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Abdul Rashid bin Abdul Manaf

v

Hii Yii Ann

[2016] SGHCR 1

High Court — Suit No 930 of 2015 (Summons No 5058 of 2015)
Zhuang WenXiong AR
8 December 2015

Conflict of laws — Natural forum

28 January 2015

Judgment reserved.

Zhuang WenXiong AR:

1 There remain few unresolved issues in the law of *forum non conveniens*; this judgment deals with two of them. Should compellability be a significant factor if a witness is willing to testify outside of the place of his or her residence? Are the merits relevant to a *forum non conveniens* application?

Facts

2 A detailed recital of the facts is necessary because *forum non conveniens* is determined with respect to the particular issues that are likely to be in dispute (*Yeoh Poh San & Anor v Won Siok Wan* [2002] SGHC 196 at [18]).

3 The plaintiff and defendant are Malaysian citizens. The plaintiff is a lawyer; the defendant, through his companies, harvests raw timber in Papua

New Guinea. The plaintiff does not dispute that he is ordinarily resident in Malaysia; the defendant has an office in Singapore and resides in Sentosa Cove when in the country.

4 The plaintiff invested in two of the defendant’s timber concessions. The plaintiff and defendant asked one Alvin John, a Malaysian lawyer, to draft agreements for both. These comprised the sale and purchase of shares, profit guarantees, a declaration of trust, and a joint venture agreement. Alvin probably drafted these in Malaysia. The parties signed these agreements in Malaysia.

5 In September 2009, some time after the investments in the two timber concessions, the parties entered into a “settlement agreement”, which the cover expresses to be

in respect of the outstanding debt due and owing to [the plaintiff] pursuant to his divestment of shares and interest in the [two timber concessions], all situated in Papua New Guinea.

The preamble goes on to state that

(B) The parties by mutual agreement have agreed to amicably terminate their joint collaboration in the aforesaid Investment upon and subject to the terms and conditions herein contained.

6 Clause 2.1 of the settlement agreement in turn stipulates that the parties agreed to amicably terminate their joint collaboration with the defendant to pay the plaintiff a sum of USD 15 million in full and final settlement of the investments in the two timber concessions. Under clause 3.1, payment was to be made by 31 December 2014 (this was amended in handwriting from 2013). Under clause 7.1, the agreement was to be governed by English law; under clause 7.2, the parties submitted to the non-exclusive jurisdiction of the courts of Queensland, Australia. Clause 10, an entire agreement clause, is worded thus

This Agreement constitutes the entire agreement between the Parties with respect to the subject matter hereof, supersedes any previous agreements and understandings between the Parties with respect thereto and may not be modified except by an instrument in writing signed [sic] by the duly authorized representatives of the Parties. Any notification of or alteration to the part to this Agreement shall be conferred upon and determined in writing by mutual consultation.

7 The money was not paid and the plaintiff filed suit in September 2015. In response, the defendant took out this summons to stay proceedings on the grounds of *forum non conveniens*. The defendant filed an affidavit in support. The defendant had recommended the plaintiff a USD 12 million investment related to international bonds and other tradable instruments. The investment lost money and the defendant made good these losses at the plaintiff's request, despite the fact that he was not legally obliged to do so because he felt personally responsible and did not want his relationship with the plaintiff to sour. After this, Alvin informed the defendant that the plaintiff wanted to be bought out of the concession investments. The parties separately instructed Alvin on the terms of the plaintiff's exit. Alvin told the defendant that the plaintiff wanted payment of USD 15 million, as that was the amount invested in the two concessions. The defendant told Alvin on several occasions that he would only do so if his finances permitted. In particular the defendant also told Alvin that if the plaintiff found a buyer for the defendant's iron ore mining business in the Philippines for not less than USD 100 million, the defendant would pay the plaintiff the USD 15 million (hereinafter referred to as "the Condition"). The defendant thought it was only fair that the plaintiff put in some effort if the plaintiff wanted to exit unscathed. On 30 September 2009, the plaintiff, the defendant and Alvin met at the defendant's office in Singapore, where the defendant reiterated the Condition. The defendant avers that the plaintiff understood the Condition and did not object. The parties thereafter

signed the settlement agreement. The plaintiff, in his affidavit in reply, denies that the parties had ever agreed to such an oral Condition. The defendant had indeed said that he was in some financial difficulty, which explains why the initial deadline for payment was four years later in December 2013. This was subsequently changed to December 2014 at the defendant's request. The defendant ensured that the deadline was formally changed, but did not bother to formally document the alleged oral Condition.

