IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2023] SGCA 24

Court of Appeal / Originating Application No 10 of 2023

Between

(1) Koh Kien Chon (Gu Jiancong)
(2) Koh Yang Kee Pte Ltd

… *Applicants*

And

Ding Asset Ltd

… *Respondent*

In the matter of Originating Claim No 265 of 2022

Between

Ding Asset Ltd

… *Claimant*

And

(1) Koh Kien Chon (Gu Jiancong)
(2) Koh Yang Kee
(3) Yang Kee Logistics Pte Ltd (in receivership)
(4) Koh Yang Kee Pte Ltd
(5) Yang Kee Logistics (Singapore) Pte Ltd

… *Defendants*

JUDGMENT

[Civil Procedure — Appeals — Permission]

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Koh Kien Chon and another
v
Ding Asset Ltd

[2023] SGCA 24

Court of Appeal — Originating Application No 10 of 2023
Judith Prakash JCA and Steven Chong JCA
23 June 2023

11 August 2023 Judgment reserved.

Steven Chong JCA (delivering the judgment of the court):

Introduction

1 This is an application for permission to appeal against the decision of a Judge sitting in the General Division of the High Court (the "Judge") in HC/RA 45/2023 ("RA 45"). The applicants, Mr Koh Kien Chon ("Mr Ken Koh") and Koh Yang Kee Pte Ltd ("KYK"), are respectively the first and fourth defendants to HC/OC 265/2022 ("OC 265"), while the respondent, Ding Asset Ltd ("Ding Asset"), is the claimant in OC 265. In HC/SUM 4292/2022 ("SUM 4292"), an assistant registrar (the "AR") granted Mr Ken Koh and KYK a stay of the actions against them in OC 265 in favour of arbitration in Singapore. However, on appeal, the Judge allowed Ding Asset's appeal against the AR's decision in RA 45, with the effect that OC 265 was to proceed against Mr Ken Koh and KYK. Mr Ken Koh and KYK now seek permission to appeal against the Judge's decision.

2 Having considered the parties' submissions, we are of the view that Mr Ken Koh and KYK have not raised any grounds on which permission to appeal should be granted. Accordingly, we dismiss the application.

The material facts

The parties to the dispute

3 The first applicant is Mr Koh Kien Chon, also known as Mr Ken Koh. Mr Ken Koh is the Managing Director and sole shareholder of the second applicant, KYK. The other director of KYK is Mr Koh Yang Kee ("Mr Koh YK"), who is Mr Ken Koh's father.

4 Mr Ken Koh and Mr Koh YK are also shareholders of Yang Kee Logistics Pte Ltd ("YKL"). They were directors of YKL until it was placed into receivership on 12 May 2022. YKL is the sole shareholder of Yang Kee Logistics (Singapore) Pte Ltd ("YKLS"). Mr Ken Koh and Mr Koh YK were also previously directors of YKLS.

5 The respondent is Ding Asset, a company incorporated in the British Virgin Islands. The ultimate beneficial shareholder and director of Ding Asset is Mr Ding Yanzhong ("Mr Ding").

6 According to Ding Asset, in or around late 2018, Mr Ken Koh and/or Mr Koh YK met with Mr Ding on several occasions and verbally represented to Mr Ding that he or his company could invest in "a Yang Kee company". Mr Ding agreed to do so and nominated Ding Asset as his investment vehicle. Consequently, two agreements were entered into, as follows:

(a) A share subscription agreement executed between Ding Asset and YKLS in or around October or November 2018 (the "Subscription

Agreement"), wherein it was agreed that Ding Asset would be issued 454,445 ordinary shares in YKLS (the "Subscription Shares") for a consideration of S$5m (the "Subscription Consideration").

(b) A put option agreement executed among Ding Asset, Mr Ken Koh and KYK in or around October or November 2018 (the "Put Option Agreement"), wherein it was agreed that Ding Asset had a put option to sell to KYK during a specified "Put Option Period" all of the Subscription Shares at a specified "Put Option Price".

7 Ding Asset claims that around the time that the Subscription Agreement and the Put Option Agreement were executed, Mr Ding was informed by "[Mr Ken Koh], [Mr Koh YK], and/or an associate of [Mr Ken Koh] and/or [Mr Koh YK] acting on their behalf" that the Subscription Consideration should be paid into a bank account belonging to YKL (the "Representation"). In reliance on the Representation, Mr Ding issued a cheque for S$5m on behalf of Ding Asset to *YKL*, instead of YKLS. Mr Ding did not realise at that time that the Subscription Consideration was being paid to a different company from the company that was the party to the Subscription Agreement.

