred to in *The Tokai Maru* at [22]):

> … I think it is a well established principle that the object of [the] Courts is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights. ... *I know of no kind of error or mistake which*, ***if not fraudulent or intended to overreach*** *, the Court ought not to correct, if it can be done without injustice to the other party*. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy … [emphasis added in italics and bold italics]

40 We do not wish to venture into the realm of speculation, but, obviously, the more interlocutory applications or steps a defendant makes or takes before it files a stay application, and/or the longer it delays in making its stay application, the court would undoubtedly take those circumstances into account in determining whether or not to grant the defendant an extension of time to apply for a stay. The court is not without the necessary procedural armoury (which includes the making of an appropriate costs order) to prevent any abuse of its process. Further, the court would be entitled to hold that procedural irregularities motivated by bad faith or by a deliberate intention to overreach on the part of the defaulting party are irremediable.

41 As regards the Judge's point that the test of prejudice seems to favour the defendant as it

apparently places the burden on the plaintiff to show that it (the plaintiff) has suffered prejudice which cannot be compensated by costs (in this connection, the Judge even suggested that the burden of proof under the test of prejudice should be reversed, with the defendant having to adduce good reasons to show why it should be allowed to make its stay application out of time (see the GD at [16])), we think this advantage is more apparent than real. The test of prejudice must ultimately be applied in the light of all the relevant circumstances of the case at hand. It goes without saying that an applicant for an extension of time has the initial burden of showing facts which warrant the court exercising its discretion in the applicant's favour. But, the burden of proof on any particular issue at any particular point in time is not static. In particular, the evidential burden would shift, depending on how the application for an extension of time progresses. In our view, unless there are other more weighty considerations, the determination by the court on the question of prejudice could very well be decisive as to how it views where the justice of the case lies and, in turn, how it decides to exercise its discretion to extend time.

42 In this connection, we ought to clarify that in *Chan*, the position taken by the plaintiff *vis-à-vis* the defendants' application for a stay of proceedings was that the timeline prescribed in O 12 r 7(2) of the Rules of Court for filing a stay application was absolute and the court had no discretion whatsoever to extend that timeline. In the absence of any other ground advanced by the plaintiff, this court quite naturally considered, in the main, only the question of prejudice in deciding whether to grant the defendants an extension of time to file their stay application. This court did *not* state in *Chan* that prejudice was the *only* matter which the court needed to take into account when considering an application for an extension of time. The court's consideration of prejudice in *Chan* must be viewed in the context of the grounds raised by the parties there. In any event, this court in *Chan* clearly also took into account other circumstances, such as the close link between the plaintiff's action in Singapore against the defendants for defamation ("the Singapore defamation action") and the plaintiff's actions in Malaysia against the defendants as trustees of an estate ("the Malaysian trusteeship actions") as well as the desirability of avoiding inconsistent findings in those two sets of proceedings (see *Chan* at [26]). Lastly, there is one other circumstance in *Chan* which warrants highlighting. This relates to the fact that the stay granted in *Chan* was a limited one, *ie*, the Singapore defamation action was stayed only to the limited extent that it was to be heard in *Singapore* after the conclusion of the Malaysian trusteeship actions (see *Chan* at [47]). The stay order in *Chan* was not the normal *forum non conveniens* stay order, which would have been an order staying the Singapore defamation action so that a fresh defamation suit could be commenced in *Malaysia* and be heard together with the Malaysian trusteeship actions, which were then pending.

Our ruling on extension of time for filing the Stay Application

43 We now turn to consider whether, applying the principles discussed at [20]–[30] above to the circumstances of this case, this court should grant the Respondent an extension of time to file the Stay Application notwithstanding that, besides being late in filing that application, the Respondent has also filed his defence to the Singapore Action. The Judge thought that the whole state of affairs was brought about by the mistake of the Respondent's solicitors. This was what he stated at [18] of the GD:

> It appeared to me that the reality was that [the Respondent's] solicitors did not realise that that the [S]tay [A]pplication had to be filed as soon as possible and before filing the defence. Had they realised this and if there were genuine reasons why they could not do so promptly, then they should have applied for an extension of time to file the [S]tay [A]pplication as well as [for an order] to defer the filing of the defence pending the outcome of the [S]tay [A]pplication.

