Broadcast Solutions Pte Ltd *v* Zoom Communications Ltd
[2013] SGHC 273

Case Number	: Suit No 119 of 2013 (Registrar's Appeal No 181 of 2013) Summons No 3444 of 2013
Decision Date	: 18 December 2013
Tribunal/Court	: High Court
Coram	: Woo Bih Li J
Counsel Name(s)	: Philip Fong and Kirsten Teo (Harry Elias Partnership LLP) for the plaintiff; Moiz Haider Sithawalla and Meilyna Lyn Poh (Tan Rajah & Cheah) for the defendant.
Parties	: Broadcast Solutions Pte Ltd — Zoom Communications Ltd

Conflict of Laws

18 December 2013

Woo Bih Li J:

Introduction

1 The defendant, Zoom Communications Ltd ("Zoom"), applied by way of Summons 1975 of 2013 for two reliefs:

(a) to set aside an order of court dated 14 February 2013 ("the Order") which granted the plaintiff, Broadcast Solutions Pte Ltd ("Broadcast"), leave to serve the writ of summons (and the statement of claim therein dated 7 February 2013 on Zoom in India; or

(b) to stay all further proceedings pursuant to O 12 r 7(2) of the Rules of Court (Cap 322, R5, 2006 Rev Ed) ("Rules of Court").

(a) I will refer to that application as "the Setting Aside and Stay Application".

2 Zoom's application was heard on 27 May 2013 by an Assistant Registrar and dismissed. Zoom then filed an appeal. I heard the appeal on 27 June 2013 and dismissed it. Zoom then sought leave to appeal to the Court of Appeal against my decision. On 30 August 2013, I granted Zoom leave to appeal. I set out below my reasons for my substantive decision on 27 June 2013 and also for granting leave to appeal.

Background

3 Broadcast is a company incorporated under the laws of Singapore and Zoom is a company incorporated under the laws of India.

4 Broadcast said that Zoom is a broadcast service provider in a similar business to Broadcast. Zoom offers services such as the rental of broadcast equipment, hire of broadcast crew and outsourcing of contracts it enters into with organisers of sports events in India. Broadcast and Zoom would from time to time enter into agreements and ask each other for assistance in the hiring of equipment and/or crew to fulfil contractual obligations owed to other parties.

5 In the present suit, Broadcast is claiming three sums of money said to be owing by Zoom to Broadcast in respect of three hire purchase agreements. The three sums are US$500,000, EUR 216,000 and S$35,000. Broadcast's writ of summons was filed on 7 February 2013.

6 On 14 February 2013, Broadcast obtained the Order on an *ex parte* basis and consequently effected service of the writ of summons on Zoom in India on 22 or 25 February 2013. Consequently, Zoom filed a memorandum of appearance on 18 March 2013. According to Broadcast, Zoom was required, under the Rules of Court, to file its defence by 1 April 2013. Zoom did not do so. On 2 April 2013, Zoom's solicitors asked Broadcast's solicitors for an extension of time till 8 April 2013 to take "full instructions". This request was made without prejudice to Zoom's right as to whether service of the writ was properly effected. Broadcast's solicitors replied on the same day to reject the request and to give 48 hours' notice to file and serve the defence by 5.30pm of 4 April 2013.

7 On 4 April 2013, Zoom filed an application by way of Summons 1787 of 2013 for various reliefs including a prayer for an order that the time limited for the service of the defence be extended to one week from the date of the order to be made on the application ("the 1st EOT Defence Application").

8 On 8 April 2013, Zoom obtained an order on the 1st EOT Defence Application which granted it an extension of time to file its defence. Therefore, Zoom was supposed to file its defence by 15 April 2013. Zoom did not do so. Instead, Zoom filed the Setting Aside and Stay Application on 15 April 2013.

9 On 27 May 2013, an Assistant Registrar dismissed the Setting Aside and Stay Application. Zoom filed a notice of appeal on 5 June 2013. Thereafter, Zoom filed Summons 2928 of 2013 for a further extension of time to file and serve its defence within seven days after the decision on its appeal was rendered, should its appeal be unsuccessful. This was its second application for an extension of time to file and serve its defence. On 17 June 2013, Zoom obtained an order on its second application.

