International Coal Pte Ltd v Kristle Trading Ltd and Another and Another Suit [2008] SGHC 182

Case Number : Suit 11/2005, 12/2005

Decision Date : 22 October 2008

Tribunal/Court : High Court

Coram : Lai Siu Chiu J

Counsel Name(s) : Yeo Soo Mong Tony with Koh Wei Ser Joanna and Chung Su-Ling Lauren (Drew & Napier LLC) for the plaintiffs; Samuel Chacko with Angeline Soh Ean Leng (Legis Point LLC) for the defendants

Parties : International Coal Pte Ltd — Kristle Trading Ltd; Kazushi Toyoshige

Arbitration – Confidentiality – Breach – Assignor of coal-mining rights entering into arbitration proceedings with assignee over disputes – Whether assignor breached its duty of confidentiality through disclosure in various letters

Equity – Estoppel – Guarantor raising issues similar to issues raised in arbitration proceedings between assignor and assignee – Whether guarantor privy of assignee – Whether guarantor estopped from raising issues

22 October 2008 Judgment reserved.

Lai Siu Chiu J:

1 These consolidated suits involved disputes relating to a number of agreements entered into for coal-mining rights in Kalimantan, Indonesia. One suit concerns the scope of the principle of privacy in commercial arbitration while the other suit touches on the applicability of issue estoppel to arbitration proceedings and court proceedings between the same parties.

2 International Coal Pte Ltd ("ICP") is a Singapore company incorporated by one Low Tuck Kwong ("Low"), who was its managing-director, for the business of coal-mining and coal mine development. Kristle Trading Limited ("Kristle") is a company incorporated in Hong Kong and is the first defendant in Suit No. 11 of 2005 ("the first suit"). The principal shareholder and president of Kristle is one Kazushi Toyoshige ("the second defendant") who is the second defendant in the first suit. Kristle's other shareholder is one Donald Cameron.

3 Low and ICP are the second and third plaintiffs respectively in Suit No. 12 of 2005 ("the second suit") taken out against Kristle and the second defendant. An Indonesian company called PT Jaya Sumplies Indonesia ("PTJS") is the first plaintiff in the second suit. Low, ICP and PTJS will hereinafter be referred to collectively as "the plaintiffs" while Kristle and the second defendant will be referred to collectively as "the defendants".

4 By an agreement dated 1 November 1995 ("the second novation agreement"), ICP was assigned, for a consideration of US$4.5m, the coal-mining rights Kristle had acquired from the Indonesian government. The second novation agreement was preceded by a number of earlier agreements.

5 First, there was an agreement dated 15 August 1994 ("the coal mining agreement") whereby PT Tambang Batubara Asam (Persero) ("PTBA"), a company owned by the Indonesian government, agreed to grant PT Gunung Bayan Prarama Coal ("GBPC") the right *inter alia* to develop coal reserves

in designated zones in Kalimantan ("the designated areas"). PTBA is now defunct and its role of coordinating coal mining activities in Indonesia has been taken over by the Indonesian Ministry of Mines and Energy ("MME").

6 Subsequently, GBPC and a company called Japanese Overseas Coal Ltd ("JOC") entered into three agreements ("the 3 Agreements") on or about 12 April 1995 to set up a joint-venture company ("the PMA Company"). JOC was a company incorporated in Japan, whose principal shareholder and President-Director at the time was the second defendant. It was envisaged by the parties that the PMA Company would have the right to explore and mine coal in the designated areas.

7 Pursuant to the 3 Agreements, JOC was to hold 65% of the share capital of the PMA Company for the first five years and thereafter 60% of the share capital for the subsequent 25 years. In addition, JOC was to have 100% of the selling rights of the coal from the designated areas.

8 By a Memorandum of Understanding dated 14 April 1995 and made between GBPC and JOC, GBPC agreed that JOC's rights and obligations under the 3 Agreements could be assigned and transferred to a third party.

9 By a novation agreement dated 31 October 1995 ("the first novation agreement") and made between JOC and Kristle, JOC assigned and transferred its rights and obligations under the 3 Agreements to the latter. A day later, Kristle in turn entered into the second novation agreement with ICP at [4]. By virtue of the two novation agreements, ICP essentially, took over the rights of JOC under the 3 Agreements for a consideration of US$4.5m payable in five instalments.

10 As part of its obligations under the second novation agreement, ICP had to and which it did, enter into three new agreements ("the 3 New Agreements") with GBPC on 1 November 1995. Further, at Kristle's request, PTJS and Low executed a guarantee dated 1 November 1995 ("the Guarantee") of ICP's obligations.

11 After ICP had paid US$1m in two payments to Kristle pursuant to the second novation agreement, disputes and differences arose between ICP and Kristle which were referred to arbitration in accordance with the terms of the second novation agreement. The arbitration proceedings were carried out under the auspices of the Singapore International Arbitration Centre ("SIAC") in SIAC Arbitration No. 78 of 1999 with ICP as the claimant and Kristle as the respondent. For the purposes of the arbitration, ICP and Kristle agreed that the applicable law governing the parties under the second novation agreement was Singapore law, the applicable law of the arbitration was the International Arbitration Act Cap 143A Revised 2004 edition ("The IAA"), the SIAC would administer the arbitration and the SIAC Rules 1977 ("the 1997 Rules") would govern the conduct of the arbitration.

12 The arbitration proceedings took place between 12 November 1999 and 7 December 2000 ("the arbitration") and the tribunal issued its final award on 31 January 2001 ("the Award"). ICP failed in its claim that the second novation agreement was void for total failure of consideration while Kristle succeeded in its claim for the balance payment due under the second novation agreement (US$3.5m) together with interest (US$289,972.60) and was also awarded (i) costs of the arbitration (S$241,737.75 and US$160,000); (ii) disbursements of S$12,960.61 and A$7,072.38; (iii) S$115,000 as reimbursement of the deposit paid by Kristle to SIAC and (iv) S$11,797.75 being reimbursement to Kristle of the balance costs paid to SIAC.

13 On or about 28 June 2001, Low together with one Lim Chai Hock ("Lim") a director of GBPC, met the second defendant in Tokyo. A gentleman by the name of Kyojiro Nakahara ("Nakahara") acted as the second defendant's interpreter as the latter speaks little English. The plaintiffs alleged that the

parties eventually reached a compromise ("the settlement agreement") at the meeting in that ICP agreed it would pay Kristle US$3m in full and final settlement of the Award ("the settlement sum"). The plaintiffs claimed that the settlement agreement also discharged PTJS and Low from their liabilities as guarantors of ICP.

14 Under the terms of the settlement agreement, Kristle was supposed to draft a document formalising the same in order to trigger the first payment of US$300,000 by ICP. The first payment would then be followed by 27 monthly payments of US$100,000 each, beginning a month after the first payment. No draft document was prepared by Kristle despite its letter to ICP dated 6 July 2004 stating the same was being prepared by Kristle's lawyers. In the event, Kristle never received any payment of the settlement sum from ICP.

15 In the exchange of correspondence between ICP and Kristle subsequent to the settlement agreement, ICP alleged that Kristle repeatedly said it would not enforce the Guarantee against PTJS and Low.

16 However, in Kristle's letter dated 1 September 2001 to ICP signed by the second defendant, Kristle informed ICP that it had been placed under the control of its creditors and that the terms of the settlement agreement were not acceptable to Kristle's creditors.

17 Kristle then applied to the High Court in Originating Summon No. 2255 of 2006 and was granted leave on 1 December 2006 to enforce the Award as a judgment. ICP's attempt to set aside the leave granted was dismissed on 21 December 2006. ICP's appeal against the dismissal was similarly dismissed by a judge in chambers on 28 January 2008. Consequently, judgment on the Award was entered against ICP on 30 January 2008.

18 Rule 34.6 of the 1997 Rules ("the Confidentiality Rule") bound the parties to keep the arbitration confidential. The Confidentiality Rule states:

> The parties and the Tribunal shall at all times treat all matters relating to the proceedings (including the existence of the proceedings) and the Award as confidential. A party or any arbitrator shall not, without the prior written consent of the other party or the parties as the case may be, disclose to a third party any such matter except:
>
> (a) for the purpose of making an application to any competent court;
>
> (b) for the purpose of making an application to the courts of any State to enforce the Award;
>
> (c) pursuant to the order of a court of competent jurisdiction;
>
> (d) in compliance with the provisions of the laws of any State which is binding on the party making the disclosure; or
>
> (e) in compliance with the request or requirement of any regulatory body or other authority which, if not binding, nonetheless would be observed customarily by the party making the disclosure.

