IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2016] SGHC 65

Suit No 182 of 2015
(Summonses Nos 998 and 1936 of 2015)

Between

MANIACH PTE LTD

… *Plaintiff*

And

(1) L CAPITAL JONES LTD
(2) JONES THE GROCER GROUP HOLDINGS PTE LTD

… *Defendants*

GROUNDS OF DECISION

[Arbitration] – [Agreement] – [Scope]
[Arbitration] – [Arbitrability and Public Policy]
[Arbitration] – [Stay of court proceedings]

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Maniach Pte Ltd
v
L Capital Jones Ltd and another

[2016] SGHC 65

High Court — Suit No 182 of 2015 (Summonses Nos 998 and 1936 of 2015)
Vinodh Coomaraswamy J
11 March; 8, 15 April; 18 May; 31 August; 2 and 3 September 2015

22 April 2016

Vinodh Coomaraswamy J:

Introduction

1 The plaintiff and the first defendant are the only two shareholders in the second defendant.[1] In these proceedings, the plaintiff seeks relief against both defendants arising from what it says is minority oppression.[2] When the first defendant was allotted shares in the second defendant in 2012, all three parties to these proceedings entered into a shareholders' agreement. That shareholders' agreement, as restated and re-executed in 2013, regulates the shareholders' relationship with each other and with the second defendant.[3] The

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1 Statement of claim at para 2 and 4.

2 Statement of claim at para 40; Affidavit of John Manos filed 25 February 2015 at para 19 to 89.

3 Affidavit of John Manos filed 25 February 2015 at page 35, Recital (B).

parties to the shareholders' agreement also agreed to resolve by arbitration their disputes or differences arising under or in connection with it.[4]

2 Relying on this arbitration agreement, both defendants have applied[5] to stay these minority oppression proceedings in favour of arbitration. They seek the stay both under s 6 of the International Arbitration Act (Cap 143A, 2002 Ed) and under the inherent jurisdiction of the court. I have refused to stay these proceedings. Both defendants have, with my leave, appealed to the Court of Appeal against my decision. I now set out my reasons.

Factual background

The parties

3 The second defendant ("the Company") is a company incorporated in Singapore. As I have mentioned, the Company has only two shareholders. The plaintiff ("Maniach") holds 37% of the Company. The first defendant ("L Capital Jones") holds the remaining 63%.[6]

4 The Company is the worldwide holding company for the *Jones the Grocer* business. That business began operations in Australia but now operates internationally.[7] It comprises a group of companies ("the Group") engaged in the business of: (i) operating and franchising gourmet cafes and grocery stores under the *Jones the Grocer* brand; (ii) distributing food and beverages to *Jones the Grocer* stores; (iii) distributing food and beverages to other restaurants,

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4 Affidavit of John Manos filed 25 February 2015 at page 76, cl 42.2.

5 SUM 998/2015; SUM 1936/2015.

6 Affidavit of Ravinder Singh Thakran filed 28 November 2014 at pp 40 to 43.

7 Affidavit of John Manos filed 25 February 2015 at para 12.

cafés and hotels;[8] and (iv) franchising new cafés and stores under the *Jones the Grocer* brand.[9]

5 Maniach is a company incorporated in Singapore. It is a personal investment vehicle for Mr John Manos. Mr Manos is Maniach's executive director and sole shareholder.[10]

6 L Capital Jones is a company incorporated in Mauritius. It is the investment vehicle of L Capital Asia LLC ("L Capital Asia") L Capital Asia is a private equity firm.[11] L Capital Asia is L Capital Jones' sole shareholder.

The structure of the Group

7 The Company owns the *Jones the Grocer* business through its wholly-owned subsidiary, Jones Group Holdings Pty Ltd ("JG Holdings"). JG Holdings is a company incorporated in Australia and has two wholly-owned subsidiaries of its own:

(a) Jones the Grocer International Pte Ltd ("JTG International"), a company incorporated in Singapore; and

(b) 3GS Holdings Pty Ltd ("3GS"), a company incorporated in Australia.

8 Broadly speaking, 3GS owns and operates the Group's business within Australia while JTG International owns and operates the Group's business in

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8 Affidavit of John Manos filed 25 February 2015 at para 11.

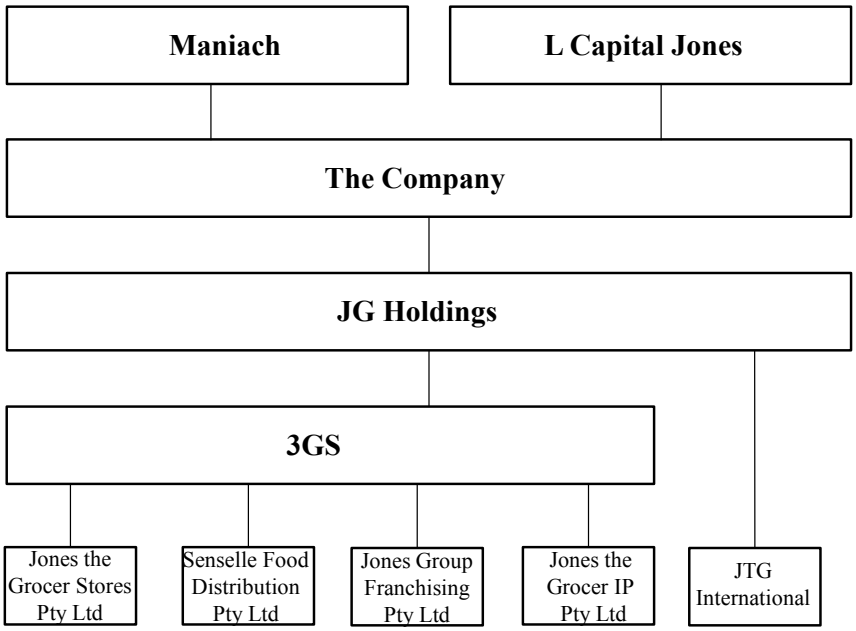
9 Affidavit of Ravinder Singh Thakran dated 11 May 2015 at para 6.

10 Affidavit of John Manos filed 25 February 2015 at para 1 and 4.

11 Affidavit of John Manos filed 25 February 2015 at para 4.

Singapore and also operates the Group's international franchising business.[12] Thus 3GS holds four wholly-owned subsidiaries incorporated in Australia.[13] I will refer to JG Holdings, 3GS and its four Australian subsidiaries as "the Australian companies". JTG International operates the Group's business in Singapore and holds the Group's interests in companies trading under the *Jones the Grocer* brand in Qatar, the United Arab Emirates and the British Virgin Islands.[14]

9 I set out a diagram of the Group structure:



12 Statement of claim at para 9 and 10.

13 Affidavit of John Manos filed 25 February 2015 at para 9 and pp 148 to 155.

14 Statement of claim at para 10.

Maniach's claim

10 I now summarise the background facts. I take the facts set out in this summary largely from Maniach's pleadings and both parties' affidavits filed in support of or in opposition to various interlocutory applications in this matter. In my summary, I will note and resolve a dispute of fact only if one arises on the affidavits and only if it is relevant to the applications before me. Therefore, if I incorporate in my summary any of the facts put forward by either party without comment, that should not be taken in itself as representing a finding of fact in that party's favour.

11 Mr Manos and his business partner founded the *Jones the Grocer* business in Australia in 2004.[15] In 2010, Mr Manos bought out his partner and became the sole owner of the business.[16]

12 In 2012, L Capital Asia agreed to inject capital into the business in order to fund its expansion.[17] The Company was incorporated in May 2012 in order to receive L Capital Asia's investment and to be the post-investment holding company of the entire business.[18]

13 In July 2012, three parties to these proceedings as well as Mr Manos executed a shareholders' agreement. Under that agreement, L Capital Asia made an initial investment of US$14m in the business and was allotted 53% of the Company's shares.[19] The remaining 47% of the Company was held by Maniach.[20]

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15 Affidavit of John Manos filed 25 February 2015 at para 12.

16 Statement of claim at para 11.

17 Statement of claim at para 12 to 13.

18 Affidavit of John Manos filed 25 February 2015 at para 12.

14 The 2012 shareholders' agreement was restated and re-executed in 2013 ("the Agreement").[21] In 2013 and 2014, L Capital Asia invested an additional US$7m in the Company in three tranches. As a result of this additional investment, L Capital Jones increased its stake in the Company from 53% to 63%, with Maniach's stake being correspondingly reduced from 47% to 37%.[22]

15 In 2014 and 2015, the two shareholders in the Company fell out irretrievably.[23] As a result, Maniach commenced these proceedings against both L Capital Jones and the Company under s 216 of the Companies Act (Cap 50, 2006 Rev Ed). The nub of Maniach's case on minority oppression is, as Mr Manos says in his affidavit: "[L Capital Jones] has been engaged in a carefully plotted campaign to wrongfully seize control of the Business".[24]

16 In order to understand the defendants' case for a stay of these proceedings, it is necessary to analyse in greater detail Maniach's minority oppression claim.

17 The general endorsement on Maniach's writ seeks damages or other relief against L Capital Jones under s 216 of the Companies Act and prays specifically for an order restraining or rescinding any transfer of the Company's shares in JG Holdings.

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19 Affidavit of Ravinder Singh Thakran for OS 1129/2014 dated 28 November 2014 at para 15.

20 Statement of claim at para 15.

21 Affidavit of John Manos filed 25 February 2015 at para 13, pp 32 to 96.

22 Statement of claim at para 16 and 17.

23 Affidavit of John Manos filed 25 February 2015 at para 15.

24 Affidavit of John Manos filed 25 February 2015 at para 18.

18 In its statement of claim, Maniach expands on its endorsement. It rests its minority oppression claim on three broad planks:

(a) L Capital Jones has excluded Maniach from the management of the Company and its subsidiaries, in breach of the common understanding between the Maniach and L Capital Jones;[25]

(b) L Capital Jones falsely claimed that the Company and JG Holdings were near insolvency and unilaterally placed them under external administration in Singapore and in Australia respectively as a pretext to transfer the Company's only asset – its shares in JG Holdings – to a third party related to L Capital Asia for virtually no net consideration;[26] and

(c) L Capital Jones has abused its voting powers as the majority shareholder of the Company by exercising those powers in bad faith and for a collateral purpose.[27]

19 I now elaborate on each of three planks of Maniach's case on oppression.

Exclusion from management of the Company

20 The first plank of Maniach's minority oppression claim is that L Capital Jones has acted unfairly by excluding Maniach from management of the Company and its business. Maniach's case is that the parties intended from the outset that Maniach would play an important role in managing the Group

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25 Statement of claim at para 40(b).

26 Statement of claim at para 40(c).

27 Statement of claim at para 40(a).

and its business. It relies on four matters as support for this aspect of its case.[28] First, cl 6 of the Agreement entitles Maniach and L Capital Jones each to nominate an equal number of directors of the Company. Thus, Mr Manos (as Maniach's nominee) has been a director of the company from its inception together with Mr Ravinder Singh Thakran and Mr Shantanu Mukerji (as L Capital Jones' nominees). Second, there are certain reserved matters listed in Schedule 2 and Schedule 2A of the Agreement which require the consent either of Maniach or of Maniach's nominee directors. Third, cl 6.2 of the Agreement provides that only Maniach has the right to nominate the Company's Executive Director. Thus, on the same day in 2012 that the parties signed the original shareholders' agreement, Maniach nominated Mr Manos to be the Group's first Chief Executive Officer ("CEO"). Finally, also on that day, Maniach nominated Mr Manos's wife, Ms Esther Iachelini, as the Group's Chief Operating Officer ("COO").

21 Maniach alleges that L Capital Jones has acted oppressively by excluding its nominee Mr Manos from a number of key decisions taken by the Company in 2014 and 2015. In many cases, Mr Manos complains,[29] L Capital Jones' conduct is in breach of the Agreement. As examples, Maniach cites L Capital Jones' causing[30] the Company to terminate Mr Manos's employment as CEO and his wife's employment as COO in December 2014. Not only did the termination operate in itself to exclude him from management, he was also not consulted about either termination in advance even though he was then a director of the Company. Instead, he was simply emailed a letter informing

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28 Statement of claim at para 18.

29 Affidavit of John Manos filed 25 February 2015 at para 15.

30 Affidavit of John Manos filed 25 February 2015 at para 15; Statement of claim at para 28.

him of his termination.[31] Mr Manos complains that his termination was effective immediately without a transition period. Moreover, the Company had no legitimate grounds to terminate his employment. His termination was in fact part of L Capital Jones's overall plan wrongfully to seize control of the business.

