Carona Holdings Pte Ltd and Others v Go Go Delicacy Pte Ltd
[2008] SGCA 34

Case Number : CA 90/2007

Decision Date : 31 July 2008

Tribunal/Court : Court of Appeal

Coram : Andrew Phang Boon Leong JA; V K Rajah JA

Counsel Name(s) : Adrian Tan and Lim Sing Yun (Drew and Napier LLC) for the appellants; Ang Cheng Hock and Tham Wei Chern (Allen and Gledhill LLP) and Alfred Dodwell (Alfred Dodwell) for the respondent

Parties : Carona Holdings Pte Ltd; Carona Fast Food Pte Ltd; Foodplex Trading Pte Ltd; Yap Teck Song; Lee Boon Hiok — Go Go Delicacy Pte Ltd

Arbitration – Stay of court proceedings – Defendant applying for stay and refusing to file defence – Steps to be taken by defendant applying for stay of proceedings – Whether application for extension of time would constitute "step in the proceedings" under Arbitration Act (Cap 10, 2002 Rev Ed)

Civil Procedure – Stay of proceedings – Scenario where defendant did not file defence because of its pending application for stay in favour of arbitration – Whether defendant could be compelled to file defence notwithstanding its pending stay application

31 July 2008

V K Rajah JA (delivering the grounds of decision of the court):

Introduction

1 This appeal considers whether a plaintiff is entitled as of right to obtain a judgment in default of defence merely because the defendant fails to file his defence pending the outcome of a stay application premised on a pre-existing agreement to arbitrate. Is a defendant invariably required to file his defence on a "without prejudice" basis or, at the very least, formally apply for an extension of time to file his defence, pending the determination of his application for a stay of proceedings in favour of arbitration? A further conundrum that arises is whether any of these or similar protective measures undertaken by a defendant pending the outcome of such a stay application can constitute a "step in the proceedings" under the Arbitration Act (Cap 10, 2002 Rev Ed) and thereby irretrievably subvert the defendant's application for a stay. We now turn to the facts of the present case.

Background facts

2 The genesis of the present appeal can be stated in brief compass. The first appellant, Carona Holdings Pte Ltd, and Go Go Delicacy Pte Ltd ("the Respondent") entered into an exclusive franchise agreement ("the Franchise Agreement") contemplating that in exchange for the payment of fees by the Respondent, the first appellant would provide the know-how in relation to the operation of the franchise, a business centred on the retailing of a special variety of frankfurters known as "Go Go Franks". Under the terms of the Franchise Agreement,[note: 1] the Respondent was bound to purchase all "operating supplies" from a designated seller, the third appellant. Further, the Franchise Agreement specified, *inter alia*, at cl 23.13.1[note: 2] that in the event of any disputes between the parties, these were to be resolved by arbitration. The clause stipulated as follows:

> Any dispute arising out of or in connection with this Agreement including any questions regarding its existence, validity or termination shall be referred to and finally resolved by arbitration in Singapore in accordance with the rules of the Singapore Arbitration Centre for the time being in force which rules are deemed to be incorporated by reference into this clause …

3 Unfortunately, the arrangement soon ran into problems. During negotiations to resolve the differences, the Respondent alleged that while it had observed its side of the bargain, the first appellant neglected to fulfil its obligations under the Franchise Agreement by failing to: (a) provide adequate training; and (b) transfer the tenancy agreement for one of its branches to the Respondent. In addition, the Respondent claimed to have been misled into purchasing numerous items that the fourth and fifth appellants had stipulated as essential for the furnishing of the Respondent's food outlet.

4 On 20 March 2007, the Respondent commenced proceedings against the first to the fifth appellants (collectively "the Appellants") complaining about these breaches. The Appellants were served the writ of summons on 27 March 2007. They entered appearance on 2 April 2007. Counsel for the Appellants then wrote to the Respondent and referred to the arbitration clause in the Franchise Agreement.[note: 3] He requested confirmation that the action would be stayed. Responding on 3 April 2007,[note: 4] counsel for the Respondent noted that while the disputes were embraced by the arbitration clause, he hoped the Appellants would waive the requirement and agree to the matter proceeding in the High Court as it would be "neat and tidy if all parties' rights and liabilities in this matter can be resolved in this one action rather than having one matter proceeds [*sic*] by way of arbitration".[note: 5] He pointed out that all the parties in the matter were not identical. The Appellants did not agree to this and an impasse was thus reached.

5 On 18 April 2007, the Appellants applied to stay the proceedings pursuant to s 6 of the Arbitration Act. The stay application was fixed for hearing on 2 May 2007. In the meanwhile, the Appellants declined to file their defence. Responding to this, on 20 April 2007, counsel for the Respondent gave 48 hours' notice to counsel for the Appellants insisting that the defence be filed.[note: 6] On 23 April 2007, counsel for the Appellants replied, stating that the 48-hour notice was inappropriate and misconceived in the light of the pending stay application.[note: 7] The Respondent disagreed and issued a further one-day notice to the Appellants maintaining that their defence be filed and extending the timeline until 24 April 2007. Finally, on 25 April 2007, the Respondent filed an *inter partes* application requesting for judgment to be entered in default of the defence.

The proceedings below

The hearing before the assistant registrar

6 The Respondent's application for default judgment was fixed to be heard together with the Appellants' application for a stay of the legal proceedings on 15 June 2007. In a rather puzzling development, both counsel apparently agreed, at the outset, to have the default judgment application heard prior to the stay application. In the result, the assistant registrar who heard the matter granted the Respondent's application for default judgment. No order was made as to the stay application which was not even heard on the merits. The Appellants appealed.

The Appeal

7 On appeal, the judge below ("the Judge") upheld the decision of the assistant registrar and determined that a stay of the proceedings was not appropriate in the circumstances. She noted that

while the first appellant was a signatory to the Franchise Agreement, the other four appellants were not bound by the arbitration clause contained therein. The Judge observed quite rightly in *Go Go Delicacy Pte Ltd v Carona Holdings Pte Ltd* [2008] 1 SLR 161 ("the GD") at [26]:

> A court cannot compel non-parties to an agreement that contains an arbitration clause to arbitrate their dispute merely because one defendant is a party to that agreement.

8 As regards whether the default application could be dealt with before the stay application had been disposed of, the Judge reviewed the decisions in *Samsung Corp v Chinese Chamber Realty Pte Ltd* [2004] 1 SLR 382 ("*Samsung Corp*") and *Australian Timber Products Pte Ltd v Koh Brothers Building & Civil Engineering Contractor (Pte) Ltd* [2005] 1 SLR 168 ("*Australian Timber*"). Without addressing the issue of whether both decisions were reconcilable, she referred extensively to *Australian Timber* as it "dealt with a situation similar to this case" (at [33] of the GD). In *Australian Timber*, Belinda Ang Saw Ean J opined that a pending stay application did not prevent time from running for the service of the defence and a defendant ought to request that the hearing date of the stay application be brought forward or apply for an extension of time to serve the defence pursuant to O 3 r 4 of the Rules of Court (Cap 322, R 5, 2004 Rev Ed) ("the 2004 Rules"), in order to obviate the entry of a default judgment. Ang J held that it must follow as a matter of logic that the filing of an application to extend time to serve the defence would not *per se* constitute the taking of a "step in the proceedings" within the meaning of s 6(1) of the Arbitration Act.

9 Adopting the reasoning in *Australian Timber*, the Judge found that the Appellants ought to have been more proactive. It was insufficient to simply rely on the stay application as a basis for refusing to comply with the 48 hours' notice. She concluded that there were other alternatives open to the Appellants: (a) the stay application could have included an additional prayer for an order that the Appellants not be compelled to file any defence pending determination of the stay application; (b) the Appellants could have applied to the duty registrar to bring forward the hearing date of the stay application; or (c) they could have applied to postpone the hearing of the default judgment application until after the stay application had been heard. In her opinion, this "would not have done violence to the spirit and effect of the appellate court's decision in *Samsung Corp*" and would not, in her view, amount to taking a "step in the proceedings" under the Arbitration Act (see [36] of the GD). She suggested that it was nevertheless still open to the Appellants to file an application to set aside the default judgment.

10 Before us, the Appellants submitted that once the stay application had been filed, all timelines under the current Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("the Rules") ought automatically to come to a standstill. We could not agree with such an extravagant proposition, especially where this could well encourage an unmeritorious defendant to file a frivolous stay application in an effort to stall for more time. Further, and more crucially, such an important consequence ought to be expressly spelt out in the Rules. The Rules are silent on this. Alternatively, the Appellants argued that, as a matter of practice, the stay application should be heard before any application for summary or default judgment. We broadly agreed that this was the correct approach. However, we must add that this view is premised on an applicant diligently pursuing his remedies. We allowed the appeal as we were satisfied that the Appellants had proceeded diligently in filing their stay application and a default judgment should not have been entered in view of the myriad factual controversies that had surfaced. We now give the reasons for our decision.

The applicable law

11 Section 6 of the Arbitration Act reads as follows:

6.—(1) Where any party to an arbitration agreement institutes any proceedings in any court against any other party to the agreement in respect of any matter which is the subject of the agreement, *any party to the agreement may, at any time* ***after*** *appearance and* ***before*** *delivering any pleading or taking any other step in the proceedings,* ***apply*** *to that court to stay the proceedings* so far as the proceedings relate to that matter.

(2) The court to which an application has been made in accordance with subsection (1) may, if the court is satisfied that —

(*a*) there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement; and

(*b*) the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration,

make an order, upon such terms as the court thinks fit, staying the proceedings so far as the proceedings relate to that matter.

(3) Where a court makes an order under subsection (2), the court may, for the purpose of preserving the rights of parties, make such interim or supplementary orders as the court thinks fit in relation to any property which is or forms part of the subject of the dispute to which the order under that subsection relates.

(4) Where no party to the proceedings has taken any further step in the proceedings for a period of not less than 2 years after an order staying the proceedings has been made, the court may, on its own motion, make an order discontinuing the proceedings without prejudice to the right of any of the parties to apply for the discontinued proceedings to be reinstated.

(5) For the purposes of this section, a reference to a party includes a reference to any person claiming through or under such party.