ICP alleged that in breach of the Confidentiality Rule, Kristle wrongfully disclosed confidential information relating to and arising out of the arbitration to various third parties including creditors of Kristle and the MME [5]. It was alleged that the second defendant had also lodged a complaint against ICP with the Tokyo office of Interpol Japan who then contacted their Indonesian counterpart

in Jakarta, on an allegation that Low had defrauded the second defendant.

19 ICP commenced the first suit on 5 January 2005 followed by the second suit on 16 January 2006.

The pleadings

20 In the first suit, ICP alleged that Kristle had breached its duty of confidentiality by wrongfully disclosing confidential information relating *inter alia* to

(i) the existence of the arbitration and/or the subject matter of the arbitration and the circumstances under which the arbitration arose;

(ii) documents prepared for and in the course of the arbitration,

(iii) the outcome of the arbitration and

(iv) the Award.

ICP sued the second defendant on the basis that he procured the breach by Kristle of the Confidentiality Rule and was the controlling mind and will of Kristle.

21 The plaintiffs *inter alia* prayed for an injunction to restrain the defendants from disclosing or otherwise making use of any and all of the confidential information relating to or arising out of the arbitration and/or Award.

22 The defence filed by the defendants did not dispute their duty of confidentiality vis a vis the arbitration but averred there was no basis in law for the terms pleaded by the plaintiffs to be implied into the arbitration agreement in the face of the 1997 Rules.

23 The defendants denied they had breached the Confidentiality Rule and averred that their duty of confidentiality, if any, extended to materials generated in the course of the arbitration subject to the exceptions provided in the Confidentiality Rule. The defendants further denied they had wrongly disclosed confidential information relating to or arising from the arbitration and/or the Award to various third parties without the plaintiffs' consent.

24 The defendants relied on exception (e) to the Confidentiality Rule (see [18]) to say they had not breached the provision when they disclosed the arbitration to third parties such as the MME and the Indonesian police.

25 In the second suit, the plaintiffs alleged the defendants made representations that the quantity of reserves of coal in the designated areas amounted to 100-200 million tons, that there was good infrastructure near the designated areas in that there was easy accessibility to the designated areas by coal barges (up to 6,000 tons) on the river, that Kristle had acquired rights to mine for coal in the designated areas under the coal mining agreement in [5] and that the requisite approvals had been obtained from PTBA and MME in respect of the 3 Agreements as well as the first and the second novation agreements.

26 Acting in reliance on the representations, ICP alleged that it entered into the second novation agreement with Kristle and paid Kristle US$1m and incurred costs and expenses. The plaintiffs alleged that the representations were false in that:-

(a) the designated areas contained only 8-10 million tons of coal;

(b) the land infrastructure near the designated areas was poor based on Kristle's own feasibility study and

(c) the requisite approvals had not been obtained from PTBA and/or MME in respect of the 3 Agreements, the first and the second novation agreements.

(I should point out that on the first day of trial, counsel for the plaintiffs informed the court (at N/E 49) that his clients were withdrawing their claims of misrepresentation based on mineability and infrastructure. These claims were similarly withdrawn in the course of the arbitration).

27 The plaintiffs also alleged that Kristle did not at any material time have the right to mine coal whether singly or jointly with GBPC or the right to assign and to transfer all the rights and obligations under the 3 Agreements to ICP: alternatively, it was an implied term and/or condition precedent to the second novation agreement that the requisite approvals or consents from PTBA and/or MME would be obtained in respect of the transfer of GBPC's rights under the coal mining agreement to the PMA company. The breach was accepted by ICP as a result of which the second novation agreement was terminated. By reason thereof, ICP was discharged from liability and performance under the second novation agreement and PTJS and Low were similarly discharged from all liability under the Guarantee in [10] as the consideration for the Guarantee had wholly failed.

28 In the alternative, ICP pleaded that by the settlement agreement reached in Tokyo between Low representing ICP and the second defendant representing Kristle, it was agreed that ICP would pay the settlement sum in full and final payment of the Award. The second defendant impliedly warranted that he was authorised by Kristle to procure the requisite board approval to enter into the settlement agreement. However, in a letter dated 1 September 2001 to ICP, Kristle alleged that it had been placed under the control of its creditors and that the settlement agreement was not acceptable to its creditors.

29 If (which ICP did not admit) the second defendant was not authorised by Kristle to procure the requisite board approval to enter into the settlement agreement, he had acted in breach of warranty of authority by reason of which ICP was entitled to claim against him an indemnity alternatively damages, in respect of all loss and damage suffered by ICP.

30 The plaintiffs prayed for a declaration that there were no obligations or moneys owing by PTJS or Low to Kristle under the Guarantee and/or Kristle was not entitled to sue PTJS or Low under the Guarantee. The plaintiffs also prayed for a declaration that the settlement agreement was binding on Kristle.

31 The settlement agreement was denied by the defendants. In their defence and counterclaim, the defendants pointed out that the Award had been converted into a judgment. Kristle referred to the terms of the Guarantee and contended that the guarantors would not be discharged from liability unless full payment had been received by Kristle under the Award together with all costs, charges and expenses (including legal fees on a full indemnity basis). Time was also of the essence under the Guarantee and any failure or delay on the part of Kristle in exercising or enforcing any right would not operate as a waiver.

32 The defendants contended that the arbitration tribunal had expressly made a finding that the second novation agreement was valid, enforceable and binding on ICP and that ICP had acted in breach of the same. The defendants also asserted that there had been no transfer of any of GBPC's

rights under the coal mining agreement.

33 The defendants further contended that as ICP together with PTJS and Low were privies of ICP at the arbitration, they were bound by the Award and were estopped from raising any allegations or assertions that were inconsistent with the findings of the arbitration tribunal as set out in the Award. Alternatively, the plaintiffs were estopped from raising any allegations or assertions that could have been or ought to have been raised in the arbitration.

34 The defendants counterclaimed for the various sums in the Award as set out in [12] above.

The evidence

(i) The plaintiffs' case

35 The plaintiffs called Low, Lim and an Indonesian law expert to testify while the defendants' only witness was the second defendant.

36 The plaintiffs' expert was Fabian Buddy Pascoal ("Pascoal") from a Jakarta law firm whose opinion was sought on whether the 3 Agreements resulted in an immediate transfer of rights to the PMA, notwithstanding those rights were subject to certain conditions subsequent. Pascoal (PW1) reviewed all the agreements referred to earlier in [4] to [10] as well as all relevant correspondence (including letters from the MME to PTBA and ICP), in the context of Indonesia's Civil Code and Presidential decrees.

37 Fabian opined that the 3 Agreements resulted in the immediate transfer of rights under the coal mining agreement. Therefore, when GBPC and JOC signed the 3 Agreements, the rights of GBPC under the coal mining agreement were transferred to the PMA company notwithstanding that the PMA company was not yet formed. However, the transfer of rights and obligations under the coal mining agreement required the prior written permission from PTBA and failure to do so was a direct violation of the terms and conditions of the coal mining agreement. The breach could not be cured by obtaining the required written permission retrospectively. Under Indonesian law, a conditional contractual obligation that was an impossible condition was prohibited by law and would render both the condition and the underlying contract null and void. Further, if the underlying agreement was void, the subsequent transfer of rights contained in that agreement was also void. It followed that under Indonesian law the 3 Agreements and their subsequent novation were null and void.

38 It emerged during his cross-examination that Pascoal had previously filed an affidavit as ICP's expert witness in the Originating Summons proceedings in [17] ("the OS affidavit") in ICP's attempt to set aside the leave granted to Kristle to register the Award as a judgment. Indeed, his opinion in the OS affidavit was almost identical to that he had prepared for this case, save for paras 15 to 19.

39 In paras 15 to 18 of the OS affidavit, Pascoal referred to the findings of the arbitration tribunal. In para 19 he concluded therefrom that the tribunal had failed to address the more general issue of whether there was a transfer of rights *per se* – it had only addressed the more specific legal issue of whether there was a transfer of rights to JOC. Further, the tribunal did not expressly rule on whether there was in fact no transfer of rights to any other party. Pascoal pointed out that the transfer of rights under the 3 Agreements was to the PMA company, not to JOC. Further, it was a present transfer of right, enforceable in the Indonesian court, even though the right would not vest until certain conditions were satisfied in the future.

40 Pascoal explained that his omission of paras 15 to 19 in the OS affidavit from his present opinion

did not change the substance of his views nor did it change his opinion.

