IN THE GENERAL DIVISION OF THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2021] SGHC 19

Suit No 65 of 2020 – Registrar's Appeal No 224 of 2020

Between

DJS Solutions Engineering Pte Ltd

… *Plaintiff*

And

AGR 1 Limited

… *Defendant*

JUDGMENT

[Civil Procedure] — [Service] — [Service out of jurisdiction]

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v
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Vincent Hoong J
6 October, 5 November 2020

27 January 2021 Judgment reserved.

Vincent Hoong J:

1 In Suit No 65 of 2020 (the "**Suit**"), the plaintiff seeks an indemnity from the defendant in respect of various liabilities and expenses it and its subsidiary allegedly incurred while assisting in the defendant's greenhouse project in Malaysia (the "**Project**"). Registrar's Appeal No 224 of 2020 ("**RA 224**") is the defendant's appeal against the decision of the assistant registrar in Summons No 2870 of 2020 ("**SUM 2870**"). The assistant registrar had dismissed the defendant's application in SUM 2870 to set aside:

(a) the order granting the plaintiff leave to serve the Writ of Summons ("**Writ**") and Statement of Claim ("**SOC**") in the Suit on the defendant outside of jurisdiction (the "**Leave Order**"); and

(b) the judgment in default of defence (HC/JUD 187/2020) obtained by the plaintiff against the defendant ("**Default Judgment**").

2 Having heard parties' submissions, I allow the defendant's appeal for the reasons set out below.

Background

3 The plaintiff is a Singapore-incorporated company in the business of providing electrical and engineering services and materials to its customers. DJS Solutions Engineering Sdn Bhd ("**DJS Malaysia**") is a Malaysia-incorporated company. At the material time, it was a wholly owned subsidiary of the plaintiff. Mr David Harmer ("**Mr Harmer**") is a director of both companies and is described in the SOC as their "directing mind and will". Mr Harmer is an Australian citizen holding a Singapore employment permit. He has been residing in Singapore since 2012. The defendant is a Hong Kong company. Its director is Mr John David Harrison ("**Mr Harrison**"), a British citizen.

4 Sometime in 2018, the defendant became interested in building a greenhouse in Malaysia to farm vegetable produce for distribution (*ie,* the Project). Mr Harrison approached Mr Harmer for assistance in undertaking the said endeavour. Between mid-2018 and mid-2019, Mr Harrison and Mr Harmer communicated extensively over WhatsApp in connection with this Project. As will be seen shortly, the parties dispute whether a contract was eventually reached between them and if so, what the terms of the contract are. According to the plaintiff, it was agreed, *inter alia,* that the plaintiff and DJS Malaysia would assist the defendant in setting up the Project in Malaysia and any expenses/liabilities they incurred upfront in the course of doing so would be paid for by the defendant. The defendant would also supposedly pay the plaintiff an additional fee equivalent to 7% of the said expenses ("**Service Fee**"). The defendant, however, denies that any contract was reached at all. It is said that the plaintiff/DJS Malaysia had incurred the said expenses on their own account.

5 Whichever is the case, the plaintiff and DJS Malaysia, under the direction of Mr Harmer, went on to incur various expenses and liabilities in connection with the Project. In particular, DJS Malaysia entered into two leases in Malaysia – one for land over which the greenhouse was to be built ("**Senai Land**") and another for residential land on which Mr Harrison could live for 12 months as the defendant's representative (the "**Casa Anda Home**"). According to the plaintiff, its head office in Singapore directly/indirectly funded all the work undertaken in relation to the Project.

6 On 29 March 2019, there was allegedly a WhatsApp call between Mr Harrison, Mr Harmer, one Mr Seven Rivera and one Mr Daniel Currie in relation to the Project (the "**29 March 2019 Call**"). Mr Rivera works for the defendant and Mr Currie is the defendant's other director (besides Mr Harrison). The contents of the 29 March 2019 Call are disputed. The defendant produced a screenshot of a WhatsApp message between Mr Rivera and Mr Currie which supposedly recorded the point made during the call – namely, that if the defendant did not raise sufficient funding for the Project, Mr Harmer (*ie,* as the plaintiff's and DJS Malaysia's representative) would be "fully exposed on his own" for all the expenses incurred in connection therewith. The plaintiff, however, rejects the defendant's allegation that it was to be responsible for the said expenses. On the contrary, the plaintiff claims that the parties agreed during the 29 March 2019 Call that the plaintiff would undertake work for the defendant and that the latter would "reimburse [it] for the work done" and pay the additional Service Fee.