8 On or around 13 November 2018, the Subscription Consideration was credited to YKL's bank account. However, Ding Asset alleges that in breach of the Subscription Agreement, YKLS did not allot the Subscription Shares to it.

OC 265

9 On 15 September 2022, Ding Asset commenced OC 265. The first to fifth defendants in OC 265 are respectively Mr Ken Koh, Mr Koh YK, YKL, KYK and YKLS (collectively, the "Defendants"). Ding Asset's pleaded causes of action include the following claims:

(a) YKLS breached the Subscription Agreement by failing to allot the Subscription Shares to Ding Asset.

(b) Mr Ken Koh and Mr Koh YK are liable in misrepresentation as they made the Representation to Mr Ding, despite knowing that the bank account in question belonged to YKL (not YKLS), and/or that it was not the bank account which Ding Asset was supposed to pay the Subscription Consideration into. Alternatively, Mr Ken Koh and/or Mr Koh YK made the Representation without belief in its truth or recklessly. In reliance on the Representation, Ding Asset paid the Subscription Consideration to YKL and therefore suffered loss.

(c) The Defendants are liable for unlawful means conspiracy, as they had a common intention to injure and cause loss to Ding Asset by unlawful means. Despite the Defendants being aware of Ding Asset's intention to invest in YKLS and not YKL, Mr Ken Koh and Mr Koh YK made the Representation intending for Ding Asset to pay the Subscription Consideration to YKL instead of YKLS.

(d) Alternatively, the Defendants are liable for lawful means conspiracy, as they conspired and combined together wrongfully with the sole or predominant intention of injuring and/or causing loss to Ding Asset, by accepting the S$5m without issuing the Subscription Shares to it.

10 Based on the above causes of action, Ding Asset seeks, *inter alia*, damages to be assessed in relation to Ding Asset's inability to sell the Subscription Shares at the Put Option Price under the Put Option Agreement.

11 The Defendants deny that they conspired to injure and cause loss to Ding Asset by unlawful or lawful means. According to Mr Ken Koh, YKL, KYK and YKLS, there was an oral variation made by Mr Ken Koh and Mr Ding to the Subscription Agreement and the Put Option Agreement, such that Ding Asset agreed to receive shares in YKL, rather than YKLS. Mr Ken Koh and Mr Koh YK also deny making the Representation to Mr Ding. In addition, Mr Ken Koh and KYK highlight that the Put Option Agreement (which they are parties to) contains an arbitration clause, while YKLS highlights that the Subscription Agreement (which it is party to) contains an arbitration clause. The arbitration clauses in the two agreements are identically worded, as follows:

> Any and all disputes arising out of or in connection with this Agreement, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration in Singapore in accordance with the Arbitration Rules of the Singapore International Arbitration Centre for the time being in force, which rules are deemed to be incorporated by reference in this Clause. The Tribunal shall consist of one arbitrator to be appointed by the Chairman of the Singapore International Arbitration Centre. The language of the arbitration shall be English and the decision of the arbitrator shall be final and binding on the Parties and shall be enforced in accordance with its terms.

The proceedings below

12 On 29 November 2022, Mr Ken Koh and KYK filed SUM 4292 seeking a stay of OC 265 in favour of arbitration. On 2 December 2022, YKLS filed a similar application in HC/SUM 4332/2022 ("SUM 4332"). However, Mr Koh YK and YKL did not file any similar application.

13 On 13 February 2023, the AR allowed SUM 4292 and SUM 4332, thus staying the actions against Mr Ken Koh, KYK and YKLS in favour of arbitration.

14 On 27 February 2023, Ding Asset appealed against the AR's decision by filing RA 45 and HC/RA 46/2023 ("RA 46") respectively. On 28 April 2023, the Judge allowed the appeals in RA 45 and RA 46. As there has been no application for permission to appeal against the Judge's decision in RA 46 (in respect of YKLS), we set out the Judge's reasoning only in relation to RA 45.

