OCM Opportunities Fund II, LP and Others v Burhan Uray (alias Wong Ming Kiong) and Others
[2004] SGHC 115

Case Number : Suit 50/2004, SIC 655/2004, 657/2004

Decision Date : 01 June 2004

Tribunal/Court : High Court

Coram : Belinda Ang Saw Ean J

Counsel Name(s) : Davinder Singh SC, Yarni Loi and Kabir Singh (Drew and Napier) for plaintiffs; Chelva Rajah SC (Tan Rajah and Cheah), N Screenivasan, Derrick Wong and Jonathan Yuen (Straits Law Practice LLC) for first to eighth and 11th to 14th defendants; Shankar A S (Rajah Velu and Co) for ninth and tenth defendants

Parties : OCM Opportunities Fund II, LP; Columbia / HCA Master Retirement Trust; Gryphon Domestic VI, LLC; OCM Emerging Markets Fund, LP; ASO I (Delaware) LLC — Burhan Uray (alias Wong Ming Kiong)

Civil Procedure – Stay of proceedings – Fraud orchestrated from Singapore and Indonesia – Investment notes subject to New York Law – Whether Singapore more appropriate forum

Civil Procedure – Striking out – Plaintiffs' claim for unlawful act conspiracy – Whether plaintiffs' claim disclosed no reasonable cause for action, or was frivolous and vexatious or an abuse of process – Whether essential elements of unlawful act conspiracy made out – Rules of Court (Cap 322, R 5, 1997 Rev Ed) O 18 r 19(1)

Injunctions – Mareva injunction – Application to discharge injunction – Whether good arguable case shown – Whether real risk of dissipation of assets – Whether material non-disclosure by plaintiffs

1 June 2004

Belinda Ang Saw Ean J:

1 On 19 January 2004, I granted to the plaintiffs the relief sought by way of their *ex parte* application for, *inter alia*, a worldwide injunction in the form of the draft order attached to the application ("the injunction"). The first to fourth plaintiffs are institutional investors. They are associated with and managed by Oaktree Capital Management LLC ("Oaktree"). The fifth plaintiff is associated with The Goldman Sachs Group Inc, and is managed by Goldman Sachs (Asia) LLC. Filed in support of the *ex parte* application were four affidavits. Melissa Obegi is the Senior Vice President and Associate General Counsel of Oaktree. She affirmed, on 14 January 2004, the principal supporting affidavit. Five volumes of exhibits were appended to her affidavit.

2 Mr Davinder Singh SC represents the plaintiffs. The defendants may be separated into two groups. The first group of defendants ("the majority defendants") are: Burhan Uray ("D1"), Joseph Wong Kiia Tai ("D2"), Soejono Varinata ("D3"), H Sudradjat Djajapert Junda ("D4"), Hendrik Burhan ("D5"), Joseph Siswanto ("D6"), PT Daya Guna Samudera Tbk ("D7"), DGS International Finance Company BV ("D8"), WMP Trading Pte Ltd ("D11"), Betty Pai (alias Pai Sha) ("D12"), Borneo Jaya Pte Ltd ("D13"), Natura Holdings Pte Ltd ("D14") and Handforth Profits Limited ("D15"). They are all represented by Straits Law Practice LLC. The second group of defendants, represented by Raju Velu & Co, are Rosmini bte Sulong ("D9") and Gary Chan Wei Long ("D10").

3 After the writ of summons and injunction were served, both groups of defendants filed separate applications to set aside the injunction and to strike out the writ of summons and statement of claim under O 18 r 19 of the Rules of Court (Cap 322, R 5, 1997 Rev Ed). The majority defendants

sought, in the alternative, a stay of the proceedings on the basis that Singapore is not an appropriate forum in which to determine the dispute. The applications were filed on 6 and 14 February 2004 respectively. The majority defendants' application to set aside the order for service out of jurisdiction of the writ of summons was abandoned at the hearing. In support of their respective applications, the defendants filed numerous affidavits totalling 30 in number. The plaintiffs, on their part, filed 11 further affidavits. Mr Chelva Rajah SC was engaged as counsel to argue the applications on behalf of all the defendants.

4 The applications were first heard on 6 February 2004 in respect of the prayers for extension of time to file a list of assets and the defence. At the conclusion of the resumed hearing on 4 and 5 March 2004, I maintained the injunction, but ordered the plaintiffs to fortify their undertaking as to damages. I also refused to strike out or to stay the proceedings. The plaintiffs were ordered, nonetheless, to furnish security for the defendants' costs up to the current stage of the proceedings.

5 On 9 March 2004, the defendants appealed against my decision. The subject matter of the appeal pertains to my refusal to set aside the injunction, strike out or stay proceedings in respect of which I now publish my reasons.

Brief overview of the plaintiffs' case

6 Broadly, this is a claim brought by the plaintiffs against D1 to D11 in which it is alleged that these defendants, or any two or more of them, conspired to and did defraud the plaintiffs of substantial sums of money by means of fraudulent misrepresentations by D1 to D11, or any two or more of them. The misrepresentations, made from time to time to investors such as the plaintiffs, were principally as to the true financial position of D7. The complaint is that the plaintiffs relied on the false financial information and were induced or otherwise influenced in their decision to purchase in the secondary market, on several occasions between 23 February 1998 and 16 May 2001 ("the relevant period"), bonds in the form of 10% guaranteed notes due 2007 ("the DGS Notes").

7 The DGS Notes were issued by D8 sometime on or about 28 May 1997 ("the Offering"). Interest was payable by D8, bi-annually, on 1 June and 1 December each year, commencing 1 December 1997, at the rate of 10% per annum. The payment of the principal and interest under the DGS Notes was guaranteed by D7 under an indenture dated 28 May 1997 ("the Indenture").

8 The DGS Notes were deposited in an electronic trading system form and they were actively marketed to institutional investors. The listing of the DGS Notes on the Luxembourg Stock Exchange was designed to facilitate trading in the secondary market. It was, so the arguments run, within the contemplation of D7, D8 and the individuals acting on behalf of D7 that a secondary market in the DGS Notes would be created as a result of the Offering. All investors and potential investors in the secondary market would, in making an investment decision, rely on the financial or other documents released from time to time by D7 for its earnings before interest, taxes, depreciation and amortisation ("EBITDA") figures, income statements, balance sheets and so on. Moreover, the investors would rely on D7 as guarantor to pay the bi-annual coupon payments on the DGS Notes and the principal sum in the year 2007.

9 To the plaintiffs, other representations made in the Offering circular dated 27 May 1997, Information Memorandum and financial information released by D7 at various times were:

(a) that the proceeds of the Offering of US$250m would be advanced by D8 to D7 to fund certain expansion plans of D7; and

(b) a significant amount of the trade receivables were factored to banks in Indonesia with recourse upon default by the trade debtors.

10 D8 and D7 defaulted on the coupon payments in June 2001. The plaintiffs conducted investigations and the fraud was then uncovered. The outcome of the investigations formed the basis of their pleaded case. The misrepresentations, as listed in the plaintiffs' skeletal submissions, were:

(a) The "third parties" continually represented in D7's financials, from whom significant receivables were due, were actually related parties that were directly or indirectly owned or controlled by D1's family.

(b) The receivables that were supposedly due to D7 from some of these companies were fictitious transactions booked into their accounts to create an appearance of genuine commercial sales.

