IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2023] SGHC 352

Originating Claim No 385 of 2023
(Registrar's Appeal No 193 of 2023)

Between

(1) Tan Wei Heng Kelvin
(2) Langgeng Sugiarto

… *Claimants*

And

(1) Tok Beng Tong
(2) Hendro Tok

… *Defendants*

JUDGMENT

[Conflict of Laws — Natural forum — Stage one of *Spiliada* test]

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v
Tok Beng Tong and another

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Lee Seiu Kin J
27 September 2023

12 December 2023 Judgment reserved.

Lee Seiu Kin J:

1 The claimants and the defendants in HC/OC 385/2023 ("OC 385") are parties based across at least three different jurisdictions in Southeast Asia. They entered into an oral agreement on 8 October 2012 for the claimants to invest in a mixed-use development known as the Permas City Development located in Johor Bahru, Malaysia (the "Permas City Development"). The terms of the oral agreement form the subject of strenuous contention by the parties in OC 385, but it is not disputed that pursuant to this agreement the claimants had on the same day paid an investment sum of RM2,307,744.74 to a Malaysian-registered company (of which the first defendant is a director and majority shareholder) which was the main developer for the Permas City Development. In OC 385, the claimants assert that the defendants had breached the terms of the oral agreement between them, including by failing to ensure that the construction of the Permas City Development would be completed in a profitable manner and

by failing to repay the investment sum of RM2,307,744.74 to the claimants. The claimants also bring an alternative claim in the tort of negligence alleging that the defendants had made certain representations as to the guaranteed profitability of investing in the Permas City Development and that the defendants had breached their duty of care by failing to advise and inform the claimants of the risks involved before the parties had entered into the oral agreement on 8 October 2012.

2 In response, the defendants filed a defence stating that the Singapore courts should not exercise their jurisdiction to hear the action and that all proceedings in OC 385 should be stayed. In HC/SUM 2259/2023 ("SUM 2259"), the defendants applied for a stay of the proceedings in OC 385 in favour of the Malaysian courts on the sole ground of *forum non conveniens*. HC/RA 193/2023 ("RA 193") is the defendants' appeal against the whole of the learned Assistant Registrar's (the "AR") decision to dismiss the application in SUM 2259.

Facts

The parties

3 The first claimant in OC 385 is Mr Tan Wei Heng Kelvin ("Mr Tan"), a Singapore citizen.[1] The second claimant is Mr Langgeng Sugiarto ("Mr Sugiarto"), who is Mr Tan's father-in-law. Mr Sugiarto is an Indonesian citizen and resides in Indonesia. I refer to Mr Tan and Mr Sugiarto collectively as "the Claimants". The Claimants describe in the Statement of Claim that they

[1] Affidavit of Tan Wei Heng Kelvin dated 14 August 2023 at para 16.

are in the business of investing in property developments throughout Southeast Asia.[2]

4 The first defendant is Mr Tok Beng Tong (referred to by the parties as "Mr Jonathan Tok"), a Singapore permanent resident and a Malaysian citizen.[3] Mr Jonathan Tok is also a director and majority shareholder of a company registered in Malaysia known as Buana Tunggal Sdn Bhd ("Buana Tunggal"), the principal activities of which are property investment and property development.[4]

5 The second defendant, Mr Hendro Tok, is a Malaysian citizen and resides in Malaysia.[5] He is Mr Jonathan Tok's father. The Claimants assert that Mr Hendro Tok is head of a group of companies named the Interasia Group to which Buana Tunggal belongs.[6] I refer to the first and second defendants collectively as "the Defendants". While I note that the Defendants in their supporting affidavit have neither confirmed nor denied this as a fact; they nonetheless acknowledge that "[Mr Hendro Tok] (*through Buana Tunggal*) was intending to construct and develop [the Phase Two development]" [emphasis added].[7] This provides some suggestion that regardless of his precise role in the Interasia Group and/or Buana Tunggal, Mr Hendro Tok certainly enjoyed some degree of influence in Buana Tunggal.

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2 Statement of Claim dated 14 June 2023 ("SOC") at para 1.

3 Affidavit of Tok Beng Tong dated 27 July 2023 at para 7.

4 Affidavit of Tok Beng Tong dated 27 July 2023 at para 9.

5 Affidavit of Tok Beng Tong dated 27 July 2023 at para 8.

6 SOC at para 3.

7 Affidavit of Tok Beng Tong dated 27 July 2023 at para 15.

Background to the dispute

The oral agreement made on 8 October 2012

6 It is not disputed that Mr Hendro Tok and Mr Sugiarto were long-time friends and this formed part of the context to the parties' business relationship.

7 On or around 8 October 2012, the Claimants entered into an oral agreement with the Defendants (the "Oral Agreement") concerning investment in Phase Two of the Permas City Development, which was a mixed-use development located in Johor Bahru, Malaysia. The main developer of the Permas City Development was Buana Tunggal. The Permas City Development was intended to have the following phases:

(a) The construction of a hypermarket at Lots 385, 2112 and 2114 ("Phase One").[8]

(b) The construction of commercial blocks A and B, and food bazaar block C, which included a multi-storey car park and a hotel block ("Phase Two").[9]

8 It is not disputed that a sum of RM2,307,744.74 was paid by Mr Sugiarto to Buana Tunggal via telegraphic transfer on 8 October 2012, being the investment sum of RM8,263,313.40 under the Oral Agreement (the "Investment Sum") less an agreed set-off of RM5,955,568.66.[10]

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8 Affidavit of Tok Beng Tong dated 27 July 2023 at para 15(a).

9 SOC at paras 5-6.

10 SOC at para 17; Affidavit of Tok Beng Tong dated 27 July 2023 at para 25.

9 The Defendants do not dispute that there was an agreement between the parties but they dispute the material terms of the Oral Agreement.[11] The dispute as to the material terms of the Oral Agreement is set out in greater detail below.

The parties' dispute in OC 385

10 As it turned out, the construction of Phase Two of the Permas City Development ("the Phase Two development") became riddled with delays and issues, including (a) the insolvency of and multiple changes in the main contractors of the Phase Two development, (b) movement control orders imposed by the Malaysian government in response to the COVID-19 pandemic from March 2020 onwards, and (c) the theft of copper wires and elevator equipment from the construction site. Furthermore, as a result of the aforesaid construction delays, the Defendants say that several purchasers of the commercial units in the Phase Two development had brought claims in the Malaysian courts for liquidated damages potentially amounting to a total of RM18,435,993.64[12] against Buana Tunggal pursuant to the terms of the sales and purchase agreements entered into between Buana Tunggal and these purchasers.

11 On or around 14 December 2023, Mr Jonathan Tok informed Mr Tan that the Phase Two development was a failed project.[13]

12 In OC 385, the Claimants allege that Mr Jonathan Tok had prepared a financial analysis calculating the projected development costs of the Phase Two development (the "Financial Analysis"). The Claimants further allege that based

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11 Affidavit of Tok Beng Tong dated 27 July 2023 at para 61.