41 Counsel for the defendants drew Pascoal's attention to certain provisions in the Indonesian Civil Code pertaining to contracts which Pascoal had not referred to in his opinion. These were Articles 1343, 1344, 1345 and 1348 ("the 4 Articles"). Pascoal agreed that applying the four Articles could result in a different interpretation to the terms of the 3 Agreements than what he had given. Pascoal had instead relied on Articles 1254 and 1332 of the Indonesian Civil Code as well as Article 13 of Indonesian Company Law.

42 Save for the settlement agreement reached on 28 June 2001 in Tokyo ("the Tokyo meeting") at which he was present, the testimony of Lim (PW2) was irrelevant as it was largely hearsay, based on what he was told by either Low or by KT Seng (the manager of PTJS) of what had earlier transpired between the parties and how the various agreements came to be signed (although Lim claimed to be involved in some of the meetings with the MME). Save for his attendance at the Tokyo meeting, Lim (by his own admission) played no part in the events or correspondence that took place after 28 June 2001 between the parties. Indeed, in his affidavit of evidence-in-chief ('AEIC") at para 45, Lim deposed that he was not involved in the settlement negotiations at all. Neither was he involved in ICP's matters. Lim was also unaware, until he was told by the defendants' counsel, that Kristle had previously rejected ICP's offer of US$3m as a settlement sum. Consequently, nothing turns on Lim's testimony.

43 Lim revealed he neither spoke nor understood Japanese. As such, it was not within his province to depose (at para 51 of his AEIC) that the second defendant and Nakahara had made representations at the Tokyo meeting. Pressed for his reasons for arriving at this conclusion, Lim's lame explanation was that Low and the second defendant shook hands after the meeting and, the second defendant as well as Nakahara, had invited him and Low for dinner on their next visit to Tokyo.

44 Low (DW3) was the plaintiff's final witness. He had filed two AEICs for these suits. I shall refer to his AEIC filed in the first suit as "Low's first AEIC" while the AEIC that he filed for the second suit will be referred to as "Low's second AEIC".

45 Due to the plaintiffs' withdrawal of their claims based on mineability and misrepresentation (see [26]), certain portions of Low's second AEIC were voluntarily expunged. According to Low's second AEIC, he no longer held positions nor did he own any shares, in PTJS or ICP. He also disclosed that the business of PTJS (which was in civil and marine engineering works, infrastructure construction, logging and coal-mining) had come to a standstill as a result of the Asian financial crisis in 1997-1998. Further, after Low took over the company, GBPC ceased to have any involvement in the coal-mines in the designated areas.

46 In relation to ICP's claim for breach of confidentiality in the first suit, it would be necessary at this juncture to set out the text of the offending letters which formed the subject of ICP's complaints and which were set out in *extenso* in Low's first AEIC. I shall refer to the letters collectively as "the five letters".

47 The first letter was from Kristle dated 19 April 2001 (at 3AB111-112) to Low ("the first letter"). ICP had taken objections to para 3 therein which said:

> We have consulted many people related to this matter and fortunately for us some of them are very close to you. They have intimate knowledge of your present situation, and also know well how you took over the coal mining project of GBPC. They have expressed their support to us and

their willingness to help us when we initiate legal proceedings.

Cross-examined, Low agreed that nowhere in the first letter was there mention of the arbitration proceedings or the arbitration Award. Moreover, in ICP's reply dated 23 April 2001 to the first letter (3AB113), ICP's director Helen Ong ("Helen") requested a reasonable discount on the arbitration Award claiming ICP could not pay due to its financial situation and further requested a payment period over a few years. There was no complaint on the issue of breach of confidentiality.

48 Next was Kristle's letter to ICP dated 8 September 2001 (3AB138) ("the second letter") which offending para 2 read as follows:

> In early September, we, by the instruction from our creditor, were called to the Ministry of Energy and Mineral Resources of Indonesia. All the contents of the meeting with Ministry of Energy were duly reported to the Creditors. In such meeting, we are requested to explain whole story of this issue with you including Novation Agreement and Arbitration in Singapore. Among the members from the Ministry, a certain person whom you know very well also attended the meeting.

Low explained that the second defendant who signed the second letter should not have disclosed the existence of the arbitration to the MME.

49 Cross-examined, Low confirmed that ICP on its part had never disclosed the arbitration to the MME. The defendants' counsel then drew Low's attention to a letter that ICP had written (and which he signed) to the MME dated 15 May 2000 where he (Low) had informed the MME of the then second tranche of the arbitration. Low defended himself with the assertion that he had been summoned to the office of the MME and was asked to give a report. Pressed, he admitted that he was prompted to write to the MME to obtain their views which he wanted to exhibit in the arbitration. Pressed further (by the court) on whether it was right of ICP to have disclosed the arbitration to the MME, Low took refuge in the excuse that he had made a mistake in writing the letter. His other excuse was that he reported the arbitration to the MME because the defendants had disclosed too much information to the MME.

50 The third offending letter was Kristle's letter dated 26 March 2003 to ICP (at 3AB221) ("the third letter") marked for Low's attention. Low objected to the following paragraphs:

> 6 We heard that you are being questioned by the Indonesian police. However, the Arbitration Award has nothing to do with the Indonesian Police. There was an official meeting at the Meeting Room at the Ministry of Mining with the four people in charge of investigating matters of your company, which concluded an agreement with this foreign affiliate to exploit coal in Indonesia, violated the contract, lost the suit but still will not make the payment, and creates unreasonable excuses, while at the same time producing much and making huge profits. You cannot shift this responsibility onto anyone else.
>
> 7 You are obviously trying to delay the payment by creating false charges one after another. But we will not accept any more delay from you even if you try to threaten us. I have never seen any sincerity on your part from the day we met. We are being encouraged to join many other enterprises that are suing you. They have also asked us to tie up with them, and to support media action, but so far we have not agreed with them.

51 During cross-examination, Low agreed that there was no mention of the arbitration and/or the Award in para 7 while para 6 in relation to the MME was no longer a valid complaint in the light of his own admission in [49] that he himself had revealed the arbitration to the MME. Low agreed that ICP's

reply dated 28 March 2003 (at 3AB224) again did not complain that Kristle had breached its duty of confidentiality. Instead, ICP's director Helen Ong ("Helen") who signed the letter claimed (in para 4) that ICP was waiting for Kristle (who was slow) to prepare the draft settlement agreement and mentioned that ICP's legal searches indicated there were apparent problems with Kristle's taxation in Hong Kong and Japan and there was *also great possibility of some criminal questions relating to JOC*. Interestingly enough, ICP's letter contained the following paragraph:

> 4 In the course of the Indonesian Police investigation, we had to provide them with contact information of Kristle Trading Ltd/Japan Overseas Coal and the people involved in them. We understand that you and your people may hear from them soon.

52 The fourth letter was Kristle's letter dated 11 April 2003 (at 3AB 225) which paras 5 and 6 were the gravamen of Low's complaint:

> Moreover, since you have not executed your obligation to pay for 2 years after the award has been reaffirmed, we have investigated Mr. TK Low as an individual and P.T. Jaya Sumpiles Indonesia, and also all of the individuals and corporations related to Mr. TK Low, including ICP.
>
> This is because we were predicting that you would not execute the obligation to pay the award making many unreasonable reasons as you have done so, and currently doing, in many of the other trials. And we have been preparing. Unfortunately, our prediction came true. Are you not the one who is having many problems with taxes and the criminal law? Once you have rejected your obligation, our legislative action will take place. We are ready to submit all of our investigation files if needed.
>
> It is known by many corporations and medias of Australia, Malaysia, the United States, Japan and many countries of EU that you have not executed the Arbitration Award against K.T.L. There are also corporations you are selling coals to, within this group. Are you not ashamed as an entrepreneur? I believe this kind of image-down will not be in favour to you as a great entrepreneur.

Again, ICP's reply dated 25 April 2003 (at 3AB 228) made no reference to the fact that Kristle had breached its duty of confidentiality. Instead, Helen who was the signatory took issue with the letterhead of Kristle's letter, which contained the misspelt name of Kristel Trading Limited.

53 The final letter to which ICP took issue with was Interpol Tokyo's letter dated 10 December 2003 to its Jakarta counterpart ("the fifth letter") which full text (see PB 1) reads:

> Subject: Request for assistance to trace a Japan National named KAZUSHI TOYOSIGHE
>
> Reference is made to your message mentioned above.
>
> Please be informed that the Tokyo Metropolitan Department (TMPD) informed the a/m subject of this matter and your request.
>
> When the subject was informed of this matter, he stated as follows:
>
> The subject sold the right regarding the coal mine in East Kalimantan, Indonesia to Mr Low Tuck Kwong for total US$4.5 million on 1 November 1995.
>
> However, Mr Low Tuck Kwong paid only US$1 million, he did not pay the remainder, US$3.5

million.