[emphases in italics and bold italics added]

12 This court in *Lai Swee Lin Linda v AG* [2006] 2 SLR 565 broadly expressed the balancing exercise to be undertaken by the courts in addressing procedural tensions (at [4]):

> [T]he rules of civil procedure constitute the basic structure within which the substantive merits of particular cases are ultimately determined. To this end, whilst the courts should not permit the application of the rules of civil procedure to be productive of unnecessary technicality and/or substantive injustice, they must, by the same token, also ensure that where contravention of these rules would in fact result in substantive injustice, such contravention should not be permitted.

13 This appeal necessitated an inquiry into first, the nature of a stay application; and second, whether the decisions of *Samsung Corp* and *Australian Timber* are indeed irreconcilable and conflicting, as suggested by the respective parties.

14 Pursuant to the Rules, a defence must be served within 14 days of service of the statement of claim. If a defendant fails to serve a defence, the plaintiff may, upon expiration of the period limited for service of a defence, move to obtain a default final or interlocutory judgment (as the case may be) pursuant to O 19 r 2 or r 3 of the Rules.

15 Here, the Appellants did not file any defence. *Prima facie*, the filing of a defence and the filing of a stay application in favour of arbitration are conceptually at odds with one another. There were two main strings to the Appellants' bow in advancing their procedural stance: first, the Appellants asserted that the question of the stay application had to be dealt with before the timelines in the Rules started to run because this would save time and expense by disposing of the merits of the key question before any consequential questions were addressed. Second, they posited that they could not be compelled to file their defence as the 48 hours' notice was inherently flawed. Since there was an agreement to arbitrate, no defence need be filed.

16 On the other hand, the Respondent submitted that there were no legal or procedural rules preventing it from entering default judgment. It contended that parties must remain uncompromisingly filial to the Rules and the timelines set out therein. The Rules, it asserted, did not expressly stipulate the legal consequences of filing such a stay application. It also averred that the mere filing of a stay application could not operate as a stay of the overriding requirement mandating that a defence be filed.

Whether a defendant should be compelled to file his defence in the event a stay application has been filed

The approaches in Samsung Corpand Australian Timber

17 It appears that while both parties relied upon the decisions of *Samsung Corp* and *Australian Timber*, their views as to the ramifications of those decisions were wildly divergent. In the circumstances, it would be helpful if we reviewed both decisions closely.

1 8 In *Samsung Corp*, a dispute arose out of a building contract containing a pre-existing agreement to arbitrate in the event of any differences between the parties. The respondents in that case were the developers of a building project while the appellants were the main contractors. The appellants refused to comply with a delay certificate issued in favour of the respondents who brought an action against the appellants to compel payment. Relying on the arbitration clause in the building contract, the appellants entered appearance and immediately applied for a stay in favour of arbitration. At the hearing of the stay application, the assistant registrar, purportedly invoking the inherent powers of the court pursuant to O 92 r 4 of the then Rules of Court (Cap 322, R 5, 1997 Rev Ed) ("the 1997 Rules"), allowed the respondents to file their application for summary judgment under O 14 of the 1997 Rules without any defence having been filed by the appellants. To safeguard the position of the appellants, she also ordered that, notwithstanding the affidavits filed by the appellants to resist the O 14 application, these affidavits should not be viewed as the taking of steps in the proceedings. Further, she granted the appellants' application that they need not file their defence until the stay application had been fully disposed of. Finally, she ordered that both the stay application and the O 14 application be heard together. Pursuant to these orders, the respondents filed their O 14 application. On appeal, the judge in chambers held that the assistant registrar had erred in invoking the court's inherent jurisdiction to override the express letter of O 14 r 1. Instead, he was of the view that, first, an O 14 application should only be made after the defence had been filed, but he recognised that it was only logical that the stay application be heard together with the O 14 application. Second, the judge ordered, in what is known as a "compromise order", that the appellants should file their defence before the stay application was disposed of, with the caveat that the filing of the defence was not to be construed as having taken a step in the proceedings. Third, we noted that the judge recognised that a joint hearing would be beneficial as the O 14 application could be more speedily dealt with and this would go some way towards avoiding duplicity in arguments.

19 It bears mention that, until late 2002, plaintiffs could apply for summary judgment under O 14 r 1 of the 1997 Rules on the basis that the defendant had no defence to the claim. Such an application could be filed immediately after the defendant entered appearance. However, on 1 December 2002, certain significant amendments to O 14 of the 1997 Rules came into force. *Inter alia*, O 14 r 1 was amended to read as follows:

> Where a statement of claim has been served on a defendant *and* that defendant has served a defence to the statement of claim, the plaintiff may, on the ground that the defendant has no defence to a claim included in the writ, or to a particular part of such a claim, or has no defence to such a claim or part except as to the amount of any damages claimed, apply to the Court for judgment against that defendant. [emphasis added]

It is quite clear that following these amendments, an application for summary judgment under O 14 can only be made after the defendant "has served a defence to the statement of claim". This has by a side-wind introduced some real practical difficulties, particularly in the context of contracts containing arbitration clauses, where a classical Catch-22 situation has been created; the plaintiff would have to wait for the defendant to file his defence before applying for the summary judgment but, on the other hand, a defendant who wants the dispute resolved by arbitration will not file his defence for fear that by doing so he would be deemed to have taken a step in the proceedings and thereby waived his rights to arbitration under s 6(1) of the Arbitration Act.

20 On appeal, this court held in *Samsung Corp* that the compromise order should not have been made by the judge in chambers as it required a defendant to pursue two contradictory courses of action. Chao Hick Tin JA drily noted in *Samsung Corp* at [24]:

> The order made by the judge [in chambers] is also a "compromise" order. On the one hand, it requires the defendant to file his Defence, which is clearly inconsistent with the rule laid down in s 6(1) of the Arbitration Act that a defendant who applies for a stay on the ground of there being an arbitration clause must not take any step in the proceeding and, on the other hand, it provides that a Defence so filed by the defendant would not be taken to mean that the defendant had taken a step in the proceeding. *But should the court go to the extent of performing what appears to be a "gymnastic" exercise in order to achieve a result, which as a matter of principle, is far from logical? The defendant is being required to run two contradictory courses of action.* … Thus we do not think the "compromise" order made by the judge is in line with the object and spirit of s 6(1) and O 14 r 1. [emphasis added]

21 The rationale behind this is immediately apparent. As Woo Bih Li JC took pains to clarify in *Yeoh Poh San v Won Siok Wan* [2002] 4 SLR 91 ("*Yeoh Poh San*") at [24]–[29], compromise orders are not desirable for four primary reasons:

(a) no such compromise orders are granted before the original stay application is heard and the position ought to be the same for appeals on stay applications;

(b) insisting on the filing of a defence would be prejudicial to a defendant who has to meet the merits of the plaintiff's claim while seeking a stay;

(c) if the defendant succeeds in the appeal, he may never have to meet the plaintiff's claim on the merits as the plaintiff may thereafter abandon, or even lose his claim in the alternative jurisdiction; and

(d) our courts are not properly seized of such matters if the stay is indeed granted on such

a basis.

22 Adopting this reasoning, this court in *Samsung Corp* at [18] determined that the solution was not to make a compromise order. Instead, it held:

> The timeframe prescribed in the Rules of Court for the filing of Defence is a general rule and should be applied in the normal sort of a case where there is no dispute as to the jurisdiction of the court. *Where, in a case, an application has been made for a stay of proceeding on the ground that the dispute ought to be referred to arbitration there is, in our opinion, much force in the contention that this question must first be determined before any further steps be taken in the proceeding*. If the stay application should succeed, the dispute will be transferred to a different forum for determination. If it should fail, the court would no doubt make the necessary consequential orders, including setting the time-limit for the filing of Defence. [emphasis added]

23 In this respect, we note that this court in *Samsung Corp* was essentially stating that the Rules Committee must have been aware of the practice prior to the amendments, of hearing the stay application together with the O 14 application. The intention behind amending the rules must have been, *inter alia*, to ensure that while a stay application is pending, no O 14 application is made. On that basis, this court concluded that the compromise order did not accord with either the spirit or the intent of s 6(1) of the Arbitration Act.

24 As we have earlier alluded, this issue was revisited in *Australian Timber*. The crux of that appeal centred on whether a default judgment obtained in an action brought in breach of an arbitration agreement could be later set aside if it was the result of the defendant merely refusing to file its defence pending determination of his stay application. Further, it considered whether such a course of conduct amounted to a "step in the proceedings" under the Arbitration Act. It has not escaped our notice that Ang J sought to distinguish *Samsung Corp* on its facts (at [12] and [15] of *Australian Timber*):

> In [*Samsung Corp*], the Court of Appeal had to consider whether it was proper for the court to either waive the requirement of O 14 r 1, or, in the alternative, compel a defendant to serve his defence so as to enable the plaintiff to apply for summary judgment. In so allowing, both the stay and O 14 applications could be heard at the same sitting, as was the practice prior to the amendments to O 14 r 1 that came into effect on 1 December 2002. Previously, a plaintiff could apply for summary judgment even though a stay application had been filed. The Court of Appeal held that the new O 14 r 1 changed the previous practice and that the court should not make a compromise order to compel the defendant to serve its defence. The compromise order would have allowed the defence to be served without treating that course as a step in the proceedings.
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> …
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> In my judgment, the proper occasion to cite the observations made by Chao JA in *Samsung* [*Corp*] and Woo JC in *Yeoh Poh San v Won Siok Wan* is at the time when the court hears an application to extend time. … I agree that the court should be wary of a requirement to serve a pleading, which might be liable to be a temporary pleading, especially when the action might be stayed for another forum or arbitration.

25 Having distinguished *Samsung Corp*, Ang J concluded, correctly in our view, at [16] that a pending stay application did not stop time running for the service of the defence:

> The Rules of Court have their own self-contained provisions relating to the service of the

> defence, time extension and default judgment. Unless and until there is a stay order to halt proceedings, the plaintiff is entitled to give notice to the defendant to serve its defence. It is for a defendant, faced with a 48-hour notice to serve its defence, to respond appropriately. A proactive approach should be adopted. The defendant could have seen the duty registrar to bring forward the hearing date of the stay application for immediate hearing as a matter of urgency or apply for an extension of time to serve the defence under O 3 r 4 and at the same time seek an urgent hearing of the matter. In the present case, *Samsung* [*Corp*] had not been interpreted correctly.