10 I heard Zoom's appeal on 27 June 2013 and dismissed its appeal.

The court's reasons

11 As regards Zoom's first prayer to set aside the Order, Zoom relied on material non-disclosures by Broadcast when Broadcast obtained the Order. However, there was one hurdle facing Zoom. Broadcast alleged that as Zoom had submitted to the jurisdiction of the Singapore court it was too late for Zoom to apply to set aside the Order. Zoom accepted the proposition that if it had submitted to the jurisdiction of the Singapore court, then it was precluded from applying to set aside the Order. However, Zoom disputed that it had submitted to the jurisdiction of the Singapore court.

12 Broadcast submitted that each of the two steps taken by Zoom constituted a submission by Zoom to the jurisdiction of the Singapore court:

(a) The first step was Zoom's 1st EOT Defence Application.

(b) The second step was the Setting Aside and Stay Application.

13 As regards Zoom's 1st EOT Defence Application, each side referred to the decision of the Court of Appeal in *Carona Holdings Pte Ltd and others v Go Go Delicacy Pte Ltd* [2008] 4 SLR(R) 460 ("*Carona*") to support its position.

14 In *Carona*, a question arose as to whether an application for an extension of time to file a

defence constituted a "step in the proceedings" for the purpose of s 6(1) of the Arbitration Act (Cap 10, 2002 Rev Ed). The Court of Appeal decided that if the purpose of asking for an extension of time to file a defence is not *bona fide* for the purpose of applying for a stay of proceedings pending arbitration, the court may either refuse an application for extension of time or dismiss an application for stay of proceedings.

15 In the case before me, Broadcast submitted that the 1st EOT Defence Application was not *bona fide* for the purpose of applying for a stay of proceedings. This was because Zoom's supporting affidavit for that application only mentioned two reasons. The first was that Zoom was obtaining legal advice in India on the service of the writ. The second was that Zoom did not have an office or representative in Singapore and, thus, its solicitors had not been able to obtain full instructions earlier. What Broadcast was saying was that because Zoom did not expressly reserve its right to apply to set aside the Order in that application or in its supporting affidavit, Zoom had submitted to the jurisdiction of the Singapore court.

16 I was of the view that this argument was without merit. Zoom had already made it clear that its Singapore solicitors had to take full instructions. Both Zoom and its Singapore solicitors may not have considered the point as to whether Zoom should apply to set aside the Order (as opposed to setting aside the service of the writ) for material non-disclosure. The issue was whether Zoom had clearly submitted or evinced its intention to submit to the jurisdiction of the Singapore court and there was no clear evidence of this yet. It is true that there may be occasions when a defendant expressly reserves the right to apply to set aside a similar order. However, while it would be ideal for a defendant to do this, the absence of such an express reservation did not transform an equivocal act into a clear submission. Therefore, there was no basis to say that Zoom had submitted to the jurisdiction of the Singapore Court when it filed the 1st EOT Defence Application. In fact, it was held in *Carona* at [95] that "[a]n application for an extension of time is not in itself tantamount to an unequivocal submission to jurisdiction". Therefore, *Carona* was authority in favour of Zoom's position on the point rather than Broadcast's.

17 The second step which Zoom took was another matter. Here, Zoom had filed an application which consisted of two different reliefs, *ie*, to set aside the Order or to stay the Singapore suit on the ground of *forum non conveniens*.

18 In so far as Zoom was seeking to set aside the Order, Zoom was contending that the Singapore court has no jurisdiction over the matter in dispute. In so far as Zoom was seeking to stay the Singapore suit, Zoom was making a different contention, *ie*, that the Singapore court should not exercise jurisdiction. In other words, even though the Singapore court has jurisdiction, the Singapore court ought not to exercise that jurisdiction and ought to stay the Singapore suit in favour of some more appropriate jurisdiction. The premise of each relief was therefore not consistent.

19 It seemed to me that by including a prayer for a stay of the Singapore suit, it was arguable that Zoom had submitted to the jurisdiction of the Singapore court. On the other hand, it was also arguable that the mere filing of an application with an alternative prayer for a stay was not a clear submission as Zoom was still first seeking to set aside the Order. To that extent, arguably, Zoom should be permitted to file an application with these two reliefs to save time and costs. If Zoom was obliged to refrain from including a prayer for a stay, then it would have to file a fresh application for a stay if it was unsuccessful in its application to set aside. However, even on this argument, there was yet another point. What should Zoom do if it fails in its application to set aside? Should it file an appeal on this issue or should it continue with the alternative prayer for a stay? If the latter, what happens if it also loses its application for a stay? Can it then file an appeal in respect of both prayers or would the fact that it had proceeded with the second prayer amount to a step in the proceedings

which is a submission to the court's jurisdiction and preclude it from proceeding with the first prayer on appeal?

