Zoom Communications Ltd *v* Broadcast Solutions Pte Ltd
[2014] SGCA 44

Case Number	: Civil Appeal No 119 of 2013
Decision Date	: 20 August 2014
Tribunal/Court	: Court of Appeal
Coram	: Sundaresh Menon CJ; Andrew Phang Boon Leong JA; Tay Yong Kwang J
Counsel Name(s)	: Moiz Haider Sithawalla, Meilyna Lyn Poh and Chew Wei Lin (Tan Rajah & Cheah) for the appellant; S Suressh and Teo Teresa Kirsten (Harry Elias Partnership LLP) for the respondent.
Parties	: Zoom Communications Ltd — Broadcast Solutions Pte Ltd

CIVIL PROCEDURE – Stay of proceedings

CONFLICT OF LAWS – Jurisdiction

CONFLICT OF LAWS – Natural Forum

[LawNet Editorial Note: The decision from which this appeal arose is reported at [2014] 1 SLR 1324.]

20 August 2014 Judgment reserved.

Sundaresh Menon CJ (delivering the judgment of the court):

Introduction

1 The issues presented in this appeal arise with some frequency when a foreign defendant based out of the jurisdiction is sued here. If such a defendant does not wish the Singapore courts to hear the action brought against him, he may challenge the existence of the Singapore courts' jurisdiction. Jurisdiction is typically founded upon the court having made an order granting the plaintiff leave to serve the originating process on the foreign defendant abroad (an "overseas service leave order"), and the plaintiff having thereafter effected such service of the originating process. Hence, any attempt by a foreign defendant to challenge the existence of the Singapore courts' jurisdiction over him will usually entail his making an application to set aside the overseas service leave order. This may be done only so long as the foreign defendant has not yet submitted to the Singapore courts' jurisdiction or otherwise accepted its existence. Submission to jurisdiction may be constituted by the foreign defendant taking a step in the proceedings where this is incompatible with his position that the Singapore courts have no jurisdiction over him. As a result, such a foreign defendant may run into difficulties if he intends, perhaps as a fall-back, to argue that if jurisdiction exists, then it should not be exercised on the grounds that Singapore is not the *forum conveniens*, or, as O 12 r 7(2) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) puts it, the "proper forum" for the trial of the action against him. Where a foreign defendant takes this course of action, then by applying for a stay of proceedings on this particular basis (referred to hereafter as "improper forum grounds" for short), he may be found to have submitted to the jurisdiction of the Singapore courts because it is well established that such a stay application is generally premised on the Singapore courts having jurisdiction over him, but being asked, as a matter of discretion, not to exercise it.

2 The foreign defendant in this case, who is the appellant in the present appeal ("the

Appellant"), seeks to set aside the overseas service leave order granted to the plaintiff, the respondent in this appeal ("the Respondent"); in the alternative, it seeks a stay of proceedings on the grounds that Singapore is not the proper forum for the trial of the dispute between the parties ("the Dispute"). The Respondent contends that by seeking a stay, even in the alternative, the Appellant has submitted to the jurisdiction of the Singapore courts and so cannot maintain its attempt to set aside the overseas service leave order that had been granted to the Respondent ("the Leave Order"). This raises the question: should submission be inferred in such circumstances, particularly if the foreign defendant actually proceeds to present its arguments for a stay to the Singapore courts?

3 It was held by the judge in the court below ("the Judge") that the Appellant, in seeking a stay of proceedings on improper forum grounds, albeit as an alternative to the setting aside of the Leave Order, and, further, in pressing its stay arguments in court, had submitted to the jurisdiction of the Singapore courts and was therefore barred from contesting the existence of jurisdiction (see *Broadcast Solutions Pte Ltd v Zoom Communications Ltd* [2014] 1 SLR 1324 ("the GD")). The Appellant contends otherwise, and this is the first issue in this appeal.

4 The second issue pertains to the application of the test laid down in *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460 ("*Spiliada*"), the leading decision of the House of Lords on the doctrine of the proper forum for the trial of an action.

5 The Judge, having dismissed the Appellant's prayer to set aside the Leave Order, also rejected its application for a stay of proceedings on improper forum grounds. The Judge concluded, applying the test laid down in *Spiliada* ("the *Spiliada* test"), that since the factors connecting the Dispute to Singapore (the Respondent's preferred jurisdiction) and India (the Appellant's preferred jurisdiction) were evenly balanced, the Appellant had failed to discharge its burden, as the stay applicant, of "establish[ing] clearly and distinctly that there [was] a more appropriate jurisdiction than Singapore to hear the [D]ispute" (see the GD at [74]).

6 Although there is substantial and persuasive foreign jurisprudence on the first issue of whether submission should be inferred where a foreign defendant both disputes the existence of the local court's jurisdiction and also, as a fall-back, applies for a stay of proceedings on improper forum grounds, this appears to be the first time the question has been squarely raised before us. Some reflection was therefore called for. There also seemed to us to be some confusion with regard to certain practice points. We therefore take this opportunity to provide guidance to the profession.

7 On the second issue, we note that when a foreign defendant is sued in Singapore, the *Spiliada* test is applied, in slightly modified forms, both at the stage of considering whether the plaintiff should be granted leave to serve the originating process on the foreign defendant out of jurisdiction, *and* also at the stage of considering whether a stay of proceedings on improper forum grounds should be ordered (assuming the foreign defendant makes such an application). Two questions were presented to us in relation to this issue: first, on whom does the burden of proof lie at each stage; and second, on the facts of this case, as between India and Singapore, which is the more appropriate forum for the trial of the Dispute?

8 We reserved judgment to consider these matters.

Background facts and procedural history

9 The Appellant, Zoom Communications Ltd, is a company incorporated in India and is in the business of supplying broadcast equipment and services. The Respondent, Broadcast Solutions Pte Ltd, is a company incorporated in Singapore and is in much the same line of business as the Appellant.

The parties have a history of hiring equipment and services from each other in order to fulfil contracts with their own clients.

10 On 7 February 2013, the Respondent filed in Singapore a writ of summons in Suit No 119 of 2013 ("the Singapore Action") claiming from the Appellant the sums of US$500,000, €216,000 and S$35,000 under three hire agreements ("the three Hire Agreements"), plus interest and costs. The Respondent applied *ex parte* for leave to serve the writ of summons ("the Writ") on the Appellant in India. On 14 February 2013, the Respondent was granted the Leave Order, and it is this order that the Appellant seeks to have set aside in this appeal.

11 On 1 March 2013, the Respondent filed a memorandum of service stating that the Writ had been served on the Appellant. The Appellant filed a memorandum of appearance on 18 March 2013; it is not disputed that this did not amount to a submission to the jurisdiction of the Singapore courts: see O 12 r 6 of the Rules of Court. The Appellant was required to serve its defence on the Respondent by 1 April 2013, but did not do so. This default was of no moment because on 4 April 2013, counsel for the Appellant applied for the time for serving the defence to be extended to "one week from the date of the order to be granted herein" [note: 1] on the grounds that full instructions had yet to be taken. On 8 April 2013, an extension of time to 15 April 2013 was granted.

12 On 15 April 2013, instead of serving its defence on the Respondent, the Appellant filed a summons ("the Summons"), which, although headed as a summons for a stay of proceedings, also included a prayer that the Leave Order be set aside. The Summons was in these terms: [note: 2]

> **SUMMONS FOR STAY OF PROCEEDINGS (FORUM NON CONVENIENS)**
>
> To: Solicitor(s) for the Plaintiff(s)
>
> HARRY ELIAS PARTNERSHIP LLP
>
> …
>
> Let all parties concerned attend before the Court on the date and time to be assigned for a hearing of an application by the [Appellant] and for the following order(s):
>
> 1. That the Order of Court dated 14 February 2013 [*ie*, the Leave Order] be set aside pursuant to Order 12 Rule 7(1)(c) of the Rules of Court;
>
> 2. That all further proceedings in this action be stayed pursuant to Order 12 Rule 7(2) of the Rules of Court;
>
> 3. That costs be paid by the [Respondent] to the [Appellant]; and
>
> 4. Such further order or relief as this Honourable Court deems fit.
>
> The grounds of the application are:
>
> 1. set out in the affidavit of Gulshan Jhurani affirmed on … 15 April 2013

13 We hereafter refer to the first two prayers of the Summons as "the Setting-Aside Prayer" and "the Stay Prayer" respectively.