26 Further, Ang J determined that an act, which would otherwise be regarded as a step in the proceedings, would not be treated as such if the applicant specifically stated that he intended to seek a stay or expressly reserved his right to do so (see [22] of *Australian Timber*). Pending determination of the stay application, one of the options open to the defendant was to apply for an extension of time to safeguard his position and this should not constitute a "step in the proceedings" within the meaning of s 6(1) of the Arbitration Act (at [23]).

Are the approaches in Samsung Corp and Australian Timber conflicting?

27 We note that Assoc Prof Lawrence Boo in "Arbitration" (2004) 5 SAL Ann Rev 47 has appraised the views expressed in *Samsung Corp* and *Australian Timber*. He observes at paras 3.16–3.17 that although Ang J attempted to distinguish this court's decision in *Samsung Corp* by emphasising that it dealt with an application relating to the deferring of the filing of a defence in an O 14 r 1 application, her observation that the 2004 Rules have their own self-contained provisions relating to the service of defence, time extension and default judgment contradicted Chao JA directly in *Samsung Corp*. In particular, Assoc Prof Boo drew attention to the observation of this court in *Samsung Corp* (see [22] above).

28 We note that at paras 3.13 and 3.18, Assoc Prof Boo remarked that both decisions were at odds with each other:

> The Court of Appeal's decision in *Samsung Corp* has properly balanced and brought perspective into what has hitherto been a confusing and illogical practice relating to O 14 applications, the filing of the defences and the applications for stay pending arbitration under the Arbitration Act. In essence, the Court of Appeal endorses the position that when an application for stay in favour of arbitration is pending, that application must be determined first before any further steps are taken in the proceedings.
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> …
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> The justice of the case in *Australian Timber* … may seem to balance in favour of not setting aside the judgment as it appears that Ang J was convinced that the defendant in that case had no substantive defence. However *in doing so, the court has unwittingly added a question mark to the practice in relation to the filing of the Defence, as suggested by the Court of Appeal in* Samsung Corp*.*
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> [emphasis added]

29 Turning our focus to reviewing both decisions, we cannot agree with Assoc Prof Boo's conclusion that a question mark has been "unwittingly" introduced. Indeed, in our view, the decisions are plainly not irreconcilable. First, it must be noted that Assoc Prof Boo is a lone voice in arguing that both decisions are inconsistent. Unfortunately, he does not spell out what *precisely* is so

inconsistent about both decisions. Other academics, for example, Asst Prof Warren B Chik in "Recent Developments in Singapore on International Commercial Arbitration" (2005) 9 SYBIL 259 at 269, have commented that both decisions are distinguishable on their facts. Asst Prof Chik does not even begin to suggest that they are *ipso facto* irreconcilable. Interestingly, Prof Jeffrey Pinsler's authoritative treatise on civil procedure, *Singapore Court Practice 2006* (LexisNexis, 2006) measuredly observes that *Australian Timber* merely defines what is to be done if a plaintiff decides to file an application for a judgment in default of defence in the face of a pending stay application. He points out quite correctly, in our view, at para 69/2/8 that *Samsung Corp* "must be read subject to the … observations made" in *Australian Timber*.

30 Second, we found that nowhere in the grounds of *Samsung Corp* does this court go so far as to declare, or even suggest, that all timelines should stop pending the outcome of a stay application.

31 Third, in our view, Assoc Prof Boo does not give adequate credit to the serious factual differences in the matrices of both cases. The main thrust of *Samsung Corp* was whether an application for summary judgment could only be made after the defence had been filed. As alluded to previously at [19], prior to the amendments, a plaintiff could apply for summary judgment on the basis that the defendant had no defence to the claim, immediately upon the entry of an appearance by the defendant. Therefore, it is evident that the focus of the decision in *Samsung Corp* centred on addressing the issue of whether a defendant could be compelled to file his defence so as to enable a plaintiff to file an O 14 application. On the other hand, the plaintiffs in *Australian Timber* did not apply for summary judgment under O 14 of the 2004 Rules, but for judgment in default of defence under O 19 of the 2004 Rules. A defence is not required to be filed under O 19. Such an application for a default judgment is, in fact, predicated on the absence of a defence. Both cases were therefore, as Asst Prof Chik rightly pointed out, clearly distinguishable on their facts.

32 Fourth, we are of the opinion that far from suggesting that the timelines in the Rules of Court will stop on the filing of a stay application, Chao JA was in fact alluding to quite the opposite. By observing (at [18] of *Samsung Corp*) that, in the event of the failure of the stay application, "the court would no doubt make the necessary consequential orders, including setting the time-limit for the filing of Defence", the court in *Samsung Corp* confirmed that fidelity to the timelines in the Rules of Court must still be observed. After the merits of the stay application have been found to be wanting, an unsuccessful defendant has to file his defence. The time limits for the filing of the defence can, at the same hearing, be set by the court. In a similar vein, *Australian Timber* clarifies that the onus lies on the defendant to bring forward the hearing date or apply for an extension of time to serve the defence, if a default judgment is to be avoided.

33 We would further add that *ordinarily* a defendant should not be asked or compelled to file his defence while the stay application is pending, as suggested by the decision of *Yeoh Poh San* ([21] *supra*). In that case, the plaintiffs commenced proceedings against the defendant who had entered an appearance and unsuccessfully applied for a stay of the proceedings on the basis of *forum non conveniens*. As the time for filing the defence had expired, the defendant sought an extension of time while the plaintiffs moved to apply for judgment in default of defence. The deputy registrar granted the defendant a compromise order (*ie*, an extension on the understanding that the plaintiffs were not to regard the filing of the defence as a step in the proceedings). Woo JC held that, first, a plaintiff's lawyer should not insist on the defendant filing a defence, pending the determination of the stay application, as this would render the appeal nugatory. Should the plaintiff insist on the filing of the defence, the defendant should then seek an extension of time and this would usually be granted so as not to render the appeal futile. Second, Woo JC opined that compromise orders were not to be encouraged. Accordingly, he decided that the defendant was to file her defence within a certain timeframe on the undertaking by counsel for the plaintiffs not to treat this as a submission to the

jurisdiction of the Singapore court. He observed at [27]:

> The point is that while a defendant is seeking to stay the proceedings, whether by way of original application or an appeal, the defendant should not be required to meet the plaintiff's claim on the merits. *A defendant is entitled to focus his attention on the appeal for a stay and not be distracted by running two contradictory courses of action at the same time.* [emphasis added]

34 The above *dictum* suggests that Woo JC was clearly mindful of the practical concern of ensuring that prejudice to the defendant would not be caused by making them run two "contradictory courses of actions". We broadly agree. A defendant should not be compelled to file a defence and made to adopt two contrary courses of action simultaneously. Through the judicious exercise of discretion, the courts can vary timelines in appropriate cases.

35 In this regard, we found it significant that, in *Samsung Corp*, Chao JA in fact cited *Yeoh Poh San* with approval. As noted earlier, one such reason is that until the merits of the stay application had been disposed of, the courts would not, strictly speaking, be decisively seized of the matter. It is apposite to also refer to the views of M Karthigesu JA in *The Jarguh Sawit* [1998] 1 SLR 648 (at [30] and [34]), a decision that Woo JC had in turn relied on in *Yeoh Poh San*:

> Firstly, whether or not a court has jurisdiction is, of necessity, a question logically prior to the substantive dispute of the parties. Unless and until a court is properly seized, it cannot adjudicate on the matter. …
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> …
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> The Rules of Court also contemplate that the matter of jurisdiction should be determined once and for all at the interlocutory stage. The Rules clearly suggest that jurisdiction is finally determined at the stage where an application is made under O 12 r 7.

36 Fifth, if timelines are deemed to be automatically suspended once a stay application is filed, this could cause procedural gridlock by encouraging unmeritorious defendants to file frivolous applications. Clearly, this too is not a desirable outcome.

37 It seems to us that the more reasonable and practical approach is for the courts to usually hear the stay application and the default judgment application together, assuming of course that they are concurrently pending. In our view, then, as between the two applications, the merits of the stay application should always be heard first. This would serve two purposes. Apart from saving costs and minimising duplicity in arguments, it would sift out the good cases from the bad, and concurrently address both undesirable scenarios where unmeritorious defendants seek to abuse the court process and those where unreasonable plaintiffs attempt to test the resolve of a defendant by insisting obdurately that the defence be filed within the time limit, regardless of the merits of the stay application. A prudent defendant ought to also apply in the alternative for an extension of time to file his defence, assuming that this has not been earlier dealt with. If the stay application is dismissed, the defendant may then seek time to file its defence. The matter can then proceed subsequently in accordance with the usual procedures contemplated and permitted by the Rules.

38 To recapitulate, we wish to emphasise that the correct procedure in future is that, first, within the stipulated 14 days under the Rules for the filing of a defence or within any extended time obtained from the court (where parties do not agree), a stay application should be filed. Second, in the event an application for a default judgment is filed (or even in anticipation of such an application), the application for a stay should include a prayer for the stay of the proceedings

(including filing of a defence) until the court has ruled on the main stay application. This will minimise the running of two contradictory causes of action and may save considerable costs as well as time. Third, the Registry should endeavour to give early hearing dates to minimise attempts to abuse process by either party, especially if the plaintiff insists on the filing of the defence. Fourth, for parties and/or counsel that behave unreasonably and/or attempt to abuse the process, carefully calibrated costs sanctions may be appropriate. We appreciate that these guidelines cannot be religiously adhered to in all matters. For example, counsel for certain defendants may in some instances reasonably require more time to obtain clear and firm instructions, particularly if their clients are based overseas. The parties and the courts should approach the issue of timelines in a commonsensical and practical manner infused with the spirit of fairness. In the ultimate analysis, the tension between meritorious stay applications and meritorious applications for summary or default judgment will have to be individually assessed on their factual matrices. It is neither desirable, nor indeed possible, to have one iron or hard and fast rule on timelines applicable to each and every case.

Whether an application for extension in time amounts to a "step in the proceedings"

39 Having considered the approach to be taken in dealing with stay and default judgment applications, a connected issue that inevitably arises is whether an application seeking an extension of time to file a defence constitutes a "step in the proceedings" under the Arbitration Act. The Appellants contended that they could not have applied for an extension of time to file a defence because it would irreparably have jeopardised their stay application. However, the Respondent asserted that *Australian Timber* stood for the proposition that an application to extend time merely preserved the defendant's position pending final determination of the stay application and was not to be construed as a voluntary submission to jurisdiction. The Respondent is correct in this.

