Orchard Capital I Ltd *v* Ravindra Kumar Jhunjhunwala
[2012] SGCA 16

Case Number	: Civil Appeal No 106 of 2011
Decision Date	: 24 February 2012
Tribunal/Court	: Court of Appeal
Coram	: Chao Hick Tin JA; Andrew Phang Boon Leong JA
Counsel Name(s)	: Lai Yew Fei and Khelvin Xu Cunhan (Rajah & Tann LLP) for the appellant; Patrick Chin Meng Liong (Chin Patrick & Co) and R S Wijaya (R S Wijaya & Co) for the respondent.
Parties	: Orchard Capital I Ltd — Ravindra Kumar Jhunjhunwala

Conflict of Laws – Choice of Jurisdiction

Conflict of Laws – Natural Forum

[LawNet Editorial Note: This was an appeal from the decision of the High Court in [2011] SGHC 185.]

24 February 2012 Judgment reserved.

Andrew Phang Boon Leong JA (delivering the judgment of the court):

Introduction

1 This is an appeal against the decision of the High Court Judge ("the Judge") in *Orchard Capital I Limited v Ravindra Kumar Jhunjhunwala* [2011] SGHC 185 ("the GD"). The Respondent had applied to stay the action brought by the Appellant against the Respondent. The application was dismissed by an Assistant Registrar ("the AR") and the Respondent appealed. The Judge allowed the appeal and stayed the action *sine die* with liberty to restore. The Appellant brought the present appeal against that decision.

2 This is a deceptive case – simple in terms of issue but hugely complex in terms of legal principles. Pared down to its essence, we have on the one hand a non-exclusive jurisdiction clause that points to Hong Kong and, on the other, the fact that the defendant (who has applied for a stay of the Singapore action) is resident in Singapore. In such circumstances, ought – and this is the central issue before this court – the Singapore action to be stayed on the ground of *forum non conveniens*? To add an ironic twist, perhaps, the applicable legal principles in relation to *forum non conveniens* have hitherto been considered to be one of the more well-established areas of Singapore law in general and the conflict of laws in particular. Whence, then, does the legal complexity just alluded to originate from?

3 Put simply, the legal complexity lies in ascertaining the legal effect of non-exclusive jurisdiction clauses in general and the specific clause in relation to the present appeal in particular. Much of the learning in the local context (and, dare we say, in the Commonwealth context as well) may be found in the comprehensive article by one of our leading local legal scholars in the field (see Yeo Tiong Min, "The Contractual Basis of the Enforcement of Exclusive and Non-Exclusive Choice of Court Agreements" (2005) 17 SAcLJ 306 ("*Yeo*")). However, despite the excellent breadth as well as depth of analysis in this article, many questions remain unanswered. Sadly, some will continue to remain

unanswered as there was no reference by either party either to this article or (and more specifically) to one central strand of issues. As we shall see, however, there has – fortuitously, perhaps – been no detrimental effect in the context of the present appeal based on the facts before us. In particular, the parties' arguments were not affected and that part of the article which could have been (but was not) raised in argument before us did not (in any event, as we shall see below (at [27])) affect the result of the present appeal. But, henceforth, lawyers would do well to pay close attention to this article should an issue relating to jurisdiction clauses, both exclusive and non-exclusive, arise before the Singapore courts in the future.

4 With these preliminary observations in mind, let us turn briefly to the background leading to the present appeal. As already alluded to above, it is in fact very straightforward.

Background

5 The Appellant is an exempt limited liability company registered in the Cayman Islands. [note: 1] The Appellant is a special purpose vehicle set up to effect financial investments, specifically in a company known as Orind Global Holdings Ltd ("OGHL"). [note: 2] The Respondent is a Singaporean Permanent Resident of Indian nationality. [note: 3] The Respondent carried on the business of manufacturing and trading in refractories. [note: 4] The Appellant and the Respondent entered into three contracts in February 2007 (collectively, "the Three Contracts"), comprising a note purchase agreement, an investment deed, and a 3.5% redeemable exchangeable convertible promissory note, respectively. [note: 5]

6 According to the Appellant, the Respondent failed to meet his obligations pursuant to the Three Contracts. In an attempt to resolve matters amicably, the Appellant and the Respondent entered into a Settlement Agreement ("the Agreement") on 28 May 2010. The relevant provisions of the Agreement are as follows: [note: 6]