7 The plaintiff further claims that on 21 May 2019, the defendant incorporated a Malaysian company, Agricultural Growing Revolutionised SDN BHD ("**AGRM**"), for the purpose of taking over the Project in Malaysia. It

alleges, however, that AGRM has yet to take any steps in this regard. This was not denied by the defendant.

8 On 22 July 2019, a manager of the plaintiff and DJS Malaysia emailed the defendant to ask for the immediate payment of MYR 212,437.37 to DJS Malaysia. This amount comprised various expenses apparently incurred in relation to, *inter alia,* the Senai Land and the Casa Anda Home. On 26 July 2019, Mr Harrison replied to deny that the defendant owed the said amounts ("**26 July 2019 Email**"). Further, he asked for the return of a sum of "USD21,350.00 provided [to the plaintiff]…[as] a deposit on the green house" because the defendant had not achieved its funding target and was not going ahead with the Project. No further response was received.

9 On 11 September 2019, the solicitors acting for the plaintiff and DJS Malaysia wrote to the defendant to ask for payment within seven days of various expenses/liabilities the two companies had allegedly incurred in relation to the Project ("**11 September 2019 Letter**"). These alleged expenses/liabilities related to, *inter alia,* the rental of the Senai Land and the Casa Anda Home, as well as various goods and services supplied by the two companies. The said expenses/liabilities totalled MYR 656,997.36. However, as the defendant had already paid USD 21,750 (approximately MYR 88,952.50) earlier, the outstanding amount was MYR 568,044.86. On 4 October 2019, Mr Harrison replied via email to state that the defendant "reject[ed] all claims" made in the 11 September 2019 Letter.

10 The dispute over the defendant's refusal to pay for the expenses/liabilities allegedly incurred by the plaintiff and DJS Malaysia in connection with the Project eventually came to a head. DJS Malaysia executed a deed (dated 16 January 2020) to assign to the plaintiff all its claims against the

defendant for the expenses/liabilities it had incurred ("**Deed of Assignment**"). The defendant was subsequently given notice of the Deed of Assignment. Shortly thereafter, on 21 January 2020, the plaintiff commenced the present Suit against the defendant.

11 On 6 February 2020, the plaintiff was granted leave to serve the Writ and SOC on the defendant outside of jurisdiction in Hong Kong (*ie,* the Leave Order mentioned earlier). The defendant then entered an appearance but omitted to file a Defence. As a result, the plaintiff obtained the Default Judgment against the defendant on 31 March 2020. The defendant was ordered to pay the plaintiff MYR 609,241.03 plus interest at 5.33% per annum from the date of Writ to the date of judgment and costs of $4,949.03.

12 In July 2020, the defendant obtained an extension of time to make an application to set aside the Default Judgment. The defendant then applied by way of SUM 2870 for the following prayers:

(a) The Leave Order (dated 6 February 2020) be set aside.

(b) The Default Judgment (dated 31 March 2020) accordingly be set aside.

(c) Costs of the application be paid by the plaintiff to the defendant.

13 On 3 September 2020, the assistant registrar dismissed the defendant's application in SUM 2870 and ordered it to pay the plaintiff costs fixed at $3,000 (all-in).

14 On 17 September 2020, the defendant filed the present RA 224 against the assistant registrar's decision. The defendant also filed Summons No 4250 of 2020 to seek:

(a) leave to file further affidavits by Mr Harrison and one Mr Azman bin Abd Hamid ("**Mr Azman**"), the landlord of the Casa Anda Home, in RA 224;

(b) a stay of execution of the Default Judgment pending the determination of RA 224; and

(c) an order that the costs of and occasioned by the application be reserved to RA 224.

On 6 October 2020, I granted leave for the defendant to file a further affidavit by Mr Harrison. I also granted an order-in-terms of the prayers set out in sub-paragraphs (b) and (c) above.

Parties' cases in the Suit

15 As mentioned earlier, the plaintiff essentially seeks an indemnity from the defendant in respect of various liabilities and expenses that it and DJS Malaysia allegedly incurred in connection with the Project. Its claims are said to be based on contract, agency and unjust enrichment. Its pleaded case is briefly as follows:

(a) By virtue of the conduct and oral/written representations between the plaintiff's Mr Harmer and the defendant's Mr Harrison from 1 June 2018 until 1 July 2019, an agreement between the parties was made (the "**Alleged Contract**") on the following terms:

(i) There was an agreement that the plaintiff would act as the defendant's "agent" in undertaking the Project.