Arguments

8 The defendant argued that he should be allowed to lead evidence on the Condition despite the entire agreement clause, because extrinsic evidence will always be admitted to invalidate a written contract on the ground of fraud or mistake. The parties in any case did not intend for the entire agreement clause to apply to exclude the Condition. Malaysia is clearly a more appropriate forum for the adjudication of the dispute. The parties have significantly more connections to Malaysia and the defendant has also undertaken to appoint solicitors in Malaysia to accept service of process. Alvin, whose evidence is crucial, cannot be compelled to testify in Singapore. Alvin has also changed his position with respect to whether he would be willing to testify in Singapore, with his latest stance being that he would be making himself available in Singapore, by appointment, to accept service of a subpoena. Critical documents are also in Malaysia. The jurisdiction and governing law clauses are also not in favour of Singapore. It was fortuitous that the settlement agreement was signed in Singapore, and mode of payment is irrelevant. The plaintiff will also not be denied substantial justice if the dispute is heard in Malaysia.

9 The plaintiff argues that Malaysia is not the distinctly more appropriate forum. Little weight should be placed on the parties being Malaysian citizens.

Alvin has clearly indicated that he would be willing to be subpoenaed to testify in Singapore. The documents relevant to the suit are not voluminous and are already in the possession of the plaintiff's solicitors, and Alvin has also confirmed that he will make available to the parties all relevant documents. The settlement agreement was signed in Singapore, and it was in Singapore where the defendant allegedly informed the plaintiff about the Condition. Singapore was the place the parties operated from, and the parties used Singapore companies and bank accounts. The settlement sum of USD 15 million was to be paid to Singapore bank accounts. The defendant also has companies and assets in Singapore such as a property in Sentosa Cove and a Rolls Royce car. The governing law and jurisdiction clauses do not point to Malaysia. A previous suit between the same parties was not stayed in favour of Australia.

My decision

Preliminary propositions

10 The Singapore courts apply *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460 ("*Spiliada*") to determine if proceedings should be stayed on the grounds of *forum non conveniens* (see eg, *JIO Minerals FZC and others v Mineral Enterprises Ltd* [2011] 1 SLR 391 at [28]). These principles are extremely well-established. A stay will only be granted where the court is satisfied that there is some other available and more appropriate forum for the trial of the action. The natural forum is the forum that has the most real and substantial connection to the action. The burden of establishing this rests on the defendant; the court takes into consideration factors not just affecting convenience or expense, such as the availability of witnesses, but also factors such as the law governing the transaction and the places where the parties reside or carry on business. If the court concludes, at this first stage, that there is some

other available forum which is clearly more appropriate, a stay will ordinarily be granted. But there may be circumstances by reason of which justice requires that a stay should nevertheless be refused. For this second stage, the burden is on the plaintiff to establish these circumstances.

11 I pause to note that, despite the presence of a non-exclusive jurisdiction clause in favour of Queensland, Australia, it was common ground between the parties that *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460 would apply; and correctly so, because the defendant sought to stay proceedings on the ground that Malaysia is a more convenient forum. *Orchard Capital I Ltd v Ravindra Kumar Jhunjunwala* [2012] 2 SLR 519 (“*Orchard Capital*”) is not applicable, because in that case the defendant was seeking a stay on the ground that the contractually designated non-exclusive forum was more appropriate.

12 Despite the label “*non conveniens*”, the doctrine is not concerned with the inappropriateness *per se* of Singapore as a forum. The doctrine is concerned with appropriateness in a relative sense – there must be *another* available and more appropriate forum. There are conceivable cases where no forum can be described as the natural forum and Lord Goff of Chieveley could “see no reason why the English court should not refuse to grant a stay in such a case, where jurisdiction has been founded as of right” (*Spiliada* at 477D). Thus an action will not be stayed if it is merely shown that connecting factors are interspersed across various jurisdictions other than Singapore (*Orchard Capital I Ltd v Ravindra Kumar Jhunjunwala* [2012] 2 SLR 519 at [34]).