> **8. Payment and Custody Arrangement**
>
> (i) [The Respondent] and OGHL shall as promptly as practicable after the date of this Agreement and in any event no later than the dates set forth below deposit USD6,500,000 in freely and immediately available funds to [the Appellant] to the account detailed at Section 8(v):
>
> (a) no less than USD2,500,000, 6 months following the date of this Agreement;
>
> (b) no less than USD3,500,000, in the aggregate, 8 months following the date of this Agreement;
>
> (c) no less than USD5,000,000, in the aggregate, 10 months following the date of this Agreement; and
>
> (d) no less than USD6,500,000, in the aggregate, the one year anniversary of the date of this Agreement;
>
> …
>
> (iii) Upon any failure of [the Respondent] or OGHL to timely pay any amount in this Section 8, then in each and every such case, unless such failure to pay shall have been waived in writing by [the Appellant], in its sole discretion, (which waiver shall not be deemed to be a waiver of any

subsequent breach): (i) any and all payment obligations outstanding by [the Respondent] and OGHL under this Agreement shall be immediately become due and payable; (ii) [the Respondent] and OGHL shall immediately pay any and all amounts outstanding under this Agreement with all accrued interest thereon in accordance with Section 8(iv) and any other sums owed hereunder in freely and immediately available funds to [the Appellant] to the account detailed at Section 8(v) and (iii) [the Appellant] may enforce any and all of its rights and remedies provided under this Agreement.

(iv) If any portion of the USD6,500,000 is not paid on October 1, 2010, then any such unpaid amount shall accrue interest from day to day at a rate of 15% per annum (or the maximum rate enforceable under applicable law).

…

[underlining in original]

7 As is evident from clause 8(i)(a) of the Agreement above, the Respondent was to pay the sum of US$2,500,000 to the Appellant by 28 November 2010. The Respondent allegedly failed to make such payment and so the Appellant commenced Suit No 8 of 2011 ("S 8/2011") on 7 January 2011 to enforce its claim under clause 8(iv) of the Agreement.

8 On 7 March 2011, the Respondent applied to stay S 8/2011 on the ground of *forum non conveniens*. The crucial clause (*viz*, the non-exclusive jurisdiction clause), in respect of the Respondent's application as well as the present appeal, is to be found in clause 23 of the Agreement ("the Clause") and reads as follows: [note: 7]

23 Governing Law

This Agreement is ***governed by and construed*** in accordance with *the laws of Hong Kong, SAR*. ***The Parties submit to the non-exclusive jurisdiction of the courts of Hong Kong, SAR.*** *The parties* hereby knowingly, voluntarily and intentionally ***waive*** *to the fullest extent permitted by law any rights they may have to* ***trial by jury*** in respect of any litigation based hereon, or arising out of, under or in connection with this Agreement.

[emphasis added in italics and bold italics]

9 The Respondent's application was heard by the AR on 21 April 2011. He refused to grant a stay of proceedings. [note: 8] Against this decision, the Respondent appealed to the High Court.

The decision in the court below

10 The Respondent's appeal was allowed by the Judge on 3 August 2011. The Judge's decision, in granting a stay of proceedings, is encapsulated within the following paragraphs of the GD (at [3]–[5]):

3 Both parties cited *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460 ("*Spiliada*") in support. It seems clear that the *Spiliada* requires a court, in an application for a stay of proceedings application on the ground of *forum non conveniens*, to determine on the balance of all competing factors, which forum would be the more clearly appropriate one. Given that the action to be stayed was commenced here, the allegation that this was not the appropriate forum meant that the burden lies with the applicant to show which was the more appropriate forum.

4 In this case, the only material factors facing off were the fact that the parties had chosen Hong Kong as the appropriate forum, and the fact that the appellant and his family are resident here, and he appears to have business in Singapore although the respondent had acknowledged that the original contracts were made to further the appellant's business in "India, China and USA". The respondent's counsel conceded that witness testimony in this case was not material as the claim would be essentially a construction of the contract. The original contracts specified Hong Kong to be the exclusive jurisdiction whereas the settlement agreement specified Hong Kong as the non-exclusive jurisdiction. Performance under the settlement agreement was to be made by payment into a Citibank account in America.

5 Generally, when the court is of the view that the factors are evenly balanced, it would conclude that the defendant had failed to discharge its burden of proving that there was another more appropriate forum. However, in the simple and straightforward contest between the two factors here, I am of the view that the selection of Hong Kong as the jurisdiction of choice was sufficient discharge of the appellant's burden, there being no evidence of any unforeseen circumstances outside the parties' contemplation at the time the settlement agreement was concluded, that renders that choice inappropriate or unjust. It was clear to the parties that the appellant's business could have taken him to China, India, USA or here. Further, there is no reason to believe that the respondent would have any difficulty enforcing a Hong Kong judgment against the appellant in Singapore. Thus, for the reasons above, the appeal is allowed and the action herein be stayed *sine die* with liberty to restore.

Issue

11 The resultant issue is, as set out at the outset of this judgment, a simple one: ought the action begun by the Appellant to be stayed on the ground of *forum non conveniens*? The real question, however, hinges on the legal effect of the Clause (bearing in mind that it is a non-exclusive jurisdiction clause) – for much will flow from our finding in this particular regard.