The subject brought the arbitration in Singapore to make Mr Low Tuck Kwong pay the remainder. The subject won the arbitration, and the Singapore International Arbitration Centre decided that Mr Low Tuck Kwong has an obligation to pay the subject US$4 million on 31 January 2001.

In spite of the a/m decision, Mr Low Tuck Kwong has not paid US$4 million at all to date.

Actually, a huge coal was mined from the coal mine in East Kalimantan, it is obvious that Mr Low Tuck Kwong defrauded the subject of the right regarding the coal mine in East Kalimantan.

When the subject pressed Mr Low Tuck Kwong to pay the remainder Mr Low Tuck Kwong threatened to kill the subject. Therefore, the subject is sensing that he is in danger, and he does not want to go to Indonesia.

Please find attached the copies of the relevant documents.

54 Questioned on how he came to have the fifth letter, Low revealed it was his colleague Hengki Wibowo ('Wibowo"), a shareholder of GBPC, who received a copy from the (Indonesian) police but he was unable to elaborate further. Low described Wibowo as being on good terms with all government officials including the police. Low agreed that Wibowo had disclosed the arbitration to the Indonesian police but justified the disclosure on the ground that Wibowo was asked about the arbitration by the police and he, therefore, explained the same.

55 Low objected to the fifth letter as it should not have been sent to the (Jakarta) police; he was unhappy with the disclosure of certain information therein *viz* the arbitration, the sum he owed and the alleged threat he had made against the second defendant.

56 Earlier (at N/E 96) Low's attention was drawn to another letter dated 28 February 2003 to Kristle, also signed by Helen on behalf of ICP. The letter was a reply to the second defendant's letter dated 27 February 2003 in which he had requested a meeting with Low on 3 March 2003 in Tokyo. ICP replied that the proposed meeting had to be cancelled for the following reason:

We understand that the reason is Mr Low will be rushing back to Jakarta, Indonesia for a police interview on Tuesday at the headquarter of Police, Jakarta. We also understand that the police interview is about matters concerning some investigations on the various Japan Overseas Coal, Kristle Trading Limited and their activities, possibly related to Gunungbayan [GBPC].

Low revealed neither he nor ICP filed a police report. I should add that in a subsequent letter dated 11 March 2003 to Kristle (3AB 219), ICP informed the second defendant that any meetings between them would have to be held in Jakarta.

57 In the second suit, Low contended that his liability as a guarantor was limited to ICP's obligation to pay Kristle US$4.5m under cl 3.1 of the second novation agreement which sum was payable as follows:

(a) US$0.5m within 30 days from the signing date of the agreement before 30 November 1995;

(b) US$0.5m on 30 June 1996;

(c) US$1.0m on 20 December 1997;

(d) US$1.5m on 20 December 1998;

(e) US$1.0m on 30 June 1999.

58 In this connection cl 7.1 of the second novation agreement was said by the defendants to be also relevant. The clause states:

> In the event that ICP intend to assign and/or sell a part or all of its rights under this Agreement, ICP shall make 30 days prior notice of this execution, have prior consent and approval from [Kristle] and pay to [Kristle] in lump sum payment all monies still outstanding balance under clause 3 of this Agreement.

59 Low maintained his answer even when his attention was drawn to the following clauses in the Guarantee:

> 1 Each Guarantor hereby irrevocably and unconditionally guarantees, not as surety only but as a primary obligor and jointly and severally with ICP, until all the money as specified in clause 3.1 and/or in the case of clause 7.1 in the Agreement fully paid.
>
> (a) the due prompt and faithful performance by ICP of all its obligations under the [second novation agreement] and
>
> (b) the due and punctual payment by ICP of all the money payable by ICP under the Agreement in the manner and at the time fixed under the [second novation agreement].
>
> In addition to the above, the each Guarantor guarantee to pay in lump sum to [Kristle] in the event that ICP has gone bankruptcy, or been dissolved or merged, or has been attached by any person or substantial part of its business has been assigned, or petition for re-organization, composition or else for special liquidation of ICP is filed.
>
> Each Guarantor shall, upon demand by [Kristle] cause forthwith to pay the moneys and such payment shall be made in accordance with clause 3.1 and clause 7.1 of the [second novation agreement].

60 Low's attention was drawn to the exchange of correspondence between Kristle and ICP after the Award. In ICP's letter dated 27 February 2001, Helen claimed that ICP was in no position to pay the Award. Kristle's reply dated 1 March 2001 reminded ICP of Low's obligations as guarantor. Notably, neither ICP nor Low in subsequent letters responded to refute Kristle's assertion that Low was liable for all the sums due under the Award or to contend that Low's liability was limited to cl 3.1 of the second novation agreement.

61 It was noted that in a series of letters from 7 March 2001 onwards signed by Helen, ICP consistently played for time – Helen's letters requested meetings with Kristle to discuss and reach amicable solutions as ICP had allegedly done with its other creditors and/or it claimed it did nor have the funds to pay the Award. On the other hand, Kristle's letters signed by the second defendant repeatedly demanded payment of the Award and refused to meet with Low other than in Tokyo.

62 After considerable toing and froing, Kristle by its letter dated 26 March 2001 (see 3AB96), made a formal demand on Low as guarantor, for payment of the Award together with interest at 6% per annum from 1 February 2001 until the actual payment date. That demand apparently galvanised Low into some action as he proposed a settlement of US$3m to the second defendant on 28 March 2001.

The proposal meant a 70% discount on the Award and it was the same proposal that Low claimed the second defendant accepted (which was denied) at the Tokyo meeting.

63 Counsel for the defendants drew Low's attention to Kristle's immediate response by fax to Low's proposal, signed by the second defendant. I am setting out the full text of that fax (at 3AB 102) as it is crucial to the issue of whether a settlement agreement was indeed reached on 28 June 2001:-

> Reference is made to your fax of March 28, 2001. We cannot accept your proposal, and basically we are not willing to go under the amount that was awarded to us by the Arbitration Tribunal. Your proposal is even lower than the original Novation Agreement. Since entering into the Novation Agreement on November 1, 1995, we have struggled for 6 years. In 1999, you filed Arbitration against us. In defending this Arbitration, we have spent a lot of time and money, and for us even US$4m is not sufficient. As it is certain that you will make a fortune from the coal concession that was found by us.
>
> However in consideration of our desire to reach a solution that will not prolong this matter, we propose as follows:
>
> 1 A settlement amount of US$4 million (four million US Dollar);
>
> 2 A lump sum first payment within 5 days from today of US$3.5 million…….;
>
> 3 The balance of US$500,000 (five hundred thousand US Dollar) to be paid in full by April 28, 2001 plus accrued interest computed at 6% p.a. from the 1st February 2001 till the actual payment date.
>
> In the event the above is not acceptable we have no option but to initiate legal proceedings.
>
> Please respond to us before you leave Japan.

64 Cross-examined on Kristle's above fax, Low in acknowledging he did not reply, used the excuse that the parties were still negotiating. Despite Kristle's clear and unequivocal refusal, Low insisted his proposal was not rejected and even claimed that it was subsequently accepted.

65 Kristle wrote to Low on 3 April 2001 referring to its fax in [63] and requested remittance of US$3.5m within five days, reminding Low that his proposal of 28 March 2001 was not acceptable. More correspondence followed in April and May 2001 with Low/ICP reiterating that it could not pay the Award in full while Kristle pressed for full payment, pointing out (in its letter dated 26 April 2001 to Low) that Low continued to operate GBPC and the profitable coal mine so there was no question that he could not afford the sums in the Award. Failing payment, Kristle threatened action against ICP, Low and PTJS.

66 The roles however were reversed after the alleged settlement agreement. It was ICP who started to press Kristle for the draft agreement Kristle was supposed to prepare (according to Low). ICP's letter dated 3 July 2001 explained the draft was needed so that ICP's board of directors could vet and discuss the final settlement. Once the document was signed, ICP stated it would effect the first instalment payment of US$300,000.