13 As mentioned I shall deal with two issues in detail: are the merits relevant to a *forum non conveniens* application; and should compellability be a

significant factor if a witness is willing to testify outside of her place of residence?

Are the merits relevant to a forum non conveniens application?

14 It was common ground between the parties that the merits of the claim or defence are irrelevant. There is binding Court of Appeal precedent in this regard: in *The “Rainbow Joy”* [2005] 3 SLR(R) 719 at [27], it was held that a court should not be required to go into the merits when hearing a *forum non conveniens* application.

15 This warrants further scrutiny for two reasons. First, English cases have taken the opposite position. Second, *The “Rainbow Joy”* held that the merits were relevant to a stay on the grounds of an exclusive jurisdiction clause. An *exclusive* jurisdiction clause comprises two components: a promise to sue in the stipulated jurisdiction and a promise not to sue outside of the stipulated jurisdiction. In a stay application premised on an exclusive jurisdiction clause in favour of a foreign jurisdiction, the applicant-defendant seeks to hold the respondent-plaintiff to the two-fold contractual bargain. The respondent-plaintiff may nevertheless be entitled to sue in Singapore and violate the exclusive jurisdiction clause if he can show exceptional circumstances amounting to strong cause; and showing that the defendant has no defence would constitute exceptional circumstances (*The “Jian He”* [1999] 3 SLR(R) 432 at [53]–[63]). On the contrary, the respondent-plaintiff in a *forum non conveniens* application cannot resist a stay on the grounds that the defendant has no defence. Thus an applicant-defendant who seeks to rely on an exclusive jurisdiction clause is paradoxically in a worse position than an applicant-defendant who chooses not to or cannot invoke an exclusive jurisdiction clause. Opportunistic applicants could avail themselves of this incongruity by seeking

a stay on alternative grounds: first relying on an exclusive jurisdiction clause, and if this fails because he has no defence, waiving his contractual rights and relying instead on *forum non conveniens*.

16 *The “Jian He”* explicitly cited and followed English cases, all of which involved exclusive jurisdiction clauses in favour of a jurisdiction outside of England. The English courts, albeit in *obiter dicta*, have taken the same position with respect to *forum non conveniens*. In *Bank of Credit & Commerce Hong Kong Ltd (in liquidation) v Sonali Bank* [1995] 1 Lloyd’s Rep 227, several letters of credit were issued by the defendant, a Bangladeshi bank, and confirmed by the plaintiff, a Hong Kong bank. The plaintiff negotiated the documents and presented them to defendant but the defendant failed to reimburse the plaintiff on the due dates for payment. The court held that it would be wholly inappropriate to grant a stay on the grounds of *forum non conveniens* because the defendant had not shown that Bangladesh is clearly or distinctly more appropriate than the English forum, and because Sonali had no defence. Bangladesh not being clearly or distinctly more appropriate was sufficient to dispose of the matter; the defendant having no defence must be taken to be *obiter dicta*. In *Merrill Lynch, Pierce Fenner & Smith Incorporated v Raffa* [2001] CP Rep 44 the defendant, a former client account manager of the claimant, was alleged to have fraudulently realised client securities to the tune of over \$50 million. The defendant was subsequently arrested in Egypt and remanded in custody with a view to criminal proceedings. The claimant lodged a request for a civil claim such that if the defendant were convicted, the criminal court would consider whether to order compensation. The defendant applied to stay English proceedings *inter alia* on the grounds that similar proceedings were underway in Egypt. The court refused to grant a stay, holding that criminal proceedings in Egypt did not preclude civil proceedings in England. The court

went on state, *obiter*, that it may well be appropriate to hear a summary judgment application prior to a stay application, because foreign proceedings may be superseded by proceedings to enforce that (summary) judgment.