The parties' arguments

The Appellant's arguments

12 The Appellant contended that the key issue for determination is whether the Respondent had discharged his burden of proving that Hong Kong is a clearly or distinctly more appropriate forum than Singapore. This contention was founded on the well-established test expounded in *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460 ("*Spiliada*"). The principles laid down in *Spiliada* are an established part of the Singapore legal landscape. As observed by this court in *JIO Minerals FZC and others v Mineral Enterprises Ltd* [2011] 1 SLR 391 (at [38]–[39]):

38 The general principles to be applied in the context of the present appeal are well-established and may be traced back to the seminal House of Lords decision of *Spiliada Maritime Corporation v Cansulex Ltd* ("*Spiliada*"). Indeed, the principles set out in *Spiliada* have been approved and applied a great many times by the Singapore courts. The applicable principles were recently summarised in the decision of this court in *CIMB Bank Bhd v Dresdner Kleinwort Ltd* ("*CIMB Bank*"), as follows (at [25]-[26]):

> 25 The *locus classicus* on the question of when a stay would be granted on the basis of *forum non conveniens* is *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460 ('*Spiliada*'), a decision of the House of Lords where Lord Goff of Chieveley, in delivering the leading judgment, laid down certain guiding principles (at 476-478) for determining the

question of *forum non conveniens* ('the *Spiliada* test'). Those principles have been adopted by this court in several cases such as *Brinkerhoff Maritime Drilling Corp v PT Airfast Services Indonesia* [1992] 2 SLR(R) 345, *Eng Liat Kiang v Eng Bak Hern*, *PT Hutan Domas Raya v Yue Xiu Enterprises (Holdings) Ltd* [2001] 1 SLR(R) 104 and *Rickshaw Investments Ltd v Nicolai Baron von Uexkull* [2007] 1 SLR(R) 377 ('*Rickshaw Investments*').

26 The gist of these principles is that, under the doctrine of *forum non conveniens*, a stay will only be granted where the court is satisfied that there is some other available and more appropriate forum for the trial of the action. The burden of establishing this rests on the defendant and it is not enough just to show that Singapore is not the natural or appropriate forum. The defendant must also establish that there is another available forum which is clearly or distinctly more appropriate than Singapore. The natural forum is one with which the action has the most real and substantial connection. In this regard, the factors which the court will take into consideration include not only factors affecting convenience or expense (such as the availability of witnesses) but also other factors such as the law governing the transaction and the places where the parties respectively reside or carry on business. If the court concludes, at this stage of the inquiry ('stage one of the *Spiliada* test'), that there is no other available forum which is clearly more appropriate for the trial of the action, it will ordinarily refuse a stay. If, at this stage, it concludes that there is some other available forum which *prima facie* is clearly more appropriate for the trial of the action, it will ordinarily grant a stay, unless there are circumstances by reason of which justice requires that a stay should nevertheless be refused. In this connection, the court will consider all the circumstances of the case. For this second stage inquiry ('stage two of the *Spiliada* test'), the legal burden is on the plaintiff to establish the existence of those special circumstances.

39 We will, in fact, proceed to analyse the facts of the present appeal in accordance with the two stages enunciated in *Spiliada* and, consistent with the terminology adopted in *CIMB Bank*, will refer to each stage as "stage one of the *Spiliada* test" and "stage two of the *Spiliada* test", respectively.

13 The thrust of the Appellant's case was that the Clause, in and of itself, did not suffice in discharging the Respondent's burden of proving that Hong Kong is a distinctly more appropriate forum. As a corollary to this argument, the Appellant contended that the Judge had erred in concluding that the parties had selected Hong Kong as *the* appropriate forum. In advancing this contention, the Appellant focused on the purported nature of the Clause which was non-exclusive. The Appellant contended that the Clause only demonstrates that Hong Kong is *an* appropriate forum while parties are at liberty to commence proceedings in other forums. Towards this end, the Appellant relied upon both local and foreign case law, as well as academic literature. The main authorities and literature cited by the Appellant, as well as the Appellant's arguments founded upon them, are summarised below.

14 The Appellant first cited the Singapore High Court decision of *OCBC Capital Investment Asia Ltd v Wong Hua Choon* [2010] 4 SLR 904 ("*OCBC Capital*") where the parties entered into an agreement containing a non-exclusive jurisdiction clause (clause 9.5) which read as follows (see *OCBC Capital* at [14]):

(a) This Agreement and the rights and duties of the parties hereunder shall be governed by, and construed and interpreted in accordance with, the laws of Malaysia and in relation to any legal action or proceedings arising out of or in connection with this Agreement ('Proceedings'), the parties irrevocably submits [*sic*] to the non-exclusive jurisdiction of the courts of Malaysia, and waive any objections to Proceedings in any court on the grounds that the Proceedings have

been brought in an inconvenient forum.

(b) Such submission shall however not affect the right of OCIA to take Proceedings in any other jurisdiction nor shall the taking of Proceedings in any jurisdiction preclude OCIA from taking Proceedings in any other jurisdiction and OCIA shall be at liberty to initiate and take actions or Proceedings or otherwise against [the defendant] in Malaysia and/or elsewhere as OCIA may deem fit.