(ii) The plaintiff and/or DJS Malaysia were "procured to provide services and put to incur expenses" for the undertaking

of the Project. The defendant agreed with the plaintiff that it would pay the plaintiff an amount equivalent to 7% of the said expenses as a service fee (*ie,* the Service Fee).

(iii) The plaintiff and/or DJS Malaysia were "procured" to enter into legal contracts with, and incur liabilities towards, third parties for the purposes of the Project. The said liabilities include both "current costs" which have already been incurred and "future costs" (collectively, the "**Expenses**", an itemised list of which was set out in Schedule A of the SOC). The Expenses related, *inter alia,* to the rental for the Senai Land and the Casa Anda Home and various other goods and services supplied. It was an express and/or implied term of the Alleged Contract that the defendant would indemnify the plaintiff and DJS Malaysia against any "expenses, loss or damage which [they] would incur in the Project" ("**Alleged Indemnification Term**").

(b) Further or alternatively, by reason of the plaintiff being an agent, and DJS Malaysia being a sub-agent, of the defendant, the defendant is at law required to indemnify the plaintiff against any "expenses, loss and damage" incurred by the plaintiff in the Project.

(c) By way of the 11 September 2019 Letter, the plaintiff had requested the payment of the Expenses (as at 30 September 2019) less US$21,750. The aforementioned deduction was made as the defendant had paid that amount to the plaintiff on 8 July 2019.

(d) In breach of the Alleged Contract, the defendant had failed to make any further payment. By reason of the defendant's said breach, the

plaintiff has been put to "past and continuing expenses, loss and damages" totalling MYR 609,241.03. This amount comprises:

(i) the Service Fee of MYR 30,750.35 (being 7% of the plaintiff's "current costs" of MYR 439,290.68); and

(ii) the Expenses totalling MYR 578,490.68.

The plaintiff is thus entitled to payment of MYR 609,241.03 from the defendant.

(e) Alternatively:

(i) as an agent of the defendant, the plaintiff is entitled to the amount of MYR 609,241.03 "by way of indemnity and services [rendered] for the undertaking of the Project"; or

(ii) the plaintiff has "conferred benefits to the [d]efendant" in the amount of MYR 609,241.03 and it would be "unjust" of the defendant not to account to the plaintiff for the said amounts.

(f) By the Deed of Assignment, DJS Malaysia has assigned to the plaintiff its causes of action against the defendant referred to in the SOC for the Expenses.

16 Although the defendant has not filed its Defence, Mr Harrison has filed several affidavits in these proceedings on its behalf. Based on these affidavits and the defendant's submissions, the defendant's case is that there was simply no contract in respect of the Project between the defendant and the plaintiff/DJS Malaysia. Further, even if the Alleged Contract existed, the defendant takes issue with the Expenses claimed in the SOC. It is said that the Expenses are "incorrect", "inflated" and "unreliable".

Issues in RA 224

17 Returning to RA 224, the defendant's sole ground for setting aside the Default Judgment is that the Leave Order cannot stand. As such, this appeal basically turns on whether the Leave Order ought to be set aside. As the Court of Appeal set out in *Zoom Communications Ltd v Broadcast Solutions Pte Ltd* [2014] 4 SLR 500 at [26], there are three requirements for valid service out of jurisdiction. They are as follows:

(a) First, there is a good arguable case that the plaintiff's claim falls within one of the jurisdictional grounds in O 11 r 1 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("**ROC**") (the "**first requirement**").

(b) Second, there is a serious issue to be tried on the merits (the "**second requirement**").

(c) Third, Singapore is the proper forum for the trial of the action (the "**third requirement**").