22 Even though his employment as CEO has ceased, Mr Manos remains a director of the Company.[32] But L Capital Jones has nevertheless excluded him from the management of the Group, denied him access to the financial records of the Company and the Group and acted unilaterally in managing the Company. For example, L Capital Jones did not consult Mr Manos in connection with its decision to place the Company, together with JG Holdings and JG International, under the control of external administrators.

23 That decision which Maniach impugns leads me to the second plank of Maniach's minority oppression claim.

Transfer of the Company's only asset at an undervalue

The revised financing plan

24 By the end of 2014, the business of the Group had slowed significantly. As a result, the Company and the Group faced financial difficulties. In October and November 2014, Mr Manos, Mr Thakran and his alternate director, Mr Harry Apostolides, had discussions about how the shareholders should address these difficulties.

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31 Affidavit of John Manos filed 25 February 2015 at para 29.

32 Statement of claim at para 19; Affidavit of John Manos filed 25 February 2015 at para 15 to 16.

25 On 21 November 2014, the shareholders agreed a revised financing plan for the Group.[33] Under the plan, Mr Manos committed to inject US$300,000 into the Group immediately, US$2.7m within four weeks and a further US$3m by May 2015. For its part, L Capital Jones committed to inject up to US$8m in tranches of US$2m, but only when Mr Manos had fulfilled his commitment to inject US$6m and only if the Group's approved business plan required further funds.[34] Mr Manos' case that he has at all times been ready, willing and able to provide US$3m in equity funding to the Group.[35]

Judicial management in Singapore

26 On 22 November 2014, the day after the revised financing plan was agreed, Mr Manos received two emails from the Company's secretarial agent attaching draft shareholders' and directors' resolutions authorising the Company to apply to the High Court to have itself placed in judicial management and authorising the Company to cause JTG International to apply to the High Court to have itself placed in judicial management.[36] Not having been consulted in advance, Mr Manos refused to sign the directors' resolutions and Maniach refused to approve the shareholder's resolutions.[37]

27 On 28 November 2014, the Company and JTG International each made the foreshadowed applications for judicial management.[38] Each company also

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33 Affidavit of John Manos filed 25 February 2015 at para 19 to 21.

34 Affidavit of John Manos filed 25 February 2015 at page 99.

35 Affidavit of John Manos filed 25 February 2015 at para 20.

36 Affidavit of John Manos filed 25 February 2015 at para 22.

37 Statement of claim at para 21; Affidavit of John Manos filed 25 February 2015 at para 22.

38 Affidavit of John Manos filed 25 February 2015 at para 23 and pp 127 to 138; Statement of claim at para 24; Affidavit of Shantanu Mukerji dated 4 March 2015 at para 16.

applied to have interim judicial managers appointed with immediate effect.[39] Mr Thakran deposed in support of each judicial management application that: (a) each company was insolvent; (b) that obtaining a further cash injection from shareholders was not a viable option for either company given that each company's liabilities exceeded its assets; and (c) that Mr Manos's offer to inject US$3m by 30 May 2015 would be too little too late for both companies.

28 Maniach took the position that the judicial management applications had been taken out in bad faith.[40] It pointed out also that neither company was in truth insolvent given that the revised financing plan agreed by the shareholders on 21 November 2014 made a sum of up to US$14m of shareholders' funds available to the Company,[41] a point mentioned nowhere in the supporting affidavits for the judicial management applications.

29 Interim judicial managers, and ultimately judicial managers, were appointed over JTG International. No judicial managers of any kind were appointed over the Company.[42]

30 The Company's application for judicial management led Mr Manos to believe that L Capital Jones had no intention of abiding by its commitment under the revised financing plan.[43] Mr Manos therefore did not inject US$3m into the Company under the plan. His position is that he was also not informed

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39 SUM 5956/2014; SUM 5949/2014.

40 Statement of claim at para 27.

41 Statement of claim at para 25.

42 Affidavit of John Manos filed 25 February 2015 at para 25; Notice of Discontinuance in OS 1130/2014 filed 18 September 2015.

43 Affidavit of John Manos filed 25 February 2015 at para 26.

that the Group was strapped for cash. He claims that had he been so informed, he would have injected US$3m into the Group as agreed.[44]

JG Holdings put into administration

31 On 12 December 2014, in its capacity as a shareholder of the Company, L Capital Jones nominated one Mr Mark Watson to be a director of JG Holdings.[45] The Company acted on this nomination and procured his appointment to the board of JG Holdings. This too took place without consulting Mr Manos.[46] Mr Watson promptly passed a resolution to place the JG Holdings under voluntary administration on the basis that it was "likely to become insolvent".[47] Voluntary administration is the Australian analogue of judicial management. Maniach knew nothing about JG Holdings being placed in administration.[48] Maniach maintains that JG Holdings was solvent and that it was placed in administration in bad faith, in order to seize control of its business.[49]

32 On or about 19 December 2014, the administrators of JG Holdings wrote to the Company indicating that they would accept a secured loan of up to AUD 1m from L Capital Jones.[50] On 23 December 2014, the administrators of the Australian companies obtained a court order declaring that the

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44 Affidavit of John Manos filed 25 February 2015 at para 27.

45 Affidavit of John Manos filed 25 February 2015 at para 44 to 47; Statement of claim at para 30.

46 Affidavit of John Manos filed 25 February 2015 at para 15.

47 Statement of claim at para 31.

48 Affidavit of John Manos filed 25 February 2015 at para 52.

49 Affidavit of John Manos filed 25 February 2015 at para 50.

50 Statement of claim at para 32; Affidavit of John Manos filed 25 February 2015 at para 58.

administrators were justified and would otherwise be acting reasonably in causing the Australian companies to enter into the proposed loan transaction with L Capital Jones.[51] The transaction was entered into on the same day and the loan monies were disbursed. L Capital Jones thereby became a creditor of the Australian companies. The security for its loan was the administrators' lien and all the assets of the Australian companies.[52]

Deed of Company Arrangement

33 On or about 19 January 2015, L Capital Asia through its wholly owned subsidiary, Fresh Bay Investment Limited ("Fresh Bay") proposed that JG Holdings, as well as the other Australian companies, enter into deeds of company arrangement ("DOCAs") pursuant to Part 5.3A of the Australian Corporations Act 2001 (Act 50 of 2001) (Cth).[53]

34 The terms of the DOCAs were, *inter alia*, that Fresh Bay would repay all arms-length non-related creditors of the Australian companies in full (at 100 cents on the dollar) and would pay all the costs of administration. In return, all of the shares in JG Holdings (which the Company owned) would be transferred to Fresh Bay for no consideration.[54] The result was that, under the DOCA, L Capital Asia would acquire all the shares in JG Holdings through Fresh Bay and, through it, the entire *Jones the Grocer* business in exchange for approximately AUD 6.6m paid to the Australian companies' creditors. Maniach says that this grossly undervalues the business and amounts to

51 Affidavit of John Manos filed 25 February 2015 at para 62.

52 Affidavit of John Manos filed 25 February 2015 at para 64.

53 Affidavit of John Manos filed 25 February 2015 at para 76; Statement of claim at para 33.

54 Affidavit of John Manos filed 25 February 2015 at para 76; Statement of claim at para 34.

stripping the Company of its only asset, its shares in JG Holdings, and leaving it as a worthless shell.[55]

35 On 29 January 2015, despite the protests of Mr Manos, the creditors of the Australian companies voted in favour of the DOCA.[56] In order for the administrators to transfer the shares of JG Holdings to Fresh Bay for no consideration, they had to obtain the leave of court in Australia.[57] They did so. The transfer has been carried out. The Company is now an empty shell.

Abuse of voting power as majority shareholder

36 The third plank of Maniach's case is that L Capital Jones has abused its voting power as a majority shareholder of the Company by voting in bad faith and for a collateral purpose. This final plank cuts across the first two planks. Thus, Maniach claims that L Capital Jones has abused its voting power as a majority shareholder of the Company by procuring the Company: (a) to exclude Maniach from management; and (b) to hatch and to execute successfully L Capital Jones' plot to seize the Company's only asset – its shares in JG Holdings – for itself, and even then at an undervalue, thereby leaving Maniach holding the worthless shares of a shell company.[58]

Commercial unfairness

37 In light of all this, Maniach claims that L Capital Jones has managed the affairs of the Company and its subsidiaries in a manner which is

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55 Affidavit of John Manos filed 25 February 2015 at para 78; Statement of claim at para 36.

56 Affidavit of John Manos filed 25 February 2015 at para 82 and 83.

57 Affidavit of John Manos filed 25 February 2015 at para 77.

58 Affidavit of John Manos filed 25 February 2015 at para 79.

oppressive to Maniach, is in complete disregard of its interests, is unfairly discriminatory to it or is prejudicial to its interests.

Maniach commences oppression proceedings

38 On 7 January 2015, Maniach sent a letter before action to L Capital Jones alleging various breaches of the Agreement and demanding that L Capital Jones take steps to rectify them.[59] On 18 February 2015, Maniach commenced these proceedings against L Capital Jones and the Company seeking relief for minority oppression under s 216 of the Companies Act.

39 Maniach prays for the following relief in its statement of claim:[60]

(a) An order that L Capital Jones buy out Maniach without discount at a price to be determined by the court, by a court-appointed valuer or by the parties' agreement;

(b) That the price for the buy-out be fixed as the value Maniach's shares would have had if not for L Capital Jones' breaches of s 216;

(c) That both the Company and L Capital Jones be restrained by injunction from transferring or procuring the transfer of the Company's shares in JG Holdings to any third party; and that any such transfer, if it has taken place, be rescinded; and

(d) That L Capital Jones pay Maniach damages to be assessed or equitable compensation.

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[59] First defendant's bundle of documents dated 15 May 2015 at pp 112 to 118.

[60] Statement of claim, prayer on pp 10 to 11.

Maniach also clarifies, through an affidavit filed by Mr Manos, that the Company is a party to the suit solely as a nominal defendant, in line with the usual practice in minority oppression claims.[61]

L Capital Jones commences arbitration

40 On 14 March 2015, almost a month after Maniach commenced these proceedings, L Capital Jones issued a notice of arbitration seeking relief against Maniach and Mr Manos for breach of the Agreement.[62] The Company is not a claimant in that arbitration.

41 It is in favour of that arbitration that both L Capital Jones and the Company seek to stay these proceedings.

42 Having set out the background facts, I now turn to the procedural history of the proceedings.

Procedural history

43 There are four applications in the procedural history of these proceedings which are relevant for present purposes.

(a) Maniach's *inter partes* application taken out at the time the action was commenced by way of Summons No. 848 of 2015 ("SUM 848") seeking an interlocutory injunction to restrain both L Capital Jones and the Company from transferring the Company's shares in JG Holdings to a third party;

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61 Affidavit of John Manos dated 20 March 2015 for SUM 998/2015 at para 4.

62 Ravinder Singh Thakran's 1st affidavit dated 11 May 2015 at para 41.

(b) The Company's application by way of Summons No. 998 of 2015 ("SUM 998") to strike out not only these proceedings but also Maniach's pending *inter partes* application for an injunction; alternatively to stay these proceedings in favour of arbitration;

(c) Maniach's *ex parte* application by way of Summons No. 1734 of 2015 ("SUM 1734") for an interlocutory injunction to restrain both L Capital Jones and the Company from transferring the Company's shares in JG Holdings to a third party until its *inter partes* application for the same injunction could be heard; and

(d) L Capital Jones' application by way of Summons No. 1936 of 2015 ("SUM 1936") to stay these proceedings in favour of arbitration.

44 The present appeal arises from my decision to dismiss the defendants' applications to stay these proceedings in SUM 998 and SUM 1936. SUM 848 and SUM 1734 are relevant, however, because Maniach submits that by appearing on and opposing those applications, one or other of the defendants took a step in these proceedings and is therefore precluded by s 6 of the International Arbitration Act from now seeking to stay these proceedings in favour of arbitration. Maniach also submits that the Company took a step in these proceedings by applying to strike them out in SUM 998.

45 I therefore summarise the proceedings on each of these four applications.

SUM 848: Maniach's **inter partes** *application for an interlocutory injunction*

46 On 18 February 2015, the same day that it commenced these proceedings, Maniach applied *inter partes* by way of SUM 848 for an

injunction restraining the defendants from transferring the Company's shares in JG Holdings to a third party until the final determination of these proceedings or until further order. The Company opposed this application.