12 Affidavit of Tok Beng Tong dated 27 July 2023 at para 52.

13 SOC at para 35.

on the Financial Analysis, the parties agreed that the Claimants would invest 20% of the expected cash outlay in the scenario where the units were sold at slightly below market price (*ie*, amounting to the Investment Sum of RM8,263,313.40), in exchange for a 20% share in the expected net profits of between RM44,232,896.80 and RM48,888,991.20, as and when such profits were earned by Buana Tunggal.[14] The Claimants claim that the Defendants breached the Oral Agreement by: (a) failing to ensure and/or take reasonable care to construct the Phase Two development in a manner that allowed Buana Tunggal to receive net profits of RM44,232,896.80 to RM48,888,991.20; (b) failing to provide the Claimants with 20% of all profits earned by Buana Tunggal from the Phase Two development to-date, as and when such profits were earned by Buana Tunggal; and (c) failing to repay the Investment Sum to the Claimants to-date, despite construction of the Phase Two development having been completed (collectively, the "Contract Claim").[15]

13 Further and/or in the alternative, the Claimants allege that the Defendants owed the Claimants a duty of care in advising, warranting and representing that the Phase Two development would be a safe investment with guaranteed profits, and that the Defendants (individually and collectively) between 27 October 2011 and 8 October 2012 breached their duty of care by failing to advise and inform the Claimants of the risks involved in the Phase Two development (the "Negligence Claim").[16] The Claimants further allege that they have suffered loss and damage from the Defendants' breach of the Oral Agreement and/or breach of their duty of care.[17]

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14 SOC at paras 12-16.

15 SOC at para 36.

16 SOC at paras 38-41.

17 SOC at para 42.

14 The Defendants have not filed a defence on the merits but have filed and served a defence challenging the jurisdiction of the court on the ground that the Singapore courts should not exercise their jurisdiction to hear the action.[18]

15 Nonetheless, Mr Jonathan Tok's affidavit dated 27 July 2023 sets out in greater detail the Defendants' position on the merits of the claims in OC 385. Broadly speaking, in relation to the Contract Claim, the Defendants dispute the material terms of the Oral Agreement as pleaded by the Claimants. The Defendants allege that:

(a) The parties agreed for the Claimants' entitlement to a stake or interest in the Phase Two development to be assessed on a pro-rated basis, *ie* based on the Claimants' investment amount versus the *actual* (as opposed to projected) total cash outlay for the costs of completing the Phase Two development, which would only be finalised after *all* the units in the Phase Two development had been sold.[19]

(b) There is no breach of the Oral Agreement between the parties as the total development costs as well as the total cash outlay of the Phase Two development cannot be ascertained as yet, due to the remaining unsold units as well as the potential total liquidated damages claim being brought by the purchasers of the commercial units (see [10] above).[20]

16 By the same token as (a) above, the Defendants also take the position that the Claimants would be liable for their proportionate share of the losses based on their aforementioned "stake" in the Phase Two development, should

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18 Defence (Jurisdiction) dated 6 July 2023.

19 Affidavit of Tok Beng Tong dated 27 July 2023 at para 32.

20 Affidavit of Tok Beng Tong dated 27 July 2023 at para 62.

the Phase Two development subsequently turn out to be unprofitable.[21] The Defendants therefore state that they intend to counterclaim against the Claimants for the Claimants' proportionate share of the losses should the Phase Two development turn out to be unprofitable, and will be seeking the taking of accounts for the Phase Two development and/or for damages to be assessed (the "Intended Counterclaim").[22]

17 In relation to the Negligence Claim, the Defendants contend that (a) no such warranties and/or representations as pleaded by the Claimants were made by the Defendants; (b) no duty of care arises as Mr Sugiarto was an experienced businessman and property developer; (c) there was no voluntary assumption of responsibility by the Defendants to the Claimants; and (d) the Claimants had relied on their own calculated judgment in entering the Oral Agreement.[23]

Key issues to be determined in OC 385

18 From the foregoing, the parties have identified that the issues which a court would have to determine at the trial are the following:[24]

S/N	Issue
The alleged representations	

[21] Affidavit of Tok Beng Tong dated 27 July 2023 at para 33.

[22] Affidavit of Tok Beng Tong dated 27 July 2023 at para 64.

[23] Affidavit of Tok Beng Tong dated 27 July 2023 at para 65.

[24] Affidavit of Tan Wei Heng Kelvin dated 14 August 2023 at para 12; affidavit of Tok Beng Tong dated 27 July 2023 at para 66.

1	Did the Defendants make certain representations in the period between October 2011 to November 2011 when the Claimants visited Malaysia that the Claimants would be guaranteed to enjoy returns on their investment in the Phase Two development?[25]	
2	Did the Defendants (individually or collectively) at any time between October 2011 and October 2012 make representations, whether verbally or in writing, guaranteeing that the Phase Two development would be profitable and/or guaranteeing any rate of return of investment on the Phase Two development?[26]	
The Contract Claim and the Intended Counterclaim		
3	What are the terms of the Oral Agreement between the Defendants and the Claimants? In particular, the following sub-issues arise:	
	(a)	Is it a term of the Oral Agreement that the Claimants would be entitled to receive 20% of all profits earned by Buana Tunggal from the Phase Two development, as and when such profits were earned by Buana Tunggal?[27]
	(b)	Is it a term of the Oral Agreement that the Defendants warranted and/or agreed that they would take reasonable care to ensure that construction of the Phase Two development would be completed in a manner that resulted in Buana Tunggal earning approximately net profits of RM44,232,896.80 to RM48,888,991.20?[28]

[25] SOC at para 9; affidavit of Tok Beng Tong dated 27 July 2023 at para 18.

[26] SOC at paras 8 and 15; affidavit of Tok Beng Tong dated 27 July 2023 at paras 19 and 26.

[27] SOC at para 16(d); affidavit of Tok Beng Tong dated 27 July 2023 at para 27.

[28] SOC at para 16(c); affidavit of Tok Beng Tong dated 27 July 2023 at para 28.

	(c)	Is it a term of the Oral Agreement that the Defendants would repay in full the Claimant's Investment Sum of RM8,263,313.40 to the Claimants once construction of the Phase Two development was completed?[29]
	(d)	Is it an implied term of the Oral Agreement that the Claimants would be liable for all proportionate losses in the Phase Two development, should the Phase Two development subsequently turn out to be unprofitable?[30]
4	Having determined the terms of the Oral Agreement, was there a breach of the Oral Agreement by the Defendants (in the Contract Claim) or by the Claimants (in the Intended Counterclaim)? The following sub-issues also arise:	
	(a)	Did the Defendants take reasonable care to ensure that the construction of the Phase Two development would be completed in a manner that results in Buana Tunggal earning approximately net profits of RM44,232,896.80 to RM48,888,991.20?
	(b)	If the Defendants' position that the Claimants' "stake" in the Phase Two development should be assessed on a pro-rated basis (see [15(a)] above) is accepted, what is the Claimants' assessed interest in the Phase Two development?
	(c)	Further and/or in the alternative, the taking of accounts for the Phase Two development.
The Negligence Claim		

[29] SOC at para 16(e); affidavit of Tok Beng Tong dated 27 July 2023 at para 28.