(c) D7 entered into factoring agreements with various Indonesian banks, under which the Djajanti Group was obliged to reimburse the banks should the customers of D7 fail to meet their obligations to pay the receivables as and when they became due. In 1998, D7 entered into a credit agreement for discounting trade receivables with PT Bank Mandiri with a facility of US$15m, renewable on 22 April 1999, bearing interest at Bank Indonesia bills discounting rate. Without the genuine trade receivables, the factoring agreements were entered into with the intention of causing D7 to increase its assumed liabilities. This, in turn, affected its ability to pay on the DGS Notes.

(d) The proceeds of the Offering were not utilised solely for the expansion of D7's business operations but were also used for the purposes of funding other businesses of the Djajanti Group, namely funding the illegal logging activities in Liberia. Funds flowed from D14 and an entity known as Lemonade Profit to D7's accounts. The funds were used to purchase heavy logging equipment for use by Oriental Timber Company ("OTC"). The proceeds of the logging activities were apparently channelled back to D14 and to D15.

11 Specifically, representations on trade receivables purportedly due from unrelated "third parties" were made and repeated in the financial information released by D7. They included D7's 1997 annual reports, D7's consolidated financial statements for the year ended 30 June 1998 and 1998 annual report. By way of illustration, the financial statements in D7's Information Memorandum prepared in 1996 by D7 for the purposes of the public offering in Indonesia of 100m new shares of par value Rp500 each represented that significant trade receivables were due from unrelated "third parties". These trade receivables were represented as arm's length transactions on commercial terms. D7 was said to have falsely represented that:

> The Company [D7] sells all of its export products to unrelated trading companies in Hong Kong, China, Singapore and Thailand which sell the products to end customers. All such sales are effected by way of back-to-back letters of credit, which in the past has enabled the Company to minimise the risk of bad debts arising in relation to the majority of its business. The Company typically allows its customers between 30 and 90 days' credit. These trading companies sell the Company's products to export customers in China, Thailand, Japan, Hong Kong, Australia and Malaysia.

D6 admitted that he was involved in the issue of the DGS Notes but denies the existence of a conspiracy as alleged or at all.

12 Besides the representations contained in financial information released by D7, oral representations were made on behalf of D7 at various meetings between agents for D7 and the plaintiffs' agents. Representations on trade receivables purportedly due from unrelated "third parties" were repeated. It was represented to the plaintiffs that D7's cash flow position and its EBITDA figures, based on its financial statements, were very good. For instance, D7's representative in Jakarta, Tri Yantono, the Finance Director of D7, met Vina Sadiathi as agent of the fourth plaintiff, on or about 9 August 1999 to discuss the business operations of D7. In conversation, Tri Yantono, on behalf of D7, represented to Vina Sadiathi that usance letters of credit backed the receivables purportedly due to D7 and the average accounts receivables were around three months. It was also alleged that at all material times, D6 was actively representing the state of business of D7 to various representatives of the plaintiffs.

13 The following entities were some of the falsely listed "third parties" from whom significant trade receivables were due:

(a) Ricocean Seafood Pte Ltd;

(b) Maritime Ltd;

(c) Amerenta Navigation Pte Ltd;

(d) Jetline Development Pte Ltd;

(e) New Guinea Pte Ltd;

(f) TF Enterprise Co Ltd;

(g) Borneo Jaya Pte Ltd (D13);

(h) Asia Fishery Group;

(i) WMP Trading Pte Ltd (D11);

(j) Delight Marine;

(k) PT Adi Nusa;

(l) Globar Star;

(m) Galmach Impex Pte Ltd;

(n) Ocean Supply Pte Ltd; and

(o) San Marco Impex Pte Ltd.

The "third parties" from whom trade receivables were purportedly due included amongst others, four Singapore companies – D11, Ricocean Seafood Pte Ltd, New Guinea Pte Ltd and Amerenta Navigation Pte Ltd (collectively referred to as "the Singapore Defaulting Companies"). At all material times, the directors of the Singapore Defaulting Companies were D2, who is D1's son; D9 and D10.

14 D7 is part of the Djajanti Group controlled by D1, his family and business associates. The Djajanti Group is divided into six divisions, including fishing and forestry. PT Bintuni Minaraya Tbk ("BMR") operates the fishing division. D1 and D3 control BMR and its subsidiaries through various shareholdings. D4 is one of the founders of BMR and had given warranties to the BMR plaintiffs in the

BMR proceedings (which I will touch on in [75]). D4 also holds directorships in companies connected with D1.

15 In the Offering circular dated 27 May 1997, under the heading "Control of the Company; Transactions with Affiliates", D7 represented that it is:

> one of a group of affiliated companies that are effectively controlled by Mr Burhan Uray and his son, Soejono Varinata. Mr Uray and Mr Varinata exercise control over [PT Hasilsamudra Laut ("HSL")] and [PT Hasilnusa Buana ("HNB")], which together [own] 76.3% (62.3% assuming full exchange of the Exchangeable Bonds) of the outstanding shares of the Company. Therefore, Mr Uray and Mr Varinata have indirect control of the Company and have power to elect all of its Commissioners and all of its Directors and to determine the outcome of most actions requiring the approval of the shareholders ...

16 BMR is the parent company of four subsidiaries including D7. At all material times, D7 represented itself as having a major fishing and shrimp business in the Arafura Sea and the South China Sea with processing bases in Benjina and Kimaan, located in Irian Jaya, Eastern Indonesia, selling frozen fish, shrimp, fish fillet, surimi and fishmeal. In the Offering letter, D1 was named as the President Commissioner of D7. In D7's financial statements for the year ended 30 June 1998, D1 was named as the President Commissioner, President Director and shareholder of D7 as at 26 December 1997. In the BMR Information Memorandum issued on 19 March 1999, BMR stated:

> [I]mmediately following the consummation of the Public Offer, Mr Burhan Uray and his family will continue to own indirectly at least a majority of the outstanding Shares of the Company.

D7's consolidated financial statements for the year ended 30 June 2000 also represented that HNB and HSL (the majority shareholders of D7) are entities controlled by D1 and D3. The information put out by the Djajanti Group contradicts D1's alleged divestment of his interest in the businesses of the Djajanti Group by 1999.

17 I do not propose to separately single out the respective involvement of D1 to D11 in the alleged conspiracy. They have been averred to in the statement of claim and are re-produced in full below. There are the various overt acts particularised in paras 225 to 230 of the statement of claim and the inference to be drawn from those matters.

Overview of the defendants' case

18 The serious allegations made against the defendants were strenuously denied. Mr Rajah started by carrying out an analysis of some of the plaintiffs' evidence. But in interlocutory applications of this nature where the facts are contested, Mr Rajah rightly conceded that the matters complained of by the plaintiffs are matters for examination at trial. To go into the details here would not assist the court in disposing of the interlocutory applications. There are, with regard to the transactions, matters that will undoubtedly require examination before the court at the trial.

19 Given the approach of Mr Rajah to the applications before me, there is no need to repeat the defendants' various responses to the disputed facts. So as not to be misunderstood, I ought to mention that I have noted the defendants' criticism of the plaintiffs' case and evidence.

20 In overview submission, the defendants categorically denied any wrongdoing. Their

contention was that D7 did not gain from misleading any secondary purchaser. D7 had already received funds from the primary issue. The price of the DGS Notes in the secondary market was of no interest to the majority defendants, as the secondary investors would not pay the defendants. More significantly, the defendants argued that the plaintiffs had not relied on any representations that were made but had gambled on the purchases of the DGS Notes in a falling market and lost with knowledge of the risk involved. In short, the plaintiffs' losses were nothing more than an investment loss in the distressed debt market.