14 The Summons was first heard by an assistant registrar ("the assistant registrar") on 13 May 2013, and judgment was reserved until 27 May 2013, when the Summons was dismissed with costs. On 5 June 2013, the Appellant appealed to a High Court judge in chambers. That appeal was heard by the Judge on 27 June 2013, and was likewise dismissed. On 30 August 2013, the Appellant sought and obtained leave for a further appeal to this court.

The parties' submissions and the decisions below

Before the assistant registrar

15 At the first hearing before the assistant registrar, the Appellant characterised its prayers in the Summons in the following manner: [note: 3]

> … Essentially we are seeking for the leave to serve out of jurisdiction given on 14 February 2013 to be set aside. Alternatively for proceedings to be stayed pursuant to Order 12 rule 7(2).

16 However, having so characterised the Summons, the Appellant then took the seemingly curious decision to present its arguments on the Stay Prayer first. Evidently, the Appellant took the view that it could hold the Setting-Aside Prayer in abeyance. We say more on this later. For present purposes, it is sufficient to note that the Appellant proceeded to make the following arguments in relation to the Stay Prayer:

> (a) The connecting factors pointed to India as the proper forum for the trial of the Dispute because separate proceedings had been commenced there by the Appellant for the return of broadcast equipment hired by the Respondent. The hire of that equipment was a separate transaction from the transactions in question in the Singapore Action, but it was relevant because the Respondent had sought to raise the three Hire Agreements as an issue in the Indian proceedings. There was therefore a real risk of a multiplicity of proceedings.
>
> (b) Conversely, there were no connecting factors pointing to Singapore as the proper forum. The Respondent had relied on its standard terms and conditions ("the Standard Terms and Conditions") containing a choice of forum clause in favour of the Singapore courts when it applied *ex parte* for the Leave Order, [note: 4] but those terms and conditions did not apply to the three Hire Agreements since the Appellant never had sight of them (and this fact, so the Appellant alleged, had not been disclosed by the Respondent when it applied for the Leave Order).

17 In relation to the Setting-Aside Prayer, the Appellant repeated its arguments that India rather than Singapore was the proper forum for the trial of the Dispute. It also claimed that the Respondent, when making its *ex parte* application for the Leave Order, failed to provide full and frank disclosure of two material points: first, that there were related proceedings ongoing in India; and second, that it was disputed whether the Standard Terms and Conditions applied to the three Hire Agreements, particularly since, according to the Appellant, those terms and conditions were never brought to its attention.

18 The assistant registrar ruled in favour of the Respondent. She considered that a prayer for the setting aside of the Leave Order and a prayer for a stay of the Singapore Action on improper forum grounds could not be pursued together "since they [were] fundamentally inconsistent with one another": [note: 5] the former contested the existence of the Singapore courts' jurisdiction, whereas the latter presumed its existence. The assistant registrar relied on *The "Jian He"* [1999] 3 SLR(R) 432 ("*The Jian He*") at [41]–[55], *The Sydney Express* [1988] Lloyd's Rep 257 and *Dicey and Morris on*

The Conflict of Laws (Lawrence Collins gen ed) (Sweet & Maxwell, 12th Ed, 1993) ("*Dicey and Morris* (12th Ed)") at p 289 as authorities for the proposition that an application for a stay of proceedings in Singapore on improper forum grounds was not a challenge to the existence of the Singapore courts' jurisdiction. The assistant registrar therefore held that the Stay Prayer represented the Appellant's acceptance of the existence of the Singapore courts' jurisdiction over it, with the result that it could no longer come to court to contest that issue.

19 The assistant registrar then examined the various connecting factors which were said to point to India and, in contradistinction, Singapore as the proper forum, and found that they were evenly matched. Neither India nor Singapore could be said to be the "clearly more appropriate" [note: 6] forum for the trial of the Dispute. Therefore, the assistant registrar held, the Appellant had failed to show that India was the proper forum, as was its burden under the *Spiliada* test.

20 The assistant registrar also thought that the Respondent, when making its *ex parte* application for the Leave Order, ought to have disclosed that it was disputed whether the Standard Terms and Conditions applied to the three Hire Agreements. She held that but for the Appellant having taken a step in the Singapore Action by applying for a stay of proceedings, she would have set aside the Leave Order for the non-disclosure.

Before the Judge

21 On appeal from the assistant registrar's decision, the Appellant conceded before the Judge that *if* it had indeed taken a step in the Singapore Action, it would not be entitled to seek to have the Leave Order set aside. The Appellant explained that it had presented its arguments on the Stay Prayer first before the assistant registrar as a practical matter. This was because if it succeeded in having the Leave Order set aside, the Respondent could simply file a fresh writ of summons in Singapore and there would be no finality on the question of where the Dispute should ultimately be tried.

22 The Appellant relied on *Williams & Glyn's Bank plc v Astro Dinamico Compania Naviera SA* [1984] 1 WLR 438 ("*Williams*") for the proposition that concurrently applying for a stay of proceedings on improper forum grounds and for the setting aside of an overseas service leave order need not amount to a submission to the local court's jurisdiction. It also repeated its arguments on India being the proper forum in the present case.

23 The Judge dismissed the appeal and declined to set aside the Leave Order for the following reasons:

(a) The Appellant sought inconsistent reliefs when it applied to set aside the Leave Order along with its application for a stay of the Singapore Action on improper forum grounds. The latter application was predicated on the Appellant having submitted to the jurisdiction of the Singapore courts. In the Judge's view, the case of *Williams* did not apply beyond its own "peculiar" facts: at [22] of the GD.

(b) The Judge held that even if merely including a prayer for a stay of proceedings on improper forum grounds in an application did not amount to a submission to the jurisdiction of the Singapore courts, actually proceeding to make arguments directed at obtaining such a stay could. The Judge was of the view that in making arguments on the Stay Prayer before the assistant registrar, the Appellant "had crossed the line" and could no longer be heard to challenge the existence of the Singapore courts' jurisdiction: at [26] of the GD.

(c) The Judge noted that while *Dicey and Morris* (12th Ed) suggested that an application for a stay of proceedings would not amount to a submission to the local court's jurisdiction if it was made as an alternative to an application challenging the existence of the local court's jurisdiction, this qualification was not restated in a later edition of that book (*viz*, *Dicey, Morris and Collins on The Conflict of Laws* (Lord Collins of Mapesbury gen ed) (Sweet & Maxwell, 15th Ed, 2012) ("*Dicey, Morris and Collins* (15th Ed)")): at [39] of the GD.

(d) Moreover, there were, in the Judge's view, also apparent contradictions in G P Selvam, *Singapore Civil Procedure 2007* (Sweet & Maxwell, 2007) ("the White Book"). Para 12/7/3(3) of the White Book stated, citing *Williams*, that an application for a stay of proceedings in Singapore pending the outcome of proceedings in a foreign jurisdiction did not amount to a submission to jurisdiction. But, para 12/7/4 stated, also citing *Williams*, that where a foreign defendant applied for a stay of proceedings in Singapore on improper forum grounds, he in fact accepted the existence of the Singapore courts' jurisdiction and was not to be treated as disputing it: at [41]–[42] of the GD.

(e) The Judge concluded that *Williams* did not establish a general principle that "a stay application [was] not a submission to the court's jurisdiction … [or] that a prayer for a stay, as an alternative to a prayer to set aside the proceedings, [would] avoid a submission to the court's jurisdiction" (see [44] of the GD). While it might be arguable that merely applying for a stay of proceedings would not amount to a submission to the local court's jurisdiction, the line would be crossed where, as here, the foreign defendant actually presented its arguments for a stay to the local court: at [44]–[45] of the GD.

(f) Finally, the Judge, as did the assistant registrar before him (see above at [20]), stated that but for the Appellant's submission to the jurisdiction of the Singapore courts, he would have set aside the Leave Order on account of the Respondent's failure to make full and frank disclosure of all the material facts when it applied *ex parte* for the Leave Order: at [63]–[64] of the GD.

24 The Judge also dismissed the Stay Prayer, ruling that the burden of proof was on the Appellant, as the stay applicant, to "establish clearly and distinctly that there [was] a more appropriate jurisdiction than Singapore to hear the [D]ispute" (at [74] of the GD). Applying the *Spiliada* test, the Judge found that the Appellant had not discharged this burden because the connecting factors pointing to India and, in contradistinction, Singapore as the proper forum appeared evenly balanced. In the Judge's view, even if India was the more appropriate forum, it was only *slightly* more appropriate; it was not "*clearly or distinctly* the more appropriate forum" [emphasis added]: at [84] of the GD.

