Datacraft Asia Ltd and Another v Kaufman, Gregory Laurence and Others [2007] SGHC 111

Case Number : Suit 761/2006, SUM 1023/2007

Decision Date : 04 July 2007

Tribunal/Court : High Court

Coram : Lee Ti-Ting AR

Counsel Name(s) : Lim Wei Lee (Drew & Napier LLC) for the plaintiffs; Sean Tan Kim Kang and Claudia Poon (Tan Kok Quan Partnership) for the third and fourth defendant

Parties : Datacraft Asia Ltd; Datacraft Asia Investments BV — Kaufman, Gregory Laurence; Gregory Laurence Kaufman; Robert Henry Leslie; Lisboa Ltd

4 July 2007 Judgment reserved.

AR Lee Ti-Ting

1 This is an application by the third and forth defendants for a stay of the present action ("the Singapore proceedings") pending the final determination of the proceedings commenced by the first, second and fourth defendants against Otsuka Shokai Co Ltd ("Otsuka"), Yoshimoto Uemura ("Uemura"), Nobuyuki Amano ("Amano") and Datacraft Japan KK ("DCJ") in the Tokyo District Court ("the Japanese proceedings"). At the time of the hearing, the first and second defendants had not yet been served with the plaintiffs' writ of summons.

2 I reserved my judgment at the end of the hearing. I have formed the view however, that the third and fourth defendants' application for a stay of the Singapore proceedings pending the final determination of the Japanese proceedings should be allowed. I now give my reasons for so finding.

The facts

The parties

3 The first plaintiff is a company incorporated in Singapore and is the 100% shareholder of the second plaintiff. The second plaintiff is a company incorporated in the Netherlands and is the majority shareholder of DCJ. According to counsel for the plaintiffs, the second plaintiff holds 89.6% of DCJ.

4 The first, second, third and fourth defendants are shareholders in DCJ. The second defendant is a trust company registered in Hawaii, USA, and the fourth defendant is a trust company registered in the Turks and Caicos Islands. The first defendant is an American citizen and was and is at all material times the principal of the second defendant. The third defendant is an Irish citizen and was and is at all material times the principal of the fourth defendant.

Background

5 The defendants to the Singapore proceedings have in fact previously commenced an action against the plaintiffs in OS No. 179 of 2004/J ("OS 179"). I gratefully adopt the facts as set out in the High Court judgment (see [2005] SGHC 174) below as it best summarise the facts that lead to the present application for a stay of the Singapore proceedings.

6 On 28 July 1999, the plaintiffs acquired 75% of the share capital of a Japanese company known as Netwave Inc ("Netwave") from Otsuka, Uemuro and Amano.

6 On 14 December 1999, the plaintiffs acquired 75% of the share capital of a Japanese company known as PTS Co Ltd ("PTS") from its then shareholders, which included the second and fourth defendants. The first and third defendants were then key employees of PTS.

7 Sometime in 2000, the plaintiffs decided to merge PTS into Netwave. The plaintiffs owned 75% of PTS and 75% of Netwave and thus would own 75% of the merged entity.

8 Pursuant to an agreement between the plaintiffs and the shareholders of PTS and Netwave, Deloitte Touche Tomatsu Japan ("Deloitte") was appointed to conduct valuations of PTS and Netwave. Deloitte's valuation would not affect the plaintiffs' shareholding, but would determine the distribution of the remaining 25% equity between the minority shareholders of Netwave and PTS. Deloitte concluded that Netwave was worth six times as much as PTS, giving rise to a 6:1 ratio in favour of Netwave. The minority shareholders of PTS thus received one-seventh of the remaining 25% of the merged entity.

9 Netwave was renamed and became DCJ. On 1 April 2001, DCJ was merged with PTS and PTS was dissolved. DCJ took over all of PTS's assets and liabilities, including all ex-employees. PTS was subsequently dissolved. The first and third defendants became employees of DCJ.

10 Sometime in October 2001, the third defendant discovered that some "commissions" were still being paid by Otsuka to DCJ when there were apparently no transactions between Otsuka and DCJ that would involve any payment being made by Otsuka.

11 The third defendant uncovered evidence that suggested that Otsuka and Netwave had entered into sham transactions, prior to the plaintiffs' acquisition of the 75% stake in Netwave. After discussing his findings with the first defendant, the first and third defendants reached the conclusion that the effect of the sham contracts was to inflate the value of Netwave. This meant that the plaintiffs would have overpaid Otsuka, Uemura and Amano for the 75% stake in Netwave, and second, the 6:1 ratio used for the merger between Netwave and PTS would have been inaccurate.

12 The first and third defendants entered into a Letter Agreement dated 29 January 2002 with the plaintiffs. The Letter Agreement provided, *inter alia*, for the plaintiffs to pay the defendants 30% of any sum recovered from Otsuka, Uemura and Amano in exchange for the evidence of the sham contracts which the third defendant had uncovered. The evidence the third defendant had uncovered was valuable to the plaintiffs as the plaintiffs would then be able to use it to seek compensation from Otsuka, Uemura and Amano in respect of the inflation of the value of Netwave.

13 The plaintiffs informed the defendants of the amount they were entitled to pursuant to the terms of the Letter Agreement on 2 August 2002. The defendants were dissatisfied with the brevity of the breakdown given by the plaintiffs as to what the defendants were entitled to and asked for details of the settlement. The plaintiffs refused to provide any details on the basis that there was a confidentiality clause in the settlement agreement that they had signed with Otsuka, Uemuro and Amano.

OS 179

14 The defendants therefore commenced OS 179 asking for a disclosure of information and documents relating to the settlement. One of the issues raised in OS 179 was the interpretation of clause 4 of the Letter Agreement which provided that, *inter alia*, the defendants would provide the plaintiffs with information on the sham transactions and that the plaintiffs would pay 30% of any recovery received from Otsuka, Uemuro and Amano to the defendants.

15 The defendants alleged that the plaintiffs owed them a fiduciary duty under Japanese law and asked for an account of all monies owed to them under the Letter Agreement. As the Letter Agreement was governed by Japanese law, the High Court in that case had to, *inter alia*, decide on a point of Japanese law, whether there had been an "entrustment" created under the Letter Agreement. The High Court found however, that there was no entrustment relationship created by the Letter Agreement. The defendants were therefore not entitled to seek a disclosure of information and documents relating to the settlement from the plaintiffs. This decision was affirmed by the Court of Appeal in Civil Appeal No. 110 of 2005/F.

The Japanese proceedings

16 On or about 14 September 2005, the first, second and fourth defendants commenced the Japanese proceedings for payment of damages from Otsuka, Uemura, Amano and DCJ in relation to the alleged inaccurate valuation of PTS's shares due to the sham transactions, claiming for:

(a) damages of ¥79,265,616 and interest of 5% per annum from 15 October 2004 until the year this sum is paid off to be paid to the first and second defendants herein; and

(b) damages of ¥77,395,368 and interest of 5% per annum from 15 October 2004 until the year this sum is paid off to be paid to the fourth defendant herein.

17 On 31 October 2006, the second defendant withdrew from the Japanese proceedings and is now longer a party to the Japanese proceedings. It should be reiterated however, that the first defendant was and is at all material times the principal of the second defendant.

The Singapore proceedings

18 On 15 November 2006, the plaintiffs commenced this suit (Suit No. 761 of 2006) against the defendants for breach of clause 8 of the Letter Agreement. The plaintiffs alleged that the commencement of the Japanese proceedings by the first, second and fourth defendants in the Tokyo District Court for payment of damages from Otsuka, Uemura, Amano and DCJ in relation to the alleged inaccurate valuation of PTS's shares due to the sham transactions was in breach of clause 8 of the Letter Agreement.

19 Clause 8 of the Letter Agreement provides that:

"In consideration of the undertakings by the parties set forth herein:

(a) each of Robert, Lisboa Ltd, Greg, the Gregory L Kaufman Trust and the Datacraft Entities, and each of their respective heirs, successors and assigns hereby agree to release and hold harmless each of the other parties and their respective affiliates, officers, directors and agents, from and against any claim, and any costs, losses or expenses incurred as a result of or in connection with any claim, by such other parties or any of their respective heirs, successors and assigns, now existing in relation to or hereafter arising from the sale of the shares of PTS Co., Ltd ("PTS") to Datacraft Asia Investments B.V., the merger of PTS with Netwave, Inc., or the management of operation of PTS, Netwave or Datacraft Japan KK; provided that nothing in this paragraph shall operate to release any person or entity from any action of gross negligence or willful misconduct."