18 I will deal with each requirement in turn.

First requirement

19 I am satisfied that the plaintiff has met the first requirement. It relies on the jurisdictional grounds in O 11 rr 1(d)(i), (d)(ii) and (o) of the ROC, extracted below:

> **Cases in which service out of Singapore is permissible (O. 11, r. 1)**
>
> 1. Provided that the originating process does not contain any claim mentioned in Order 70, Rule 3(1), service of an originating process out of Singapore is permissible with the leave of the Court if in the action —
>
> > (d) the claim is brought to enforce, rescind, dissolve, annul or otherwise affect a contract, or to recover damages or obtain other relief in respect of the breach of a contract, being (in either case) a contract which —
> >
> > > (i) was made in Singapore, or was made as a result of an essential step being taken in Singapore;
> > >
> > > (ii) was made by or through an agent trading or residing in Singapore on behalf of a principal trading or residing out of Singapore;
> >
> > …
> >
> > (o) the claim is a restitutionary one … and the defendant's alleged liability arises out of any act done, whether by him or otherwise, in Singapore;

20 The plaintiff has a good arguable case that its claim falls within O 11 r 1(d)(i) of the ROC. On a perusal of the WhatsApp correspondence between Mr Harmer and Mr Harrison between mid-2018 and mid-2019, there is ample evidence suggesting that an agreement had been reached between the parties. The said correspondence indicates that Mr Harrison did ask Mr Harmer to go ahead with undertaking various items of work in connection with the Project. More importantly, it seems to me plainly arguable that the defendant had also agreed that the plaintiff/DJS Malaysia would pay upfront for the various expenses/liabilities and that the defendant would later pay for the same (*ie,* the Alleged Indemnification Term) with an additional 7% as the Service Fee. I do not propose to set out all the messages supporting this finding, but will simply quote selected extracts to illustrate my point:

(a) In the message below, the defendant clearly acknowledges that it would reimburse the plaintiff/DJS Malaysia for certain expenses in connection with the Project that the latter had paid for earlier:

> [4/7/18, 1:53:00 PM] John Harrison: AGR1 will reimburse you for this once we have money in
>
> [4/7/18, 1:53:10 PM] David Harmer: No problem

(b) The messages below were exchanged in May 2019 in relation to the payment of the rental of the Casa Anda Home (for which Mr Azman was the landlord):

> [27/05/2019, 12:52:17 PM] [Mr Harrison]: Azman has turned off the Wifi also … That really doesn't help me when I'm trying to work from here
>
> [27/05/2019, 1:57:25 PM] [Mr] Harmer: What are you try to say John. **Are you requesting for DJS to put more money up front again to sort out these issues**.
>
> [27/05/2019, 1:58:56 PM] [Mr Harrison]: **If you want to and we can pay the 7%?** …
>
> …
>
> [27/05/2019, 2:07:10 PM] [Mr Harrison]: **If needed, can transfer the money for next months rent on both also to DJS, along with the 7%.**
>
> Then get all leases into AGR1
>
> [27/05/2019, 2:08:00 PM] [Mr] Harmer: If you send the money in advance then **DJS don't need to add the 7% only a 1% fee**
>
> [27/05/2019, 2:08:19 PM] [Mr Harrison]: **[thumbs up sign]**
>
> [emphasis in bold added]

When Mr Harrison was asked if he wanted the plaintiff/DJS Malaysia to pay for the Project's expenses "*up front again*" [emphasis added], he impliedly indicated that he did and made reference to what must have been the 7% Service Fee alleged by the plaintiff. Notably, Mr Harrison

did not correct Mr Harmer's assertion that the plaintiff/DJS Malaysia had already been paying upfront for previous expenses. He later acknowledged that *ultimately*, it was the *defendant* who would have to cover the rental costs (as well as pay an additional 7% if the plaintiff/DJS Malaysia paid for the same first). This supports the Alleged Indemnification Term. As far as the Service Fee is concerned, the defendant argues that this discussion shows that in fact no agreement had been reached as of May 2019. To my mind, however, these messages appear to be equally consistent with the plaintiff's case that the defendant had *generally* agreed to pay the 7% Service Fee for any expenses/liabilities that the plaintiff/DJS Malaysia incurred upfront. Mr Harmer was merely reminding Mr Harrison in these messages that if the latter "sen[t] the money [for the rental] in advance", the defendant need not pay the 7% Service Fee in that particular instance. In any event, the defendant's argument does not detract from the main thrust of the correspondence – namely, that it had (impliedly) acknowledged its responsibility to cover the rental costs of the Casa Anda Home even though the property was leased to DJS Malaysia.

(c) In addition, Mr Harrison also acknowledged below that the defendant owed certain payments to Mr Harmer and/or the plaintiff.