Our decision

Preliminary observations

25 The two key questions which we have to decide in this appeal are whether the Leave Order should be set aside, and if not, whether the Stay Prayer should be allowed.

26 On the first question *apropos* the setting aside of the Leave Order, it is well established that the jurisdiction of the Singapore courts is territorial. Jurisdiction exists as of right over a defendant who is within Singapore, but jurisdiction over a foreign defendant is discretionary: see *Siemens AG v Holdrich Investment Ltd* [2010] 3 SLR 1007 at [7]. In the latter situation, absent the foreign defendant's consent to the Singapore courts assuming jurisdiction over him, jurisdiction would only arise where the foreign defendant has been validly served with an originating process out of

jurisdiction. The requirements for valid service out of jurisdiction are well established, namely:

(a) the plaintiff's claim must come within one of the heads of claim in O 11 r 1 of the Rules of Court;

(b) the plaintiff's claim must have a sufficient degree of merit; and

(c) Singapore must be the proper forum for the trial of the action.

27 A foreign defendant who has been sued here and who does not want to submit to the jurisdiction of the Singapore courts may enter an appearance and then seek to dispute the existence of the Singapore courts' jurisdiction in any of the ways enumerated in O 12 r 7(1) of the Rules of Court, which reads:

Dispute as to jurisdiction, etc.

7.—(1) A defendant who wishes to dispute the jurisdiction of the Court in the proceedings by reason of any such irregularity as is mentioned in Rule 6 or on any other ground shall enter an appearance and within the time limited for serving a defence apply to the Court for —

(*a*) an order setting aside the writ or service of the writ on him;

(*b*) an order declaring that the writ has not been duly served on him;

(*c*) the discharge of any order giving leave to serve the writ on him out of the jurisdiction;

(*d*) the discharge of any order extending the validity of the writ for the purpose of service;

(*e*) the protection or release of any property of the defendant seized or threatened with seizure in the proceedings;

(*f*) the discharge of any order made to prevent any dealing with any property of the defendant;

(*g*) a declaration that in the circumstances of the case the Court has no jurisdiction over the defendant in respect of the subject-matter of the claim or the relief or remedy sought in the action; or

(*h*) such other relief as may be appropriate.

…

28 For instance, the foreign defendant may apply, within the time limited for serving his defence, to set aside the overseas service leave order (see O 12 r 7(1)(*c*)) on the grounds that the plaintiff failed to meet one or more of the three requirements listed at [26] above. If that order was obtained *ex parte*, the foreign defendant may also seek to impugn it on the grounds that the plaintiff failed to make full and frank disclosure of all the material facts when it applied for that order. But, his contest to the existence of the Singapore courts' jurisdiction may only be maintained if he has not, either explicitly or implicitly through his own actions, waived his right to do so.

29 As indicated earlier, the Appellant seeks to have the Leave Order discharged under O 12 r 7(1)(*c*) of the Rules of Court. Of the factors enumerated above, two are not disputed: it is not suggested

that the Respondent's claim does not come within one of the heads of claim in O 11 r 1, or that it does not have a sufficient degree of merit. It is, instead, three other factors that are in issue:

(a) The first is the threshold issue of whether the Appellant accepted the existence of the Singapore courts' jurisdiction by submitting to jurisdiction.

(b) If it is found that the Appellant did not submit to the jurisdiction of the Singapore courts, it would then have to be determined whether the Leave Order should be set aside due to either:

(i) the Respondent's failure to provide full and frank disclosure of all the material facts when it made its *ex parte* application for the Leave Order; or

(ii) the Respondent's failure to show that Singapore is the proper forum for the trial of the Dispute.

30 We note that on the last point of whether Singapore is the proper forum, the test applied is substantively the same as that applied in considering whether a stay of proceedings on improper forum grounds should be granted, namely, the *Spiliada* test. It follows that if the Leave Order is not set aside (*ie*, if the Respondent succeeds in showing that Singapore is the proper forum), then a stay of the Singapore Action would not be granted, unless something new has arisen since the Appellant made its setting-aside application such that the stay application can be mounted on a different factual basis. In the present case, no new issues can possibly have arisen, principally because the Setting-Aside Prayer and the Stay Prayer were filed at the same time. Thus, if we decline to set aside the Leave Order, it should follow that the Stay Prayer would not be granted. We discuss this point in more detail later, but the short point is that for the reasons elaborated below, the Stay Prayer was entirely unnecessary. Our comments generally on the Setting-Aside Prayer and the Stay Prayer being sought concurrently should be understood subject to this overarching observation.

31 Against that background, we turn to the issues in dispute set out at [29] above, namely:

(a) whether the Appellant submitted to the jurisdiction of the Singapore courts; and

(b) if not, whether the Leave Order should be set aside for:

(i) the Respondent's failure to make full and frank disclosure of all the material facts when applying *ex parte* for the Leave Order; or

(ii) the Respondent's failure to establish that Singapore is the proper forum for the trial of the Dispute.

Whether the Appellant submitted to the jurisdiction of the Singapore courts

32 In our judgment, the first issue of whether the Appellant submitted to the jurisdiction of the Singapore courts is capable of being answered shortly. If the Appellant had indeed made arguments on the Setting-Aside Prayer and the Stay Prayer in the alternative in the proceedings below, with the Stay Prayer constituting its fall-back application, it could not have submitted to the jurisdiction of the Singapore courts. The rule that a foreign defendant who has submitted to the jurisdiction of the local court cannot be heard to challenge the existence of jurisdiction is self-evident. But, it is a question of fact in each case whether there has been a submission. Where a foreign defendant puts forward an application for a stay of proceedings on improper forum grounds as a fall-back to an application for an overseas service leave order to be set aside, it would generally *not* be appropriate to infer that he

has submitted to the jurisdiction of the local court. This is so for the simple reason that the question of whether the local court has jurisdiction over the foreign defendant (which is the question to be decided *vis-à-vis* his setting-aside application) is logically anterior to the question of whether such jurisdiction, if it exists, should be exercised (which is the question to be decided *vis-à-vis* the foreign defendant's stay application).

33 The foregoing analysis does not readily change even where, as a matter of convenience and timing, the two prayers for, respectively, the setting aside of an overseas service leave order and a stay of proceedings on improper forum grounds are sought at the same time. The key consideration is that so long as the foreign defendant has not done anything which, considered in the context and circumstances of the case, is meaningful only if he has waived any objection to the existence of the local court's jurisdiction, he should not be treated as having submitted to jurisdiction. In our judgment, this is the effect of *Williams.*

34 The Respondent has advanced two arguments against this proposition. The first is that the Appellant fails to appreciate the distinction between applications under O 12 r 7(1) challenging the existence of the Singapore courts' jurisdiction and applications under O 12 r 7(2) for a stay of proceedings on improper forum grounds. According to the Respondent, an application under the latter provision necessarily entails that there has been a submission to our courts' jurisdiction. The Respondent also contends that *Williams* does not apply on the present facts because it stands only for the limited proposition that the English courts have a statutory power to grant a stay of proceedings in connection with a challenge to the existence of their jurisdiction. *Williams*, the Respondent argues, is not authority for the more general proposition that a stay application will not amount to a submission to the jurisdiction of the local court as long as it is mounted as a fall-back to an application to set aside an overseas service leave order.

35 The Respondent's second argument is that on the facts of the present case and the notes of evidence of the hearings below, it is not the case that the Appellant sought the setting aside of the Leave Order as its primary relief, and then, as a fall-back, sought a stay of proceedings on improper forum grounds. Instead, the Respondent contends, the Appellant actually proceeded with the Stay Prayer as its primary application, and in so doing, submitted to the jurisdiction of the Singapore courts.

Whether Williams applies to the present case

36 On the Respondent's first argument that (among other things) *Williams* is inapplicable to the present case, we agree that the facts of *Williams* were, as the Judge noted at [22] of the GD, "peculiar" (see also [23(a)] above). But, this does not mean that the principles articulated there are not of general application.