17 English law however takes a different position where a defendant, served *ex juris*, challenges the jurisdiction of the court. The defendant in *Speed Investments Ltd and another v Formula One Holdings Ltd and others* [2005] 1 WLR 1233 challenged the jurisdiction of the court while the claimant applied for summary judgment. The defendant filed an acknowledgement of service (roughly equivalent to an entry of appearance in Singapore), but the court held that it would not exercise its power to hear an application for summary judgment before an outstanding challenge to jurisdiction has been determined, and in determining the challenge to jurisdiction, the court should not go into the details or the nature of the claim. The court cited the following passage from *European Capital Trade Finance Ltd v Antenna Hungaria RT* (unreported) 27 March 1995 with approval:

... [if a court looks into the merits] a defendant who was challenging the jurisdiction of the court would be compelled to prepare not only submissions but also evidence to meet a claim for summary judgment at a time when he was saying that the court had no jurisdiction over him. That might not be unacceptable where the challenge to jurisdiction fails; but it is plainly contrary to principle where the challenge is a valid one and, at the time when preparations would have to be put in hand, it would not be known whether the challenge would succeed or fail.

18 Quite apart from precedent, there are good reasons why a court should not go into the substantive merits during a *forum non conveniens* application. Firstly, O 12 r 7(2) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) mandates that an application for a stay on *forum non conveniens* grounds be made within the time limited for serving a defence. When a stay application is afoot, the

defendant cannot be compelled to file his defence (*Samsung Corp v Chinese Chamber Realty Pte Ltd and others* [2004] 1 SLR(R) 382 (“*Samsung*”) at [4]–[7]); and timelines for filing the defence will only be set if the defendant fails in his application to stay (*Samsung* at [18]). Any determination with respect to the sufficiency, or lack thereof, of the merits in a *forum non conveniens* application is neither binding on the defendant nor the court in subsequent interlocutory applications. A defendant could very well plead a defence that was not raised or introduce evidence that was not adduced during the *forum non conveniens* application, and thereby successfully fend off a summary judgment application by the plaintiff; with the net result being that the *forum non conveniens* application should not have been dismissed solely on the merits. There is also a possibility of the court hearing the summary judgment application, after having heard full arguments, concluding that there is no defence despite the earlier court hearing the *forum non conveniens* application holding that there was a defence. The only way of obviating this would be for a court to hear both the *forum non conveniens* and summary judgment applications concurrently but this is no longer allowed under the current O 14 r 1, whereby a summary judgment application can be filed only after the defence has been filed (*cf. Aoki Corp v Lippoland (Singapore) Pte Ltd* [1995] 1 SLR(R) 314, with *Samsung* at [3] noting that under the old O 14, stay applications were routinely heard together with summary judgment applications).

19 Secondly, if it were open to the courts to explore the merits during a *forum non conveniens* application, opportunistic plaintiffs would simply assert that defendants have no defence in order to tease out the defences that the defendant would probably raise at a potential summary judgment application. Defendants applying for stays would have to anticipate such an assertion, and be prepared to address the court on both *Spiliada* and the merits within a

compressed time frame or beseech the court for an extension of time. All this would increase the length and cost of litigation.

20 Thirdly, and most importantly, the (non-)assumption of jurisdiction should not be conflated with the substantive merits. The common refrain is that an action with no perceived defence should not be stayed because the action will not go to trial, and it cannot be said to be inconvenient for the plaintiff to obtain summary judgment in the forum. This is a fallacy and assumes that the plaintiff will necessarily obtain summary judgment regardless of the forum. But “[a]nother court may apply a different choice of law rule, or may admit different evidence, or may place the burden of proof differently; or may for a variety of reasons conclude that the defendant has an arguable or a good defence” (A Briggs, *Civil Jurisdiction and Judgments* (Informa Law, 6th Ed, 2015) at p 424). The willingness of a court to decline to exercise extant jurisdiction in recognition of the availability of a more appropriate forum should, as a corollary, entail a willingness to allow that more appropriate forum to adjudicate upon the merits. The Singapore courts do not have a monopoly on outcomes. This ties in with an important function of the doctrine of *forum non conveniens*, namely, the allocation of adjudicative authority between states (see *eg*, C A Whytock, “Litigation, Arbitration and the Transnational Shadow of the Law” (2007) 18 Duke J Comp & Int’l L 449 at p 452; C McLachlan. “International Litigation and the Reworking of the Conflict of Laws” (2004) 120 LQR 580 at p 609). This adjudicative authority must include the power of the appropriate forum to come to its own conclusion on the merits.