> [28/5/2019, 10:17:24 PM] [Mr Harrison]: Mate?
>
> [Azman's] only interested in his money.
>
> **As I am only interested in getting you paid for everything you have done and are doing!**
>
> …
>
> [30/05/2019, 5:27:20 PM] [Mr Harrison] : Dave [*ie,* Mr Harmer] I'm fully aware and not happy in the slightest with the situation.
>
> **That I and AGR1 owes you and DJS.**

> It won't ever happen again I can assure you of that…
>
> [emphasis in bold added]

21 The defendant's submissions and Mr Harrison's affidavits have offered no explanation for the abovementioned WhatsApp correspondence which would bring the plaintiff below the threshold of a 'good arguable case'. The defendant merely makes the following three arguments:

(a) First, if the Alleged Contract did exist, there would be a "signed agreement in writing".

(b) Second, the screenshot of the WhatsApp message between Mr Rivera and Mr Currie (referred to at [6] above) records the point made during the 29 March 2019 Call – namely, that if the defendant did not obtain sufficient funding, Mr Harmer would be "fully exposed on his own" for all expenses incurred in connection with the Project.

(c) Third, in Mr Harrison's 26 July 2019 Email (see [8] above), he had clearly stated that the defendant would not enter into a contract unless its funding target was met (and it was not).

22 I make the following respective points in relation to the defendant's arguments above:

(a) Whilst the lack of a formal written agreement is relevant, it does not detract from the fact that there is extensive WhatsApp correspondence between Mr Harmer and Mr Harrison suggesting the existence of the Alleged Contract.

(b) As the assistant registrar rightly noted, the screenshot merely depicts a WhatsApp message *between the defendant's own employees*. It is not probative evidence of the parties' common intention.

(c) Mr Harrison's 26 July 2019 Email was sent *after* the parties' relationship had already somewhat broken down. It is not fully contemporaneous with the time that the Alleged Contract is said to have been entered into and is not a reliable indication of the parties' intentions during that time.

23 There is hence a good arguable case that the parties had entered into the Alleged Contract (and agreed upon the Alleged Indemnification Term). Furthermore, the plaintiff is a Singapore-incorporated company and its director, Mr Harmer, has given unchallenged evidence that he was locally resident during the material time. The Alleged Contract would thus have been made as a result of an "essential step" taken by the plaintiff (through Mr Harmer) in Singapore within the meaning of O 11 r 1(d)(i) of the ROC. In this vein, the defendant asserts that the said provision does not apply because the WhatsApp communications between Mr Harmer and Mr Harrison do not show that the two were always in Singapore during their negotiations. Although some WhatsApp messages from Mr Harmer shows that he did occasionally travel to Malaysia in 2018 and 2019, these did not detract from the key thrust of his evidence – namely, that by and large, Mr Harmer was locally resident and did conduct the plaintiff's business from Singapore.

24 That being the case, the plaintiff meets the first requirement for valid service outside of jurisdiction. I note that the defendant also seeks to defeat the plaintiff's argument that the Alleged Contract was "made in Singapore". It argues that this cannot be correct because the 11 September 2019 Letter states that the Alleged Contract was entered into "in or about 1 April 2019". Based on Mr Harrison's passport entries, he was apparently not in Singapore at the material time. Ultimately, however, it is inconsequential whether the Alleged Contract was made in Singapore or elsewhere. For the purposes of meeting the

first requirement for valid service outside of jurisdiction, it is sufficient that the plaintiff has a good arguable case that an "essential step" was taken in Singapore under O 11 r 1(d)(i) of the ROC.

25 The plaintiff also relies alternatively on O 11 r 1(d)(ii) of the ROC. It submits that it is an agent (of the defendant) doing business in Singapore and that it had entered (on behalf of the defendant) into contracts with various third parties as a result ("**Third Party Contracts**"). The difficulty with this submission is that in the present Suit, the plaintiff is only seeking reliefs in respect of the Alleged Contract it had entered into with *the defendant*. On the other hand, the "contracts" which the plaintiff relies on as falling within O 11 r 1(d)(ii) of the ROC are the Third Party Contracts it says it had concluded with *other parties*. I have some doubts as to whether the plaintiff's action on the Alleged Contract may be said to "enforce, rescind, dissolve, annul or *otherwise affect*" the Third Party Contracts. Indeed, it is neither pleaded nor argued how these Third Party Contracts would be "affected" by the Suit. I therefore reject the plaintiff's reliance on this jurisdictional ground.

