William Jacks & Co (Singapore) Pte Ltd *v* Nelson Honey & Marketing (NZ) Ltd [2015] SGHCR 21

Case Number : Suit No 85 of 2015 (Summons No 2064 of 2015)

Decision Date : 16 September 2015

Tribunal/Court : High Court

Coram : Zhuang WenXiong AR

Counsel Name(s) : Chandra Mohan Rethnam, Jonathan Cheong and Tan Ruo Yu (Rajah & Tann Singapore LLP) for the plaintiff; Gerald Yee, Prakash Nair and Ms Yoga Vyjayanthimala (Clasis LLC) for the defendant.

Parties : William Jacks & Company (Singapore) Pte Ltd — Nelson Honey & Marketing (NZ) Limited

Civil Procedure – Pleadings – When bound

Conflict of Laws – Choice of Law – Contract – Alleged void contract

Conflict of Laws – Choice of Jurisdiction

Conflict of Laws – Foreign Judgments – Recognition – Issue estoppel

Conflict of Laws – Jurisdiction – Discretionary

Conflict of Laws – Natural Forum

Contract – Formation

Evidence – Admissibility of evidence

16 September 2015 Judgment reserved.

Zhuang WenXiong AR:

1 "The power of a sovereign to affect the rights of persons, whether by legislation, by executive decree, or by the judgment of a court, is called jurisdiction" (J H Beale, "The Jurisdiction of a Sovereign State", (1923) 36 Harv L Rev 241 at p 241). Long-arm jurisdiction — that is, jurisdiction over persons outside of the territorial confines of the state — does not sit easily with a territorial notion of sovereignty. This calls into question whether judgments against extra-territorial persons ought to be recognised outside of that territory. More specifically, where a foreign court has assumed long-arm jurisdiction, how should this affect a local court's determination of its own long-arm jurisdiction?

2 The plaintiff, William Jacks & Company (Singapore) Pte Ltd ("William Jacks"), is a Singapore-incorporated company in the business of the wholesale and retail distribution of health food and supplements. The defendant, Nelson Honey & Marketing (NZ) Limited ("Nelson Honey"), is a New Zealand-incorporated company in the business of exporting honey.

3 William Jacks bought some manuka honey from Nelson Honey for a sum of NZ$206,300, to be

delivered from New Zealand to Shanghai, China in two shipments (a full recounting of the facts is at [76]–[77] below). William Jacks initially pleaded that the purchase was pursuant to a purchase order, but during proceedings before me, William Jacks sought to argue that the parties had agreed to an exclusive distributorship agreement which contained an exclusive jurisdiction clause in favour of Singapore and controlled individual purchases. This was an area of controversy and I return to this later on in the judgment (at [65]–[74] below).

4 In November 2014, Nelson Honey commenced a suit against William Jacks in the High Court of New Zealand for the unpaid purchase price of the honey. William Jacks did not file a defence in New Zealand, and applied to dismiss proceedings (the New Zealand equivalent of applying to set aside service *ex juris* of the writ) or in the alternative stay proceedings on the basis of *forum non conveniens*. This application was dismissed in June 2015 (reported as [2015] NZHC 1215, ("the New Zealand Judgment")), and is currently undergoing review. William Jacks commenced Suit No 85 of 2015 against Nelson Honey in January 2015 for non-conformity, alleging that the honey supplied in the first shipment was defective, and that the batch number and expiry dates were not printed for the second shipment. William Jacks' application for leave under O 11 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) to serve the writ and statement of claim was granted in February 2015. Service was effected in March 2015. Nelson Honey filed Summons No 2064 of 2015 on 20 April 2015, seeking to set aside the service *ex juris* of the writ, or in the alternative, to stay proceedings on the grounds of *forum non conveniens*.

5 When I first heard this matter, I noticed that William Jacks was relying on matters that were not pleaded in its statement of claim and on evidence outside of its initial supporting affidavit. The parties had also not submitted on whether the dismissal of William Jack's application in New Zealand gives rise to an estoppel. I therefore directed the parties to address me on the mentioned three issues at a subsequent hearing.

The issues

6 The straightforward procedural history belies the complexity of the issues that arise. These are:

(a) Is an O 11 applicant bound by her pleaded statement of claim for the O 11 application?

(b) Can an O 11 applicant rely on evidence outside of the initial supporting affidavit in an application by the counterparty to set aside service *ex juris*?

(c) Does the New Zealand court's dismissal of William Jack's application to dismiss or stay proceedings give rise to an estoppel?

(d) Did the parties agree to the exclusive jurisdiction of the Singapore courts?

(e) Is Singapore a more appropriate forum than New Zealand, or vice versa?

(f) Should service *ex juris* of the writ on Nelson Honey be set aside?

(g) Should proceedings be stayed on the basis of *forum non conveniens*?

I deal with the issues *seriatim.*

Is an O 11 applicant bound by her pleaded statement of claim?

7 William Jacks raised the argument that the parties had agreed to an exclusive distributorship agreement containing an exclusive jurisdiction clause in favour of Singapore, but this was a matter which was not pleaded in its statement of claim. As has been mentioned, this was an issue upon which I directed further research.

8 William Jacks took the position that an O 11 applicant is not bound by her pleaded statement of claim, and may apply to amend the same. Nelson Honey took the position that an O 11 applicant is bound by the pleaded cause of action, and in any event cannot rely on another head of jurisdiction that was not initially relied on.

9 Any analysis of the law in this area must start with two opposed English Court of Appeal cases decided a century ago: *Holland and another v Leslie* [1894] 2 QB 450 ("*Holland v Leslie*") and *Parker v Schuller* (1901) 17 TLR 299.

10 In *Holland v Leslie*, leave had been granted for service *ex juris*; the cause of action was for an unpaid bill of exchange. The indorsed statement of claim erroneously described the bill of exchange. The plaintiffs applied to amend the statement of claim. Lord Esher MR allowed this amendment, and held that there was no difference between writs served out of the jurisdiction and writs served within the jurisdiction, save that an amendment will not be allowed if the effect was to introduce a cause of action in respect of which leave could not have been originally granted for service *ex juris*.

11 I turn to *Parker v Schuller* (1901) 17 TLR 299. The claim in this action as endorsed in the writ of summons was breach of a CIF contract because of non-delivery of certain chemicals in Liverpool. The plaintiff had relied on Order XI, r 1(e), that is, a breach of a contract within the jurisdiction, for service *ex juris*. On appeal to the Court of Appeal, the defendants argued that the contract would have been fulfilled if they had delivered the goods to the ship at the foreign port, and posted documents to Liverpool; there was therefore no breach within the jurisdiction. The plaintiffs conceded that the CIF contract was breached by reason of non-delivery of documents. Romer LJ said:

> … an application for leave to issue a writ for service out of the jurisdiction ought to be made with great care and looked at strictly. If a material representation upon which the leave was obtained in the first instance turned out to be unfounded, the plaintiff ought not to be allowed, when an application was made by the defendant to discharge the order for the issue of the writ and the service, to set up another and a distinct cause of action which was not before the judge upon the original application.

Service *ex juris* of the writ was therefore set aside.

12 Perhaps unaware of *Holland v Leslie*, a spate of English cases followed *Parker v Schuller* (see *e.g. In re Jogia (A Bankrupt)* [1988] 1 WLR 484 at 491 and *Metall und Roshstoff AG v Donaldson Lufkin & Jenrette Inc* [1990] 1 QB 391 ("*Metall und Roshstoff*") at 436). *Walton Insurance Limited v Deutsche Rock (UK) Reinsurance Company Limited and another* 1990 WL 754929 ("*Walton Insurance*") marked a turning point. The plaintiff initially sued the first defendant for negligent misrepresentation. The plaintiff also obtained leave for service *ex juris* on the second defendant on the ground that it was a necessary and proper party, in that it would be liable for breach of warranty of authority. The first defendant subsequently took the position that it would not challenge the authority of the second defendant. The plaintiff changed tack, and sought to uphold service *ex juris* on the basis that the second defendant was a necessary and proper party because it would be liable for negligent misrepresentation. The Court of Appeal held that this was permissible, because *Parker v Schuller* does not apply to the substitution of one reason (why the second defendant was a necessary and proper party) for another. Tellingly, the court resoundingly approved of the decision

below, and cited, verbatim, passages from the same. A portion is reproduced:

> .. it is not right to extend the principle in Parker v Schuller to this case which is not covered by the earlier decision. In saying this, I bear in mind the absence of prejudice to [the second defendant] and the waste of time and money which would be caused if the Plaintiff were forced to start all over again."