21 Therefore, on both the authority of *The “Rainbow Joy”* and on principle, I hold that I cannot take into account the merits in determining whether an action should be stayed on the grounds of *forum non conveniens*.

Application of Spiliada

22 I leave aside the issue of Alvin John’s testimony for the moment. The other factors do not show that Malaysia is clearly the more appropriate forum. I analyse, first, to the personal connections of the parties. Citizenship is a non-factor because one can be resident or conduct business outside of the country of one’s citizenship. Residence points towards Singapore. The defendant did not deny the plaintiff’s assertion that the defendant neither resides nor does business in Malaysia but resides and does business in Singapore.

23 I turn to the transactional connections. The settlement agreement was signed in the defendant’s Singapore office, and this was also where the purported Condition was communicated to the plaintiff. Notices under the same were to be delivered to the defendant’s Singapore office or his Singapore fax number. Little weight can be ascribed to the foregoing. The mere fact of the parties having met in Singapore should have no bearing whatsoever on the appropriateness of Singapore as a forum. The most that can be said is that it was convenient to meet in the defendant’s office in Singapore. But it would be a leap to say that this points towards the appropriateness of Singapore: the true factor that ought to be taken into account is the defendant’s personal connection to Singapore. If any weight is ascribed to the parties having met in Singapore, this would be tantamount to double-counting. The same reasoning applies to the notices being sent to the defendant’s Singapore address, and the plaintiff’s contention that the USD 15 million would have been paid to the plaintiff’s Singapore bank accounts.

24 The governing law of the settlement agreement is, pursuant to clause 7.1, English law. This is a neutral factor. If the parties do not rely on the presumption of similarity (see *eg, Rickshaw Investments Ltd and another v*

Nicolai Baron von Uexkull [2007] 1 SLR(R) 377 at [43]), then the Malaysian courts will apply Malaysian law and the Singapore courts will apply Singapore law. If the parties do not invoke the presumption of similarity, English law experts will have to be engaged, and the inconvenience and costs involved would be materially similar in both Malaysia and Singapore.

25 I turn to Alvin John being resident in Malaysia. Both parties agree that the testimony of Alvin John will be crucial, especially with respect to whether the parties had agreed to the Condition. The Singapore courts have distinguished between convenience *stricto sensu* and compellability (*JIO Minerals FZC and others v Mineral Enterprises Ltd* [2011] 1 SLR 391 (“*JIO Minerals*”) at [63]). There is ample case authority that convenience is not a significant factor if a stay in favour of Malaysia is sought, because Singapore and Malaysia are neighbouring states and travel time should pose no real challenge (see *eg, Chan Chin Cheung v Chan Fatt Cheung and others* [2010] 1 SLR 1192 at [35]).

26 The case therefore hinges on the compellability of Alvin John as a witness. I analyse this in detail in the next section.

Should compellability be a significant factor if a witness is willing to testify outside of her place of residence?

27 Subpoenas cannot be served on persons outside of Singapore (O 38 r 18). It is of no surprise that the compellability of a witness in a jurisdiction is a factor that points towards that jurisdiction as being more appropriate (*JIO Minerals* at [63]; [71]–[74]). There is however scant authority on whether a court should take compellability into account if a witness expresses a willingness to attend trial outside of her place of residence.

28 *Spiliada* spoke of the availability of witnesses (at 478A) but did not consider compellability. In *Rickshaw Investments Ltd and another v Nicolai Baron von Uexkull* [2007] 1 SLR(R) 377 (“*Rickshaw Investments*”), two key issues of fact turned on testimony from witnesses who resided in, and were compellable in, Singapore. Crucially, neither party had adduced evidence with respect to whether those witnesses were willing to travel outside of Singapore to testify. The Court of Appeal therefore held that it was significant that the Singapore-based witnesses were clearly compellable to testify in Singapore, and ultimately refused a stay. *CIMB Bank Bhd v Dresdner Kleinwort Ltd* [2008] 4 SLR(R) 543 cited *Rickshaw Investments* with approval, but on the facts compellability was not a factor because the three identified material witnesses were neither resident in Singapore nor England (which the appellant postulated as the more appropriate forum).