37 In *Williams*, the appellant bank sued the respondent companies, which were owned and managed in Greece, to enforce certain guarantees that had purportedly been entered into by the respondents. The respondents made an application under the English equivalent of our O 12 r 7(1) (*viz*, O 12 r 8 of the Rules of the Supreme Court (UK)) contesting the existence of the English courts' jurisdiction. At the same time, they applied for a stay of proceedings on the grounds that the issues which would determine the question of jurisdiction and, to a large extent, the decision on the merits had already been raised in separate proceedings in Greece. Briefly, the respondents' argument was that the guarantees in question, which included a clause specifying English law as the governing law of the instruments and the English courts as the forum for determining disputes thereunder, had been executed without any authority and were fraudulent. It was this issue that was proceeding to trial in Greece. If the guarantees were indeed found to be fraudulent in the Greek proceedings, then the

clause on which the English courts depended to found the existence of their jurisdiction over the respondents would be null and void. The only question before the House of Lords was which of the issues – that of jurisdiction or that of a stay – should be decided first.

38 Lord Fraser of Tullybelton held (at 442) that "logically the court must decide whether it has jurisdiction before it can go on to consider any other question in the action". However, on the facts, "a decision on jurisdiction could only be reached by deciding whether the guarantees were valid or not and thus in effect deciding the issue which [was] at the heart of the action" (see likewise 442). The question of whether a stay of proceedings should be granted could therefore be decided first, displacing the normal order of things. Further, ordering a stay in such circumstances would not entail the English courts assuming jurisdiction and thereby rendering the respondents' contest to the existence of jurisdiction nugatory.

39 The appellant in *Williams* raised two arguments in particular. First, it was submitted that the English courts had no power to grant a stay of proceedings without having first made a ruling on whether they had jurisdiction over the respondents. Lord Fraser rejected this argument on the grounds that the English courts had the power to do so under s 49(3) of the Supreme Court Act 1981 (c 54) (UK) ("the SCA 1981 (UK)").

40 Second, it was argued (at 442 of *Williams*) that:

> … [T]he respondents either had waived any objection to the [existence of the English courts'] jurisdiction because they had taken a step in the action by applying for a stay, or … would waive any objection if they persisted with their application [for a stay] in priority to disputing the [existence of] jurisdiction.

Lord Fraser rejected this argument as well. His Lordship considered that as a general principle, whether a particular step taken by a foreign defendant *necessarily* involved a waiver of any objection to the existence of the local court's jurisdiction depended on two tests. The first was that found in the following observations of Cave J in *Rein v Stein* (1892) 66 LT 469 at 471:

> It seems to me that, in order to establish a waiver, you must show that the party alleged to have waived his objection has taken some step *which is only necessary or only useful if the objection has been actually waived, or if the objection has never been entertained at all.* [emphasis added]

41 The second test was that set out in the following observations of Denning LJ in *In re Dulles' Settlement (No 2)* [1951] Ch 842 ("*Dulles*") at 850:

> I cannot see how anyone can fairly say that a man has voluntarily submitted to the jurisdiction of a court, when he has all the time been vigorously protesting that it has no jurisdiction. If he does nothing and lets judgment go against him in default of appearance, he clearly does not submit to the jurisdiction. What difference in principle does it make, if he does not merely do nothing, but actually goes to court and protests that it has no jurisdiction? I can see no distinction at all.

42 Applying these two tests, Lord Fraser held that on the facts of *Williams*, it could not be said that a stay of proceedings would *only* be necessary or *only* be useful if the respondents had waived any objection to the existence of the English courts' jurisdiction. This was because the very purpose of the respondents' stay application was to postpone the inquiry into the existence (or otherwise) of the English courts' jurisdiction until the outcome of the proceedings in Greece was known; those proceedings were relevant and, indeed, necessary to the determination of the jurisdiction issue. Moreover, the respondents had from the beginning been protesting vigorously that the English courts

had no jurisdiction over them. In those circumstances, their application for a stay of proceedings was not inconsistent with their maintaining their objections to the existence of the English courts' jurisdiction.

43 It is clear from the subsequent treatment of *Williams* in the authorities that on the question of when a foreign defendant may be taken to have submitted to the jurisdiction of the local court, the case has come to stand for the proposition enunciated by Cave J in *Rein v Stein* (see [40] above), which is that submission to jurisdiction may be inferred if the foreign defendant has taken a step that is "only necessary or only useful" if: (a) any objection to the existence of the local court's jurisdiction has been waived; or (b) no such objection has ever been entertained at all. This, in our judgment, is too well-established a rule of private international law to be controverted: see, for instance, *Dicey, Morris and Collins* (15th Ed) at paras 11–129 and 11–130, and most recently, the judgment of the UK Supreme Court in *Rubin and another v Eurofinance SA and others* [2012] UKSC 46 at [159]. Reference may also be made to Richard Fentiman, *International Commercial Litigation* (Oxford University Press, 2010) ("*Fentiman*"), where the learned author states at para 9.07:

> A defendant which acknowledges service of the claim, and applies to contest the court's jurisdiction does not submit. Again, until a court exercises jurisdiction, a defendant which expressly maintains its continued challenge to the court's jurisdiction does not submit by making an application unrelated to the court's jurisdiction, including presumably an application for a stay of proceedings.

Williams is cited as the authority for the last proposition in the above quotation.

44 We consider that *Williams* is correct on this point. In our view, the fundamental issue in cases where a foreign defendant both disputes the existence of the local court's jurisdiction and, as a fall-back, seeks a stay of proceedings on improper forum grounds is whether there has been a waiver of any objection which the foreign defendant might wish to raise to the existence of the local court's jurisdiction. As a matter of principle, a party should only be taken to have waived a legal right if his conduct is unequivocal. Colman J expressed it well in the following terms in *Advent Capital plc v G N Ellinas Imports-Exports Ltd and Standard Trading Limited* [2005] EWHC 1242 (Comm) at [78]:

> … The essence of the test [in *Williams*] is that – reflected in the word "only" – there has to be an unequivocal representation by word or conduct that objection is not taken to the relevant jurisdiction. …

45 Applying that test to the present case, we do not think that a prayer for a stay of proceedings on improper forum grounds, when it is framed as a fall-back to a prayer challenging the existence of the Singapore courts' jurisdiction, can be said to amount to a step that would only be useful or only be necessary if any objection to the existence of the Singapore courts' jurisdiction has been waived. We accept that taken separately, the arguments on each of these prayers have inconsistent bases: the former set of arguments *denies* that the Singapore courts have jurisdiction over the foreign defendant, whereas the latter set of arguments *admits* that the Singapore courts have jurisdiction over the foreign defendant but pleads that it should not be exercised. However, where these two sets of arguments are presented in the alternative, they fall to be considered in a cascading sequence, and not together; only if the first set of arguments fails to find traction will the Singapore courts even need to consider the second set of arguments. In situations where this sequence of analysis is applicable, the making of a stay application on improper forum grounds as a fall-back would not prejudice the primary application challenging the existence of the Singapore courts' jurisdiction.

46 Further, it cannot be doubted (and the Respondent correctly did not contest this) that if the

Appellant had first applied to set aside the Leave Order, and then, only after that application had foundered, had applied afresh for a stay of proceedings on improper forum grounds, there would have been no question of the Appellant having submitted to the Singapore courts' jurisdiction. If no question of submission would have arisen had the Setting-Aside Prayer and the Stay Prayer been applied for sequentially in separate summonses, then as a matter of principle, there seems no reason why the Appellant should not be permitted, having made the appropriate reservations of its rights, to collapse the two prayers into a single summons, with the Stay Prayer mounted as a fall-back to the Setting-Aside Prayer.

47 We note that under O 12 r 7(1) of the Rules of Court, any challenge to the existence of the Singapore courts' jurisdiction must be made within the time limited for serving a defence; and under O 12 r 7(2), any application for a stay of proceedings on the grounds that Singapore is not the proper forum must likewise be made within the same timeframe. As the timelines are the same, a foreign defendant who wishes both to contest the existence of the Singapore courts' jurisdiction under O 12 r 7(1) and also seek a stay of proceedings on improper forum grounds under O 12 r 7(2) as a fall-back might well see an advantage in seeking both reliefs at the same time or even in the same application, but as alternative prayers. This is why such applications are frequently mounted together, but this does not thereby render this practice a sound strategy in every case. Our observations in this paragraph, it should be noted, go only to the question of submission to the jurisdiction of the Singapore courts; they do not go to the separate question of whether a subsequent application for a stay of proceedings on improper forum grounds under O 12 r 7(2) would be foreclosed in any event once the Singapore court has ruled that it will not set aside the applicable overseas service leave order, a point we return to later in this judgment at [76]–[79].