67 In Kristle's letter dated 6 July 2001, the second defendant merely said the agreement was "under preparation by our lawyer". Whatever may have been the proposal at the Tokyo meeting was not mentioned at all. Kristle followed up with its letter dated 1 September 2001 rejecting ICP's

proposal of 28 June 2001. Kristle stated that its creditors would never agree to any of the three proposals ICP made at the Tokyo meeting. Notice was given to ICP that if it failed to pay what was due to Kristle before 10 September 2001, the creditors had urged Kristle to transfer the Award to the creditors.

68 Counsel for the defendants pointed out to Low (who disagreed) that based on ICP's position in its letter dated 3 July 2001, it was only after approval by ICP's board of directors and signing of the settlement agreement that the same could be considered a done deal. Although he professed to be willing to pay Kristle the settlement amount starting with US$300,000, Low claimed the obligation to pay did not arise until after the settlement agreement had been signed, notwithstanding the repeated demands Kristle/the second defendant had made of him previously. As for his non-payment, Low gave the disingenuous excuse that the second defendant did not give the bank account particulars to which payment was to be remitted and the second defendant did not ask for payment! (Both excuses were patently untrue as Kristle had already given its bank account particulars in its letter dated 26 March 2001 and it had repeatedly demanded payment without avail).

69 Notwithstanding Low's stand that the settlement agreement was a done deal, it was noteworthy that two years later, when the settlement agreement was still not signed and no payment was effected by ICP and/or Low, ICP's letter of 28 March 2003 to Kristle said (see 3AB224):

> In line with this, we shall demand that any settlement agreement to be entered into with you shall have adequate indemnity to protect us in all forms.

Low asserted that pursuant to cl 3.1 of the second novation agreement, his liability as a guarantor was limited to US$3.5m and if the settlement agreement was upheld, then his liability was reduced to US$3m.

70 I turn next to the issue of the representations Kristle had allegedly made. Low's cross-examination revealed that Kristle had not in fact made any representations to ICP/Low that certain approvals had been granted. The representations in fact came from PTBA. Low agreed that ICP was advised by a reputable Singapore law firm in its negotiations with Kristle, on the two novation agreements and the three Agreements. (Indeed, it was ICP's solicitors who drafted the novation agreements). This was also the finding of the arbitration tribunal who concluded (at para 64 of the Award) that ICP made its own investigations and assessed the risks involved and eventually exercised its own judgment, independent of any representation even if the same had been made. The tribunal went on to add that ICP's claim based on misrepresentation failed at the threshold. (Low confirmed in cross-examination [N/E 143] that he accepted the findings of the arbitration tribunal in relation to his liability as guarantor but not the Award). Low denied counsel's suggestion that his allegation of misrepresentation was raised as an afterthought in an attempt to avoid paying what was due to Kristle under the second novation agreement, as well as to avoid his liability under the Guarantee

71 It would appear from cl 3.8.1(b) of the 3 New Agreements (see 1AB 479) that should GBPC fail to obtain government approval especially from the MME, ICP had the option to withdraw from the three new Agreements but Low did not exercise that right. In fact, not only did ICP not withdraw from the three new Agreements but it emerged from the evidence that Low had given up his Singapore citizenship to become an Indonesian citizen; one can only assume that such a drastic move was for economic/commercial reasons.

72 Low revealed that he had sold off his shares in ICP for a consideration of S$1.00 and disposed of his shares in PTJS in January 2002 for the Indonesian Rupiah equivalent of S$21,754.92

The defendants' case

73 As stated earlier [35], the second defendant was the defendants' only witness. As he testified in Japanese, I was conscious of the disadvantages of such translated testimony. The second defendant filed separate AEICs for the two suits. In his AEIC for the first suit, the second defendant alleged that the plaintiffs brought the action to harass the defendants. He contended that Kristle did not in any way breach its duty of confidentiality and all it had tried to do was to recover payment of what was due to it at law.

74 In relation to para 3 of the first letter in [47], the second defendant's AEIC for the first suit identified the persons consulted by Kristle as Arief Kusmo ("Kusmo"), V Surya T ("Surya") and Haji Mirhanuddin Samad ('Samad"). Kusmo was an Indonesian fluent in Japanese who acted as Kristle's/the second defendant's interpreter, Surya was a consultant engaged by Kristle while Samad was the President of GBPC at the material time. The second defendant was informed by Samad that he (Samad) was very close to Low. The second defendant said he did not consult any of the three gentlemen on the Award. He merely told them he had not been paid even $1.00 under the Award.

75 The second defendant was cross-examined on Kristle's letter dated 1 September 2001 in [16] to ICP even though it was not the subject of complaint or form part of the plaintiff's pleaded case. The second defendant explained he had merely told his creditors that the Award was out *viz* it had been issued but he did not inform them of the contents. In cross-examination, the second defendant revealed he and JOC had borrowed money from his personal friend Mr Sanai ("Sanai") to fund his coal mining venture which cost included engaging a team of Japanese geologists to visit the designated areas to carry out surveys and whose report convinced the second defendant of the feasibility of the coalmine(s).

76 Although Sanai had wanted the second defendant to assign the Award, the second defendant denied he had revealed to Sanai details of the Award. He had merely told Sanai that ICP, the debtor, had asked for a discount on what was due to Kristle. According to the second defendant, all that he told Sanai was that SIAC was well respected and so too were its arbitrators.

77 The second defendant explained Sanai was aware of the second novation agreement, that Low had not paid the balance $3.5m and the dispute arising therefrom. Sanai was also aware the dispute had gone for arbitration before the SIAC and of the subsequent Award. The Award was issued in January 2001 and when nothing happened after three years, Sanai wanted to know what the second defendant was doing to recover the debt owed by ICP. Sanai had pressed the second defendant to repay his loan and the second defendant had apparently assured Sanai that Low would pay the Award and in turn the second defendant would pay Sanai. Consequently, Sanai was upset when he learnt that Low did not keep his promise to pay the Award.

78 In his AEIC for the first suit, the second defendant had deposed that in August 2001, the MME wanted to know the position concerning the coal mine dispute, on an investigation initiated by Kristle. The MME also wanted to interview Low. Consequently, there was no question of the second defendant breaching the Confidentiality Rule by voluntarily divulging information to the MME on the arbitration and Award.

79 In his AEIC for the second suit, the second defendant denied there was a settlement agreement as the plaintiffs had alleged. The second defendant deposed (in para 22) that given the amounts involved, the importance of the matter, the history of ICP and Low reneging on their obligations even when such obligations were clearly spelt out in documents, ICP's proposals to effect payment by instalments over an extended period of time and Kristle's ability to legally enforce the

Award immediately in various countries, he would not have entered into any oral agreement with ICP to settle Kristle's claims arising from the Award.

80 As for the plaintiffs' other claims, the second defendant deposed they were a rehash of what was claimed and decided at the arbitration and the plaintiffs ought not to be permitted to re-litigate issues decided against them there or raise issues they could have raised but failed to, at the arbitration. He added that the plaintiffs' allegations of misrepresentations were contrived and were unfounded.

81 As nothing turns on the second defendant's cross-examination in relation to the second suit, I shall proceed to deal with the issues involved. For the first suit, the only issue was whether the defendants had breached the Confidentiality Rule.

The findings

(i) The first suit

82 As a matter of law, an obligation of confidentiality is to be implied in arbitration proceedings due to the private nature of such proceedings. Oft-cited English authorities like *Dolling-Baker v Merrett* [1990] 1 WLR 1205, *Hassneh Insurance Co of Israel v Steuart J Mew* [1993] 2 Lloyd's Law Report 243, *Ali Shipping Corporation v Shipyard Trogir* [1999] 1 WLR 314 and *AEGIS v European Re* [2003] 1 WLR 1041as well as the local case *Myanma Yaung Chi Oo Co Ltd v Win Win Nu* [2003] 2 SLR 547 reinforces the point. In this regard, I prefer the English position to Australia's where the High Court (see *Esso Australia Resources Ltd v Plowman* (1995) 128 ALR 391 adopted a contrary interpretation. I therefore reject the defendants' contention that there would be no room for a duty to be implied in the face of an express provision in the Confidentiality Rule [18]. Nor do I accept their interpretation that once the arbitration had concluded and the Award was issued, the Confidentiality Rule no longer applied.

83 The implied rule is not in dispute; it is the exceptions to the duty of confidentiality both under common law and under the Confidentiality Rule that give rise to controversy and which in this case will determine the fate of the first suit.