In response to proceedings brought under this agreement, the defendant in that case applied for a stay of proceedings on the ground of *forum non conveniens*. One of the issues that the court had to consider was the effect of the non-exclusive jurisdiction clause (*ie*, clause 9.5). The court held that, on a plain reading of clause 9.5(b) above, the plaintiff (*ie*, OCIA) could commence proceedings in any other jurisdiction (see *OCBC Capital* at [16]). In relation to clause 9.5(a), the court interpreted the portion of the clause concerning a waiver of any objections to proceedings on the ground of *forum non conveniens* as applying to only proceedings in Malaysia (see *OCBC Capital* at [21]). Accordingly, the usual principles governing applications for a stay of proceedings on the ground of *forum non conveniens* (see above at [12]) were applicable. In the course of applying the principles in *Spiliada*, the court had to consider the role of the non-exclusive jurisdiction clause. The court cited several decisions which took the view that the effect of a non-exclusive jurisdiction clause was that the parties could not argue that the selected non-exclusive forum was inappropriate (see *OCBC Capital* at [41]–[43]). In the court's view, therefore, the legal consequence of the non-exclusive jurisdiction clause was that the selected forum was *an* appropriate forum. In the final analysis, however, the court considered that the defendant had not discharged his burden of proving that another forum was clearly or distinctly more appropriate than Singapore (see *OCBC Capital* at [49]).

15 The Appellant next relied upon the treatise by Prof Adrian Briggs, *Agreements on Jurisdiction and Choice of Law* (Oxford University Press, 2008) ("*Briggs*"), in which the learned author summarised the various interpretations of non-exclusive jurisdiction clauses, as follows (at para 4.20):

Suppose for example, that the parties agree that the courts of Ruritania are to have non-exclusive jurisdiction, and say no more about it than that. There are, in fact, several ways to interpret their agreement. They may have agreed (1) that either side may seise the nominated court, but that the freedom of the other to seise any other court or courts is unrestricted; or (2) that either side may seise the nominated court, and once this is done, making it the first court to be seised, the jurisdiction of that court becomes exclusive; or (3) that either side may institute proceedings, in any court, but if either party then seises the nominated court, any proceedings in the first court will be discontinued and the defendant will appear and defend in the nominated court.

The Appellant, not surprisingly, contended that only the first interpretation stated above was applicable on the facts of this case as neither party had instituted proceedings in Hong Kong, the nominated forum. Hence, it was argued that the Clause did not limit the Appellant's right to commence proceedings in Singapore.

16 The Appellant also relied on the Hong Kong Court of Appeal decision of *Noble Power Investments Ltd v Nissei Stomach Tokyo Co Ltd* [2008] 5 HKLRD 632 ("*Noble*"), the salient facts of which are as follows. The first plaintiff in *Noble* was a company registered in the British Virgin Islands whilst the second plaintiff and the defendant were entities registered in Japan. The parties entered into an agreement known as a "Cooperation Agreement". Disputes subsequently arose when the defendant informed the second plaintiff that it was repudiating its obligations under the "Cooperation Agreement". The plaintiffs accepted the repudiation and claimed damages from the defendant by

commencing action via a writ. However, leave of court was required to serve the writ upon the defendant as it was a Japanese company. The defendant objected to the grant of such leave on the basis of *forum non conveniens*. In the course of adjudication, the court had to consider the effect of a non-exclusive jurisdiction clause contained within the "Cooperation Agreement" which read as follows:

> 27.1 This Agreement shall be construed and governed in accordance with the laws of Hong Kong and the parties hereto submit to the non-exclusive jurisdiction of the courts of Hong Kong.
>
> 27.4 Nothing contained in this Clause shall limit the right of any party to take any suit, action or proceedings arising under this Agreement against the other parties in any other court of competent jurisdiction, nor shall the taking of any suit, action or proceedings arising under this Agreement in any one or more jurisdictions preclude the taking of any suit, action or proceedings arising under this Agreement in any other jurisdiction, whether concurrently or not, to the extent permitted by the law of that jurisdiction.

The court in *Noble* considered the effect of non-exclusive jurisdiction clauses at some length, as follows (at [31]–[33]):

> 31 In considering the effect of a non-exclusive jurisdiction clause, it is critical to recognize that there are differences in approach depending upon where proceedings have been instituted. Where proceedings are instituted in the named forum (to which the parties have agreed to submit), the party who seeks a stay or otherwise to contest the jurisdiction or appropriateness of that forum, has a very heavy burden to discharge, since that party has by definition agreed contractually to submit to the jurisdiction. In other words, he is seeking to avoid a forum to which he has, by contract, agreed to submit. The extent of this burden is discussed below.
>
> 32 Where, however, proceedings are instituted in a forum *other than* the identified one, an altogether different approach may be required. Here, much depends on the precise wording of the clause in question. If the other forum is one to which the parties have also agreed to *submit* in the event of their being sued, it may be that there is little difference between the two situations. Where, however (as is more common) the other forum is merely one in which proceedings can be instituted without any obligation on the party sued actually to submit to that forum, the approach is different. The party who then seeks to contest the jurisdiction or appropriateness of that forum is in a better position so to do (compared with the situation articulated in the previous paragraph) simply because he would not be seeking to avoid a forum to which he has contractually agreed to submit.
>
> 33 Some simple illustrations to summarize the foregoing propositions might assist:
>
> (1) A sues B in Hong Kong. Hong Kong is named as a non-exclusive jurisdiction to which the parties have agreed to submit in the event of their being sued. The burden on B, if he contests the appropriateness of the Hong Kong courts, is a heavy one.
>
> (2) A sues B in Hong Kong. Hong Kong is on this occasion not named as a jurisdiction but the courts of, say, Japan are named as the non-exclusive jurisdiction. However, on a true construction of the relevant clause, the parties have nevertheless agreed to submit to the jurisdiction of the courts of any other forum (which would include Hong Kong) in the event of their being sued there. Again, in view of the agreement actually to submit, the burden on B is also a heavy one.