Order 18 rule 19 of the Rules of Court

21 I shall first deal with the applications to strike out the writ of summons and statement of claim. The defendants asserted that the plaintiffs had not made out the cause of action on the facts as put forward. Three limbs of O 18 r 19 of the Rules of Court were relied upon for the defendants' principal contention. If that sole issue were to be affirmed, the defendants would equally succeed in their application to set aside the injunction since one of the pre-conditions to a grant of the injunction – a good arguable case – would not be satisfied.

22 For the purposes of the striking out applications, the court had to assume that the allegations made in the pleaded case would be made good. Mr Rajah argued that even if the alleged primary facts could be made good, the conspiracy claim was bound to fail because the factual situations relied upon for the cause of action fall seriously short of meeting the threshold requirements of the tort of conspiracy to injure by unlawful means. I agree that a cause of action pleaded without support of material facts is defective and should be struck out as disclosing no reasonable cause of action, or as being frivolous and vexatious or an abuse of court.

23 It is useful to repeat Mr Rajah's contentions as set out in the defendants' skeletal submissions.

> In this application the Court is asked to strike out the Plaintiff's claim because 3 essential ingredients of … unlawful act conspiracy are missing. They are:-
>
> > (a) There must be an intent … on the part of each of the alleged conspirators ... to cause injury to each of the Plaintiffs. The Statement of Claim shows no such intent apart from some bald assertions.
> >
> > (b) The unlawful act must be actionable by each of the Plaintiffs against at least one of the conspirators absent the combination between them. None of the Plaintiffs have shown any of the alleged unlawful acts to be actionable by it against any of the Defendants.
> >
> > (c) Each party to the conspiracy must have engaged in the combination for the conspiracy. The Statement of Claim shows no such combination against most if not all the Defendants.

24 To understand Mr Rajah's arguments better, it is necessary to repeat the assertions made in the statement of claim that he took issue with.

> **The nature of and parties to the Conspiracy**
>
> 222 On or about dates presently unknown to the Plaintiffs, Uray, Joseph Wong, Soejono, Sudradjat, Hendrik, Siswanto, DGS (through Uray and/or Soejono and/or Sudradjat and/or Hendrik and/or Siswanto and/or any of them), DGSBV (through Uray

and/or Soejono and/or Sudradjat and/or Hendrik and/or Siswanto and/or any of them), Betty Pai, Rosmini Sulong, Gary Chan, WMP Trading Pte Ltd (through Joseph Wong and/or Rosmini Sulong and/or Gary Chan or any of them), Ricocean Seafood Pte Ltd (through Joseph Wong and/or Rosmini Sulong and/or Gary Chan or any of them), Amerenta Navigation Pte (through Joseph Wong and/or Rosmini Sulong and/or Gary Chan or any of them) and New Guinea Pte Ltd (through Joseph Wong and/or Rosmini Sulong and/or Gary Chan or any of them), or any two or more of them, wrongfully and dishonestly and with intent to injure the Plaintiffs conspired and agreed together to (misrepresent the financial position of DGS and/or the intended use of the proceeds of the Offering) to investors and/or would-be investors of the DGS Guaranteed Notes, including the Plaintiffs, to induce or otherwise influence them in their decision to purchase the DGS Guaranteed Notes when the Defendants knew that the representations were false, and to conceal such fraud from the Plaintiffs, with the intention of injuring the Plaintiffs ("the Conspiracy"). As set out above, Ricocean Seafood Pte Ltd, Amerenta Navigation Pte Ltd and New Guinea Pte Ltd are also parties to the Conspiracy; however they have not been joined as Defendants as they have been placed in liquidation. The Plaintiffs however reserve their rights to commence proceedings to, *inter alia*, obtain discovery against these companies.

223 The Plaintiffs are presently unable to provide particulars of precisely how or when the Conspiracy was conceived. However, in support of their allegation that it existed between the persons alleged, the Plaintiffs rely upon the following facts and matters:

Existence of agreement

(1) The persistent and fraudulent misrepresentations to investors and would-be investors of the DGS Guaranteed Notes, including the Plaintiffs, of the financial position of DGS, based on fictitious trade receivables.

(2) The sham legal proceedings brought against the Singapore Defaulting Companies in March 2000 to paint a false picture that DGS and the Singapore Defaulting Companies had transacted at arm's length and were unrelated companies.

(3) Fraudulently misrepresenting the fictitious receivables as genuine transactions to the Indonesian banks to obtain credit facilities through factoring agreements, with knowledge that the purported trade debtors would not meet their obligations, thereby exposing DGS to increased liabilities, which was ultimately detrimental to its ability to honour its obligations under the Indenture.

(4) Fraudulently misrepresenting the purpose of the Offering, with the knowledge that the funds of DGS were not solely for the use of DGS but for other businesses of the Djajanti Group as well.

(5) Channelling funds between DGS and Natura Holdings Pte Ltd, for the purposes of purchasing expensive logging equipment for the use of OTC;

(6) Scaling down the business of DGS.

(7) Resisting any attempts by the Plaintiffs to obtain an independent professional audit of DGS's business and verification of the alleged reasons for its financial difficulties.

(8) The Plaintiffs contend generally that the existence of the facts and matters referred to above is consistent only with a dishonest scheme.

Parties-Conspirators

(9) Uray is chairman of the Djajanti Group and in control of the operations of DGS, its holding companies, its subsidiaries and other related companies, including the Singapore Defaulting Companies. In respect of OTC and its activities in Liberia, there is a reported bank document showing payment by Borneo Jaya Pte Ltd, on Uray's order, of USD500,000 to an arms trafficking company. Uray was a defendant in the BMR Proceedings, accused of making fraudulent warranties under a share subscription agreement. As commissioner and/or director of DGS and chairman of the Djajanti Group, the clear and obvious inference is that Uray knew that the statements in the Offering Circular and the DGS accounts relied on by the Plaintiffs (as set out above) were false. Uray obviously meant to mislead the Plaintiffs and participated in the Conspiracy, with the intent to injure the Plaintiffs.

(10) Joseph Wong is another son of Uray and has been raised in Singapore. He is in control of the Singapore companies linked to the Djajanti Group, and signed off on accounting reports of these Singapore companies. He was also a defendant in the BMR Proceedings. Apart from that, he is also the manager of OTC and, together with Uray and Soejono, is associated with TF Enterprise. Joseph Wong knew and/or must have known that the receivables were fictitious and that they would be falsely reflected as genuine transactions in the DGS accounts relied on by the Plaintiffs (as described above) and/or Joseph Wong knew and/or must have known that the Offering was actually dishonestly designed to raise funds not only for the use of DGS but also for other businesses interests of the Djajanti Group, including OTC's logging activities. Joseph Wong had knowledge of and participated in the Conspriacy with the intent to injure the Plaintiff.

(11) Soejono is Uray's son, who has been groomed to take over the helm from Uray. He is also an active director of the Djajanti Group of companies and its associated and/or related companies. He was also a defendant in the BMR Proceedings. Given the scale and extent of the fraudulent scheme, Soejono, as director of DGS and the other Djajanti companies, knew and/or must have known of and participated in the Conspiracy, with the intent to injure the Plaintiffs.