Although not stated in these terms, the effect is that a plaintiff may invoke a new cause of action so long as she is relying on the same O 11 head of jurisdiction.

1 3 *Walton* is plainly at odds with *Parker v Shuller*. *Walton's* attempt at distinguishing *Parker v Shuller* is wholly unconvincing. Romer LJ clearly said that a plaintiff cannot rely on a new cause of action, *simpliciter*; Romer LJ did not say that a plaintiff cannot rely on a new cause of action where the new cause of action does not fall within the same O 11 jurisdictional head as the original pleaded cause of action. *Walton* is best explained by reference to the court's reluctance to force the plaintiff to start afresh.

14 Another Court of Appeal decision, *AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC* [2012] 1 WLR 920 ("*AES*"), declined to extend *Parker v Shuller*. The claimant relied on the breach of an arbitration agreement governed by English law, and one CPR jurisdictional head for service *ex juris*, but sought to rely on another jurisdictional head when the defendant challenged service. The Court of Appeal held that *Parker v Schuller* was not applicable because the claimant was relying on the same cause of action. While technically reconcilable with *Parker v Schuller*, *AES* is at odds with the rationale behind *Parker v Schuller*: if it is objectionable for a plaintiff to rely on a new cause of action, it is surely as objectionable, if not more, for a plaintiff to rely on a new jurisdictional head.

15 English law came full circle in *NML Capital Ltd v Republic of Argentina* [2011] 2 AC 495 ("*NML Capital*"). The claimant obtained summary judgment on bonds issued by the defendant in a Federal Court in New York, and sought to enforce that judgment debt in England. The claimant successfully applied, *ex parte*, for permission to serve the claim form out of the jurisdiction. The defendant applied to set the order for service aside on the ground that the defendant enjoyed state immunity, and in response, the claimant invoked two new grounds to contend that the defendant did not enjoy immunity. Lord Phillips of Worth Matravers PSC (with whom the rest of the Supreme Court agreed) laid down these propositions of law:

> (a) Procedural rules should be the servant not the master of the rule of law. The overriding objective of the Civil Procedure Rules (SI 1998 No 3132) (UK) ("CPR") is to enable the court to deal with cases justly, and this involves saving expense and ensuring that cases are dealt with expeditiously (at [74]);
>
> (b) Where an application is made to amend a pleading the normal approach is to grant permission where to do so will cause no prejudice to the other party that cannot be dealt with by an appropriate order of costs. Where all that a refusal of permission will achieve is additional cost and delay, the case of permitting amendment is even stronger (at [75]);
>
> (c) Where there is valid basis for subjecting an out-of-jurisdiction person to jurisdiction, it is not obvious why it should be mandatory for a claimant (seeking to invoke new grounds) to be required to start all over again rather than the court having a discretion (*ibid*);
>
> (d) Therefore *Parker v Schuller* should no longer be applied, or should be confined to its facts

(at [79]).

16 I close my legal analysis with *Transpac Capital Pte Ltd v Lam Soon (Thailand) Co Ltd* [1999] 3 SLR(R) 454, which is not *stricto sensu* on point. In contrast to the cases analysed earlier, the first defendant successfully applied to set aside service *ex juris*; thereafter, in a subsequent application, the plaintiff sought to amend its statement of claim in order to re-serve the writ on the first defendant. The proposed amendments were allowed by Tay Yong Kwang JC (as he then was), who (at [24]) commented that he "[did] not follow the [defendants'] logic in their submissions that the plaintiffs should commence a fresh action instead of amending the present one". I take this case to stand for the proposition that a court should be chary of leaving a party no choice but to start over.

17 I now analyse whether, as a matter of policy, *NML Capital* was justified in overruling *Parker v Schuller*. The application to set aside service *ex juris* is filed by the defendant and heard *inter partes*. Since the defendant is already before the court, it would be expedient for a court to consider if service *ex juris* can be sustained on new grounds if these are raised by the plaintiff. A *de jure* rule which puts the plaintiff to the formality and expense of filing a fresh writ is inefficient, when leave can simply be granted to the plaintiff to amend his statement of claim. Such a rule would also be inefficient vis-à-vis the defendant, because the defendant would potentially contest a second setting-aside hearing if the plaintiff serves a fresh writ; this could have been dealt with at the first hearing when the plaintiff first tried to raise new grounds.

18 This must be counterbalanced against plaintiffs circumventing the O 11 procedure, which "is designed to ensure that both the court is fully and clearly apprised as to the nature of the legal claim with which it is invited to deal on the ex parte application, and the defendant is likewise apprised as to the nature of the claim which he has to meet, if and when he seeks to discharge an order for service out of the jurisdiction" (*Metall und Roshstoff* at 436). I agree that this is a consideration that must be given some weight, but this does not justify the sledgehammer approach of *Parker v Schuller*. A court ought to have the discretion to tailor an order that is proportionate to the plaintiff's behaviour and the prejudice caused to the defendant (see *eg*, *Mitora Pte Ltd v Agritrade International (Pte Ltd)* [2013] 3 SLR 1179, where the Court of Appeal held that proportionality is an important factor in determining if an unless order is to be made). Where a plaintiff seeks to cynically circumvent O 11, employs trickery to lure a defendant into the jurisdiction, or otherwise egregiously abuses the court process, a court may go the extent of disallowing a plaintiff from amending his statement of claim and/or restraining her from filing a new writ.

19 On the weight of both principle and authority, I follow *Holland v Leslie* and *NML Capital*, and decline to follow *Parker v Schuller* and the line of cases following it. In summary, a plaintiff may rely on a cause of action and/or a O 11 head of jurisdiction in an *inter partes* application by the defendant to set aside service *ex juris*, even if the cause of action and/or O 11 head of jurisdiction was not relied upon in the initial *ex parte* application for service *ex juris*.

20 I am satisfied that the plaintiff's belated reliance on the exclusive distributorship agreement does not constitute an abuse of process. Low Kean Jin, a company director of William Jacks, affirmed an affidavit saying that he was initially alerted by the affidavit of Philip Alfred Leslie Cropp, the managing director of Nelson, who said that the relationship grew out of formal contracts and informal emails and phone calls. Low went on to say that the employees who initially dealt with Nelson Honey had left the company, and Low had to obtain the help of an ex-employee to obtain a copy of the exclusive distributorship agreement. I accept this explanation. I therefore allow William Jacks to raise the argument that the parties had agreed to an exclusive distributorship agreement containing an exclusive jurisdiction clause. If this argument succeeds, William Jacks shall be granted leave to amend its statement of claim.

Can an O 11 applicant rely on evidence outside of the initial supporting affidavit?

21 In *ISC Technologies Ltd and another v James Howard Guerin and others* [1992] 2 Lloyd's Rep 430, a defendant applied to set aside service *ex juris*; Hoffman J (as he then was) emphatically said "[o]f course the Court can receive evidence which was not before the Master [who heard the *ex parte* application]".

22 As a matter of principle, allowing an O 11 applicant to rely on evidence outside the initial supporting affidavit surely flows *a fortiori* from the applicant being allowed to rely on a new cause of action or jurisdictional head. Pleadings are hierarchically superior to evidence: pleadings define and delineate the issues at stake, not only for trial, but for pre-trial interlocutory proceedings (*PT Prima International Development v Kempinski Hotels SA and other appeals* [2012] 4 SLR 98 at [35]) and evidence may not be given for facts which are not relevant to those issues (s 5 of the Evidence Act (Cap 97, 1997 Rev Ed)).

