Virsagi Management (S) Pte Ltd *v* Welltech Construction Pte Ltd and another appeal [2013] SGCA 50

Case Number	: Civil Appeals Nos 90 and 91 of 2012
Decision Date	: 25 September 2013
Tribunal/Court	: Court of Appeal
Coram	: Sundaresh Menon CJ; Chao Hick Tin JA; Andrew Phang Boon Leong JA
Counsel Name(s)	: Andrew J Hanam (Andrew LLC) for the appellant in Civil Appeal No 90 of 2012 and Civil Appeal No 91 of 2012; Ramalingam Kasi (Raj Kumar & Rama) for the respondent in Civil Appeal No 90 of 2012; Cheah Kok Lim (Cheah Associates LLC) for the respondent in Civil Appeal No 91 of 2012.
Parties	: Virsagi Management (S) Pte Ltd — Welltech Construction Pte Ltd

Conflict of Laws – Forum election – Lis alibi pendens

Conflict of Laws – Natural forum – Stay of proceedings

[LawNet Editorial Note: This was an appeal from the decision of the High Court in [2012] SGHC 207.]

25 September 2013

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

Introduction

1 Civil Appeal No 90 of 2012 ("CA 90") and Civil Appeal No 91 of 2012 ("CA 91") were appeals against the decision by the judge ("the Judge") in *Virsagi Management (S) Pte Ltd v Welltech Construction Pte Ltd* [2012] SGHC 207 ("the GD").

2 We dismissed the appeals and now give the detailed grounds for our decision.

The facts

Background to the dispute

3 In 2006, the Building and Construction Authority of Singapore ("BCA") invited companies to set up authorised overseas training centres ("OTCs") in India and Bangladesh. These OTCs trained, tested and certified workers for employment in the construction industry in Singapore. The companies which ran these OTCs had to meet certain criteria determined by the BCA. Welltech Construction Pte Ltd ("Welltech") met these criteria but Virsagi Management (S) Pte Ltd ("Virsagi") did not, even though it had the necessary expertise in operating OTCs. Accordingly, Mr Lee Siong Kee ("Victor"), the director and shareholder of Virsagi, approached Welltech with the following proposition: Welltech was to apply for the BCA licence pursuant to which Victor/Virsagi would run an OTC in Dhaka.

4 Welltech was successfully shortlisted in an initial ballot exercise conducted by the BCA in October 2006. Under the terms and conditions set out by the BCA for the setting-up and operation of OTCs, Welltech was required to set up a company in Bangladesh to manage the OTC as well as retain at least a 30% shareholding in that company.

5 Virsagi introduced a Bangladesh-registered company, Rupsha Overseas Ltd ("Rupsha"), to Welltech as their local partner for the joint venture. Welltech, Virsagi and Rupsha entered into an undated agreement ("the Rupsha Agreement") under which the parties agreed to set up a joint venture company, Welltech Test Pvt Ltd ("WTPL"), for the purpose of operating the OTC. [note: 1] The Rupsha Agreement was submitted to the BCA by Welltech by way of a letter dated 24 November 2006. We will return to the main narrative momentarily but we pause here to mention that the Rupsha Agreement was never carried out, as Rupsha was replaced by another Bangladesh incorporated company, GN International ("GNI"). GNI was eventually replaced by Mr Ferdous Ahmed Badel (who claims it should be spelt "Fardous Ahamad Badel") trading as Gazipur Air Express International ("Badel" or "Gazipur", as the case may be) in 2009 (see further at [9] below).

6 On 25 November 2006, the joint venture company, WTPL, was incorporated with 100 shares issued. Victor held 40 shares as a representative of Virsagi, Mr Woon Wee Phong ("Woon"), a director of Welltech, held 30 shares and Badel/Gazipur held or came to hold 30 shares.

7 On 6 December 2006, the BCA granted Welltech in-principle approval to set up an OTC in Dhaka, Bangladesh. This approval was valid for a period of three years with effect from 6 December 2006, and would be reviewed yearly thereafter.

8 In early 2007, Virsagi and Welltech entered into a written agreement ("the Principal Agreement") under which they set out their respective roles in the establishment and operation of the OTC in Dhaka. Welltech was to obtain the BCA licence and also agreed to employ workers trained by the OTC for its own construction business in Singapore. Virsagi was to do everything else that was necessary for the running of the OTC including the operations in Bangladesh. This included the incorporation of a joint venture company in Bangladesh named WTPL. It is not disputed that the Principal Agreement was terminated on 31 December 2011.