20 It is also necessary to reproduce in its entirety paragraphs 18, 19, 23, 24, 28 and 29 of the Statement of Claim where the plaintiffs pleaded as follows:

18 By virtue of Clause 8(a) of the Letter Agreement and under the laws of Japan, the Defendants have agreed to release the Plaintiffs and its affiliates from and against any claim by the Defendants or any of their respective heirs, successors and assigns, now existing in relation to or hereafter arising from the sale of the shares of PTS to the 2nd Plaintiff, the merger of PTS with Netwave, or the management or operation of PTS, Netwave or DCJ.

19 By virtue of Clause 8(a) of the Letter Agreement and under the laws of Japan, the Defendants have agreed to hold harmless the Plaintiffs and its affiliates from and against any costs, losses or expenses incurred as a result of or in connection with any claim by the Defendants or any of their respective heirs, successors and assigns, now existing in relation to or hereafter arising from the sale of the shares of PTS to the 2nd Plaintiff, the merger of PTS with Netwave, or the management or operation of PTS, Netwave or DCJ.

…

23 DCJ and the Plaintiffs have incurred significant costs, losses and expenses as a result of the Tokyo District Court Proceeding.

PARTICULARS

(a) Legal fees and expenses incurred by DCJ in responding to the Tokyo District Court Proceeding up to 13 October 2006 ¥20,524,611

(b) Legal fees and expenses incurred by DCJ in responding to the mediation before the Tokyo Summary Court initiated by the Defendants in relation to the alleged inaccurate valuation of PTS' shares due to the sham transactions made by Otsuka, Uemura and Amano. ¥6,604,873

(c) Value of management time expended by DCJ in dealing with the Tokyo District Court Proceeding and the mediation up to 13 October 2006 $20,000

(d) Value of management time expended by the Plaintiffs in dealing with the Tokyo District Court Proceeding and the mediation up to 13 October 2006 $80,000

24 DCJ and the Plaintiffs continue to incur costs, losses and expenses as a result of the matters pleaded above.

…

28 As a result of the matters pleaded above, DCJ and the Plaintiffs have suffered loss and damage. The Plaintiffs will rely on Articles 415 and 416 of the Civil Code of Japan.

PARTICULARS

Paragraphs 23 and 24 are repeated.

29 The Plaintiffs also claim costs and interests pursuant to section 12 of the Civil Law Act (Cap. 43).

AND THE PLAINTIFFS CLAIM:

(1) an order that the Defendants release DCJ from the Tokyo District Court Proceeding;

(2) an order that the Defendants do pay the sum of ¥27,129,484 to DCJ;

(3) an order that the Defendants pay DCJ the sum of $20,000;

(4) an order that the Defendants pay to the Plaintiffs the sum of $80,000;

(5) an order that the Defendants pay to DCJ all legal costs and expenses which are continuing and that are or will be incurred by DCJ in relation to the Tokyo District Court Proceeding;

(6) an order that the Defendants pay to DCJ compensation for management time which are continuing to be expended and that are or will be expended by DCJ in relation to the Tokyo District Court Proceeding to be assessed.

(7) an order that the Defendants pay to the Plaintiffs compensation for management time which are continuing to be expended and that are or will be expended by the Plaintiffs in relation to the Tokyo District Court Proceeding to be assessed;

(8) damages; alternatively, damages to be assessed;

(9) interest;

(10) costs; and

(11) such further or other relief as this Honourable Court deems fit.

21 The plaintiffs' claim herein is therefore for enforcement of clause 8(a) of the Letter Agreement. In particular, the plaintiffs seek an order that the defendants release DCJ from the Japanese proceedings and an indemnity from the defendants for all the costs incurred and that will be incurred by the plaintiffs and DCJ as a result of the Japanese proceedings.

Affidavits filed

22 As a number of affidavits were filed by the parties, for the sake of clarity, it will be best if I first set out the respective affidavits filed by the third and fourth defendants and the plaintiffs.

23 In support of their application, the third and fourth defendants filed the following affidavits:

(a) the second affidavit of Sean Tan Kim Kang filed on 12 March 2007 ("Sean Tan's affidavit");

(b) the first affidavit of Masahiko Miyashita ("Miyashita") filed on 2 April 2007 ("Miyashita's first affidavit");

(c) the second affidavit of Miyashita filed on 18 May 2007 ("Miyashita's second affidavit");

(d) the first affidavit of Robert Leslie filed on 21 May 2007 ("Leslie's affidavit");

(e) the second affidavit of Robert Leslie filed on 7 June 2007 ("Leslie second affidavit"); and

(f) the third affidavit of Miyashita filed on 7 June 2007 ("Miyashita's third affidavit").

24 The plaintiffs filed the following affidavits in response:

(a) the second affidavit of Low Beng Lan filed on 23 April 2007 ("Low's second affidavit");

(b) the first affidavit of Akihito Katayama filed on 23 April 2007 ("Katayama's first affidavit");

(c) the third affidavit of Low Beng Lan filed on 22 May 2007 ("Low's third affidavit"); and

(d) the second affidavit of Akihito Katayama filed on 23 May 2007 ("Katayama's second affidavit").

Issues before this court

Whether lis alibi pendens applies

25 The grounds of the third and fourth defendants' application for a stay of the Singapore proceedings are that "clause 8 will be determined in the Japanese proceedings" because:

(i) DCJ has raised clause 8 as a defence in the Japanese proceedings; and

(ii) the Tokyo District Court will determine if DCJ was liable for the alleged sham transactions committed by Otsuka, Uemuro and Amano which would mean that DCJ is guilty of 'gross negligence' or 'willful misconduct' and the plaintiffs as well as DCJ would therefore be unable to rely on clause 8 in the Singapore proceedings (see [20] Miyashita's first affidavit; [16] Miyashita's second affidavit).

26 Counsel for the plaintiffs, Ms Lim Wei Lee ("Ms Lim") argued however, that the only "link" between the Japanese and the Singapore proceedings is that both actions arose from the same factual background as set out in paragraphs 6 to 11 of this judgment. Even if there may be an overlap in the Singapore and Japanese proceedings, there is no duplicity of proceedings or lis alibi pendens and there should therefore not be a stay of the Singapore proceedings. Indeed, counsel for the third and fourth defendants, Mr Sean Tan ("Mr Tan") conceded that this is not *strictly* a case of lis alibi pendens.

27 At the outset, I must state that I am of the view that it is not possible for the third and fourth defendants to argue that lis alibi pendens apply. It is trite law that lis alibi pendens arises where the same parties are involved in both sets of proceedings and the same issue is being litigated. For instance, where the same plaintiff sues the same defendant in Singapore and abroad; and second, where the plaintiff sues the defendant in Singapore and the defendant sues the plaintiff abroad. In *PT Jaya Putra Kundur Indah v Guthrie Overseas Investment Pte Ltd* [1996] SGHC 285 ("*PT Jaya*"), in finding that there was no "true lis alibi pendens" on the facts of that case, the learned Justice Lai Siu Chiu had opined at [60] of her grounds of decision ("*GD*") that this was because "they were not concurrent proceedings involving the same parties to the subject action and they did not involve the same issues of fact and law, arising from the same or related causes of action". According to the

learned judge, lis albi pendens arises only where "litigation involving the same parties and the same parties and the same issues is continuing simultaneously in two different countries" (see [30] *PT Jaya*).

28 In *OCM Opportunities Fund v Burhan Uray* [2004] SGHC 115 ("*OCM*"), the defendants had argued that the plaintiff's claim should be determined not in Singapore, but in Indonesia or New York and sought a stay of the Singapore action. The learned Justice Belinda Ang refused to stay the Singapore action. At [68] to [71] of her judgment, she opined as follows:

> 6 8 *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.
>
> [Emphasis added.]

29 In *Transtech Electronics Pte Ltd v Choe Jerry* [1998] 3 SLR 272, the defendants applied to stay the action on the basis that the plaintiffs had filed a suit in New York against the defendants which was a duplication of the present action. The defendants contended that there was a multiplicity of actions and it would not be right to allow both actions to proceed. Justice Judith Prakash refused to stay the Singapore proceedings as she was of the view that the parties and causes of action in the allegedly duplicitous actions were not identical. Counsel for the plaintiffs pointed this court to [12], [16], [20] and [21] of the judgment:

> 1 2 *It would be immediately appreciated that there are many points of difference between the Singapore and New York actions. First, the parties to the two sets of proceedings are not identical.* There are both different plaintiffs and different defendants. The similarity in parties is confined to the fact that one of the plaintiffs in the New York action is the plaintiff in the Singapore action and one of the three defendants in the New York action is one of the four defendants in the Singapore action. *Secondly, the causes of action are not the same.* The Singapore proceedings are based on the statutory rights to relief against oppression which are

granted to a minority shareholder by s 216 of the Act. The New York proceedings on the other hand encompass various causes of action including breach of contract, trust and restitution. *Thirdly, with one exception, the reliefs sought in each action are distinct and arise from different sets of facts.* The exception averred to is the fourth prayer in the Singapore action ie that the first defendant be directed to take all steps necessary to effect the transfer of the business rights to the company. This is similar to the third claim in the New York action ie that for specific performance of the agreement for assignment of the business rights to the company. *From an initial reading of the pleadings filed in the two sets of proceedings therefore, I considered that there was little overlap between the two and that the claim to duplicity of actions was overstated.*

…

16 Whilst the courts have accepted that it is undesirable in general for there to be two sets of proceedings in two different jurisdictions involving the same parties and the same issues and arising from the same underlying factual matrix, they do not ipso facto prevent one of those actions from continuing. … The court has always to have regard to the right of a party to invoke a jurisdiction available to him by the law of a particular country and cannot deprive such party of that right without good ground.