47 This application has not yet been determined but has, to a large extent, been overtaken by events.

SUM 998: the Company's application to strike out, alternatively to stay, these proceedings

48 On 5 March 2015, the same day that it entered an appearance in these proceedings, the Company applied by way of SUM 998 to strike out not only these proceedings but also SUM 848, alternatively for a stay in favour of arbitration.

49 When SUM 998 was argued before me, the Company relied on only one ground to submit that these proceedings should be struck out. It will be recalled that the Company applied for a judicial management order at the end of 2014 (see [27] above). Under s 227C(*c*) of the Companies Act, once a company has filed an application for a judicial management order, no proceedings may be commenced against that company except with leave of the court. Maniach commenced these proceedings against the Company in 2015 while the company's judicial management application was still pending, but without seeking or securing the leave of court under s 227(*c*).

50 Maniach accepted that it had failed to obtain the necessary leave to commence these proceedings. It therefore brought separate proceedings by way of Originating Summons No. 210 of 2015 ("OS 210") seeking the necessary leave of court with retrospective effect. OS 210 was fixed before me for hearing together with SUM 848 and SUM 998. After hearing the parties, I

held that I had the power under s 227C(*c*) to grant Maniach leave to commence these proceedings with retrospective effect and exercised that power in Maniach's favour by granting that leave. The Company has not appealed against my decision in OS 210.

51 As I have mentioned, the only ground which the Company advanced in oral argument on SUM 998 to strike out these proceedings was Maniach's failure to obtain leave under s 227C(*c*) to commence them. My decision to grant Maniach the necessary leave therefore cut away the Company's entire argument for striking out these proceedings. I therefore dismissed the Company's primary prayer in SUM 998.[63] The Company has not appealed against this aspect of my decision either.

52 The Company's alternative prayer in SUM 998 is for an order staying these proceedings in favour of arbitration, either under s 6 of the International Arbitration Act or under the court's inherent jurisdiction. The Company's appeal is against my decision to dismiss the Company's alternative application under this prayer for a stay of these proceedings.

SUM 1734: Maniach's* ex parte *application for an injunction

53 While SUM 848 was pending, Maniach learned that the hearing in the Australian court for leave to effect the transfer of the Company's shares in JG Holdings to Fresh Bay for no consideration to the Company under the DOCA (see [35] above) had been brought forward for an expedited hearing. As a result, on 15 April 2015, Maniach applied *ex parte* by way of SUM 1734 for an interlocutory injunction in similar terms to the injunction it seeks in SUM

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[63] Certified transcript dated 8 April 2015 at page 49 line 16 to 21.

848, but to maintain the *status quo* until SUM 848 could be heard rather than until trial.

54 When Maniach took out SUM 1734, L Capital Jones had not entered an appearance in these proceedings. Within two hours of being served with the application and the supporting affidavit, L Capital Jones entered an appearance. It is now represented in these proceedings by the same counsel as represents the Company.

55 After hearing counsel for the plaintiff and for both defendants, I have granted Maniach the interlocutory injunction it sought, to remain in force until SUM 848 is determined or until further order. This injunction has also been overtaken by supervening events.

SUM 1936: L Capital Jones' application to stay these proceedings

56 On 23 April 2015, eight days after entering an appearance, L Capital Jones applied by way of SUM 1936 to stay these proceedings in favour of arbitration either under s 6 of the International Arbitration Act or under the Court's inherent jurisdiction. Unlike the Company, L Capital Jones did not seek to strike out these proceedings, whether on grounds of the procedural defect arising under s 227C(*c*) relied on by the Company or under any of the limbs of O 18 r 19 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed).

57 L Capital Jones' appeal is brought against my decision to dismiss its application by way of SUM 1936 to stay these proceedings.

The defendants' stay applications

58 The defendants seek to stay these proceedings under s 6(1) of the International Arbitration Act. Sections 6(1) and 6(2) read as follows:

> **Enforcement of international arbitration agreement**
>
> 6.—(1) Notwithstanding Article 8 of the Model Law, where any party to an arbitration agreement to which this Act applies institutes any proceedings in any court against any other party to the agreement in respect of any matter which is the subject of the agreement, any party to the agreement may, at any time after appearance and before delivering any pleading or taking any other step in the proceedings, apply to that court to stay the proceedings so far as the proceedings relate to that matter.
>
> (2) The court to which an application has been made in accordance with subsection (1) shall make an order, upon such terms or conditions as it may think fit, staying the proceedings so far as the proceedings relate to the matter, unless it is satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed.

Burden and standard of proof

59 Section 6(1) posits, first, a plaintiff who has instituted civil proceedings and, second, a defendant to those proceedings who wishes to have the proceedings stayed. It then sets out the following three criteria for the stay which are relevant for present purposes:

(a) The plaintiff and the defendant are parties to an arbitration agreement with each other;

(b) The subject-matter of the civil proceedings falls within the subject of the parties' arbitration agreement; and

(c) The defendant makes its application for the stay after entering an appearance but before taking any other step in the proceedings.

It is common ground that if these three requirements in s 6(1) are satisfied, a stay of these proceedings is mandatory under s 6(2). It is also common ground that the burden of establishing these requirements rests on the defendants, as the parties seeking the stay.

60 The question which then arises is the standard to which the defendants must discharge their burden on each requirement. The usual rule in civil proceedings is that a party who has a burden of proof must discharge it on the balance of probabilities. The weight of authority, however, is that the burden on an applicant to establish the first two of the requirements I have set out at [59] above is a light one: *Tjong Very Sumito and others v Antig Investments Pte Ltd* [2009] 4 SLR(R) 732 ("*Tjong Very Sumito*"). Although light, the burden is nevertheless real. Judith Prakash J has characterised it as the burden of showing a *prima facie* case: *Malini Ventura v Knight Capital Pte Ltd and others* [2015] SGHC 225 at [36] ("*Malini Ventura*"). The alleviation of the usual civil burden is justified in this context because the very premise of the UNCITRAL Model Law, and of the International Arbitration Act which adopts and enacts it, is that a court should permit an arbitral tribunal to determine for itself whether it has jurisdiction over a particular dispute before the court determines that question: *Malini Ventura* at [28].

61 The third of the three requirements set out at [59] above stands in a different class from the other two. Unlike those two, the third requirement has to do only with what has transpired in the civil proceedings themselves. It has nothing to do with the contractual relationship between the parties or with the scope of their dispute which has now arisen, which is the subject-matter of the first two requirements. More importantly, it does not go to an arbitral tribunal's jurisdiction to hear and determine the parties' dispute. Thus, if a court stays proceedings in favour of arbitration, and if the defendant to the

proceedings (as the respondent in the arbitration) brings a challenge to the arbitral tribunal's jurisdiction, the third requirement will not be an issue for the tribunal to address because it will be quite irrelevant to resolving the challenge. Alleviating the usual civil standard, *ie,* the balance of probabilities for this requirement is therefore not necessary in order to uphold the premise of the Model Law and the International Arbitration Act.

Summary of the parties' submissions

62 The first requirement of s 6(1) is an arbitration agreement between the plaintiff and the defendants. It is common ground that cl 42.2 of the Agreement fulfils this requirement. It reads as follows:[64]

> In case any dispute or difference shall arise between the Parties as to the construction of this Agreement or as to any matter of whatsoever (sic) nature arising thereunder or in connection therewith, including any question regarding its existence, validity or termination, such dispute or difference shall be submitted to a single arbitrator… . Such submission shall be a submission to arbitration in accordance with the SIAC Rules by which the Parties agree to be so (*sic*) bound….

63 It is also common ground that this arbitration agreement binds each of the parties as a matter of contract in accordance with its terms. In particular, there is no suggestion that the arbitration agreement is "null and void, inoperative or incapable of being performed" within the meaning of s 6(2) on any contractual ground.

64 With that in mind, I now summarise the submissions made by the parties.

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[64] Affidavit of John Manos filed 25 February 2015 at page 76.

65 The defendants submit in brief that:[65]

(a) Maniach's claim in these proceedings should properly be characterised as a claim for breach of the Agreement and not as a claim for relief from minority oppression; and therefore the subject-matter of these proceedings falls squarely within the scope of the parties' arbitration agreement.

(b) In the alternative, even if Maniach's claim is properly characterised as a claim for relief from minority oppression, the scope of the parties' arbitration agreement is wide enough to encompass such a claim.

66 In response, Maniach, submits that:[66]

(a) Both defendants are precluded from applying for a stay because each failed to do so "before…taking any other step in the proceedings" within the meaning of s 6(1).

(b) In the alternative, Maniach's claim in these proceedings is indeed a *bona fide* claim for relief from minority oppression and not one for breach of the Agreement; and, as such, it falls outside the scope of the parties' arbitration agreement.

(c) In the final alternative, even if its claim falls within the scope of the parties' arbitration agreement, a minority oppression claim is not arbitrable.

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65 Maniach's submissions dated 15 May 2015 at para 2(a) and (b).

66 Maniach's submissions dated 15 May 2015 at para 3.

67 In response, the defendants submit that:

(a) Neither defendant took any steps in these proceedings within the meaning of s 6(1) before applying for a stay.[67]

(b) Minority oppression claims are indeed arbitrable because there are no public policy reasons which justify overriding the parties' express choice of arbitration as the means of dispute resolution for disputes arising from or connected with the Agreement.[68]

68 There are therefore three issues which I have to determine:

(a) whether either defendant has taken a step in these proceedings;

(b) whether the subject-matter of these proceedings falls within the subject of the parties' arbitration agreement; and

(c) whether Maniach's minority oppression claim is arbitrable.

69 I consider each of these issues in turn.

Whether either defendant has taken a step in the proceedings

70 I begin my analysis of the first issue by examining Maniach's submission that the defendants took a step in these proceedings within the meaning of s 6(1) by pursuing SUM 998. I will then turn to consider Maniach's submission that the defendants took a step in these proceedings by resisting SUM 848 and SUM 1734.

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[67] L Capital Jones' submissions dated 15 May 2015 at para 2(c) and the Company's submissions dated 15 May 2015 at para 2(c).

[68] L Capital Jones' submissions dated 15 May 2015 at para 28.

SUM 998 – the Company

71 Maniach alleges that the Company took a step in these proceedings when it took out SUM 998 praying to strike out Maniach's action. To understand Maniach's submission in context, I have to set out the principal elements of the Company's application in SUM 998 and its grounds which the Company set out in the summons itself:

> Let all parties concerned attend before the Court on the date and time to be assigned for a hearing of an application by the [Company] for the following orders:-
>
> 1. That [Maniach's] action be struck out;
>
> 2. That [SUM 848] be struck out;
>
> 3. In the alternative to prayers (1) and (2), that the action be stayed in favour of arbitration;
>
> …
>
> The grounds of the application are:
>
> 1. that [Maniach] failed to obtain leave to commence proceedings against the [Company] pursuant to section 227C(c) of the Companies Act (Cap 50);
>
> 2. that the proceedings are in respect of matters which are the subject of an arbitration agreement;
>
> 3. that the Endorsement of Claim and [SUM 848] (a) disclose no reasonable cause of action, (b) are scandalous, frivolous or vexations, (c) may prejudice, embarrass or delay the fair trial of the action, and/or (d) would otherwise amount to an abuse of the process of the Court; and
>
> 4. further elaborated in the affidavit of Shantanu Mukerji filed in support of this application.

72 The Company thus sought two heads of relief in SUM 998. As its primary relief, it prayed that these proceedings and SUM 848 be struck out. If

it was unable to secure its primary relief, it prayed in the alternative that these proceedings be stayed under s 6.

73 I consider first the Company's prayer to strike out these proceedings. The Company rested this prayer on two separate grounds. The first ground was that Maniach failed to obtain leave to commence these proceedings against the Company as required by s 227C(*c*) of the Companies Act. The second ground was that these proceedings fell within one (or more) of the limbs of O 18 r 19 of the Rules of Court.