[30] Affidavit of Tok Beng Tong dated 27 July 2023 at para 33.

5	Did the Defendants owe the Claimants a duty of care (a) when advising, warranting and representing that the Phase Two development would be a safe investment with guaranteed profits and (b) to advise and inform the Claimants of the risks involved in the Phase Two development?
6	Second, if a duty of care exists on the facts, did the Defendants breach their duty of care to the Claimants?

19 The parties also agree that the *main* issue in the action relates to the terms of the Oral Agreement made between the Defendants and the Claimant on 8 October 2012.[31]

Procedural history

20 By SUM 2259 filed on 27 July 2023 the Defendants applied to court for a stay of the proceedings in OC 385 on the sole ground of *forum non conveniens*. The Defendants say that Malaysia is the more appropriate forum for the proceedings, and seek the following orders:[32]

(a) That all proceedings in this action be stayed.

(b) Costs of SUM 2259 to be paid by the Claimants to the Defendants.

(c) Such further relief, orders and directions be given as the court deems fit.

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31 Defendants' written submissions dated 25 September 2023 at para 37.

32 HC/SUM 2259/2023 dated 27 July 2023.

21 SUM 2259 was heard before the Assistant Registrar ("AR") on 6 September 2023. The Defendants' application for a stay of proceedings was dismissed.[33] On 11 September 2023, the Defendants filed their notice of appeal against the whole of the AR's decision.[34]

Decision below

22 The AR first accepted the Claimants' identification of the five issues which arise for determination at trial, as follows:

(a) What are the terms of the Oral Agreement between the parties.

(b) Consequently, whether the Defendants have breached any of those terms.

(c) What is the quantification of the loss suffered by the parties, where applicable, by way of the taking of accounts or otherwise.

(d) Further and in the alternative to the first issue, whether the Defendants owed the Claimants a duty of care in relation to the Phase Two development.

(e) If the Defendants are found to have owed the Claimants a duty of care, whether the Defendants breached it.[35]

23 Applying the first stage of the test in *Spiliada Maritime Corporation v Cansulex Ltd (The Spiliada)* [1987] AC 460 ("*Spiliada*"), the AR did not find,

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33 NE 6 September 2023 at p 11 (lines 26-28).

34 Notice of Appeal dated 11 September 2023.

35 NE 6 September 2023 at pp 9 (line 29) to 10 (line 5).

on balance, Malaysia to be a more appropriate forum for the determination of the proceedings.[36]

24 The AR observed that the most significant plank of the Defendants' case on the applicable connecting factors appeared to be that the Permas City Development project is situated in Malaysia, the witnesses and documents in relation to the project are situated in Malaysia, and that the witnesses are compellable only by the Malaysian courts. However, the AR took the view that these connecting factors pointing to Malaysia would only relate to one out of the five identified issues above for determination at the trial, and the witnesses and documents are not likely to be of assistance in the determination of the issues relating to proving the terms of the Oral Agreement between the parties.[37] Furthermore, the AR accepted the Claimants' argument that most, if not all, of the documents relating to the Permas City Development project would be in the electronic form to be a reasonable one. The Claimants also argued that the Defendants would have access to these documents by virtue of their positions in Buana Tunggal and the corporate group to which it belongs.[38] Thus, the AR considered that while witness compellability was an important factor, it could not outweigh the significance of the other connecting factors to Singapore in this case.

25 Turning to the connecting factors which pointed to Singapore, the AR considered that these were as follows:[39]

> … It is not disputed that the physical meetings between the parties took place mainly in Singapore and in my view, it is

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36 NE 6 September 2023 at p 12 (lines 13-15).

37 NE 6 September 2023 at pp 11 (line 33) to 12 (line 4).

38 NE 6 September 2023 at p 10 (lines 23-28).

39 NE 6 September 2023 at p 12 (lines 8-11).

> likely that any oral agreement will be concluded between the parties in Singapore. If so, the governing law of the oral agreement, unless otherwise expressly agreed, will naturally be Singapore law.

26 The AR also considered that the personal connections factor, with regard to the parties' respective citizenship and ordinary residence, was at best neutral.[40]

27 On balance, therefore, the AR did not find Malaysia to be the more appropriate forum and there was no need to proceed to consider the second stage of the *Spiliada* test. The AR also ordered the Defendants to pay the Claimants the costs of the application in SUM 2259 at S$9,000 (all-in).[41]

Parties' arguments on appeal

28 The Defendants submit that the claims have closer connections to Malaysia, as: (a) both Defendants are Malaysian citizens; (b) Buana Tunggal is a Malaysian company;[42] (c) all the project documents relating to the Permas City Development are located only in Malaysia;[43] and (d) the witnesses that the Defendants intended to call are only available and compellable in Malaysia.[44] On appeal, the Defendants further submit that Malaysian law governs the Oral Agreement.[45] The Defendants allege that the key decision makers in negotiating and entering the Oral Agreement were Mr Sugiarto and Mr Hendro Tok, who were both not in Singapore at all material times. Any communications between

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40 NE 6 September 2023 at p 12 (lines 6-8).

41 NE 6 September 2023 at p 13 (lines 1-2).

42 Defendants' written submissions dated 25 September 2023 at paras 26-32.

43 Defendants' written submissions dated 25 September 2023 at paras 53-54.

44 Defendants' written submissions dated 25 September 2023 at paras 37-38; 42-43.

45 Defendants' written submissions dated 25 September 2023 at paras 56, 59-60.

Mr Sugiarto and Mr Hendro Tok would have been made by telephone conversation and/or social visits by the Claimants to Malaysia, with Mr Tan and Mr Jonathan Tok being asked by their respective key decision makers to assist in the necessary follow up work.[46]

29 The Claimants rely on substantially the same submissions as they did when SUM 2259 was heard before the learned AR. The Claimants submit that their claims are more closely connected to Singapore, since: (a) the first claimant is a Singapore citizen, the first defendant is a Singapore permanent resident, and the second claimant is willing to attend and testify in Singapore court proceedings;[47] (b) many of the physical meetings between Mr Tan and Mr Jonathan Tok took place in Singapore; (c) Mr Tan suffered damage in Singapore; (d) Singapore law applies by default as the Defendants did not plead that Malaysian law applies,[48] and; (c) the shape of the litigation is in favour of the Singapore courts, as most of the claims relate to the Oral Agreement, which was concluded in Singapore and would be governed by Singapore law.[49]

30 The Claimants also submit that little weight should be given to the Malaysian connecting factors. First, the Defendants' witnesses would be limited to evidence of the delays in the Phase Two construction, rather than the actual breach of contractual or tortious duties by the Defendants themselves.[50] Furthermore, the progress and delays to the Phase Two development would have already been captured by documentary evidence; for instance, minutes of

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46 Defendants' written submissions dated 25 September 2023 at paras 59-60; affidavit of Tok Beng Tong dated 27 July 2023 at paras 17 and 69.