(3) A sues B in Hong Kong. Again, Hong Kong is not named as the non-exclusive jurisdiction but the courts of Japan are. However, this time the parties have not agreed to submit to any jurisdiction other than the Japanese courts. In other words, while the parties have agreed to submit to Japanese jurisdiction in the event that they are sued there, and while they have also agreed that they are at liberty to institute proceedings in a jurisdiction other than Japan, no positive obligation exists for a party to submit to any jurisdiction other than Japan. Here, the burden on B is less heavy.

[emphasis in original]

As alluded to earlier in this paragraph, the procedural context in *Noble* (an application to set aside the leave that had been granted to the plaintiffs for the service of a writ out of jurisdiction) is different from the context of the present appeal (an application for a stay of proceedings). Hence, while the outcome in *Noble* might not be relevant, the court's comments at [31]–[33], as reproduced above, are relevant insofar as they explain the general effect of non-exclusive jurisdiction clauses.

17 At the hearing before this court, the Appellant repeated, in substance, its arguments made in the court below, *viz*, that the Clause does not preclude commencement of proceedings in Singapore and that the Respondent bears the burden of proving that Hong Kong is a clearly or distinctly more appropriate forum, based upon the illustration stated at [33(3)] of *Noble* (as reproduced in the preceding paragraph).

The Respondent's arguments

18 The Respondent, not surprisingly, supported the Judge's views (above at [10]) and took the position that, by virtue of the Clause, the parties had submitted to the non-exclusive jurisdiction of the courts of Hong Kong. This factor, it was submitted, tilted the balance in favour of the Respondent in the application of the *Spiliada* test (see above at [12]).

19 The Respondent also attempted to argue that the court should also take cognisance of the fact that parties had agreed, *inter alia*, to waive all rights to a trial by jury (above at [8]). As such, the parties had – by implication – agreed to resolve all matters in a jurisdiction which allows trial by jury. This issue is addressed shortly below (at [29]).

20 In addition to contending that the Clause operated in favour of the Respondent, the Respondent also submitted that there were a myriad of factors which indicated that Singapore was not an appropriate forum for the matter to be heard. First of all, the Respondent pointed out that the only factor connecting this case with Singapore is the fact that the Respondent resides in Singapore. Secondly, there is no evidence to suggest that he has any assets or properties locally. Thirdly, the Respondent highlighted that the Three Contracts, as well as the Agreement, were neither executed nor performed in Singapore.

Our decision

21 We will begin by considering, as a preliminary matter, the legal effect of a non-exclusive jurisdiction clause. We will then apply the *Spiliada* principles to the facts before us.

What is the legal effect of a non-exclusive jurisdiction clause?

22 As already mentioned, the first port of call is the article by Prof Yeo (cited above at [3]). However, it discusses a great many issues, not all of which are germane to the present appeal. In so

far as the issues discussed (including those relevant to the present appeal) are concerned, the analysis is complex – in the main because the issues themselves are complex (many of which have not been the subject of direct legal precedent as well). We hope that we will not be doing a disservice to the article by distilling what is relevant in the context of the present appeal. One reason for doing so is because, as we shall elaborate upon in a moment, one of the central strands, whilst posing many hitherto unresolved legal questions (and even conundrums), can (as alluded to at the outset of this judgment) be addressed relatively easily on the facts of the present appeal; hence, there is no need to canvass the various issues arising from this particular strand in the detail that we might otherwise have had to.

23 At the risk of oversimplifying the erudite analysis by Prof Yeo, it appears to us that – at least in so far as non-exclusive jurisdiction clauses are concerned – there are two central strands of analysis.