74 The Company's citation of the three limbs of O 18 r 19 in the stated grounds for SUM 998 was not mere surplusage. Order 18 r 19 was a considered basis of the Company's prayer to strike out these proceedings and of equal status with the non-compliance with s 227C(*c*) of the Companies Act. Thus Mr Shantanu Mukerji's affidavit filed in support of SUM 998 restates expressly both of these grounds at the very outset of his affidavit.[69] He deals with the first ground for striking out, under s 227C(c), in five paragraphs.[70] He then goes on to provide the factual basis for the second ground for striking out in 33 carefully-drawn paragraphs[71] arranged under headings corresponding to each limb of O 18 r 19. These paragraphs claim to show that these proceedings are without merit[72] and invite the court to strike them out because Maniach commenced them: (i) with no reasonable cause of action against the Company; (ii) without the leave of court under s 227C(c), thereby abusing the process of the court;[73] or (iii) for the collateral purpose of affecting or defeating the

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69 Affidavit of Shantanu Mukerji dated 4 March 2015 at para 4.

70 Affidavit of Shantanu Mukerji dated 4 March 2015 at para 16 to 21.

71 Affidavit of Shantanu Mukerji dated 4 March 2015 at para 26 to 58.

72 Affidavit of Shantanu Mukerji dated 4 March 2015 at para 30.

administration of the Australian companies and the imminent proceedings in Australia under the DOCA (see [35] above).[74]

75 I turn now to consider the Company's prayer for a stay of these proceedings. The way SUM 998 is drafted presents this prayer as a second-best remedy, and one which the Company will pursue only if the striking out application fails. Thus, the prayer for a stay is the third and final prayer out of three substantive prayers in that application and is expressly characterised by its introductory words as an alternative to the earlier two prayers. Further, Mr Mukerji's affidavit in support of SUM 998 deals with the grounds for staying these proceedings in favour of arbitration in only six brief paragraphs.[75] He presents these paragraphs at the end of his affidavit, after detailing at length in the preceding 43 paragraphs the factual basis for the Company's prayer that these proceedings be struck out.[76]

76 Maniach relies on the structure of SUM 998 and of its supporting affidavit to submit that the Company took a step in these proceedings within the meaning of s 6(1) when it filed SUM 998. Because the Company's primary purpose in taking out SUM 998 was to invite the court to strike out these proceedings on the merits pursuant to O 18 r 19, Maniach submits that the Company thereby submitted to the jurisdiction of the court. Relying on the authority of *Carona Holdings Pte Ltd and others v Go Go Delicacy Pte Ltd* [2008] 4 SLR(R) 460 ("*Carona*") at [93], Maniach's submission is that that suffices to estop the Company from now seeking a stay of these proceedings

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73 Affidavit of Shantanu Mukerji dated 4 March 2015 at para 32.

74 Affidavit of Shantanu Mukerji dated 4 March 2015 at para 38.

75 Affidavit of Shantanu Mukerji dated 4 March 2015 at para 59 to 64.

76 Affidavit of Shantanu Mukerji dated 4 March 2015 at para 16 to 58.

(*Carona* at [52]). This is said to be the result even though the Company from the outset foreshadowed its intent to apply to stay these proceedings in favour of arbitration. The Company's conduct thereafter in seeking to strike out these proceedings on the merits is clearly inconsistent with any such intent (*Carona* at [101]).

77 The Company says that it applied to strike out these proceedings because the proceedings suffered from a fundamental defect: Maniach had failed to obtain leave under s 227C(*c*) of the Companies Act before commencing them. The application to strike out was thus a rejection of the court's jurisdiction over the Company and not an affirmation of that jurisdiction. That application ought not, therefore, to be considered a step in the proceedings. Moreover, the Company maintained from the outset of these proceedings that these proceedings ought to be stayed in favour of arbitration. The Company cannot, therefore, be said to have lost the right to seek that stay by its application to strike out.

78 In *Carona*, the Court of Appeal undertook a comprehensive survey of the case law from other jurisdictions which considered when a procedural act by a party in civil proceedings will preclude that party from seeking a stay of those proceedings in favour of arbitration. The Court of Appeal derived the following four principles from those cases (at [93]):

> … First, where a party performs or carries out a significant act signifying that it is *submitting to the court's jurisdiction* rather than to arbitration to resolve the outstanding issues between the parties, that party will be deemed to have taken a step in the proceedings. Second, the act will be regarded as a step in proceedings if it is a step in furtherance of the action by *advancing the hearing of the matter in court* in contrast to one that serves to smother the action and stop the proceedings dead in its tracks. Third, where a party does an act with the consent of the other party, this will not amount to taking a step in the proceedings. Finally, the courts usually take the

> position that parties should not blow hot and cold or equivocate. Instead, they should be decisive about whether they are insisting on arbitration in preference to litigation.
>
> [Emphasis original]

79 The Court of Appeal explained also that the question whether a particular procedural act by a defendant amounts to taking a step in the proceedings should be approached pragmatically. The focus should therefore not be on the procedural means which a defendant adopts in performing the procedural act in question but on the substantive ends which the defendant seeks to achieve by that procedural act (at [94]). Thus, in *Carona* itself, the Court of Appeal held that an application to extend time to file a defence would not constitute a step in the proceedings if it was made to support an application to stay the proceedings in favour of arbitration and to protect the defendant's position if the application failed rather than out of an unqualified desire to engage the plaintiff on the merits of its case.

80 Bearing these principles in mind, I find that the Company did not take a step in these proceedings within the meaning of s 6(1) by reason of the manner in which it presented or argued SUM 998. I have arrived at that finding for five reasons.

81 First, the Company's prayer to strike out these proceedings on grounds of a procedural defect cannot amount to a step in these proceedings. This aspect of the Company's striking out application challenged Maniach's proceedings *in limine*. Making that application did not put in play the merits of Maniach's claim. It did quite the opposite: by applying to strike out on that ground, the Company took the position that these proceedings should come to an immediate end, irrespective of the merits, because they suffer from a procedural defect which could not be cured retrospectively. In other words, the

Company did not seek to advance the hearing of this action in court but sought instead sought to smother it and stop it dead in its tracks (*Carona* at [93] cited above at [78]).

82 The decision of the English Court of Appeal in *Eagle Star Insurance Co Ltd v Yuval Insurance Co Ltd* [1978] 1 Lloyd's Rep 357 ("*Eagle Star*") is support for this aspect of my decision. In *Eagle Star*, the plaintiff commenced litigation despite having an arbitration agreement with the defendant. The plaintiff's statement of claim was fundamentally defective. The defendant therefore applied to strike it out. The plaintiff promptly abandoned the defective statement of claim, replaced it with a new statement of claim which addressed the defects and applied for summary judgment. The defendant cross applied to stay the proceedings in favour of arbitration. The plaintiff argued that the defendant was precluded from doing so because it had taken a step in the proceedings by its earlier application to strike out the statement of claim.

83 The English Court of Appeal granted the stay, holding that the defendant had not taken a step in the proceedings. Lord Denning MR explained that "in order to deprive a defendant of his recourse to arbitration, a 'step in the proceedings' must be one which impliedly affirms the correctness of the proceedings and the willingness of the defendant to go along with a determination by the Courts of law instead of arbitration" (at 361). He held that the defendant's application to strike out the proceedings was not an affirmation of the correctness of the proceedings but was in fact a disaffirmation of the proceedings. It was not a 'step in the proceedings' and did not preclude the defendant from applying for a stay. Goff and Shaw LJJ agreed with Lord Denning in the result. Both judges made clear, however, that the decision should not be taken to mean that an attempt to strike out

proceedings could never be regarded as a step in those proceedings (at 363 and 364).

84 The principle I draw from *Eagle Star* is that where a defendant applies to strike out proceedings without inviting the court to consider the merits of the proceedings, the defendant does not thereby take a step in the proceedings. *Eagle Star* was cited in *Carona* at [50] and [101] without disapproval. In fact, when Goff and Shaw LJJ's caveat is borne in mind, *Eagle Star* is a decision entirely consistent in its principle and in its outcome with the Court of Appeal's analysis in *Carona* (at [94]). If one focuses on the substantive ends of the defendant in *Eagle Star* (terminating the action summarily on grounds of a procedural defect) rather than the procedural means adopted (a striking out application) it becomes clear that, on the facts, the defendant in *Eagle Star* did nothing inconsistent with an intent to submit the parties' dispute to arbitration. A defendant who applies to strike out proceedings, as in *Eagle Star* and in the case before me, on grounds of a fundamental procedural defect unrelated to the merits does not submit to the jurisdiction of the court. Instead, the defendant quite clearly rejects that jurisdiction. That is all that the Company did in SUM 998 insofar as it relied on Maniach's failure to comply with s 227C(*c*) of the Companies Act.

85 Second, insofar as the Company prayed in SUM 998 to strike out these proceedings on the grounds set out in O 18 r 19, that aspect of its prayer was never pressed in argument and therefore did not amount to taking a step in these proceedings. It is true that the primary relief which the Company sought in SUM 998, on its face and in its supporting affidavit, was to strike out these proceedings both on grounds of a procedural defect and on the merits. It is also true that counsel for the Company at the oral hearing of SUM 998 insisted that its application to strike out these proceedings on grounds of procedural

defect should be heard first, before Maniach's application in OS 210 for an order to cure retrospectively the procedural defect.[77] But I decided to defer hearing any part of SUM 998 until I had dealt with OS 210.

86 Having heard the parties' submissions on OS 210, I made an order granting Maniach retrospective leave to commence these proceedings.[78] That order eliminated the procedural defect which the Company complained of in its striking out application. I then turned to consider SUM 998. Counsel for the Company raised no ground to strike out these proceedings other than the procedural defect.[79] As I had already cured that defect, and as the Company no longer sought to strike these proceedings out under O 18 r 19, there was no remaining basis whatsoever for the Company's striking out application. I accordingly dismissed both prayers 1 and 2 of SUM 998 (see [71] above) before starting to hear that application.[80] The oral arguments which the Company then presented on SUM 998 were confined to its prayers to stay these proceedings in favour of arbitration. The Company's application to strike out these proceedings under O 18 r 19 was never heard or argued. It was therefore not a step in these proceedings within the meaning of s 6(1).

87 Maniach argues that the Company took a step in the proceedings simply by filing an application which prayed for an order striking out these proceedings under O 18 r 19 even if that prayer was never heard or argued. Simply by praying for that order, it is said, the Company submitted to having

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77 Certified transcript dated 8 April 2015, page 1 line 44 to page 3 line 3.

78 Certified transcript dated 8 April 2015, page 49 line 1 to 11.

79 Certified transcript dated 8 April 2015, page 49 line 12 to 15.

80 Certified transcript dated 8 April 2015, page 49 line 16 to 26.

the issue of whether or not Maniach had a reasonable cause of action decided by a court and not by arbitration.

88 For this submission, Maniach relies on the case of *WestLB AG v Philippine National Bank and others* [2007] 1 SLR(R) 967 ("*WestLB*"). In *WestLB*, a defendant filed an application praying, first, to stay the plaintiff's action pursuant to s 3 of the State Immunity Act (Cap 313, 1985 Rev Ed) and, second, for the court to order that certain funds held by the plaintiff be released to the defendant. Under s 4(3)(b) of the State Immunity Act, a defendant ceases to be entitled to assert state immunity in relation to civil proceedings if, amongst other things, it takes "any step in the proceedings". It was submitted that the defendant had taken a step in the proceedings by presenting and arguing the second prayer in its application. In the course of arguments, as a response to this submission, the defendant abandoned the second prayer.

89 Kan Ting Chiu J dismissed the defendant's application for a stay. He held that the defendant had submitted to the jurisdiction of the court by advancing the second prayer in its application. That prayer seeking the release of the funds was held to be intended not merely as a procedural consequence of a stay being granted, but as a substantive prayer to be pursued in its own right. The second prayer put in play the merits of the parties' claims. The court could not accede to that prayer and release the funds to the defendant without determining on the merits that the defendant indeed had a beneficial interest in those funds (at [33]). The defendant's prayer thus invited the court to take jurisdiction over the underlying dispute, to take jurisdiction over the parties and to determine their dispute and grant relief accordingly. The defendant had submitted to the jurisdiction of the court and had thus taken a step in the proceedings.

90 The defendant failed in its appeal to the Court of Appeal (reported *sub nom Republic of the Philippines v Maler Foundation* [2008] 2 SLR(R) 857). The Court of Appeal held that the defendant's second prayer "*demonstrated the appellant's unequivocal, clear and consistent intention to submit to jurisdiction*" [emphasis in original]. As the Court of Appeal noted in *Carona*, the defendant in *WestLB* "indicated it would proceed with Prayer 2 even if the stay application succeeded and this suggested that the appellant had always intended to invoke the jurisdiction of the Singapore Courts to release the Funds to it and that Prayer 2 was not merely a request for an order consequential on a stay order."