48 The foregoing analysis is sufficient to deal with the issue of whether the Appellant's stay application amounted to a submission to the Singapore courts' jurisdiction, but since a number of authorities were cited in the course of the arguments before us, we take this opportunity to clarify the position.

49 The first authority which we wish to discuss in this regard is our decision in *Republic of the Philippines v Maler Foundation and others* [2008] 2 SLR(R) 857 ("*Republic of Philippines*"). In *Republic of Philippines*, we found that the appellant in that case ("the Philippines Republic") submitted to the jurisdiction of the Singapore courts when it prayed for, among other things, the release to it of certain funds that comprised the subject matter of the action. That prayer had been included in an application for a stay of proceedings on the grounds of sovereign immunity. We found that the Philippines Republic would have proceeded with its prayer for the funds to be released regardless of whether or not its stay application was successful. Thus, it was clear from the circumstances of the case, construed as a whole (see [80]–[82] of *Republic of Philippines*), that in fact, the Philippines Republic was invoking the jurisdiction of the Singapore courts, rather than contesting its existence. It was on that basis that we held that the Philippines Republic had submitted to the jurisdiction of the Singapore courts.

50 In our judgment, *Republic of Philippines* has no application to the present case principally because here, the Appellant's application under O 12 r 7(2) for a stay of the Singapore Action on improper forum grounds was mounted as a fall-back to its primary application under O 12 r 7(1) for the Leave Order to be set aside.

51 The second authority which we wish to draw attention to is our decision in *The Jian He*. Both the assistant registrar and the Judge relied on this case as an authority for the proposition that an application for a stay of proceedings was not a challenge to the existence of the local court's jurisdiction; indeed, it was said to entail submission to the local court's jurisdiction. The paragraph

cited is [44] of *The Jian He*:

> 44 … [Order] 12 r 7 only applies where the jurisdiction of the court is being challenged. A stay application on the ground of a foreign jurisdiction clause does not challenge the jurisdiction of the court. It is asking the court to exercise its discretion not to assume jurisdiction over the case but to let the case be heard in another more appropriate forum, in this instance, a contractual forum. In *The Sydney Express* [1988] Lloyd's Rep 257 at 262 Sheen J said:
>
> > Lord Fraser pointed out [in *Williams*] that Order 12 r 8(1)(h) [*ie*, the equivalent of our O 12 r 7(1)(*h*)], although wide in its terms ... must be read in its context and is not appropriate to include an order to stay. O 12 r 8 deals with the case in which a defendant wishes to dispute the jurisdiction of the court. An application for a stay is the appropriate procedure for enforcing an agreement to litigate in some other jurisdiction when a writ has been issued and served without irregularity other than a breach between the parties.

52 We do not disagree, but in our view, the principle enunciated at [44] of *The Jian He* has no relevance in cases such as the present, where the application for a stay on improper forum grounds is a fall-back which needs to be canvassed only if the primary application for the setting aside of the overseas service leave order fails.

53 Further, in our opinion, contrary to what the Judge appeared to suggest (at [32]–[44] of the GD), there is no confusion regarding the law on submission to jurisdiction as stated in *Dicey and Morris* (12th Ed), *Dicey, Morris and Collins* (15th Ed) and the White Book. The correct position is that an application for a stay of proceedings will be held to amount to a submission to the local court's jurisdiction where the application is only necessary or only useful if the foreign defendant has waived any objection to the existence of the local court's jurisdiction or has never entertained any such objection at all (see the test laid down in *Rein v Stein* as set out at [40] above). On this basis, there is no contradiction between paras 12/7/3(3) and 12/7/4 of the White Book. The former paragraph states that an application to stay proceedings in a local court *pending the outcome of proceedings in a foreign jurisdiction* does not amount to a submission to the jurisdiction of the local court. This would be correct where the outcome of the foreign proceedings must be known before it can be determined whether the local court has jurisdiction over the foreign defendant, as was the case in *Williams*.

54 There is a further point to note in relation to para 12/7/3(3) of the White Book. The proposition in the previous paragraph can only be correct, even in the narrower terms in which we have framed it, if and to the extent the local court has the power to stay proceedings without first assuming jurisdiction over the foreign defendant. This point was raised in *Williams*, and s 49(3) of the SCA 1981 (UK) was relied upon by the House of Lords as conferring a very wide power on the English courts to stay proceedings without having to first determine that they had jurisdiction over the foreign defendant (see *Williams* at 442). We do not have legislation in similar terms; it is not clear whether either para 9 of the First Schedule of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) or our High Court's inherent powers might serve the same purpose, and we accordingly express no concluded view on this.

55 With regard to para 12/7/4 of the White Book, it states that where a stay application is mounted on *the basis that the local court is not the proper forum for the trial of the action*, this does entail a submission to the jurisdiction of the local court because such an application is a step that can only be contemplated if the local court has jurisdiction over the foreign defendant, but is being asked not to exercise it. We agree that this is the position where the stay application is the foreign defendant's sole or primary application, as opposed to a fall-back application which needs to be pursued only if the foreign defendant's jurisdictional challenge fails.

56 To summarise:

(a) A foreign defendant who disputes the existence of the Singapore courts' jurisdiction under O 12 r 7(1) and also applies for a stay of proceedings on improper forum grounds under O 12 r 7(2) will generally not be taken to have submitted to the jurisdiction of the Singapore courts *provided* the latter application for a stay is made as a fall-back to the jurisdictional challenge.

(b) Due to the timelines laid down in the Rules of Court, it may *seem* advisable for both a challenge to the existence of the Singapore courts' jurisdiction and an application for a stay of proceedings on improper forum grounds to be made concurrently, albeit with the appropriate reservation that the stay application needs to be dealt with only if the jurisdictional challenge fails. This, however, is to be understood subject to the observations we made at [30] and [47] above.

(c) A foreign defendant who applies for a stay of proceedings on improper forum grounds without also contesting the existence of the Singapore courts' jurisdiction will ordinarily be taken to have submitted to jurisdiction (see *The Jian He* at [44] and *Chan Chin Cheung v Chan Fatt Cheung and others* [2010] 1 SLR 1192 at [22]).

(d) However, an application for a stay of proceedings may not amount to a submission to the jurisdiction of the Singapore courts if the stay is sought because the question of jurisdiction can only be determined after the outcome of ongoing foreign proceedings is known (see *Williams* at 442) *and* the Singapore courts have the power to stay the proceedings in Singapore without first assuming jurisdiction over the foreign defendant.

Whether the Appellant submitted to jurisdiction when it proceeded with the Stay Prayer

57 We turn now to the Respondent's contention at [35] above that as a matter of fact, even on the basis of the foregoing principles, the Appellant's conduct amounted to a submission to the jurisdiction of the Singapore courts. It is said that the true position is not that the Appellant pursued the Setting-Aside Prayer and the Stay Prayer in the alternative, with the former constituting the primary relief sought, but that the Appellant pursued the Stay Prayer as its primary application before the assistant registrar (and likewise before the Judge). By reason of this, the Respondent argues, the Appellant has, as a matter of fact, submitted to the jurisdiction of our courts.

58 We agree that if the Respondent's contention accurately reflects the Appellant's true position, the Appellant would indeed have submitted to the jurisdiction of the Singapore courts for the reasons we have discussed. If the Appellant had argued for a stay as its primary relief *and* the Stay Prayer had been decided first, it could no longer protest under O 12 r 7(1) that the Singapore courts had no jurisdiction over it. In general, as we mentioned at the outset of this judgment (see [1] above), a foreign defendant who does not want his dispute with the plaintiff to be heard here and who wishes to add a second string to his bow by concurrently seeking a stay of proceedings on improper forum grounds runs the risk that his conduct may be taken to amount to a submission to the jurisdiction of the Singapore courts. On this point, the following observations made in Adrian Briggs & Peter Rees, *Civil Jurisdiction and Judgments* (Informa, 5th Ed, 2009) at pp 571–572 are pertinent:

> … [I]n relation to a jurisdictional challenge, a defendant who also applies for a stay of proceedings would appear to be under an obligation to advance it at the same time as he raises any objection which he may have to the jurisdiction of the court. Though CPR Part 11 [the UK equivalent of our O 12 r 7] certainly appears to impose this particular timing, a defendant may need to tread particularly carefully when making a concurrent stay application, so that he does

not do something which is capable of being construed as waiving his challenge to the jurisdiction in the strict sense. For the defendant to be required to do both things at the same time or not at all increases the opportunity for accident. After all, a stay can only be sought of proceedings over which the court has jurisdiction, and an application for a stay of proceedings cannot be seen as a challenge to the jurisdiction, as distinct from a challenge to the exercise of that jurisdiction. If a defendant takes a step which amounts to a submission to the jurisdiction, the conclusion that he has abandoned his challenge to the jurisdiction may be hard to avoid.