24 The *first* central strand is *contractual* in nature. Put simply, *depending on the intention of the parties concerned, a non-exclusive jurisdiction clause could (taken at its highest) be given the effect of an exclusive jurisdiction clause* – in which case strong cause would be required to be demonstrated by the party seeking to sue in a jurisdiction other than that stated in the relevant clause itself (in this case, the Appellant). Such effect may, for instance, be given where it would be a breach of the non-exclusive jurisdiction clause to object to the exercise of jurisdiction by the selected forum, given the wording of the clause and the circumstances. However, a possible critique of such an approach is that, on occasion at least, the distinction between non-exclusive jurisdiction clauses and exclusive jurisdiction clauses will be blurred, if not effaced. Prof Yeo frankly admits this (see *Yeo* at 359, where Prof Yeo explains that the consequence of this contractual analysis is that there is no *theoretical* distinction between these two types of clauses). Such a result runs, of course, counter to the Appellant's view (as briefly noted above at [13]) and, perhaps, is also not entirely consistent with the approach taken by the courts in *OCBC Capital* and *Noble*. On the other hand, as Prof Yeo argues, such an approach is a principled one. One can appreciate the persuasiveness of such an argument, especially if one has regard to the substance – as opposed to the mere form – of the *contractual* arrangement entered into by the parties. Further, as just noted, the result is by no means a forgone one *if strong cause* can in fact be demonstrated by the party seeking to act in breach of the clause itself.

25 The *second* central strand is *general* in nature. Put simply, a non-exclusive jurisdiction clause is *a factor – in all cases – in ascertaining whether or not the action concerned ought to be stayed* (pursuant to the principles first laid down in the seminal House of Lords decision of *Spiliada* (see [12] above)), although (according to Prof Yeo) its qualitative strength as a factor will differ, depending on the precise circumstances before the court. We will, in fact, return to these principles later (see below, especially at [31]). As Prof Yeo correctly emphasises, this second central strand is *separate and distinct* from the first inasmuch as it is *not* premised on the contractual intention of the parties as such (see *Yeo* at 350 and 351).

26 The parties' arguments centred, in substance, on the *second* central strand although it was possible, in our view, for the parties (in particular, the Respondent) to have canvassed arguments centring on the first as well. However, as we have already observed, the various arguments in this last mentioned regard (*ie*, with respect to the *first* central strand which is *contractual* in nature) are by no means clear and are clearly complex, at least for the most part (see generally *Yeo* at 336–353). When, for example, can there be an agreement (in the context of a non-exclusive jurisdiction clause) to *waive* objection to jurisdiction (see, for example, clause 9.5(a) in *OCBC Capital* (see above at [14])) and, if so, ought a narrow or a broad approach to such waiver be adopted (see *Yeo* at 341–344)? To take another issue, can it be implied, from the non-exclusive jurisdiction clause concerned, that there has been an undertaking by the parties that the jurisdiction mentioned in that

clause is the *most appropriate* forum so that it would be a breach of contract for one of the parties to argue that any other court other than the chosen court should adjudicate on the substantive issues between the parties (see *Yeo* at 345–347)? These are just a couple of a number of issues that could arise for consideration by the court but which did not arise for decision in the context of the present appeal. In the circumstances, definitive answers to the various issues raised by Prof Yeo in his article, as interesting as they may be, must await another occasion when one or more of these issues arise squarely for decision by this court. We should caution, however, that we are by no means wholeheartedly accepting the contractual approach that is the subject of the first central strand of Prof Yeo's article. The contractual approach is not without its difficulties. For instance, it may well be argued that it is impractical to apply the contractual approach at an interlocutory stage when all that the court has is affidavit evidence. Another difficulty, which Prof Yeo recognises, is that a contractual approach may lead to uncertainty (see *Yeo* at 352). This is not to say that these difficulties are intractable. For example, as Prof Yeo suggests, a potential solution to the problem of uncertainty could be through the use of *presumptions*, though as Prof Yeo immediately adds, presumptions may themselves present difficulties (see *Yeo at 3*52).

27 Fortunately, however, as it turns out, *even if* arguments in relation to the *first* central (*ie*, contractual) strand had been raised before this court in order to maintain, for example, the proposition that the Clause ought to be accorded the effect of an *exclusive* jurisdiction clause, they would, in our view, have failed. As Prof Yeo himself argues, much would – in a contractual context – depend on the precise intention of the parties themselves which is to be gathered from the language utilised by the parties as well as the surrounding factual matrix (to the extent that the governing law of the contract requires such an approach (in the context of Singapore law, a contextual approach is required (see generally the decision of this court in Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd [2008] 3 SLR(R) 1029, especially at [132]–[133])); it should be noted, however, that in practical terms, the *lex fori* would apply to questions of interpretation by default in most cases because of the presumption of similarity (see *Yeo* at 315)). In this regard, it seems to us that, having regard to the context in which, *inter alia*, the Clause was entered into, the parties had *not* intended that the Clause have a significant effect. In particular, a perusal of the terms of the Agreement will reveal that the Agreement itself is, in the main, intended to ensure that *the Respondent* (as well as related parties) discharge their obligations as stated therein (the only clauses that appear clearly neutral (and which can be found as *general* clauses in many similar agreements) include those (towards the end of the Agreement) relating to the amendment of the Agreement as well as waiver or modification of its terms (clause 16), the remedy of injunction and specific performance (clause 19), the entire agreement clause (clause 20), third party rights (clause 21), severability in the event of invalidity, illegality or unenforceability (clause 22), and execution of the Agreement in counterparts (clause 25)). If so, then the Clause ought to be construed as being drafted in a manner consistent with such an approach (*viz*, to benefit *the Appellant*). This interpretation appears to be buttressed by the fact that *each* of the original agreements (which were allegedly breached and which were the subject of the claim which was, in turn, sought to be settled pursuant to the Agreement) contained an *exclusive* jurisdiction clause (also relating to Hong Kong). It would appear – coupled with, as just pointed out, the main purpose of the Agreement as embodied in its principal terms – that the inclusion, *instead*, of a *non*-exclusive jurisdiction clause in the Agreement suggests that *the Appellant* desired *more flexibility* in *enforcing* the terms of the Agreement in the event of a breach of it by the Respondent.