15 The Judge found that Ding Asset's claims against Mr Ken Koh and KYK were governed by the arbitration clause in the Put Option Agreement, and that the applicable legislative provision was s 6 of the Arbitration Act 2001 (2020 Rev Ed) (the "AA"). Sections 6(1) and 6(2) of the AA provide as follows:

> **Stay of legal proceedings**
>
> **6.**—(1) Where any party to an arbitration agreement 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 filing and serving a notice of intention to contest or not contest and before delivering any pleading (other than a pleading asserting that the court does not have jurisdiction in the proceedings) 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) may, if the court is satisfied that —
>
> (*a*) there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement; and
>
> (*b*) the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration,
>
> make an order, upon any terms that the court thinks fit, staying the proceedings so far as the proceedings relate to that matter.

16 The Judge proceeded on the basis that the requirement in s 6(2)(*b*) of the AA was satisfied, and therefore turned to consider if there was sufficient reason to refuse a stay. Having regard to the factors articulated in *CSY v CSZ*

[2022] 2 SLR 622 ("*CSY*") as to whether sufficient reason existed to refuse a stay, the Judge found that the "key factors of concern" in the present case were: (a) the likelihood of injustice in having the same witnesses deal with the same factual issues before two different fora; (b) the overlap between the issues in dispute such that there was a real prospect of inconsistent findings; and (c) the consequent likelihood of disrepute to the administration of justice.

17 The Judge observed that the essence of Ding Asset's claim in conspiracy was that Mr Ken Koh and Mr Koh YK had, by the Representation, caused loss to Ding Asset pursuant to a common intention shared by *all* the Defendants. The allegations against Mr Ken Koh and Mr Koh YK thus "permeate[d]" across Ding Asset's conspiracy claim against all the Defendants. However, since Mr Koh YK and YKL were not bound by any arbitration agreement, a stay of proceedings against Mr Ken Koh and KYK would create parallel proceedings. This meant that "[t]he veracity of the allegations against [Mr Ken Koh and Mr Koh YK would] have to be determined in both *fora*, through examination of the same evidence and the same key witnesses", thus creating a "real risk of inconsistent findings which [would] bring disrepute to the administration of justice".

18 In the Judge's view, the degree of overlap in the present case was substantially similar to that in *CSY*. In that case, this court found that there was sufficient reason to refuse a stay in favour of arbitration, due to a significant overlap of issues between the disputes governed by the arbitration clause and the disputes that were not.

19 In addition, the fact that Mr Koh YK and YKL had not applied for case management stays served to "bolster" the case for refusing a stay in favour of arbitration. In the absence of such applications from Mr Koh YK and YKL, the

Judge observed that "the policy of eliminating the risks associated with overlapping issues … would in fact be achieved by refusing the stays in favour of arbitration". Further, the Judge rejected the suggestion that the court could exercise its inherent powers to grant case management stays against Mr Koh YK and YKL. Even if the court possessed the inherent power to stay a claim on case management grounds, the Judge found that it was not appropriate to exercise that power in the absence of any application by Mr Koh YK and YKL for the court to do so.

20 The Judge therefore found that there was sufficient reason to refuse a stay of the actions against Mr Ken Koh and KYK and allowed the appeal in RA 45, with the result that OC 265 was to proceed against all the Defendants.

21 On 9 June 2023, Mr Ken Koh and KYK filed the present application seeking permission to appeal against the Judge's decision in RA 45. We note, for completeness, that Mr Ken Koh and KYK obtained an extension of time to file the present application by way of CA/OA 7/2023.

The parties' submissions

22 Mr Ken Koh and KYK submit that permission to appeal should be granted as the Judge made a *prima facie* error of law in finding that there was sufficient reason to refuse a stay. In particular, the Judge erred in the following ways:

> (a) The Judge erred in his application of the law. The Judge's decision that the risk of inconsistent findings constituted sufficient reason to refuse a stay was contrary to the decision in *Maybank Kim Eng Securities Pte Ltd v Lim Keng Yong and another* [2016] 3 SLR 431 ("*Maybank*").

(b) The perceived multiplicity of proceedings was induced by the way Ding Asset pleaded its claim. In any event, the multiplicity of proceedings was "illusory" as the arbitral tribunal could decide on Ding Asset's allegations against Mr Ken Koh, while a court could independently decide on the allegations against Mr Koh YK.

(c) The Judge was wrong to find that the degree of overlap in the present case was similar to that in *CSY*.