20 *It appeared to me that in the factual situation that existed here, the plaintiffs had good reason to bring two separate sets of proceedings.* Apart from the first defendant, the defendants in the New York action are not amenable to Singapore jurisdiction and the matters on which they had been sued are separate and distinct (except for the transfer of business rights issue) from the matters which form the basis of the Singapore proceedings. *Whilst there is some overlapping in the two actions in that the plaintiffs are seeking to force the first defendant to implement certain alleged contractual promises, that is only one of the matters covered and it is not sufficient in itself to establish a multiplicity of actions. Further, while multiplicity of actions is one of the factors to be considered when a court is determining whether a foreign forum is the most convenient forum for the trial of a particular action, it is not the only factor and its mere existence cannot be determinative of the outcome of an application for a stay on this ground.*

21 The defendants were not able to establish that the New York court was the forum conveniens and therefore their application for a stay had to be dismissed. …

[Emphasis added.]

30 Hence, lis albi pendens arises only when the causes of action and reliefs sought in both sets of proceedings are the same. Mr Tan argued however, that the causes of action in the Singapore and Japanese proceedings are clearly related and lis alibi pendens should apply when the same or similar issues arise from the same underlying factual matrix. Mr Tan urged this court to adopt a wider approach towards what would constitute lis alibi pendens. His argument was that lis alibi pendens applies so long as there is a proximate link between the two sets of proceedings. In support of this submission, he pointed to Article 22 of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters ("Brussels Convention"), which has been incorporated into English law by the U.K. Civil Jurisdiction and Judgments Act 1982 (section 2(1) and Schedule 1). Article 22 of the Brussels Conventions states:

Where related actions are brought in the courts of different Contracting States, any court other than the court first seised may, while the actions are pending at first instance, stay its proceedings. A court other than the court first seised may also, on the application of one of the

parties, decline jurisdiction if the law of that court permits the consolidation of related actions and the court first seised has jurisdiction over both actions. For the purpose of this Article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.

31 In *Sarrio SA v Kuwait Investment Authority* [1997] 4 All ER 929, 933, Lord Saville, who delivered the English House of Lords' decision, interpreted the phrase "related actions" in Article 22 of the Brussels Convention as follows:

> [T]hese wide words are designed to cover a range of circumstances, from cases where the matters before the courts are virtually identical… to cases where although this is not the position, the connection is close enough to make it expedient for them to be heard and determined together to avoid the risk [of irreconcilable judgments resulting from separate proceedings].

32 Counsel for the third and fourth defendants therefore urged this court to stay the Singapore proceedings on the basis that the Singapore and Japanese proceedings are so closely related actions that it would be more expedient for both actions to be heard together by the Japanese court to avoid the risk of irreconcilable judgments resulting from separate proceedings. In support, counsel pointed to [56] of Lai Siu Chiu J's *GD* in *PT Jaya* where the learned judge had used words similar to that of Article 12 of the Brussels Convention in outlining the effect of concurrent proceedings in Singapore in the court's exercise of its discretion in ordering a stay of proceedings under the principles laid down by the House of Lords in the seminal case of *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460 ("*Spiliada*"). The learned judge had said as follows:

> The concurrent proceedings within jurisdiction will almost always be related proceedings in terms of common or similar issues of law and fact rather than proceedings involving exactly the same parties and exactly the same issues of law and fact, arising from the same or related causes of action. *Related proceedings within jurisdiction may be defined as those which, although not arising from the same cause of action, are so closely connected that it is expedient to hear them together to avoid irreconcilable judgments from separate proceedings and unnecessary costs and inconvenience.* In such cases, although the concurrent proceedings are relevant, I think it is clear that the policy reasons with respect to the undesirability of lis alibi pendens do not apply with as much force. [Emphasis added]

33 In support of the proposition that this court should take into account the underlying factual matrix in deciding if the Singapore proceedings should be stayed, counsel pointed this court to *Paladin Agricultural Ltd & Anor v Excelsior Hotel (Hong Kong) Ltd* [2001] 2 HKC 215 ("*Paladin*"), a decision of the Hong Kong Court of First Instance. In *Paladin*, the first plaintiff had entered into a sub-tenancy agreement, which contained an arbitration clause, with the defendant. Under the sub-tenancy agreement, the first plaintiff was, *inter alia*, obliged to keep the premises free from pests and vermin and not to permit use or occupation for rent or other consideration by any other party. However, the premises were used by the second plaintiff, with whom the defendant had no contractual relationship, as a restaurant.

34 The defendant sued the first plaintiff's parent company who had provided a guarantee for the performance of the covenants by the first plaintiff ("the guarantee action"). The first and second plaintiffs then sued the defendant because the restaurant had closed down because of a dispute over the presence of vermin. Shortly thereafter, the first plaintiff was joined as a defendant in the guarantee action. The defendant then served a notice of dispute on the first plaintiff under the

arbitration clause in the sub-tenancy agreement. As against the first plaintiff, the defendant sought a stay of the proceedings on the basis that the dispute should be referred to arbitration. As against the second plaintiff, the defendant sought a stay of the proceedings pending the arbitration proceedings between the first plaintiff and the defendant. The second plaintiff argued that it should be allowed to pursue its action because the issues in the guarantee action and its action were not identical. There was no risk of any inconsistent judgments because of a duplicity in proceedings.

35 Burrell J allowed the defendant's application for a stay of the action between the first plaintiff and the defendant. He was of the view that it would also be appropriate to stay the second plaintiff's proceedings until after an award had been made in the arbitration proceedings. Burrell J explained why he ordered a stay of the proceedings between the second plaintiff and the defendant at page 224 of his judgment as follows:

> In the exercise of my discretion to order a stay as requested by the defendant, I take into account the following factors:
>
> (i) The second plaintiff only came into the litigation relatively late and after there had been a change of solicitors.
>
> (ii) On the face of it, the second plaintiff's existence as a separate legal entity operating the restaurant appears to be in breach of the tenancy agreement between the first plaintiff and the defendant.
>
> (iii) The second plaintiff's claim, in money terms, is about 4% of the amount of the first plaintiff's claim.
>
> (iv) There are many common issues. It is fair to say the claims are not identical but the root cause is the same and the majority of the consequential issues are the same.
>
> (v) A duplication of proceedings creates the risk of inconsistent findings and the inevitability of increased costs.
>
> These factors are not of equal weight. However, taken together and applying the principle set out in the Supreme Court Practice 1999, Vol 2 at p 1647:
>
> If there are two courts faced with substantially the same question or issue, it is desirable [that] that question or issue shall be determined in only one of those two courts. If by that means justice can be done, and the Courts will if necessary stay one of the actions. The same principle applies to proceedings other than actions…
>
> I am satisfied the discretion should be exercised in the defendant's favour. I am satisfied that to do so will 'prevent unnecessary expense, trouble and anxiety to the parties' and that it is 'just and convenient to do so'. I have weighed in the balance the second plaintiff's desire to pursue its claim and the fact that the issues in the two claims are not identical, albeit they are, in reality, largely the same.

36 Similarly, counsel contended that if the underlying factual matrix was considered, the root cause of both the Singapore and Japanese proceedings is the same. In the Singapore proceedings, the plaintiffs are seeking pursuant to clause 8(a), first, an order that the defendants release DCJ from the Japanese proceedings and second, an indemnity for all the costs incurred and that will be incurred by the plaintiffs and DCJ as a result of the Japanese proceedings. In the Japanese proceedings,

clause 8(a) is also before the Japanese court as DCJ has raised it as a defence.