40 It would be helpful if we begin by examining the genesis of what constitutes a "step in the proceedings", first by referring to the English jurisprudence in this area and, subsequently, the position taken by the courts in other jurisdictions. Some two decades ago, Sir Michael J Mustill and Stewart C Boyd in *The Law and Practice of Commercial Arbitration in England* (Butterworths, 2nd Ed, 1989) ("*Mustill and Boyd*") wistfully lamented at p 472 that the reported English cases were difficult to reconcile and provided little guidance on the nature of a "step in the proceedings". Fortunately, as we shall see, some recent cases have helpfully illuminated this area of practice.

The English position

What is a "step" in the proceedings?

41 A good starting point of our discussion is s 4 of the Arbitration Act 1889 (c 49) (UK) which provides as follows:

> If any party to a submission ... commences any legal proceedings in any court against any other party to the submission … in respect of any matter agreed to be referred, any party to such legal proceedings may at any time after appearance, and *before delivering any pleadings or taking any other steps in the proceedings, apply to that court to stay proceedings*, and that court or judge thereof if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings. [emphasis added]

42 When this provision was re-enacted as s 4(1) of the Arbitration Act 1950 (c 27) (UK) it remained largely unchanged and declared:

> If any party to an arbitration agreement, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the agreement, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to those legal proceedings may at any time after appearance, and *before delivering any pleadings or taking any other steps in the proceedings*, *apply to that court to stay the proceedings*, and that court or a judge thereof, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the agreement, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings. [emphasis added]

43 In essence, s 4(1) expressly stated that the right to a stay would be lost if any pleadings were delivered or "other steps in the proceedings" were taken. This recognised that a defendant ought to elect, at the earliest possible stage of the court proceedings, whether he desired to be involved in those proceedings or he insisted on arbitration. Once a step was taken, that election would be deemed to have been made in favour of allowing the action to proceed.

44 The conundrum which the English courts have tried to resolve time and time again is what would constitute an unauthorised step. Indeed, John Sharkey and John Dorter in *Commercial Arbitration* (The Law Book Company Limited, 1986) observe at p 70 that "something more than mere correspondence or other communications" is necessary to warrant that an unauthorised step has been taken. Some positive conduct consistent with the election of allowing the action to proceed is therefore required. It does indeed appear that the English position on this particular aspect of practice has until quite recently been far from being either certain or unanimous.

45 We begin our analysis of the English position with the case of *Ives & Barker v Willans* [1894] 2 Ch 478 where Lindley LJ perceptively noted (at 484), in relation to s 4 of the Arbitration Act 1889, that:

> [A] step in the proceedings means something in the nature of an application to the Court, and not mere talk between solicitors or solicitors' clerks, nor the writing of letters, but the taking of some step, such as taking out a summons or something of that kind, which is, in the technical sense, a step in the proceedings.

46 The approach in *Ives & Barker v Willans* was subsequently adopted by the decision of *Zalinoff v Hammond* [1898] 2 Ch 92 at 95, where Stirling J added a sheen by saying that a step referred to a "*substantive step* taken by a party. It may be that a very limited application to the Court—such as taking out a summons for an extension of time would be enough" [emphasis added]. This position was reiterated in *The County Theatres and Hotels, Limited v Knowles* [1902] 1 KB 480 ("*County Theatres*") where a step in the proceedings was held to be "something in the nature of an application to the Court" (at 481). Referring to *Ives & Barker v Willans*, this stance was echoed by Luxmoore LJ in *Lane v Herman* [1939] 3 All ER 353 at 356:

> I think that what was said by Lindley, L.J., is really the best guide to what is a step in the proceedings in a case of this kind. It must be a step taken in the proceedings in the technical sense if it is to be held to bar an application for a stay under sect. 4 [of the Arbitration Act 1889].

47 In *Austin and Whiteley Limited v S Bowley and Son* (1913) 108 LT 921, Ridley J opined at 921 that:

> [W]hat is intended by a step in the proceedings is some step which indicates an intention on the part of a party to the proceedings that he desires that the action should proceed and has no desire that the matter should be referred to arbitration.

48 The permissible period for seeking a stay "after appearance, and before delivering any pleadings or taking any other steps in the proceedings" was confirmed once again in s 1(1) of the Arbitration Act 1975 (c 3) (UK) which provided:

> If any party to an arbitration agreement to which this section applies, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the agreement, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to the proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to the court to stay the proceedings; and the court, unless satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred, shall make an order staying the proceedings.

49 The meaning of the words "after appearance, and before delivering any pleadings or taking any other steps in the proceedings" in s 1 of the Arbitration Act 1975 were considered in *Roussel-Uclaf v G D Searle & Co Ltd and G D Searle & Co* [1978] 1 Lloyd's Rep 225. Graham J's observations of s 1 (at 231) are particularly pertinent:

> On the whole, I think that the statute is contemplating *some positive act by way of offence on the part of the defendant rather than merely parrying a blow by the plaintiff, particularly where the attack consists in asking for an interlocutory injunction*. Such a remedy against a defendant might well be necessary whether the action was ultimately stayed or not, in order to preserve, for example, the property the subject of the action in the meantime; and, as a practical manner, in such a case it would not be of importance whether the application to stay was made before, at the same time, as or after the application for an injunction. [emphasis added]

50 It appears that the English courts took into consideration whether there was some "positive act" or essentially, an act which "impliedly affirm[ed] the correctness of the [court] proceedings and the willingness of the defendant to go along with a determination by the Courts of law instead of arbitration", as observed by Lord Denning MR in *Eagle Star Insurance Co Ltd v Yuval Insurance Co Ltd* [1978] 1 Lloyd's Rep 357 ("*Eagle Star*") at 361.

51 More recently, the English position has been helpfully clarified by Potter J's incisive observations in *Blue Flame Mechanical Services Limited v David Lord Engineering Limited* (1992) 8 Const LJ 266 ("*Blue Flame Mechanical*"). He summarised (at 267) the essence of what a "step" in the proceedings, in the light of the Arbitration Act 1975, refers to:

> (1) a step in the action which bars the defendant is something actually done or acquiesced in by him which is a significant procedural act in the case;
>
> (2) done with the intention of electing to litigate rather than stand on the right to arbitrate.

52 This distillation of the meaning of a "step" suggests that it is to be understood in a practical and commonsensical way. So, for instance, a step which manifests a willingness to submit to the jurisdiction of the court instead of evincing an intention to rely on arbitration ought to be regarded as taking a step in the proceedings. As Prof M Sornarajah incisively points out in "Stay of Litigation

Pending Arbitration" (1994) 6 SAcLJ 61 at 73, the single clear rule on this issue is that if the defendant demonstrates a willingness to seek recourse via the gates of litigation, he cannot thereafter rely on the existence of the arbitration and request for a stay. Such an approach is based on a notion of estoppel, as noted in *Halvanon Insurance Co Ltd v Companhia de Seguros do Estado de Sao Paulo* [1995] LRLR 303 and in *Patel v Patel* [2000] QB 551.

53 Prof D Mark Cato in *Arbitration Practice and Procedure: Interlocutory and Hearing Problems* (LLP, 3rd Ed, 2002) states at p 1351 that this is indeed currently the position under the Arbitration Act 1996 (c 23) (UK). Under this Act, a clear articulation of the English approach is now apparent. Sections 9(3) and 9(4) read as follows:

> (3) An application may not be made by a person before taking the appropriate procedural step (if any) to acknowledge the legal proceedings against him or after he has taken any step in those proceedings *to answer the substantive claim*.
>
> (4) On an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed.
>
> [emphasis added]

54 It is plain that s 9(3) is more explicit in setting out what kind of "step" will undermine a party's right to a stay, namely, one that "acknowledge[s] the legal proceedings against him" or one that "answer[s] the substantive claim". Robert Merkin in *Arbitration Law* (Informa, 1991) at para 8.27 observes that the wording of the Arbitration Act 1996:

> … merely confirms the previously established position that a distinction is to be drawn between an applicant who contests the judicial proceedings on their merits by demonstrating an intention to defend them, and an applicant who has merely sought to safeguard his position pending the determination of his application for a stay.

The words "to answer the substantive claim" in the latter provision cannot be ignored and should be read conjunctively with the earlier phrase "any step in the proceedings". Merkin concludes that these words "to answer the substantive claim" serve to narrow the ambit of the meaning of a "step in the proceedings".

55 From the cases, certain principles in the English approach are now plainly discernible after several rather unhappy twists and turns. It now seems to be fairly settled that a "step" is deemed to have been taken if the applicant employs court procedures to enable him to defeat or defend those proceedings *on their merits* and/or the applicant proceeds, from a procedural point of view, beyond a mere acknowledgment of service of process by evincing an unequivocal intention to participate in the court proceedings in preference to arbitration. Accordingly, the courts have held the following acts as steps in the proceedings such as seeking leave to defend or to strike out (*Pitchers, Ltd v Plaza* (*Queensbury*)*, Ltd* [1940] 1 All ER 151), attending a summons for directions (*County Theatres* ([46] *supra*), *Richardson v Le Maitre* [1903] 2 Ch 222 and *Ochs v Ochs Brothers* [1909] 2 Ch 121) and requiring disclosure of documents (*Parker, Gaines & Co, Limited v Turpin* [1918] 1 KB 358).

56 For clarity, we may contrast this approach, however, with the position of the English courts when confronted with an applicant who takes a step *to answer a substantive claim*. A good example of this approach is found in *London Central and Suburban Developments Ltd v Gary Banger* [1999] ADRLJ 119. After the claimant commenced proceedings for damages for breach of contract, the defendant, without obtaining legal advice, wrote a letter entitled "Defence" to the court and the

claimant's solicitors. The letter set out inside the reasons why his firm had not broken the contract. Judge Thornton QC did not permit a stay of the proceedings as he held that this complied with the formal requirements for filing a defence under the rules of court and thereby constituted a step in the proceedings. However, he noted that, in any event, conduct displayed by a defendant which *in substance amounted to an answer to the substantive proceedings* could constitute a step in the proceedings. As such, the defendant was quite rightly prevented from relying on the arbitration clause regardless of whether a narrow or wide reading of s 9(3) of the Arbitration Act 1996 was adopted.