20 Zoom appeared to have thought that it could proceed with both prayers and, if it was unsuccessful on both, it could then appeal against both the decisions without realising that taking the step to proceed with the second prayer at first instance might well prejudice its appeal against the decision on the first prayer.

21 Zoom relied on *Williams & Glyn's Bank Plc v Astro Dinamico Compania Naviera SA* [1984] 1 WLR 438 ("*Williams*"). In that case, a bank in England had commenced an action in England against two guarantors who were companies owned and managed in Greece. The guarantors filed an application in the action in England to seek, *inter alia*, (a) an order to set aside the proceedings on the ground that the English court had no jurisdiction and (b) a stay of the English action pending the determination in Greek proceedings which the guarantors had commenced. A question arose as to whether the relief seeking a stay should be heard first. Bingham J decided that the question of jurisdiction must be decided first as the prayer seeking a stay involved the assumption that the English court did have jurisdiction over the matter. On appeal, the Court of Appeal decided that the application for a stay should be decided first. The bank's appeal to the House of Lords was dismissed. Therefore, counsel for Zoom, Mr Sithawalla submitted that this illustrated that a prayer for a stay was not inconsistent with a prayer disputing jurisdiction.

22 However, I should mention that the facts in *Williams* were peculiar in that a decision on the jurisdiction of the English court could only be reached by deciding whether the guarantees were valid or not and this in turn raised the question as to whether the English court or the Greek court should determine the matter. In other words, the prayer for a stay had to be decided first so that it could be determined whether the English court would continue to hear the English action and determine the validity of the guarantees which in turn would determine the question of the jurisdiction of the English court. The "peculiarity" and the "unusual" circumstances of the case were noted by Lord Fraser of Tullybelton at 442A and 444E of the law report. Indeed, he said at 441H–442A that: "In the ordinary case there can be little doubt that the question of jurisdiction would fall to be decided first; logically the court must decide whether it has jurisdiction before it can go on to consider any other question in the action."

23 Therefore, the outcome in that case did not assist Zoom. The passages in Lord Fraser's judgment at 442–444 which may suggest that a prayer for a stay is not inconsistent with a challenge to jurisdiction must be considered in the context of the peculiar facts there.

24 However, Zoom also submitted that it would be considered to have taken a step in the proceedings which is a submission to the jurisdiction of the court only if the step was with a view to determining the merits of the claim. Since the prayer for a stay was not with such a view, that step did not constitute a submission to the jurisdiction of the court. Zoom relied on [55] of *Carona* but [55] of *Carona* was not as restrictive as Zoom had suggested. In *Carona*, the Court of Appeal said at [55] that:

> From the cases, certain principles in the English approach are now plainly discernible after several rather unhappy twists and turns. It now seems to be fairly settled that a "step" is deemed to have been taken if the applicant employs court procedures to enable him to defeat or defend those proceedings on their merits and/or the applicant proceeds, from a procedural point of view, beyond a mere acknowledgment of service of process by evincing an unequivocal intention to participate in the court proceedings in preference to arbitration. Accordingly, the courts have held the following acts as steps in the proceedings such as seeking leave to defend or to strike

out (*Pitchers, Ltd v Plaza (Queensbury), Ltd* [1940] 1 All ER 151), attending a summons for directions (*County Theatres* ([46] *supra*), *Richardson v Le Maitre* [1903] 2 Ch 222 and *Ochs v Ochs Brothers* [1909] 2 Ch 121) and requiring disclosure of documents (*Parker, Gaines & Co, Limited v Turpin* [1918] 1 KB 358).

25 It may be arguable that a prayer for a stay is not an unequivocal intention to participate in the Singapore proceedings but, even if this argument was correct, there is a difference between the situation where a party only files an application with that prayer and the situation where he actually proceeds to argue for that prayer.

26 Even if the fact of including the prayer for a stay does not amount to a submission to the Singapore court's jurisdiction, I was of the view that when Zoom proceeded with its prayer for a stay, it had crossed the line. This was a submission to the court's jurisdiction and Zoom was asking the court not to exercise the jurisdiction on the basis of *forum non conveniens.* This was different from a situation where a defendant is challenging the court's jurisdiction.