84 The principles that can be extracted from the last English authority cited above *viz* the Privy Council decision in *AEGIS v European Re* were that (unlike the approach taken by Parker LJ in *Ali Shipping Corporation v Shipyard Trogir*) there should be no generalizations of what the duty of confidentiality encompassed as each case should be evaluated in the context of its circumstances. Further, following the approach taken by Colman J in *Hassneh Insurance Co of Israel v Steuart J Mew*, a distinction has to be drawn between different types of confidentiality attaching to different types of documents. Arbitration awards were also to be treated differently from the materials used or disclosed in the course of arbitration proceedings.

85 With the above observations in mind, I turn now to para 3 of the first letter [47] complained of. The plaintiffs' closing submissions (para 128) interpreted the words "initiate legal proceedings" therein to mean proceedings to enforce the Award. That was a possible interpretation as the Award was subsequently converted to a judgment on 30 January 2008. However, it should be noted that the three persons the second defendant "consulted" in this paragraph (see [74]) were no strangers to the dispute. Two (Kusmo and Surya) were employed by Kristle while Samad headed GBPC as its President. It goes without saying that they would have "intimate knowledge of [ICP]'s present situation" – these persons would have known of the novation and other agreements before the second defendant consulted them and before the arbitration even began. The fact that Low chose to

read more into para 3 than what was stated is no reason to find the defendants liable for breach of the Confidentiality Rule. Moreover, I accept the defendants' submission that once the Award was registered as a Singapore judgment, it entered the realm of the public domain and no privacy can attach to enforcement proceedings attendant on the judgment.

86 I turn next to the second letter. After some prevarication and after admonition by the court (N/E 79), Low eventually confirmed that his objection was only to para 2 therein as set out in [48] above. Essentially, Low's complaint was that the defendants should not have disclosed to the MME the existence of the arbitration. However, more than one year earlier, ICP itself had in its letter dated 15 May 2000, informed the MME of the second tranche of the arbitration then in progress. Low had also revealed (at N/E 101) that his colleague Wibowo had explained the arbitration dispute to the Jakarta police when Wibowo procured a copy of the fifth letter (see [54] above). What is sauce for the goose is sauce for the gander. It lies ill in the mouth of the plaintiffs to complain against the defendants when they themselves breached the Confidentiality Rule much earlier. Even if the defendants did disclose the arbitration to the MME, they came within exception (e) of the Confidentiality Rule [18]. The court had questioned Low (N/E 81) and he had agreed that if the plaintiffs were summoned by government bodies like the MME, they could not refuse to attend the meeting/interview. I have no hesitation therefore in dismissing this complaint as frivolous and/or *mala fide*.

87 The complaint on the third letter [50] was equally unmeritorious. Paragraph 6 referred to ICP/Low being questioned by the MME, when it was ICP who had made the first approach to the MME. As for para 7, there was no mention at all of or reference to, the arbitration. The third letter was simply a demand for payment of what was owed to Kristle. I cannot understand how the plaintiffs and Low in particular can complain in essence that it was an affront for a judgment creditor to demand payment from its judgment debtor.

88 Next I turn to paragraphs 5 and 6 of the fourth letter in [52]. Again, there was no mention of the arbitration in para 5. While para 6 referred to the Award, there was no indication that the defendants had disclosed the same. Without details being furnished in para 6 itself, the complaint (that the defendants had disclosed the arbitration/Award) remained a mere suspicion in the mind of Low.

89 It was clear from the correspondence that Low had made threats and/or caused threats (express or veiled) to be made against the second defendant (as can be seen in ICP's letter dated 28 March 2003 in [51] above) causing the second defendant to be fearful for his personal safety and to be unwilling to return to Indonesia, particularly in the face of ICP's insistence that all meetings between the parties take place in Jakarta. Indeed, the second defendant testified that he was advised by the Japanese Ministry of Foreign Affairs not to visit Indonesia to avoid the risk of being unjustly arrested.

90 On the face of it therefore, it was concern for the second defendant's safety that prompted Interpol Tokyo to write the fifth letter in [53] to its Jakarta counterpart – to seek assistance to trace the second defendant's whereabouts. No satisfactory explanation was given by Low as to how he came to lay his hands on the letter. Obviously, his colleague Wibowo [54] who (Low revealed) secured the letter had very strong connections with Indonesian government officials and the police in particular. Wibowo could and should have been called to testify. As he was not, I can only assume any evidence he would have given would not have assisted the plaintiffs.

91 It emerged from the second defendant's cross-examination (N/E 270) that he had been called up by Interpol Tokyo on a complaint Low had made against him to Interpol alleging the defendants

were guilty of cheating and defaults. Again, Low, not the defendants, had first breached the Confidentiality Rule in this regard.

92 It was obvious from the correspondence adduced at the trial that Low/ICP had no intention of paying the Award to Kristle at all, as the defendants argued in their closing submissions. The many letters of ICP to the defendants were merely to play for time in the hope that the Award would become time-barred (which defence was indeed raised to the defendants' counterclaim in the second suit) and/or that the defendants would eventually abandon their attempts to recover the Award. I arrive at this conclusion based on a number of observations. First, every letter (save for one or two) from ICP/Low was headed "without prejudice". Secondly, not once did ICP/Low refute the defendants' repeated accusation that Low/ICP had reaped huge profits from the coal mines in the designated areas. Consequently, Low's evidence and claim in court that he received no consideration for ICP's payment of US$1m to Kristle defies belief and was rejected by the arbitration tribunal. Next, neither Low nor Helen objected to or took issue with the defendants' statements relating to disclosure of the arbitration and/or Award. Indeed, the first time the objection was raised was in the plaintiffs' solicitors' letter dated 29 March 2005 (at 3AB 231), well after these proceedings had been commenced. Finally, it bears remembering, by Low's own testimony, that by the time of the trial if not earlier, ICP had become a dormant or defunct company. Even if the Confidentiality Rule or implied duty of confidentiality had been breached, what was the prejudice to Low and/or ICP? Was his motive to ensure that the public did not come to know of his failure and/or refusal to honour an Award that arose from his own unsuccessful arbitration claim?

93 Not content with not paying Kristle a single cent of the Award either by ICP or personally as its guarantor, Low decided to launch yet another offensive by these suits to harass the defendants (especially the second defendant) further. The plaintiffs' claim in the first suit was completely without merit.

94 Counsel for the plaintiffs had cross-examined the second defendant (sometimes at length) on three other letters besides the four letters in issue. The first was the letter dated 1 September 2001 ("the September letter") from Kristle to ICP rejecting the settlement agreement. I had earlier observed [75] that the September letter did not form part of the plaintiffs' pleaded case. In their submissions (para 189), the plaintiffs sought to argue that their pleaded case was breach of confidentiality and the September letter formed part of the evidence of the breach. I reject this argument. In the same way that the plaintiffs had pleaded the four letters and the portions thereof which they claimed breached the duty of confidentiality, it was incumbent on the plaintiffs to specifically plead the September letter if it formed part of their case.

95 The second additional letter that was not pleaded was that dated 3 March 2005 to Low from Donald Cameron [2] ("Cameron's letter") who is/was the second shareholder and chairman of Kristle [2], written at the second defendant's request and copied to the second defendant. Cameron's letter attached a statement of the amount due to Kristle as of end February 2005 and included the following para 3:

> Over the past year or so we have received requests from the Asian Wall Street Journal who would like to print our story. Till now we have declined however we have put together a write-up which we will be submitting to them, and possibly other newspapers next week.

96 Annexed to Cameron's letter was a write-up that Kristle had purportedly drafted and which it intended to send to the Asian Wall Street Journal ("AWSJ"). The write-up contained the following paragraphs:

> Over several years Kristle tried to have Mr Low honour the contract by either paying or returning the rights. However, suddenly in Sept 1999 Kristle was informed that Mr Low had initiated arbitration proceedings against Mr Toyoshige claiming misrepresentation. As compensation Mr Low demanded that Kristle return to him the US$1 million that he had already paid. However, Mr Low had no intention of returning the rights to Kristle Trading, nor would his company leave the coal mine site, he just wanted all the rights be bought from Kristle Trading for free.
>
> After a long Arbitration in Singapore the Arbitration Tribunal ruled in favour of Kristle Trading's counterclaim and requested the Tribunal to return them their rights, however the situation had become so complex that the Tribunal had no option but to award Kristle the outstanding contract amount plus interest.
>
> Please note that although the Tribunal ruling was against International Coal Pte Mr Low had signed a personal guarantee indemnifying Kristle should International Coal Pte not perform to their obligations.
>
> Kristle waited and waited but payment was not forthcoming. Several months later Mr Low made an impassioned plea to Mr Toyoshige claiming he was on the verge of bankruptcy, and asked for a 70% discount on the Award. Naturally Kristle did not accept this….