9 Virsagi then entered into an agreement dated 26 April 2007 with GNI, to establish the OTC ("the GNI Agreement"). GNI was controlled by Mr Aminul Hossain Sarker ("Sarker") and Badel. Subsequently, Badel and Sarker fell out, and this led to Virsagi entering into a fresh agreement with Gazipur, which was controlled by Badel, on 26 April 2009 ("the Gazipur Agreement"). Under the Gazipur Agreement, Gazipur was to obtain the necessary licences to set up and run the OTC in Bangladesh, while Virsagi was to handle the BCA testing of the workers and to mobilise them to work in Singapore as well as to obtain approval from the Ministry of Manpower for their employment in Singapore.

Events leading up to the dispute

10 According to Victor, Woon and Badel met in Singapore in 2010. At that meeting, they agreed to operate the OTC to the exclusion of Virsagi. It appears that Victor found out about that. He told the parties that he intended in any case to retire from the OTC business and invited them to buy him out instead.

11 The parties worked out a scheme pursuant to which Virsagi would provide the requisite training to Welltech to take over the business, and Victor would also sell his 40% share in WTPL to Badel. This arrangement was later abandoned, because Victor took issue with Gazipur working together with a person named Mr Taneem Hasan in the OTC business in Dhaka. While the buyout negotiations continued, the parties agreed to extend the Principal Agreement, which was due to expire on 31 December 2010, by another year, to 31 December 2011. It was not extended further thereafter.

12 In the event, the buyout negotiations failed. Virsagi wrote to Welltech on 14 December 2011

threatening legal action if it continued to be excluded from the OTC business.

The Bangladesh proceedings

13 Victor (since the shareholder in WTPL is Victor and not Virsagi) commenced legal action in Company Matter No 8 of 2012 ("CM 8/2012") on 5 January 2012 in the Supreme Court of Bangladesh, High Court Division (Statutory Original Jurisdiction) in Dhaka ("Dhaka High Court") seeking orders concerning WTPL. Victor claimed that the other majority shareholders were carrying out the business of an OTC and mobilising workers with other parties without the participation of WTPL and Victor/Virsagi. Victor made an application under s 233 of the Companies Act (Bangladesh) 1994 (Act No 18 of 1994) ("Bangladesh Companies Act") and sought from the Dhaka High Court:

(a) a direction that the other shareholders of WTPL are "to continue their business as an [OTC] in Bangladesh through [WTPL] with the active participation of the petitioner"; and

(b) pending the disposal of CM 8/2012, an ad-interim order restraining Woon and Badel "from doing [OTC] business in Bangladesh for export of manpower to Singapore by themselves, or through any company in which they are an officer or a shareholder, except through the [OTC] operated by [WTPL] and with the active participation of the petitioner". [note: 2]

14 On 9 January 2012, Victor obtained the ad-interim order (see above at [13(b)]) from the Dhaka High Court restraining Welltech and Gazipur from conducting the OTC business in Bangladesh for export of manpower to Singapore by themselves or through any company except WTPL, and with the active participation of Victor ("the Dhaka Order"). The Dhaka Order was then stayed on 15 January 2012 pursuant to an application made by Badel in Bangladesh.

15 CM 8/2012 was heard by the Dhaka High Court on 15 and 16 April 2012, and a written judgment was delivered on 21 June 2012 dismissing Victor's application. Victor appealed against the Dhaka High Court's decision and that appeal was still pending at the time we heard the present appeals.

The proceedings in Singapore

16 On 26 January 2012, after the Dhaka Order was stayed but before CM 8/2012 was heard by the Dhaka High Court, Virsagi commenced Suit No 63 of 2012 ("Suit 63") and Suit No 64 of 2012 ("Suit 64") in the Singapore courts.

17 Suit 63 was an action by Virsagi against Welltech for inducing Badel to breach the Gazipur Agreement and for unlawful interference with the Gazipur Agreement. Virsagi sought, *inter alia*, an injunction to restrain Welltech from further interference with the Gazipur Agreement, an order that Virsagi be allowed to resume its scope of work under the Gazipur Agreement, damages, and an account of profits.

18 Suit 64 was an action by Virsagi against Badel for breach of contract seeking, *inter alia*, an injunction to restrain Badel from terminating the Gazipur Agreement, an order that Virsagi be allowed to resume its scope of work under the Gazipur Agreement, damages, and an account of profits.

The decision in the court below

19 The Judge stayed both Suit 63 and Suit 64 on the grounds of both *lis alibi pendens* (however, see below at [41] on the correct terminology to be used) as well as *forum non conveniens*.