37 Counsel also argued that the policy reasons as to why it would be most undesirable to have concurrent proceedings in two different jurisdictions apply equally in the present case. These policy reasons were expressed by Lai Siu Chiu J in *PT Jaya* in the course of deciding how lis alibi pendens affects the court's exercise of its discretion to stay proceedings. The interplay between lis alibi pendens and the *Spiliada* principles was also considered by the learned judge. The learned judge opined at [30] to [33] of her *GD* thus:

> In *De Dampierre v De Dampierre* [1988] 1 AC 92, the House of Lords held that the principles enunciated in *Spiliada* in relation to the grant of a stay of proceedings on the doctrine of forum non conveniens are equally applicable when there was a lis alibi pendens, i.e., where litigation involving the same parties and the same issues is continuing simultaneously in two different countries. In other words, the fact that a refusal of a stay of proceedings will lead to a multiplicity of proceedings in Singapore and abroad is a relevant and important factor to be considered under the doctrine of forum non conveniens.
>
> I realised however, that the question has not been fully addressed by the authorities as to what stage of the enquiry does the court take into account the fact that there is a lis alibi pendens – whether it is at the stage of deciding whether there is a clearly appropriate forum abroad or whether it is at the stage of deciding whether there are reasons of justice upon which a stay of proceedings should be refused. Nevertheless, without the benefit of detailed argument, I am tentatively willing to take the view that, conceptually, the factor of lis alibi pendens may be considered at both stages of the enquiry.
>
> *The first policy reason why it is undesirable to have concurrent actions in Singapore and abroad is because it involves more expense and inconvenience to the parties than if trial was held in merely one country* (*The Abidin Daver* [1984] 1 AC 398 at pp 411-2). Hence, the factor of lis alibi pendens may be considered at the stage of determining whether there is a clearly more appropriate forum for the trial of the action together with the other factors considered at this stage which also seek to avoid unnecessary expense and inconvenience such as the location of the evidence, the residence of the parties, the choice of law, etc.
>
> *The other main reason why a lis alibi pendens should be avoided is that it can lead to two conflicting judgments, with an unseemly race by the parties to be first to obtain judgment and to subsequent problems of estoppel; this is a recipe for confusion and injustice* (see *The Abidin Daver* (supra) at pp 412, 423-4). As such, in my view, a lis alibi pendens may also be taken into account as a factor in the second stage of the enquiry when determining whether there are reasons of justice why the trial should or should not take place in Singapore. It is at this stage that concerns similar to lis alibi pendens, such as those factors which demonstrate why it may lead to injustice to have trial in a forum abroad, eg. excessive delay in the foreign forum, will be deliberated upon by the court.
>
> [Emphasis added]

38 I agree with Mr Tan that the Singapore and Japanese proceedings are clearly related. However, the fact that there are related or concurrent proceedings in another jurisdiction has always been a factor which courts take into account in deciding first, whether there is a clearly more appropriate forum abroad and second, whether there are reasons of justice upon which a stay of proceedings should be refused. Accordingly, I fail to see why it is necessary for this court to extend the law on lis alibi pendens and hold that lis alibi pendens applies even when the parties involved and

the reliefs sought in the two sets of proceedings are different.

39 The parties to the Japanese proceedings are the first and fourth defendants, Otsuka, Uemura, Amano and DCJ. The first and second plaintiffs are therefore not party to the Japanese proceedings. In addition, the second and third defendants are also not party to the Japanese proceedings.

40 Mr Tan urged this court to adopt the view that it is irrelevant that only the first and fourth defendants are involved in the Japanese proceedings. This is because the second and fourth defendants are trust companies beneficially owed by the first and third defendants at all material times. Mr Tan pointed this court to [8] and [9] of Miyashita's second affidavit where Miyashita said as follows:

> Mr Katayama attempts at paragraph 11 to make an issue out of the fact that the second defendant is not a plaintiff in the Japanese proceedings. This is in fact not a significant point. …
>
> It is correct that the second defendant was initially a plaintiff in the Japanese proceedings, but subsequently withdrew itself as a plaintiff. The Complaint in the Japanese proceedings was initially filed with the fourth defendant (Lisboa Limited), the first defendant (Mr. Gregory Laurence Kaufman) or the second defendant (Gregory Kaufman Trust) named as plaintiffs therein. This manner of listing or naming plaintiffs is not usual in litigation in Japan. As the litigation proceeded, the Tokyo District Court pointed this out and urged the plaintiffs to specify who was said to be entitled to the damages being claimed. After discussion with the first and second defendants, as it was felt that there would not be substantial difference between the first and second defendants due to the fact that the second defendant is in fact the first defendant's trust company, and the first defendant is the sole beneficiary, any gain or loss of the second defendant will ultimately be the gain or loss of the first plaintiff. It was therefore decided that the first defendant would continue as one of the plaintiffs in the Japanese proceedings, and the second defendant would be withdrawn as a plaintiff. … The above is basically a matter of procedure or form, and has no relation to the substantive claims in the Japanese proceedings. The substance of the plaintiffs' claims have not been altered, and the same claims are being prosecuted.

41 I am unable to agree with Mr Tan that lis alibi pendens can apply even though only the first and fourth defendants are involved in the Japanese proceedings. Even if I am prepared to make a concession and hold that this is not of grave consequence since the second and fourth defendants are trust companies beneficially owed by the first and third defendants, it is not disputed that the plaintiffs in the Singapore proceedings are not party to the Japanese proceedings. Mr Tan argued however that the evidence shows that the plaintiffs are closely involved in the Japanese proceedings. Mr Tan pointed to paragraphs 23(c) and 23(d) of the Statement of Claim where the plaintiffs seek a sum of $80,000 for the value of management time expended by the plaintiffs in dealing with the Japanese proceedings, which was four times the amount sought by DCJ for the value of management time expended in dealing with the Japanese proceedings.

42 Ms Lim's submission was that it is entirely conceivable that the first plaintiff's board and management would monitor and discuss litigation that their subsidiary company is involved. Ms Lim asserted that the plaintiffs and DCJ are different companies with different shareholders and management and it could not therefore be said that there is an identity of parties.

43 It must be borne in mind that even though the first and second plaintiffs and DCJ are all companies in the Datacraft group, in law they remain separate entities. In *Win Line (UK) Ltd v*

Masterpart (Singapore) Pte Ltd & Anor [2000] 2 SLR 98 ("*Win Line*"), the plaintiffs' vessel was chartered by the first defendants, Masterpart (Singapore) Pte Ltd ('Masterpart') but Masterpart allegedly breached the charter contract. The plaintiffs sued Masterpart and the second defendants, Donald & Mcarthy Pte Ltd ('D&M'), whom the plaintiffs alleged should be responsible for Masterpart's default because, *inter alia*, Masterpart and D&M were at all material times run as a single corporate entity and were therefore jointly liable for the breach. Justice Judith Prakash in the Singapore High Court allowed the plaintiffs' claim against Masterpart but dismissed the plaintiffs' claim against D&M. In so deciding, the court affirmed the well-established principle that each company in a group of companies was a separate legal entity. At [43] to [45] of the judgment, the learned Justice Judith Prakash opined:

> 43 The plaintiffs also submitted that the evidence disclosed that Masterpart and D&M were organised as one economic entity and for that reason it would be correct to make D&M responsible for the liabilities normally incurred by Masterpart. That argument is one that has been made in previous cases to justify lifting the corporate veil that exists between a parent company and its subsidiaries within the same group. Even in such a situation the argument has not been well received. In the *Cape Industries* case, the court considered that the concept of the group as a single economic entity could not justify any departure from the normal rule that each 'company in a group of companies… is a separate legal entity possessed of separate legal right and liabilities (see judgment of Slade LJ at p 532). Even where one company is a subsidiary of another, there is no presumption that the subsidiary is the parent company's alter ego (see p 537). Referring to the arguments of counsel in the case that all members of the Cape group of companies should be regarded as one or as being virtually the same as a partnership in which all the companies were partners, Slade LJ said:
>
> > In our judgment, however, we have no discretion to reject the distinction between the members of the group as a technical point. We agree with Scott J that the observations of Robert Goff LJ in *Bank of Tokyo Ltd v Karoon (Note)* [1987] AC 45, 64, are apposite:
> >
> > '[Counsel] suggested beguilingly that it would be technical for us to distinguish between parent and subsidiary company in this context; economically, he said, they were one. But we are concerned not with economics but with law. The distinction between the two is, in law, fundamental and cannot here be bridged.'
>
> 44 Although as *Gore-Brown on Companies* (44th Ed) points out (at Supplement 19 s 1.4.3) there are other views on this, in particular that expressed by Lord Denning MR in the Court of Appeal decision of *DHN Food Distributors Ltd v London Borough of Tower Hamlets* [1976] 3 All ER 462 where the court permitted a holding company to obtain compensation for disturbance resulting from the compulsory acquisition of premises belonging to its subsidiary, so much so that the law on this issue has not been completely resolved, what the plaintiffs wish me to do here is to extend the principle into a completely different area and treat two companies which have no common shareholders or directors as being a single economic unit and thus a single legal unit. I cannot do this.
>
> 45 In any event the evidence does not establish that D&M and Masterpart were a single economic unit. There was no evidence of corporate financial control exercised by D&M over Masterpart. …