97 Unpleasant as it may sound, it seemed to me that the above extracts accurately reflected what transpired before and after the arbitration. The plaintiffs' submissions (para 265) complained that Cameron's letter (together with the third letter in [99] below) "showed a propensity of the second defendant to go to any lengths to add undue pressure onto ICP including further disclosure of confidential information to other third parties". Given my observations in [89] to [92], I would have thought the pressure was being exerted on the defendants by Low, not *vice versa*.

98 Looking at the matter from the second defendant's standpoint, I was not entirely surprised by Cameron's letter or the write-up intended for the AWSJ. The second defendant had reached the end of his tether. He had tried unsuccessfully for the past four years (2001 to 2005) to recover the Award from Low/ICP. He must have been driven to desperation in what he intended to do. However, the letter was not and never sent to the AWSJ.

99 The third additional letter was that dated 12 March 2007 (at PB9) from Toshiki Kaifu, a former prime minister of Japan, to the Indonesian President ("the Kaifu letter"). It was a confidential communication between two politicians which copy the second defendant obtained from Sasaki Akio ("Akio") the first secretary to Toshiki Kaifu. The Kaifu letter stated:

> In 1995 Mr Toyoshige sold his rights relating to GBPC to a company owned by a Mr Low Tuck Kwong (TKLow) who at that time had Singapore nationality. However, soon thereafter TKLow obtained Indonesian nationality, defaulted on his contract with Mr Toyoshige, kept the rights of GBPC and since then has made a huge profit selling the coal from this profitable mine.
>
> Already 10 years have passed since TKLow unilaterally breached the contract with Mr Toyoshige. Related to this dispute TKLow also lost an International Arbitration in Singapore 6 years ago but has not yet paid even one dollar of the Arbitration Award that was granted to Mr Toyoshige...
>
> TKLow has lost International Arbitration and has not lived up to the judgment. Moreover, he has filed a suit through Interpol against an innocent man to stop him coming to fight for what is rightly his…

100 The plaintiffs alleged that the Kaifu letter was a forgery, relying on two unsigned letters purportedly issued by one Ryuichi Umemoto. The unsigned letters were also not on any official letterhead. As counsel for the defendants objected to the authenticity of these documents and the maker was not called, counsel for the plaintiffs wisely did not press the issue.

101 The plaintiffs' objections to the Kaifu letter focused on the fact that it must have been the defendants who disclosed the arbitration to the former premier of Japan. In their closing submissions, the defendants put the blame for the Kaifu letter squarely on the plaintiffs' conduct. It was said that had ICP and/or Low effected payment of the Award and had they not lodged false reports against the defendants with the Indonesian police and exposed the second defendant to the risk of being unjustly arrested, the latter would not have been compelled to protect his interests by enlisting the assistance of Toshiki Kaifu.

102 I note again that the Kaifu letter, like the September letter [94] and Cameron's letter [95] was not pleaded and hence merit no consideration in any event. Further, the letter was only sent last year. Coupled with the fact that the Award is now a judgment, any confidentiality that attached to the arbitration and/or the Award had been removed by the plaintiffs' own action in instituting these proceedings and making the arbitration and the Award a matter of public record. I should point out that at the commencement of trial, counsel for the plaintiffs applied in Summons no. 398 of 2088 to have the proceedings held in camera. I disallowed the application as the plaintiffs (particularly Low) failed to provide any valid reasons to support the unusual request. The plaintiffs did not appeal against my decision. The plaintiffs chose to sue in Singapore and they must live with the publicity, if any, attendant on law suits in Singapore.

103 It would be apposite at this juncture to make my observations on the veracity of the two key witnesses. Contrary to the lengthy submissions of the plaintiffs' counsel in that regard, I was of the view that the second defendant's evidence was more reliable than Low's, whose testimony was marked by constant prevarication and sometimes contradictions. Low did not impress me as a witness of truth.

104 On the evidence, I find that the plaintiffs have failed to prove their case in the first suit on a balance of probabilities.

(ii) The second suit

105 The issues in the second suit for determination are:

(a) Was there a settlement agreement or compromise?

(b) Did Kristle make the misrepresentations the plaintiffs alleged?

(c) If he is liable, what is the extent of Low's liability as guarantor?

(d) Would issue estoppel apply to the plaintiffs' claim?

Each of the above issues will be dealt with in turn.

(a) Was a settlement agreement reached at the Tokyo meeting?

106 The plaintiffs relied on ICP's letter of 28 June 2001 to the defendants and the defendants' letter dated 6 July 2001 as evidence that a settlement agreement had been concluded. ICP's letter referring

to the settlement agreement was self-serving and should rightly be ignored. As for Kristle's letter, all that it said was:

> The Agreement is now under preparation by our Lawyer and according to him, draft will be ready early next week.

It is difficult to tell from the cryptic sentence above whether Kristle was indeed preparing the alleged settlement agreement since its letter did not refer to ICP's letter at all. What was noteworthy was the draft agreement which Kristle eventually forwarded to ICP under cover of its letter dated 9 December 2002 (at 3AB 186) did not reflect the alleged settlement agreement. The draft required payment in accordance with the Award. Provided Kristle received payment of the Award, Kristle agreed not to enforce the Award. A draft guarantee to be signed by Low was also forwarded.

107 It was ICP who changed the terms of Kristle's draft to reflect a settlement sum of US$3m, after its solicitors had amended the draft which it then returned to Kristle on 30 January 2003 again under a "without prejudice" cover. The parties never signed any agreement to confirm the settlement.

108 Letters after 30 January 2003 from Kristle to ICP/Low would have removed any doubts that there may be, of Kristle's refusal to accept the settlement agreement. Paragraph 22 of the second defendant's AEIC for the second suit (see [79] above) explained why he would not have accepted Low's proposal. Consequently, I find that there was no settlement agreement whereby the defendants agreed to a compromise of US$3m in full and final settlement of the Award.

(b) Did Kristle make the representations to ICP that the requisite approvals had been obtained from PTBA and MME?

109 This issue was raised and adjudicated at the arbitration proceedings and answered in the negative by the tribunal (see [70] above). Further, Low had admitted that the representations were not made by Kristle but by PTBA. Coupled with my finding below [146] on issue estoppel, the claim on misrepresentations was a non-starter and is accordingly rejected.

(c)(i) Low's liability as a guarantor

110 The plaintiffs' submissions argued that even if Low was liable as a guarantor, it was for the principal sum outstanding (of US$3.5m) and not for the sums under the Award since Low was not a party to the arbitration proceedings. The plaintiffs cited *Ex parte Young In re Kitchin* (1881) LR 17 Ch D 668 ("*Re Kitchin*") in support of their submission which headnote reads:

> In the absence of special agreement a judgment or an award against a principal debtor is not binding on the surety, and is not evidence against him in an action against him by the creditor, but the surety is entitled to have the liability proved as against him in the same way as against the principal debtor.

Reliance was also placed on *Bruns v Colocotrinis ("The Vasso")* [1979] 2 Lloyds Law Report 412 where Robert Goff J applied *Re Kitchin* as well as *Ards Borough Council v Northern Ireland Bank Limited* (an unreported 1994 case).

111 The defendants countered the above submission by relying on a local case *Oversea-Chinese Banking Corp Ltd v Ang Thian Soo* [2006] 4 SLR 156 where Choo Han Teck J while applying the principles in *Re Kitchin* declined to follow it. The case of *Compania Sudamericana De Fletes SA v African Continental Bank Ltd ("The Rosarino")* [1973] 1 Lloyd's Law Report 21 was cited as another

authority where *Re Kitchin* was not followed.

112 The plaintiffs further argued that Low was not liable in any event because the time-bar under s 6(1)(a) of The Limitation Act Cap 163 Revised 1996 edition ("The Limitation Act") had set in, as it commenced on 20 December 1997, when ICP defaulted in payment of the third instalment under cl 3.1 (c) of the second novation agreement. The plaintiffs pointed out that pursuant to the acceleration clause (cl 4 of the Guarantee), all outstanding sums then became due and Kristle could have enforced its rights against Low and/or PTJS. There was nothing in the Guarantee that stated Kristle must first proceed against ICP and obtain a judgment before it can seek recourse against the guarantors. A demand on the guarantors for payment was not even necessary under cl 2 of the Guarantee which states:

> This Guarantee shall be a continuing guarantee and shall remain in full force and effect so long any moneys remain owing under the Agreement, and may be enforced against each Guarantor without any demand being made on or proceedings taken against ICP.

while cl 4 states:

> Each Guarantor hereby agrees that if any event of non-payment under and pursuant to clause 3.1 and clause 7.1 of the Agreement occurs, the said Guarantors shall (whether or not any guarantor knows of the occurrence of such non-payment and/or the said notice having given to ICP) pay all the money balance payable under the Agreement.