91 Maniach points out that in *WestLB*, the defendant was held to have taken a step in the proceedings simply by filing a summons which included a prayer invoking the court's jurisdiction to inquire into the merits of the parties' dispute, even though the defendant withdrew that prayer before it could be determined. Maniach argues that in the present case too, the Company filed SUM 998 which included a prayer invoking the court's jurisdiction to strike these proceedings out under O 18 r 19 on the merits. That, says Maniach, constitutes a step in these proceedings in itself, even though the Company did not go on actually to have its striking out prayer determined.

92 I do not accept Maniach's submission. In *WestLB*, it was only in the course of the stay application that the defendant finally made an election and withdrew the prayer which was inconsistent with an attempt to stay the proceedings (at [29]). In the present case, the inconsistent prayer fell away even before SUM 998 was argued (see [85] above). The Company never even attempted to press the inconsistent prayer in argument. The Court of Appeal in *Carona* described the defendant's behaviour in *WestLB* as an attempt to have its cake and eat it. Stretching that analogy perhaps to breaking point, the

distinction appears to me that in *WestLB*, the defendant took a bite of its cake and therefore could no longer have its cake. In the present case, the Company never attempted to take a bite of it and so still had its cake.

93 I therefore find that, although the Company's application to strike out Maniach's action on the merits came very close to taking a step in the proceedings, as events actually transpired, it did not cross the line which separates a procedural act which is not a step in the proceedings from one which is.

94 Third, although the Company did submit to me in oral arguments that Maniach's claim lacked merit and was an abuse of process, it did so only in argument on OS 210. OS 210 was an originating process entirely separate from these proceedings. The Company's steps in OS 210 cannot, by definition, be steps in these proceedings. It is also the case that the relief which Maniach sought in OS 210 is entirely outside the scope of the arbitration agreement between the parties. It cannot be said, even by extension, that the Company's acts in OS 210 were in any way inconsistent with its position that Maniach is obliged to arbitrate its disputes with the Company. The Company cannot therefore be said, on this ground either, to have taken a step in these proceedings within the meaning of s 6(1).

95 Fourth, the fact that the Company presented its striking out application in SUM 998 as the primary relief which it sought and presented its application to stay these proceedings under s 6(1) only as alternative relief is insufficient to make the Company's conduct in connection with SUM 998 a step in these proceedings.

96 Maniach relies on *Zoom Communications Ltd v Broadcast Solutions Pte Ltd* [2014] 4 SLR 500 ("*Zoom*") to argue to the contrary. In that case, a foreign defendant filed an omnibus application which prayed, first, that the order granting the plaintiff leave to serve the writ on the defendant out of the jurisdiction be set aside; and, second, that the action against the defendant be stayed on grounds of *forum non conveniens*. The premises of both prayers were mutually contradictory: the prayer to set aside service denied jurisdiction while the prayer to stay the action admitted jurisdiction but invited the court to decline it. At the hearing of the application, the defendant argued the prayers in the reverse sequence, presenting substantive arguments on the prayer for a stay before arguing the prayer to set aside service. The plaintiff contended that the defendant was precluded from pursuing the prayer to set aside service because it had submitted to the court's jurisdiction by presenting and arguing the stay prayer.

97 The Court of Appeal held that, even though the defendant prayed to stay the action on grounds of *forum non conveniens* in the very same application in which it prayed to set aside service altogether, that did not in itself amount to a submission to the jurisdiction of the court. It was clear from the presentation of the prayers in the defendant's application that the prayer to set aside service was its primary relief (at [45]). Thus, the defendant did not present or pursue an independent prayer to stay the action; it was simply pursuing an alternative prayer for a stay in case the court held that it had jurisdiction and rejected the defendant's primary prayer. As the Court of Appeal explained (at [45]):

> … where these two sets of arguments are presented in the alternative, they fall to be considered in a cascading sequence, and not together; only if the first set of arguments fails to find traction will the Singapore courts even need to consider the second set of arguments. …

98 Maniach argues that the Company cannot rely on the authority of *Zoom* to argue that it has not submitted to the court's jurisdiction in this case because SUM 998 sought a striking out order as the primary relief and a stay under s 6(1) only as the alternative relief. To my mind, that submission elevates form over substance and misunderstands *Zoom*.

99 *Zoom* establishes that, where the premise underlying one prayer in an application (Prayer B) contradicts the premise underlying another prayer in the same application (Prayer A), the applicant will not be taken to concede the premise of Prayer B simply by presenting it to the court for determination, provided that Prayer B is in substance presented as an alternative to Prayer A.

100 In *Zoom*, the Court of Appeal found the defendant's prayer for a stay was in substance an alternative to its prayer to set aside service and therefore well within this principle. The Court of Appeal came to that conclusion for two reasons. First, the prayer for a stay was framed that way (at [45]). Thus, although the prayer for a stay was not expressly characterised as an alternative prayer on the face of the defendant's application, it was implicit in the sequence of prayers presented that a stay was the defendant's fall-back position. Second, even though the defendant chose to argue the prayer for a stay before arguing the prayer to set aside service at the actual hearing of the omnibus application, that was done under an express reservation of the defendant's rights under the prayer to set aside and purely for convenience in presentation (at [60]).

101 In the present case, by the time I heard SUM 998, the Company framed its prayer for a stay under s 6(1) as its primary relief. That suffices to bring the present case within the principle in *Zoom*. It is true that on the face of SUM 998 itself, the Company expressly characterised its prayer to stay these

proceedings as relief alternative to a striking out. But whether a defendant has taken a step in the proceedings is a question of fact in every case. Further, as *Carona* makes clear, this question must be approached pragmatically, with a focus on substance rather than procedure and on principle rather than precedent (at [94]).

102 In resolving this question of fact, I choose to place greater weight on what the Company did at the hearing of SUM 998 before me than on what it did when it drafted and filed SUM 998. The Company did nothing before me to contradict its decision in oral arguments to frame its application for a stay as its primary relief. Insofar as the Company's striking out application rested on the procedural defect under s 227C(*c*) of the Companies Act, the Company did not succeed in its attempt to have that heard before its stay application. In any event, a striking out on that ground is entirely consistent with an intent to refer the parties' disputes to arbitration. Insofar as the Company's striking out application proceeded under O 18 r 19 and rested on the merits of Maniach's action, the Company never attempted to have that aspect of its prayer to strike out heard. The result is that its entire application to strike out was dismissed without the Company having to present any arguments whatsoever. *Zoom* is of no assistance to Maniach.

103 To complete this point, I will analyse an argument which the Company made in response to this part of Maniach's submissions. The Company relies on the cases of *Australian Timber Products Pte Ltd v Koh Brothers Building & Civil Engineering Contractor (Pte) Ltd* [2005] 1 SLR(R) 168 ("*Australian Timber*") and *Patel v Patel* [2000] QB 551 ("*Patel*") for the proposition that a defendant who applies to set aside default judgment does not thereby take a step in the proceedings and remains entitled to apply to stay the proceedings in favour of arbitration. The Company argues by analogy to these cases that its

attempt first to strike out these proceedings and then in the alternative to stay these proceedings does not amount to a step in these proceedings.

104 While I accept the proposition which the Company extracts from these cases, I cannot accept that the proposition is relevant on the facts of this case. An application to strike out an action is quite different from an application to set aside a default judgment. As explained in both cases, an application to set aside a default judgment is a necessary precursor to an application to stay an action. Once any sort of judgment has been entered, the action is concluded. Unless the judgment is set aside, there is no action to be stayed (*Patel* at 556; *Australian Timber* at [24]). The present case is quite different. This action was live at all times, notwithstanding the procedural defect arising from Maniach's failure to comply with s 227C(*c*) of the Companies Act. It did not need to be revived in order to be stayed. The application to strike out was therefore not a necessary precursor to the stay application. The Company's application to strike out is not in the same class as the applications to set aside a default judgment in the two cases cited to me.

105 The fundamental question is whether the Company took a step in these proceedings by praying to strike out these proceedings in SUM 998. On that question, neither of the cases which the Company cites, once properly understood, is of any assistance to the Company. The key point for the Company is that its prayer to strike out had, by the time of the hearing before me, been framed only as an alternative to the prayer for a stay and that I dismissed that prayer without the Company presenting any argument on it whatsoever.

106 Finally, from the time the Company entered an appearance in these proceedings on 5 March 2015, it asserted and maintained the position that

these proceedings ought to be stayed in favour of arbitration.[81] As the Company has not, for the reasons I have given above, carried out a procedural act which is clearly inconsistent with this position, it right to apply for a stay remains reserved.

107 In *Chong Long Hak Kee Construction Trading Co v IEC Global Pte Ltd* [2003] 4 SLR(R) 499 ("*Chong Long Hak Kee*"), Tay Yong Kwang J held that a defendant who carries out a procedural act in proceedings while expressly reserving his right to apply for a stay of those proceedings despite that act will not be considered to have taken a step in the proceedings within the meaning of s 6(1). In that case, under threat of default judgment, a defendant filed not only a defence but also a counterclaim. Both pleadings were subject to the defendant's express reservation of its right to seek a stay of the proceedings in favour of arbitration. Tay Yong Kwang J held (at [13] – [14]) that that reservation was effective to prevent the defendant's act, whether in terms of filing the defence or the counterclaim, from being deemed to be a step in the proceedings. But, despite its reservation, the defendant two weeks later served a 48-hour notice on the plaintiff requiring it to file its defence to the counterclaim. That act by the defendant was entirely inconsistent with the earlier reservation of rights. The reservation therefore ceased to be effective and the defendant's act in compelling the plaintiff to file a defence to the counterclaim amounted to a step in the proceedings.

108 In *Australian Timber*, Belinda Ang J derived from *Chong Long Hak Kee* the principle that "an act, which would otherwise be considered a step in the proceedings, will not be treated as such if the applicant has specifically

[81] The Company's written submissions dated 15 May 2015 at para 14; Affidavit of Shantanu Mukerji dated 4 March 2015 at para 59 to 64; Affidavit of Shantanu Mukerji dated 30 March 2015 at para 32 to 36.

stated that he intends to seek a stay or expressly reserves his right to do so" (at [22]). That reservation will remain effective unless the defendant carries out a procedural act which is clearly inconsistent with the reservation, as that amounts to approbating and reprobating (*Carona* at [101]).

109 It appears to me that the Company has carried out no procedural act which is clearly inconsistent with its position, adopted at the very outset of its involvement in these proceedings, that these proceedings ought to be stayed in favour of arbitration. The Company did not thereafter approbate and reprobate. Although it foreshadowed an intention to have the court inquire into the merits of Maniach's claim in these proceedings by applying to strike the action out on the merits under O 18 r 19, it never followed through on that intention by presenting arguments to the court on the merits. Had it actually argued its application to strike these proceedings out on the basis of O 18 r 19, I would have considered that to be approbating and reprobating and sufficient to preclude it from applying for a stay. But that did not happen.

110 For all the foregoing reasons, I hold that SUM 998 does not amount to a step in the proceedings by the Company within the meaning of s 6(1).

SUM 998 – L Capital Jones

111 SUM 998 is an application taken out by the Company. On the face of it, therefore, it appears impossible to characterise SUM 998 – whether in terms of how it was drafted or how it was argued – as being a step in these proceedings by L Capital Jones. Maniach, however, argues that L Capital Jones exercised its control of the Company to use the Company as its cat's paw in this action between 5 March 2015 (when the Company entered its appearance) and 15 April 2015 (when L Capital Jones was compelled to enter

an appearance). Thus, Maniach argues, the Company's acts in connection with SUM 998 ought to be attributed to L Capital Jones.

112 Maniach relies on the following facts to support its position:

(a) Mr Mukerji, who filed the affidavit in support of the Company's striking out application in his capacity as a director of the Company,[82] is also a director of L Capital Jones.

(b) In his affidavit filed on behalf of the Company, Mr Mukerji asserts that these proceedings should be struck out, not only as against the Company, but even as against L Capital Jones.[83]

(c) Letters written by the Company's solicitors suggest that L Capital Jones was already discussing these proceedings with the Company's solicitors even before L Capital Jones entered an appearance.

(d) When L Capital Jones eventually entered an appearance, it came as no surprise that it was represented by the Company's solicitors.