47 Claimants' written submissions dated 25 September 2023 at para 4.

48 Claimants' written submissions dated 25 September 2023 at para 4.

49 Claimants' written submissions dated 25 September 2023 at para 10.

50 Claimants' written submissions dated 25 September 2023 at para 6.

meetings and correspondence.[51] The Claimants further submit that various witnesses whom the Defendants intend to call—being the architect representative, project managers of the first, second and third main contractors, a quantity surveyor and engineers involved in the Phase Two development—would not require to be compelled to attend court to give evidence as their interests would be aligned with that of the Defendants and of Buana Tunggal.[52] Second, the Claimants reiterate that the documents relating to the Phase Two development are most likely to have been stored and circulated in electronic form, which the Defendants would have easy access to, as they occupy key positions in Buana Tunggal and the corporate group to which it belongs.[53]

The applicable legal principles

31 The applicable legal principles are well-settled and not disputed by the parties.

32 As the Court of Appeal explained in *Rappo, Tania v Accent Delight International Ltd and another and another appeal* [2017] 2 SLR 265 ("*Rappo*") at [68]–[72]), the *Spiliada* test involves two stages:

> (a) First, the court considers whether, *prima facie*, there is some other available forum which is more appropriate for the case to be tried ("Stage One"). Under Stage One, the court searches for those incidences (or connections) that have the most relevant and substantial associations with the dispute. Factors that may be considered include: (i) the personal connections of the parties and witnesses; (ii) connections to relevant

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51 Claimants' written submissions dated 25 September 2023 at para 7.

52 Claimants' written submissions dated 25 September 2023 at para 8.

53 Claimants' written submissions dated 25 September 2023 at para 9.

events and transactions; (iii) the applicable law to the dispute; (iv) the existence of proceedings elsewhere; and (v) the shape of the litigation. The process is not mechanical; a court has to take into account an entire multitude of factors in balancing the competing interests: see also *Rickshaw Investments Ltd and another v Nicolai Baron von Uexkull* [2007] 1 SLR(R) 377 ("*Rickshaw Investments*") at [15].

(b) Second, if the court concludes that there is a more appropriate forum, then the court will ordinarily grant a stay unless there are circumstances by reason of which justice requires that a stay should nonetheless not be granted ("Stage Two").

33 In *Rappo*, the Court of Appeal further emphasised (at [70] and [72]) that it is the *quality* of the connecting factors that is crucial in this analysis, rather than the quantity of factors on each side of the scale. Ultimately, the lodestar for a court tasked with identifying the natural forum is whether any of the connections point towards a jurisdiction in which the case may be "tried more suitably for the interests of all the parties and for the ends of justice" (citing Lord Goff of Chieveley in *Spiliada* at 476).

Issues to be determined

34 In the light of the foregoing, the issues before me are:

(a) Whether Malaysia is the more appropriate forum.

(b) If Malaysia is the more appropriate forum, whether there are circumstances by reason of which justice requires that a stay should nonetheless not be granted.

Whether Malaysia is the more appropriate forum

35 At Stage One of the *Spiliada* test, the burden is on the Defendants to demonstrate that there is *another* available forum which is clearly or distinctly more appropriate than Singapore (*CIMB Bank Bhd v Dresdner Kleinwort Ltd* [2008] 4 SLR(R) 543 ("*CIMB Bank*") at [26]).

36 I address the connecting factors in turn before concluding on Stage One of the *Spiliada* test.

Connections to events and transactions

The Phase Two development is located in Malaysia

37 In the main, I agree with the Defendants' submission that performance of the Oral Agreement, being the investment in the construction of the Phase Two development, was contemplated by the parties to substantially take place in Malaysia.[54] The transaction, the subject of the Oral Agreement, (*ie*, the Claimants' payment of the Investment Sum) was made by the Claimants not to the Defendants but to the Malaysian-registered company Buana Tunggal (see [8] above), which was the main developer for the Phase Two development. Furthermore, the underlying subject matter of the Oral Agreement relates to the construction of a development that is located in Malaysia. To my mind, these transactions and events are undoubtedly relevant to the dispute at hand revolving primarily on a claim for breach of the Oral Agreement, and provide a clear and meaningful connecting factor pointing to Malaysia.

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54 Defendants' written submissions dated 25 September 2023 at para 28.

The physical meetings in Singapore

38 The Claimants point to the following three events and transactions which they say point to Singapore as the appropriate forum: (a) first, that many of the physical meetings between Mr Tan and Mr Jonathan Tok took place in Singapore, save for two site visits to Malaysia between October to November 2011; (b) second, that Mr Sugiarto's "historical dealings" with Mr Hendro Tok had always been based in Singapore; and (c) third, Mr Tan has suffered damage in Singapore, being a citizen and resident of Singapore.[55] I address each in turn.

39 I do not consider the fact that physical meetings between Mr Tan and Mr Jonathan Tok took place in Singapore to be a strong factor pointing in favour of Singapore. The Claimants allege that there were various meetings in Singapore between these two parties between October 2011 to October 2012 prior to the Oral Agreement being entered into. They further allege that certain representations at issue (see S/N 2 at [18] above) as to the Phase Two development were made verbally and in writing by Mr Jonathan Tok to Mr Tan during these meetings in Singapore.[56] Additionally, after the Oral Agreement was entered into, more meetings between Mr Tan and Mr Jonathan Tok continued to take place in Singapore from October 2012 to 2022 as there were requests for information and documents relating to the Phase Two development.[57]

40 However, as seen from [3] to [5] above, the parties resided and did business in various jurisdictions. While Mr Tan and Mr Jonathan Tok did meet

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55 Claimants' written submissions at paras 57-64.

56 SOC at para 15; affidavit of Tan Wei Heng Kelvin dated 14 August 2023 at para 19.

57 Claimants' written submissions at para 59.

in Singapore on various occasions to discuss and sort out arrangements relating to the Oral Agreement, I accept that any other communications between Mr Sugiarto and Mr Hendro Tok (and as between these two parties and Mr Tan and/or Mr Jonathan Tok) must necessarily have been made by telephone conversations and/or electronic means, given that they were all residing in different jurisdictions at all material times. Furthermore, I accept that there is some suggestion that Mr Sugiarto and Mr Hendro Tok played a more significant role as the key decision makers behind the investment in the Phase Two development, with Mr Tan and Mr Jonathan Tok simply asked to assist with the matter.[58] By the Claimants' account, it was Mr Hendro Tok who had solicited the investment opportunity leading to the Oral Agreement from Mr Sugiarto,[59] whereas by the Defendants' account, it was Mr Sugiarto who had approached Mr Hendro Tok on his own accord.[60] If such was the case, then the fact that Mr Tan and Mr Jonathan Tok met in Singapore would all the more have been a matter of convenience for the parties as a whole.