29 The appellants in *JIO Minerals* averred that they intended to call witnesses based in Indonesia, and argued that they may have to be compelled but did not adduce evidence as to whether this was necessary. The parties did not lead evidence on the compellability of Indonesian witnesses in the Indonesian courts. The Court of Appeal nonetheless accepted that it was more likely for Indonesian witnesses to testify in Indonesia, and ultimately stayed proceedings.

30 One of the material Singapore-resident witnesses in *UBS AG v Telesto Investments Ltd and others and another matter* [2011] 4 SLR 503 (“*UBS*”) expressed reservations about failing an affidavit on behalf of the defendants. The defendants argued that this was not a weighty factor because his evidence could be adduced by deposition through judicial channels. The High Court disagreed and held that it was important to assess the credibility of this material

witness; as it was not suitable for his evidence to be adduced by deposition, compellability was a crucial factor.

31 In the recent decision of *Bunge SA and another v Indian Bank* [2015] SGHC 330 (“*Bunge*”), the evidence of an Indian-incorporated company, Varun, was crucial to the dispute. There was no indication that either of the parties had contacted Varun to ascertain if its officers were willing to testify in Singapore; and at any rate, Varun was in liquidation and the Indian courts would have had the jurisdiction to join Varun as a necessary and proper party.

32 Lastly, *Peters Roger May v Pinder Lillian Gek Lian* [2006] 2 SLR(R) 381 (“*Peter May*”) involved witnesses hailing from Singapore, Australia, Germany and the UK. The High Court held that the easy and ready availability of video link with unprecedented clarity and life-like verisimilitude warrants a re-assessment of the need for physical presence; geographical proximity and physical convenience are no longer compelling factors. Nonetheless “if for instance the evidence of an important foreign witness cannot be *voluntarily* obtained by video link, this could tip the balance in favour of hearing the matter in the foreign jurisdiction where the witness resides so the witness can be compelled to give evidence there” (at [27]) [emphasis added].

33 Ostensibly juxtaposed against the above is the High Court decision of *Exxonmobil Asia Pacific Pte Ltd v Bombay Dyeing & Manufacturing Co Ltd* [2007] SGHC 137 (“*Exxonmobil*”). The court noted that *Rickshaw Investments* had held that compellability was potentially an important factor. The defendant’s vice-president filed an affidavit saying that he had spoken to three potential witnesses who had intimated that they were unwilling to be witnesses. Nonetheless, this self-serving hearsay evidence should be disregarded, and

more is expected otherwise all a defendant needs to do to stay proceedings is to state that some witnesses do not wish to testify but cannot be compelled by the Singapore courts to do so.

34 *Rickshaw, JIO Minerals, UBS and Bunge* are consistent with *Peter May*. In the former cases, there was no evidence whatsoever of the willingness of witnesses to testify outside of their place of residence and compelling them to testify in their place of residence was taken to be necessary. In *Peter May*, voluntariness was the touchstone: the balance would be tipped in favour of the foreign jurisdiction where the witness resides if evidence cannot be obtained voluntarily by video link. I elaborate. In a defendant’s application to stay on the grounds of *forum non conveniens*, the overall persuasive burden lies on that defendant to persuade the court to exercise its discretion to grant a stay (*Spiliada* at 476D); but he who asserts must prove (*SCT Technologies Pte Ltd v Western Copper Co Ltd* [2015] SGCA 71 (“*SCT Technologies*”) at [17]) and where a party seeks to establish the existence of certain matters to persuade the court to exercise its discretion in its favour, the burden rests on him to prove those matters (*Spiliada* at 476E). A willingness to travel outside of one’s place of residence to testify is one of those matters. Therefore in the absence of such evidence, the former cases treated compellability as a significant factor.