26 For completeness, I will also address the plaintiff's reliance on O 11 r 1(o) of the ROC. To recapitulate, the plaintiff's unjust enrichment claim is that it had "conferred benefits to the [d]efendant" in the amount of MYR 609,241.03 and it would be "unjust" of the defendant not to account to the plaintiff for the said amounts. The plaintiff argues that Mr Harrison was in Singapore when he requested it to provide the aforesaid benefits. Alternatively, the defendant's alleged liability for restitution supposedly arose out of an act done by the plaintiff in Singapore. As regards the latter argument, however, the plaintiff does not even specify which of its own acts it is referring to.

27 In my judgment, the plaintiff has failed to establish a good arguable case that its claim falls within O 11 r 1(o) of the ROC. As the Court of Appeal

reiterated in *Wee Chiaw Sek Anna v Ng Li-Ann Genevieve (sole executrix of the estate of Ng Hock Seng, deceased) and another* [2013] 3 SLR 801 (at [134]):

> …[T]here is no freestanding claim in unjust enrichment on the abstract basis that it is "unjust" for the defendant to retain the benefit – there must be a particular recognised unjust factor or event which gives rise to a claim.

In the plaintiff's pleadings and submissions, however, it has completely omitted to point to any specific unjust factor underlying its claim. That being the case, it falls far short of showing that it has a "good arguable case" in unjust enrichment/restitution.

Second requirement

28 Based on the evidence discussed at [20]–[22] above, I am of the view that there is a serious question to be tried as to (a) whether the Alleged Contract existed (in particular, whether the parties had agreed on the Alleged Indemnification Term and the Service Fee); and (b) whether the plaintiff was the agent of the defendant.

29 As regards the unjust enrichment claim, however, I find that there is no serious issue to be tried for the same reason given at [27] above.

Third requirement

30 The third requirement is that Singapore must be the proper forum for the trial of the action. The proper forum is the forum with which the dispute has the most real and substantial connection. The court will consider various factors in this analysis, and it is the quality of the connecting factors that is crucial rather than the quantity of factors on each side of the scale. As set out in *JIO Minerals FZC and others v Mineral Enterprises Ltd* [2011] 1 SLR 391 ("***JIO Minerals***") at [42], relevant factors include (a) the personal connections of the parties; (b) the connections to relevant events and transactions; (c) the governing law of the

dispute; (d) the existence of proceedings elsewhere; and (e) the overall shape of the litigation (*ie,* the manner in which the claim and defence have been pleaded).

31 In *JIO Minerals* (at [41]), the Court of Appeal further quoted the following guidance from *Halsbury's Laws of Singapore* vol 6(2) (LexisNexis, 2009) at para 75.090:

> As the search is for the forum that is *prima facie* clearly more appropriate to try the case, it is important to see what the case is about, and connections which have no or little bearing on adjudication of the issues in dispute between the parties will carry little weight.

The exercise of identifying the proper forum is not mechanistic; instead the entire multitude of factors should be taken into account in balancing the competing interests (*Lakshmi Anil Salgaocar v Jhaveri Darsan Jitendra* [2019] 2 SLR 372 ("***Lakshmi***") at [54]).

32 The plaintiff submits that Singapore is the proper forum for, *inter alia,* the following reasons:

(a) The two key witnesses are Mr Harmer and Mr Harrison. The former resides in Singapore. As far as Mr Harmer is aware, Mr Harrison also resides locally (save for the period August 2018 to 2019 when he lived in Malaysia).

(b) All the evidence in this Suit is in documentary form and may thus be produced before the Singapore courts with convenience.

(c) Besides the fact that the defendant is a Hong Kong company, the plaintiff, the defendant and this Suit all have no connection to that jurisdiction.

(d) As regards the possibility of Malaysia as an alternative forum, the defendant had no connection whatsoever with Malaysia except until 21 May 2019 when it incorporated AGRM for the purposes of taking on the Project. AGRM has yet to take any substantive steps in this regard. Further, by the time of AGRM's incorporation, the plaintiff/DJS Malaysia had already incurred all the relevant liabilities currently in dispute. That the Project is in Malaysia does not by itself preclude Singapore being the proper forum. Similarly, the fact that a claim is brought in a foreign currency has, by itself, no bearing on issue of the proper forum. A claim in a foreign currency may be brought in a Singapore court.

(e) As for any Expenses incurred by DJS Malaysia, the company has already assigned its claims against the defendant to the plaintiff.

33 The defendant argues that Singapore is not the proper forum but omits to clearly point to a different forum that is more appropriate. Its grounds are, *inter alia*, as follows:

(a) It is unclear that the parties are personally connected to Singapore. Only the plaintiff is a Singapore company. The defendant and DJS Malaysia are foreign entities. Although the plaintiff's director Mr Harmer resides in Singapore, the defendant's director Mr Harrison is no longer in Singapore and cannot be compelled to testify in a Singapore court.