41 Therefore, I consider the fact that certain meetings between Mr Tan and Mr Jonathan Tok took place in Singapore could not, without more, establish a clear nexus to Singapore.

The Claimants' remaining two factors

42 The Claimants have also pointed to Mr Sugiarto's "historical dealings" with Mr Hendro Tok which they say have always been based in Singapore. By "historical dealings" the Claimants appear to be referring to the history of previous business dealings between Mr Sugiarto and Mr Hendro Tok and the

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58 Affidavit of Tok Beng Tong dated 27 July 2023 at para 17.

59 SOC at para 5.

60 Affidavit of Tok Beng Tong dated 27 July 2023 at para 16.

manner in which they became friends over the years.[61] In support of their assertion that these previous business dealings took place in Singapore, the Claimants exhibited screenshots of the Interasia Group's website, by which they meant to persuade the court that Buana Tunggal is part of the larger corporate group known as the Interasia Group that operates out of Singapore.[62] As noted at [5] above, the Claimants also allege that Mr Hendro Tok is head of the Interasia Group.[63] However, apart from these screenshots which, I would note, do not shed light in any way on the previous business dealings between Mr Sugiarto and Mr Hendro Tok, the Claimants have not otherwise substantiated the bare assertion that such previous dealings took place in Singapore, or even given particulars of the dealings. In any event, whether such "historical dealings" took place in Singapore or not is not entirely relevant to the circumstances surrounding the inception of the Oral Agreement. It is not disputed that the Oral Agreement was made orally and there is no suggestion that Mr Sugiarto or Mr Hendro Tok was in Singapore at the material time. I therefore decline to place any weight on this proposed factor.

43 Lastly, I also decline to place much weight on the proposed factor that Mr Tan, being a citizen of and resident in Singapore, has suffered damage in Singapore. In *Lakshmi Anil Salgaocar v Jhaveri Darsan Jitendra* [2019] 2 SLR 372 ("*Lakshmi*"), the Court of Appeal considered (at [85]) that limited weight ought to be placed on the factor of the place of breach given that it *assumes* that the plaintiff's claim has been made out. Likewise, I consider that the fact of Mr Tan suffering damage in Singapore presupposes that there has been a breach,

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61 Affidavit of Tan Wei Heng Kelvin dated 14 August 2023 at paras 17-18; affidavit of Tok Beng Tong dated 27 July 2023 at paras 11-12.

62 Affidavit of Tan Wei Heng Kelvin dated 14 August 2023 at para 17.

63 SOC at para 3.

and it should therefore be given limited weight in the overall analysis. I should add that the fact that the second Claimant, Mr Sugiarto, suffered damage in Indonesia (if the claimants' case is found at trial to be made out) and this would further dilute whatever weight that could be given on this score.

Governing law of the Oral Agreement

44 I consider the governing law of the Oral Agreement to be a factor pointing to Malaysia, subject to the qualification expressed at [55] below.

45 To recapitulate, the Claimants submit that Singapore law applies by default as the *lex fori* whereas the Defendants argue that Malaysian law governs the Oral Agreement.

46 It is well-accepted that the court applies a three-step approach to determine the governing law of a contract (see *Pacific Recreation Pte Ltd v S Y Technology Inc and another appeal* [2008] 2 SLR(R) 491 ("*Pacific Recreation*") at [36], citing *Overseas Union Insurance Ltd v Turegum Insurance Co* [2001] 2 SLR(R) 285 at [82]). At the first stage, the court considers whether the parties had expressly chosen a governing law. If there is no express choice made by the parties, the court considers at the second stage whether the intention of the parties as to the governing law can be inferred from the circumstances. If the court is unable to infer the parties' intentions, it proceeds to the third stage where the court assesses which system of law the contract has the closest and most real connection with the contract in question and the circumstances surrounding the inception of that contract. This is the same as the objective test of what the reasonable man ought to have intended if he had thought about the matter at the time when he made the contract for the dispute to be determined

"in the most convenient way and in accordance with business efficacy" (*Pacific Recreation* at [47] and [49]).

47 Applying the three-stage approach, it is clear that there was no express law to the Oral Agreement. Moving on to the second stage, I begin by noting that the place of contracting is regarded as "generally not important in determining the governing law of a contract, except, perhaps, where the contract is to be performed in that country" (*Pacific Recreation* at [43], citing *Chatenay v The Brazilian Submarine Telegraph Company, Limited* [1891] 1 QB 79). The Claimants suggest that the Oral Agreement was largely concluded in Singapore on the basis that the physical meetings between Mr Tan and Mr Jonathan Tok took place in Singapore.[64] I set out the factors identified in *Pacific Recreation* at [37] and [43]–[44] that are relevant to the present case as follows:

(a) the commercial purpose of the transaction;

(b) the currency of the contract or the currency for payment; and

(c) the places of residence or business of the parties.

48 The first factor is the commercial purpose of the transaction, which for much the same reasons as set out at [37] above, clearly points to Malaysia. The very subject matter of the Oral Agreement concerned financing the construction of the Phase Two development that is located in Johor Bahru, Malaysia.

49 With this in mind, even if the Oral Agreement was largely concluded in Singapore, this bore no particular relation to the place of performance of the Oral Agreement. With the parties based across various jurisdictions, it is equally plausible that Singapore was a convenient location for Mr Tan and Mr Jonathan

[64] Claimants' written submissions dated 25 September 2023 at paras 57-63.

Tok to physically meet to sort out the details relating to the Claimants' investment in the Phase Two development. I therefore decline to give much weight to the place of contracting at the second stage.

50 The second factor is the currency of the contract, which also points to Malaysia. It is not disputed that payment pursuant to the Oral Agreement was made in Malaysian Ringgit, namely, the Investment Sum of RM8,263,313.40 (see [8] above). Furthermore, payment of the Investment Sum was made to Buana Tunggal, which was a company registered in Malaysia and the main developer for the Phase Two development.

51 The third factor relates to the places of residence or business of the parties, which is neutral. I reiterate my considerations expressed at [40] above that the parties resided and did business in various jurisdictions. Although there were several physical meetings in Singapore between Mr Jonathan Tok and Mr Tan, the Claimants also pleaded that the parties had on two occasions met in Malaysia to visit the site on which the Phase Two development would be constructed,[65] and I have accepted that any other communications between Mr Sugiarto and Mr Hendro Tok must necessarily have been made by telephone conversations and/or electronic means.

52 For these reasons, I find that it is reasonable to infer that the implied law governing the Oral Agreement is likely to be Malaysian law.