…

… Accordingly, if the form in which the application is worded makes it clear that the stay is sought without prejudice to the contention that the court does not have jurisdiction, and that it is sought only if the challenge to the jurisdiction fails, the defendant should not be held to have submitted by virtue of his application.

59 It is ultimately a question of fact whether a particular course of conduct by a foreign defendant amounts to a submission to the jurisdiction of the local court. The Appellant was not as alive as it should have been to the "opportunity for accident" that was presented in the way it ran its case. We note that the Summons was headed as a summons for a stay of proceedings on improper forum grounds. Further, the Appellant presented its arguments on the Stay Prayer first, and those arguments were recorded by the assistant registrar as the Appellant's "primary" [note: 7] arguments. That said, having examined the record of proceedings of the hearings before the assistant registrar and before the Judge, we conclude that while the Appellant might not have fully appreciated the nuances of the law on submission to jurisdiction, its conduct as a whole did not constitute a waiver of its objection to the existence of the Singapore courts' jurisdiction. We are satisfied that the true position is that the Appellant pursued the Setting-Aside Prayer and the Stay Prayer as alternative prayers, with the former prayer being the primary relief sought, and presented its arguments for a stay before its arguments on the Setting-Aside Prayer as a matter of convenience. In such a situation, it may ultimately matter little which set of arguments is canvassed first, for whichever set of arguments is presented first, as long as the local court is aware that the existence of its jurisdiction over the foreign defendant is being challenged, it must *first* decide that such jurisdiction exists before it can consider whether it should exercise it.

60 We note that the assistant registrar recorded that the Appellant was "[e]ssentially" [note: 8] seeking that the Leave Order be set aside, and alternatively, that the Singapore Action be stayed pursuant to O 12 r 7(2) of the Rules of Court. In other words, the Appellant conceptualised its arguments in the correct order before the assistant registrar. While it proceeded to present its arguments on the Stay Prayer first, counsel for the Appellant, Mr Moiz Haider Sithawalla ("Mr Sithawalla"), explained this decision in the following terms, as recorded by the assistant registrar: [note: 9]

… Start of these proceedings suggested to Your Honour, sensible to deal with forum point, as once it is determined, whole action falls away. That is why we argued should deal with that first. Cannot be taken as sign that I have submitted to jurisdiction.

61 In other words, the Appellant took the position that notwithstanding the order in which it presented its arguments, it never had any intention to submit to the jurisdiction of the Singapore courts. Instead, it was proceeding on the basis that it would hold the Setting-Aside Prayer in abeyance until the Stay Prayer had been determined. Mr Sithawalla further explained this position before the Judge in the following terms: [note: 10]

> If we succeed in setting aside the order for service out of jurisdiction, [the Respondent] may still apply again for another order. The court then considers whether Singapore is the appropriate forum. If there was a ruling under second prayer [*ie*, the Stay Prayer] then it will be of guidance to the court below.

62 The Appellant was evidently concerned that even if the Setting-Aside Prayer were determined in its favour, it could still be sued again in Singapore; whereas if it succeeded on the Stay Prayer, that would foreclose once and for all the risk (from the Appellant's perspective) of the Dispute being tried in Singapore. As the Appellant observed before us, as far as it was concerned, it did not wish to have the Dispute determined on the merits by the Singapore courts, and it was immaterial whether this was because the Singapore courts did not have jurisdiction, or because despite having jurisdiction, they chose not to exercise it.

63 While we understand the Appellant's point, it seems to us that the Appellant adopted a strategy that was both unnecessary and unnecessarily risky. It was unnecessary because if the Appellant's position was that India rather than Singapore was the proper forum for the trial of the Dispute, it could have presented this argument in its application to set aside the Leave Order by contending that the Respondent had failed to meet one of the requirements for obtaining an overseas service leave order, namely, it had failed to show that Singapore was the proper forum (see above at [26(c)]). It was not necessary to have the Stay Prayer heard simply to have a determination on the identical point of whether Singapore was the proper forum and thus raise an estoppel.

64 The Appellant's strategy was also unnecessarily risky because in purporting to hold the Setting-Aside Prayer in abeyance, the Appellant muddied its own position that it was really presenting its arguments on the Stay Prayer as a fall-back in case its arguments on the Setting-Aside Prayer were rejected. It thereby ran the risk of having its conduct construed as amounting to a waiver of its right to contest the existence of the Singapore courts' jurisdiction.

65 Having said that, in our judgment, and having regard to the totality of the circumstances, we are satisfied that the Appellant did not mean to go so far as to waive its objection to the existence of the Singapore courts' jurisdiction. The decisive point, in our judgment, is that right from the time of the first hearing before the assistant registrar, Mr Sithawalla took pains to make clear that whatever else he was doing, he was maintaining the Appellant's objection to the existence of the Singapore courts' jurisdiction. We echo the observations of Denning LJ in *Dulles* at 850 (approved in *Williams* at 444), which we referred to earlier at [41] above, namely:

> I cannot see how anyone can fairly say that a man has voluntarily submitted to the jurisdiction of a court, when he has all the time been vigorously protesting that it has no jurisdiction. …

We are therefore satisfied that the Appellant did not submit to the jurisdiction of the Singapore courts either in including the Stay Prayer in the Summons *per se*, or in subsequently presenting its arguments on that prayer in court.

Whether the Leave Order should be set aside

66 We turn then to consider the Appellant's argument that the Leave Order should be set aside due to either: (a) the Respondent's failure to provide full and frank disclosure of all the material facts when it made its *ex parte* application for the Leave Order; or (b) the Respondent's failure to show that Singapore is the proper forum for the trial of the Dispute.

Whether there was a failure to provide full and frank disclosure of all the material facts

67 In respect of the Respondent's alleged failure to provide full and frank disclosure of all the material facts when applying *ex parte* for the Leave Order, the Appellant has two complaints: first, that the Respondent did not disclose that it was disputed whether the Standard Terms and Conditions applied to the three Hire Agreements; and second, that the Respondent did not disclose that there were ongoing proceedings in India which (according to the Appellant) were related to the Singapore Action.

68 We agree with the Judge that the aforesaid facts ("the undisclosed facts") were material facts that ought to have been disclosed. The test of materiality, which is an objective test, is whether the facts in question are matters that the court would likely take into consideration in making its decision: see *The "Vasiliy Golovnin"* [2008] 4 SLR(R) 994 at [86]. By an objective reckoning, the undisclosed facts were matters that could well have been taken into consideration by the assistant registrar and the Judge in deciding the Setting-Aside Prayer and the Stay Prayer. The Standard Terms and Conditions, which were relevant to the governing law of the three Hire Agreements, constituted an important, albeit not determinative, factor in deciding whether the Leave Order should have been granted (and, in turn, whether the Setting-Aside Prayer should be allowed); and it was incumbent on the Respondent to alert the Singapore courts to the concurrent Indian proceedings if there was any risk of multiple and conflicting judgments.

69 Notwithstanding this, we are satisfied that we ought not to set aside the Leave Order on the grounds of a lack of full and frank disclosure by the Respondent. Our reasons for so ruling are set out below. In essence, they relate to the connecting factors pointing to Singapore and, in contradistinction, India as the proper forum for the trial of the Dispute. We do not think that the undisclosed facts, taken together, are so material in all the circumstances as to warrant setting aside the Leave Order.