20 The Judge found that although the causes of action of the various proceedings were different, the reliefs claimed against Welltech and Gazipur by Virsagi in both jurisdictions were substantially the same. In particular, Virsagi wanted to ensure that Welltech and Badel could only carry on the OTC business in Bangladesh with Virsagi's involvement. On this basis, the Judge found that the proceedings in both jurisdictions concerned the same issues. The Judge also held that the issues arose from the same factual matrix. In addition, the Judge said (see the GD at [27]) that the common issues before both the Singapore and Dhaka courts, were as follows:

(a) whether Virsagi was "entitled to insist that Badel/Gazipur continue with the Gazipur Agreement when the Principal Agreement has been validly terminated"; and

(b) "in these circumstances, whether Welltech and Badel/Gazipur could carry on OTC business in Dhaka without involving Virsagi".

21 The Judge added that even if the issue of *lis alibi pendens* had been the only issue before him, he would have been prepared to grant a stay of Suit 63 and Suit 64 on the facts as they appeared at that stage of the proceedings.

22 For completeness, the Judge also found that Bangladesh was clearly the more appropriate forum to determine the disputes after considering the principles of *forum non conveniens* set out in the leading House of Lords decision of *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460 ("the *Spiliada* principles") (see the GD at [28]–[38]).

The issues

23 The issues before this Court were:

(a) Whether the proceedings in Suit 63 and Suit 64 should be stayed based on the doctrine of *lis alibi pendens* (however, see below at [41] on the correct terminology to be used) ("Issue 1").

(b) Whether the proceedings in Suit 63 and Suit 64 should be stayed on the ground of *forum non conveniens* ("Issue 2").

24 We should state at the outset that, whilst we agree wholly with the decision of the Judge with regard to Issue 2, we respectfully differ from him with regard to Issue 1. Indeed, as we shall explain in a moment, Issue 1 ought not to have been canvassed in the manner it was in the court below. Further, we are of the view that, in any event, the Judge's holding on this particular issue in relation to the facts is (again, with respect) erroneous. In the circumstances, these grounds of decision are confined to only these two (related) matters in respect of Issue 1. Given, however, our decision with regard to Issue 2, we dismissed the appeals.

Our decision

Staying of proceedings on the ground of lis alibi pendens

25 It will be recalled that the Judge considered the issue of *lis alibi pendens* as a distinct issue in its own right to *stay the proceedings* in Suit 63 and Suit 64.

26 A *lis alibi pendens*, translated literally, means an action or suit pending elsewhere. Strictly speaking, one would utilise the concept of a *lis alibi pendens* only in relation to "simultaneous actions pending in [the local court, in this case Singapore] and in a foreign country between the same parties

and involving the same or similar issues" (see *Dicey, Morris and Collins on the Conflict of Laws* vol 1 (Sweet & Maxwell, 15th Ed, 2012) at para 12-042). The more pertinent question in the context of the present judgment is how the presence of a *lis alibi pendens* affects the decision of the court in respect of its exercise of jurisdiction over proceedings seised in Singapore. Some clarification of the various effects of a *lis alibi pendens* in this regard is necessary.

The effect of a lis alibi pendens on the issue of jurisdiction before the court

27 As a starting point, a *lis alibi pendens* may arise in two types of factual situations; as observed by M Karthigesu JA, delivering the judgment of this court in *Yusen Air & Sea Service (S) Ptd Ltd v KLM Royal Dutch Airlines* [1999] 2 SLR(R) 955 ("*Yusen Air*") (at [16]):

> This appeal requires the consideration of the applicable principles governing a situation where a plaintiff commences two sets of proceedings, one the local forum and another in a foreign jurisdiction against the defendant in respect of the same issues arising from the same underlying factual matrix. Such *lis alibi pendens* can come about in *two ways: first, where the same plaintiff sues the same defendant in Singapore and abroad; and second, where the plaintiff sues the defendant in Singapore and the defendant sues the plaintiff abroad, or* vice versa. [emphasis added]

For ease of reference as well as analysis, we will term the first way "common plaintiff" situations, and the second way "reversed parties" situations (see the taxonomy used in J D McClean, "Jurisdiction and Judicial Discretion" (1969) 18 ICLQ 931 at 934).