53 For completeness, even if it could not be inferred that the parties intended Malaysian law to be the governing law following the second stage of the analysis, I would have no difficulty arriving at the same conclusion under

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[65] SOC at para 9.

the third stage as to which law has the closest and most real connection with the Oral Agreement. The Court of Appeal in *Pacific Recreation* clarified (at [48]) that the same factors are to be taken into consideration at the second and third stage, but the difference lies in the weight which is to be accorded to these factors, with equal weight being placed on *all* factors at the third stage. For similar reasons as stated above, it is clear that Malaysian law bears the most connection with the Oral Agreement.

54 As to the Claimants' argument that Malaysian law was not expressly pleaded by the Defendants, I would note that this is precisely because a defence on the merits of the case would typically not be filed by a defendant who seeks a stay of proceedings based on *forum non conveniens* (see O 6 r 7(4) of the Rules of Court 2021 (the "ROC 2021")). In the present case, I am satisfied that there is adequate material before the court for a finding to be made as to the governing law of the Oral Agreement, for the purposes of identifying the appropriate forum.

55 For the foregoing reasons, I consider the governing law of the Oral Agreement to be a relatively important factor pointing to Malaysia, even taking into account the following qualification. I recognise that the issues to be determined at trial (as identified by the parties at [18] above) are largely factual as opposed to legal in nature (see in this regard the observations of the Court of Appeal in *Lakshmi* at [56]–[57]). Furthermore, both Singapore and Malaysia are common law jurisdictions. Although I note that the law of contract in Malaysia is governed by her Contracts Act 1950 (Act 136), there is no suggestion by either party that the Malaysia or Singapore courts would apply different contract or tort law principles such as to affect the outcome of the dispute.

Place where the tort occurred

56 Insofar as the Claimants' alternative pleaded case lay in the tort of negligence, I also consider the place where the tort was alleged to have occurred, which can provide a convenient starting point or *prima facie* position insofar as the place of the tort was not fortuitous (*Rickshaw Investments* at [39] and [40]; *JIO Minerals FZC and others v Mineral Enterprises Ltd* [2011] 1 SLR 391 ("*JIO Minerals*") at [106]). But in the present case, I consider the place of the tort to be a neutral factor for the following two reasons.

57 The test that is commonly applied for determining the place of the tort is that which looks at the events constituting the tort and asks where, in substance, the cause of action arose (*JIO Minerals* at [90]). For the tort of negligence, this would be where the failure to take reasonable care took place (*Distillers Co (Biochemicals) Ltd v Laura Anne Thompson* [1971] AC 458). The Claimants' pleaded case in negligence alleges that prior to the Oral Agreement being entered into the Defendants had failed to take reasonable care in giving certain advice, warranties and representation to the Claimants that the Phase Two development would be a safe investment with guaranteed profits.[66] Therefore, I consider that the closest link to Singapore would be insofar that the Defendants' voluntary assumption of responsibility substantially took place by Mr Jonathan Tok's acts or omissions in Singapore. However, even this could not be said for certain for much the same reasons as set out at [40] above. I reiterate that the physical meetings between Mr Jonathan Tok and Mr Tan told only one side of the story. As between Mr Hendro Tok and Mr Sugiarto, their communications must necessarily have been made by telephone conversations and/or electronic means from their respective locations. There is also some

66 SOC at paras 39-41.

suggestion that Mr Hendro Tok and Mr Sugiarto were in fact the key decision makers behind the Oral Agreement. More importantly, on at least two occasions in October and November 2011 the Claimants had made social visits to the Defendants and to the construction site of the Phase Two development in Malaysia. By the Claimants' own pleaded case, it is alleged that during the time of both these visits to Malaysia the Defendants had continued making the representations the subject of the Negligence Claim.[67]

58 Furthermore, *even if* Singapore could be considered the place of the tort, I consider the *prima facie* position to be displaced on the facts of the case indicating that it was fortuitous that the failure to take reasonable care took place in Singapore. As stated above, the parties were based across different jurisdictions, the Oral Agreement related to the construction of a development project in Malaysia, and the sole nexus to Singapore was the location of the physical meetings between Mr Jonathan Tok and Mr Tan.

59 I therefore consider the place where the tort occurred to be a neutral factor in the present case.

The Defendants' witnesses

60 The Defendants say that they intend to call witnesses who are residents in Malaysia to give evidence on the following events to establish the Defendants' defence that they had ensured and/or used reasonable care to ensure the profitable construction of the Phase Two development:[68]

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67 SOC at para 9(a).

68 Defendants' written submissions dated 25 September 2023 at para 41; affidavit of Tok Beng Tong dated 27 July 2023 at paras 72-74.

(a) The insolvency and resultant delays of the first main contractor appointed, Mutiara Raya Corporation Sdn Bhd.

(b) The delays caused to the Phase Two development by the second main contractor appointed, Max Southern Steel Sdn Bhd ("MSSB").

(c) Delays occasioned by the COVID-19 pandemic from March 2020 onwards.

(d) Theft issues at the Phase Two development site and related problems with suppliers.

(e) Efforts by Buana Tunggal to appoint the third main contractor to take over MSSB and to complete the remaining works at the Phase Two development.

(f) Delays of delivery of vacant possession of the purchased units and purchasers' claims for liquidated damages against Buana Tunggal, for which the Defendants intend to call as witnesses some of the purchasers of the commercial units in the Phase Two development. Most of these purchasers reside in Malaysia.

61 Apart from the witnesses involved in point (f) above, the witnesses whom the Defendants intend to call were all involved in the Phase Two development and were either the project consultants or main contractors for the Phase Two development not in the employ of the Defendants or Buana Tunggal.[69] These witnesses are Malaysian citizens and as far as the Defendants are currently aware are residing in Malaysia.[70]

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69 Defendants' written submissions dated 25 September 2023 at para 43.

70 Affidavit of Tok Beng Tong dated 27 July 2023 at para 72.

62 I do not accept the Claimants' submission that limited weight should be given to the personal connections of the witnesses since the witnesses which the Defendants intend to call would provide limited evidence as to the existence of delays in the construction of the Phase Two development, rather than the actual breach of contractual or tortious duties by the Defendants themselves.[71]

63 By the Claimants' own pleaded case (see [12] above), they allege, on the basis that the Reasonable Care Term exists, that the Defendants *did not ensure and/or did not take reasonable care to ensure* that the construction of the Phase Two development would be completed in a manner that results in Buana Tunggal earning approximately net profits of RM44,232,896.80 to RM48,888,991.20.[72] As set out above at S/Nos 3(b) and 4(b) of [18] above, the Claimants have therefore put in issue the question of the manner in which the Defendants managed and/or oversaw the timely and profitable completion of the Phase Two development project, which is a separate and distinct inquiry from the mere fact of the existence of delays in the completion of the project.