(12) Sudradjat is a founding member of BMR, shareholder of DGS, President Director of the Djajanti Group and director of many other companies of which Uray is President Director. He clearly has a very close business relationship with Uray. Sudradjat was also a defendant in the BMR Proceedings. He knew and/or must have known that the accounts of DGS, which the Plaintiffs relied on (as described above) were false and the obvious inference is that he had knowledge of and participated in the Conspiracy, with the intention of injuring the Plaintiffs.

(13) Hendrik is Uray's son. Given his family ties and the fact that he is actively involved in running the Djajanti businesses from Indonesia, Hendrik clearly had knowledge of and participated in the Conspiracy. Further, he was also a former director of Borneo Jaya Pte Ltd … and is believed to be involved in the Global Star Group of Companies in Hong Kong which are also related to Uray and the Djajanti Group.

(14) Siswanto was at all material times a director of DGS and/or BMR and is believed to be related to Uray. Siswanto met with and/or otherwise spoke privately with various representatives of the Plaintiffs from time to time in relation to the

operations and affairs of DGS. Siswanto knew and/or must have known of and participated in the Conspiracy.

(15) DGS and DGSBV, the guarantor and issuer of the DGS Guaranteed Notes respectively, are effectively and ultimately controlled by Uray and Soejono, and must have been involved in any dishonest scheme if there was one. They clearly participated in the Conspiracy.

(16) Rosmini Sulong is believed to be a daughter of Uray and has been raised in Singapore. She is in any case obviously a very trusted member of the Djajanti Group. Like Joseph Wong, she holds numerous directorships and has shareholdings in almost all the Singapore companies linked to the Djajanti Group. Further and/or alternatively, given her close business relationship and possibly family ties with Uray, Joseph Wong and Soejono, Rosmini Sulong knew and/or must have had knowledge of and participated in the Conspriacy to injure investors and potential investors of the DGS Guaranteed Notes, which included the Plaintiffs.

(17) Gary Chan is clearly a trusted business associate with links to the Djajanti Group. Gary Chan is the current director and shareholder of numerous Djajanti linked companies in Singapore, including the defaulting companies (which includes WMP Trading). As a director of the Singapore Defaulting Companies and given his close links with Joseph Wong, Gary Chan knew and/or must have known that the receivables were fictitious and that they would be falsely reflected as genuine transactions in the DGS accounts relied on by the Plaintiffs (as described above) and/or given his close links with Joseph Wong and Rosmini Sulong, he knew and/or must have known that funds of DGS were being diverted for the use of OTC. He must have known of and participated in the Conspiracy.

(18) WMP Trading is one of the four Singapore Defaulting Companies. It is the only one of the four Singapore Defaulting Companies that has not been placed in liquidation. Through its directors, it, together with the other 3 Singapore Defaulting Companies, which are in liquidation, was clearly involved in the Conspiracy and had the requisite knowledge.

(19) The inference to be drawn from the facts and matters referred to in the preceding sub-paragraphs is that at all material times, there were very close personal, family and business relationships between Uray and/or Joseph Wong and/or Soejono and/or Sudradjat and/or Hendrik and/or Siswanto and/or Rosmini Sulong and/or Gary Chan.

(20) The Plaintiffs contend generally that the existence of the facts and matters referred to above is consistent only with a dishonest scheme perpetuated by Uray, his family, close business associates and related companies.

Intention to injure

25 Mr Rajah argued that the plaintiffs would have to plead and show, how and when each of the alleged conspirators subscribed to this intent, either by averring direct facts or by averring to facts which can reasonably support the inference of such an intent and not just some general intent. The pleadings and affidavit evidence before the court did not establish that the defendants were trying to cause damage to the plaintiffs in the sense that a "purpose to harm" was what actuated the defendants in so acting. The fact that the defendants realised that damage to the plaintiffs was an

inevitable consequence of their action is plainly insufficient to satisfy this element of the tort. The plaintiffs, therefore, have no plausible basis for their allegation that the conspiracy was aimed at them or intended to injure them.

26 Counsel for the defendants relied on *Fatimi Pty Ltd v Bryant* [2002] NSWSC 750 where Campbell J, in an analysis of the tort of conspiracy to injure by unlawful means, said at [181]:

> In this second sub-species of conspiracy, the policy judgment being made is that if A and B gang up with one of their objectives being to hurt C, and where they intend to achieve that objective by the use of unlawful means, an action for damages should likewise lie. The policy judgment is made that the additional element of agreement to use unlawful means to the effect the harm justifies lowering the bar from a "*principal purpose to harm*" to a "*purpose (not necessarily principal) to harm*" test. However, the "*purpose to harm*" must still be what is actuating the defendants in acting. That the defendants realise that damage to the plaintiff is a likely, or indeed an inevitable, consequence of their action is not enough to satisfy this element of the tort. Rather, damage to the plaintiff must be one of the things which the defendants are trying to achieve.

27 Campbell J, in his analysis of the elements of this second sub-species of the tort of conspiracy, referred to *Maritime Union of Australia v Geraldton Port Authority* (1999) 93 FCR 34 at 104–107. Nicholson J reviewed the Australian law on this topic and rejected the contention, "that it is unnecessary for specific intent to be proved where a conspiracy involves unlawful acts or unlawful means".

28 Campbell J also cited *McWilliam v Penthouse Publication Ltd* [2001] NSWCA 237, where Mason P (with whom Handley and Hodgson JJ agreed), said at [13] concerning a conspiracy to engage in unlawful conduct:

> [A] plaintiff in a case such as the present must establish intent to injure the plaintiff. It is not enough to establish that the acts of the conspirators necessarily involved injury to the plaintiff or that the plaintiff was a person reasonably within the contemplation of the conspirators as a person likely to suffer damage ...

29 The "unlawful means" conspiracy which was reaffirmed by the House of Lords in *Lonrho plc v Fayed* [1992] 1 AC 448 was recently described by the English Court of Appeal in *Kuwait Oil Tanker Co SAK v Al Bader(No 3)* [2000] 2 All ER (Comm) 271 at [108] as:

> A conspiracy to injure by unlawful means is actionable where the claimant proves that he has suffered loss or damage as a result of unlawful actions taken pursuant to a combination or agreement between the defendant and another person or persons to injure him by unlawful means, whether or not it is the predominant purpose of the defendant to do so.

That passage was referred to by Lai Kew Chai J in *Malaysian International Trading Corp Sdn Bhd v Interamerica Asia Pte Ltd* [2002] 4 SLR 537 at [58].

30 Mr Davinder Singh argued that it is sufficient, for establishing unlawful means conspiracy, to show that the defendants embarked "deliberately" upon the course of conduct, appreciating the probable consequences to the plaintiff: see *Clerk & Lindsell on Torts* (18th Ed, 2000), para 24–124. That, he said, is the correct test as opposed to the Australian jurisprudence put forward by the other side. Mr Rajah conceded that the Australian position appears to be somewhat different. A review of

the law cannot be undertaken at this interlocutory stage of the proceedings. The review is best reserved to the trial judge for deliberation after hearing full arguments.

31 That aside, the current view in the High Court, as is apparent from the recent decision of Lai J, is that the principles of the tort of conspiracy to injure by unlawful means endorsed in *Kuwait Oil Tanker* apply in Singapore. On that note, would the claimant have to plead and prove that the conspirators actually intended to injure the claimant and that such intention could not simply be inferred from the acts complained of? This was a point argued in *Kuwait Oil Tanker*, but was roundly rejected by the English Court of Appeal.