28 This distinction was held to have a substantive significance; as further observed by Karthigesu JA (also at [16] in *Yusen Air*):

> It is settled law that, in the [reversed parties] situation, the existence of concurrent proceedings in another jurisdiction is only an additional factor to be considered under the test laid down by the House of Lords in *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460 ("*Spiliada*") in deciding whether to stay the local proceedings (*De Dampierre v De Dampierre* [1988] AC 92; *The Hooghly Mills Co Ltd v Seltron Pte Ltd* [1994] 3 SLR(R) 757). However, in the [common plaintiff] situation, the English courts have taken the view that, except in very unusual circumstances, such a plaintiff would be put to an election and he would have to decide which jurisdiction he wishes to pursue his claim. The leading authority on this point is the judgment of Sir Browne-Wilkinson VC (as he then was) in the case of *Australian Commercial Research* [*Australian Commercial Research and Development Ltd v ANZ McCaughan Merchant Bank Ltd* [1989] 3 All ER 65].

29 A *lis alibi pendens* therefore operates as a *fact* to which our rules on private international law accord *legal significance* by reference to two (and only two) separate legal doctrines. The first is what we shall term "the doctrine of forum election", whilst the second is the more familiar doctrine of *forum non conveniens*. It is clear from *Yusen Air* that whether the doctrine of forum election applies, however, is dependent on how the *lis alibi pendens* comes about (*ie*, whether it is a common plaintiff or reversed parties type situation). We will elaborate, in turn, on how each doctrine operates and their legal significance on how the court will decide a question of jurisdiction when faced with a *lis alibi pendens*.

(1) The doctrine of forum election

30 An application made by the defendant to put the plaintiff to an election is the first way in which a *lis alibi pendens* may affect the jurisdiction of the court under private international law. This will

apply *only* in a *common plaintiff* situation. The court in *Yusen Air* further elaborated (at [27]) on the approach to be taken in such cases:

> In our judgment, when a plaintiff sues the same defendant in two or more different jurisdictions over the same subject matter, the defendant can take up an application to compel the plaintiff to make an election as to which set of proceedings he wishes to pursue. *For the purposes of an election, the considerations of* forum conveniens *do not come into play. However, the defendant would need to demonstrate a duplicity of actions in the different jurisdictions. Once this is established, the burden of proof then shifts to the plaintiff to justify the continuance of the concurrent proceedings by showing "very unusual circumstances". If the plaintiff fails to demonstrate such unusual circumstances, he would have to make an election.* [emphasis added]

It is important to note that the court in *Yusen Air* made clear that when the plaintiff is electing which forum to proceed in, any questions regarding which forum is the more appropriate, or natural, forum for the dispute to be tried are irrelevant.

31 How then does this process of election operate within the framework of our private international law rules on jurisdiction? As Prof Yeo Tiong Min clearly observes (see *Halsbury's Laws of Singapore – Conflict of Laws* vol 6(2) (LexisNexis, Singapore, 2009) ("*Yeo*") at para 75.094):

> … [*Lis alibi pendens*] *raises factors either within the test in* The Spiliada, *or within the issue of forum management generally*. Within the framework of *The Spiliada, lis alibi pendens* raises issues of duplication of resources, as well as the risk of conflicting judgments. [emphasis added]

The learned author then proceeds to provide the following commentary on how the doctrine of forum election operates in the context of forum or (as the learned author terms it) case management (see *Yeo* at para 75.108):

> Where a plaintiff is proceeding against the same defendant in two jurisdictions in relation to the same subject matter, *the court will compel the plaintiff to elect one jurisdiction to pursue the claim, because the pursuit of such concurrent proceedings will be regarded as vexatious unless there are very unusual circumstances to justify it*. Once the defendant establishes duplicity of proceedings, the burden is shifted to the plaintiff to justify continuation of concurrent proceedings by showing the existence of very unusual circumstances. One possible justification may be that the parties had contractually provided for that possibility. If the plaintiff fails to provide justification, then he would be put to an election. *Natural forum considerations are not relevant to the question of election. Instead, issues of case management are raised*. [emphasis added]

32 We agree with Prof Yeo's approach. In a common plaintiff *lis alibi pendens* situation, the court, when asking the plaintiff to elect which forum he wishes to proceed in, is *not* deciding on the appropriateness of the court in exercising its jurisdiction over the dispute – unlike in the situation relating to a stay of proceedings where the doctrine of *forum non conveniens* is applied. That is the reason why the question of whether Singapore is the natural forum to hear the dispute is not relevant when the plaintiff is asked to make an election. The court is merely managing its own process. The reason why a plaintiff should be compelled to elect in a common plaintiff situation was stated by this court in *Koh Kay Yew v Inno-Pacific Holdings Ltd* [1997] 2 SLR(R) 148 ("*Koh Kay Yew*") as follows (at [22]):