27 The distinction, mentioned above at [26], was emphasised by the Court of Appeal in *Chan Chin Cheung v Chan Fatt Cheung & others* [2010] 1 SLR 1192 ("*Chan Chin Cheung*") where the court said at [22]:

> The appellant relies on several cases to argue that an extension of time under O 3 r 4, even if permissible, cannot "cure" the fact that the respondents had already taken steps in the proceedings and submitted to the jurisdiction of the Singapore courts. With respect, this argument is off the mark because whether a litigant has *submitted* to the jurisdiction of the court is relevant only to an application for a stay under O 12 r 7(1), where the litigant is taking the position that the court has *no jurisdiction* to hear the case. In contrast, where the litigant applies for a stay under O 12 r 7(2) on the ground of *forum non conveniens*, he in fact *accepts the court's jurisdiction* and is not to be treated as disputing it (see *The Jian He* at [44]; and GP Selvam, *Singapore Civil Procedure 2007* (Sweet & Maxwell, 2007) ("*Singapore Civil Procedure 2007*") at para 12/7/4). …
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> [emphasis in original]

28 The Court of Appeal cited *The "Jian He"* [1999] 3 SLR(R) 432 ("*The Jian He*") at [44] and GP Selvam, *Singapore Civil Procedure 2007* (Sweet & Maxwell, 2007 Ed) ("Singapore Civil Procedure") at para 12/7/14.

29 In *The Jian He*, the Court of Appeal said at [44]:

> In our opinion, this argument is misconceived. O 12 r 7 only applies where the jurisdiction of the court is being challenged. A stay application on the ground of a foreign jurisdiction clause does not challenge the jurisdiction of the court. It is asking the court to exercise its discretion not to assume jurisdiction over the case but to let the case be heard in another more appropriate forum, in this instance, a contractual forum. In *The Sydney Express* [1988] Lloyd's Rep 257 at 262 Sheen J said:
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> > Lord Fraser pointed out [in the case of *Williams & Glyn's Bank v Astro Dinamico* [1984] 1 Lloyd's Rep 453] that Order 12 r 8(1)(h) [*ie* the equivalent of our O 12 r 7(1)(h)], although wide in its terms ... must be read in its context and is not appropriate to include an order to stay. O 12 r 8 deals with the case in which a defendant wishes to dispute the jurisdiction of the court. An application for a stay is the appropriate procedure for enforcing an agreement

to litigate in some other jurisdiction when a writ has been issued and served without irregularity other than a breach between the parties.

30 Although the Court of Appeal in *The Jian He* did not explicitly say that the stay application there amounted to a submission to the jurisdiction of the court, this is implied as the non-challenge would ordinarily be construed as a submission. In any event, the Court of Appeal did say expressly in *Chan Chin Cheung* that an application for a stay under O 12 r 7(2) on the ground of *forum non conveniens* is in fact an acceptance of the court's jurisdiction.

31 However, in so far as *The Jian He* referred to *The "Sydney Express"* [1988] Lloyd's Rep 257 ("*The Sydney Express*") and what was thought to be a passage from the judgment of Sheen J, I should first clarify that the passage cited in *The Jian He* at [44] is from 260 and not 262 of the law report. In fact, the passage was actually taken from Sheen J's summary of a submission by Mr Priday, counsel for the defendants in that case. More importantly, Sheen J concluded at 261 that a stay application did not amount to a submission to the jurisdiction of the English court. This is contrary to [44] of *The Jian He* and [22] of *Chan Chin Cheung*.

32 I also note that *The Jian He* also cited, at [45], *Dicey and Morris* on *The Conflict of Laws* (Sweet & Maxwell, 12th Ed, 1993) ("*Dicey 12th*") which states, at p 289, that "an application to stay proceedings is not a challenge to the jurisdiction of the court". I think it is apposite to cite the entire paragraph which says:

> **Method of challenge to jurisdiction**. A defendant who has been served with a writ and wishes to challenge the jurisdiction of the English court should file an acknowledgment of service giving notice of intention to defend the proceedings and apply, within the time limited for service of defence, for service of the writ to be set aside or other appropriate relief.[4] Where, however, the defendant does not challenge the existence of jurisdiction but wishes to persuade the court not to exercise it, e.g. because, in a non-Convention case, England is not the *forum conveniens* or there is an agreement between the parties conferring jurisdiction on the courts of another country,[5] he should apply for a stay of the English proceedings and not for the writ to be set aside,[6] as an application to stay proceedings is not a challenge to the jurisdiction of the court.[7] But it has been held[8] that the appropriate remedy, when it is alleged that there is a jurisdiction agreement providing for the jurisdiction of another 1968 Convention State, is an application for a stay rather than an application to set aside. Although this is probably wrong, it will not normally make any practical difference.[9]

33 Footnote 7 cites *Bankers Trust Co v Galadari* [1986] 2 Lloyd's Rep 446, at 449 ("*Bankers Trust*") and footnote 8 cites *The Sydney Express*.