Whether Singapore is the proper forum

70 As mentioned at [7] above, when a foreign defendant is sued in Singapore, the issue of the proper forum arises at two different stages of the proceedings: first, where the plaintiff applies for leave to serve the originating process on the foreign defendant out of jurisdiction, it must show that Singapore is the proper forum; second, if the foreign defendant (after having been served with the originating process) seeks a stay of proceedings on improper forum grounds, it must show that Singapore is not the proper forum for the trial of the action. It is generally accepted that the same test – the *Spiliada* test – applies at both stages. The only difference lies in who bears the burden of proof at each stage; the standard of proof remains the same: see *Halsbury's Laws of Singapore* vol 6(2) (LexisNexis, 2013) ("*Halsbury's* vol 6(2)") at para 75.082.

(1) The burden of proof

71 With regard to the burden of proof, *Spiliada* (at 480) is authority for the proposition that in seeking leave to serve an originating process out of jurisdiction under O 11 of the Rules of Court, the burden of proving that Singapore is the proper forum lies on the plaintiff. In *Oriental Insurance Co Ltd v Bhavani Stores Pte Ltd* [1997] 3 SLR(R) 363 ("*Oriental Insurance*"), we summarised the position in the following terms at [16]:

> … Where … the court's jurisdiction is premised on O 11, the burden of proving that Singapore is the appropriate forum falls on the plaintiff and this remains the case even when the defendant (served out of jurisdiction) comes to Singapore to contest the jurisdiction of the Singapore court. …

72 That the burden of showing that Singapore is the proper forum remains on the plaintiff in the aforesaid scenario is fair and just because the exercise of jurisdiction by the Singapore courts over a foreign defendant is, in a real sense, an imposition on him (see *Société Générale de Paris v Dreyfus Brothers* (1885) 29 Ch D 239 at 242–243) and there is no justice in adding to his troubles the further burden of proof. But, where the Singapore courts do have jurisdiction, the foreign defendant who wishes to seek a stay of proceedings on improper forum grounds has the burden of proving what he asserts.

73 The Appellant seeks to attack this doctrine, which we think is well established and good law, in the following way. Relying on the passage which we cited (at [71] above) from [16] of *Oriental Insurance*, the Appellant submits that this suggests there is a difference between the situation where the Singapore courts have jurisdiction as of right (as, for instance, where the foreign defendant has submitted to jurisdiction or is served with the originating process within jurisdiction), and the situation where the Singapore courts' jurisdiction is founded on service out of jurisdiction under O 11. The Appellant accepts that in the former situation, the burden falls on the foreign defendant who seeks a stay of proceedings on improper forum grounds to show that Singapore is not the proper forum (see above at [72]), but contends that in the latter situation, the burden should remain on the plaintiff to demonstrate that Singapore is the proper forum even when it is the foreign defendant who is seeking a stay of proceedings on improper forum grounds. In our judgment, this is not entirely correct.

74 The full passage from *Oriental Insurance* at [16] was cited to us:

> It was argued before us that the substance of this passage was that where a plaintiff has established jurisdiction as of right, a higher burden is demanded of the defendant than where jurisdiction is granted other than of right. This was a confusing argument for more reasons than one. Firstly, it is patently clear that where the court has jurisdiction as of right, the burden of proving that another forum is more appropriate always falls on the defendant. Where, however, the court's jurisdiction is premised on O 11, the burden of proving that Singapore is the appropriate forum falls on the plaintiff *and this remains the case even when the defendant (served out of jurisdiction) comes to Singapore* ***to contest the jurisdiction of the Singapore court*** *.* If the burden falls in one type of case on the defendant and in the other type of case on the plaintiff, we fail to appreciate the respondent's argument that the defendant has a "higher" burden where jurisdiction is founded as of right. Where jurisdiction is not founded as of right, the burden falls on the plaintiff, not the defendant – it would thus be a nonsense to say that the defendant has a "lesser" burden in such cases. [emphasis added in italics and bold italics]

75 The Appellant relies on the italicised portion of the above quotation. Read in its proper context, what that portion indicates is that where a foreign defendant disputes the existence of the Singapore courts' jurisdiction on the grounds that Singapore is not the proper forum (and thus, that one of the requirements for valid service out of jurisdiction (see [26] above) has not been satisfied), at the hearing of the foreign defendant's jurisdictional challenge, the plaintiff retains the burden of showing that Singapore is the proper forum. This is unsurprising because in the final analysis, it is the same burden that the plaintiff would have borne at the stage of making its *ex parte* application for leave to serve the originating process on the foreign defendant out of jurisdiction. It is thus entirely appropriate that the plaintiff should retain that burden at the *inter partes* stage if the foreign defendant, having been served, makes a challenge to the existence of the Singapore courts' jurisdiction. However, that has no application where the Singapore courts undoubtedly have jurisdiction, whether as of right or because there has been a submission to jurisdiction or because there has been valid service of an originating process out of jurisdiction, and the question is whether a stay of proceedings on improper forum grounds ought to be ordered.

76 This brings us back to the observations we made earlier (see [30], [47] and [63] above) that the Appellant's stay application in this case is unnecessary, given that the question of whether Singapore is the proper forum for the trial of the Dispute is already necessarily embedded within the Appellant's challenge to the existence of the Singapore courts' jurisdiction. In fact, for this reason, the burden is on the Respondent (the plaintiff in the Singapore Action) at all times to show that Singapore is the proper forum.

77 The jurisprudence appears to be settled that the substance of the *Spiliada* test does not differ regardless of whether the inquiry on the proper forum takes place as part of a challenge to the existence of the local court's jurisdiction, or as part of an application for a stay of proceedings on improper forum grounds. These are two distinct processes, but the test is essentially similar; what is different is that the burden of proof is reversed. The objective of the test is to show that a particular jurisdiction (the local court, in the case of a plaintiff defending a challenge to jurisdiction, and a foreign jurisdiction, in the case of a foreign defendant seeking a stay of proceedings on improper forum grounds) is the "forum which is clearly more appropriate for the trial of the action" (*per* Lord Goff of Chieveley in *Spiliada* at 447).

78 There might remain some debate as to whether this is conceptually satisfactory. If the substance of the *Spiliada* test does not differ according to the nature of the application, then a foreign defendant who seeks the setting aside of an overseas service leave order and prays as a fall-back for a stay of proceedings on improper forum grounds, as was done here, will find that his stay application is pointless. If the local court declines to set aside the overseas service leave order, where the burden is on the plaintiff to show that the local court is the proper forum, then it seems inconceivable that the position would change on what is essentially the identical issue in the foreign defendant's stay application (when the burden will have shifted to the foreign defendant to show that the local court is not the proper forum). This conundrum is noted in *Halsbury's* vol 6(2) in the following terms at para 75.104:

> In principle, once leave has been affirmed in a failed application to set it aside, or where no such application has been made, then issues of natural forum would already have been considered, or at least should have been raised in a challenge to jurisdiction, [*sic*] an application by the defendant to stay proceedings on grounds of natural forum thereafter, may meet with the objection that the issue is *res judicata*, or that it would amount to an abuse of process.
>
> …
>
> … In Singapore practice, such stay applications appear to be countenanced generally, but ever since the time for making a stay application has been delimited to the same period as for challenging jurisdiction, there is no real advantage in pursuing a stay application on [the] grounds [of] Singapore not being a proper forum in an Order 11 case. In any event, a stay application may be permissible in exceptional cases of change of circumstances justifying a fresh application.

79 In the light of what we have already said, it will be apparent that in our judgment, it is in fact wholly unnecessary and likely counter-productive for a foreign defendant who does not wish to have his dispute with the plaintiff tried in the local court to make both a jurisdictional challenge and a stay application based *on the same material*.

80 In any event, as a matter of practice, the local court will collapse the issue of the proper forum into one question considered in the round, as observed by the learned author of *Fentiman* at para 12.02:

> … [W]hatever the onus of proof, the court's task in both is to assess each party's contention that its preferred forum is most appropriate. In practice, the defendant prevails if it establishes that the *forum conveniens* is abroad, but the claimant succeeds if it shows that the *forum conveniens* is England.

(2) The application of the *Spiliada* test to the present case

81 We turn to the application of the *Spiliada* test to the facts of the present case. At the outset, we note that this test involves a balancing of competing connecting factors by a judge, whose decision should not be lightly interfered with on appeal unless he came to his decision by an error of law or a misapplication of the relevant principles. As Lord Bingham of Cornhill pointed out in *Lubbe v Cape plc* [2000] 1 WLR 1545 at 1556 (in a passage subsequently endorsed by Lord Neuberger in *VTB Capital plc v Nutritek International Corp and others* [2013] UKSC 5 at [92]):

> This is a field in which differing conclusions can be reached by different tribunals without either being susceptible to legal challenge. The jurisdiction to stay is liable to be perverted if parties litigate the issue at different levels of the judicial hierarchy in the hope of persuading a higher court to strike a different balance in the factors pointing for and against a foreign forum.