(d) The Judge "conflated" the issue of granting a case management stay with the issue of granting a stay in favour of arbitration.

23 Further, Mr Ken Koh and KYK submit that RA 45 raises questions of importance upon which further argument and a decision of a higher tribunal would be to the public advantage. The purported questions of importance are:

(a) whether the presence of a claim under a single cause of action against multiple defendants, some of whom are parties to arbitration agreements and some are not, is in itself a sufficient reason to refuse a stay in favour of arbitration where the dispute falls within the scope of the arbitration agreement(s); and

(b) whether the issue of a case management stay against the other defendants who are not parties to the arbitration agreement(s) should be decided simultaneously or subsequently.

24 Ding Asset submits that there are no grounds for granting permission to appeal, and that this application should therefore be dismissed.

The threshold for granting permission to appeal

25 It is well-established that permission to appeal may be granted if: (a) there is a *prima facie* error of law; (b) the matter concerns a question of general principle decided for the first time; or (c) the matter concerns a question of importance upon which further argument and a decision of a higher tribunal would be to the public advantage: *VXF v VXE* [2022] 2 SLR 716 at [10].

26 As noted at [22]–[23] above, Mr Ken Koh and KYK rely on grounds (a) and (c) in the present application. In relation to ground (a), Mr Ken Koh and KYK rely on *Ng Tze Chew Diana v Aikco Construction Pte Ltd* [2020] 3 SLR 1196 ("*Diana Ng*") at [61] for the proposition that an "error of law" includes an erroneous *application* of the law. In our view, *Diana Ng* does not stand for this proposition. The court in *Diana Ng* was concerned with what a "question of law" entails for the purposes of obtaining leave to appeal against an arbitral award under s 49 of the AA, and not with the threshold for granting permission to appeal. The relevant part of the judgment states as follows:

> 61 A question of law is distinct from an error of law, and relates specifically to a 'point of law in controversy'. It does not extend to errors in the *application* of the law. As the Court of Appeal explained in *Northern Elevator Manufacturing Sdn Bhd v United Engineers (Singapore) Pte Ltd* [2004] 2 SLR(R) 494 ('*Northern Elevator*') at [18]–[19]:
>
> > 18 … in *Ahong Construction (S) Pte Ltd v United Boulevard Pte Ltd* [1993] 2 SLR(R) 208 … G P Selvam JC (as he then was) stated at [7]:
> >
> > > … A question of law means *a point of law in controversy* which has to be resolved after opposing views and arguments have been considered. It is a matter of substance the determination of which will decide the rights between the parties. … If the point of law is settled and not something novel and it is contended that the arbitrator made an error in the application of the law there lies no appeal against that error for there is no question of law which calls for an opinion of the court. …

> 19 To our mind, a 'question of law' must necessarily be a finding of law which the parties dispute, that requires the guidance of the court to resolve. When an arbitrator does not apply a principle of law correctly, that failure is a mere 'error of law' (but more explicitly, an erroneous application of law) which does not entitle an aggrieved party to appeal.
>
> [emphasis in original]

27 It is clear from the above passage that the court in *Diana Ng* was not commenting on what constituted an "error of law" for the purposes of an application for permission to appeal. On the contrary, it has been observed that an assertion that the judge reached the wrong conclusion on the evidence, or the mere erroneous application of the law to a given factual scenario, will not satisfy the threshold for granting permission to appeal: see *IW v IX* [2006] 1 SLR(R) 135 at [20]; *Hwa Aik Engineering Pte Ltd v Munshi Mohammad Faiz and another* [2021] 1 SLR 1288 at [15] and [24]. An erroneous application of the law – *ie*, where a judge, having set out the law correctly, reaches the wrong conclusion on the facts – is at best an error of *fact*, and will therefore generally not warrant the granting of permission.

Our analysis

28 Having set out the threshold for permission to be granted, we turn to consider Mr Ken Koh and KYK's submissions. In our judgment, Mr Ken Koh and KYK have not disclosed any grounds on which permission should be granted.