44 This decision in *Win Line* was recently affirmed by Sundaresh Menon JC in *Public Prosecutor v Lew Syn Pau and another* [2006] 4 SLR 210. The court reiterated the principle that companies in a group remain separate legal entities. This is so even when a holding company in effect exercises

complete control over its subsidiary. It would suffice to reproduce [205] of Sundaresh Menon JC's judgment, where the court referred to *Briggs v James Hardie & Co Pty Ltd* (1989) 16 NSWLR 549, a New South Wales Court of Appeal decision:

> In *Briggs v James Hardie & Co Pty Ltd* (1989) 16 NSWLR 549 ("*James Hardie*") Rogers A-JA who was in the majority of the New South Wales Court of Appeal… made the following observations:
>
> (a) there is no common unifying principle which underlies the occasional decision of the courts to ignore the doctrine of separate legal personality and to pierce the corporate veil (at 567);
>
> (b) in the light of the explicit statements in *Salomon v Salomon & Company, Limited* [1897] AC 22 it has been a matter of extreme difficulty for the common law to make even a slight inroad into the principle of separate legal personality by holding that the company was acting as an agent for its shareholders (at 569);
>
> (c) to the extent it was suggested in *DHN Food Distributors Ltd v Tower Hamlets London Borough Council* [1976] 1 WLR 852 ("*DHN*") that there is a general tendency to ignore the separate legal entities of various companies within a group and to look at the economic entity of the whole group, there were in fact "no special circumstances in the facts of [that] case which differentiated it from the ordinary relationship of parent and fully owned and controlled subsidiary. Rare indeed is the subsidiary that is allowed to run its own race". The actual decision in *DHN* was considered doubtful by Lord Keith of Kinkel who delivered the judgment of the House of Lords in *Woolfson v Strathclyde Regional Council* (1978) 38 P&CR 521 (at 572).

45 I agree with Mr Tan that paragraphs 23(c) and 23(d) of the Statement of Claim where the plaintiffs are seeking $80,000, or four times the amount sought by DCJ, for the value of management time expended in dealing with the Japanese proceedings suggest that the plaintiffs are exercising control over DCJ's conduct of its defence in the Japanese proceedings. Nonetheless, there is overwhelming authority in support of the proposition that a subsidiary company is a separate legal entity from its parent company and this principle applies with equal force even if the parent company, i.e. the plaintiffs in the present case, own 95% of the subsidiary company, i.e. DCJ.

46 The real crux of the third and fourth defendants' application for a stay of the Singapore proceedings is the possibility of some preclusive effect on the Singapore proceedings as a result of the Japanese proceedings. However, once I accept that there is no identity of parties in the Singapore and Japanese proceedings, it follows that there can be no possible issue estoppel as a result of any decision by the Tokyo District Court in the Japanese proceedings. In *Lee Tat Development Pte Ltd v Management Corporation of Grange Heights Strata Title No 201 (No 2)* [2005] 3 SLR 156, the Singapore Court of Appeal held that the following requirements had to be met to establish issue estoppel:

(a) There must be a final and conclusive judgment on the merits;

(b) That judgment must emanate from a court of competent jurisdiction;

(c) There must be identity between the parties to the two actions that are being compared; and

(d) There must be an identity of subject matter in the two proceedings.

47 In the present case, there is no final and conclusive judgment by any court on the effect of clause 8 of the Letter Agreement. Second, there is no identity of parties in the Japanese and Singapore proceedings. Since the plaintiffs are not party to the Japanese proceedings, any finding made by the Tokyo District Court would not be binding on them.

48 I now turn my attention to the issue of whether there is an identity of subject matter. Before proceeding further however, it must be reiterated that the basis of the plaintiffs' claim in the Singapore proceedings for an order that DCJ be released from the Japanese proceedings and for the damages and costs of defending the Japanese proceedings is clause 8(a) of the Letter Agreement.

49 Ms Lim pointed me to [10] of Katayama's first affidavit where Katayama said that "the issue of whether the plaintiffs (as separate and distinct legal entities from DCJ) are able to claim for payment of all costs and expenses incurred by the plaintiffs and DCJ as a result of the Japanese proceedings from the defendants pursuant to clause 8 is not in issue in the Japanese proceedings". This was not challenged by the third and fourth defendants' expert witness, Miyashita himself (see [6] Miyashita's second affidavit).

50 The expert witness for the third and fourth defendants, Miyashita, averred that clause 8, which was the basis of the first and second plaintiffs' cause of action in the Singapore proceedings will be decided in the Japanese proceedings. Miyashita had opined at [20] of his first affidavit thus:

> Under Japanese law, Clause 8(a) cannot be relied on if the party seeking to rely on the same is found to have been guilty of "gross negligence" or "willful misconduct". *DCJ has raised Clause 8 as a defence in the Japanese proceedings, and argued that by virtue of Clause 8, the claims against DCJ in the Japanese proceedings ought to be dismissed.* The first, second and fourth defendants argued the following: (i) the obligations of the parties to the Letter Agreement that were stipulated in the Letter Agreement are consideration for each other (essentially reciprocal or mutual in nature), and since neither the first plaintiff nor the second plaintiff had fulfilled its obligations under the Letter Agreement, neither the first defendant nor the third defendants were under any obligation and/or in a position to fulfill their obligations under the Letter Agreement, and (ii) DCJ should not be released from its liability for damages because such damages were caused by DCJ's willful misconduct and/or gross negligence at the minimum. After hearing arguments from both sides, the Tokyo District Court did not dismiss the claims against DCJ, and as a result, DCJ remains as a defendant in the Japanese proceedings. *It will be determined at the trial of the Japanese proceedings if there was any "gross negligence" or "willful misconduct" on the part of DCJ, or if the obligations of the parties of the Letter Agreement are the consideration for each other. If so, DCJ, and consequently the first and second plaintiffs, will not be able to rely on clause 8 for an indemnity against the first, second, third and fourth defendants for all costs incurred by the first and second plaintiffs and DCJ as a result of the Japanese proceedings*.
>
> [Emphasis added.]

51 To further bolster the point that clause 8(a) will be determined in the Japanese proceedings, Mr Tan argued that DCJ had in fact sought a separation of the Japanese proceedings before the Tokyo District Court at the 2nd and 4th Preparations for Argument Proceedings so that the issue of whether the first and fourth defendants were in breach of clause 8(a) in suing DCJ in the Japanese proceedings could be decided separately from the main issue of whether Otsuka, Uemura and Amano were guilty of any alleged sham transactions in the valuation of Netwave and PTS. However, DCJ's request was rejected by the Tokyo District Court and DCJ therefore remains as a defendant in the Japanese proceedings.

52 At [24] of his first affidavit, Katayama explained the effect of DCJ remaining as a defendant in the Japanese proceedings even though DCJ had requested for a separation of the action. According to Ms Lim, DCJ had only orally suggested that the proceedings against DCJ be separated. Katayama opined thus:

> On 10 May 2006, at the 5th Preparations for Argument Proceedings, DCJ orally suggested to the Tokyo District Court that it exercise its discretionary power to separate the proceedings against DCJ from the proceedings against Otsuka, Uemura and Amano and separately examine and decide the issue of clause 8. However, the Tokyo District Court did not consider it efficient to separate the proceedings against DCJ as all the proceedings against Otsuka, Uemura, Amano and DCJ have to deal with the common issue of whether there were any alleged sham transactions concluded by Otsuka, Uemura and Amano, whether the first and fourth defendants have sustained the alleged damages and whether the alleged sham transactions caused the alleged damages. In my experience, such development suggests that it is likely that the court may not even determine the issue of clause 8 in the Japanese proceedings. The Tokyo District Court is really concerned with the issue of the alleged sham transactions.

53 Ms Lim argued that it was inaccurate for Miyashita to assert at [20] of his first affidavit that "after hearing arguments [at the hearing on 10 May 2006] from both sides, the Tokyo District Court did not dismiss the claims against DCJ". The Tokyo District Court has not made any decision whether the claims against DCJ should be dismissed, a point accepted by Miyashita himself (see [11] Miyashita's third affidavit). Ms Lim asserted that at the 5th Preparations for Argument Proceedings on 10 May 2006, the Tokyo District Court only heard the parties' arguments on whether to separate the proceedings against DCJ (see [8] Katayama's second affidavit). Ms Lim argued at [123] of her written submissions that while "theoretically, the Tokyo District Court has a discretionary power to separately decide the issue of clause 8 without separating the proceedings against DCJ. However, the Courts in Japan generally rarely exercise such power and it would be highly unlikely for the Court in the Japanese proceedings to do so because doing so would effectively force the other defendants in the Japanese proceedings to wait for the Court to examine this issue and relevant evidence and reach its conclusion, all of which would be irrelevant to the claims against the other defendants" (see [26] Katayama's first affidavit).