82 We agree with this in principle. But, in our judgment, and with respect, for the reasons set out below, the Judge failed to appreciate the true significance of the connecting factors raised by the parties. Upon an appropriate consideration of these factors, we consider, unlike the Judge, who thought the connecting factors were evenly balanced, that Singapore is the proper forum for the trial of the Dispute.

83 At [77]–[82] of the GD, the Judge analysed the relevant connecting factors as follows:

> (a) The Respondent was incorporated in Singapore and its commercial activities were centred here, whereas the Appellant was incorporated in India and its commercial activities were centred there.
>
> (b) The Respondent's witnesses were in Singapore, whereas the Appellant's witnesses were in India.
>
> (c) The equipment for two of the three Hire Agreements belonged to the Respondent and was situated in Singapore, whereas the equipment for one of those agreements was already in India even before the relevant agreement was entered into. On the other hand, the Appellant alleged that the equipment for two of the three Hire Agreements, although situated in Singapore, had been sent to India for the performance of those agreements.
>
> (d) On the point of the governing law of the three Hire Agreements, the Respondent alleged that the Standard Terms and Conditions applied, but given that the Appellant never had sight of those terms and conditions, it was likely that they did not apply.
>
> (e) The Appellant said that Indian law applied, relying on another written agreement between the parties which was not the subject of any dispute.
>
> (f) The Appellant said that there were related proceedings in India, but the Respondent said that it had expressly reserved the right in those proceedings to commence claims under the three Hire Agreements elsewhere.

84 The Judge concluded that the connecting factors were evenly balanced, and that although India might be the slightly more appropriate jurisdiction, it was not clearly or distinctly so. He therefore declined to grant a stay of proceedings.

85 We agree that most of the connecting factors enumerated above appear evenly balanced. We do not think that the issue of the governing law of the three Hire Agreements is decisive either way, even taking into account the allegation that the Standard Terms and Conditions were not brought to the Appellant's attention. We agree that there is considerable dispute over what the applicable governing law is, and we cannot say with any certainty on the evidence before us whether Singapore law or Indian law ought to apply to the three Hire Agreements.

86 There is, however, one point which the Judge appeared not to have considered. It is not disputed that the sums claimed in the Singapore Action were to have been paid by the Appellant to the Respondent in Singapore. Accordingly, whatever the governing law of the three Hire Agreements might be, the alleged breach of those agreements occurred here. In our judgment, this connecting factor tilts the balance towards Singapore as the proper forum for the trial of the Dispute.

87 On the alleged relevance of the Indian proceedings, the Judge noted (at [83] of the GD) that the Respondent was correct in contending that the issues there were different from those in the Singapore Action. He did not, however, say explicitly that the Indian proceedings were irrelevant to the Singapore Action. The Appellant sought to persuade us that the Indian proceedings were relevant, and that this was therefore a connecting factor that pointed to India as the more appropriate forum.

88 Having regard to the cause papers filed in the Indian proceedings, we do not think that those proceedings are at all relevant to the Singapore Action. The Appellant commenced the Indian proceedings in October 2012, before the Singapore Action was commenced. Its claim in the Indian proceedings was for the return of certain broadcast equipment lent to the Respondent and damages for wrongful detention. The Appellant claimed that it was the Respondent that first raised the three Hire Agreements, which are the subject of the Singapore Action, as an issue in the Indian proceedings. Specifically, the Respondent made a statement in those proceedings to the effect that there were outstanding payments due to it from the Appellant in the sums of US$500,000, €216,000 and S$35,000, which are the sums claimed by the Respondent in the Singapore Action. The Respondent reserved its right to claim those sums in other forums (*ie*, in Singapore), but said that those outstanding sums were relevant in the Indian proceedings for two reasons:

(a) they showed that the Appellant had come to court with unclean hands; and

(b) they showed that the Indian proceedings were liable to be dismissed because they amounted to a misrepresentation by the Appellant to the Indian courts, given that "the return of [the broadcast] equipment was being discussed *in conjunction with the repayment of the huge sum owed* by the [Appellant] to the [Respondent]" [note: 11] [emphasis added], and "the [Respondent was] waiting for the [Appellant] to come back to [it] with a plan for settlement of all outstanding dues". [note: 12]

89 It is evident to us that in fact, the Appellant's only argument on the Indian proceedings in relation to the Singapore Action is that the Respondent *mentioned* its claim to the aforesaid sums of money in the course of the Indian proceedings. In our judgment, this is quite insufficient to show that the Indian proceedings are related to the Singapore Action and that there is therefore a tangible risk of multiple and inconsistent judgments, which is what is ultimately material. For instance, there was

no attempt by the Appellant to present a draft defence to the Respondent's claim in the Singapore Action to show how the Singapore Action would be impacted by the Indian proceedings if the Singapore Action were not stayed. It is true that the Appellant is entitled not to particularise its possible defences at the present stage of the litigation, but it must balance this against the consideration that if it chooses not to do so, the Singapore courts might find it difficult to accept that the Indian proceedings are related to the Singapore Action in any meaningful way. It seems to us that the Appellant did not attempt to present a draft defence as described above because, in fact, there was no real or material connection between the two sets of proceedings.

90 Further, as Mr Sithawalla conceded before us, the Appellant is not denying that it owes the sums claimed by the Respondent in the Singapore Action; nor does it seek to argue that those sums are a central issue in the Indian proceedings. Its position in relation to the Respondent's claim to those sums is merely that the parties had, in the course of their prior dealings, agreed to set off outstanding amounts against future agreements. What we find decisive to the question before us is that not only is there no real connection between the Singapore Action and the Indian proceedings, there is one factor – the place where the breach of the three Hire Agreements occurred (see above at [86]) – that points unambiguously to Singapore as the proper forum. Once that becomes evident, then having regard to the remaining connecting factors, there is no reason why the Singapore Action should not be permitted to continue here.

91 In the final analysis, in the light of the foregoing considerations, we conclude that the Respondent's non-disclosure of material facts when it made its *ex parte* application for the Leave Order does not displace our judgment that the connecting factors, taken as a whole, point to Singapore as the proper forum for the trial of the Dispute.

Conclusion

92 In the circumstances, we hold as follows:

(a) the Appellant did not submit to the jurisdiction of the Singapore courts either in making a stay application *per se*, or in presenting its arguments for a stay in court;

(b) there was material non-disclosure on the part of the Respondent when it made its *ex parte* application for the Leave Order;

(c) however, we exercise our discretion not to set aside the Leave Order despite such non-disclosure; and

(d) Singapore is the proper forum for the trial of the Dispute.

93 Accordingly, the Appellant's challenge to the existence of the Singapore courts' jurisdiction fails. The Singapore courts do have jurisdiction over the Appellant because although it did not submit to jurisdiction, it has been validly served with the Writ in India. Further, given that Singapore is the proper forum for the trial of the Dispute, the stay of proceedings sought by the Appellant will not be granted.

94 This appeal is therefore dismissed. We depart from the usual rule that the Respondent should have its costs and instead order each party to bear its own costs of the appeal. In our judgment, the Respondent contributed significantly to the litigation in that: (a) it made reference in the Indian proceedings to the sums claimed in the Singapore Action, only to then argue that those sums were not in fact material after all; and (b) it failed to make full and frank disclosure of all the material facts

when applying *ex parte* for the Leave Order. There will be the usual consequential orders.

[note: 1] Appellant's Core Bundle ("CB") vol II, p 11.

[note: 2] CB vol II, p 13.

[note: 3] CB vol II, p 37.

[note: 4] Affidavit of A'zman bin Khamis dated 13 February 2013 at p 5 (CB vol II, p 42).

[note: 5] Record of Appeal ("ROA") vol III (Part B), p 102.

[note: 6] CB vol II, pp 25–26.

[note: 7] ROA vol III (Part B), p 103.

[note: 8] CB vol II, p 37.

[note: 9] ROA vol III (Part B), p 97.

[note: 10] ROA vol III (Part B), p 109.

[note: 11] CB vol II, p 46 (see also CB vol II, pp 45–49 generally).

[note: 12] CB vol II, p 46.