The Judge did not make a prima facie error of law

The Judge's decision is not contrary to legal principles

29 First, Mr Ken Koh and KYK contend that the Judge's finding is contrary to the general principle that where the dispute is within the scope of an

arbitration agreement, a stay will only be denied in "exceptional circumstances", and to the following observations in *Maybank* that the mere existence of "related actions" will not be sufficient reason to refuse a stay (at [23]):

> 23 However, it must be kept in mind that even though the court's power to grant a stay in favour of domestic arbitration under s 6 of the AA is discretionary, the burden is on the party who wishes to proceed in court to 'show sufficient reason why the matter should not be referred to arbitration'. Assuming the applicant is ready and willing to arbitrate, the court will only refuse a stay in exceptional cases … ***Certainly, the fact that there are related actions, some governed by arbitration agreements and some not, is not in itself a sufficient reason to sanction a breach of an arbitration clause and depart from the policy in favour of arbitration.*** …
>
> [emphasis added in bold italics]

30 In our view, Mr Ken Koh and KYK's contention fails to recognise that the Judge did *not* refuse a stay merely because there were "related actions", or because there would otherwise be parallel proceedings in the arbitration and in the courts. Rather, as noted at [17] above, the Judge found that the manner in which Ding Asset had pleaded its claim meant that the same issues and evidence would have to be explored in both fora, leading to a "real risk of inconsistent findings which [would] bring disrepute to the administration of justice". It was therefore the risk of inconsistent findings – and not the fact of related proceedings *per se* – that led the Judge to refuse a stay. Once this is properly appreciated, it is clear that the Judge's decision is not at odds with the observations in *Maybank*.

31 In this regard, the Judge's decision is consistent with the principles articulated in *CSY*. In that case, this court set out the relevant factors in determining whether there is "sufficient reason" to refuse a stay (at [25]):

> 25 In each case, however, the court must scrutinise the myriad factual circumstances to determine how best to manage its processes and ensure the efficient and fair resolution of the entire dispute. The term 'sufficient reason' captures a broad range of factors (*Fasi Paul Frank v Specialty Laboratories Asia Pte Ltd* [1999] 1 SLR(R) 1138 at [18]). Ultimately, the factors invoked will be weighed against and will have to be found to outweigh the significant consideration that the parties had voluntarily bound themselves to arbitrate and ought therefore to be held to their agreement (*Sim Chay Koon v NTUC Income Insurance Co-operative Ltd* [2016] 2 SLR 871 at [8]–[10]). Amongst others, we consider the following factors instructive in the inquiry:
>
> (a) the existence of related actions and disputes, some of which are governed by an arbitration agreement and others which are not;
>
> (b) the overlap between the issues in dispute such that there is a real prospect of inconsistent findings;
>
> (c) the likely shape of the process for the resolution of the entire dispute;
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> (d) the likelihood of injustice in having the same witnesses deal with the same factual issues before two different fora;
>
> (e) the likelihood of disrepute to the administration of justice ensuing from the fact that overlapping issues may be differently determined in different actions;
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> (f) the relative prejudice to the parties; and
>
> (g) the possibility of an abuse of process.

32 Having regard to the factors listed above, the court in *CSY* found that while the mere existence of related actions would not justify refusing a stay, the facts of *CSY* went "beyond that" and that refusing a stay was therefore warranted (at [26] and [29]). As we have explained, the Judge in the present case expressly had regard to the factors set out in *CSY*, and likewise concluded that the facts went beyond a mere case of related actions as there was a real risk of inconsistent findings (see above at [16] and [30]). In the circumstances, the Judge's decision is consistent with the decisions in *Maybank* and *CSY* and we reject Mr Ken Koh and KYK's submission to the contrary.

There is a real risk of multiplicity of proceedings

33 Second, we turn to Mr Ken Koh and KYK's contention that the Judge made a *prima facie* error as any multiplicity of proceedings was only "perceived" or "illusory". We do not find any merit in this argument. To begin with, the essence of this contention appears to be that the Judge was wrong to find that there was a multiplicity of proceedings – in other words, that the Judge reached the wrong conclusion on the facts. As we have explained at [27] above, this would, at best, constitute an error of *fact*, and not law, which generally will not satisfy the threshold for granting permission to appeal.

34 In any event, we disagree that the Judge made an error of fact in finding that there was a multiplicity of proceedings that justified refusing a stay. Mr Ken Koh and KYK cite *Car & Cars Pte Ltd v Volkswagen AG and another* [2010] 1 SLR 625 ("*Car & Cars*") for the proposition that "a stay may be granted if the perceived multiplicity was induced by the way the plaintiff initiated its case or arranged its affairs". Mr Ken Koh and KYK submit that a stay should be granted as the perceived multiplicity in the present case was a product of the way Ding Asset pleaded its claim (*ie*, by "needlessly conjoin[ing]" Mr Ken Koh and Mr Koh YK as the makers of the Representation, in an attempt to circumvent the arbitration agreement).