34 At p 311, *Dicey 12th* states:

> … In order to establish that the defendant has, by his conduct in the proceedings, submitted or waived his objection to the jurisdiction, it must be shown that he has taken some step which is only necessary or only useful if the objection has been waived or never been entertained at all.

35 Then, at p 312, *Dicey 12th* states an apparent qualification to what was stated at p 289:

> Thus an application for a stay of proceedings may amount to a submission, but not if it is made as an alternative to an application to the court for the proceedings to be set aside on the basis that the court has no jurisdiction.[64]…

36 Footnote 64 cites *Williams*.

37 In p 401 of the 15th edition of *Dicey*, a similar view from p 289 of *Dicey 12th* is expressed, that is, an application to stay proceedings is not a challenge to the jurisdiction of the court. However, the qualification cited above from p 312 of *Dicey 12th* is not found at the equivalent pages, *ie*, p 423-424, of the 15th edition.

38 It seems to me that the passages referred to above from *Dicey 12th* are far from clear. Does an application to a court for a stay of proceedings amount to a submission to the jurisdiction of the court or not? *Dicey 12th* appears to suggest that it does amount to a submission but not if it is made as an alternative to an application to set aside the proceedings on the basis that the court has no jurisdiction.

39 The 15th edition also does not make the position clear even though it does not contain the qualification referred to above at [35].

40 I come back to the Singapore Civil Procedure. The current edition was published in 2013. Unfortunately there are two passages found in paras 12/7/3(3) and 12/7/4 of the current edition which are also far from clear and, indeed, appear contradictory.

41 The relevant passage at para12/7/3(3) at p 110 states:

> (3) If a defendant chooses to make an application under r 7(1) he should not meanwhile serve a defence or take any step inconsistent with his stand that the court has no jurisdiction. The effect of any steps which he may take must be considered in the context and circumstances of the case. Thus, a step taken because the defendant had no practical alternative may not preclude him from applying under O 12 r 7 (*International SOS Pte Ltd v Overton Mark Harold George* [2001] 2 SLR(R) 777). Also an application to stay proceedings in Singapore pending the outcome of proceedings in a foreign jurisdiction does not amount to a submission to jurisdiction (see *Williams & Glyn's Bank plc v Astro Dinamico Comp*. *Naviera S A* [1984] 1 WLR 438; [1984] 1 All ER 760, HL).

42 The relevant passage from para 12/7/4 at p 111 states:

> …
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> … Where the defendant has been served in accordance with the ROC and applies for a stay on grounds of *forum non conveniens* he in fact accepts the court's jurisdiction and is not to be treated as disputing it and O 12 r 7 has no application: see *The Jian He* [1999] 3 SLR(R) 432, following *The Sydney Express* [1988] Lloyd's Rep 257 and *Williams & Glyn's Bank plc v Astro Dinamico Comp. Naviera SA* [1984] 1 WLR 438; [1984] 1 All ER 760, HL. See also *The Messiniaki Tolmi* [1984] 1 Lloyd's Rep 266 CA (Eng). …

43 Therefore, it was no surprise that when Zoom was applying for leave to appeal to the Court of Appeal in respect of my decision, it was relying on, *inter alia*, para 12/7/3 to establish that I had made a *prima facie* error of law or that there was good reason to seek the views of the Court of Appeal. On the other hand, Broadcast was relying on, *inter alia*, para 12/7/4. Interestingly, *Williams* is cited in both these passages of the current edition of the Singapore Civil Procedure even though both passages are not consistent.

44 With respect, it seems to me that the confusion arises from the interpretation one gives to *Williams*. Passages from textbooks like *Dicey* and the Singapore Civil Procedure and cases like *The Sydney Express* suggest that *Williams* established a general principle without regard to the peculiar facts and unusual circumstances I mentioned above at [22]. As mentioned above, I was and am of the view that *Williams* is not authority for the general proposition that a stay application is not a submission to the court's jurisdiction. Neither is it authority for the general proposition that a prayer for a stay, as an alternative to a prayer to set aside the proceedings, will avoid a submission to the court's jurisdiction.

45 It seemed to me that there is no difference whether an application for a stay on the ground of *forum non conveniens* is made as a discrete application or as an alternative to a prayer to set aside. Furthermore, while it may be arguable that an application for a stay *per se* does not constitute a submission to the jurisdiction of the court, I was of the view that a defendant has crossed the line once he presents arguments for a stay.