57 In *Patel v Patel* ([52] *supra*), Lord Woolf MR determined that an act which would otherwise be regarded as a step in the proceedings would not be treated as such *if the applicant had specifically stated that he intended to seek a stay*. In that case, the applicant acknowledged service of the respondent's writ endorsed with a statement of claim and indicated his intention to defend. However, no defence was served, and default judgment was entered in the respondent's favour. The applicant later applied to set aside the default judgment. In the first supporting affidavit, he sought leave to defend the action and to counterclaim, and referred to the merits of the action. However, in the second affidavit, he appeared to contradict himself by stating an intention to seek a stay. The English Court of Appeal held that he was entitled to a stay. Lord Woolf MR held that the first affidavit was otiose as a successful application to have the judgment set aside would have rendered those applications unnecessary. Hence, on this reasoning, it would be wrong to have deprived the applicant of his right to a stay. Otton LJ decided that the second affidavit expressing the applicant's wish for a stay overrode the possibility that the act of seeking leave to defend and counterclaim amounted to a step in the proceedings.

58 This decision was followed subsequently by *Capital Trust Investments Ltd v Radio Design TJ AB* [2002] 2 All ER 159, where the Court of Appeal considered if the defendant's application for summary judgment amounted to taking a step in the action so as to deprive him of the right to seek a stay. The court concluded that the application for summary judgment did not amount to taking a "step" because, as Clarke LJ astutely observed at [60]:

> … it did not … express the willingness of [the defendant] to go along with a determination of the courts instead of arbitration. On the contrary, *it made it clear that the application for summary judgment was only advanced 'in the event that its application for a stay is unsuccessful'.* [emphasis added]

59 Viewed in this light, it appears to us that *Mustill and Boyd* ([40] *supra*) are right in observing at p 472 that the English courts are now persuaded in reality by two crucial and practical considerations in assessing whether an applicant has taken a step in the proceedings: firstly, the conduct of the applicant must be such as to demonstrate an election to abandon his right to stay, in favour of allowing the action to proceed; and secondly, the act in question must have the effect of invoking the jurisdiction of the court.

60 What would then have the effect of invoking the jurisdiction of the court and thereby result in an actual submission to jurisdiction under English law? In *Global Multimedia International Ltd v Ara Media Services* [2007] 1 All ER (Comm) 1160, Sir Andrew Morritt C elaborated on the test to be applied in considering if there has been an actual submission to jurisdiction (at [27]) as follows:

> The test to be applied in determining whether any particular conduct amounts to a submission to the jurisdiction was considered by Colman J in *Spargos Mining NL v Atlantic Capital Corp* reported only in (1995) Times, 11 December, but quoted in full by Patten J in *SMAY Investments Ltd v Sachdev* [2003] EWHC 474 (Ch) at [41], [2003] 1 WLR 1973 at [41]. I reproduce the whole of the quote as set out in that para [41] from the judgment of Patten J:

'In approaching the question of submission, I have in mind the following authorities. In *Astro Exito Navagacion SA v WT Hsu*, otherwise know[n], more pronounceably, as *The Messiniaki Tolmi* [1984] 1 Lloyds Reports, 266, Goff LJ said at p 270, "Now a person voluntarily submits to the jurisdiction of the court if he voluntarily recognises, or has voluntarily recognised, that the court has jurisdiction to hear and determine the claim which is the subject matter of those proceedings. … The effect of a party's submission to the jurisdiction is that he is precluded thereafter from objecting to the court exercising its jurisdiction in respect of such claim. Whether any particular matter, for example an application to the court, amounts to a voluntary submission to the jurisdiction must depend upon the circumstances of the particular case." In [*Sage v Double A Hydraulics Ltd* [1992] The Times, 2 April 1992, TLR 165], Farquharson LJ said (and this is a report of the judgment which is not reported in *oratio recta*): "*A useful test was whether a disinterested bystander with knowledge of the case would have regarded the acts of the defendant, or his solicitors, as inconsistent with the making and maintaining of his challenge." In arriving at the view to be imputed to the disinterested bystander, it seems to me that one has to bear in mind that there will be an effective waiver, or a submission to the jurisdiction, only where the step relied upon as a waiver, or a submission to the jurisdiction*, cannot be explained, except on the assumption that the party in question accepts that the court should be given jurisdiction. If the step relied upon, although consistent with the acceptance of jurisdiction, is a step which can be explained also because it was necessary or useful for some purpose other than acceptance of the jurisdiction, there will, on the authorities, be no submission … If the well-informed bystander had been left in doubt because what the defendants had done was equivocal, in the sense that it was explicable on other grounds in addition to agreement to accept the jurisdiction of the court, then the conclusion must be, on the authorities, that there would have been no submission to the jurisdiction. The representation derived from the conduct of the party said to have submitted must be capable of only one meaning.'

[emphasis added]

Application for an extension of time

61 Having considered the English approach on what would constitute a step in proceedings, we now turn to the question of whether a request for an extension of time would constitute a step in the proceedings under the current English position. Older cases, such as *Ford's Hotel Company*, *Limited v Bartlett* [1896] AC 1 ("*Ford's Hotel*") and *Smith & Co v British Marine Mutual Insurance Association* [1883] WN 176, seem to suggest that applying for an extension of time ought to be regarded as taking a step in the proceedings.

62 A good starting point is the decisions of the Court of Appeal and the House of Lords in *Ford's Hotel*. In this case, the parties had entered into a building contract containing a clause providing for referral of the matter to arbitration in the event of a dispute. A dispute arose and the defendants applied to the plaintiff on three occasions, and obtained his consent, to an extension of time for delivering their defence. On a fourth attempt, the plaintiff refused to consent to a further extension of time. Following this, the defendants filed an application for a further extension of time for a month and successfully obtained an order extending the time for filing the defence by 14 days. Subsequently, they applied and obtained from the High Court master an order for a stay of proceedings pursuant to the arbitration clause in the contract.

63 Before the Court of Appeal (see *Bartlett v Ford's House Company* [1895] 1 QB 850), the plaintiff appealed on the ground that the defendants had taken a step in the proceedings by applying for an extension of time and were not entitled to a stay of proceedings. The defendants argued, on

the other hand, that a "step in the proceedings" referred to some onward movement in the litigation by which the defendant indicated his election that the action should proceed and thereby waived his right to have the matter referred to arbitration.

64 The Court of Appeal considered whether a request for an extension of time constituted a step in proceedings and drew a distinction between obtaining an extension of time by consent and filing an application for an extension of time. In their view, the latter constituted taking a step in the proceedings because it had the "purpose of invoking the assistance of the Court to enable the defendants to proceed with their defence to the action" (*id*, at 851). The application for a stay of proceedings was hence delayed. As Rigby LJ noted (*id*, at 852):

> The defendants … procured the consent of the plaintiff to an extension of time for delivery of defence on several occasions, and then they took out a summons for a month's further time. *The intention of the section* [*ie,* s 4 of the Arbitration Act 1889] *is that the application for a stay of proceedings shall be promptly made, and shall not be preceded by any other step in the action*. The taking out of the summons upon which an order was made was … clearly a step in the proceedings within the meaning of the section. [emphasis added]

65 On appeal to the House of Lords, their lordships affirmed the decision of the Court of Appeal and elaborated further on the rationale for s 4 of the Arbitration Act 1889. As Lord Halsbury LC commented in *Ford's Hotel* at 5:

> The intention of the Legislature in giving effect to the contract of the parties, and saying that one of them should be entitled to make an application to insist that the matter should be referred according to the original agreement, *was that they should at once, and before any further proceedings were taken, specify the terminus a quo*, and that if an application to stay proceedings was made under those circumstances, then that the Court should enforce the contractual obligation to go to arbitration. … [T]hat seems to me a very wise provision: *that costs should not be thrown away in beginning to litigate.* [emphasis added]

66 In essence, it appears that the Court of Appeal and House of Lords were persuaded that by filing an application for an extension of time, the defendants had manifested their unequivocal intention to proceed with the action as this had been done even at the very last moment without any clear reference to alternative arbitration proceedings. Lord Shand's observation in *Ford's Hotel* at 6 is revealing:

> The proceeding of presenting such a summons and supporting it before the master was unquestionably judicial and implied a statement to the effect that the appellants were to defend the action. … Having regard to the provisions of the arbitration statute this appears to me to have been in effect an abandonment of the proposal to have the subject of the cause disposed of by arbitration.

67 This indicates the view of the courts that the context in which the request for an extension of time was made and the reasons for the defendants' act of delaying the proceedings by persistently requesting for extensions of time, without clarifying their intentions from the outset, mattered a great deal.

68 We note, however, the position is that if the reason sought for the extension of time was merely to preserve the applicant's position in the event the application for a stay was refused, the court nevertheless retained its discretion to grant a stay. This was made clear in *London Sack & Bag Co Ltd v Dixon & Lugton, Ltd* [1943] 2 All ER 763. Here, the defendant took out a summons asking for

the action to be stayed and stated that the plaintiffs and defendants were bound by an agreement to refer their disputes to arbitration. The defendants applied for and obtained an order to extend time to serve their defence until after the hearing of the stay application. MacKinnon LJ held that the defendants could not be said to have taken a step in the action "so as to debar them from pursuing their application to stay the action" (at 767).

69 More recently, in *Marzell Investment Ltd v Transtelex Ltd* (Court of Appeal (Civil Division), 25 June 1986); [1987] CLY 3099, the parties had been in dispute over service charges under a lease agreement. The plaintiffs made their claim in the county court and the defendants delivered a defence to that claim. Several disputes arose subsequently between both parties and the plaintiffs took out a summons to consolidate the subsisting county court proceedings with the new proceedings in the High Court. The High Court master held that the county court proceedings and the High Court action should be consolidated. The defendants followed by taking out a summons seeking an extension of time to file a defence and sought a stay pending arbitration. The master granted the extension of time. However, after the date for filing their defence passed, the first defendants issued a summons seeking a stay of the High Court proceedings consolidated with the county court claim and also issued a further summons seeking a further extension of time for delivering a defence.

70 The issue before Master Turner was whether the defendants had taken a step in the proceedings. He held that the defendants' attendance at the hearing of the summons to consolidate the High Court proceedings with the county court claim did not amount to taking a step in the action. With respect to the summons to extend time to deliver a defence, he concluded that, in the circumstances, the defendants could not have taken a step in the action because the wording of their summons had included a reference to a consideration of applying "for a stay pending arbitration".