35 Leaving aside Singapore case law, the United States Supreme Court, in the seminal decision of *Gulf Oil Corporation v Gilbert* 330 US 501 (1947) (“*Gulf Oil*”), listed the factors to be considered in *forum non conveniens* applications and sharply distinguished between “availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses” (at 508). While there are differences between the American and English-Singaporean conceptions of *forum non conveniens*, these centre on

the consideration of public interest factors and the number of limbs that comprise the test. When it comes to the “relative advantages and obstacles to fair trial” (*Gulf Oil* at 508) or the “factors affecting convenience or expense” (*Spiliada* at 478A) the two conceptions are materially similar. *Gulf Oil* therefore stands as highly persuasive authority that burnishes *Peter May*.

36 As a matter of principle, compellability should come into play as a significant factor only where there is no indication that a witness is willing to testify outside of her place of residence. Quite often, formal court processes are optional and need not be invoked unless necessary. For instance, pleadings can be amended by agreement (O 20 r 12 of the Rules of Court) and particulars may be furnished pursuant to a request by letter (implicit in O 20 r 6). The same applies for the attendance of witnesses: a subpoena, backed by the coercive power of the state, need not be sought if a witness is willing to attend; and in practice, it can be readily observed that the majority of witnesses are not subpoenaed. It is well-nigh a contradiction in terms to speak of compelling somebody to do something that he is already willing to do.

37 To this it may be argued that willingness to testify at trial is a mirage that is attributable to the long shadow cast by subpoenas, and ultimately punishment for disobeying an order of court. I do not share this view. A witness may be willing to testify for a myriad of reasons, and it cannot be assumed that it is the threat of sanction that is the sole or dominant reason for her willingness to do so.

38 Drawing the threads together, I state the following propositions:

- (a) The availability of a witness can be considered as one of the factors in determining whether an action should be stayed (*Spiliada* at

478A), and the weight that this factor carries can vary depending on the facts of the case (*Spiliada* at 482B). In this respect compellability is a factor that should not be conflated with convenience (*JIO Minerals* at [63]).

(b) A distinction must be drawn between the willing and unwilling (*Peter May* at [27] and *Gulf Oil* at 508). One who asserts that a witness is willing to testify outside of his place of residence must prove this (*SCT Technologies* at [17] and *Spiliada* at 476E); if this is neither asserted nor proven a witness will not be taken to be willing to testify outside of his place of residence (*Rickshaw, JIO Minerals, UBS and Bunge*).

(c) Compellability can be a significant factor in the absence of assertion or proof that a witness is willing to testify outside of his place of residence. This is *a fortiori* if unwillingness is actually proved.

(i) Where a Singapore-resident witness is concerned, this points towards Singapore as the *forum conveniens* (*Rickshaw Investments* at [23]) and *UBS* (at [68]–[70])). A Singapore-resident witness is of course compellable in the Singapore courts.

(ii) Where a witness is resident in a jurisdiction outside of Singapore, this points towards that jurisdiction as the *forum conveniens* (*JIO Minerals* at [74]) and *Bunge* (at [47])). Compellability under that jurisdiction's law must be proven; but if not proven a court will take judicial notice that it is more likely for a witness to testify in the courts of his residence (*JIO Minerals* at [73]–[74]) and *Bunge* (at [47])).

(d) Compellability is ordinarily not a significant factor if a witness is proven to be willing to testify outside of the place of her residence (*Peter May* at [27] and *Gulf Oil* at 508).

Is Alvin John willing to testify in Singapore?

39 There was some dispute over Alvin John's willingness to testify in Singapore. The defendant submitted that Alvin is not while the plaintiff submitted that Alvin is. Before me the plaintiff sought to adjourn the matter to serve a subpoena on Alvin because he had indicated that he was willing to travel to Singapore to accept service. I dismissed this request. During the interim period between the hearing and the release of this judgment, the plaintiff filed an affidavit of service averring that Alvin accepted service of a subpoena in Singapore.

40 The defendant framed Alvin as being unwilling to testify because of shifting positions and a qualification. It is incumbent on the court to set out Alvin's written responses to the parties:

(a) On 26 October 2015, Alvin refused to answer if he was aware of any agreed terms or conditions not recorded in writing, but went on to write that

... I will answer the rest of the aforesaid questions in your letter at the full trial of the matter. I am willing to give evidence in any jurisdiction including Singapore if called upon and/or subpoenaed by either party and subject to my availability on the trial dates.