28 However, *even assuming* that this is *not* the case (and, hence, taking the Respondent's case at its highest), it is clear, in our view, that there is simply *no evidence whatsoever* that demonstrates that the Clause was intended by the parties to have a significant effect. In the circumstances, it is very clear, in our view, that the *substance* of the parties' intention was *not*, *inter alia*, to accord to the Clause the effect of an *exclusive* jurisdiction clause. Neither is there, as just stated, any evidence

to suggest that the parties had intended the Clause to have – from a contractual perspective – a significant legal effect.

29 In this regard, we should address an argument that the Respondent has made by relying on the reference in the Clause to the parties waiving their right to a jury trial (see above at [8]). In our view, this particular aspect of the Clause is, at best, neutral. It would only suggest that the parties intended to exclusively select Hong Kong if Hong Kong was the only jurisdiction in the world with a jury system. This is most certainly not the case.

30 That having been said, it does *not* follow that the Clause has *no* legal effect whatsoever. This is where the *second* central strand is relevant. In this regard, the following observations by Prof Yeo might be usefully noted (see *Yeo* at 348–349):

> 87 It is not in doubt that, whatever may be inferred or implied about the parties' intentions as to the scope of the agreement embodied in the jurisdiction agreement, the fact that a court has been chosen by the parties, albeit non-exclusively, is relevant in the application of the principles of the natural forum. The fact that the parties thought that the chosen forum was at least an appropriate forum to determine their disputes must surely carry some weight in the court's determination. What weight this factor will carry must depend on all the circumstances of the case. In a number of Singapore cases, no particular weight was given to the existence of a non-exclusive forum or foreign jurisdiction agreement, but this could be because the point had not been seriously pressed by counsel.
>
> 88 It goes too far, perhaps, to say that a non-exclusive jurisdiction agreement will never be accorded any more weight than any other connections in the case under consideration. On the other hand, it may also go too far to say that a non-exclusive jurisdiction agreement will *always* be a strong indicator of the appropriate forum to hear the case. ***The weight to be attributed to it ought to depend on the circumstances.*** It may make a difference whether the jurisdiction clause formed part of a closely negotiated contract or is a standard term in a contract of adhesion. Where the parties have clearly put their minds to the consideration of the clause, that will understandably be a very strong factor. On the other hand, if the parties have indicated a list of possible countries for the disputes to be tried, then the choices may not mean very much in terms of comparative appropriateness, and the court may even be justified in not giving any particular weight to the clause.
>
> [emphasis in original; emphasis added in bold italics]

31 There is, understandably, no magic formula as such. As Prof Yeo aptly put it, much would depend on the precise facts and circumstances concerned. An interesting question that arises (but not in the context of the present appeal) is whether or not, in relation to the observations made by Prof Yeo as quoted in the preceding paragraph, the line between the contractual approach embodied in the first central theme and the more general approach embodied in the second central theme may become blurred or even effaced to the extent that it is accepted that the latter approach may "elevate", so to speak, the relative importance of a non-exclusive jurisdiction clause beyond that of just a factor to be considered pursuant to the general principles laid down in *Spiliada* – to which principles (and application thereof) our attention now turns. Before proceeding to do so, however, it is acknowledged that Prof Yeo has in fact pointed out the distinction between both approaches (see *Yeo* at 350 and 351 as well as above at [25]). However, to the extent that the more general approach embodied in the second central theme nevertheless entails a consideration of the circumstances surrounding the making of the non-exclusive jurisdiction clause, there is – on a practical level – at least some possible blurring of the lines.

Application of the principles in Spiliada

32 Applying the principles set out at [12] above to the facts of the present appeal, it is clear that the Respondent first bears the burden of proof pursuant to stage one of the *Spiliada* test referred to in that paragraph. More importantly, as this court observed in *CIMB Bank Bhd v Dresdner Kleinwort Ltd* [2008] 4 SLR(R) 543 ("*CIMB Bank*") (at [26], also quoted above at [12]):

> [I]t is not enough just to show that Singapore is not the natural or appropriate forum. The defendant [the Respondent in the present appeal] must also establish that there is another available forum which is *clearly or distinctly more appropriate than Singapore*. [emphasis added]

33 Counsel for the Respondent, Mr Patrick Chin, sought to argue against the requirement referred to in the preceding paragraph that the defendant (the Respondent in this appeal) "must also establish that there is another available forum [Hong Kong in the present appeal] which is *clearly or distinctly* more appropriate than Singapore" (see *CIMB Bank* at [26]) [emphasis added]. The phrase "clearly or distinctly" is too well-established a criterion to be departed from – and, in our view, rightly so as it is consistent with the entire spirit as well as rationale of the doctrine of *forum non conveniens* in general and the principles thereof embodied in *Spiliada* (see also Yeo Tiong Min, *Halsbury's Laws of Singapore* vol 6(2) (LexisNexis, 2009) at para 75.088). Indeed, the Judge himself also adopted this approach (see above at [10]).