23 It would make no sense whatsoever to allow an O 11 applicant to rely on a new cause of action or jurisdictional head, and yet bar her from adducing evidence to prove the same. Both should be considered together as a composite whole if the plaintiff is also seeking to rely on a new cause of action or jurisdictional head. If the plaintiff's behaviour or the prejudice caused to the defendant is such that the plaintiff should not be allowed to adduce new evidence in support of the new cause of action or jurisdictional head, it should follow the plaintiff is likewise not allowed to rely on a new cause of action or jurisdictional head.

24 The situation is different where the O 11 applicant is not relying on a new jurisdictional head or cause of action, but is simply relying on new evidence to amplify the already pleaded cause of action or invoked jurisdictional head. In such cases, the court should, analogously, consider the behaviour of the plaintiff and the prejudice caused to the defendant; the same principles and considerations as those listed in [18] above should apply. In particular, where there is cynical and deliberate suppression of material evidence at the *ex parte* stage, such evidence should not be allowed to be adduced by the O 11 applicant at the *inter partes* stage.

25 Here I am allowing William Jacks to rely on a new cause of action. It would not make any sense for me to go on to bar William Jacks from adducing evidence in support of this cause of action. I therefore allow William Jacks to adduce evidence that the parties had agreed to an exclusive distributorship agreement.

Does the New Zealand's court dismissal of William Jack's application give rise to an estoppel?

26 The New Zealand High Court dismissed William Jack's application to set aside service *ex juris* or in the alternative, stay proceedings on *forum non conveniens* grounds, and in doing so, the court also found that the parties had not agreed to the exclusive jurisdiction of the Singapore courts.

27 The general principles governing when an issue estoppel arises are well rehearsed. The elements are (see *e.g. The "Bunga Melati 5"* [2012] 4 SLR 546 at [79]):

(a) the judgment in the earlier proceedings being relied on as creating an estoppel must have been given by a foreign court of competent jurisdiction;

(b) the judgment must have been final and conclusive on the merits;

(c) there must have been identity of parties in the two sets of proceedings; and

(d) there must have been identity of subject matter, *ie*, the issue decided by the foreign court must have been the same as that arising in the proceedings at hand.

28 The application of the law to the facts is however fraught with difficulty, particularly in the interlocutory context where conflict of law issues are raised. It is uncontroversial that element (c) is satisfied in this case. I shall analyse the rest in turn.

Was the New Zealand court a court of competent jurisdiction?

29 A foreign court is a court of competent jurisdiction where the party in question is either present within the jurisdiction or has submitted to jurisdiction.

30 I consider the former briefly. William Jacks can only be said to be present in New Zealand if it has established and maintained at its own expense a fixed place of business of its own in New Zealand, or if a representative has for more than a minimal period of time been carrying on William Jack's business (*Adams v Cape Industries Plc* [1990] Ch 433 ("*Adams v Cape*") at 530). Neither is satisfied in this case. In particular it has been held that a seller is not present in another country merely because it sells goods to a buyer in that country (*Lucasfilm Ltd and others v Ainsworth and another* [2010] Ch 503 at [192]). By analogy, William Jacks is not present in New Zealand simply because it purchased goods from Nelson Honey. I therefore hold that William Jacks was not present in New Zealand.

31 The issue of submission is more vexed. What is nonetheless clear is that a Singapore court must apply Singapore municipal law, more specifically Singapore rules of private international law, to the question of whether the foreign court has jurisdiction (*Adams v Cape* at 518; *Dicey, Morris and Collins on The Conflict of Laws* vol 1 (Sweet & Maxwell, 15th Ed, 2012) at para 14-055). The foreign court's rules as to when, under foreign law, it will be taken to have jurisdiction are therefore irrelevant: "English Courts never investigate the propriety of the proceedings in the foreign Court" (*Pemberton v Hughes* [1899] 1 Ch 781 at 790).

32 English law once took the view that the mere appearance to either contest jurisdiction or beseech a court not to exercise jurisdiction could constitute submission; this has since been overruled by legislation that has no equivalent in Singapore.

33 The first leading English case is the Court of Appeal decision of *Harris v Taylor* [1915] 2 KB 580. The plaintiff sought to enforce an Isle of Man judgment against the defendant. The plaintiff had, in the Isle of Man, applied for and obtained an order for service *ex juris* of a writ of summons, claiming damages for loss of consortium (subsequently abandoned) and criminal conversation with the plaintiff's wife. The defendant appeared conditionally to set aside the writ on three grounds: the procedural rules did not contemplate or authorise service out of jurisdiction; no cause of action arose or existed within the jurisdiction of the Isle of Man courts; and the defendant was domiciled in England had never had a domicile in the Isle of Man. The application to set aside failed. Buckley LJ and Pickford LJ held that, having applied to the Isle of Man court to contend that that court had no jurisdiction over him and failing in this application, the defendant had thereby submitted to the jurisdiction of the Isle of Man court. Bankes LJ couched his judgment more broadly, and said that if a defendant applied to a court for the exercise of its protection, he would have bought himself under an obligation to obey the ultimate judgment of the court.

3 4 *Harris v Taylor* was roundly criticised. Wolff said the decision was unfortunate (Martin Wolff, *Private International Law* (Oxford: Clarendon Press, 2nd Ed, 1950 at p 259); Dicey and Morris went so far as to say that the decision was "revolting to commonsense" (A V Dicey and J H C Morris, *Dicey*

and Morris on the Conflict of Laws (London: Stevens & Sons, 9th Ed, 1973 at p 996).

35 The second leading English case is the Court of Appeal decision of *In re Dulles' Settlement (No 2)* [1951] Ch 842 ("*Re Dulles*"). An infant (by his mother as next friend) took out a summons seeking to appoint his mother as guardian and for his father to provide for his maintenance. The father was resident in America; in spite of this, the mother did not apply for service *ex juris*. On the maintenance issue, the father objected on the basis that he had not submitted to the jurisdiction. Therefore the issue of whether a foreign court had jurisdiction did not arise. Despite this, a coram comprising Denning LJ (as he then was) and Evershed MR (as he then was) were at pains to distinguish *Harris v Taylor*. Denning LJ said that he "cannot see how anyone can fairly say that a man has voluntarily submitted to the jurisdiction of a court, when he was all the time been vigorously protecting that it has no jurisdiction" (at 850) and rationalised *Harris v Taylor* on the basis that the defendant in that case could not contest service *ex juris* because it was *res judicata*: he had raised this point unsuccessfully in the Isle of Man court and had not appealed against it; *Harris v Taylor* therefore "is no authority on what constitutes a submission to jurisdiction generally" (at 851). Evershed MR agreed with Denning LJ, but also went on to say that the correctness of *Harris v Taylor* "may, however, fall at some time to be considered in the House of Lords" because the question of a foreign court's competence should "be open to the consideration of our own courts" (at 849).

36 I turn to the last English case, the Court of Appeal decision of *Henry v Geoprosco International Ltd* [1975] 3 WLR 620 ("*Henry v Geoprosco*"). The plaintiff, a Canadian resident in Alberta, entered into a service agreement in Canada with the defendant, a Jersey company with its head office in London, for employment in the Trucial States. The plaintiff commenced an action for damages for wrongful dismissal in the Supreme Court of Alberta; the Supreme Court of Alberta granted leave to the plaintiff to serve the statement of claim out of jurisdiction on the defendant in Jersey. The defendant applied to set aside service *ex juris* on two grounds: Canada was not the *forum conveniens*, and the presence of an arbitration clause. This was dismissed, and the plaintiff obtained a judgment by default. The plaintiff then sought to enforce that judgment in England, whereupon the defendant pleaded that it had not submitted to the jurisdiction of the Supreme Court of Alberta. The court distinguished *Re Dulles* because it did not pertain to the enforcement of foreign judgments (at 633E–F); was obiter and decided by only a two-judge coram (at 636C–D); and in any case, the reasoning of Denning LJ is circular because a matter is *res judicata* only if a defendant is bound, and a defendant is only bound if his actions constituted a voluntary submission to the jurisdiction of that court (at 636C). *Harris v Taylor* was therefore wholly unshaken and was binding on the Court of Appeal until and unless the House of Lords overruled it (at 637A). It was held that the English courts will not enforce the judgment of a foreign court against a defendant, although not residing within the jurisdiction of that court, appears before that court solely to preserve assets seized by that court (at 637F). Nevertheless, if a defendant enters a conditional appearance, applies to set aside service *ex juris* and fails, the conditional appearance becomes unconditional and is a voluntary submission to the jurisdiction of the foreign court (at 639C–D). Therefore, the defendant in *Henry v Geoprosco* was taken to have submitted to the jurisdiction of the Supreme Court of Alberta.