44 We are inclined to agree with this finding of the Judge as there is nothing to suggest that the

Respondent's lateness in filing the Stay Application was brought about by any bad faith or by any intention on the Respondent's part to overreach. It seems to us that this was a case of either oversight or unfamiliarity with the Rules of Court on the part of the Respondent's solicitors. While this court does not condone such mistakes, the question that remains, ultimately, is this: is the Respondent's procedural default so egregious that the imposition of a sanction by way of an appropriate costs order would not suffice to register the court's disapproval? We do not think so. The position taken by the Appellant is that the Respondent, by filing his defence to the Singapore Action, has accepted the jurisdiction of the Singapore courts, and that is fatal to the Stay Application. We do not think the filing of the Respondent's defence *per se* necessarily leads to this outcome. Work done by the Appellant's solicitors following the filing of the Respondent's defence can be adequately compensated by costs. It is also pertinent to note that in a letter written by the Respondent's solicitors on 4 June 2009 [note: 9] (*ie*, one day prior to the mutually-agreed extended deadline of 5 June 2009 for the filing of the Respondent's defence), the Respondent's solicitors asked the Appellant's solicitors to allow the Respondent to defer filing his defence, stating that the Respondent would be making a stay application on the ground of *forum non conveniens*. Apparently, for various reasons (*eg*, the efforts of the Respondent's solicitors to get a copy of the Maldivian judgment obtained by Shahid against SJM (*ie*, the Maldivian judgment referred to at sub-para (a) of [6] above) and the wait for a legal opinion from the Maldives as to whether or not the Appellant's claims against the Respondent could be pursued there), [note: 10] the Respondent did not feel able then to apply for a stay of the Singapore Action.

45 Without going into the question of whether these reasons were adequate to justify the Respondent's decision not to file the Stay Application within the prescribed timeline, the fact is that the Stay Application was not an afterthought. Admittedly, the apparent difficulty encountered by the Respondent in complying with the timeline for applying for a stay of the Singapore Action could have been easily overcome by his making an express reservation when filing his defence to that action. This was not done (due, perhaps, to an insufficient understanding of the Rules of Court on the part of the Respondent's solicitors). On 23 June 2009, the Respondent's solicitors again wrote to the Appellant's solicitors, [note: 11] reiterating (among other things) the Respondent's intention to apply for a stay of the Singapore Action and the fact that they (the Respondent's solicitors) were waiting for certain documents (see [44] above). While the delay here involved a period of approximately one month and three weeks, it bears emphasis that the Stay Application is an interlocutory matter which does not involve the filing of a notice of appeal out of time. Moreover, the Stay Application cannot be regarded as without merit (see the GD at [25]–[52] and the discussion below at [53]–[64]). In the circumstances, we do not think that the Judge's decision to grant the Respondent an extension of time to file the Stay Application can be regarded as plainly without any basis and plainly wrong.

Waiver

46 Before we move on to consider the Second Issue, we note, in passing, that the question of whether the Respondent could be taken, by virtue of his lateness in applying for a stay of the Singapore Action, to have waived his right to make such an application was not dealt with in the court below, nor was it raised by the parties in their submissions in this appeal. All that we wish to say in this regard is that in the commentary on O 12 r 7 of the Rules of Court in *Pinsler 2009* at para 12/7/6, it is stated that "[a] lengthy delay in making [a stay] application (ie beyond the time limit for serving a defence) may be treated as a waiver of any objections which might have been raised". As no submission was made by the parties as to whether the principle of waiver was applicable in the present case and, if so, how that principle should be applied, we will make no further comment on this issue.