35 Mr Ken Koh and KYK's reliance on *Car & Cars* is misplaced. In *Car & Cars*, the parties had entered into four separate agreements with significantly different dispute resolution clauses, each worded differently. It was in that context that Andrew Ang J (as he then was) observed that "the parties could have foreseen that there would be a risk of multiplicity and inconsistent decisions should disputes arise out of these agreements", and that the parties therefore "ought to be held to their respective contractual bargains and should

proceed to arbitration" (at [50]). Clearly, *Car & Cars* involved a different factual matrix from the present case and does not stand for the proposition that a party should be made to participate in parallel proceedings simply because of the way it pleaded its claim. In any event, there is no evidence that Ding Asset "needlessly conjoin[ed]" Mr Ken Koh and Mr Koh YK in its pleadings in an attempt to circumvent the arbitration agreement. This is a bare allegation on Mr Ken Koh and KYK's part, which we do not accept.

36 We also disagree with Mr Ken Koh and KYK's submission that any multiplicity of proceedings in the present case is only "illusory". Ding Asset's misrepresentation claim rests on the allegation that "[Mr Ken Koh], [Mr Koh YK], and/or an associate of [Mr Ken Koh] and/or [Mr Koh YK] acting on their behalf" made the Representation to Mr Ding. If the parties were made to participate in parallel proceedings, a court hearing the action against Mr Koh YK may well conclude that the Representation was made jointly by Mr Ken Koh and Mr Koh YK, which would clearly overlap with any findings of an arbitral tribunal hearing the action against Mr Ken Koh. Likewise, given that Ding Asset's conspiracy claim is premised on the allegation that *all* the Defendants had a common intention to injure Ding Asset, a court or arbitral tribunal hearing the claim would have to make a finding in respect of *all* the Defendants. In our view, there is thus a real risk of multiplicity and inconsistent decisions if the parties were made to participate in parallel proceedings. As such, the Judge did not make an error of fact in any event.

37 For completeness, Mr Ken Koh and KYK also rely on *Epoch Minerals Pte Ltd v Raffles Asset Management (S) Pte Ltd and others* [2018] SGHC 223 ("*Epoch Minerals*") and *Parastate Labs Inc v Wang Li and others* [2023] SGHC 48 ("*Parastate*") as examples of cases where a stay in favour of arbitration was granted to some (but not all) defendants. In our judgment, these

cases are not helpful. They both concern situations where a stay in favour of arbitration had *already* been granted to the defendants who were bound by the arbitration clause. The only question before the court was whether a case management stay should be granted to the *remaining* defendants who were *not* bound by the arbitration clause (see *Epoch Minerals* at [8] and *Parastate* at [1]–[2]). In other words, these cases do not address the question that the court was concerned with in RA 45, which was whether a stay in favour of arbitration should be granted to defendants bound by the arbitration clause in the first place. They are therefore not germane to the inquiry of whether the Judge made a *prima facie* error of law.

The degree of overlap is similar to that in CSY

38 Third, Mr Ken Koh and KYK submit that the Judge was wrong to find that the degree of overlap in the present case was similar to that in *CSY*, as *CSY* concerned a "singular continuous dispute split into 2 time periods" between two parties, while the present case involves "multiple causes of action" between different parties. In our view, this is ultimately a contention that the Judge erred in his application of the law to the facts. As we have explained at [27] above, an alleged error in the application of the law is an error of *fact* rather than law, which generally will not suffice for the purposes of seeking permission to appeal.