Further, if any documents once in my possession is made available to one party, I shall at the same time make available the same to the other party.

(b) On 13 November 2015, Alvin wrote

I have known [the defendant] and the Plaintiff for a long time. My relationship with both parties remains cordial until todate [sic]. Hence I wish to remain impartial to their current impasse and I have intimated my position personally to both parties.

Therefore if my evidence is required at trial, it is only appropriate for a subpoena to be issued for my attendance in court.

(c) On 20 November 2015, Alvin wrote

If either party in this suit requires my evidence at trial in Singapore, please **obtain a subpoena** for my attendance in Court. For the avoidance of any doubt, I wish to emphasize that I will only give evidence in a Singapore court as a subpoenaed witness;

If and when a subpoena has been issued, I will make myself available in Singapore, by appointment, to accept service of the said subpoena.

[emphasis in original]

41 To be more precise, the defendant submitted that the 26 October letter is unclear because of the use of “and/or”; and is qualified because Alvin’s attendance was subject to his availability on trial dates. In the 13 November letter, Alvin shifted his position to say he would not give voluntarily give evidence and would have to be subpoenaed; and in the 20 November letter, Alvin absurdly says that he would not voluntarily give evidence but would voluntarily travel to Singapore to be served. All this shows that there is a risk that Alvin will not turn up in Singapore.

42 I do not agree with the defendant. I take the point that Alvin had indeed changed his position by subsequently insisting on being subpoenaed, but a change of position *per se* is neither here nor there. Alvin explained in his 13 November letter that he wished to remain impartial because he still had a cordial relationship with both parties, and *therefore* it would be appropriate for him to

be subpoenaed. These are hardly the words of somebody not willing to testify in Singapore, and are entirely understandable because Alvin does not want to give the appearance that he is testifying for either side. Alvin has gone to the extent of saying that he would accept service of a Singapore-issued subpoena in Singapore, and has indeed made good on that count. The submission that Alvin's willingness is qualified because it is subject to his availability on trial dates does not hold water. Alvin is being entirely reasonable in doing so, and the parties surely cannot expect Alvin to drop plans simply to testify in Singapore. I therefore hold that the plaintiff has proven that Alvin is willing to testify in Singapore.

43 I held that compellability is ordinarily not a significant factor (at [38(d)]) but compellability may yet be a significant factor despite avowed willingness especially where shady or fly-by-night witnesses are concerned. However this is not the case where Alvin is concerned. From the exhibited correspondence, Alvin John is the eponymous lawyer in Alvin John & Partners. He is a practising lawyer in Malaysia; and the word of a lawyer is his bond. Neither party has impugned Alvin John's character or integrity in any way. The compellability of Alvin in Malaysia is therefore not a significant factor.

Conclusion

44 The merits are not relevant to a *forum con conveniens* application. All the factors, save for Alvin John's testimony, are finely balanced. The courts ought to distinguish between willing and unwilling witnesses; while compellability can be significant factor in the absence of assertion or proof that a witness is willing to testify outside of her place of residence, compellability is ordinarily not a significant factor if a witness is proven to be willing to testify outside of the place of her residence. The plaintiff has proven that Alvin John,

despite being resident in Malaysia, is willing to testify in Singapore. The defendant has not shown that Malaysia is clearly or distinctly more appropriate than Singapore. I therefore do not need to turn to the second stage of the *Spiliada* test; and in any event the plaintiff did not seek to invoke the second stage.

45 For the reasons above, I dismiss the defendant's application to stay proceedings on the grounds of *forum non conveniens*. I shall hear the parties on costs.

Zhuang WenXiong
Assistant Registrar

Francis Xavier SC and Ang Tze Phern (Rajah & Tann Singapore
LLP) for the plaintiff;
Hri Kumar SC, Tham Feei Sy and Ms Charmaine Chew (Drew &
Napier LLC) (instructed); Ms Haridas Vasantha Devi and Shaun
Marc Liew (Samuel Seow Law Corporation) for the defendant.