32 Nourse LJ, at [120], said:

> [W]e accept the submission that such an intention must be proved … We cannot, however, accept the second part of the submission. In many contexts it will be necessary in order to prove intention to ask the court to infer the relevant intention from the primary facts. We can see no reason why there should be a special rule of evidence in this situation. On the contrary, in the case of most conspiracies to injure by tortious means it will be clear from the acts of the conspirators that they must have intended to injure the claimant. In the case of a conspiracy to defraud by wholesale misappropriation it would be absurd to argue that the conspirators did not intend just that.

33 Similarly, in *Bourgoin SA v Ministry of Agriculture, Fisheries and Food* [1986] QB 716, Oliver LJ (as he then was) said at 777 that:

> If an act is done deliberately and with knowledge of its consequences, I do not think that the actor can sensibly say that he did not "intend" the consequences or that the act was not "aimed" at the person who, it is known, will suffer them.

34 It is recognised by the editors of *Halsbury's Laws of Australia,* vol 26 (LexisNexis Butterworths, 1997) at [415–65] that reckless conduct may also be treated as intention. Equally, the defendant may be treated as having intended the result of an act if a particular result is substantially certain to follow that act.

35 Furthermore, it would seem that so long as the claimant is a member of a class of individuals, it is not necessary to have an identifiable victim to show that the conduct was done with intention to injure that victim. The claimants in *Bullman v Berkeley Homes (Essex) Ltd* [2003] All ER (D) 132 (Apr) did not plead that there was any intention to injure them. The judge said at [108]:

> I agree with Miss Weaver that mere foreseeability of damage is not enough, but in my judgment it is enough if the claimant is a member of a class of persons who will be directly injured by the unlawful conduct and whom the conspirators intend to injure, even if his membership of the class is uncertain at the date of the agreement.

36 However, when a conspiracy is aimed, not at an individual or at a class of individuals, but at the public, the damage sustained by a member of the public is too remote to give rise to a right of action. In *Vickery v Taylor* (1910) 11 SR (NSW) 119, an agreement to raise the price of a company's shares by making false statements was held not actionable by the court since there was no intention to injure the plaintiff as a member of the public, even though he suffered foreseeable loss as a consequence.

37 The conspiracy alleged by the plaintiffs involved, amongst other things, falsification of accounts, fraudulently misrepresenting that D7 had substantial receivables from unrelated third parties including misapplication of company funds. It was pleaded in para 123(a) of the statement of claim that D1 to D11, or any two or more of them, conspired such that their fraudulent misrepresentations were made with the intention that they would be acted upon by investors or potential investors of the DGS Notes, which included the plaintiffs. The conspiracy was aimed at the plaintiffs as investors of the DGS Notes in the secondary market.

38 In this case, the alleged fraudulent misrepresentations amounted to unlawful means because they were made fraudulently to induce the plaintiffs to invest in the DGS Notes in circumstances where, but for the fraud, they would have invested the money elsewhere. Seemingly, where there is an intention to do an unlawful act, that on any view will do harm to the claimant, the intention to injure will most probably be inferred. The conspirators' intention to benefit themselves in the knowledge that loss to the claimant will result from their unlawful act, will be treated also as an intention to harm the claimant. Ultimately, it is a matter of evidence for the court at trial to evaluate, on an objective basis, whether a particular result is substantially certain to follow an act and if the answer is in the affirmative, the defendant may be treated as having intended the result of that act.

Unlawful act must be actionable

39 It was put across as an essential ingredient of the unlawful means conspiracy that the unlawful act must be actionable by each of the plaintiffs against at least one of the conspirators absent the combination between them. It was not pleaded nor stated in any of the plaintiffs' affidavits, that the alleged unlawful acts are actionable by each of the plaintiffs against any of the defendants.

40 The so-called ingredient alluded to by Mr Rajah is not one of the three recognised essential elements of the tort of conspiracy to injure by unlawful means. The three elements that must be present for a claim of unlawful means conspiracy to succeed are:

(a) unlawful means taken pursuant to a combined agreement between the two or more defendants;

(b) loss or damage suffered by the plaintiff as a result; and

(c) an intention to injure the plaintiffs by unlawful means (see [29] s*upra*).

41 Whilst there is no separate pleaded cause of action in the tort of deceit against D1 to D11 or any one of them, that omission is not necessarily fatal to the claim against them for unlawful means conspiracy. On this point, I draw support from Colman J's helpful analysis of the legal position in *Bank Gesellschaft Berlin International SA v Raif Zihnali,* Queen's Bench Division (Commercial Court), 16 July 2001 (unreported) at [32]:

> The tort of deceit is not alleged against Demirel, notwithstanding that, on the pleaded facts, it would have been open to BGBI to claim that he was a joint tortfeasor in respect of the deceit alleged against his co-conspirators. That omission does not, however, undermine the foundations of the claim against him for unlawful means conspiracy, the essential elements of which seem to have been lost sight of in some of the authorities. That which engages liability is, as I see it, the combination to use unlawful means advertance to the risk of damage to the claimant in consequence of the unlawful conduct

> and damage to the claimant caused by such conduct. The proposition advanced *obiter* by Stewart Smith LJ in *Credit Lyonnais Bank Nederland NV (Now Generale Bank Nederland NV) v Export Credit Guarantee Department* [1998] 1 Lloyd's Rep 19 at p 32 and adopted and applied by Toulson J in *Yukong Line Ltd of Korea v Rendsburg Investments Corporation of Liberia and others (No 2)* ... [1998] 1 WLR 294 at p 314 … that the unlawful act relied upon must be actionable at the suit of the claimant appears to introduce a requirement which is conceptionally irrelevant. Waller LJ in *Watson v Dutton Forshaw Motor Group Ltd* [Court of Appeal, 22 July 1998 (unreported)] at page 25 and in *Surzur Overseas Ltd v Koros and others* [1999] 2 Lloyd's Rep 611 and 616 considered that, having regard to the decision of the House of Lords in *Lonrho plc v Fayed and others* [1992] 1 AC 448…, it was "eminently arguable" that the unlawful means do not have to be actionable at the suit of the claimant.

42 Mr Rajah referred to *Michaels v Taylor Woodrow Developments Ltd* [2001] Ch 493. In that case, the claimant contended that any breach of a statute would constitute unlawful means sufficient to support an action for unlawful means conspiracy. Thus, breaches of a statute, which were not actionable as breaches of statutory duty, were nevertheless actionable if they formed the unlawful means in such a conspiracy. Laddie J disagreed with counsel. He held that not all wrongful or illegal acts would support an action for conspiracy by unlawful means. A major difference between a conspiracy to injure and a conspiracy by unlawful means was that, in the former, activities which were not actionable in their own right could be rendered actionable by virtue of their being performed in concert and where there was a predominant intention to injure. In the latter, the unlawful means had to be actionable in their own right against at least some of the alleged conspirators. Where, as in *Michaels v Taylor Woodrow*, the wrongful act consisted of the breach of a statute, it would only support an action for conspiracy by unlawful means if it was determined that the intention of the legislature was that such causes of action should be available to enforce the provisions of the legislation. That could not be said of the UK Landlord and Tenant Act 1987 under consideration by Laddie J. The unlawful means conspiracy was not made out because conspiracy to commit a breach of a statutory provision was not actionable as the statutory provision itself did not give rise to a private right of civil action for breach of statutory duty.