37 Perhaps due to the academic maelstrom that followed (see *eg*, L Collins, "Harris v Taylor Revived" (1976) 92 LQR 268 and B A Caffrey, "The Harris v Taylor Phoenix" (1980) 13 Vand J Transnat'l L 43), Parliament passed the Civil Jurisdiction and Judgments Act 1982 (c 27), which legislatively overruled *Harris v Taylor* and *Henry v Geoprosco*. Section 33(1) reads:

> Certain steps not to amount to submission to jurisdiction of overseas court.
>
> (1) For the purposes of determining whether a judgment given by a court of an overseas country should be recognised or enforced in England and Wales or Northern Ireland, the person

against whom the judgment was given shall not be regarded as having submitted to the jurisdiction of the court by reason only of the fact that he appeared (conditionally or otherwise) in the proceedings for all or any one or more of the following purposes, namely—

(a) to contest the jurisdiction of the court;

(b) to ask the court to dismiss or stay the proceedings on the ground that the dispute in question should be submitted to arbitration or to the determination of the courts of another country;

(c) to protect, or obtain the release of, property seized or threatened with seizure in the proceedings.

38 I turn next to the position obtaining in Singapore. The starting point is of course *WSG Nimbus Pte Ltd v Board of Control for Cricket in Sri Lanka* [2002] 1 SLR(R) 1088. The plaintiff contracted with the defendant for the commercial rights to certain cricket matches; the contract provided for arbitration in Singapore. The matter was initially settled, but disputes arose and the defendant took out an action in the Colombo High Court. The plaintiff filed an application objecting to the jurisdiction of the Colombo High Court on the basis of the arbitration clause, issued a Notice of Arbitration, and applied to the Singapore High Court for *inter alia* an anti-suit injunction restraining the defendant from proceeding with the Colombo action. This was granted on an *ex parte* basis, but notwithstanding this, the defendant continued with Colombo proceedings and obtained a ruling that the Colombo High Court had jurisdiction.

39 Lee Seiu Kin JC (as he then was) considered *inter alia Harris v Taylor*, *Re Dulles*, and *Henry v Geoprosco* but did not come to a determinative conclusion as to which line of cases should be followed (at [50]). The court proceeded on the assumption that *Henry v Geoprosco* was law, and found that the plaintiff was faced with a purported termination of contract rights, and therefore had an interest to ensure that the Columbo High Court did not assume jurisdiction, "which is in the nature of having assets within the jurisdiction" (at [52]). In any event the plaintiff did not take a step in proceedings which necessarily involved waiving their objection to jurisdiction (at [54]).

40 The second and final Singapore case I shall be analysing is the Court of Appeal decision of *Zoom Communications Ltd v Broadcast Solutions Pte Ltd* [2014] 4 SLR 500 ("*Zoom v Broadcast*"). Similar to *Re Dulles*, the decision does not technically pertain to the enforcement or recognition of foreign judgments. The plaintiff-respondent obtained leave for service *ex juris* of the writ of summons. The defendant-appellant entered an appearance and filed a summons with two prayers: the first seeking to set aside service *ex juris* and the second for a stay of proceedings on the grounds of *forum non conveniens*. The Court of Appeal did not consider *Harris v Taylor* and *Henry v Geoprosco*, but nonetheless held that the defendant did not submit to the jurisdiction of the Singapore courts. A submission will only be inferred if the foreign defendant has taken a step that would only be useful or only be necessary if any objection to the existence of the Singapore court's jurisdiction has been waived (at [43] and [45]). A foreign defendant who disputes the existence of jurisdiction (by challenging service *ex juris*) and also applies for a stay of proceedings on the grounds of *forum non conveniens* will generally not to be taken to have submitted to the jurisdiction of the Singapore courts provided the latter application for a stay is made as a fall-back to the jurisdictional challenge (at [56]).

41 I leave precedent aside for a moment. Savingy was of the view that every legal relation had a seat, that is, a territory to which the relation belonged to or is subject to. The forum of the obligation coincides with that seat, but crucially, both the forum and the true seat depend upon the voluntary

submission of the parties to local law: "we must fix the forum of the obligation in virtue of their voluntary submission" (F C von Savingy, *Ad Pandectas*, pt 2, bk 1, tit 4 n 18, quoted in E G Lorenzen, "Validity and Effects of Contracts in the Conflict of Laws, 30 Yale L J 565 at 574). Such submission is "always excluded by an express declaration to the contrary" (E G Lorenzen, "Validity and Effects of Contracts in the Conflict of Laws, 30 Yale L J 565 at 574). I therefore fully agree with Denning LJ in *Re Dulle*: it is simply contrary to logic for someone to be taken to have voluntarily submitted to the jurisdiction of a foreign court, when all he has done is to take out an application (in the foreign court) to argue the precise opposite, namely that the foreign court does not have the requisite jurisdiction.

42 I note that *Harris v Taylor* and *Henry v Geoprosco* were both trenchantly criticised, and have since been legislatively overruled by the Civil Jurisdiction and Judgments Act 1982.

43 I have pointed out that *Zoom v Broadcast* stands for the proposition that an application to challenge service *ex juris*, coupled with a fall-back application to stay on the grounds of *forum non conveniens*, does not constitute submission to a Singapore court. I had earlier established that I must apply Singapore rules to the question of a foreign court's jurisdiction, and the foreign court's rules as to when it will be taken to have jurisdiction are thereby irrelevant (see [31] above). As a matter of principle, it is difficult to justify there being two sets of rules, depending on whether a Singapore or foreign court is involved. This was the approach taken in *Re Dulles*, where it was assumed that the same principles (vis-à-vis submission) would apply regardless of whether the jurisdiction of an English court or a foreign court was at stake — otherwise there would not have been a need for the court to say that *Harris v Taylor* "is no authority on what constitutes a submission to jurisdiction generally". I thereby also hold that I am bound to apply *Zoom v Broadcast* to the question of whether a defendant has submitted to the jurisdiction of a foreign court.

44 On the basis of both principle and authority, I follow *Re Dulle* and *Zoom v Broadcast*, and decline to follow *Harris v Taylor* and *Henry v Geoprosco*. William Jacks have, in this case, applied to the High Court of New Zealand to set aside service *ex juris* and in the alternative, for a stay on *forum non conveniens* grounds, and have done nothing else that could be construed to be a step that would only be useful or necessary if any objection to jurisdiction had been waived. William Jacks did not submit to the jurisdiction of the New Zealand High Court, which is therefore not a court of competent jurisdiction. This is sufficient to deal with the estoppel issue, but I shall analyse the other elements for completeness.

Was the New Zealand High Court judgment final and conclusive on the merits?

45 There are two aspects to this: whether the judgment was final and conclusive, and whether this was on the merits.

46 To recap, the New Zealand High Court judgment was made by an Associate Judge (which is equivalent to an Assistant Registrar in Singapore), and is currently undergoing review by the New Zealand High Court. William Jacks argued that the New Zealand High Court judgment is not final and conclusive, because under r 2.3(4) of the New Zealand High Court Rules (Schedule 2 to the Judicature Act 1908 (Act No 89 of 1908)), a review of an Associate Judge's decision "proceeds as a rehearing". Nelson Honey argued that the mere fact that a decision is appealable does not make it any less final and conclusive.

47 I agree with Nelson Honey. *Manharlal Trikamdas Mody and another v Sumikin Bussan International (HK) Ltd* [2014] 3 SLR 1161 states that a judgment is final and conclusive if it cannot be varied, re-opened or set aside; and the fact that the judgment has been appealed against does not necessarily mean that it is not final (at [141]).