> In the latter situations [in which a party had commenced actions concurrently in two jurisdictions], it is understandable that any court should feel uncomfortable about allowing both

actions to go on. Not only would the *same issue be litigated twice but there would also be the risk of having two different results*, each conflicting with the other. And these problems would have arisen simply because one party decided to sue in one place too many. In such circumstances, courts, including those in Singapore, should *prevent the inherent abuse of the different judicial systems in different jurisdictions* by compelling that party to choose the jurisdiction that he wants to litigate in. The underlying need to prevent a multiplicity of similar proceedings justifies the courts being more prepared to grant an injunction. [emphasis added]

33 Karthigesu JA in *Yusen Air* was also at pains to point out that the doctrine of *forum non conveniens* is not superseded by the doctrine of forum election in common plaintiff cases (at [34]):

> It is also our considered view that the plaintiff's election is not the only way to resolve this issue. Apart from compelling the plaintiff to elect, it remains open to the defendant to take up an application for a stay of local proceedings or a restraint of foreign proceedings if the defendant wishes to have the action tried in one of the jurisdictions where the plaintiff has commenced an action.

34 Indeed, it seems to us that the doctrine of forum election in common plaintiff situations of *lis alibi pendens* and the doctrine of *forum non conveniens* do *not* overlap in any way on a *conceptual* level. The two principles can – and do – operate alongside each other, although, practically speaking, it is perhaps inevitable that the two doctrines will interface with one another given that they both concern questions of jurisdiction in private international law. To that end, we highlight certain scenarios of such interaction between these doctrines.

35 When the plaintiff is put to an election, and he then elects to continue his claim in Singapore, the court will enjoin the plaintiff to stop all other foreign proceedings by way of an injunction. At this juncture, the defendant may be happy for the dispute to be heard in Singapore, and nothing more needs to be done. However, where the defendant does not want proceedings to continue in Singapore, it is open to it to rely on the doctrine of *forum non conveniens* to argue that the overseas forum is clearly or distinctly the more appropriate forum for the dispute to be heard, and therefore to have the Singapore proceedings stayed. This is clear from the observations of Karthigesu JA in *Yusen Air* (see above at [33]).

36 On the other hand, if the plaintiff elects to pursue its claim in the overseas forum (instead of in Singapore) but the defendant wants the proceedings to continue in Singapore, the latter may seek an anti-suit injunction from the Singapore courts to prevent the plaintiff from carrying on with the foreign proceedings. The plaintiff's election does not, *ipso facto*, preclude the granting of such an injunction. Where, however, the defendant is happy to have the dispute heard abroad, it would have (in substance) obtained the same outcome pursuant to an application to stay proceedings under the doctrine of *forum non conveniens*. It has been said that in such a situation the court will *discontinue* the local proceedings (rather than just grant a stay): see the English High Court decision of *Australian Commercial Research and Development Ltd v ANZ McCaughan Merchant Bank Ltd* [1989] 3 All ER 65 ("*Australian Commercial Research*") at [70] as well as *Yusen Air* at [32] (citing Smart, "*Lis Alibi Pendens*: Staying or Discontinuing English Proceedings" [1990] LMCLQ 326 at 329)). However, we take the view that the court is not restricted to discontinuing the local proceedings, and may, in the *appropriate circumstances*, grant a stay of proceedings instead. This might be the case where the foreign court's jurisdiction is being challenged (see, for example, the English High Court decision of *AG v Arthur Andersen & Co* The Independent (31 March 1988) and *Yusen Air* at [32]), or where the action in Singapore is brought to obtain security by way of a *Mareva* injunction or attachment of assets (see, for example, the Singapore High Court decision of *Multi-Code Electronics Industries (M) Bhd and another v Toh Chun Toh Gordon and others* [2009] 1 SLR(R) 1000 ("*Multi-Code*

Electronics")).

37 It should therefore be clear that the doctrine of forum election, as a mechanism of case management, is never finally dispositive of where the dispute will be heard unless the defendant has no objections to the plaintiff's election.

(2) *Lis alibi pendens* as part of the doctrine of *forum non conveniens*

38 The second effect a *lis alibi pendens* will have on a question of jurisdiction is under the rubric of the doctrine of *forum non conveniens* (pursuant to the *Spiliada* principles). This will apply regardless of how the *lis alibi pendens* arises (*ie*, whether as a result of a common plaintiff or reversed parties case). In a reversed parties situation, this is the only way a *lis alibi pendens* can have any legal significance for the purposes of jurisdiction. The doctrine of forum election *does not* apply. In a common plaintiff *lis alibi pendens* situation, where the defendant wishes to stay proceedings under the doctrine of *forum non conveniens*, the *lis alibi pendens* will (just as in a reversed parties situation) feature as one of the factors in deciding whether it is appropriate for the Singapore court to hear the dispute. It should be noted at this juncture, however, that there could be situations which relate to *parallel proceedings* which might not necessarily fall within the narrower compass of a *lis alibi pendens* (see above at [26] and later below at [46]–[47]). Such proceedings would equally constitute one of the factors in the application of the *Spiliada* principles (see, for example, the decisions of this court in *CIMB Bank Bhd v Dresdner Kleinwort Ltd* [2008] 4 SLR(R) 543 at [70] and *Rickshaw Investments Ltd and another v Nicolai Baron von Uexkull* [2007] 1 SLR(R) 377 at [90]; as well as *Yeo* at para 75.094 (see below at [39])).