39 In any case, we are of the view that the Judge did not make an error of fact in his finding. The point made by the Judge was that in both *CSY* and the present case, there was a significant overlap in the issues that would have to be considered by the putative arbitral tribunal and the court. In *CSY*, the dispute centred on a company's allegations that its external auditor had failed to detect material misstatements in its audited financial statements for financial years

("FY") 2014 to 2019. The dispute in relation to FY2018 and FY2019 (the "FY2018 and FY2019 Dispute") was subject to an arbitration agreement, while the dispute in relation to FY2014 to FY2017 ("FY2014 to FY2017 Dispute") was not. The court declined to stay the FY2018 and FY2019 Dispute in favour of arbitration, on the basis that there was a significant overlap between the disputed issues in the FY2014 to FY2017 Dispute and the FY2018 and FY2019 Dispute (at [26]–[27]). The FY2014 to FY2017 Dispute and the FY2018 and FY2019 Dispute could be described as "nearly identical", such that there was a real prospect of inconsistent findings between the two fora (at [30]–[31]).

40 In our judgment, it follows from our analysis at [36] above that the present case would likewise raise *identical* issues for determination by an arbitral tribunal and a court hearing the action (*eg*, whether all the Defendants had the common intention to injure Ding Asset). We therefore do not see any error in the Judge's comparison of the present case to the facts of *CSY*.

The Judge did not conflate issues of case management with whether a stay in favour of arbitration should be granted

41 Finally, we address Mr Ken Koh and KYK's contention that the Judge "conflated" the issue of granting a case management stay with that of granting a stay in favour of arbitration. This contention appears to suggest that the Judge was wrong to have considered the fact that Mr Koh YK and YKL have not applied for a case management stay, at the point when he was deciding whether a stay in favour of arbitration should be granted to Mr Ken Koh and KYK. However, Mr Ken Koh and KYK have not cited any authority to support this proposition. In their submissions, Mr Ken Koh and KYK refer to extracts from the following authorities:

> *Tomolugen Holdings Ltd and another v Silica Investors Ltd and other appeals* [2016] 1 SLR 373 ('*Tomolugen*') at [188]

> 188 … In this regard, we consider that the court's discretion to stay court proceedings pending the resolution of a related arbitration, at the request of parties who are not subject to the arbitration agreement in question, can in turn be made subject to the agreement of those parties to be bound by any applicable findings that may be made by the arbitral tribunal. …
>
> *Maybank* at [24]
>
> 24 Furthermore, once the court does decide to stay a dispute in favour of domestic arbitration under the AA, this crucial difference between the AA and the [International Arbitration Act (Cap 143A, 2002 Rev Ed) ('IAA')] falls away. The court is then confronted with the same question it faces in the context of the IAA: whether, having stayed one claim in favour of arbitration, it should order that the other claim be likewise stayed as a matter of proper case management. …
>
> *Parastate* at [63]
>
> 63 Having granted a mandatory arbitration stay of Parastate's claims against Babel Asia, I exercised my discretion to stay the rest of the action, to ensure the efficient and fair resolution of the dispute as a whole, and ultimately serve the ends of justice.

42 *Tomolugen*, *Maybank* and *Parastate* were all cases where the parties, having either obtained or applied for a stay over parts of the action in favour of arbitration, had also applied for a stay of the remaining claims (which were not subject to the arbitration agreement) as a matter of case management. The extracts set out above were therefore made in the context of the court deciding on the applications for a case management stay, and only illustrate that the court may grant such a stay in the circumstances if appropriate (and on such terms as it thinks appropriate). They do not suggest that a court *cannot* consider the absence of applications for a case management stay from other defendants, in deciding whether a stay in favour of arbitration should be granted to a particular defendant, especially in circumstances where the absence of a case management stay would result in concurrent overlapping proceedings in two fora. There is therefore no basis for Mr Ken Koh and KYK's contention that the Judge was

wrong to consider the fact that Mr Koh YK and KYK had not made any application for a case management stay.

43 In so far as Mr Ken Koh and KYK are suggesting that the Judge should have first granted them a stay in favour of arbitration, before granting Mr Koh YK and YKL a case management stay, the point remains that Mr Koh YK and YKL have *not* made any such stay application. It was for this reason that the Judge found that it would be inappropriate to stay the actions against Mr Koh YK and YKL, even if the court could do so in an exercise of its inherent powers. In our view, Mr Koh YK and YKL's omission to apply for a case management stay is particularly significant because it suggests that both Mr Koh YK and YKL are content for the dispute to be decided in OC 265. While counsel for YKL confirmed at the hearings before the AR and the Judge below that YKL is willing to arbitrate the dispute, such a unilateral confirmation by YKL does not confer the court with the power to stay the proceedings in favour of arbitration in the absence of Ding Asset's agreement to arbitrate the dispute. In any event, we do not think this explains why YKL has yet to apply for a case management stay, even at this late stage of the proceedings. We also agree with the Judge that YKL did not need to wait for the outcome of RA 45 and RA 46 (or this application, for that matter) in order to take out an application for a case management stay. Besides, no similar confirmation was made by Mr Koh YK and as such, OC 265 will still proceed and thereby the real risk of inconsistent findings cannot be ruled out. Finally, as we have noted, the authorities cited by Mr Ken Koh and KYK (at [41] above) concern cases where an application for a case management stay *had* been made by the relevant parties. The authorities do not suggest that a court should order a case management stay against defendants (who are not parties to the arbitration agreement) even in the absence of any such application, in tandem with an order staying the proceedings against