113 Maniach cites no authority for its argument that one defendant can be precluded from seeking a stay of proceedings under s 6 by actions taken in civil proceedings by another defendant which it controls, or even with which it is closely associated. In any case, it is unnecessary for me to decide this point because I have already held that the acts of the Company in connection with SUM 998 do not amount to a step in the proceedings. Attributing these acts to

[82] Affidavit of Shantanu Mukerji dated 4 March 2015 at para 1.

[83] Affidavit of Shantanu Mukerji dated 4 March 2015 at para 22.

L Capital Jones advances Maniach's case in defeating L Capital Jones' application for a stay no further.

SUM 1734 – L Capital Jones and the Company

114 The next plank in Maniach's submission that the defendants are precluded from seeking a stay of these proceedings is that they both took a step in these proceedings by presenting substantive arguments in opposition to Maniach's application for an interlocutory injunction at the opposed *ex parte* hearing of SUM 1734. I do not accept this submission. Neither defendant's opposition of Maniach's application for an interlocutory injunction amounts to a step in these proceedings.

115 In *Roussel-Uclaf v G D Searle & Co Ltd and G D Searle & Co* [1978] 1 Lloyd's Rep 225 ("*Roussel-Uclaf*"), a defendant resisted a plaintiff's application for an interlocutory injunction by tendering evidence and appearing in court. Graham J found that that did not amount to a step in the proceedings. He explained (at 231):

> … On the whole, I think that the statute is contemplating some positive act by way of offence on the part of the defendant rather than merely parrying a blow by the plaintiff, particularly where the attack consists in asking for an interlocutory injunction. …

This passage is cited in *Carona* and is entirely consistent with the Court of Appeal's approach in that case of focusing on the substantive ends of an act rather than the procedural means. A defendant who opposes an attempt initiated by a plaintiff to secure a measure such as an interlocutory injunction is not acting but reacting and is not pursuing its rights but is simply defending its interests.

116 Choo Han Teck JC (as he then was) followed *Roussel-Uclaf* in *International SOS Pte Ltd v Overton Mark Harold George* [2001] 2 SLR(R) 777. That was a *forum non conveniens* case in which Choo JC had to consider whether a defendant who had opposed a plaintiff's application for an interlocutory injunction thereby took a step in the proceedings such that it could no longer dispute the jurisdiction of the court on an application under O 12 r 7 of the Rules of Court (Cap 322, R5, 1997 Rev Ed). Choo JC held that the defendant did not take a step in the proceedings. He referred to *Roussel-Uclaf* and said (at [6]):

> A step in the proceedings in the context of an application under O 12 r 7 must be a step which is inconsistent with the stand taken by the party who alleges that the court has no jurisdiction over the matter. Any step taken towards challenging the opposite party's action will generally be regarded as such a step in the proceedings. However, I use the word "generally" because there are instances in which the party may have no alternative but to do so. The present case before me is an example.

117 Transposed to the context of s 6(1), a defendant who takes the initiative to challenge a plaintiff's claim will generally be taken to have demonstrated a willingness to submit the parties' disputes to litigation rather than to arbitration. But a defendant who has no alternative but to challenge an interlocutory step which a plaintiff has initiated, particularly in circumstances where the defendant has made or foreshadowed an application to stay the proceedings, will generally not be held to have taken a step in the proceedings within the meaning of s 6(1). But, as Choo JC also pointed out, *Roussel-Uclaf* is not authority that a defensive act can never amount to a step in the proceedings (at [6]).

118 I hold that nothing which either defendant did in connection with SUM 1734 amounts to a step in the proceedings within the meaning of s 6(1). First,

L Capital Jones indicated an intention to seek a stay of these proceedings at the very outset of arguments on SUM1734. Counsel for the defendants informed me that she was appearing on the opposed *ex parte* application in circumstances of urgency and therefore not yet been instructed to apply for a stay but fully expected to receive such instructions. She therefore expressly made her submissions on SUM 1734 without prejudice to that anticipated application.[84] L Capital Jones thereafter did nothing in the course of arguments on SUM 1734 which was inconsistent with the intended application. As for the Company, its application for a stay of proceedings in SUM 998 had already been made and was pending hearing. Second, on the authority of *Roussel-Uclaf*, both defendants were merely parrying Maniach's effort to seek an *ex parte* interlocutory injunction.

119 Maniach submits that the defendants opposed SUM 1734 out of choice, not out of necessity, and therefore cannot rely on cases such as *Roussel-Uclaf* where the defendant had no real alternative but to resist the injunction. Maniach relies on L Capital Jones' own characterisation of SUM 1734 as having "no utility" because the transfer of shares which Maniach sought to restrain would be an act neither of L Capital Jones nor of the Company. Maniach submits that a defendant who asserts that an injunction has no utility as a matter of fact and of law cannot in the same breath say that it was compelled to oppose that injunction in order to parry a blow.

120 I do not agree with Maniach's submission. The interlocutory injunction which Maniach sought in these proceedings was to be directed to both defendants and was intended to restrict their freedom of action. Whether the interlocutory injunction would have achieved the purpose for which Maniach

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[84] Certified transcript dated 15 April 2015 at page 2, line 4 to 30.

sought it is an entirely separate point. L Capital Jones' characterisation of the interlocutory injunction as useless for Maniach's purposes does not go to show that both defendants had no interest in resisting the injunction in order to avoid an unjustified restraint on their freedom of action.

121 I cannot characterise either defendant's conduct in presenting substantive arguments on the opposed *ex parte* hearing of SUM 1734 either as being voluntary or as being inconsistent with an intent to arbitrate its dispute with Maniach, given that SUM 998 was pending and SUM 1936 had been foreshadowed as imminent. In these circumstances, I find that neither defendant took a step in these proceedings by parrying Maniach's blow in SUM 1734.

122 Neither defendant is therefore precluded from applying for a stay of these proceedings under s 6(1) of the International Arbitration Act, provided the other requirements for a stay are met. It is to those requirements that I now turn.

Whether this dispute is within the scope of the arbitration agreement

123 The next issue which I have to determine is whether the subject-matter of these proceedings falls within the scope of the parties' arbitration agreement. The burden on this issue rests on the defendants. To meet it, they need only establish a *prima facie* case that it does (see [60] above).

124 The defendants advance two arguments on this issue. The first argument is that Maniach's claim in these proceedings is an abuse of process[85] because it is in truth a contractual claim for breach of the Agreement which

[85] L Capital Jones Ltd's written submissions dated 15 May 2015 at para 12.

Maniach has disguised as a minority oppression action in order to evade the parties' arbitration agreement.[86] That submission may carry some moral force but carries no legal force. Maniach has the right to present the facts which underlie its claim in whichever legal form maximises its forensic advantage, its prospects of success and the relief it can secure: *Rickshaw Investments Ltd and another v Nicolai Baron von Uexkull* [2007] 1 SLR(R) 377 at [47]. Maniach's subjective intent in choosing to present its claim as a minority oppression action has no bearing on the true question before me.

125 The true question before me is whether the subject-matter of these proceedings falls within the scope of the parties' arbitration agreement. If it does, a stay of these proceedings is mandatory (subject only to the point about arbitrability which Maniach has raised) regardless of Maniach's intent in presenting its claim in this legal form. If it does not, then a stay of these proceedings is not mandatory.

126 It is only the defendants' second argument which squarely addresses the true question before me. That argument is that, even if the parties' dispute is genuinely a minority oppression action, their arbitration agreement is wide enough to encompass it. To support this argument, the defendants rely on the well-known principle that "arbitration clauses should be generously construed such that all manner of claims, whether common law or statutory, should be regarded as falling within their scope, unless there is good reason to conclude otherwise" (*Larsen Oil & Gas Pte Ltd v Petroprod Ltd (in official liquidation in the Cayman Islands and in compulsory liquidation in Singapore)* [2011] 3 SLR 414 ("*Larsen Oil*") at [19]).

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[86] L Capital Jones Ltd's written submissions dated 15 May 2015 at para 3 to 12.

127 Quentin Loh J considered a similar arbitration clause in a similar context in *Silica Investors Ltd v Tomolugen Holdings Ltd and others* [2014] 3 SLR 815 ("*Silica*"). I have found his approach instructive and have adopted it in my analysis of this issue. I therefore have to deal with *Silica* at some length.

Silica Investors Ltd v Tomolugen Holdings Ltd

128 In *Silica*, a shareholder in a company sold a part of its shares to the plaintiff, comprising a minority stake in the company. The share sale agreement between the plaintiff and its seller incorporated an arbitration agreement drafted in the very wide form which has now become typical. The plaintiff later brought minority oppression proceedings against all the other shareholders in the company (including its seller), against the company itself and against its directors. The plaintiff had an arbitration agreement with only one of the defendants, *ie* its seller. All of the defendants nevertheless applied to stay the proceedings in favour of arbitration, relying on both s 6(1) of the International Arbitration Act and the court's inherent powers of case management.

129 Quentin Loh J explained that in order to determine whether the subject-matter of a plaintiff's claim in civil proceedings falls within the scope of an arbitration clause, the court must look past the legal label assigned to the claim and look instead to the factual allegations underlying the claim (at [52]). He continued:

> 53 To determine if the factual allegations underlying the claim are within the scope of the arbitration clause, the court must ascertain the relationship between the factual allegations underlying the claim and the contract that incorporates the arbitration clause. In the present case, the question is whether the factual allegations made in support of

> the minority oppression claim arise out of or are in connection with the Share Sale Agreement.
>
> 54 According to the Court of Appeal, a matter would fall outside the scope of the arbitration clause only if it was unrelated to the contract that contained the arbitration clause (see *Tjong Very Sumito v Antig Investments Pte* Ltd [2009] 4 SLR(R) 732 ("*Tjong Very Sumito*") at [22]–[23] and [69]). However, this does not necessarily mean that the matter would fall within the scope of the arbitration clause if it was in any way related to the contract which contained the arbitration clause. The deeper question, which the Court of Appeal did not elaborate upon in *Tjong Very Sumito*, is the closeness of the relationship that must be present. Would it be sufficient if the substantive rights and liabilities of the parties under the contract are not invoked per se, but are relied upon as the basis for a claim in tort or statute? What if only part of the claim makes reference to the provisions of the contract?

130 In *Silica*, the plaintiff rested its case on four planks, alleging that the majority had acted unfairly in the following four ways: (1) by issuing shares in the company to itself in payment of a fictitious debt, thereby diluting the plaintiff's stake; (2) excluding the plaintiff from participating in management; (3) causing the company to guarantee the debts of an unrelated entity for the majority's benefit; and (4) exploiting the company's resources for the majority's benefit. The third and fourth planks had nothing to do with the share sale agreement and therefore could not, on any view, be said to arise out of or in connection with the arbitration agreement between the plaintiff and its seller. However, on the first plank, the plaintiff's basis for alleging that the debt was fictitious was simply that the existence of any such debt was contradicted by a warranty in the share sale agreement (at [6(a)]). And on the second plank, the plaintiff's basis for asserting an expectation of participation in management was an express or implied understanding said to arise only from the share sale agreement itself (at [6(b)]).

131 Loh J held (at [56]) that the first two planks fell within the scope of the parties' arbitration agreement:

> 55 In the present case, the Plaintiff has referred to some of the provisions in the Share Sale Agreement to establish the extent of his reasonable expectations in asserting the minority oppression claim. Yet, only two out of the four allegations, namely the Share Issuance Issue and the Management Participation Issue, make reference to the provisions in the Share Sale Agreement. Be that as it may, I am of the view that the matter has a sufficiently close connection to the Share Sale Agreement such that it would fall within the scope of the Arbitration Clause.

132 Loh J found that the first two planks of the plaintiff's case were the preponderant part of its case (at [56]) and were so closely interrelated with the remaining two planks that they could not be dealt with separately (at [58]). He therefore concluded that the plaintiff's claim as a whole must therefore be taken to fall within the scope of the arbitration agreement. As Loh J said (at [56]):

> 56 It is quite clear that the Plaintiff's claim would fall within the scope of the Arbitration Clause if it was based solely on the [first plank] and the [second plank]. The fact that the other allegations do not wholly relate to the Share Sale Agreement should not detract from this conclusion. If a sufficient part of the factual allegations underlying the claim relates to the contract, then the entire claim must be treated as falling within the arbitration clause in the contract. …

In arriving at this conclusion, Loh J applied the principle that "the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal": *Premium Nafta Products Ltd v Fili Shipping Co Ltd* [2007] 2 CLC 553 at [13] *per* Lord Hoffman, cited with approval in *Larsen Oil* at [13].