43 Unlike *Michaels v Taylor Woodrow,* the fraudulent misrepresentation, as alleged in this case, is capable of amounting to unlawfulness for the purposes of the tort of conspiracy. Liability for misrepresentation can be made out where the misrepresentation is made to a group to which the claimant belongs so that the claimant is one of those intended to be deceived (see *Commercial Banking Company of Sydney Limited v RH Brown & Company* (1972) 126 CLR 337). I have already mentioned that at the time of the Offering, it was in the contemplation of D7 and those behind D7 that a secondary market would be created. So the defendants intended, through the Offering circular, to inform and encourage purchasers in the secondary market, in addition to those investors who relied on the Offering circular, in making a decision to accept the allotment offer.

44 I did not regard as fanciful any argument that the facts of this case fall outside the general rule that an offer document is exhausted when the shares are issued. An exception to that rule is where the offer document contains material false statements and is intended to be acted on by a person other than the original allottees of the shares. That person, if deceived and injured, may maintain an action of deceit: see *Halsbury's Laws of England,* vol 7(1) (4th Ed, 1996 Reissue) at para 335; *Possfund Custodian Trustee Ltd v Diamond* [1996] 2 All ER 774; *Andrews v Mockford* [1896] 1 QB 372.

No agreement or combination

45 The defendants' argument is that the statement of claim did not contain sufficient particulars of the alleged agreement, for instance, what the conspirators agreed to do and when the agreement was reached. Consequently, the defendants are prejudiced in that they will have difficulties meeting the plaintiffs' case. The defendants must know what evidence ought to be prepared to meet the plaintiffs' case. Furthermore, justice requires full compliance with the fundamental principle of pleadings that requires the plaintiffs to furnish utmost particulars so that the trial is conducted fairly, openly and, without surprises and, in the result, minimise costs.

46 First, I was not persuaded that the statement of claim was so lacking in particulars of the alleged agreement. Reading para 222 with the earlier paragraphs such as paras 115, 117, 118, 123(a) and 124 of the statement of claim, as a matter of inference, the agreement must have taken place before the Offer document.

47 Second, it is self-evident that in conspiracy cases of this type, it would be remarkable for various conspirators to regulate the arrangements as between themselves in a formal manner. The realities were recognised by the English Court of Appeal in *Kuwait Oil Tanker* ([29] *supra*) which stated at [111] that a claimant is never required to show the existence of anything in the nature of an express agreement, whether formal or informal:

> It is sufficient if two or more persons combine with a common intention, or, in other words, that they deliberately combine, albeit tacitly, to achieve a common end.

Therefore, as is often the case, the agreement or combination is to be inferred from the evidence. The Court of Appeal found the following passage from the judgment in the criminal case of *R v Siracusa* (1990) 90 Cr App R 340 at 349 to be of assistance in this regard, notwithstanding that the context was a criminal conspiracy:

> [T]he origins of all conspiracies are concealed and it is usually quite impossible to establish when or where the initial agreement was made, or when or where other conspirators were recruited. The very existence of the agreement can only be inferred from overt acts. Participation in a conspiracy is infinitely variable: it can be active or passive. If the majority shareholder and director of a company consents to the company being used for drug smuggling carried out in the company's name by a fellow director and minority shareholder, he is guilty of conspiracy. Consent, that is agreement or adherence to the agreement, can be inferred if it is proved that he knew what was going on and the intention to participate in the furtherance of the criminal purpose is also established by his failure to stop the unlawful activity.

48 Similarly, Lai J in *Malaysian International Trading Corp Sdn Bhd v Interamerica Asia Pte Ltd* ([29] *supra*) commented at [59]:

> Mitco rely on the overwhelming circumstantial evidence. Fraud cases of this type rarely leave behind a documentary trail, unless the conspirators whilst hatching the conspiracy were electronically recorded. But evidence of overt acts and omissions together are available to prove the fact of a conspiratorial combination or agreement.

49 A point taken by the defendants was the plaintiffs' omission to plead knowledge of the Singapore defendants in respect of the issue of the DGS Notes and of the consequences of their issue. Thus, the overt acts allegedly committed by them could not possibly have been done pursuant to the conspiracy. That argument is unsound. As a matter of law, each party to the conspiracy may join in the execution thereof at any time and they are not required to know what the other

conspirators have agreed to do. However, the parties to the conspiracy must be sufficiently aware of the surrounding circumstances and share the same object. A question in this case is how far each of the parties to the conspiracy was aware of the plan and then "joined in the execution" thereof.

50 At first instance in the *Kuwait Oil Tanker* case, Moore-Bick J put the matter in the following way (in a passage with which the Court of Appeal expressly approved at [133]):

> Of course, as in any case of this kind, it is necessary to examine the evidence with care to see whether each defendant was involved in each fraudulent transaction, but once one reaches the conclusion that the defendants combined to steal from their employer by whatever means might present themselves, the question in relation to any particular scheme or enterprise in which one or some of them can be shown to have directly participated is whether that enterprise fell within the overall scope of their common design. If several people agree to enable each other to steal from their employer, lending their support in different ways at different times and taking different shares of the proceeds (or even each retaining for himself what he takes), each of them is a party to the agreement pursuant to which all the thefts take place. In those circumstances there is in my judgment no need for each to be fully aware of the circumstances of each theft in order for him to be liable as a conspirator provided that the theft in question falls within the scope of their agreement.

His remarks are pertinent to the facts of this case.

51 Some of the defendants were able to falsify the accounts of D7 by overstating its current assets to the extent that the account balances between D7 and the related third parties showed the latter as owing money to D7. The false accounting entries were mirrored in the respective accounts of D7 and the related third parties for the same period. Given the deliberate and calculated fraudulent accounting entries involving separate entities, there can arguably, at this interlocutory stage, be only one conclusion: that the directors of the Singapore Defaulting Companies were aware of the circumstances and conspired with the directors and senior management of D7 for the purpose of dishonestly portraying D7 as a good investment. The accounts did not give a true and fair view of the state of D7's financial affairs as at the end of each relevant accounting period. Falsification of the accounts of D7 proceeded smoothly as the directors of the Singapore Defaulting Companies assisted D7 by, in turn, falsifying the accounting records of the Singapore Defaulting Companies.

52 The plaintiffs rely on the relationships between D1 to D11 and the overt acts, as pleaded, to infer that an agreement with an intention to injure a class of persons, namely, investors and potential investors of D7, existed. The fraudulent misrepresentation was that fictitious receivables were genuine. There is apparently no evidence that fish or other related products were ever sold by D7 to any of the Singapore Defaulting Companies. The result is that the audited accounts did not present a true and fair view of the state of affairs of D7 and the Singapore Defaulting Companies. D11 is a $2 company. There is evidence that D11's debt to D7 in 1998 was US$3m. Yet, D7 allowed D11 to further increase the debt to US$17m. There is also evidence that D5 signed some documents for the fictitious sale of fish or related products.

53 D2 was appointed director of D11 with effect from 21 June 1999. However, he signed off on the accounts of D11 for the financial year ended 31 December 1998 as director. He also signed off on the accounts of New Guinea Pte Ltd for the financial year ended 1997. D2 admitted to having an interest in both D14 and D15.

54 D9 became director and shareholder of D11 on 31 July 2000. She signed off on the accounts of D11 for the financial years 1999 and 2000 respectively. She also signed off on the accounts of New Guinea Pte Ltd for the financial years ended 31 December 1997, 1999 and 2000 respectively. She further signed accounts of D13 for the financial year ended 30 June 2000.