39 Accordingly, when a *lis alibi pendens* operates within the doctrine of *forum non conveniens*, it must be considered in light of the general principles applicable to the *forum non conveniens* analysis (*viz*, the *Spiliada* principles). In this regard, Prof Yeo provides helpful guidance on the weight to be given to parallel proceedings generally (including situations of *lis alibi pendens*) (see *Yeo* at para 75.094):

> The weight to be given to the fact of existence of parallel proceedings will depend on the circumstances. The degree to which the respective proceedings have advanced is an important consideration; although the advanced stage of proceedings may be disregarded if proceedings had been deliberately advanced at the insistence of the party seeking to rely on this as a factor.The degree of overlap of issues and parties is another consideration. However, little or *no* weight will be given to fact that there are foreign proceedings if they are commenced for strategic reasons to bolster the case of a clearly more appropriate forum elsewhere.
>
> Where there has been or is litigation involving very complex facts which call for highly specialised expert evidence, and such expertise has been built up in a particular jurisdiction, that could be a very important indication of the prima facie natural forum. This factor, discussed in *The Spiliada*, came to be known as the *Cambridgeshire* factor (named after the vessel involved in the prior proceedings where the expertise had been developed), is recognised as a highly exceptional factor and has rarely been applied since then.
>
> The risk of conflicting judgments arising from concurrent proceedings is another factor to consider, but it is not decisive and will need to be weighed with other factors. If it is a straight competition between proceedings in the forum and proceedings elsewhere, this factor should carry no weight, because the only question before the court is whether it should exercise its own jurisdiction and it has no control over foreign proceedings. Of course, ideally the trial should be held at only one of the competing fora, but trial in either forum alone will obviate the risk.

However, the problem usually arises in the context of complex litigation involving multiple issues and/or multiple litigants.

[emphasis added]

40 It bears emphasis that, for the purposes of the doctrine of *forum non conveniens*, it is sufficient for there to be related (or parallel) proceedings (as compared to a strict *lis alibi pendens* (see above at [26] as well as below at [46]–[47])) in order for the foreign proceedings to weigh into the analysis of appropriateness. This is a sensible approach to take, given that the existence of parallel proceedings is never wholly dispositive of the issue of the natural forum as a matter of course, but is only a factor to be considered in the application of the *Spiliada* principles.

(3) Summary and further considerations

41 We reiterate that a *lis alibi pendens* will affect how the court would deal with an issue of jurisdiction to hear proceedings seised in Singapore in two ways: the first, pursuant to common plaintiff *lis alibi pendens* situations, where the doctrine of forum election will be applicable; and, second, as part of the application of the doctrine of *forum non conveniens* (pursuant to the *Spiliada* principles), regardless of whether it is a common plaintiff or reversed parties situation. We note that in some prior cases, and indeed in the present case at first instance, the first way has been referred to as "the doctrine of *lis alibi pendens*" (see, for example, the Singapore High Court decisions of *Ang Ming Chuang v Singapore Airlines Ltd (Civil Aeronautics Administration, Third Party)* [2005] 1 SLR(R) 409; *Tan Kah Hock and Another v Chou Li Chen and Others* [2008] SGHC 82 and *Multi-Code Electronics*). It should be clear by now that such an approach is terminologically confusing, and might (unfortunately) lead to confusion (as well as conflation) of substantive legal principles. We are therefore of the view that it is best for common plaintiff *lis alibi pendens* situations which raise the issue of forum election (as it has been in these grounds of decision) to be referred to as the doctrine of forum election instead.

42 The doctrine of forum election operates by putting the plaintiff to an election once the defendant has established that there is a *lis alibi pendens*, unless the plaintiff can demonstrate why the multiple proceedings are justified. This is to ensure that the defendant is not vexed or oppressed by the plaintiff's abuse of the court process. As demonstrated above, it is clear that this is a separate analytical framework from that of *forum non conveniens*, and the two do not elide on a conceptual level.