the other defendants (who are parties to the arbitration agreement) in favour of arbitration.

44 Ultimately, it is for the defendants to decide how best to deal with a claim where some parties are bound by an arbitration agreement while others are not. If a stay is applied for only by those defendants who are parties to the arbitration agreement, they must accept that their decision would effectively create parallel proceedings in the court and in the arbitration, and may therefore result in a risk of inconsistent findings, which is a factor that the court may have regard to when deciding whether to grant a stay in favour of arbitration under the AA. In the circumstances, we disagree that the Judge erroneously "conflated" the issues of case management with granting a stay in favour of arbitration. We therefore reject Mr Ken Koh and KYK's contention that the Judge made a *prima facie* error of law.

RA 45 does not raise any questions of importance

45 Next, we turn to consider Mr Ken Koh and KYK's second ground for the present application, which is that permission to appeal should be granted as RA 45 raises the following questions of importance:

(a) whether the presence of a claim under a single cause of action against multiple defendants, some of whom are parties to arbitration agreements and some are not, is in itself a sufficient reason to refuse a stay in favour of arbitration where the dispute falls within the scope of the arbitration agreement(s) ("Question 1"); and

(b) whether the issue of a case management stay against the other defendants who are not parties to the arbitration agreement(s) should be decided simultaneously or subsequently ("Question 2").

46 In our judgment, neither of the above questions arises on the facts of RA 45. In relation to Question 1, we have explained at [30] above that the Judge did not refuse to stay the actions against Mr Ken Koh and KYK merely because Ding Asset had pleaded the same cause of action in respect of all the Defendants (namely, conspiracy by unlawful or lawful means), or because there would otherwise be parallel proceedings in the courts and in the arbitration. It was instead the real risk of inconsistent findings that warranted the refusal of a stay. RA 45 therefore did not raise the question of whether a single cause of action against multiple defendants was, *by itself*, sufficient reason to refuse a stay in favour of arbitration. In any event, based on the principles set out in *Maybank* and *CSY*, we are of the view that the answer to Question 1 must necessarily depend on the facts at hand. While the mere fact of related actions would not in itself be sufficient reason to refuse a stay in favour of arbitration, the court must consider if there are *other* circumstances that indicate that refusing a stay would best ensure the efficient and fair resolution of the entire dispute, having regard to the factors stated in *CSY* at [25].

47 As for Question 2, Mr Ken Koh and KYK submit that this question arises for determination as the cases at [41] above suggest that "the issue of case management only arises after the Court decides whether to grant a stay in favour of arbitration". In our view, this is a misreading of the case law. As we have noted, none of the authorities cited by Mr Ken Koh and KYK suggests that case management concerns may *only* be considered after a stay in favour of arbitration is granted. Question 2 therefore likewise does not arise on the facts of RA 45.

Conclusion

48 For the reasons set out above, we find that Mr Ken Koh and KYK have not raised any grounds on which permission to appeal against the Judge's decision in RA 45 should be granted. Accordingly, we dismiss the present application.

49 Mr Ken Koh and KYK are to pay Ding Asset costs of the present application fixed at S$8,000 (all-in). The usual consequential orders are to apply.

Judith Prakash
Justice of the Court of Appeal

Steven Chong
Justice of the Court of Appeal

Mansurhusain Akbar Hussein, Remesha Chandran Pillai and Shauna Low (Jacob Mansur & Pillai) for the applicants;
N Sreenivasan SC, Jerrie Tan and Felicia Tee (K&L Gates Straits Law LLC) (instructed), Ravindran s/o Ramasamy (CNPLaw LLP) for the respondent.