The Second Issue

The Second Issue

The applicable legal principles

47 We now turn to the Second Issue, namely, whether a stay of the Singapore Action on the ground of *forum non conveniens* is justified. To determine which is the most appropriate forum for trial as between two or more available fora, the court has to decide which forum the dispute has the most real and substantial connection with. On this issue, the leading authority is *Spiliada*. The *Spiliada* test, which (as can be seen from [11] and [13] above) is a two-stage test, has become the established test in Singapore, having been accepted in numerous previous cases in our courts, the more recent ones being *PT Hutan Domas Raya v Yue Xiu Enterprises (Holdings) Ltd and another* [2001] 1 SLR(R) 104, *Rickshaw Investments Ltd and another v Nicolai Baron von Uexkull* [2007] 1 SLR(R) 377, *CIMB Bank Bhd v Dresdner Kleinwort Ltd* [2008] 4 SLR(R) 543 ("*CIMB Bank*"), *Goh Suan Hee v Teo Cher Teck* [2010] 1 SLR 367 and *JIO Minerals FZC and others v Mineral Enterprises Ltd* [2010] SGCA 41.

The Judge's decision on the Second Issue

48 In the court below, the Judge quite rightly applied the *Spiliada* test in deciding the Second Issue. Having weighed the various relevant connecting factors, he came to the conclusion that the Maldives would be the more appropriate forum for the trial of the Dispute. The connecting factors which he considered are tabulated below:

CONNECTING FACTORS CONSIDERED UNDER THE FIRST STAGE OF THE *SPILIADA* TEST	
Factors pointing to Singapore as the more appropriate forum	***Factors pointing to the Maldives as the more appropriate forum***
1. The Employment Contract was allegedly made in Singapore (see the GD at [35]). 2. According to the Appellant, the Employment Contract was governed by Singapore law (see the GD at [35]).	1. The Respondent was working for SJM in the Maldives at the material time (see the GD at [34]). 2. The Employment Contract was performed by the Respondent in the Maldives (see the GD at [35]). 3. The Respondent's alleged breaches of the Employment Contract were committed in the Maldives (see the GD at [35]). 4. The Respondent's employment was terminated in the Maldives (see the GD at [35]). 5. Maldivian law was probably the governing law of the Dispute (see the GD at [35]). 6. There were two witnesses in the Maldives (namely, Shahid and one Ibrahim Gahir ("Gahir")), who were not willing to come to Singapore to give evidence and who were not compellable witnesses in Singapore (see the GD at [38]–[39]).
CONNECTING FACTORS CONSIDERED UNDER THE SECOND STAGE OF THE *SPILIADA* TEST	
Factors raised by the Appellant	***The Judge's decision on the factors raised***

1. The Appellant would not have any legal recourse in the Maldives because, the Employment Contract being unenforceable in the Maldivian courts, there was no available forum in the Maldives to resolve the Appellant's claims against the Respondent (see the GD at [44]). 2. There was a prior court ruling in the Maldives (specifically, the ruling in the Maldivian profit suit mentioned at [7] above) which could result in the Appellant having no standing to sue the Respondent in the Maldives (see the GD at [46]). 3. Maldivian law was not as developed as Singapore law in that causes of action based on tort, trust and agency could not be sued on in the Maldives. Hence, the Appellant had fewer causes of action there as compared to Singapore (see the GD at [50]).	1. *Rejected* on evidential grounds (see the GD at [45]). 2. Regarded as a *neutral* factor (see the GD at [47]–[49]). 3. *Rejected* for reasons of international comity, namely, it was not for the Singapore courts to pass judgment on the competence or independence of foreign judiciaries (see the GD at [51]).

49 On the basis of the above table, it is easy to see why the Judge held that the preponderance of the relevant connecting factors in the instant case favoured the Maldives as the more appropriate forum under the first stage of the *Spiliada* test, and also went on to hold that the Appellant had failed to show, under the second stage of the *Spiliada* test, why a stay of the Singapore Action should not be granted despite the Maldives being the more appropriate forum. We now examine whether the Judge was right to come to this conclusion.

Evaluation of the Judge's exercise of discretion under the Spiliada test

50 It is settled law that in deciding whether or not to stay an action on the ground of *forum non conveniens*, a judge is exercising his discretion, and this court, in hearing an appeal against such a decision, should only review that decision and should not exercise an independent discretion. As this court stated in *Chan* at [28]:

> ... [A]s the question of whether or not to grant a stay of proceedings involves an exercise of a judge's discretion, the appellate court will only review the [j]udge's exercise of his discretion. It will not exercise the discretion afresh and substitute its own discretion in place of [the discretion of] the court below …