48 With respect to whether the New Zealand judgment was one on the merits, the leading case is the House of Lords decision of *D S V Silo- Und Verwaltungsgesellschaft Mbh v Owners of the Sennar and 13 Other Ships* [1985] 1 WLR 490. The plaintiff's predecessor in title brought an action in tort against the defendants in the Dutch courts, with the Dutch Court of Appeal declining jurisdiction on the basis that the bill of lading contained an exclusive jurisdiction clause for Khartoum or Port Sudan. The plaintiff then brought an action against the (same) defendants in England. The defendants successfully argued that the plaintiff was estopped.

49 The plaintiff argued that the decision of the Dutch Court of Appeal was merely procedural in nature because it consisted only of a decision that there was no jurisdiction to entertain and adjudicate upon the plaintiff's claim, and did not pronounce in any way on the underlying substantive claim. Lord Brandon of Oakbrook disagreed (at 499F–G):

> In my opinion, this argument is based on a misconception with regard to the meaning of the expression "on the merits" as used in the context of the doctrine of issue estoppel. Looking at the matter negatively a decision on procedure alone is not a decision on the merits. Looking at the matter positively a decision on the merits is a decision which establishes certain facts as proved or not in dispute; states what are the relevant principles of law applicable to such facts; and expresses a conclusion with regard to the effect of applying those principles to the factual situation concerned.

Lord Brandon concluded that the decision of the Dutch Court of Appeal that the Dutch courts lacked jurisdiction "was a decision on the merits for the purposes of the application of the doctrine of issue estoppel" (at 499H).

50 As can be seen, "a decision on the merits" has not been construed narrowly to only refer to substantive claims, and has been construed broadly to include pronouncements on jurisdiction. I agree. The whole point of the doctrine of *issue* estoppel is to prevent the re-litigation of issues that have already been heard and determined by a foreign court; it would be incongruous to require the issue to be one that pertains to the underlying substantive claim.

51 I therefore hold that the New Zealand High Court judgment is final and conclusive on the merits.

Was there identity of subject matter?

52 Lord Wilberforce, in *Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2)* [1967] 1 AC 853 ("*Carl Zeiss No 2*"), said that in order to ascertain the precise issue decided, the court's judgment, pleadings and evidence would have to be examined (at 967C and E). I therefore turn to William Jack's application and the New Zealand judgment.

53 As has already been mentioned, William Jacks applied to dismiss proceedings, and in the alternative stay proceedings on the ground of *forum non conveniens*. The requirements to be met with respect to dismissal are roughly equivalent to those required under O 11 in Singapore. These are:

(a) There is a good arguable case that the claim falls wholly within one or more paragraphs of r 6.27 of the High Court Rules (these are equivalent to the heads of jurisdiction listed in O 11 in the Singapore Rules of Court);

(b) There is a serious issue to be tried on the merits;

(c) New Zealand is the appropriate forum for trial; and

(d) Whether there are other relevant circumstances which support an assumption of jurisdiction.

54 The New Zealand Judgment, in assuming long-arm jurisdiction, held that:

(a) There is a good arguable case that the contract was to be wholly or in part performed in New Zealand (at [16]);

(b) There is a serious issue to be tried on the merits (at [19]);

(c) New Zealand is the appropriate jurisdiction (applying *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460 ("*Spiliada*")) (at [64]) because:

(i) There was no exclusive distribution agreement in force, and therefore no agreement that the Singapore courts have exclusive jurisdiction (at [43]);

(ii) The convenience, expense and availability of witnesses is finely balanced but lies slightly in favour of Nelson Honey (at [50]);

(iii) There is a good arguable case that the contract was made in New Zealand (at [63]).

55 These are the equivalent requirements under Singapore law for the assumption of long-arm jurisdiction:

(a) There is a good arguable case that the case falls within one of the limbs of O 11 r 1 of the Rules of Court (*Bradley Lomas Electrolok Ltd v Colt Ventilation East Asia Pte Ltd* [1999] 3 SLR(R) 1156 at [19]);

(b) There is a serious question to be tried on the merits (*ibid*);

(c) Singapore is the more or most appropriate forum for the trial of the action (*Oriental Insurance Co Ltd v Bhavani Stores Pte Ltd* [1997] 3 SLR(R) 363 at [20] and [23]).

56 There are therefore two possible issue estoppels:

(a) Whether the most appropriate forum is New Zealand or Singapore;

(b) Whether the parties had agreed to the exclusive jurisdiction of the Singapore courts.

57 There is, surprisingly, no case authority on the exact point as to whether, in the context of the assumption of long-arm jurisdiction, a court's determination as to which forum is appropriate can give rise to an estoppel in the court of another jurisdiction. What is clear is that no issue estoppel would arise if, despite the using the same label "*forum conveniens*", Singapore and New Zealand apply different tests (see *eg*, the Australian test in *Voth v Manidra Flour Mills Proprietary Limited* (1988) 79 ALR 9), where the enquiry is into whether the forum is clearly inappropriate). But *Spiliada* principles are applicable in both Singapore (see *eg*, *Zoom v Broadcast*) and New Zealand (the New Zealand Judgment cited *Wing Hung Printing Co Ltd v Satio Offshore Pty Ltd* [2011] 1 NZLR 754). This raises the spectre of identity of subject-matter, and merits further analysis.

58 The closest authority on point is the Nova Scotia Court of Appeal decision of *Sydney Steel Corp*

v Canadian National Railway Co (1998) 164 DLR (4th) 747 ("*Sydney Steel*"), where the defendant attempted to stay proceedings on the basis of, *inter alia*, *forum non conveniens*. The plaintiff had, in earlier proceedings in Quebec, unsuccessfully applied for a stay on *forum non conveniens* grounds. The defendant attempted to argue that the plaintiff was bound by issue estoppel. The court declined to find an estoppel (at [12]):

> I have a serious question in my mind whether issue estoppel applies at all when courts in different jurisdictions are applying a balancing test such as this for the purpose of determining their own exercise of jurisdiction.

59 In much the same vein, *Halsbury's Laws of Singapore* vol 6(2) (LexisNexis, 2013 Reissue), in the context of *forum non conveniens* opines that (at para 75.163):

> (a) The issue whether a foreign court should hear the case is not the same issue as whether the court of the forum should hear the case;
>
> (b) A court only decides for itself whether it should hear the case, and has no power to decide where the case should be heard;
>
> (c) A decision of a foreign court that one forum is clearly more appropriate than another is arguably a question of procedure in the conflicts of law sense.

60 I hold that a decision of a foreign court as to whether that foreign court is the appropriate forum, in the context of an assumption of long-arm jurisdiction, can never give rise to an issue estoppel. This is because there can never be identity of subject matter. Under common law rules of private international law, the question of the assumption of long-arm jurisdiction is unilateral, in the sense that a court only decides for *itself* whether it is to assume jurisdiction. The issue of whether New Zealand is the appropriate forum is different from the issue of whether Singapore is the appropriate forum. It may be argued that this is a semantic distinction that ought not to be drawn, because New Zealand being the appropriate forum would implicitly and logically exclude Singapore being the appropriate forum. But this is precisely the sort of semantic distinction that must be drawn in analysing whether an estoppel arises. *Carl Zeiss No 2* exhorted the need for caution unless "there appears to have been a full contestation and a clear decision on the issue" (at 967E). There was full contestation in New Zealand over whether New Zealand was appropriate, and certain arguments were deployed in that respect, but it cannot be safely assumed that arguments that are the exact converse would be deployed in Singapore over whether Singapore is appropriate.