46 There may be unusual facts, like the ones in *Williams*, which result in a different conclusion but that was not the case before me.

47 I add that the distinction emphasised in *Chan Chin Cheung* (see [27] above) was also observed in *Bankers Trust* at 449 on the right column.

48 However, I should also mention that *Chan Chin Cheung* and *The Jian He* did not involve the same facts before me. They were not cases in which a stay prayer was being argued after a setting aside prayer was unsuccessful. Therefore, one could arguably say that the observations there were not, strictly speaking, binding on the facts before me, although, in my view, the principle of law enunciated in those cases would clearly apply here as well.

49 I also wish to mention O 12 r 7(1) and (2) of the Rules of Court. Order 12 r 7(1) of the Rules of Court stipulates that a defendant who wishes to dispute the jurisdiction of the court shall enter an appearance and, within the time limited for serving a defence, apply to the court for one of various reliefs set out in sub-paragraphs (*a*) to (*g*). Sub-paragraph (*c*) is the relevant sub-paragraph for present purposes. It provides for a defendant to apply for the discharge of any order giving leave to serve the writ on him out of jurisdiction.

50 On the other hand, an application for a stay of proceedings on the ground that Singapore is not the proper forum, which in my view includes a *forum non conveniens* argument, comes under O 12 r 7(2) and not O 12 r 7(1). Order 12 r 7(2) states:

> (2) A defendant who wishes to contend that the Court should not assume jurisdiction over the action on the ground that Singapore is not the proper forum for the dispute shall enter an appearance and, within the time limited for serving a defence, apply to Court for an order staying the proceedings.

51 Significantly, O 12 r 7(5) and (6) states:

> (5) A defendant who makes an application under paragraph (1) shall not be treated as having submitted to the jurisdiction of the Court by reason of his having entered an appearance and if the Court makes no order on the application or dismisses it, paragraph (6) shall apply as if the defendant had not made any such application.
>
> (6) Except where the defendant makes an application in accordance with paragraph (1), the

appearance by a defendant shall, unless the appearance is withdrawn by leave of the Court under Order 21, Rule 1, be treated as a submission by the defendant to the jurisdiction of the Court in the proceedings.

52 As can be seen, the protection from O 12 r 7(5) applies only to an application made under O 12 r 7(1) and not to one made under O 12 r 7(2). In my view, this suggests that an application *per se* for a stay constitutes a submission to the jurisdiction of the court (although I have mentioned that the opposite may be arguable) and, *a fortiori*, where arguments have in fact been advanced for an application for a stay on the ground of *forum non conveniens* (see also *Principles of Civil Procedure* by Jeffrey Pinsler SC (2013) at pp 202 and 208 for further comments).

53 I also note that para 12/7/1 of Singapore Civil Procedure states:

> **Entry of appearance to dispute court's jurisdiction**—The policy underlying rr.6 and 7 is that a defendant should not be regarded as having submitted to the jurisdiction of the court by reason only of the fact that he appeared in the proceedings for the purpose of (1) contesting the jurisdiction of the court; (2) asking the court to dismiss or stay proceedings on the ground that the dispute in question should be submitted to arbitration or to the determination of the courts of another country; or (3) protecting, or obtaining the release of, property seized or threatened with seizure in the proceedings.

54 I do not agree with the second point made in the above commentary in para 12/7/1. It assumes that O 12 r 7(5) applies to applications made under both O 12 r 7(1) and (2) whereas O 12 r 7(5) is clearly confined to the former only.

55 Nevertheless, in the light of the state of affairs I have referred to, I decided to grant leave to Zoom to appeal to the Court of Appeal on the ground that the issue is a question of general principle (even if not decided for the first time) and a question of importance upon which further argument and a decision or clarification of a higher court would be in the public interest.

56 There is one other point I would like to mention. The United Kingdom has the Civil Jurisdiction and Judgments Act 1982 (c 27)(UK). Section 33(1)(b) thereof states that for the purpose of determining whether the judgment of a foreign country should be enforced in the United Kingdom, the person against whom the judgment was given shall not be regarded as having submitted to the jurisdiction of the foreign court by reason only of his appearing in the proceedings for a stay application. In the *Sydney Express*, Mr Priday argued that it would be absurd if the same procedural step when taken in England, should have precisely that effect. While that provision may influence or affect the decisions of English courts on the issue, Singapore does not have an equivalent provision.