51 Similarly, in the earlier case of *CIMB Bank*, this court held at [84]:

> It is clear that in determining whether or not to grant a stay of proceedings, the judge will be exercising a discretion. Such an exercise of discretion should not be interfered with by an appellate court *unless the judge had misdirected himself on a matter of principle, or … had taken into account matters which he ought not to have taken into account or had failed to take into account matters which he ought to have taken into account, or [unless] his decision [was] plainly wrong* … [emphasis added]

52 In his submissions, counsel for the Respondent cited the decision of the House of Lords in *Shiloh Spinners Ltd v Harding* [1973] AC 691 and the local case of *QBE Insurance Ltd v Sim Lim Finance Ltd*

[1987] SLR(R) 23 ("*QBE Insurance*"). These two cases set out substantially the same proposition of law as that enunciated at [28] of *Chan* and [84] of *CIMB Bank*, save that *QBE Insurance* laid down (at [36]) an additional ground for an appellate court to interfere with a lower court's exercise of discretion as follows:

> The function of an appellate court in hearing an appeal against an interlocutory order is primarily a reviewing function and the court should reverse a decision ... [*inter alia*] in order to promote consistency in the exercise of … discretion by the judges as a whole where there appear, in closely comparable circumstances, to be two conflicting schools of judicial opinion as to the relative weight to be given to particular considerations …

As the Respondent is not saying that there are "in closely comparable circumstances, … two conflicting schools of judicial opinion as to the relative weight to be given to particular considerations" (*per* [36] of *QBE Insurance*) in the present case, nothing in this appeal turns on this additional ground for interfering with a lower court's exercise of discretion and we need make no further comment on it.

The first stage of the Spiliada *test*

(1) Availability of allegedly material witnesses in the Maldives

53 In respect of the Judge's exercise of discretion under the first stage of the *Spiliada* test, the Appellant's strongest point, in our view, is the argument (based on the decision in *Mineral Enterprises Ltd v JIO Minerals FZC and others* [2010] SGHC 109) that in deciding a stay application, the court "[can]not simply weigh the connecting factors without reference to the likely issues". [note: 12] Two connecting factors have been singled out by the Appellant in this regard, namely, the availability of allegedly material witnesses in the Maldives and the governing law of the Dispute.

54 *Vis-à-vis* the first of the aforesaid connecting factors, the Appellant argues that "[t]he crux of [its] case concerns the authority of the Respondent and that is a matter between the [Appellant] and the Respondent alone". [note: 13] According to the Appellant, the question of what authority the Respondent actually possessed at the material time is solely "a matter within the knowledge of the parties [*ie*, the Appellant and the Respondent]" [note: 14] [emphasis in bold in original omitted]. Thus, the Appellant claims, the Judge should not have taken into account the fact that there are witnesses in the Maldives (*ie*, Shahid and Gahir) who are allegedly material witnesses. Indeed, the Appellant asserts that these Maldivian witnesses are wholly unnecessary for the purposes of resolving the Dispute. Accordingly, it submits that the availability of allegedly material witnesses in the Maldives should carry little weight.

55 As we see it, this argument is valid only if it is viewed solely from the viewpoint of the Appellant's pleaded case. That, of course, would be too narrow a perspective. The Respondent's defence to the Appellant's claim for US$175,000 (see sub-para (a) of [5] above) is that following a negotiation between Seung and Shahid, where the Respondent was present, Seung agreed to pay US$175,000 to Shahid for the latter's services. As for the Appellant's claim for US$101,982.37 (see sub-para (b) of [5] above), the Respondent's position is that the payment of this sum to Son was agreed on at a discussion between Seung and the Respondent, where Shahid and Gahir were present. In the light of this defence, the evidence of Shahid and Gahir becomes very important. The issue of the scope of the Respondent's authority cannot be regarded as just an internal matter between the Appellant and the Respondent. Shahid can provide evidence on the services that he rendered to SJM, which evidence might show that the payment of US$175,000 to him was justified. Shahid can also testify on how the letter of 27 August 2007 from the Respondent (written on behalf of SJM) to him

confirming payment of US$175,000 for "services … received" [note: 15] came into being. Further, Shahid and Gahir can provide evidence on Seung's alleged agreement with the Respondent to pay Son the sum of US$101,982.37. We also note that although Gahir is apparently the brother-in-law of Shahid, the Judge found no reason to suspect that these two Maldivian witnesses were contrived by the Respondent to support the Stay Application (see the GD at [38]).