55 D10 signed off on various falsified accounts of the same Singapore Defaulting Companies as director. He signed off on the accounts of New Guinea Pte Ltd for the financial years ended 31 December 1999 and 2000 as well as the accounts of D11 for the financial years 1999 and 2000. He further signed the accounts of D13 for the financial year ended 30 June 2000.

56 Overall, it cannot be asserted that the plaintiffs' claim against the individual defendants (save for D12 to D15) is bereft of any possibility of success. They should not be prevented from proceeding with their case even though the potential for the defendants to present a strong defence exists (see *The Tokai Maru* [1998] 3 SLR 105). The claim against the defendants involved allegations of conspiracy amongst the defendants. Those allegations could only be properly examined at trial. In the circumstances of the case, it was not appropriate to strike out the statement of claim and action as disclosing no reasonable cause of action, or as being frivolous and vexatious or an abuse of process.

Stay of proceedings

57 This brings me to the stay application filed on behalf of the majority defendants. Their counsel's contention is that, assuming there was a conspiracy, whether the means used were unlawful as a matter of fact and law must be determined not in Singapore, but in Indonesia or New York.

58 The writ of summons has been served and jurisdiction conferred on the court to adjudicate on the dispute. The majority defendants subsequently abandoned their application to set aside the order for service out of jurisdiction of the writ of summons. If these defendants had continued to contest the jurisdiction of the Singapore court, the burden of proving that Singapore is the appropriate forum falls on the plaintiffs (see *Oriental Insurance Co Ltd v Bhavani Stores Pte Ltd* [1998] 1 SLR 253 at [16]). But they did not. A starting point in such a situation is that these defendants must be taken to have accepted that the Singapore court has jurisdiction and it is appropriate that the proceedings should be brought here. It falls on the majority defendants to show that either Indonesia or New York is the forum which is clearly or distinctly more appropriate than Singapore.

59 The emphasis of the first-stage test in *Spiliada Maritime Corp v Cansulex Ltd (The Spiliada)* [1987] AC 460 is upon "appropriate" rather than "convenient" because this is not simply a matter of practical convenience. The purpose is to identify the forum "with which the action has the most real and substantial connection" (see *per* Hunter JA in *The Adhiguna Meranti* [1988] 1 Lloyd's Rep 384 at 385). As Waung J pointed out in *The Kapitan Shvetsov* [1998] 1 Lloyd's Rep 199 at 204, what is required of the first-stage test is that the other forum must be distinctly more appropriate and not just marginally more appropriate, although it need not be the most appropriate forum.

60 I begin with New York as a more suitable forum. The defendants have identified, in the alternative, New York as the more appropriate forum to bring this case since the DGS Notes are subject to New York law and to the non-exclusive jurisdiction of the New York courts. This proper law clause is contained in the Indenture. I agree with Mr Davinder Singh that the Indenture has no application or relevance to the present cause of action and subject matter of the unlawful means

conspiracy claim for damages. It follows that New York is clearly or distinctly not a more appropriate forum than Singapore.

61 In argument, the defendants pointed to their strong connection with Indonesia. They were:

(a) D1, D3 to D8 are resident in and do not carry out business in Singapore.

(b) D1 is in Singapore for a maximum of one to two months a year. He resides in Indonesia.

(c) D3 lives and works in Indonesia. He runs the Djajanti Group, which is an Indonesian concern.

(d) Both D4 and D5 live and work in Indonesia. They have no connections with Singapore.

(e) D6 lives and works in Indonesia. He has no connections with Singapore except for an interest in a company unconnected to the Djajanti Group.

(f) D7 is an Indonesian listed company, which does not operate in Singapore.

(g) D8 is a single purpose Dutch entity.

(h) D12 is neither resident in Singapore nor Indonesia.

(i) D2 is a Singapore citizen but lives and works extensively in Liberia.

(j) D11, D13 and D14 are Singapore companies.

(k) The plaintiffs are all US entities.

(l) The DGS Notes were not issued or traded in Singapore and are not subject to any Singapore regulatory bodies.

(m) The main assets of the key defendants are in Indonesia.

(n) The bulk of the wrongful acts are alleged to have taken place in Indonesia and the nature of those acts would have to be ascertained under Indonesian law.

(o) Even if there were a conspiracy, the conspiracy would have been hatched in Indonesia.

(p) Even if the funds from the DGS Notes issue were used for other purposes, this would have been carried out in Indonesia.

(q) The Offering circular made it clear that execution of any judgments would have to be enforced by fresh proceedings in Indonesia.

62 In addition, Mr Rajah pointed out that the witnesses of facts in issue including staff from D7 and officers from D7's auditors, PriceWaterhouseCoopers, are Indonesians who will have to travel and be accommodated in Singapore. Interpreters may be required for the trial. All these expenses will be costly. Documentary evidence would have to be translated from Bahasa Indonesia to the English language.

63 The plaintiffs, on the other hand, pointed to factors connecting the proceedings to Singapore. They referred to D1's attempts to downplay his links with Singapore. They argued that D1 is a permanent resident of Singapore and has as his address, 18 Margoliouth Road, Singapore. He spends at least two months in a year in Singapore. He controls D13, a company incorporated in Singapore, and various other Singapore companies. The Singapore companies, including the Singapore Defaulting Companies, played a critical role in the conspiracy and many are now in liquidation in Singapore. The conspiracy could not be committed without the Singapore companies. Without the fictitious receivables from the Singapore companies, D7 and the other conspirators could not have represented to the plaintiffs that D7 had assets.

64 The plaintiffs' allegation is that the defendants, or those who were in a position to do so assisted by others, arranged for the true nature of the fictitious sales to be concealed from the plaintiffs and D7's auditors by a series of sham accounting transactions. This was a fraud that was probably orchestrated from Indonesia and Singapore that impacted on the plaintiffs from another jurisdiction. It cannot be said with any degree of certainty, that significant evidence relevant to the matters in issue will be located in Indonesia as compared to Singapore and *vice versa*. At best, the location of evidence – witnesses of fact and documentary in kind – is a neutral factor. Whether the trial is in Singapore or Indonesia, the documents would have to be translated. This is yet another neutral point. I also did not find the argument as to compellability of witnesses persuasive for the same reason.

65 I observed that no evidence of Indonesian law, or Indonesian law being the applicable law of the tort, was before me. There is merit in the argument that the defendants, having not opposed the order for service out of jurisdiction of the writ of summons, have accepted and acknowledged that the claim falls within the ambit of O 11 r 1(1) of the Rules of Court. Several limbs of r 1(1) were relied upon and the relevant sub-rules for the purposes of the stay application are sub-rule (1)(f) and (p). The Singapore court, so having jurisdiction on that basis, is arguably the appropriate court for the trial of the action.

66 It was not asserted that Indonesian law on this topic is different from Singapore law. Therefore, there was no basis for Mr Rajah saying that the defendants in Indonesia would incur significantly higher legal fees as they would have to obtain separate Indonesian law representation and opinion in respect of the legality or otherwise of representations made and acts and omissions in Indonesia.