64 I am satisfied that the Defendants have shown that the evidence from the foreign witnesses identified at paragraph 72(a)–(g) of Mr Jonathan Tok's affidavit dated 27 July 2023 (collectively, the "Malaysian Witnesses") is at least arguably relevant to the Defendants' defence on the management of the Phase Two development project. On the issue of the Claimants' pleaded Reasonable Care Term, if indeed found to be a term of the Oral Agreement, this is likely to raise a significant number of disputed factual issues, for instance, as to who is at fault for the delays to the Phase Two development, and whether these delays

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71 Claimants' written submissions dated 25 September 2023 at paras 5-7.

72 SOC at para 16(c) and 36(b); affidavit of Tan Wei Heng Kelvin dated 14 August 2023 at para 12(b) and 12(d).

were critical delays such that the project as a whole was delayed.[73] The evidence from the project consultants or main contractors for the Phase Two development whom the Defendants intend to call would therefore be relevant to the determination of these factual issues.

Witness compellability

65 I begin by dealing with the appropriate weight to be given to the factor of witness compellability, before turning to witness convenience.

66 The Defendants argue that they need to rely on the Malaysian Witnesses who may have to be compelled to give evidence. They claim that the Singapore courts cannot compel a foreign witness to testify in a Singapore court (see by implication from O 15 r 4(3) of the Rules of Court 2021, which requires that an order to attend court or an order to produce documents must be served on the witness "by personal service *in Singapore*" [emphasis added]).

67 In response, the Claimants rely on O 66 r 1 of the Rules of Court 2012 (PU(A) 205/2012) (M'sia) (the "Malaysian ROC") which they say provides that the Malaysian courts have the power to order witnesses based in Malaysia to attend and be examined in relation to proceedings before a foreign court, upon request by any person authorised to make such a request by that foreign court.[74]

68 Although the Claimants have not adduced expert evidence on this point of Malaysian law, in Singapore, it is well-recognised that issues of foreign law can also be proven by directly adducing raw sources of foreign law as evidence,

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73 Affidavit of Tan Wei Heng Kelvin dated 14 August 2023 at paras 27-28.

74 Claimants' written submissions dated 25 September 2023 at para 50; affidavit of Tan Wei Heng Kelvin dated 14 August 2023 at pp 85-87 (Exhibit "TWHK-4").

provided they satisfy the requirements in the Evidence Act 1893 (2020 Rev Ed) (the "EA"). Nonetheless, the precise evidentiary weight to be accorded may differ depending on the foreign law at hand (*Pacific Recreation* at [55] and [60]). In the present case, I note that s 59(1)(*b*) of the EA provides that the Singapore courts shall take judicial notice of "all Acts passed or hereafter to be passed by the legislature of any territory within the Commonwealth". Furthermore, under s 59(2) of the EA, our courts can "resort for [their] aid to appropriate books or documents of reference" when dealing with such Acts. Given the comparative similarities between Singapore and Malaysian civil procedure and the presence of an equivalent legislative provision in Singapore, being O 55 r 1 of the ROC 2021 (and its predecessor legislation, O 66 r 1 of the Rules of Court 2014), I consider that there is little difficulty in the present case in a Singapore court competently assessing whether O 66 r 1 of the Malaysian ROC provides for the position as stated by the Claimants.

69 Order 66 r 1 of the Malaysian ROC provides:

> **Jurisdiction of Registrar to make order (O 66 r 1)**
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> 1. (1) Subject to paragraph (2), the power of the High Court or a Judge thereof to make, in relation to a matter pending before a Court or tribunal in a place outside the jurisdiction, orders for the examination of witnesses and for attendance and for production of documents and to give directions may be exercised by the Registrar.
>
> (2) The Registrar may not make such an order if the matter in question is a criminal matter.

Order 66 r 2 of the Malaysian ROC in turn provides the procedure for an application for an order under O 66 r 1, and O 66 r 4 further provides the procedure for the taking of evidence under any order made in pursuance of O 66 of the Malaysian ROC.

70 In *Malaysian Rules of Court 2012: An Annotation* vol 2 (LexisNexis, 2012) at para 66/1/4, the position under O 66 r 1 is further stated as follows:

> **66/1/4. Pending before a court or tribunal in a place outside the jurisdiction.** There must be a matter pending before the foreign court or tribunal before the High Court can exercise its power under this rule. The question of whether there is a matter pending before the foreign court or tribunal is for the requesting court to determine. The court will not question the bona fides of a letter of request from a foreign court: see the dicta of Eusoff Chin J (as his Lordship then was) in *Lorrain Esme Osman v A-G of Hong Kong* (unreported, Originating Summons No R8-24-59-89), where it was also held that concrete evidence in the form of a decision of the foreign court must be produced to prove that no proceedings were pending at the date of the application for the order for examination of witnesses and production of documents in the High Court. See also *Dato Mohamed Hashim Shamsuddin v A-G, Hong Kong* [1986] 2 MLJ 112, where the Supreme Court was satisfied from the order of the foreign court for issue of the letter of request, the letter of request itself and the affidavit filed in the High Court in support of the application that there were pending proceedings in the foreign court.

71 I am therefore satisfied that the availability of O 66 r 1 of the Malaysian ROC mitigates, to some extent, the witness compellability factor as relied upon by the Defendants. Where proceedings are pending before a foreign (*ie*, outside of Malaysia) court or tribunal, and where a witness in Malaysia is unwilling to give evidence or to produce documents voluntarily, the High Court in Malaya and the High Court in Sabah and Sarawak have the power to make an order that evidence be taken in Malaysia, for the purposes of the foreign proceedings.

Witness convenience

72 I consider that the appropriate weight to be given to the witness convenience factor must be balanced between (a) on the one hand, the availability of giving evidence via video-link as well as the close proximity of Singapore to Malaysia (*JIO Minerals* at [69]–[70] and [110]; see also O 15 r 5

of the ROC 2021) and (b) on the other hand, the greater significance afforded to the witness convenience factor where the main disputes in the case at hand revolve around questions of fact (*Rickshaw Investments* at [19]), and also given that the Defendants intend to call *multiple* witnesses based in Malaysia.

73 In addition, while I noted at [71] above that the Malaysian courts have the power to make an order under O 66 r 1 of the Malaysian ROC that evidence be taken in Malaysia for the purposes of foreign proceedings, such mode of taking evidence will no doubt be more cumbersome in both time and expenses to the Defendants should the Malaysian Witnesses turn out to be *unwilling* to give evidence and/or to produce documents voluntarily. In this regard, O 66 r 4(2) alludes to the payment of fees and expenses due to the examiner under the procedure in O 66 of the Malaysian ROC.

74 On balance, therefore, I consider that there would be relatively more convenience in having the case decided in the forum where the Malaysian Witnesses are ordinarily resident. For completeness, I also note that the Claimants have not suggested that they intend to call other witnesses who may be based in Singapore or elsewhere.