56 The fact that an important witness is only available and compellable in a particular jurisdiction is a significant consideration which can tilt the balance in favour of that jurisdiction (see *Peters Roger May v Pinder Lillian Gek Lian* [2006] 2 SLR(R) 381). In this regard, the Respondent's Maldivian law expert said that witnesses in the Maldives were compellable to testify in a civil action there, whereas the Appellant's Maldivian law expert appeared to take the view that witnesses in the Maldives were not thus compellable. The Appellant's Maldivian law expert added, however, that the Maldivian courts could assist in the taking of evidence (via video link) of *willing* witnesses in the Maldives for use in foreign proceedings (see the GD at [39]). It is unclear whether a witness in the Maldives who is *unwilling* to testify in a foreign action can be compelled to give evidence by video link for the purposes of the foreign action. Even assuming that there are no legal provisions in the Maldives to that effect and also no legal provisions to compel an unwilling witness to testify in a civil matter instituted in the Maldivian courts, presumably, greater pressure can be brought to bear on such a witness to testify if his evidence is required in relation to an action in the Maldives as opposed to a foreign action. To that extent, the availability of allegedly material witnesses in the Maldives favours that jurisdiction as the more appropriate forum for the trial of the Dispute.

(2) Governing law of the Dispute

57 We now turn to the second connecting factor singled out by the Appellant before this court, *viz*, the governing law of the Dispute. That the governing law of a dispute is a relevant factor in determining which jurisdiction the dispute has the closest connection with was reiterated and explained by this court in *CIMB Bank* at [63] as follows:

> The reason why, in the consideration of the question of forum non conveniens, the issue of applicable law [*ie*, governing law] is a relevant factor is because where a dispute is governed by a foreign law, *the forum will be less adept in applying that law than the courts of the country of that law, and there could be savings in time and resources in litigating the dispute in the forum of the applicable law*. [emphasis added]

58 The Appellant submits that the governing law of the Dispute (which basically centres on the issue of the Respondent's authority and the issue of whether the Respondent committed the tort of conspiracy against the Appellant) [note: 16] is a neutral connecting factor because, in so far as these two issues are concerned, there is no difference between the *content* of Singapore law and that of Maldivian law. Specifically, the Appellant contends that: [note: 17]

> … [W]hether or not the Respondent acted in breach of his authority, the law would remain the same, whether in Singapore or in the Maldives …
>
> … The wrong would remain a wrong, whether in the Maldives or in Singapore. As such, the Judge's view subscribing to the applicability of Maldivian law as the governing law is incorrect.

59 In *Dicey, Morris and Collins on The Conflict of Laws* (Lawrence Collins gen ed) (Sweet & Maxwell, 14th Ed, 2006) ("*Dicey*") at vol 1, para 12-029, the following proposition is stated:

> If the legal issues are straightforward, or *if the competing fora have domestic laws which are*

substantially similar, the identity of the governing law will be a factor of rather little significance. [emphasis added]

This proposition was cited with approval by this court in *CIMB Bank* at [61].

60 In the present case, there is no doubt that the Respondent's alleged breaches of the Employment Contract occurred in the Maldives. Also, the alleged tort of conspiracy was committed there. Clearly, the alleged breaches of contract as well as the alleged tort of conspiracy would be governed by the law of the Maldives. In our view, the Appellant has failed to show that Maldivian law on breach of contract and the tort of conspiracy is the same as the corresponding areas of Singapore law. The Applicant has consequently failed to show that the circumstances of the present case warrant the application of the proposition expounded at vol 1, para 12-029 of *Dicey*. It must be borne in mind that in *CIMB Bank*, this court held that the governing law was not a factor of much significance because the court accepted that the Singapore courts would be able to apply the competing forum's law (if it were indeed the relevant governing law) "without the aid of foreign experts" (at [63]) since that law was English law. In contrast, it is highly questionable whether the same can be said in the present case, given that there already seems to be a sharp divergence of opinion between the respective parties' expert witnesses on several aspects of Maldivian law and the Maldivian legal system even at this interlocutory stage (see the GD at [39] and [44]). Hence, it cannot be said that the Singapore courts would be able (if the Singapore Action were allowed to proceed here) to apply Maldivian law without the aid of any experts on that system of law. On this factor, we agree with the Judge that the governing law of the Dispute also favours the Maldives as the more appropriate forum.