57 In view of my conclusion and Zoom's concession that it was precluded from applying to set aside the Order if it had submitted to the jurisdiction of the Singapore court, the question of material non-disclosure became academic. Nevertheless, I will say something about it because I am concerned that it is too often the case that litigants fail to discharge their duty to make full disclosure.

58 It was not disputed that as Broadcast was making an *ex parte* application for the Order, it was under a duty to make full and frank disclosure of all material facts.

59 Zoom alleged various material non-disclosures on the part of Broadcast. I will mention the most obvious one first.

60 In seeking the Order, Broadcast sought to persuade the court that the agreements which were

the subject of its claim were governed by Singapore law. The supporting affidavit of A'zman Bin Khamis filed on or about 13 February 2013 made this allegation relying on cl 22 of its standard terms and conditions for hire purchase agreements ("Standard Terms") to that effect. The impression given by that affidavit was that all the agreements which were the subject of Broadcast's claim were in writing and that the Standard Terms were found therein or were somehow incorporated to apply to them.

61 However, the agreements in question were apparently not in writing, even if agreements between the parties on other transactions might have been.

62 More importantly, the Standard Terms containing the choice of Singapore law provision were found in Broadcast's own document which was not signed or agreed to by Zoom. Broadcast subsequently sought to rely on another provision in the Standard Terms, *ie*, cl 3.4 to incorporate the Standard Terms into the agreement in question. Clause 3.4 states:

> Signature of the Purchase Order or an email sent by the Hirer or by a person authorised to sign on the Hirer's behalf shall constitute acceptance of the Equipment and the terms and conditions set out herein.

However, the emails exchanged between the parties made no reference to the Standard Terms, let alone incorporate them in the agreements in question. It seemed to me that the mere existence of emails exchanged between the parties was unlikely to be adequate to incorporate the Standard Terms.

63 In any event, it was for Broadcast to disclose that:

(a) the agreements were not in writing;

(b) the choice of Singapore law provision is part of the Standard Terms found in a standalone document; and

(c) there was no email specifically referring to or incorporating the Standard Terms.

64 Even if Broadcast was genuinely of the view that the Standard Terms applied, it was still its duty to disclose the above facts and let the court reach its own conclusion. Broadcast did not do so. In view of that and the materiality of the non-disclosure, I would have set aside the Order on that non-disclosure alone.

65 Another allegation of non-disclosure was that there were already existing proceedings in India between Zoom and Broadcast when Broadcast filed its *ex parte* application for the Order. The Indian proceedings were commenced by Zoom to claim damages from Broadcast for retaining its equipment (which Broadcast had received under a different agreement) and for damage to its equipment which was discovered after Broadcast eventually returned the equipment to Zoom.

66 Broadcast's position was that it did not disclose the Indian proceedings because its claim in Singapore was for money already owing by Zoom before the question of wrongful retention and damage to the equipment arose. Hence, the issues were separate and, in the Indian proceedings, it had expressly reserved its right to commence proceedings in a jurisdiction other than in India to claim the money owing to it. Therefore, Broadcast's position was that it clearly had not submitted its claim to the jurisdiction of the Indian court and there was therefore no need to disclose the Indian proceedings.

67 I was of the view that, again, it was for the court to assess those facts and not for Broadcast to unilaterally omit to disclose them. If the existence of the Indian proceedings had been disclosed, the Singapore court might have required Broadcast to inform Zoom of the *ex parte* application so as to give Zoom an opportunity to oppose the application. If Zoom decided to attend and oppose the application it would have been heard as an opposed *ex parte* application. Nevertheless, I accepted that this omission was less serious than the first non-disclosure mentioned above.

68 I now come to the second prayer for a stay of the proceedings on the ground of *forum non conveniens*.

69 When Zoom made its application for leave to appeal to the Court of Appeal against my decision, Zoom alleged that as the Singapore court's jurisdiction was premised on O 11 of the Rules of Court and not as of right, the burden of proof had shifted to Broadcast to establish that Singapore was the more appropriate jurisdiction than the jurisdiction preferred by Zoom. Zoom relied on a statement made by the Court of Appeal in *Oriental Insurance Co Ltd v Bhavani Stores Pte Ltd* [1997] 3 SLR(R) 363 ("*Oriental Insurance*") at [16] where the court said:

> … Firstly, it is patently clear that where the court has jurisdiction as of right, the burden of proving that another forum is more appropriate always falls on the defendant. Where, however, the court's jurisdiction is premised on O 11, the burden of proving that Singapore is the appropriate forum falls on the plaintiff and this remains the case even when the defendant (served out of jurisdiction) comes to Singapore to contest the jurisdiction of the Singapore court. …

70 It appeared that Zoom was contending that the High Court had proceeded in error when hearing Zoom's second prayer in the Setting Aside and Stay Application because the High Court had proceeded on the wrong premise, *ie*, that the burden of proof was on Zoom to establish clearly and distinctly that another jurisdiction is the more appropriate one to hear the dispute. Alternatively, this was again a question of importance on which further argument and the Court of Appeal's decision would be in the public interest.