61 In any event any explicit pronouncement by a foreign court on the appropriateness of Singapore would not be binding on a Singapore court. A common law court does not pronounce on whether a foreign court has, under foreign rules, properly assumed jurisdiction (*Pemberton v Hughes* at 790). That the common law rules are unilateral in outlook is unsurprising, and indeed, is mandated by Westphalian sovereignty: each state is sovereign over its territory to the exclusion of all external powers, and this is inclusive of the sovereign power to adjudicate on disputes in courts of law (but see J A Caporaso, "Changes in the Westphalian Order: Territory, Public Authority, and Sovereignty" (2000) 2(2) international Studies Review No 2). If a court were to adjudicate on whether a foreign court, under foreign rules, is to assume jurisdiction or has properly assumed jurisdiction, this would constitute jurisdictional overreach that would not be entitled to recognition outside of that court. The most obvious exception to this is where there has been a deliberate ceding of sovereignty (see *eg*, Brussels I Regulation (Council Regulation (EC) 44/2001 (OJ 2001 L12, p 1)). This has nothing to do with a balancing test being employed (*Sydney Steel*) nor with jurisdictional issues being procedural (which is question-begging; in any case the procedure-substance dichotomy has been questioned in

Goh Suan Hee v Teo Cher Teck [2010] 1 SLR 367 at [21]). The Singapore High Court is the sole arbiter of its own jurisdiction.

62 The position is *a fortiori* where *Spiliada* principles are being applied to determine if proceedings should be stayed. This is, to reiterate, distinct from the consideration of *Spiliada* principles vis-à-vis the question of whether long-arm jurisdiction should be assumed. In an application for a stay, a court determines whether there is another *clearly more* appropriate forum. This is a comparative inquiry — due to the way the test is phrased, it would not be logically inconsistent for multiple courts to come to the conclusion that there is no other clearly more appropriate forum.

63 None of the foregoing applies to the second estoppel, namely, whether the parties had agreed to an exclusive jurisdiction clause. But this case does not pertain to the straightforward issue of whether a clause has been incorporated into an (agreed to be) extant contract, in which case the proper law of the contract would govern incorporation. If the very existence of the contract is in doubt, either the *lex fori* or the putative proper law of the contract would govern the question of existence (see [68] below). The New Zealand Judgment did not touch on these choice of law issues: it appears that parties did not take the point, and the court simply applied New Zealand law to the question of existence when Singapore law could potentially have applied. A Singapore court, applying either the *lex fori* or the putative proper law, would apply Singapore law to the same question. Given that different laws shall be applied I am doubtful whether there can said to be identity of subject matter. Furthermore, as there was no contestation over whether the parties had, under Singapore law, agreed to the exclusive jurisdiction of the Singapore courts, this calls for caution. I therefore also hold that there is no identity of subject matter, in that the New Zealand court's determination as to whether, under New Zealand law, the parties had agreed to the exclusive jurisdiction of the Singapore courts is different from the issue of whether, under Singapore law, the parties had so agreed.

64 In summary, an issue estoppel does not arise:

(a) The New Zealand High Court is not a court of competent jurisdiction because William Jacks had not submitted to its jurisdiction;

(b) There is no identity of subject matter:

(i) The issue of whether New Zealand is the natural forum is different from the issue of whether Singapore is the natural forum, and in any case any foreign pronouncements on the jurisdiction of the Singapore courts under Singapore law can never be binding due to Westphalian sovereignty;

(ii) The issue of whether the parties had, under New Zealand law, agreed to the exclusive jurisdiction of the Singapore courts is different from the issue of whether the parties had agreed to the same under Singapore law.

(c) Nonetheless, the New Zealand High Court judgment is final and conclusive on the merits.

Did the parties agree to the exclusive jurisdiction of the Singapore courts?

65 William Jacks initially pleaded that the sale and purchase of the honey was done pursuant to a purchase order dated 18 February 2013 ("the 18 February purchase order"); there was no mention of an exclusive jurisdiction clause in favour of Singapore. The hearing before me was the first time that William Jacks argued that the parties had agreed to an exclusive jurisdiction clause, and it is settled

law that William Jacks must establish this on the standard of a good arguable case (see *eg*, *Canada Trust Co and others v Stolzenberg* [1998] 1 WLR 547 at 555C).

66 William Jacks, through an affidavit of its regional director, Low Kean Jin, said that some of William Jacks' representatives, including himself, met with Terry Bone, the General Manager of Nelson Honey at Park Royal Hotel in Singapore to discuss a potential distributorship agreement between the parties. Minutes of the meeting reflected that "any dispute to be in accordance to Singapore law". Three versions of a draft distributorship agreement were circulated between the parties, and in the second and third versions, there was a clause 5.2 stating that parties "consent to the exclusive jurisdiction of Singapore courts for any dispute arising out of the Agreement" ("the EJD"). The draft distributorship agreement was never signed. Nelson Honey, through an affidavit of Terry Bone, denies that there ever was such an agreement because the draft agreement was never executed and both sides needed the approval of higher-ups before any such agreement could be executed. In response, William Jacks relied on the legal arguments that the EJD had been incorporated into the initial PO, that the EJD constituted a separate oral agreement, and that Nelson Honey is estopped from denying the existence of the EJD. Essentially the parties differ not over fact but over the legal effects of what had transpired.

67 A preliminary issue must first be explored: which law applies to the question of whether an agreement has been concluded? I note that the Sale of Goods (United Nations Convention) Act (Cap 283A, 2013 Rev Ed) does not apply, because Art 1 of the United Nations Convention on Contracts for the International Sale of Goods ("CISG") states that the CISG applies to the *sale* of *goods*. Exclusive distributorship agreements which govern the framework for the future supply of goods do not fall within the CISG (J O Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention* (Kluwer Law International, 3rd Ed, 1999) at para 56.2). This matter therefore falls to be resolved by the common law rules on conflict of laws.

68 There are two main competing views. The first is that the *lex fori* applies by default: "[t]here is no system other than the municipal law to which reference can be made for the purposes of answering the preliminary questions whether a contract has been made and its terms" (*Oceanic Sun Line Special Shipping Co v Fay* (1988) 165 CLR 197 at 225). The second is that the putative proper law, that is, the law that would govern the contract on the assumption that it exists, applies (*The "Heidberg"*[1994] 2 Lloyd's Rep 287; *CIMB Bank Bhd v Dresdner Kleinwort Ltd* [2008] 4 SLR(R) 543). Both views have their own problems. If the *lex fori* were to apply, the accident of the forum would be decisive and this would be contrary to the *raison d'etre* of the conflict of laws, which is the provision of objective criteria to prevent the venue of the dispute from playing an unduly decisive role. If the putative proper law were to apply, this would presuppose that a contract has been concluded; this is circular, and would be unfair to the party that is contending that an agreement has not been concluded. I do not need to resolve this issue because, on the facts of this case, Singapore law is both the *lex fori* and the putative proper law of the contract.

69 I turn to the language of the third draft distributorship agreement. It is titled "exclusive distribution agreement" and the preamble reads:

> Upon signing of this Agreement, the Supplier [*ie*, Nelson Honey] appoints William Jacks & Co (Singapore) Pte. Ltd as its exclusive distributor for the territory of Singapore, Malaysia & Brunei for all Nelson Honey range of products …

These are the obligations imposed on William Jacks *qua* distributor:

> 2.1 The DISTRIBUTOR shall diligently promote the sale of the PRODUCTS in their retail outlets

as well as any other outlets that may become franchisees or resellers of the DISTRIBUTOR.

2.2 The DISTRIBUTOR will also continue to promote the sale of the PRODUCTS to different players within the health food wholesale and retail industry and will continue to sell these products through them or through their outlets should the need arise.

2.3 The DISTRIBUTOR shall assume responsibility for determining whether PRODUCTS supplied by SUPPLIER comply with applicable laws of Singapore, Brunei and Malaysia including:

a. Labelling requirements

b. Product safety standards

c. Registration and approval

2.4 The DISTRIBUTOR shall advise SUPPLIER in what respect the PRODUCT fails to comply.

The contact was for a stipulated duration:

1.1 This agreement shall come into force and remain binding from the date of first order, December 1st, 2010 till December 1st, 2012 and shall be subject to annual review thereafter. Upon mutual acceptance, this agreement shall be renewed unless terminated as provided for hereunder.