61 In the result, under the first stage of the *Spiliada* test, we affirm the Judge's finding that the connecting factors show that the Maldives would be the more appropriate forum for the trial of the Dispute. The one single link which the Dispute has with Singapore, as far as we can see, is the fact that the Respondent was apparently employed by the Appellant – a Singapore company – and seconded by it to work for SJM in the Maldives.

The second stage of the Spiliada *test*

62 Turning to the second stage of the *Spiliada* test, the Appellant alludes to the fact that in the Maldivian profit suit mentioned at [7] above, which has already been concluded, the Civil Court of the Maldives, in holding that the Respondent's employer was SJM and not the Appellant, considered documents issued in the Maldives to the exclusion of documents issued in Singapore (see the GD at [31]). In view of this, the Appellant argues that substantial justice cannot be done if it is compelled to initiate proceedings against the Respondent in the Maldives because the Maldivian courts are likely to adopt the same approach as that taken in the Maldivian profit suit.

63 With respect, the Appellant, in raising this argument, is traversing old grounds which have already been sufficiently dealt with by the Judge. Suffice it to restate that the Judge held that there would be no unfair prejudice to the Appellant if it were to litigate the Dispute in the Maldives since "[the Appellant] was not yet a party to proceedings in the Maldives and it would be open to another Maldivian court to take a different view [on the identity of the Respondent's employer]" (see the GD at [48]). Both of the Maldivian law experts called by the Appellant have not expressed any views to the contrary. Furthermore, there is nothing to suggest that the Appellant cannot tender the documents issued in Singapore in proceedings before the Maldivian courts.

64 In the circumstances, we hold that the Judge is correct in concluding, *vis-à-vis* the second stage of the *Spiliada* test, that the Appellant has not shown that there are circumstances by reason

of which justice requires that a stay of the Singapore Action be denied even though the application of the first stage of the *Spiliada* test points to the Maldives as the more appropriate forum for the trial of the Dispute.

Conclusion

65 For the foregoing reasons, we affirm the Judge's decision to order a stay of the Singapore Action on the ground of *forum non conveniens*. Accordingly, we dismiss the present appeal with costs and the usual consequential orders.

[note: 1] See the Appellant's Case filed on 1 July 2010 ("the Appellant's Case") at para 2.1 and the Respondent's Case filed on 2 August 2010 ("the Respondent's Case") at para 18.

[note: 2] See the Record of Appeal dated 1 July 2010 ("ROA") at vol 3(A), pp 130–139 (English translation of the judgment of the Civil Court of the Maldives in Case No 776/MC/2008) and vol 3(D), pp 941–949 (English translation of the judgment of the Supreme Court of the Maldives in Case No 2009/SCA/22).

[note: 3] See ROA at vol 3(A), pp 148–155 (English translation of the judgment of the Civil Court of the Maldives in Case No 408/MC/2008).

[note: 4] See ROA at vol 3(C), pp 702–712 (English translation of the judgment of the Civil Court of the Maldives in Case No 733/MC/2008).

[note: 5] *Id* at pp 710–711.

[note: 6] See the Appellant's Case at paras 5.12–5.15.

[note: 7] See the Respondent's Case at para 228.

[note: 8] *Ibid*.

[note: 9] See the Core Bundle dated 1 July 2010 ("CB") at vol 2, p 74.

[note: 10] See paras 11–22 of the Respondent's affidavit filed on 11 January 2010 (at ROA vol 3(D), pp 932–933).

[note: 11] See CB at vol 2, p 78.

[note: 12] See the Appellant's Case at para 6.14.

[note: 13] *Id* at para 6.10.

[note: 14] *Ibid*.

[note: 15] See CB at vol 2, p 114.

[note: 16] See the Statement of Claim at paras 15 and 23.

[note: 17] See the Appellant's Case at paras 6.22–6.23.