The present case

133 The arbitration agreement in the present case, like the one in *Silica*, is very widely drafted. It encompasses "any dispute or difference [which] shall

arise between the Parties as to the construction of this Agreement or as to any matter of whatsoever (sic) nature arising thereunder or in connection therewith". There is no indication that the parties intended to exclude statutory claims which one might have against the other from the ambit of this arbitration agreement. (This is of course an entirely separate question from whether the law permits a particular statutory claim to be resolved by arbitration.)

134 The Agreement in which the parties' arbitration agreement is found is a broad-ranging agreement intended to govern the relationship between Maniach and L Capital Jones as shareholders in the Company and in managing its business. The Agreement governs the composition of the Company's board and the conduct of shareholder meetings (cll 6 and 7). It governs how the Company is to obtain finance (cl 9). It obliges the shareholders to exercise their voting rights to ensure that the business and affairs of the Group will be properly and efficiently managed and operated in accordance with sound commercial principles (cl 10.3).

135 As I have elaborated upon above (at [17] – [37]), Maniach's minority oppression claim rests on three pleaded planks: (1) excluding Maniach from management contrary to the parties' common understanding (see above at [20] – [22]); (2) engineering the transfer of the Company's only asset to a related party at an undervalue (see [24] – [35] above); and (3) abusing voting powers (see [36] above). Tracking the words of the parties' arbitration agreement, for any one of these planks to come within the scope of the arbitration agreement, it must "arise" under the Agreement or be "connected" with the Agreement. I take each of these forms of words in turn.

Arise under the Agreement

136 In my view, none of Maniach's three planks "arises" under the Agreement.

137 Maniach has not pleaded any sort of a breach by L Capital Jones, or indeed by the Company, of a contractual obligation under the Agreement. Indeed, in order to succeed in showing minority oppression, it need neither plead nor prove any such breach. Nor can it be said, as it was said of the plaintiff in *Silica*, that the only basis for the relationship of trust and confidence alleged by Maniach arises from the Agreement. Maniach's case pleads a relationship of mutual trust and confidence between the parties which is quite separate from the Agreement and which predates it.[87]

138 To succeed in its minority oppression claim, Maniach will have to establish on each plank of its case commercial unfairness contrary to this relationship of mutual trust and confidence. The unfairness need not rise to the

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87 Statement of claim at para 13.

level of a breach of a contractual obligation under the Agreement. I take each plank in turn.

139 Maniach's exclusion from management claim is pleaded as follows:

> 18. It was at all material times intended by the parties that [Maniach] would play an important role in the management of the Group and of the Business:
>
> Particulars
>
> (a) Clause 6 of the [Agreement] entitles [Maniach] and [L Capital Jones] to each nominate an equal number of directors to the Board, with the Executive Director nominated by [Maniach];
>
> (b) Schedules 2 and 2A of the [Agreement] specified certain "Reserved Matters" relating to the management and the conduct of the Business, which would require either the consent of [Maniach's] nominated director(s) or the consent of [Maniach];
>
> (c) On or about 2 July 2012, Mr Manos was appointed the CEO of the Group;
>
> (d) On or about 2 July 2012, Mr Manos's wife … was appointed the Chief Operating Officer (COO) of the Group.
>
> …

In my view, it cannot be said for two reasons that Maniach's case on exclusion from management arises under the Agreement.

140 First, although Maniach's pleading refers to certain provisions of the Agreement, its case is not that L Capital Jones has breached these provisions. Its case simply takes the existence of these provisions as an undisputable fact and invites the court to infer from that fact that it was the common intention of the parties that Maniach should participate in management. The next step in its case is that its current exclusion from management amounts to commercial

unfairness because it is contrary to the common intention. Determining whether Maniach and L Capital Jones had that common intention will not require the contractual provisions which Maniach cites to be construed in any contractual sense, whether within the four corners of the Agreement or with the aid of admissible extrinsic evidence, or to be enforced in any sense at all.

141 Second, Maniach's case on exclusion from management does not rest *solely* on the existence of these two contractual provisions. It rests also on the fact that the Company employed Mr Manos and his wife in the two most senior management positions in the group and that L Capital Jones exercised its control of the Company to cause it to do so. There is nothing in the Agreement which obliges the Company to employ Mr Manos as its CEO and his wife as its COO or which obliges L Capital Jones to exercise its control of the Company to bring that about. Both of those appointments and the support necessary from the Company and L Capital Jones to bring them about are facts which do not arise under the Agreement and which exist independently of it.

142 Maniach's second plank is that L Capital Jones has engineered the transfer of the Company's only real asset at an undervalue to a related entity. As pleaded, this plank makes no reference whatsoever to any of the provisions of the Agreement. This plank too does not arise under the Agreement.

143 Maniach's third plank is that L Capital Jones has abused its voting powers by bringing about the state of affairs complained of in the first two planks. These two planks also do not arise under the Agreement. While the Agreement has detailed provisions dealing with the exercise of voting powers, the very essence of this plank is not that L Capital Jones has breached these provisions but that L Capital Jones has *not* breached these provisions. It is the forensic advantage of being able to succeed in its claim by proving

commercial unfairness rather than breach of contract that has led Maniach to elect to commence proceedings under s 216 of the Companies Act rather than for breach of contract.

144 For the foregoing reasons, it is my view that L Capital Jones has failed to establish a *prima facie* case that any of the three planks of Maniach's case arise under the Agreement and therefore fall within the parties' arbitration agreement.

Connected with the Agreement

145 It is my view, however, that the subject-matter of this action is connected with the Agreement within the meaning of the parties' arbitration agreement. The Agreement regulates the relationship between Maniach and the only other shareholder of the Company in their capacity as shareholders. The word "connected" is so capacious that it compels me to accept that all three planks of Maniach's claim are *prima facie* connected to the Agreement.

146 I therefore find that the subject-matter of these proceedings falls *prima facie* within the scope of the parties' arbitration agreement.

Whether Maniach's claim is arbitrable

Arbitrability and the statutory minority oppression claim

147 The final issue I have to consider is whether a claim under s 216 of the Companies Act is arbitrable. In *Larsen Oil*, the Court of Appeal explained that the concept of arbitrability is a cornerstone of arbitration (at [44]). Arbitrability as a general proposition in the law of arbitration finds its expression in s 11 of the International Arbitration Act. A finding of non-arbitrability must have the result that a stay of the proceedings – or at least a

stay of any non-arbitrable matter comprised in the proceedings – is no longer mandatory under s 6(1): *Larsen Oil* at [25]; *Silica* at [60]. The non-arbitrability renders the arbitration agreement unenforceable to that extent, whether because it is null and void, because it is inoperative or because it is incapable of being performed within the meaning of those words in s 6(2) of the International Arbitration Act and Article 8(1) of the Model Law: *Fulham Football Club (1987) Ltd v Richards and another* [2012] Ch 333 ("*Fulham Football Club*") at [35] – [36] per Patten LJ.

148 In 2004, in the case of *Exeter City Association Football Club Ltd v Football Conference Ltd* [2004] 1 WLR 2910 ("*Exeter City*"), the English High Court held that the statutory minority shareholder claim under English company law, the analogue of s 216 of our Companies Act, is not arbitrable. As the judge put it (at [22] – [23]):

> 22. … The Companies Court has jurisdiction to wind up a company or a limited liability partnership, and the same court has supervisory powers, designed to give protection to shareholders by enabling them to apply to the court for special relief. In effect, the court controls by statute the creation and the extinction of the company, and also attends to it during midlife crises.
>
> 23. The statutory rights conferred on shareholders to apply for relief at any stage are, in my judgment, inalienable and cannot be diminished or removed by contract or otherwise.

In arriving at this conclusion, His Honour Judge David Weeks QC accepted and extended the reasoning in the first-instance decision of the Supreme Court of Victoria in *A Best Floor Sanding Pty Ltd v Skyer Australia Pty Ltd* [1999] VSC 170 which held that a contributory was not precluded from presenting a winding up petition under the Australian Corporations Law by an arbitration clause in the joint venture agreement which expressly encompassed "disputes, differences or questions …touching … the dissolution or winding up".

149 Almost seven years later, in *Fulham Football Club*, the English Court of Appeal held that the statutory minority shareholder claim in English company law is indeed arbitrable even though an arbitral tribunal is unable to grant certain statutory remedies, such as a winding up order, which the statute makes available to a successful plaintiff. To that extent, *Exeter City* was wrongly decided. As Patten LJ said (at [78]):

> 78. Judge Weeks QC was therefore wrong in my view to extend the reasoning … in *A Best Floor Sanding Pty Ltd v Skyer Australia Pty Ltd* [1999] VSC 170 to a petition under what was then section 459. The statutory provisions about unfair prejudice contained in section 994 give to a shareholder an optional right to invoke the assistance of the Court in cases of unfair prejudice. The court is not concerned with the possible winding up of the company and there is nothing in the scheme of these provisions which, in my view, makes the resolution of the underlying dispute inherently unsuitable for determination by arbitration on grounds of public policy. The only restriction placed upon the arbitrator is in respect of the kinds of relief which can be granted.

150 Both *Exeter City* and *Fulham Football Club* took an all or nothing approach to the arbitrability of statutory minority oppression claims. In *Silica*, Loh J charted a middle path. He held that whether a minority oppression action is arbitrable depends on the facts and circumstances of each case:

> 141 In my judgment, the nature of a minority oppression claim and the broad powers of the court under s 216(2) of the CA would mean that a minority oppression claim is one that may straddle the line between arbitrability and non-arbitrability. It would not be desirable therefore to lay down a general rule that all minority oppression claims under s 216 of the CA are non-arbitrable. It will depend on all the facts and circumstances of the case. No single factor should be looked at alone. Nor should the remedy or relief asked for assume overriding importance, as that would enable litigants to manipulate the process and evade otherwise binding obligations to refer their disputes to arbitration.
>
> 142 That said, except for those cases where all the shareholders are bound by the arbitration agreement, or where there are unique facts like *Fulham* ([63] supra), and the court is satisfied that, first, all the relevant parties (including

> third parties whose interests may be affected) are parties to the arbitration and, secondly, the remedy or relief sought is one that only affects the parties to the arbitration, many if not most of the minority oppression claims under s 216 of the CA claims will be non-arbitrable. This will often be in cases where, eg, there are other shareholders who are not parties to the arbitration, or the arbitral award will directly affect third parties or the general public, or some claims fall within the scope of the arbitration clause and some do not, or there are overtones of insolvency, or the remedy or relief that is sought is one that an arbitral tribunal is unable to make.

151 The defendants urge me to follow the approach in *Fulham Football Club*. On that approach, the defendants succeed on the issue of arbitrability without any need to inquire further. Alternatively, if the approach in *Fulham Football Club* does not find favour with me, the defendants urge me to follow Loh J's approach. They accept that on that approach, as Loh J himself said, many if not most minority oppression actions will be held non-arbitrable. But the defendants submit that many of the exceptional factors which Loh J identified in this passage in *Silica* – and which were missing in *Silica* itself – are present here. First, all the shareholders of the Company are bound by the same arbitration agreement, as indeed is the Company itself. Second, no third party interests arise because there are only two shareholders of the Company and both of them will be parties to the arbitration. Finally, and for the same reason, the remedy or relief which Maniach seeks will affect only the parties to the arbitration. The defendants therefore urge me to hold on the facts of this case that there are no public policy considerations which operate to render the subject-matter of these proceedings non-arbitrable.

The statutory minority oppression claim is not arbitrable

152 I take the defendants' points in reverse sequence. I find it difficult, with respect, to accept that arbitrability is or ought to depend on the facts and circumstances of each case. Arbitrability is an overarching concept which has

its source outside the International Arbitration Act, outside the Model Law and outside the parties' arbitration agreement. It is imposed from above in order to give effect to the national public policy of the seat or, as in this case, the forum. Public policy typically applies to bar arbitration of all dispute of a particular type, not on a case by case basis. As the Court of Appeal said in *Larsen* (at [44]):

> … there is ordinarily a presumption of arbitrability where the words of an arbitration clause are wide enough to embrace a dispute, unless it is shown that parliament intended to preclude the use of arbitration for the particular *type* of dispute in question …, or that there is an inherent conflict between arbitration and the public policy considerations involved in that *type* of dispute.
>
> [Emphasis added.]