71 I should mention that although this argument and *Oriental Insurance* were mentioned in Zoom's written submission for the main hearing of the Setting Aside and Stay Application, Zoom did not pursue this argument in oral submissions before me at that time. Instead, parties appeared to be proceeding on the premise that the burden of proof was on Zoom.

72 Coming back to the statement in *Oriental Insurance*, the context in which the statement appeared suggested that Zoom was entitled to rely on *Oriental Insurance* to support its argument about the burden of proof. However, having considered the statement in that case again, I am of the view that Zoom had misinterpreted it. Zoom had thought that the reference to the defendant coming to Singapore to contest the jurisdiction of the Singapore court was a reference to an application for a stay. It was not. The reference to the contest of Singapore jurisdiction was a reference to a setting aside application on the ground of lack of jurisdiction and not to a stay application. As I have stated above, in a stay application, the applicant is not contesting the jurisdiction of the court. Rather he accepts that the court has jurisdiction but he is asking the court not to exercise its jurisdiction.

73 In other words, all the statement means is that a plaintiff proceeding under O 11 has the burden of proving that Singapore is the appropriate forum at the time he is making his application for the service of the writ out of Singapore and he still has that burden if a defendant files an application in Singapore to set aside an order made under O 11 on the ground that he is contesting the jurisdiction of the Singapore court.

74 As regards a stay application on the ground of *forum non conveniens*, I was and I am of the view that the burden of proof is always on the applicant to establish clearly and distinctly that there is a more appropriate jurisdiction than Singapore to hear the dispute.

75 However, I accept that the context in which the statement was made might arguably support Zoom's interpretation, *ie*, that the Court of Appeal was referring to a stay application when it referred to a contest of the jurisdiction of the Singapore court because the court was dealing primarily with a stay application in [13] to [15] and in [16] itself. Since I was inclined to grant Zoom leave to appeal to the Court of Appeal in any event, this is a point which the Court of Appeal may also settle.

76 I come now to the merits of the stay application. The applicable principles are those stated in *Spiliada Maritime Corporation v Cansulex Ltd* [1987] 1 AC 460 ("*Spiliada*") which have been applied many times in Singapore and I do not need to repeat them.

77 Broadcast is a company incorporated in Singapore with its commercial activities centred in Singapore. Zoom is a company incorporated in India with its commercial activities centred in India.

78 Witnesses for Broadcast reside in Singapore while witnesses for Zoom reside in India.

79 Equipment for two of the three agreements belonged to Broadcast and was situated in Singapore. Equipment for one of the three agreements was already in India before that agreement was entered into.

80 However, Zoom said that the equipment for two of the agreements, although situated in Singapore, was sent to India for performance of those agreements.

81 As for the governing law of the three agreements, Broadcast alleged that it was Singapore law but this was on the premise that the Standard Terms apply and it was likely that they did not apply. On the other hand, Zoom alleged that Indian law applied but this was on the argument that in another agreement between the parties (which was not the subject of any dispute), there was a provision providing that Indian law was the governing law. Zoom was therefore relying on an implied term.

82 Zoom also relied on existing proceedings in India between the parties which I have mentioned but Broadcast emphasised that the issues were different and it had expressly reserved its right to commence proceedings elsewhere for its own claims.

83 It seemed to me that Zoom had a better chance of establishing that the governing law was Indian law for the agreements in question. However, there was no elaboration as to which aspect of Indian law was involved and the dispute, if any, appeared to be more of a factual one. As for the existence of Indian proceedings, Broadcast was correct that the issues were different. Whether Broadcast had wrongly retained Zoom's equipment and/or damaged its equipment under a different agreement was different from whether Zoom was liable to pay the sums claimed by Broadcast under the three agreements in question.

84 The factors appeared evenly balanced and if India was the more appropriate jurisdiction, this was only slightly so. It was not clearly or distinctly the more appropriate forum. Therefore Zoom had failed to discharge its burden.

85 In the circumstances, I decided against granting a stay of the Singapore proceedings.