71 On appeal to the judge in chambers, the master's decision was reversed on the ground that the defendants had taken steps in the action, firstly, by appearing at the hearing of the summons to consolidate the two sets of proceedings and submitting to the order which was made; and secondly, by issuing the summons for an extension of time. On appeal to the Court of Appeal Stephen Brown LJ observed:

> *The wording of the summons, including the words "or to apply for a stay pending arbitration", did not in fact alter the character of that summons. It was essentially a summons to extend time for the delivery of a defence … The words "or to apply for a stay pending arbitration" were mere surplusage and quite meaningless in my judgment.* That summons was essentially a summons seeking an extension of time in which to deliver a defence. In my judgment that was clearly a step in the action. [emphasis added]

Accordingly, Brown LJ affirmed the judge's holding and held that the summons for an extension of time constituted a further step in the action.

The approach of the courts in other jurisdictions

72 It would be apposite at this juncture to briefly consider the approach adopted in other jurisdictions. At the conclusion of the review, we summarise the relevant principles that have been adopted.

Hong Kong

73 In *Halsbury's Laws of Hong Kong* vol 1(2) (LexisNexis, 2003 Reissue), it is noted at para 25.046 that:

A step in the proceedings is an act which both invokes the jurisdiction of the court and demonstrates the applicant's election to allow the action to proceed. An applicant may take what would otherwise be a step if he makes it clear that that act is done without prejudice to his right to apply for a stay. *Steps in the proceedings have been held to include*: the filing of an affidavit in opposition to a summons for summary judgment, service of a defence, and an application to the court for leave to serve interrogatories, or for a stay pending the giving of security for costs, or for an extension of time for serving a defence, or for an order for discovery, or for an order for further and better particulars, or making a payment into court. *The following have been held not to be steps*: acts preliminary to the issue of proceedings, a request in correspondence for an extension of time for serving a defence, the filing of affidavits in answer to an application by the plaintiff for the appointment of a receiver, transferring a summons into counsel's list, applying to strike out a defective statement of claim, resisting an application for an interlocutory injunction by putting in evidence and appearing in court, applying for a stay on grounds other than that the dispute was subject to an arbitration agreement, and opposition to the arrest of a vessel in Admiralty proceedings. [emphasis added]

74 Sections 6(2) and 6(3) of the Arbitration Ordinance (Cap 341) (HK) provide as follows:

(2) Subject to subsection (3), if a party to an arbitration agreement that provides for the arbitration of a dispute involving a claim or other matter that is within the jurisdiction of the Labour Tribunal or a person claiming through or under such a party, commences legal proceedings in any court against any other party to the agreement or any person claiming through or under that other party, in respect of any matter agreed to be referred, and any party to those legal proceedings applies to that court after appearance and *before delivering any pleadings or taking any other step in the proceedings*, to stay the proceedings, the court or a judge of that court may make an order staying the proceedings, if satisfied that —

(*a*) there is no sufficient reason why the matter should not be referred in accordance with the agreement; and

(*b*) the applicant was ready and willing at the time the proceedings were commenced to do all things necessary for the proper conduct of the arbitration, and remains so.

(3) Subsections (1) and (2) have effect subject to section 15 of the Control of Exemption Clauses Ordinance (Cap. 71).

[emphasis added]

It appears that the Hong Kong courts have adopted the approach of the English courts. In *Winning Godown Ltd v Sam Yu Construction Co* [1987] 1 HKC 366 ("*Sam Yu*"), the defendant applied to resist an application for an interlocutory injunction and to stay proceedings pursuant to s 6(1) of the then Arbitration Ordinance. Section 6(1) of the then Arbitration Ordinance (cited at 368) read as follows:

… any party to those legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to that court to stay …

75 Citing several of the earlier mentioned English authorities, Deputy Judge Barnett considered the issue of what constituted a step in the proceedings. Although the plaintiff tried to mount the argument that any action on the part of the defendant, aside from acknowledging service and applying for a stay would constitute a step in the proceedings, Barnett DJ was not persuaded, and recognised this would lead to severe practical consequences. We note, in particular, the rationale of

the court in reasoning what a "step" in an action is (at 371):

> It is now settled law that the court cannot reopen an architect's certificate. If the application to stay fails because, perhaps inadvertently, a defendant has done something which constitutes a step in the proceedings, *he would be deprived of the opportunity to ventilate in court a matter which might well merit close scrutiny.*
>
> Alternatively, if an architect's certificate is at the centre of the dispute between the parties, there appears to me to be nothing to prevent the parties proceeding to arbitration anyway to resolve issues over which the arbitrator has jurisdiction but over which the courts have not. Accordingly, there would be the inconvenience and expense of judicial and arbitral proceedings running in tandem.
>
> It is clearly undesirable that such consequences should depend upon what is essentially a fine procedural point. I am confident that this is not the meaning to be attributed to the word 'step'. *In my view, the acid test is whether a defendant has done something in the proceedings which shows he is submitting to the court's jurisdiction rather than an arbitrator's to try the real issue between the parties. Whether the act is offensive or defensive is irrelevant.*
>
> [emphasis added]

76 Following from this reasoning, the application for the interlocutory injunction was deemed to go to the merits of the dispute between the parties and, by resisting the injunction, the defendant had taken a step in the proceedings. The stay application was thereby dismissed.

77 In *China Trade Omni Development Centre Ltd v Ramada International Inc* [1989] 1 HKC 417, the plaintiffs sued the defendants for breach of a management agreement. After acknowledging service of the writ and indicating their intention to defend, the first defendant applied for a stay. Before making the stay application, the first defendant took out two summonses: first, to strike out the endorsement on the writ; and second, to strike out two of the plaintiffs for want of authority. Affidavits in support were filed, stating that these two applications were made without prejudice to the stay application. The plaintiffs argued, *inter alia*, that the first defendant had taken a step in the proceedings prior to making the stay application and ought to be barred from applying for a stay.

78 In the High Court, Deputy Judge Saied agreed with the "acid test" put forth in *Sam Yu* ([74] *supra*) and was of the view (at 422) that the crux of the issue was whether there was "a willingness to go to law" and an affirmation of the institution of proceedings (citing *Skopos Design Group Ltd v Homelife Nursing Ltd* The Times (24 March 1988)). As he observed at 422:

> [N]either of those two applications of the defendants was such that it could possibly be said to amount to an 'affirmation of the correctness' of these proceedings and neither is, in my view, a 'step in the proceedings'.

79 Subsequently, in *Euro-America Insurance Ltd v Lite Best Co Ltd* [1993] 1 HKC 333 ("*Euro-America*"), the defendant filed an affidavit in opposition to the plaintiff's summons for judgment in default to be entered before issuing a summons for a stay. In addition, his counsel appeared at the hearing of the plaintiff's summons. Kaplan J held that the defendant had taken a step in the action and this barred him from applying for a stay. In contrast, in *Jialing (Hong Kong) Co Ltd v JA Moeller (Hong Kong) Ltd* [1993] 2 HKC 637 ("*Jialing*"), the issue was whether the filing of an affidavit seeking leave to defend in opposition to a summons under O 14 of the Rules of the Supreme Court (Cap 4 sub leg) (HK) was a step in the action. Unlike in *Euro-America*, counsel for the first defendant here did

not appear at the O 14 summons to argue the summons before the master but "appeared to have it adjourned until after the determination of a summons, which he told the Master he was about to issue but had not yet issued"(at 640).

80 The High Court dismissed the summons for a stay on the grounds that first, a step in the action within the meaning of s 6 of the Arbitration Ordinance did not have to be the *positive* institution of an application to the court. It was sufficient if the defendant concurred in an application by the plaintiff. Kaplan J's reasoning in *Jialing* merits quoting *in extenso*, at 643:

> In my judgment, it is necessary to start by looking at the obligation which the terms of O 14 place upon a defendant. A defendant would be most unwise (save in the most exceptional case) not to put in any evidence in opposition to an O 14 application … The reason for this is, provided that the application is one within the terms of O 14, there is a clear onus upon a defendant to show cause as to why judgment should not be entered against him. This has to be done by affidavit or otherwise. … There was no mention of arbitration in either affidavit. As far as I am aware, there was no correspondence prior to the hearing before the Master where the arbitration clause was even adverted to. *The affidavits did not state that the contentions in relation to the application for summary judgment were made without prejudice to the first defendant's right to seek arbitration.* [emphasis added]

81 And he elaborated further at 644–645:

> I am satisfied in this case that the conduct of the first defendant is such as to demonstrate a clear election to abandon their right to a stay, and I am satisfied that the act in question did have the effect of invoking the jurisdiction of the court because the affidavits were filed in an attempt to discharge the onus placed upon the first defendant by the terms of O 14.
>
> …
>
> It seems to me that *what the court must look at is the intention behind the act of filing the affidavit.* I am quite satisfied that *the conduct of the first defendant in filing two affidavits, in opposition to an O 14 application without reference to the arbitration clause and without prejudice to any application for a stay, shows quite clearly that the first defendant must have demonstrated an election to abandon his right to stay in favour of allowing the action to proceed. …*
>
> What a defendant faced with this situation cannot, in my judgment, do is what the first defendant, in fact, did. There was *no reference to arbitration in any correspondence prior to proceedings or after the institution of the proceedings* or, at any rate, none were shown to me. Both affidavits were put in without any reference to the arbitration clause or to the intention of the first defendant to issue an application for a stay.
>
> [emphasis added]

Second, where an affidavit was affirmed to defend the O 14 proceedings, this constituted a step in the action, regardless of whether or not there was a subsequent hearing in those proceedings. The fact that the first defendant had not included any reference to the arbitration clause in the affidavit evidenced his election to allow the action to proceed. Accordingly, his stay application could not be acceded to.

Malaysia

82 We also note with regard to the Malaysian position that several cases illustrate an adoption of the English approach. In *Jurumurni Sdn Bhd v PPC Glomac Sdn Bhd* [1999] MLJU 398, the defendant applied to stay proceedings pursuant to s 6 of the Arbitration Act 1952 (Act 93) (M'sia). Counsel for the plaintiff submitted that acts by the defendant, such as applying for an extension of time to file its statement of defence and an affidavit in reply, were tantamount to taking steps in the proceedings. Counsel for the defendant argued that the defendant had reserved its position in the matter and that praying for the extension orders should not preclude it from obtaining a stay. Adopting the position in the early English cases, the Kuala Lumpur High Court held that making an application for extension of time to file and serve a defence as well as to file an affidavit in reply were acts that amounted to steps in the proceedings.