(b) The relevant events and transactions are more closely connected to Malaysia. The Project was carried out in Malaysia and the Expenses incurred were incurred in Malaysian Ringgit.

(c) As regards the overall shape of the litigation, DJS Malaysia's assignment of rights to the plaintiff is a cynical attempt to found an action in Singapore. The filing of the Writ and SOC one day after service of the notice of the Deed of Assignment on the defendant is suspicious.

34 In my judgment, the only serious alternative fora for hearing the present dispute are Singapore and Malaysia. Although the factors pointing in favour of each alternative are somewhat finely balanced, I am ultimately of the view that Malaysia is the most appropriate forum. I will explain by addressing the relevant factors in turn.

35 At its heart, the plaintiff's action is a claim for indemnification of various liabilities and expenses that it and DJS Malaysia had incurred in relation to the Project. Its claim is premised on the existence of the Alleged Contract and/or an agency relationship with the defendant. The material issues are therefore (a) whether the parties had agreed to enter into a contract; (b) if "yes", whether the Alleged Indemnification Term, Service Fee and the alleged agency relationship were part of the agreed terms; and (c) whether the Expenses were incurred within the scope of the defendant's contractual obligations and/or the parties' agency relationship (if any).

36 That being the case, the "events and transactions" which are relevant to the dispute are this. First, it is the parties' course of conduct from mid-2018 to mid-2019 which is relevant to assessing whether a contract had arisen (and what its terms are). This course of conduct is primarily borne out in the WhatsApp correspondence between Mr Harmer and Mr Harrison during that time. In this regard, Mr Harmer (the director of the plaintiff and DJS Malaysia) mainly conducted the said WhatsApp discussions from Singapore. On the other hand, during the material period of time (*ie,* mid-2018 to mid-2019), Mr Harrison (the director of the defendant) appears to have conducted these discussions from

Malaysia. On this score, it appears that neither Singapore nor Malaysia is clearly favoured as the proper forum.

37 Second, it is the circumstances in which the Expenses were incurred which are relevant to determining whether they fall within the scope of the defendant's contractual obligations to the plaintiff and/or the parties' agency relationship (if any). These circumstances include the WhatsApp correspondence between Mr Harmer and Mr Harrison insofar as any agreement or instructions to undertake specific items of work in relation to the Project are concerned. For the reasons I have explained, however, this correspondence is neutral as to whether Singapore or Malaysia is the proper forum. More importantly, the circumstances which are also relevant include the *transactions* giving rise to the Expenses themselves as well as the *work* which was being paid for and done. In this regard, the relevant transactions were (by and large) entered into by the plaintiff/DJS Malaysia with third parties for good and services to be supplied/performed *in Malaysia* for the purposes of the Project. At the end of the day, the discussions between the parties all centred around how to move the Project in Malaysia forward. Seen in this light, I am of the view that the relevant events and transactions are more connected to Malaysia than Singapore.

38 Moving on, the personal connections of the parties are rather dispersed. Connecting this Suit to Singapore is the fact that (a) the plaintiff is a Singapore company; and (b) Mr Harmer resided in Singapore, from which location he conducted both the plaintiff's and DJS Malaysia's business. On the other hand, the fact that the defendant is a Hong Kong company is neutral. More importantly, Mr Harrison appears to have conducted the defendant's business (at least insofar as the Project was concerned) from Malaysia during the material period between mid-2018 and mid-2019. That AGRM had been incorporated by the defendant in Malaysia to take over the Project also reinforced the

connection of this Suit to Malaysia (albeit not significantly so). Ultimately, the fact that both the plaintiff and DJS Malaysia were contracting with third parties in Malaysia for the purposes of furthering the Project there tilts the balance slightly in favour of Malaysia.

39 As for the overall shape of the litigation, the plaintiff's pleadings expressly rely on the fact that any claims which DJS Malaysia has against the defendant for the Expenses have been assigned to it. In my view, this goes some way towards weakening the connection that the Suit has with Malaysia. That having been said, the crux of the plaintiff's claim is still inextricably tied to Malaysia because both the Alleged Contract and the Expenses allegedly incurred all relate to the Project in that jurisdiction. This factor would thus seem to slightly favour Malaysia as being the proper forum (or is at the very least, neutral as between Singapore and Malaysia).