34 Hence, the question that arises in the context of the present appeal is this: Has the Respondent discharged the burden under the first stage of the *Spiliada* test in demonstrating that Hong Kong is a *clearly or distinctly* more appropriate forum for the hearing of the dispute between it and the Appellant than Singapore? To this end, the only positive factor which the Respondent can invoke – if at all – is embodied in the Clause. This is so, because the remaining arguments advanced by the Respondent (at [19]–[20]) above) only attempt to show that the dispute involves connecting factors which are interspersed across various jurisdictions other than Singapore. In *Siemens AG v Holdrich Investment Ltd* [2010] 3 SLR 1007, this court held that such a submission will not suffice in justifying a stay of proceedings on the basis of *forum non conveninens* (at [4]):

> The purpose of the *forum conveniens* analysis is to identify the most appropriate forum in which to try the substantive dispute. It is wrong to say that Singapore is *forum non conveniens* simply because the connecting factors which point to Singapore are outweighed by all the connecting factors which point away from Singapore. The connecting factors which point away from Singapore must point to a more appropriate forum than Singapore, and they might not do so if those connections are dispersed amongst several jurisdictions. Quite simply, Singapore is *forum non conveniens* only if there is a more appropriate forum than Singapore.

35 What, then, is the legal status of the Clause? In particular, does it only have the same weight as any other connecting factor *or* is it a strong indicator that Hong Kong is a clearly or distinctly more appropriate forum to hear the case? In our view, it is clear that the Clause is *not* a strong indicator that Hong Kong is a clearly or distinctly more appropriate forum to hear the case. As noted above (at [27]), it would appear that the Agreement itself was intended to ensure, *inter alia*, that *the Respondent* discharges his obligations pursuant to the relevant terms of the Agreement. It was also noted (see above at [28]) that, even if this was not the case, there was *simply no evidence* that the Clause was intended by the parties to be a strong indicator that Hong Kong is a clearly or distinctly more appropriate forum to hear the case. Again, it was also noted (see above at [29]) that the part of the Clause which refers to a waiver of the parties' right to jury trial is neutral. At best, the Clause is merely *a* factor that this court ought to consider in deciding whether or not the Appellant's action should be stayed. We note that a similar view was taken in relation to the effect of a non-exclusive

jurisdiction clause in *OCBC Capital* (see *OCBC Capital* at [44], cited above at [1s4]), although we should add that the non-exclusive jurisdiction clause in that case *explicitly* provided that the submission to the non-exclusive forum was not to affect the plaintiff's right to sue elsewhere (see clause 9.5(b) in *OCBC Capital* (reproduced above at [14])). Returning to the present appeal, against this factor (*ie*, the presence of the Clause in the Agreement) is the fact that the Respondent is resident in Singapore. We should also note that, in the context at least of the Appellant's claim against the Respondent pursuant to the alleged breach by the latter of the terms of the Agreement, the general principles in both Singapore and Hong Kong are broadly similar (reference may also be made to the decision of this court in *Good Earth Agricultural Co Ltd v Novus International Pte Ltd* [2008] 2 SLR(R) 711 at [27]). Taking all these circumstances into account, it *cannot*, in our view, be said that the Respondent has demonstrated that Hong Kong is a *clearly or distinctly* more appropriate forum for the hearing of the dispute between it and the Appellant than Singapore. Hence, the action brought by the Appellant against the Respondent in Singapore ought *not* to be stayed.

36 We should also note that we agree with counsel for the Appellant's, Mr Lai Yew Fei's, characterisation of the Judge's reasoning (set out above at [10]) to the effect that the Judge had, in substance at least, characterised the Clause as an *exclusive* jurisdiction clause (which it clearly was *not*) . Neither, for the reasons set out above, can the Clause have the *effect* of an *exclusive* jurisdiction clause or, indeed, any significant effect for that matter.

Conclusion

37 For the reasons set out above, we allow the appeal with costs, and with the usual consequential orders.

[note: 1] Statement of Claim (Record of Appeal ("RA") vol II at p 10).

[note: 2] *Ibid.*

[note: 3] *Ibid.*

[note: 4] *Ibid.*

[note: 5] *Ibid.*

[note: 6] Appellant's Core Bundle ("ACB") vol II at p 37.

[note: 7] ACB vol II at p 41.

[note: 8] RA vol II at p 28.