67 D9 and D10 did not apply to stay the proceedings. Nonetheless, they supported the majority defendants' stay application. I cannot see how this stance would assist D9 and D10 and the majority defendants in the stay application. The action would continue against D9 and D10 even if a stay of the Singapore action were granted in favour of the majority defendants. As far as D9 and D10 are concerned, Singapore is the appropriate forum and they have filed their respective defences to the action. More importantly, the conspiracy claims against D9 and D10 are inextricably intertwined with the same conspiracy claims against D1 to D8 and D11 as the claims against both groups of defendants are founded on essentially the same misrepresentations. Thus, in the interest of avoiding duplicity of proceedings and the attendant risk of conflicting outcomes in different jurisdictions involving identical and interdependent issues, the desire to resolve the entire dispute in a single trial is a strong factor against a stay of the action. Added to that are other factors like the stage of the proceedings in Singapore against D9 and D10.

68 The various proceedings in Indonesia did not involve the same parties and issues that are being litigated here. Case 114 was brought by the plaintiffs in Indonesia for the appointment of public

accountants to audit the accounts of D7. In Case 125, D7 sought to set aside the order made in Case 114. Case 406 was brought by the plaintiffs in Indonesia to set aside the sale of some vessels on the ground that the sale was a sham. Save for D3 and D7, the other defendants in that case were different. It is not unreasonable to view all the proceedings in Indonesia as a feature of modern commercial litigation necessary in order to enable the proceeds of fraud to be recovered. They were plainly different from the cause of action and issues that are being litigated in Singapore. There is no *lis alibi pendens* to speak of.

69 The first and fifth plaintiffs brought an action in New York against D7 and D8, in contract, to recover their interest in the DGS Notes. The action was dismissed on 14 April 2003 on the ground that the claimants were not registered holders of the DGS Notes. This New York action was founded on a different cause of action and the parties were not identical. Again, like the Indonesian actions, there is no *lis alibi pendens* to speak of.

70 In my judgment, the defendants have not discharged the burden that Indonesia or New York is clearly or distinctly the more appropriate forum for the trial of the action than Singapore. The application for a stay failed at this stage. It is thus not necessary to determine if a trial in Indonesia will deprive the plaintiffs of legitimate personal or juridical advantages, and if so, to balance the advantages of litigating in Singapore against the disadvantages of litigating in Indonesia, if Indonesia is the more appropriate forum than Singapore.

71 For these reasons, I refused to stay the Singapore action.

Worldwide injunction

72 I now turn to the defendants' application to discharge the injunction. The attack was put in three ways. First, it is said that the plaintiffs have no good arguable case as the statement of claim did not disclose a reasonable cause of action in Singapore. This is no longer a live issue given my refusal to strike out the statement of claim and action. Second, it is argued that there was no risk of dissipation of assets. Third, it is argued that the plaintiffs were guilty of material non-disclosure such that the injunction should be discharged.

73 I turn first to the submission that no risk of dissipation was shown by the plaintiffs and all that the plaintiffs were able to muster was a mere possibility or an unsupported fear. It is trite law that an appropriate case of risk of dissipation is made out, evidentially, where there is a good arguable case of fraud, as was the case here, of unlawful means conspiracy (see Steven Gee, *Mareva Injunctions and Anton Piller Relief* (4th Ed, 1998) at 198).

74 I come to the third ground of Mr Rajah's attack, that is to say, material non-disclosure. Mr Rajah complained of three specific matters. They were:

(a) failure to disclose the discharge of the BMR Mareva injunction;

(b) failure to bring to the court's attention s 11.6 of the Indenture which would have afforded possible defences to D3, and on the plaintiffs' pleadings, to D1, D2, D4 and D5; and

(c) that D12 sold her Sovereign Apartment (see [80] *infra*) despite the Mareva injunction in the BMR proceedings.

75 By way of explanation, arbitration proceedings were brought against D7's holding company,

BMR, for fraudulent breach of warranties arising out of an equity investment of about US$70m in BMR pursuant to a share subscription agreement entered between the claimants and various parties associated with the Djajanti Group. Many of the defendants in the BMR proceedings are also defendants in these proceedings. They are D1 to D4, D11 and D12. The claimants there obtained, on 25 October 2001, an *ex parte* injunction against D1 to D4 including D11 and D12, D13 and D14. The injunction in the BMR proceedings was upheld after an *inter partes* hearing, save for the injunction against D12, D13 and D14 which was discharged on 29 November 2001.

76 I did not think that any of the complaints were material. They were entirely irrelevant to my considerations in granting relief. In the context of this case, where there are multiple allegations of false statements and accounts, the discharge of the BMR injunction is not a factor that would compel me to discharge the Mareva injunction on the ground of non-disclosure.

77 In any event, Mr Davinder Singh had explained that the BMR plaintiffs had given confidential information to the court, which would have subjected them to certain undertakings not to disclose that information. The undertakings would extend to information obtained from a third party as a result of the injunction. Consequently, the plaintiffs had little information then about what was said in the BMR proceedings by the various parties. As can be seen from the plaintiffs' written submissions, the lists of court documents not caught by the undertakings, as advised by Rodyk & Davidson, the solicitors for the BMR plaintiffs, were limited. None of the court documents identified would have suggested that the Mareva injunction against D12 to D14 had been discharged.

78 Mr Rajah raised s 11.6 as a possible defence without further elaboration. Mr Davinder Singh referred to the s 11.6 point as a red herring. He explained that the section prevented registered note holders from suing non-parties on the Indenture. The section would not bind the plaintiffs as they were not registered note holders. Similarly, non-parties could not rely on it. In any event, an exclusion clause like s 11.6 would be unenforceable if fraud was proved.

79 D12 to D15 are joined as defendants to the proceedings as they are alleged to be the nominees of D1 to D11 or any one of them. They may be joined as defendants even though the plaintiffs have no cause of action against them if a good arguable case is shown that the nominee was holding assets belonging to D1 and any of the majority defendants. I was satisfied, on a balance of probabilities, that the plaintiffs have made out the requisite arguable case against D12 to D15.

80 D12 denied that she was the common law wife of D1. She was the registered owner of an apartment, #12-01, The Sovereign, 99 Meyer Road, Singapore 437920 until it was purportedly sold. D1 admitted that he partially funded the purchase of the apartment. The plaintiffs question the sale, as the circumstances of the sale were unusual. D12 sold the apartment shortly after the injunction against D12 in the BMR proceedings was lifted and completion of the sale took place within a week. D12 explained that her buyer had money to complete a quick sale. No explanation was given about the absence of conveyancing searches normally carried out. Those searches would not have been completed within a week. More importantly, the apartment was the address at which D15, a British Virgin Islands ("BVI") company, operated. D15 operated a bank account in Singapore, which had been used to channel funds from one company to another. D15 is connected to D1 and his family and D12.

81 D1 has admitted that D13 is one of his companies. D13 had made payment on D1's order. The inference the plaintiffs seek to draw is that the funds of D13 are beneficially the property of D1 and his family.

82 D14 is a BVI company. Substantial amounts of money were transferred from D14 to D7's US

dollar account at the Bank of Central Asia in Indonesia and the funds were used to purchase logging equipment for OTC. D3 is a shareholder and director of OTC which at one time operated significant logging activities in Liberia on behalf of the Djajanti Group. D14 was also involved in channelling funds to D15.

Result

83 Accordingly, I dismissed the applications to strike out or stay the proceedings as well as to discharge the injunction. I ordered costs of the application to discharge the injunction to be in the cause. The plaintiffs were awarded the costs of the applications to strike out and stay the proceedings. Those costs were to be agreed, if not taxed.