40 In respect of witness availability and compellability, the two key witnesses are obviously Mr Harmer and Mr Harrison. As Mr Harmer still resides in Singapore, it is more convenient for him to testify here. There is, however, nothing which indicates that he would be unavailable or unwilling to testify even if the trial were heard in Malaysia instead. His availability and compellability as a witness is therefore not of any particular significance. The position as regards Mr Harrison is less clear. I am cognisant that Mr Harrison is not some third-party witness over whom the defendant has no control (see in contrast, the situation discussed in *Lakshmi* at [73]). On the contrary, he is both a director-employee and a major shareholder of the defendant. He would thus have a clear interest in testifying on the defendant's behalf whether the trial is heard in Singapore or Malaysia. His availability as a witness is therefore neutral. In the event, however, that he is unwilling to testify, his compellability as a witness is also inconclusive as his present whereabouts are unknown. To the

best of Mr Harmer's knowledge, Mr Harrison currently lives in Singapore. The defendant's submissions (dated 3 November 2020) state, however, that Mr Harrison is no longer resident here. For some unknown reason, there is no affidavit evidence from Mr Harrison himself to that effect. In the circumstances, I do not think that the factors of witness availability and compellability point either way.

41 The final two factors to be considered are the governing law of the dispute and the location of the relevant evidence. As to the former factor, the defendant submits that it is of little relevance as the key issues are factual, not legal, in nature. The plaintiff makes no submissions at all. I note that there is no suggestion from either side that Singapore and Malaysia would apply different principles of law such that the outcome of the dispute would be affected, especially since both fora are common law jurisdictions (see *Lakshmi* at [55]). Accordingly, I do not ascribe much weight to this factor. Similarly, the fact that the relevant evidence in this case is in documentary form and located in Singapore is also not significant. Documents can easily be transported or emailed overseas, and the expense of doing so can be addressed by an appropriate costs order if necessary (*John Reginald Stott Kirkham and others v Trane US Inc and others* [2009] 4 SLR(R) 428 at [40]).

42 Taking everything together in the round, my overall view that the relevant events and transactions, the personal connections of the parties and the overall shape of the litigation tilts the balance in favour of Malaysia as the proper forum. For completeness, although the failure to establish the third requirement is, in itself, sufficient reason to set aside the Leave Order, I will address the defendant's final ground of appeal below.

Duty of full and frank disclosure

43 The defendant's final string in the bow is that the plaintiff had failed to provide full and frank disclosure in its original application for the Leave Order. It is argued that the plaintiff breached the said duty in the following ways:

(a) First, the plaintiff did not disclose the "[f]ull WhatsApp [c]orrespondence" between Mr Harmer and Mr Harrison, the 29 March 2019 Call and Mr Harrison's 26 July 2019 Email.

(b) Second, the plaintiff did not plead or disclose on affidavit the fact that the defendant had been given valid notice of the Deed of Assignment. The giving of notice was material to whether the assignment from DJS Malaysia in favour of the plaintiff was "effectual in law".

(c) Third, the plaintiff claimed as "incurred costs" various expenses relating to, *inter alia,* the rental of the Casa Anda Home. It did not, however, disclose the material fact that it has yet to pay for the said expenses.

44 In respect of [43(c)] above, I highlight that the SOC includes a claim for an *indemnity* from the defendant in respect of the liabilities that the plaintiff and DJS Malaysia supposedly incurred for the purposes of the Project. The plaintiff has sufficiently evidenced DJS Malaysia's liability for the rental of the Casa Anda Home via the tenancy agreement exhibited to Mr Harmer's affidavit (dated 4 February 2020). It is not a necessary or material part of this claim that the liabilities in question have already been discharged. As for the remaining matters referred to by the defendant, I am not persuaded that they are so material in all the circumstances to warrant a setting aside of the Leave Order.

Conclusion

45 Given my finding that Singapore is not the proper forum for the dispute, I allow the appeal in RA 224. I set aside Leave Order granting the plaintiff leave to serve the Writ and SOC outside of jurisdiction. The Default Judgment is accordingly set aside.

46 I will now hear parties on the question of costs.

Vincent Hoong
Judge of the High Court

Koh Teck Beng Glen (WMH Law Corporation) for the plaintiff;
Sean Francois La'Brooy and Lim Jonathan Wei-Ren (Selvam LLP)
for the defendant.