54 At [16] and [17] of his second affidavit, Miyashita countered however that:

> Mr Katayama confirms that DCJ had applied to the Tokyo District Court to exercise its discretion to separate DCJ from the Japanese proceedings, and "separately examine and decide the issue of Clause 8". He goes on to confirm that the Tokyo District Court did not consider it efficient to do this as the claims against Otsuka, Uemura, Amano, and DCJ have to deal with the common main issue of whether there were any sham transactions. Having confirmed all of this, Mr Katayama thereafter incredibly concludes that *"(i)n [his] experience, such development suggests that it is likely that the court may not even determine the issue of Clause 8 in the Japanese proceedings".* With respect, there is no logical basis for this conclusion. Given that it has made no ruling on Clause 8, which is one of the defences raised by DCJ, I am of the view that the Tokyo District Court will in fact make a ruling on Clause 8, and more importantly, whether DCJ was part of the conspiracy along with Otsuka, Uemura and Amano to create the sham transactions. If the Tokyo District Court determines that DCJ was part of the conspiracy, it would follow that DCJ would have been guilty of either "gross negligence" or "willful misconduct". This finding would have an impact on the entitlement of the first and second plaintiffs to rely on Clause 8(a) in the Singapore proceedings.

Paragraph 25 of Katayama's Affidavit contains more conjecture. DCJ, as early as in its 2nd Preparations for Argument Proceedings asked that it be separated from the Japanese proceedings, and repeated this request orally at the 4th Preparations for Argument Proceedings. It is correct that after hearing arguments from DCJ's lawyers and myself, the Tokyo District Court declined to separate DCJ from the Japanese proceedings (which is akin to not dismissing the claims against it).

[Emphasis original]

55 Mr Tan also pointed this court to the 5th Preparations for Argument Proceedings filed by DCJ on 12 July 2006 where DCJ specifically asked the Tokyo District Court for an immediate dismissal of the plaintiffs' claims. I note that DCJ had in fact made extensive submissions in response to the plaintiffs' contention in their 3rd Preparatory Document that DCJ was not entitled to be released from the Japanese proceedings pursuant to clause 8(a). Since clause 8(a) has been raised as a defence by DCJ, I am unable to accept the plaintiffs' contention that the Tokyo District Court will not make a determination on the effect of clause 8(a).

56 The plaintiffs' evidence is that the Tokyo District Court is only interested in the sham transactions. At [15] and [17] of Katayama's first affidavit, he had opined:

The main focus of the Japanese proceedings is the alleged fraud committed by Otsuka, Uemura and Amano. In the Japanese proceedings, the first and fourth defendants are alleging that Otsuka, Uemura, Amano and DCJ conspired to make sham transactions which resulted in an inflation of the value of Netwave Inc ("Netwave"), now known as DCJ, and seek damages for this alleged fraud. DCJ features insofar as the first and fourth defendants allege that DCJ should also be liable for the acts of Uemura and Amano, who were directors or employees of Netwave at the time the alleged fraud was committed.

…

Accordingly, the alleged fraud committed by Otsuka, Uemura and Amano, the alleged damages suffered by the first and fourth defendants and the causal relationship between the alleged fraud and the alleged damages are the key issues in the Japanese proceedings. These issues are the crucial, dispositive issues – if the claimants in the Japanese proceedings fail to prove any of these issues, their claims will necessarily be dismissed. Accordingly, the evidence led at trial in the Japanese proceedings also mainly relates to the alleged fraud committed by Otsuka, Uemura and Amano.

57 Miyashita framed the issue before the Tokyo District Court at [6] and [7] of his third affidavit as follows:

[T]he main issue or focus of the Japanese proceedings is whether there was a conspiracy between Otsuka, Uemura, Amano and DCJ to fraudulently create sham transactions which resulted in an inflation in the value of Netwave (now known as DCJ). … If the Tokyo District Court finds that such a conspiracy did exist, and that DCJ had been a co-conspirator or had participated in the conspiracy, under Japanese law, DCJ would be considered to be guilty of either "gross negligence" or "willful misconduct". This would have a direct bearing on Clause 8, which contains both phrases, and the plaintiffs seeking to rely on Clause 8(a) for an indemnity would be prevented from doing so because of DCJ's "gross negligence" and/or "willful misconduct".

… [I]t should also be noted that as Uemura was the representative director of Netwave (now known as DCJ), under Japanese law, if Uemura is held by the Tokyo District Court to have committed any wrongdoings, these same wrongdoings will be imputed to Netwave/DCJ or regarded as the wrongdoings of Netwave/DCJ.

58 Katayama asserted at [19] to [24] of his first affidavit however:

19. … [I]t is far from certain that the Tokyo District Court will even address clause 8 in its judgment. Further, it is my view that the Tokyo District Court is not very likely to consider this issue in its judgment…

…

21 The issue of clause 8, on the other hand, is not determinative of the claims in the Japanese proceedings and does not dispose of any of the claims against Otsuka, Uemura and Amano. Thus, there is… a distinct likelihood that the Tokyo District Court may not even address clause 8 in its judgment at all as the issue of clause 8 has no bearing on the crucial issues in the Japanese Proceedings. For example, if the Tokyo District Court decides on the main issue that the plaintiffs failed to prove that Otsuka, Uemura and Amano committed any wrongdoing, the Court will simply dismiss all of the claims (including those against DCJ) without reference to clause 8.

22 … Clause 8 is merely one of the defences raised by DCJ in the Japanese proceedings. … [E]ven if the Tokyo District Court finds in favour of the claimants in the Japanese proceedings on all the dispositive issues, the point remains that it is still far from certain that the Tokyo District Court will even consider Clause 8 in its judgment. For example, if the Tokyo District Court finds in favour of DCJ on any of its defences (other than Clause 8), there would be no need for the Court to even consider the other defences.

23 … [G]iven the substance of the Japanese proceedings, it is not very likely that the Japanese courts will make any finding on the issue of clause 8 of the Letter Agreement. …

24 On 10 May 2006, at the 5th Preparations for Argument Proceedings, DCJ orally suggested to the Tokyo District Court that it exercise its discretionary power to separate the proceedings against DCJ from the proceedings against Otsuka, Uemura and Amano and separately examine and decide the issue of clause 8. However, the Tokyo District Court did not consider it efficient to separate the proceedings against DCJ as all the proceedings against Otsuka, Uemura, Amano and DCJ have to deal with the common main issue of whether there were any alleged sham transactions concluded by Otsuka, Uemura and Amano, whether the first and fourth defendants have sustained the alleged damages and whether the alleged sham transactions caused the alleged damages. In my experience, such development suggests that it is likely that the court may not even determine the issue of clause 8 in the Japanese proceedings. The Tokyo District Court is really concerned with the issue of the alleged sham transactions.

59 Ms Lim argued that it does not necessarily mean that DCJ and the plaintiffs would be precluded from claiming on clause 8 even if the Tokyo District Court finds that DCJ is liable for the alleged fraud committed by Otsuka, Uemura and Amano. She pointed me to [29] of Katayama's first affidavit where Katayama said:

At paragraph 20 of Miyashita's affidavit, it is also alleged that "[u]nder Japanese law, clause 8(a) cannot be relied on if the party seeking to rely on the same is found to have been guilty of 'gross negligence' or 'wilful misconduct'. This is incorrect. This issue is simply a matter of interpretation

of the Letter Agreement in accordance with established principles of contractual interpretation under Japanese law. There is no specific law in Japan, as implied by this sentence, that clause 8 cannot be relied on if the party seeking to rely on the same is found to have been guilty of "gross negligence" or "willful misconduct".

60 Ms Lim submitted that after Katayama pointed out that there is no specific law in Japan that clause 8 cannot be relied on if the party seeking to rely on the same is found to have been guilty of 'gross negligence' or 'willful misconduct', Miyashita had to clarify this statement and agree that this was not an issue of Japanese law, but a simple matter of interpreting the Letter Agreement in accordance with the principles of contractual interpretation under Japanese law. Miyashita had stated at [14] of his third affidavit that:

> If clause 8(a) was before the Japanese courts, the Japanese courts would interpret it using Japanese principles of contractual interpretation. Given that the principles of contractual interpretation under Japanese law are established, the interpretations given by the Singapore courts and the Japanese courts ought to be the same. In the instant case, given that the Tokyo District Court is likely to determine clause 8(a) in the Japanese proceedings, and seeing that the Tokyo District Court is more experienced in applying Japanese contractual principles of interpretation than the Singapore court, it makes eminent sense for the Tokyo District Court to be allowed to interpret clause 8(a).