The availability of documents

75 It is possible for the location of documents to become a relevant connecting factor if the disclosure of these documents can only easily be obtained in proceedings in one of the competing jurisdictions (*Ivanishvili, Bidzina and others v Credit Suisse Trust Ltd* [2020] 2 SLR 638 ("*Ivanishvili*") at [98]). The Defendants assert that all the project documents in relation to the Phase Two development are located only in Malaysia, because these documents are in the possession of the various parties involved in the Phase Two

development that are either Malaysian entities and/or Malaysian citizens.[75] At the hearing on 27 September 2023, counsel for the Defendants orally submitted that such project documents would be relevant to assessing the Claimants' interest in the Phase Two development if the Defendants' position on the terms of the Oral Agreement is accepted, and also relevant to the taking of accounts for the Phase Two development and/or for damages to be assessed under the Defendants' Intended Counterclaim (see [16] above). The Defendants further submit that such project documents can only be obtained via the discovery process in the Malaysian courts and are therefore a relevant connecting factor pointing to Malaysia.[76]

76 For the following two reasons, however, I do not consider the availability of documents to be a relevant connecting factor in the present case.

77 In the first place, the Defendants have not demonstrated an at least arguable case that the project documents cannot be easily obtained. On the contrary, I agree that these documents relating to the Phase Two development are most likely to have been stored and circulated in electronic form. I also agree, bearing in mind that Buana Tunggal was the main developer for the Phase Two development, and that the Defendants appear to occupy key positions in Buana Tunggal (see [4] and [5] above), that it is likely that the Defendants would have easy access to these project documents which are relevant to their defence and Intended Counterclaim.

78 Furthermore, even if I am wrong as to the above, I also consider the availability of the procedure under O 66 r 1 of the Malaysian ROC sufficient to

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75 Defendants' written submissions dated 25 September 2023 at para 53.

76 Defendants' written submissions dated 25 September 2023 at para 54.

rebut the Defendants' argument that they would be unable to obtain documents which are solely in the possession of Malaysian parties. As noted at [71] above, the Malaysian courts would have the power to make an order for the production of documents by a witness based in Malaysia, for the purposes of foreign proceedings.

Personal connections of the parties

79 The Claimants submit that this factor points in favour of Singapore as the first claimant is a Singapore citizen, the first defendant is a Singapore permanent resident, and the second claimant is willing to attend and testify in Singapore court proceedings.

80 However, the first defendant is also a citizen of Malaysia and the second defendant resides in Malaysia. I therefore consider this factor to be neutral and find applicable in this regard the observation of the Court of Appeal in *Rappo* (at [71]) that "in disputes involving well-heeled parties who have a high degree of mobility … the current domicile of the parties may be of little legal significance, depending on the circumstances of the case." This is even more so given the close geographical proximity between the parties' respective places of domicile in the present case (*ie*, Singapore, Malaysia and Indonesia).

Conclusion: Malaysia is the more appropriate forum

81 I am satisfied that the Defendants have discharged their burden of showing that Malaysia is clearly and distinctly the more appropriate forum than Singapore for the trial of the case concerned. The place of performance of the Oral Agreement was intended by the parties to be substantially performed in Malaysia and the underlying subject matter of the Oral Agreement, being the construction of a development project that is located in Johor Bahru, clearly

points to Malaysia (see [37] above). Together with the governing law of the Oral Agreement which I have found at [52] above to be Malaysian law as well as the undoubted convenience in having the case decided in Malaysia where the intended witnesses are ordinarily residents (see [74] above), I consider that the connecting factors meaningfully point to Malaysia as the jurisdiction in which the case may be "tried more suitably for the interests of all the parties and for the ends of justice" (*Rappo* at [72], citing *Spiliada* at 476). Insofar as the strongest argument to be made in favour of Singapore is that many of the physical meetings between Mr Jonathan Tok and Mr Tan had taken place in Singapore, I reiterate my considerations at [40] above that it was Mr Sugiarto and Mr Hendro Tok who played the more significant roles as the key decision makers behind the investment in the Phase Two development and, in any event, much of the communications between the parties must necessarily have been made by electronic means given that they were all residing in different jurisdictions at the material time. Furthermore, there were at least two occasions where the Claimants had visited the Defendants in Malaysia and during which time, by the Claimants' pleaded case, they say that the Defendants had continued to make certain representations as to the profitability of the investment. Finally, while I consider the strength of the witness compellability factor to be largely mitigated for the reasons expressed at [71] above, I also note the Court of Appeal's observation in *Ivanishvili* (at [96]) that "[u]ltimately, the court will usually be prepared to assume that despite the possible arrangements and accommodations [*ie*, the availability of judicial assistance proceedings for taking evidence in the foreign jurisdiction], it would *typically* be easier to secure the evidence of witnesses in the jurisdiction where they are located". [emphasis in original]

82 On balance, therefore, I consider at Stage One of the *Spiliada* test that Malaysia is the more appropriate forum.

Stage Two of the *Spiliada* test

83 The legal burden at Stage Two of the *Spiliada* test is on the claimant to establish the existence of special circumstances by reason of which justice requires that a stay should nonetheless be refused (*CIMB Bank* at [26]). In the present case, the Claimants have not raised any personal or juridical advantage that they would lose or that they would be denied substantial justice if the case is not litigated in Singapore. I also do not consider that any special circumstances exist which require that a stay should nonetheless be refused.

Conclusion and costs

84 For the reasons set out above, I consider that Malaysia is clearly and distinctly the more appropriate forum for the trial of OC 385. I therefore allow the appeal for the proceedings in OC 385 to be stayed on the ground of *forum non conveniens*.

85 The costs of SUM 2259 are to be reversed with the Claimants to pay the Defendants the costs of the application at S$9,000 (all-in).

86 In respect of the costs of the appeal payable by the Claimants to the Defendants, Appendix G of the Supreme Court Practice Directions 2021 provides that the costs to be awarded for an appeal before a Judge in the General Division to be in the range of S$5,000 to S$35,000. The Defendants submit that costs of the appeal should be fixed at S$15,000,[77] whereas the Claimants are

[77] Defendants' written submissions dated 25 September 2023 at para 70.

seeking costs to be fixed at S$10,000 (inclusive of disbursements).[78] Taking into account that this appeal does not engage issues of legal and factual complexity and that the matter was fixed for a special half-day hearing, I order costs of the appeal to be fixed at S$12,000 (all-in) payable by the Claimants to the Defendants.

87 In conclusion, the appeal is allowed and I make the following orders:

(a) that all proceedings in OC 385 be stayed;

(b) the Claimants are to pay the Defendants the costs of the application in SUM 2259 fixed at S$9,000 (all-in); and

(c) the Claimants are to pay the Defendants the costs of the appeal in RA 193 fixed at S$12,000 (all-in).

Lee Seiu Kin
Judge of the High Court

Zhuang Wenxiong, Qabir Singh Sandhu, Bertrice Hsu Li-Jia and Li Jiabao (LVM Law Chambers LLC) for the first and second claimants;
Patrick Ong Kok Seng (Patrick Ong Law LLC) for the first and second defendants.

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78 Claimants' written submissions dated 25 September 2023 at para 71.