153 Thus, public policy prohibits the arbitration of any disputes of the following types, regardless of the specific facts and circumstances underlying any particular dispute of that type: "citizenship or legitimacy of marriage, grants of statutory licences, validity of registration of trademarks or patents, copyrights, winding up of companies, bankruptcy of debtors, [and] administration of estates" (Section 2.37.17 of Review of Arbitration Laws, LRRD No. 3/2001 cited with approval in *Larsen* at [29]).

154 Even if public policy dictates different answers to the question of arbitrability within a particular type of dispute, those different outcomes again apply to entire sub-types and not on a case by case basis within that type. Thus, the question presented to the Court of Appeal in *Larsen* was the arbitrability of proceedings by a company in liquidation to recover payments for the benefit of creditors. The Court of Appeal held that the public policy considerations were not the same for all types of these claims. Arbitrability therefore depended on the specific type of claim under consideration. For this

purpose, the Court of Appeal divided claims by an insolvent company into three sub-types and opined on the arbitrability of each sub-type as follows: (1) disputes which arise only upon the onset of insolvency and only as a result of the operation of the insolvency regime are not arbitrable *per se* (at [46]); (2) disputes which stem from the insolvent company's pre-insolvency rights and obligations and which either affect the interests of the general body of creditors or which attempt to contract out of mandatory insolvency rules are non-arbitrable (at [48]); and (3) disputes between the insolvent company and another party which are in reality private disputes *inter se* are arbitrable.

155 It appears to me that the answer to the question whether the statutory minority oppression claim is arbitrable must either be that all claims of that type are arbitrable or that no claims of that type are arbitrable. I say this for two reasons.

156 First, arbitrability rests on fundamental conceptions of public policy. It should not be within the power of a party unilaterally to arrange the facts and circumstances of the case for tactical reasons, so as to invite the intervention of public policy and to maximise the likelihood of disrupting the parties' bargain. But that is precisely what determining the arbitrability question on a case by case basis does. It allows a party the opportunity to manipulate the outcome of the arbitrability inquiry. To take an example, assume a majority shareholder wished to litigate instead of arbitrate a minority oppression action. It could simply sell some, but not all, of its shares in an arm's length transaction to an unrelated third party. By that simple act, a third party interest would be inserted, thereby turning what was previously an arbitrable dispute into a non-arbitrable dispute.

157 Second, a case by case approach to arbitrability undermines commercial certainty. It does so in two ways. First, it becomes impossible to predict the outcome of the inquiry into arbitrability. Whether a dispute is arbitrable or not can be known only after the time and delay involved in permitting a court to consider all the circumstances and facts of the particular case and make its finding. Adopting a case by case approach to arbitrability is virtually indistinguishable from a court claiming for itself, contrary to s 6(2) of the International Arbitration Act and Article 8(1) of the Model Law, a discretion to permit an action in which arbitrability is in issue to proceed to litigation. Second, taking the example given in the preceding paragraph, the very same dispute on the very same underlying facts can suddenly change by a party's unilateral act from being arbitrable to being non-arbitrable, and perhaps even back again. That degree of uncertainty, it appears to me, fails to respond to commercial needs.

158 For these reasons, it is my view that the question whether this dispute is arbitrable does not depend on the facts and circumstances of this case but upon the fundamental question whether the statutory minority oppression claim is, as a type, arbitrable.

159 I accept Maniach's submissions that it is not arbitrable, and do so for two reasons.

160 First, I accept the reasoning in *Exeter City* that the minority oppression claim, being statutory in nature and being asserted in relation to the affairs of a creature of statute, ought to be supervised and determined by the court in all cases.

161 Second, although I do not accept a case by case approach to arbitrability, I accept the two reasons which Loh J gave in *Silica* for holding that the specific claim in that case was not arbitrable as reasons why the statutory minority oppression claim is a type of claim which is not arbitrable. Those two reasons were: (a) an arbitral tribunal is unable to grant a plaintiff in minority oppression proceedings the full panoply of relief available under s 216(2) of the Companies Act to remedy minority oppression; and (b) it is undesirable to compel the parties to fragment a minority oppression dispute between litigation and arbitration, whether that fragmentation arises because the arbitral tribunal cannot grant the full range of relief which the statute makes available to a successful plaintiff or because only some of the parties to the dispute are parties to the arbitration agreement.

162 Both of these grounds carry weight with me as reasons for holding that the statutory minority oppression claim as a type is not arbitrable. The present case is an illustration.

The full range of relief available under s 216 is not available in arbitration

163 One of the heads of relief which Maniach seeks in these proceedings is an order under s 216(2)(*e*) of the Companies Act for L Capital Jones to buy out Maniach's shares in the Company on terms. The terms are that the price for Maniach's shares should be determined without discount and at the value those shares would have had but for L Capital Jones' oppressive conduct. I asked counsel for the defendants whether an arbitral tribunal could order L Capital Jones to buy Maniach out on terms. She responded that it could, pursuant to s 12(5) of the International Arbitration Act.

164 Section 12(5) empowers an arbitrator to "award any remedy or relief that could have been ordered by the High Court if the dispute had been the subject of civil proceedings before the court". I do not accept that that section confers on an arbitrator the statutory power to order a buy out on terms under s 216(2)(*d*) of the Companies Act. That power is vested only in a judge, and even then only by s 216(2)(*d*) of the Companies Act. It is alien to the common law and even to equity. It is as much uniquely a judge's power as the power to order a company to be wound up, under either s 216(2)(*f*) or s 254(1) of the Companies Act. Counsel for the defendants accepts that s 12(5) does not empower an arbitrator to relieve oppression by ordering a company to be wound up under s 216(2)(*f*) of the Companies Act. That must be correct. But she maintains that where all the shareholders are parties to the arbitration agreement and to the arbitration, an arbitral tribunal has the power under s 12(5) of the International Arbitration Act the power of a judge under s 216(2)(*f*) of the Companies Act to order a majority shareholder to buy out an oppressed minority shareholder on terms.[88]

165 Counsel for the defendants was unable to cite any support for this submission on the width of s 12(5). *Silica* is directly contrary to her submission. In *Silica*, Loh J considered the scope of s 12(5) and concluded: (1) that it clearly could not "be construed as conferring upon arbitral tribunals the power to grant all statute-based remedies or reliefs available to the High Court" and (2) that an arbitral tribunal "clearly cannot exercise the coercive powers of the courts or make awards *in rem* or bind third parties who are not parties to the arbitration agreement" (at [111]). He then went on to hold that an arbitral tribunal had no general power to order a buy-out on terms, implicitly holding that to be a coercive power of the court (at [140]):

[88] Certified transcript dated 18 May 2015, page 46 line 1 to 8.

> … Also, under s 216(2)(*d*) of the CA, absent any conferment of jurisdiction or power by the consent of the parties under the terms of reference or by a provision within the arbitration agreement or the articles of association or other agreement between the parties, or some other power by the law of the seat or the governing law, *I do not think that an arbitral tribunal has the general power to order one shareholder-party to buy out the other shareholder-party on specific terms. A fortiori* if there are other shareholders in the company who are not parties to the arbitration agreement and are therefore not bound by the arbitral award.
>
> [emphasis added]

166 I accept as correct this part of Loh J's analysis in *Silica*. An order for a buy-out on terms is indeed an exercise of the coercive power of the court. It compels the subject of the order to acquire property on terms other than of its own choosing. I cannot therefore accept the defendants' argument that s 12(5) of the International Arbitration Act empowers an arbitral tribunal to order a buy-out on terms, even if all the shareholders are parties to the same shareholders' agreement, to the same arbitration agreement and to the same arbitration.

167 Maniach's alternative prayer is for rescission of any transfer of the Company's shares to a third party. That order is on its face intended to interfere with a third party's rights. As events have transpired, and unless there has been a further transfer, that third party is Fresh Bay. Fresh Bay is not a party to any arbitration agreement and will not be a party to the intended arbitration. An arbitrator who hears this minority shareholder dispute would therefore have no power to grant the relief sought. It is also not an answer for the defendants to say that the third party may submit itself to jurisdiction of the arbitration. The point I make is that this difficulty illustrates why *any* minority oppression action ought not as a matter of principle to be arbitrable,

and not why *this* minority oppression action is not, on the facts of this case, arbitrable.

Fragmentation of dispute resolution

168 Similarly, the second reason which Loh J gave in *Silica* for holding that the plaintiff's claim in that case was not arbitrable carries weight with me as a reason why a statutory minority oppression claim is not arbitrable. That second reason is the fragmentation of the resolution of the parties' dispute which would result.

169 The fragmentation that Loh J recoiled from in *Silica* is by no means atypical. If minority oppression claims are arbitrable, fragmentation along remedial lines is inevitable. The most useful remedies for an oppressed minority shareholder are the precisely the remedies which are coercive, which operate *in rem* or which bind non-parties to the dispute. But those are the very remedies which an arbitrator is powerless to grant. The result is that a minority oppression claim which is to be arbitrated almost inevitably will be fragmented along remedial lines, with the arbitral tribunal making all the findings of fact, establishing whether the minority has suffered oppression, determining the appropriate relief and then, if that relief is beyond the tribunal's grasp, remitting the matter to the court. But that gives rise to a serious problem. In this scenario, the court's only task is to grant the relief which the arbitral tribunal has determined the minority is entitled to be awarded. The court will be carrying out a purely administrative act. All of the underlying matters have been decided by the arbitral tribunal and cannot be reopened, being either *res judicata* or carrying an issue estoppel. In these circumstances, it is difficult to say that the court is in any sense exercising judicial power.

170 Another type of fragmentation is also likely if minority oppression claims are arbitrable. That is fragmentation on the issues. A minority shareholder in an oppression action typically relies on a combination of a broad range of matters to establish oppression. Some of those matters amount to breaches of the law (either of the Companies Act or of some other law), some amount to breaches of contract (either of the contract between the members constituted by the articles of association or of a separate contract between shareholders), some amount to conduct contrary to understandings or expectations and some amount to no more than general unfairness. Maniach's case in these proceedings is a typical example. That case rests on three planks, none of which I have found *prima facie* to arise from the Agreement but all of which I have found *prima facie* to be connected to the Agreement. One of those planks, exclusion from management, rests on four grounds (see [139] above). Two of those grounds can be said *prima facie* to be connected with the Agreement. Two of those grounds are on any view wholly unconnected to the Agreement. But it cannot have been the intent behind the statutory minority oppression claim that resolving whether Maniach can secure a remedy should involve each of these issues and sub-issues being allocated between arbitration and litigation. Arbitration being ultimately rooted in the parties' agreement, the desirability of one-stop dispute resolution in construing an arbitration agreement does not point in favour of arbitration alone.

171 For all of the foregoing reasons, it is my view that the statutory minority oppression claim is a type of dispute which is not arbitrable.

Conclusion

172 In conclusion, I find that none of the defendants have taken a step in the proceedings within the meaning of s 6(1) of the Act. I also find that the

arbitration agreement between the parties is *prima facie* wide enough in scope to encompass the present dispute, being one that is connected to the Agreement. Nevertheless, I decline to grant the stay sought by the defendants because I find that the statutory claim for relief from minority oppression is not arbitrable.

173 I have therefore dismissed with costs both defendants' applications to stay these proceedings.

Leave to appeal

174 After I delivered my judgment, the defendants applied for leave to appeal against my decision. I have granted the defendants leave to appeal for two reasons.

175 First, I accept the defendants' submission that this case raises a question of importance upon which further argument and a decision of a higher tribunal would be to the public advantage. At the time the defendants applied for leave, the appeal against Loh J's decision in *Silica* had been heard by the Court of Appeal but had not been decided. While the same or substantially the same questions were at that time pending judgment before the Court of Appeal in the *Silica* appeal, there was at that time no appellate authority on these important points.

176 Second, I granted the defendants leave to appeal because as long as the outcome of the *Silica* appeal was pending, there was a real possibility that I may have unwittingly arrived at a decision running counter to the analysis and reasoning of the Court of Appeal in *Silica*. If that were the case, the defendants would have been denied justice if I did not grant them leave to appeal.

Vinodh Coomaraswamy
Judge

Chew Kei-Jin, Tham Lijing, Melissa Tan and Stephanie Tan (Tan Rajah & Cheah) for the plaintiff;
Koh Swee Yen, Suegene Ang, Sim Mei Ling and Jill Ann Koh Ying (WongPartnership LLP) for the defendants.