43 However, some aspects of the doctrine of forum election and its relationship to the principles in relation to *forum non conveniens* as well as anti-suit injunctions do raise some issues of concern. Does a common plaintiff situation where the plaintiff is unable to show unusual circumstances mean that there is, *prima facie*, vexation and oppression to the defendant? Should this have an effect on how vexation and oppression operate in the context of anti-suit injunctions (see, for example, *Koh Kay Yew* as well as the Singapore High Court decision of *Beckkett Pte Ltd v Deutsche Bank AG and another* [2011] 1 SLR 524)? Why does *forum election* result, by default, in a discontinuance of proceedings if the plaintiff elects to proceed overseas, rather than, say, a stay of proceedings? We need not address these (problematic) questions in the context of the present appeal, given our decision on *the facts of the present appeal* (*ie*, that the doctrine of forum election could not have resulted in a stay of proceedings, and that there was no *lis alibi pendens* on the facts of the present case although the doctrine of *forum non conveniens* nevertheless applied in favour of the Respondents). These questions can be dealt with when they next arise directly for decision by the court. It is, instead, to our findings on the facts in relation to the present appeal which our attention must now turn.

The doctrine of forum election applied to the facts of the present case

44 In the present case, Welltech and Gazipur both sought to *stay proceedings* on the ground of *lis alibi pendens*, relying on the principles set out in *Yusen Air*. The Judge referred to *Yusen Air* in his decision, but did not raise the issue of the plaintiff making an election as such. In fairness, this was probably appropriate, given that Welltech and Gazipur only sought to have the proceedings in Singapore stayed. Furthermore, the proceedings in Bangladesh were decided against Victor, and it would be practically certain that Virsagi, if put to an election, would have chosen to continue proceedings in Singapore. If that was the case, however, the Judge must, with respect, be mistaken in observing that he would have *stayed the proceedings* on the ground of the doctrine of forum election had it been the only issue before him. The only way that the proceedings in Singapore could have been stayed if Virsagi had elected to proceed with its claim in Singapore would be by Welltech and Badel demonstrating that there was a clearly more appropriate forum elsewhere pursuant to the doctrine of *forum non conveniens*.

No lis alibi pendens on the facts of the present case

45 As also indicated earlier, it is, *in any event*, clear that there was no *lis alibi pendens* on the facts of the present case. In this regard, it is important to be clear what precisely constitutes a *lis alibi pendens*, especially since the case law does not evidence a uniform manner of assessment.

46 In *Yusen Air*, the Court of Appeal appeared to focus on three things: the identity of the parties, the issues arising from both sets of proceedings, and the underlying factual matrix giving rise to these issues. In most cases, these three factors will be considered. However, some decisions have considered the causes of action and reliefs sought by parties in the various proceedings in order to determine whether or not there was a *lis alibi pendens* (see, for example, the Singapore High Court decisions of *Transtech Electronics Pte Ltd v Choe Jerry and others* [1998] 1 SLR(R) 1014 at [12] and *Lanna Resources Public Co Ltd v Tan Beng Phiau Dick and another* [2011] 1 SLR 543 ("*Lanna Resources*") at [16]). Indeed that was the approach taken by the Judge in the court below; in particular, he considered the similar reliefs sought by the parties important in his finding that there was a *lis alibi pendens*.

47 We are of the view that in deciding whether there is a *lis alibi pendens*, the first legal port of call ought to be the identity of the parties and the causes of action concerned. This will enable to court to identify whether there are same or similar issues arising from the same factual matrix which are before both the local and foreign court(s), and, if so, the extent of these similarities. The nature of the reliefs sought will be relevant to the analysis, given that in most cases the reliefs sought and the causes of action concerned will be inextricably linked with each other. However, the court ought not to hold, without more, that the local and foreign court(s) are faced with the same or similar issues by focusing merely on the reliefs sought – for example, whether the claimant is entitled to the same quantum of damages as a remedy. As for the degree of similarity necessary, the party seeking to demonstrate that there is a *lis alibi pendens* need not show a total correspondence of issues, but the court will be more likely to find a *lis alibi pendens* where the issues are of a greater degree of similarity.

The identity of the parties

48 Turning to the facts of the present appeal, it is clear that the parties in the Singapore and Bangladesh proceedings were *not* the same. In Singapore, the plaintiff was Virsagi while the defendants were Welltech and Badel/Gazipur. In Bangladesh, the plaintiff was Victor while the defendants were WTPL, Woon and Badel. Arguments were made by Welltech and Badel, initially, at

first instance, that the parties are effectively the same, but this was not taken any further by the Judge since counsel for Virsagi conceded this point subsequently.