1.2 Either party may terminate this Agreement after giving six (6) months notice in writing to the other party that is in default or in breach of this Agreement. However, within the time frame of these 6 months, should the default or breach be rectified or if the default or breach can be rectified in a reasonable period of time agreeable to both parties, no termination of this Agreement will take place until all efforts are discontinued.

70 My findings are twofold: the parties did not agree to an exclusive distribution agreement; and even if they had so agreed, the exclusive distribution agreement does not apply to the purchase of honey pursuant to the 18 February purchase order.

71 The parties did not agree to an exclusive distribution agreement. Firstly, there is evidence that the parties could not sign the agreement because they needed to get approval from their respective head offices. In particular, one Yoke Ching from William Jacks, in an email to Terry Bone dated 7 September 2010, expressly wrote that:

I am afraid the agreement could not be signed off before you go as we need to send to our HQ for vetting before signing. I will first review and will get back to you should there be anything that is left out.

It is true that the lack of a signature is not *per se* determinative, and that a court should look at the entire course of negotiations to determine if a contract has been entered into (*Lim Koon Park and another v Yap Jin Meng Bryan and another* [2013] 4 SLR 150 at [65]–[66] and [75]). But where documents have deliberately been left unsigned because of a want of authority, this *ex hypothesi* rules out *consensus ad idem* at the close of negotiations.

72 Secondly, it cannot be said that the parties had entered into the exclusive distribution agreement through conduct (see *eg*, *Brogden v Metropolitan Railway Co* (1877) 2 App Cas 666). The

conduct that William Jacks relies on is inconsistent with the exclusive distribution agreement in four ways. First, the exclusive *distributorship* agreement contemplated William Jacks promoting Nelson Honey-branded products. The honey supplied instead bore William Jack's own label and as a matter of logic this rules out the promotion of Nelson Honey-branded products. Second, the exclusive distribution agreement covered Singapore, Malaysia and Brunei. The honey supplied was instead shipped from New Zealand to China. Third, the exclusive distributorship agreement provided for the honey to be supplied on an ex-factory basis. The honey was instead supplied on an ex-warehouse basis. Fourth, the exclusive distributorship agreement was only to remain binding between December 2010 and December 2012, after which there was to be an annual review. The honey was supplied pursuant to the 18 February 2013 and there is no evidence that an annual review ever took place. Due to these inconsistencies, even assuming *arguendo* that the parties had entered into the exclusive distribution agreement, the honey supplied pursuant to the 18 February purchase order would constitute a separate transaction that is not governed by the exclusive distribution agreement.

73 Indeed, Nelson Honey exhibited an email thread whereby William Jacks attempted, but failed, to procure exclusive distributorship rights for Nelson Honey products in China because Nelson Honey had already granted exclusive distributorship rights for Hong Kong, Macau and China to another party. Terry Bone wrote to one Allen Yeo of William Jacks on 28 July 2011:

> … This leaves supplying honey to you under your own label. Is this of interest to Natures Farm?

This is consistent with my two findings, *viz.*, that the parties did not agree to an exclusive distribution agreement, and even if they had agreed, the exclusive distribution agreement does not govern the purchase of honey pursuant to the 18 February purchase order.

74 William Jacks has therefore failed to show a good arguable case that the parties had agreed to the exclusive jurisdiction of the Singapore courts. There is therefore no necessity for William Jacks to amend its statement of claim for the purposes of this summons.

Is Singapore a more appropriate forum than New Zealand?

75 I agree with the approach promulgated by the Court of Appeal in *Zoom v Broadcast* (at [80]): where a defendant applies to set aside service *ex juris* and, in the alternative, a stay of proceedings on the grounds of *forum non conveniens*, a Singapore court will collapse the issue of the proper forum into one question considered in the round. In applying *Spiliada* principles, it is incumbent on a court to identify, with precision, the issues that will arise at trial (*Limit (No 3) Ltd v PDV Insurance Co Ltd* [2005] 2 All ER (Comm) 347 at [72]).

76 I am therefore recounting the facts with more detail. Nelson Honey harvested, processed and packed manuka honey from over 4,000 beehives spread over New Zealand in a factory in Motupiko, New Zealand. The 18 February purchase order stated that the sale was to be ex-warehouse; the honey was delivered in two shipments to a warehouse in Auckland belonging to a freight forwarder. William Jacks then on-sold and delivered the honey to buyers in China, whereupon complaints were made about the honey. William Jacks is not currently in possession of the honey because it has been wrongfully seized by a third party, and proceedings are currently afoot to recover the same. Nonetheless, Nelson Honey retains a quantity of honey from every batch of honey produced.

77 Nelson Honey, in New Zealand proceedings, is suing for the unpaid purchase price. William Jacks, in Singapore proceedings, is alleging that the honey delivered in the first shipment was not of satisfactory quality, in that it contained bubbles and black spots, had colour variations, appeared watery and had a froth-like appearance, and the UMF activity levels of the honey being below

specifications. The honey delivered in the second shipment was also not of satisfactory quality, in that it had a froth-like appearance and missing batch numbers and expiry dates. It is alleged that Nelson Honey offered to remedy this by providing hand-held stamps, but William Jacks rejected this because hand-stamping would have violated food regulations in China. William Jacks has also pleaded some particulars of loss (while also seeking damages to be assessed):

Particulars	**Amount**
Claim by Shanghai Yi Jia Trading Pte Ltd for compensation for defective goods in respect of the first shipment	RMB 2,112,270.00
Claim by Shanghai City Huan Qi e-commerce Pte Ltd for compensation for non-delivery of goods and expenses in respect of the second shipment	RMB 1,982,891.25
Transport costs for both shipments	S$ 80,829.56
Loss of profit	S$ 272,404.14
Total	S$ 1,234,733.99

78 The disputes are likely to centre around *inter alia*:

(a) Whether the honey is of unsatisfactory quality because of bubbles, black spots and froth;

(b) What are the UMF levels of the honey in the first shipment, and whether the honey is of unsatisfactory quality because of these levels being below specification;

(c) Whether the honey is not sellable in China because of missing batch numbers and expiry dates;

(d) Was the loss of profit too remote? What is the quantum of the profit lost?

79 The factors that I am to take into account under the first limb of *Spiliada* "include not only factors affecting convenience or expense (such as the availability of witnesses) but also other factors such as the law governing the transaction and the places where the parties respectively reside or carry on business" (*CIMB Bank Bhd v Dresdner Kleinwort Ltd* [2008] 4 SLR(R) 543 at [26]).

80 I note that the parties had spilt much ink over whether the contract was made in New Zealand or Singapore. I deal with this in the context of the O 11 heads of jurisdiction later, but for the purpose of *forum non conveniens*, this issue is a red herring. The evidence discloses that the parties had dealt with and communicated with each other over email, with offers and counter-offers being made. Where a contract is made via email after a chain of offers and counter-offers, the location where the contract is made is an artificial construct that is determined by happenstance. I express no view on the actual facts — hypothetically, it may be the case that the contract was made in New Zealand because acceptance of an offer was received in New Zealand (see Art 18(2) of the CISG), but it could easily have been the case that the offer was received in Singapore instead, depending on who had the last word. This factor, on the facts of this case, ought not to have any bearing on whether Singapore or New Zealand is the proper forum.

81 I first analyse the law that is applicable to the contract. Singapore choice of law rules are not engaged because Singapore and New Zealand have both ratified the CISG, and the 18 February

purchase order pertained to the sale of goods. Thus a Singapore court will apply the CISG via the Sale of Goods (United Nations Convention) Act (Cap 283A, 2013 Rev Ed). New Zealand likewise applies the CISG via the Sale of Goods (United Nations Convention) Act 1994 (Act No 60 of 1994). Because Singapore and New Zealand would both apply the same body of uniform law, this is a neutral factor.

82 I next analyse the personal connections of the parties. Nelson Honey is a New Zealand company and William Jacks is a Singapore company. Whether the case is tried in New Zealand or Singapore, representatives of one company would have to fly to a foreign country, and solicitors would have to be instructed in a foreign country. This is therefore a neutral factor.