61 Ms Lim's submission was that the interpretation of clause 8(a) i.e. the terms 'gross negligence' and 'willful misconduct" under the principles of contractual interpretation under Japanese law was an issue which could and should in fact be decided by the Singapore court. Counsel urged me to bear in mind that the application by the third and fourth defendants for a stay of the Singapore proceedings should not somehow degenerate into a trial of the merits of the plaintiffs' claim on clause 8. Ms Lim contended that the third and fourth defendants were in fact seeking the court to assess the merits of the plaintiffs' claim through this application for a stay of proceedings.

62 Ms Lim's next submission was that there is a distinct likelihood that the Japanese Courts will not even address Clause 8 in its decision. As set out earlier, it is Katayama's evidence that the main issues in the Japanese proceedings are first, the alleged sham transactions executed by Otsuka, Uemura and Amano, second, the alleged damages and third, the causal relationship between the alleged sham transactions and the alleged damages. It follows that the claim in the Japanese proceedings would fail if the claimants fail to prove any of these three issues to the Japanese court's satisfaction.

63 Ms Lim's argument was that DCJ's defence of clause 8 is not determinative and would not dispose of any of the claims against Otsuka, Uemura and Amano in the Japanese proceedings. There is therefore a distinct likelihood that the Tokyo District Court may not even address clause 8 in its judgment at all as the issue of clause 8 has no bearing on the issues in the Japanese proceedings. For example, if the claimants in the Japanese proceedings fail to satisfy the court on any one of the three dispositive issues, the Tokyo District Court will simply dismiss all the claims without reference to clause 8.

64 In any event, since clause 8 is only one of the various defences raised by DCJ in the Japanese proceedings, the plaintiffs argued that it may well be that the Tokyo District Court will find for DCJ on one of these other defences (assuming that the Tokyo District Court finds, in the first place, that Otsuka, Uemura and Amano did commit fraudulent transactions and, in the second place, that DCJ should be liable for the acts of Uemura and Amano), in which case it is unlikely that the Tokyo District Court would make any substantive finding on the specific issue of clause 8.

65 Even if the Tokyo District Court mentions clause 8 in its judgment, Ms Lim argued that it is uncertain whether the court will address clause 8 in a manner that is, in the words of Peter Barnett in *Res Judicata, Estoppel & Foreign Judgments: The Preclusive Effects of Foreign Judgments in International Law*, (Oxford: Oxford University Press, 2001) at paragraph 5.99, "necessary and fundamental to the court's decision and not incidental or collateral".

66 On a reading of the affidavits filed by the third and fourth defendants' expert witness, Miyashita, and the plaintiffs' expert witness, Katayama, I am of the view that it is more likely than not that the Tokyo District Court will make a finding on the effect of clause 8 as DCJ has raised it as a defence in the Japanese proceedings. I find myself in agreement with [15] of Miyashita's second affidavit where Miyashita states thus:

> Mr Katayama has conceded that clause 8 is one of the defences raised by DCJ in the Japanese proceedings. This being the case, there is certainly a possibility that the Tokyo District Court will decide on the same. Mr Katayama has not said anything to definitively state and confirm that the Tokyo District Court will not rule on Clause 8, and indeed he cannot state or confirm this. … [I]t is my considered view that the Tokyo District Court will in fact consider and rule on clause 8 in the Japanese proceedings.

67 I have already explained earlier that I am of the view that there is no duplicity of proceedings or lis alibi pendens as the parties and the reliefs sought by the parties in the Singapore and Japanese proceedings are different. The policy reasons with respect to the undesirability of lis alibi pendens do not apply with as much force in a situation where the two sets of proceedings are merely related. I agree with counsel for the plaintiffs that even when there are concurrent proceedings with overlapping issues which may lead to conflicting decisions, this does not *ipso facto* mean that one of the actions must be stayed. In the Court of Appeal's recent decision in *Rickshaw*, the learned Justice Andrew Phang Boon Leong (who delivered the decision of the Court of Appeal) said at [90] of the judgment as follows:

> [T]here is nevertheless an overlap of both facts as well as issues between the German proceedings on the one hand and the Singapore proceedings on the other – particularly in so far as the issue of the respondent's alleged misconduct is concerned. *In the circumstances, there is a risk of conflicting judgments, at least in so far as some issues are concerned. However, whilst this is a factor that must be taken into account, it is not decisive (bearing in mind that the concurrent proceedings in Singapore and Germany were respectively commenced by the appellants and the respondents, as opposed to a lis alibi pendens*: see PT Jaya ([43] supra) at [56]). The danger of conflicting judgments must be weighed against other factors in the Spiliada enquiry and we have seen that, hitherto, the various factors point towards Singapore as being the most appropriate forum to hear the case…"
>
> [Emphasis added.]

68 It must be pointed out at this juncture however, that the third and fourth defendants are not seeking a permanent stay of the Singapore proceedings. Indeed, the application before this court is for a stay of the Singapore proceedings *pending the final determination of the Japanese proceedings*. Since I am of the view that clause 8(a) will be determined in the Japanese proceedings, this ought to be sufficient reason why the third and fourth defendants' application for a stay of the Singapore proceedings *pending the final determination of the Japanese proceedings* should be allowed. Even though I agree with the plaintiffs that any decision by the Tokyo District Court on clause 8(a) has no preclusive effect whatsoever on the Singapore proceedings since the parties and the reliefs sought by the parties in the Singapore and Japanese proceedings are different and the Tokyo District Court's

decision will not be binding on the Singapore courts, in my view, a Singapore court will in all likelihood regard a finding made by the Japanese courts on the effect of clause 8(a) highly instructive and persuasive. At [7] of Miyashita's second affidavit, Miyashita stated as follows:

> Assuming if the Tokyo District Court rules that DCJ was/is guilty of "gross negligence" or "wilful misconduct", bearing in mind that the Letter Agreement is also governed by Japanese law, it is implausible that another Japanese Court in construing clause 8(a) and its enforceability in the Singapore proceedings will then take a view that this "gross negligence" or "willful misconduct" will not disentitle a party from relying on Clause 8(a). *Mr Katayama makes the sweeping statement at paragraph 9 of his Affidavit that "(a)ny finding made by the Tokyo District Court on any issue would not be binding on the first and second plaintiffs and would not be determinative of the substantive rights of the first and second plaintiffs'.* Given the proximate link between a finding by the Tokyo District Court that DCJ was/is guilty of "gross negligence" or "willful misconduct", and the success of a claim under clause 8(a) of the Letter Agreement in the Singapore proceedings, *I cannot see how the Singapore court can disregard or ignore such a finding made by the Tokyo District Court. Such a finding may not be binding, but it is, in my view, extremely instructive and persuasive.*
>
> [Emphasis added.]

Whether the plaintiffs would be prejudiced by a stay of the Singapore proceedings

69 Ms Lim urged this court to consider the serious prejudice that the plaintiffs would suffer if the Singapore proceedings are stayed pending the final determination of the Japanese proceedings. While I agree with her submission that any decision by the Tokyo District Court would not be binding on the plaintiffs and the Singapore court, I fail to see what sort of prejudice the plaintiffs could possibly suffer as a result of a stay of the Singapore proceedings pending the final determination of the Japanese proceedings.

70 The plaintiffs' claim is, inter alia, an order that the defendants release DCJ from the Japanese proceedings and an order that the defendants pay the plaintiffs compensation for costs, expenses and management time that are continuing to be expended and that are or will be expended by the plaintiffs in defending the Japanese proceedings. I agree with Miyashita (see [30] of Miyashita's second affidavit) that a stay of the Singapore proceedings and the corresponding delay would not prejudice the plaintiffs because "the costs, expenses and management time can only be fully quantified upon the conclusion of the Japanese proceedings".

71 Furthermore, while I do have doubts as to whether the Singapore courts is the correct forum for the plaintiffs to seek an order that the defendants release DCJ from the Japanese proceedings, I cannot accept Ms Lim's argument that I am in effect denying the plaintiffs' claim in the present action. The plaintiffs are not precluded from pursuing their claims in the present action after the Japanese proceedings have been concluded. I must stress again that my decision is that the Singapore proceedings should be stayed *pending the final determination of the Japanese proceedings*.