83 In *Sanwell Corp v Trans Resources Corp Sdn Bhd* [2002] 2 MLJ 625, a dispute arose between the appellant and the first respondent over a contract which contained an arbitration clause. The Malaysian Federal Court elaborated on some examples of what might constitute a "step in the proceedings" at 634–635:

> [I]f the applicant has subsequently delivered any pleadings, or taken any other step in the proceedings which indicates his election to allow the action to proceed in the court, the applicant will be considered to have abandoned his right to seek recourse to arbitration … *Halsbury's Laws of England* (4th Ed, Reissue) para 627, at pp 347–348 explains the situation:
>
> The applicant must have taken no step in the proceedings after acknowledgement of service. A step in the proceedings is an act which both invokes the jurisdiction of the court and which demonstrates the applicant's election to allow the action to proceed. An applicant may take what would otherwise be a step if he makes it clear that the act is done without prejudice to his right to apply for a stay. Steps in the proceedings have been held to include: the filing of an affidavit in opposition to a summons for summary judgment, service of defence, and an application to the courts for leave to serve interrogatories, or for a stay pending the giving of security for costs or for an extension of time for serving a defence, or for an order for discovery, or for an order for further and better particulars.

The Federal Court further considered what the phrase "any other steps in the proceedings" in s 6 of the Arbitration Act 1952 referred to and held (at 633) that it must refer to "any other step(s) – *other* than the initial, the first, the primary or the main step in a sequence or series of steps in any proceedings" [emphasis added] before the court.

84 More recently, in *Malaysian European Production System Sdn Bhd v Zurich Insurance (M) Bhd* [2003] 1 MLJ 304, the defendant, through its solicitors, wrote a letter asking the plaintiff for an extension of time to file its defence and, later, applied to stay all proceedings and refer the dispute arising between the parties to arbitration. The issue before the court, *inter alia*, was whether the defendant had taken a step in the proceedings by asking for an extension of time. The court drew a distinction between asking for an extension of time by applying to court and asking by letter for a time extension by consent between parties. It concluded that only the former would be tantamount to taking a step, adopting the position in *Ford's Hotel* ([61] *supra*).

Canada

85 Turning to the Canadian position, in the case of *Heistein & Sons v Polson Iron Works Limited* (1919) 46 OLR 285, the defendants sought to stay the action but the plaintiffs argued that the defendants had taken a step in the proceedings by issuing and serving an order for security for costs. Middleton J decided at 286 that the request for security and costs was "no merely formal thing" and

was, instead, "an intimation that, security being given, the action might proceed".

86 This was followed by *The Dufferin Paving Co Ltd v The George A Fuller Co of Canada Ltd* [1935] OR 21 ("*Dufferin Paving Co*") where the plaintiff brought an action to recover from the defendant certain moneys. After receiving the statement of claim, the defendant demanded particulars of the plaintiff's claim and requested for an extension of time of ten days for delivering its defence. Thereupon the plaintiff gave detailed particulars of its claim but, instead of delivering its statement of defence, the defendant moved to apply for a stay of the action, contending that all matters were to be referred to arbitration under the agreements between both parties. Section 7 of the Arbitration Act, RSO 1927, c 97 (Can), ("the Arbitration Act 1927") is broadly similar to its English counterpart and reads as follows (cited in *Dufferin Paving Co* at 25):

> If any party to a submission, or any person claiming through or under him, commences any legal proceeding in any court against any other party to the submission, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to such legal proceeding may at any time after appearance and before delivering any pleading *or taking any other step in the proceeding* apply to that court to stay the proceeding; and that court, or a judge thereof, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission and that the applicant was at the time when the proceeding was commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings. [emphasis in *Dufferin Paving Co*]

87 The Court of Appeal for Ontario reasoned that the defendant, by stating in its demand for particulars that it required them for the purpose of "drawing its statement of defence", had "already elected to defend and would defend" (at 24). Mulock CJO opined (*ibid*):

> I think the fair meaning of [the defendant's demand] is not that the defendant required particulars and extension of time for the purpose of deciding whether or not to defend, but that it had already elected to defend and would defend. … An undertaking by a defendant with a plaintiff that, on being furnished with particulars and given a certain extension of time, it would file a statement of defence, leads up to the filing of a statement of defence and may rightly be regarded as a step in the proceedings within the meaning of sec.7 [of the Arbitration Act 1927].

88 Hence, the court held that the demand for particulars and an extension of time for defence constituted together a "step in the proceedings" within s 7 of the Arbitration Act 1927. The court distinguished it from a simple request for an extension of time to file a defence, as in *Brighton Marine Palace and Pier, Limited v Woodhouse* [1893] 2 Ch 486, where asking for time by letter was held not to be a step because it was "done to avoid taking a step in the action, and, therefore, there was no election to proceed with the action" (at 27 of *Dufferin Paving Co*).

89 In *Raymond v Adrema Limited* [1963] 1 OR 305 ("*Raymond v Adrema*"), the action arose out of a contract of employment containing an agreement to arbitrate in the event of any dispute arising between the parties. The defendant applied for a stay but the plaintiff opposed this on the ground that the defendant had taken another step in the action by moving to set aside an order permitting service of the writ and statement of claim out of the jurisdiction on the ground of want of jurisdiction in the Ontario courts to make the order. Section 7 of the Ontario Arbitrations Act, RSO 1960, (c 18) (Can) is largely similar to s 4(1) of the Arbitration Act 1950 ([42] *supra*) in the United Kingdom. Looking at past Canadian decisions, Wells J noted at 309 that:

> With respect, it would seem to me that all the matters which have been so treated [as "any

other steps"] are matters in the general procedure of the action which advance it from the beginning of the action to trial and are developments in the course of putting the action in such a condition that it can be dealt with by the Court.

Following from this reasoning, Wells J held that the application brought by the defendant to set aside the order permitting service of the writ of summons and statement of claim on the defendant out of the jurisdiction was not such a step. It was (*ibid*):

> … not a step in the furtherance of the action; ***it was an attempt by the defendant to smother the action as it were and prevent it proceeding against the defendant in question***. In my opinion, it does not come within the description of "any other steps" used in s. 4 of the *Arbitration Act* in England or of s.7 of the Ontario statute in the same matter. [emphasis added in bold italics]

9 0 We note that Wells J emphasised that the court would also look at, firstly, whether there was no sufficient reason why the matter should not be referred to arbitration in accordance with the agreement and, secondly, whether the applicant was, at the time when the proceedings were commenced, still ready and willing to do all things necessary for the proper conduct of the arbitration. As such, the defendant was not entitled to a stay since it could not show that it was and remained ready and willing to do all things necessary for the proper conduct of the arbitration.

91 Subsequent Canadian cases have adopted the approach taken in *Raymond v Adrema*. In *Fathers of Confederation Buildings Trust v Pigott Construction Co Ltd* (1974) 44 DLR (3d) 265, a dispute arose between the parties in relation to a building contract. The issue at hand was whether any of the actions taken by the defendant were steps in the proceedings and, therefore, the defendant would be precluded from procuring a stay of proceedings by s 6 of the Arbitration Act, RSPEI 1951, c 12 (Can), essentially similar to s 7 of the Arbitration Act 1927 ([86] *supra*). The defendant filed a demand for further particulars as well as a notice of motion for an order to strike out the plaintiff's statement of claim. Citing *Ives & Barker v Williams* ([45] *supra*), the Prince Edward Island Supreme Court held that where a party made a demand for particulars in order to guide himself as to whether he would allow the action to proceed in court or avail himself of the provisions of the arbitration clause in the pre-existing agreement to apply for a stay of proceedings, such action by him did not constitute a step in the proceedings. The court emphasised at 273 that:

> Of the actions taken by the defendant no one can be said to form any series with other steps in or in furtherance of the action, nor of the developments in the course of putting the action in such a condition that it could be dealt with by the Court. Each of the two applications now under appeal was clearly an attempt by the defendant to smother the action and to prevent it proceeding against the defendant in question. What the legislation intends to do is to prevent unnecessary expenditure of money in the defining of issues for trial only to have the same thrown away through a later stay of the action.

92 In *Central Investments & Development Corporation v Miller Associates Ltd* (1982) Nfld & PEIR 35, the defendant applied for an order staying the proceedings by the plaintiff pursuant to a pre-existing agreement to arbitrate. The plaintiff argued that the defendant had applied for and was granted an extension of time to file his defence and this constituted a step in the proceedings. Unsurprisingly, the defendant responded that such an application was not a step in the proceedings. The court held at 37 that the extension of time was "for the purpose of receiving proper instructions in order to prepare and file a statement of defence, due to the complexity of the case and its many issues". Therefore, the purpose of requesting an extension of time was to receive proper instructions "only consequent to which could a defence be prepared, or alternatively, such instructions might

equally establish to prudent counsel, that no defence was available" (at 38). In a similar vein to *Raymond v Adrema*, the application for time was held not to advance the matter for trial or put the action in such a condition that it might be dealt with by the court.

Synopsis

93 Having examined the approaches adopted in various other jurisdictions, such as Hong Kong, Malaysia and Canada, it appears to us that the courts in these jurisdictions appear to quite uniformly take into consideration the circumstances enveloping an act in deciding if it constitutes a step in the proceedings. First, where a party performs or carries out a significant act signifying that it is *submitting to the court's jurisdiction* rather than to arbitration to resolve the outstanding issues between the parties, that party will be deemed to have taken a step in the proceedings. Second, the act will be regarded as a step in proceedings if it is a step in furtherance of the action by *advancing the hearing of the matter in court* in contrast to one that serves to smother the action and stop the proceedings dead in its tracks. Third, where a party does an act with the consent of the other party, this will not amount to taking a step in the proceedings. Finally, the courts usually take the position that parties should not blow hot and cold or equivocate. Instead, they should be decisive about whether they are insisting on arbitration in preference to litigation. Disingenuous reservations will be disregarded. Should a party wish to proceed to arbitration, that party must be ready and willing to do all things necessary for the proper conduct of the arbitration.