83 I turn to the location of the evidence with respect to liability. The honey that is the subject of these proceedings has been shipped to China, albeit wrongfully seized and no longer in the possession of William Jacks, but Nelson Honey has retained samples. In any event the substantial dispute is not the physical state of the honey *per se*, but whether the honey was of satisfactory quality. This is an issue that will revolve around custom and expert evidence (particularly with respect to UMF activity levels). William Jacks has already gone to the expense of engaging a Chinese laboratory and a Singapore laboratory to test the honey; it is likely that representatives from the Chinese laboratory will have to fly to either Singapore or New Zealand. Nelson Honey is likely to engage experts from a New Zealand laboratory. Both sides will also likely adduce evidence of custom from others in the manuka honey trade, and this will potentially include Chinese witnesses who will give evidence on Chinese food regulations. Witnesses from one side or the other would have to fly to either Singapore or New Zealand to be cross-examined.

84 It is true that Nelson Honey's processing operations are in New Zealand, and Nelson Honey alleges that site visits are required. But I am unable to see how site visits would be relevant or useful. The issue at stake is whether the supplied honey is defective, and not whether Nelson Honey's processes are apt to lead to defective honey (see *eg*, *Koh Wee Meng v Trans Eurokars Pte Ltd* [2014] 3 SLR 663, where in respect of an allegedly defective automobile no visits were made to the factory where the automobile was manufactured).

85 But the location of the evidence with respect to damages is not evenly balanced. The loss of profit suffered by William Jacks must be quantified, and it is incumbent on William Jacks to give evidence on the exact commercial arrangements between itself and its Chinese buyers. This evidence will be even more complex if William Jacks also claims for loss of profit from the loss of repeat orders (see *eg*, *GKN Centrax Gears Ltd v Matbro Ltd* [1976] 2 Lloyd's Rep 555). Furthermore, Art 77 of the CISG states that a party must take reasonable measures to mitigate loss, including loss of profit. This evidence will centre around the reasonable measures which a Singapore company could have taken (or which William Jacks did take) to mitigate loss, including the purchase of substitutes. Some evidence from the Chinese buyers will need to be adduced, but a substantial amount of evidence will be coming from William Jacks. Therefore, with respect to the location of witnesses and evidence for the purposes of assessing damages, Singapore is by far the more convenient forum.

86 I pause to note that it could be argued that proceedings could be bifurcated, with Singapore only being the appropriate forum for the assessment of damages and not the trial on substantive liability. This argument is untenable on two grounds: first, the Singapore courts cannot control how proceedings unfold in New Zealand and it cannot be assumed that the New Zealand courts will be amenable to bifurcation; second and in any event, it cannot be said to be convenient, both in terms of time and cost, for different courts to hear different parts of a dispute (A Briggs and P Rees, *Civil Jurisdiction and Judgments* (Informa, 5th Ed, 2009) at para 4.23).

87 Finally I turn to the fact that there are ongoing proceedings in New Zealand. Implicit in my analysis thus far is that the doctrine of forum election does not apply because this is not a common plaintiff situation (*Virsagi Management (S) Pte Ltd v Welltech Construction Pte Ltd and another appeal* [2013] 4 SLR 1097 ("*Virsagi*") at [30]–[37]). This is a reversed parties situation where the fact of parallel proceedings is something that is taken into account in the application of *Spiliada* principles (*Virsagi* at [38]). The weight to be given hinges on (*Virsagi* at [39], citing *Halsbury's Laws of Singapore* vol 6(2) (LexisNexis, 2009) at para 75.094):

(a) The degree to which the respective proceedings have advanced;

(b) The degree of overlap of issues and parties;

(c) The risk of competing judgments.

88 There is a large, if not complete overlap of issues and parties. In New Zealand, Nelson Honey is suing for the contract price, and William Jacks will be able to raise non-fitness as a defence and counterclaim. The situation is exactly the reverse in Singapore. However, both Singapore and New Zealand proceedings are both only at the jurisdictional stage, with William Jacks challenging jurisdiction in New Zealand and Nelson Honey challenging jurisdiction in Singapore. There has thus far been no duplication of effort or wastage of resources with respect to substantive liability; as things currently stand, the fact of parallel proceedings does not hold much weight.

89 Nonetheless, if proceedings in New Zealand proceed beyond the jurisdictional stage, this would constitute a factor that would outweigh the factors analysed earlier; the inconvenience and expense of trial in two jurisdictions would surely outweigh the convenience of proceedings taking place in Singapore because of the location of evidence and witnesses.

90 For completeness, I note that neither party had relied on the second limb of *Spiliada*, and correctly so because the second limb is not relevant to the facts of this case.

91 Therefore, I conclude that Singapore is the more appropriate forum if and only if proceedings in New Zealand do not progress beyond the jurisdictional stage. This will be the case if William Jacks undertakes to abandon proceedings in New Zealand (and allow default judgment to be entered against it in default of appearance) should it fail to dismiss or stay proceedings in New Zealand. I shall hear the parties on this.

Should service *ex juris* of the writ on Nelson Honey be set aside?

92 I turn to the other requirements the assumption of long-arm jurisdiction, which I reproduce for convenience:

(a) There is a good arguable case that the case falls within one of the limbs of O 11 r 1 of the Rules of Court (*Bradley Lomas Electrolok Ltd v Colt Ventilation East Asia Pte Ltd* [1999] 3 SLR(R) 1156 at [19]);

(b) There is a serious question to be tried on the merits (*ibid*);

93 William Jacks is relying on O 11 rr 1(*d*)(i), 1(*f*)(ii) and 1(*p*). O 11 r 1(*d*)(i) is sufficient to dispose of the case, and reads:

(*d*) the claim is brought to enforce, rescind, dissolve, annul or otherwise affect a contract, or

to recover damages or obtain other relief in respect of the breach of a contract, being (in either case) a contract which —

(i) was made in Singapore, or was made as a result of an essential step being taken in Singapore;

94 O 11 r 1(*d*)(i) is broader than Ord 11 r 1(d)(i) of the Rules of Supreme Court (UK), which does not have the additional language of a contract being made as a result of an essential step being taken in the jurisdiction. English cases are therefore unhelpful. There are also no known Singapore cases which have pronounced on the ambit of O 11 r 1(*d*)(i).

95 The addition of "an essential step being taken in Singapore" obviates the need for a court to determine precisely where a contract was made, so long as an essential step was taken in Singapore. This is clearly satisfied in this case. William Jacks, a Singapore-registered company, conducted negotiations by email from its Singapore office. The parties differ over who exactly sent the last offer and who consequently accepted, but I do not need to come to a landing on this. Either William Jacks accepted an offer from Nelson Honey, or Nelson Honey accepted an offer from William Jacks, and either way, an essential step was taken by William Jacks from its Singapore office.

96 It is also obvious that there is at least a serious question to be tried on the merits. I have listed some of the issues arising at [78] above. By way of illustration, the issue of whether the manuka honey had satisfactory UMF levels is a serious issue that must be resolved at trial through expert evidence.

97 I have already established that Singapore is, subject to certain conditions, more appropriate than New Zealand. Therefore I decline to set aside service *ex juris* of the writ and statement of claim.

Should proceedings be stayed on the basis of *forum non conveniens*?

98 Having concluded that Singapore is a more appropriate forum than New Zealand for the purposes of service *ex juris* (provided that William Jacks undertakes to abandon New Zealand proceedings), I too hold that New Zealand is not a more appropriate forum than Singapore: "it is in fact wholly unnecessary and likely counter-productive for a foreign defendant… to make both a jurisdictional challenge and a stay application based on the same material" (*Zoom v Broadcast* at [79]). Therefore I decline to stay proceedings on the basis of *forum non conveniens*.

Conclusion

99 Summons No 2064 of 2015 is therefore dismissed, but on the condition that William Jacks provides an undertaking that it shall abandon proceedings in New Zealand should it fail to dismiss or stay proceedings in New Zealand. If this undertaking is not provided, Summons No 2064 of 2015 is allowed, in that service *ex juris* of the writ of summons and statement of claim shall be set aside.

100 I shall hear the parties on the undertaking and costs.