Whether Japan is the clearly more appropriate forum for the determination of the plaintiffs' claim

72 Both counsels also made submissions on the issue of which forum would be the clearly more appropriate forum for the determination of the plaintiffs' claim under the principles laid down by the House of Lords in the seminal case of *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460 ("*Spiliada*"). Mr Tan argued that there were several factors which pointed to Japan as having the

closest connection to the issues in dispute:

(a) The Letter Agreement is governed by Japanese law, and choice of law is relevant in determining the natural forum of a dispute (see [42] *Rickshaw*; [43] *PT Jaya*);

(b) The Japanese proceedings were commenced before the Singapore proceedings, and are at a significantly more advanced stage than the Singapore proceedings (see [89] *Rickshaw*);

(c) Japanese law is not the same as Singapore law;

(d) Conspiracy is the main focus of the Japanese proceedings, and as the tort was committed in Japan, the place where the tort was committed is the natural forum for determining the claim (see [37] and [40] *Rickshaw*);

(e) The defendants in the Japanese proceedings are Japanese;

(f) The first defendant is resident in Japan;

(g) The fourth defendant is the trust company of the third defendant, who has a Japanese wife, and who had lived in Japan at the time the sham transactions were allegedly entered into;

(h) The main witnesses are in Japan, and the location of witnesses is a relevant factor (see [23] and [25] *Rickshaw*);

(i) The main witnesses are in Japan, and the location of witnesses is a relevant factor (see [23] and [25] Rickshaw);

(j) The documents to be referred to are likely to be in Japanese, and these include the transcripts of the Japanese proceedings. Savings in terms of translation costs is another factor (see [24] to [26] *Ang Ming Chuang v Singapore Airlines Ltd (Civil Aeronautics Administration, third party)* [2005] 1 SLR 409); and

(k) Clause 8(a) has been put into issue by the parties in the Japanese proceedings, and will in all likelihood be determined by the Japanese court.

73 In response, Ms Lim argued that the choice of law clause under clause 9 of the Letter Agreement, which stipulates that the Letter Agreement is governed by Japanese law should be given little weight. Indeed, the authors of *Dicey and Morris on The Conflict of Laws* (14th Edition) said at page 478:

> If the legal issues are straightforward, or if the competing forum have domestic laws which are substantially similar, the governing law will be a factor of little significance.

74 Ms Lim pointed me to David Steel J's decision in *Navigators Insurance Co Ltd v Atlantic Methanol Production Co LLC* [2003] EWHC 1706 (Comm) where the court approved this statement. In this case, the claimants relied heavily on the choice of English law in the contract. The court rejected the submission that this was a significant factor, pointing out that there was no such novel, complex and undecided issues of English law in the case that were "not capable of fair resolution in any foreign court, however distinguished and well respected." The court also pointed out at [45] of the judgment that:

There are possible issues of construction such as the meaning of "substantial completion", "contract completion", "contract period", "commencement of business", "commercial operation", "commercial production" etcetera. But these are straight forward points of linguistic analysis on which it is not suggested that Texas courts would have any difficulty (or indeed any different approach)…

75 Ms Lim also argued that the interpretation of clause 8(a) i.e. the terms 'gross negligence' and 'willful misconduct" under the principles of contractual interpretation under Japanese law was not a complex issue. No evidence had been adduced which would suggest that Japanese principles of contractual interpretation are so complex and so different from Singapore law that it could only be fairly applied by a Japanese court. Ms Lim contended that it would be highly inconsistent for the third and fourth defendants to make such an argument, given that they themselves asked a Singapore court to apply Japanese principles of contractual interpretation in OS 179.

76 Ms Lim's argument was that even if clause 8 is an issue in the Japanese proceedings, it was impossible to predict the finding the Tokyo District Court will make on clause 8. In any event, the Tokyo District Court's decision on clause 8 has no effect whatsoever on the plaintiffs' claim for an indemnity from the defendants for all the costs incurred and that will be incurred by the plaintiffs and DCJ as a result of the Japanese proceedings and the order sought by the plaintiffs that the defendants release DCJ from the Japanese proceedings.

77 In response to the submission made by counsel for the third and fourth defendants that Japan was the clearly more appropriate forum for the resolution of the dispute between the parties because the defendants in the Japanese proceedings are Japanese and second, the first and third defendants are resident in Japan, Ms Lim pointed out that the third defendant, who is an Irish citizen, is now resident in Ireland. This was affirmed by Mr Tan. Ms Lim also asserted that the first plaintiff, a listed company on the main board of the Stock Exchange of Singapore, and the second plaintiff, as a wholly-owned subsidiary of the first plaintiff, are based in Singapore.

78 Mr Tan had also argued that Japan was the clearly more appropriate forum because the documents that will be referred to by the Singapore court in this action would be in Japanese and there would be much savings in terms of translation costs if the dispute was resolved in Japan. Ms Lim urged me to consider however, first, the fact that the Letter Agreement is in English, second, negotiations on the drafting of the Letter Agreement were conducted in English and third, that all the witnesses who were called in OS 179, other than the experts in Japanese law, spoke English as their primary language. Ms Lim pointed me to *International Credit & Investment Co (Overseas) Ltd v Adham* (Unreported, Morritt, Schiemann, Buxton LJJ, English Court of Appeal (Civil Division), 28 October 1997) where the English Court of Appeal dismissed the defendants' appeal against the decision of the judge below who had refused to set aside the order granting leave to serve out and to stay the proceedings. The English Court of Appeal rejected the defendants' argument that the judge took into account an irrelevant factor when he considered the language of the relevant witness:

The third allegedly irrelevant matter is said to be that of language. The judge said at page 18:

"… The language of the relevant witnesses was said by the court in Re Harrods Buenos Aires to be a relevant factor. In that case the witnesses were primarily Spanish speaking although some were Italian speaking. In this case they all appear to be English speaking. In assessing the truth or falsehood of evidence, it is easier if the language in which the witnesses are speaking is the same language as that of the judge assessing it and the evidence does not have to go through an interpreter…"

It is said by the new defendants that this consideration is irrelevant and that it does not really arise because English is not the first language of Mr Djouhri or Laith Pharaon. But of the languages available to both of them English is more appropriate for the trial of the action than any other. That would be the first language of the judge in an action tried in England, though not necessarily if it were tried in Pakistan.

For all these reasons I reject the submission that the judge took irrelevant matters into account.

79 Ms Lim contended that the existence of prior proceedings in Singapore, OS 179, which is closely related to the present suit is another reason why this court should not grant a stay of the Singapore proceedings. The first and fourth defendants had argued in the Japanese proceedings that the obligations of the parties to the Letter Agreement were reciprocal or mutual in nature. Accordingly, they were not obliged to fulfil their obligations under the Letter Agreement since neither the first nor the second plaintiffs had fulfilled their obligations under the Letter Agreement. According to Ms Lim however, this argument made by the defendants in the Japanese proceedings was in fact the same argument which had already been dismissed by the Singapore court in OS 179. The defendants were therefore seeking a second bite of the cherry in another forum. This was another reason why a stay of the Singapore proceedings should not be granted since the defendants would be estopped from raising such allegations before a Singapore court. The "mutual obligations" which the first and fourth defendants assert were not fulfilled by the plaintiffs are matters which are res judicata between the parties herein.

80 Ms Lim also argued that there would be significant savings of time and costs for all parties to have the present suit litigated in Singapore. Ms Lim pointed out that they were the same solicitors who had conducted the trial on behalf of the first and second plaintiffs in OS 179 and CA 110 and are therefore well versed with the Letter Agreement and the factual background. Furthermore, the documents relating to the negotiations on the Letter Agreement and the factual background relating to the Letter Agreement have previously been adduced and filed in the Singapore courts.

81 I agree with Mr Lim however, that Japan is the clearly more appropriate forum for the resolution of the plaintiffs' claim. I am of the view that it would be more appropriate for DCJ to make a counter-claim against the defendants in the Japanese proceedings for the same reliefs sought by DCJ and the plaintiffs in the present action, i.e. for an order from the Tokyo District Court that the defendants release DCJ from the Japanese proceedings and an indemnity from the defendants for all the costs incurred and that will be incurred by the plaintiffs and DCJ as a result of the Japanese proceedings. The advanced stage of the Japanese proceedings and the fact that the Tokyo District Court will make a finding on the effect of clause 8(a) suggest that Japan is the clearly more appropriate forum for the resolution of the plaintiffs' claim. Indeed, I must stress that the plaintiffs' entire claim in the Singapore proceedings arises out of the Japanese proceedings. The other factors discussed above as to why Japan is or is not a clearly more appropriate forum for the resolution of the plaintiffs' claim in the Singapore proceedings were in my view neutral at best.

Conclusion

82 I therefore allow the third and fourth defendants' application for a stay of the present action pending the final determination of the Japanese proceedings with costs to be agreed, failing which, to be taxed.