The causes of action and issues raised

49 It will be recalled that in Suit 63, Virsagi claimed that Welltech was liable for the tort of inducing breach of contract, or alternatively, for the tort of unlawful interference with the Gazipur Agreement. Some of the issues which need to be addressed in order to establish the validity of the claim in Suit 63 would include the following:

(a) whether the Gazipur Agreement is valid;

(b) whether the Gazipur Agreement is not illegal or in restraint of trade or is capable of being rescinded;

(c) whether Welltech had knowledge of the existence of the Gazipur Agreement;

(d) whether Welltech intended to interfere with Gazipur's performance of the Gazipur Agreement;

(e) whether Gazipur breached the Gazipur Agreement (which is the issue to be decided in Suit 64);

(f) whether Welltech has committed an unlawful act affecting Gazipur;

(g) whether Welltech did so intending to injure Virsagi; and

(h) whether Virsagi suffered any loss.

50 In Suit 64, Virsagi claimed that Gazipur had breached the Gazipur Agreement, and the main issues related to the construction of certain clauses in the contract, as well as whether there were breaches of those clauses.

51 On the other hand, CM 8/2012 was commenced by Victor in Dhaka pursuant to s 233 of the Bangladesh Companies Act, which provides for the protection of minority shareholder interests. The main issue was whether Victor, as the petitioner in the action, was "entitled to get any relief under the Provisions of Section 233 of the Companies Act 1994". [note: 3] The only issue for the Dhaka High Court to decide in CM 8/2012 was whether relief in the form of a direction to the other shareholders of WTPL "... to continue their business as an [OTC] in Bangladesh through [WTPL] with the active participation of the petitioner" should be granted. [note: 4] The subsidiary issues arising from this main issue were identified by Abdur Rahman J in his written judgment (at pp 21–22) where it was found that WTPL was a non-functioning company. The OTC setup in Bangladesh was not established under WTPL and was instead owned and run by Victor and Badel under the terms of the Gazipur Agreement. Finally, the lending of the BCA licence by Welltech (represented by Woon) to establish and run the OTC business in Dhaka had nothing to do with WTPL. [note: 5]

52 Therefore, it is clear, in our view, that the causes of action in Suit 63, Suit 64, and CM 8/2012 were entirely different, and did not give rise to the same issues. The Singapore court in deciding Suit 63 and Suit 64 would not have to traverse much of the grounds considered in CM 8/2012.

The reliefs sought by the parties

53 We agree with the Judge that the injunctive relief sought in both sets of proceedings were similar in substance. Victor/Virsagi was seeking not to be excluded from the OTC business now conducted by Gazipur and Welltech, whether by way of specific performance of the Gazipur Agreement or through relief for the action of minority shareholder oppression.

Conclusion

54 Considering all the factors, we found that there was insufficient similarity between the Singapore and the Bangladesh proceedings and that there was therefore no *lis alibi pendens* in the context of the present proceedings (notwithstanding our agreement with the Judge's decision regarding the similarity of reliefs sought). Welltech and Badel were not subject to vexation or oppression by Virsagi bringing Suit 63 and Suit 64, respectively, in Singapore.

55 We should note, however, that even if there was no *lis alibi pendens* on the facts of the present case, this did not mean that there were no parallel or related proceedings. There were, undoubtedly, parallel or related proceedings in both Bangladesh as well as Singapore. These proceedings would be (and, in fact were) considered as a factor to be applied in relation to the doctrine of *forum non conveniens*, which constituted Issue 2 in the present case and which we have decided in both Welltech's and Gazipur's favour, in agreement with the Judge.

Conclusion

56 For the reasons set out above, we held that the Judge, with respect, was mistaken with regards to Issue 1, and should not have stayed proceedings on the ground of *lis alibi pendens* (or rather, the doctrine of forum election).

57 Notwithstanding our decision on Issue 1, as already noted above, given our decision on Issue 2, we dismissed the appeals. However, in light of our decision on Issue 1, the costs awarded in the court below of $4,000 to Welltech and $8,000 to Badel/Gazipur were each reduced by fifty per cent. As for the costs of CA 90 and CA 91, we respectively awarded Welltech and Badel/Gazipur the costs of these appeals fixed at $7,500 (including disbursements) each. The usual consequential orders applied.

[note: 1] Respondent's Supplementary Core Bundle at pp 7–8.

[note: 2] *Ibid*, at p 56.

[note: 3] *Ibid*, at p 82.

[note: 4] *Ibid*, at pp 56–57.

[note: 5] *Ibid*, at pp 82–83.