The Singapore position

94 In our view, an application for an extension of time to file a defence plainly does not constitute a "step in the proceedings" under s 6(1) of the Arbitration Act. *First*, as mentioned earlier, we agree with the views of Woo JC expressed in *Yeoh Poh San* ([21] *supra*) that, where a plaintiff's solicitor insists on the filing of the defence notwithstanding the pending application or an appeal therefrom, the defendant's solicitors should then promptly apply for an extension of time to file the defence pending the outcome of the appeal. A pragmatic approach is warranted when assessing the procedural act in question. We are not impressed by some of the older English cases that appear to place an undue premium on procedural subtleties rather than on the substance of the issue at hand. In our view, it would be a mistake to place too much emphasis on the means adopted rather than on the ends of an application to stay which is to challenge the appropriateness of the court's jurisdiction and to bring an immediate closure to the pending court proceedings. We should add that citing isolated decisions from other jurisdictions will usually not be helpful in resolving the competing tensions that are almost invariably present in assessing this issue. Each case should be approached and resolved on the basis of principle rather than merely precedent.

95 This brings us to the case of *Ford's Hotel* ([61] *supra*) where both the English Court of Appeal and House of Lords decided that a request for an extension of time constituted a step in the proceedings. As alluded to earlier, the defendants in *Ford's Hotel* thrice obtained the plaintiff's consent for further time to deliver their defence, and upon their fourth request being refused, took out a summons and obtained an order for a further 14 days. The taking out of the summons was held to be a step in the proceedings by the House of Lords because "[t]he proceeding of presenting such a summons and supporting it before the master … implied a statement to the effect that the appellants were to defend the action" (*per* Lord Shand at 6). With respect, while that case is not directly relevant on the facts before us and can be distinguished, we are of the view, after mature reflection, that the approach postulated is archaic, inconsonant with common sense and ought not to be followed in Singapore. An application for an extension of time is not in itself tantamount to an unequivocal submission to jurisdiction. It is not so plainly "done with the intention of electing to litigate, rather than stand on the right to arbitrate" (see the quote from *Blue Flame Mechanical* at

[51] above). We hasten to add that, if it is indeed plain that the purpose of asking for an extension of time is not, in the final analysis, *bona fide* for the purposes of staying the proceedings pending arbitration, the court in the exercise of its discretion can either refuse the extension of time or dismiss the stay application.

96 When is a party regarded as having submitted to the jurisdiction of the Singapore courts? This was most recently addressed in *Republic of Philippines v Maler Foundation* [2008] 2 SLR 857 ("*Republic of Philippines*") and it offers some useful insights. Though this is not a case involving a contest on the applicability of an arbitration clause, it is nevertheless instructive as it clarified the meaning of what a "step in the proceedings" meant in a not altogether dissimilar statutory context. The appeal arose from competing claims to a sum of money ("the Funds") which formed part of a larger pool of assets originally held in the Swiss bank accounts of the first to fifth respondents. These assets were allegedly ill-gotten gains accumulated by the late Ferdinand E Marcos during his term as President of the Republic of the Philippines. At the appellant's request, the Swiss courts issued several freezing orders against the assets pending legal proceedings in the Philippines to determine their ownership. In 1997, the freezing orders were varied and the assets were released to Philippine National Bank ("PNB") to hold the moneys in reputable banks as an escrow agent until a competent court could make a final and enforceable decision as to their ownership. PNB deposited the assets with various banks in Singapore, with the Funds placed in an account with WestLB AG, Singapore ("WLB"). In 2003, following an order by the Supreme Court of the Philippines that the assets be forfeited to the appellant ("the Forfeiture Order"), PNB instructed WLB to release the Funds to it. However, WLB did not do so as prior to the due date for the release of the Funds it received competing claims to the Funds.

97 WLB then commenced interpleader proceedings to determine the ownership of the Funds. The appellant was later added as a defendant to the interpleader proceedings. It took out an application for the interpleader proceedings to be stayed, contending that it owned and/or had an interest in the Funds by virtue of the Forfeiture Order and was entitled as a sovereign nation to assert state immunity in respect of the Funds pursuant to s 3 of the State Immunity Act (Cap 313, 1985 Rev Ed). The appellant prayed for the following orders (see *Republic of Philippines* at [20]):

> 1 That the claims … to … the Funds be stayed pursuant to section 3 of the State Immunity Act (Cap 313);
>
> 2 That the Funds be released to the [appellant];
>
> 3 Costs; and
>
> 4 Such further or other ancillary directions that this Honourable Court deems fit or necessary to give.

The respondents, on the other hand, disputed the legal effect of the Forfeiture Order under Singapore law and resisted the stay application, arguing that the Forfeiture Order did not give the appellant a sufficient interest in the Funds to assert state immunity and that the appellant had already submitted to the jurisdiction of the Singapore courts.

98 At first instance, Kan Ting Chiu J dismissed the stay application on the ground that the appellant had submitted to the jurisdiction of the Singapore courts through its own conduct by including a specific prayer in the stay application for the Funds to be released to it ("Prayer 2"), as well as through the acts of its agent, PNB (see *WestLB AG v Philippine National Bank* [2007] 1 SLR 967). Hence, by filing written submissions in the interpleader proceedings and claiming a

beneficial interest in the Funds, Kan J held that PNB was trying the appellant's claim and thereby submitting to the jurisdiction of the Singapore courts and could no longer invoke state immunity.

99 On appeal, the appellant contended that Kan J was wrong in holding Prayer 2 to be a step in the proceedings when its objective in the stay application was to assert state immunity. This court upheld the decision at first instance and found that the appellant had submitted to the jurisdiction of the Singapore courts as Prayer 2 was a step in the proceedings since it *demonstrated the appellant's unequivocal, clear and consistent intention to submit to jurisdiction.* The appellant had indicated it would proceed with Prayer 2 even if the stay application succeeded and this suggested that the appellant had always intended to invoke the jurisdiction of the Singapore courts to release the Funds to it and that Prayer 2 was not merely a request for an order consequential to a stay order. As Chan Sek Keong CJ noted at [80]:

> In our view, Prayer 2 was always intended to invoke the jurisdiction of our courts to release the Funds to the Appellant *irrespective of why (ie, the grounds on which) the interpleader proceedings were to be stayed, so long as those proceedings were stayed.* [emphasis in original]

It is plain that the appellant was attempting to have its cake and eat it. This is of course legally impermissible. The case is a useful illustration of the point that a party applying for a stay should not blow hot and cold.

1 0 0 *Second*, we wish to reiterate that in ascertaining what a step in the proceedings is, the context in which a request for an extension of time is sought is germane in assessing if it constitutes a step – indeed, the background forms the canvass against which the application for an extension of time is to be assessed. The application for extension of time to file a defence is merely an acknowledgment by a defendant that the court has transient jurisdiction over the parties. As such, an application actually makes it abundantly clear to the opposing party and the court that the defendant does not intend to defend the action in court pending the outcome of its application for a stay. This, to us, is such a plain proposition that we remain puzzled as to why the courts have equivocated on this issue for so long.

101 In this regard, we respectfully agree with Potter J's perceptive observations in *Blue Flame Mechanical* ([51] *supra* at 267), *viz*, that an act which "has been done manifestly without prejudice to an intention to invoke arbitration and *merely to preserve the status quo* until a summons to stay is promptly issued" [emphasis added] cannot constitute or be viewed as a step in the proceedings. This issue was addressed in a similar fashion in *Chong Long Hak Kee Construction Trading Co v IEC Global Pte Ltd* [2003] 4 SLR 499. Tay Yong Kwang J held there that, in the event any steps were made with the express reservation of the pre-existing rights under the arbitration agreement, the defendant's right to stay the proceedings could be preserved. We agree with this approach, subject to the caveat that it is of course conceptually possible for an earlier reservation to be subsequently waived by clearly inconsistent conduct. A party should be careful not to approbate and reprobate simultaneously. We note in passing that in *SP Chua Pte Ltd v Lee Kim Tah (Pte) Ltd* [1993] 3 SLR 122 ("*SP Chua Pte Ltd*"), Amarjeet Singh JC, commenting on *Eagle Star* ([50] *supra*), remarked at 127, [17] that the English position in reality "draws a distinction between what may be described as an extra judicial act done by the defendant and one by which he invokes the jurisdiction of the court". He reasoned that the circumstances surrounding the application would be decisive in indicating if parties had indeed taken a step in the proceedings. So, for instance, in *SP Chua Pte Ltd*, a request for more particulars by the defendants, where the plaintiffs' claim was sketchy, was found not to be the same as an application to court for further particulars but merely a piece of correspondence between both parties, and did not constitute a step in the action. It is axiomatic, in our view, that an application for an extension of time is not an abandonment of the right to prosecute a stay

application in Singapore – it merely asks for *additional* time for the filing of the defence pending the outcome of the stay application. It is a neutral procedural step to safeguard the defendant's position so that in the event that its primary position on the inappropriateness of the court assuming jurisdiction is rejected, it can nevertheless continue to resist the pending claim.

102 The potential success of the stay application would often be one of the factors to be assessed in the exercise of the discretion to grant an extension of time for filing the defence. In most cases, the fact that there is a contractual arbitration clause would suffice, without more, to show that there may well be merit in the stay application. The Appellants' concern that the approach of *Australian Timber* ([8] *supra*) encourages unmeritorious defendants to make unsubstantiated requests for a stay is considerably overstated. Only reasonable requests for an extension of time would be granted, *ie*, in instances where the defendants have established that they have legitimate grounds (usually on the basis of documentary evidence) to ask for a stay.

103 All said and done, we must say that it is rather disappointing that, as a result of procedural subtleties that would defy any logical explanation to a layperson, the Appellants had been entirely shut out from presenting a defence, even assuming, *arguendo*, the stay application was without merit. It appears that an undue deference to the letter rather than to the objectives of the Rules has led to a rather absurd situation.

Conclusion

104 In the result, the appeal was allowed. The merits of the defence ought to have been appraised separately. If there appeared to be a plausible defence, permission should not have been given for the entry of the default judgment. It is cold comfort to suggest that the Appellants could file a separate application to set aside the default judgment. That would have led to unnecessary costs being incurred and valuable time being lost. Accordingly, we set aside the default judgment. To avoid further procedural complications, *vis-à-vis* the position of the non-parties to the arbitration agreement, the Appellants prudently confirmed that they would not proceed with their application for a stay pending arbitration and that they would file their defence.

[note: 1]Appellant's Core Bundle ("ACB") vol II at p 41.

[note: 2]ACB vol II at p 65

[note: 3]ACB Vol II at p.80.

[note: 4]ACB vol II at p 81.

[note: 5]ACB vol II at p 81.

[note: 6]ACB Vol II at p.85.

[note: 7]ACB Vol II at p.86.

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