113 The defendants on the other hand submitted that the principal claim of Kristle was premised on the obligations of Low and PTJS to make payment of the sums due under the Award. Hence, time only began to run from the date of the Award *viz* 31 January 2007. Under s 31 of The Limitation Act, Kristle's counterclaim would be deemed to have commenced on the same date as the plaintiffs' action viz 5 January 2005 so no issue of time-bar arose.

114 The defendants' submissions described the plaintiffs' arguments on cl 3.1 of the second novation agreement in [112] as misconceived because:

> (a) the payment dates in that clause were not absolute dates by which ICP was bound to effect payment of the amounts prescribed;
>
> (b) under cl 5.1 of the second novation agreement, if any payments under cl 3.1 were not made on their due dates, ICP's investigations on the coal reserves in the designated areas would be deemed uneconomical in which event ICP had the option of withdrawing from the project and returning to Kristle the rights transferred under the second novation agreement in exchange for a release of its obligations to make further payments under cl 3.1;
>
> (c) when ICP filed to make payment of the US$1m due under cl 3.1(c) at [57] on 20 December 1997, the deeming provision of cl 5.1 was triggered and gave ICP the option of withdrawing from the designated area and the second novation agreement;
>
> (d) in effect the time for making any further payments under cl 3.1 would be at large and subject to ICP's right to withdraw from the project;
>
> (e) as ICP continued to remain in occupation of the designated areas after 30 June 1999 (that being the effective period of the second novation agreement under cl 7.4) and failed to return to Kristle the rights under the document, its obligation to pay the balance US$3.5m crystallised on

that date.

115 Needless to say, the plaintiffs disagreed with the above arguments. They contended that contrary to the defendants' submissions (in relation to the question of issue estoppel which is dealt with below (in [137] to [148]), neither Low nor PTJS were privies of ICP in the arbitration proceedings so as to be bound by the Award; therefore the UK appellate court's decision in *House of Spring Gardens Ltd v Waite* [1990] 3 WLR 347 should not be followed.

116 If indeed Kristle's claim against the guarantors was time-barred, all the other arguments as to whether the Award was binding on Low and whether he was a privy of ICP at the arbitration would become academic as Low would not be liable.

117 I agree with and accept the plaintiffs' submissions that ordinarily, the six years limit to commence action started from 20 December 1997 (*viz* the deadline under cl 3.1(c) for the plaintiffs' payment of the third tranche of US$1m of the consideration of US$4.5m). Once ICP defaulted in payment of that sum, Kristle could and should have called upon the Guarantee and demanded payment from Low and PTJS. The fact that Low took the offensive instead by commencing arbitration proceedings against Kristle is no excuse for the defendants not to have commenced a suit, which if necessary or by agreement, could have been stayed pending the arbitration. Such a suit could then have been revived once the Award was issued on 31 January 2007. Consequently, as Kristle failed to commence any action against the guarantors before 20 December 2003, its claim against Low and PTJS should have been time-barred.

118 However, the time-bar did not set in. Earlier, I had observed (in [92]) that ICP generally labelled its letters "without prejudice" but <u>not</u> its letter dated 28 June 2001 and its subsequent chaser dated 3 July 2001. ICP's letter dated 28 June 2001 addressed to the second defendant as the President-Director of Kristle was headed "Arbitration No. 78 of 1999" and stated as follows:

> Please refer to the meeting today in Tokyo. The meeting was attended by our representatives Mr Low Tuck Kwong and Mr Lim Chai Hock and your representatives Mr Nakahara and your goodself.
>
> It has been agreed in the referred meeting that both parties to the captioned arbitration had reached full and final settlement. With this settlement, there shall be no further claims by either party against the other parties or the guarantors or any other persons/organisations.
>
> The settlement shall only consist of payments by International Coal Pte Ltd to Kristle Trading Ltd as follows:
>
> 1 One first payment of US$300,000 after the signing of the formal agreement.
>
> 2 Monthly payments of US$100,000 each beginning a month after The First Payment. There shall only be 27 of such Monthly Payments.
>
> It is also agreed that Kristle Trading will prepare the draft of the formal settlement agreement based on the agreed terms as described above. In this respect, we wait for your draft and hope to receive it as soon as possible.

119 The letter was an open acknowledgement that ICP (and the guarantors) owed Kristle the Award which ICP alleged had been compromised and reduced to US$3.5m. Under s 26(2) of The Limitation Act, the right to recover any debt or other liquidated pecuniary claim is deemed to have accrued on

the date of the acknowledgment or the last payment provided that under s 27 of the same Act, such acknowledgement was in writing and signed by the person making the acknowledgement. Under s 6(3) of The Limitation Act, a judgment is valid for 12 years from the date when the judgment became enforceable. Whichever way one looks at it, the time-bar had either been extended to commence from 28 June 2001 because of ICP's acknowledgement (as well as the guarantors) of the debt or further extended to run from 30 January 2008 when the Award was converted into a judgment that was enforceable.

120 How would ss 26 and 6(3) of The Limitation Act affect Low's liability as guarantor? Kristle no longer relied on s 3.1 of the second novation agreement for its claim. Kristle's claim against Low was now based on the Award which ICP had failed to pay, not based on the contract. Consequently, Kristle's counterclaim against Low was not time-barred. I should point out too that Low and PTJS did not take the position that they were discharged from liability as guarantors in the statement of claim because of time-bar. Rather, their stand (see [133] below) was that they were discharged from all liabilities because the second novation agreement was void and unenforceable. They only raised the issue of time-bar as a defence to Kristle's counterclaim. At law, Low cannot be allowed to approbate and reprobate when it suits his convenience to do so. He should not be allowed to resile from his original pleaded position that the Guarantee was valid but not enforceable because of failure of consideration under the second novation agreement. If the court finds there was no failure of consideration and the second novation agreement was valid, it must follow that Low remains liable as a guarantor.

(c)(ii) What is the extent of Low's liability as a guarantor?

121 Having dealt with the time-bar issue, I turn now to address the extent of Low's liability as a guarantor. Both in Low's oral testimony and in the plaintiffs' closing submissions it was contended that Low's liability only extended to the unpaid balance of US$3.5m under cl 3.1 of the second novation agreement. The defendants not unsurprisingly disagreed and asserted that Low and PTJS were liable for the Award.

122 The instalment payments under cl 3.1 were set out in [57] above together with the wording of the operative clause in the Guarantee in [59]. It would appear from the clear wording of the latter clause that Low's liability was indeed limited to cl 3.1. As there was no reference to arbitration or any award arising out of arbitration proceedings, I agree with the plaintiffs' submissions that Low's liability was limited to the outstanding sum owed by ICP of US$3.5m. Further, contrary to the defendants' submission, cl 7.1 of the second novation agreement has no application as it cannot be read in isolation but must be seen in the context of the entire cl 7.

(d) Are the plaintiffs estopped from making their claim by reason of the arbitration/Award?

123 This fourth and final issue is tied up with the question of whether Low and PTJS were privies of ICP in the arbitration and the latter issue should therefore be dealt with first. At law (see *Halsbury's Laws of England* 2003 4th edition reissue vol 16 [2]), there are three classes of privies *viz*:

(i) privies in blood (eg ancestor and heir);

(ii) privies in law (eg testator and executor, bankrupt and trustee in bankruptcy) and

(iii) privies in estate or interest (eg vendor and purchaser, landlord and tenant, testator and devisee).

We are only concerned with the third category since (i) and (ii) would obviously not apply.

124 The defendants' closing submissions relied on the following facts in support of their arguments that Low and PTJS were indeed privies of ICP:

(a) Low was at the time of the arbitration, the managing-director of ICP and had conduct of ICP's claims and defences in those proceedings;

(b) Low was the sole witness of fact for ICP at the arbitration. He would have/ought to have raised all claims and defences available to ICP in the arbitration. He filed four affidavits and applied twice to amend ICP's claim in the arbitration;

(c) It was in the interest of Low and PTJS to participate in the arbitration proceedings because both were jointly and severally liable not as sureties but as primary obligors, together with ICP, under the second novation agreement;

(d) At the time of the arbitration, Low was the President-Director of PTJS;

(e) Low was inextricably involved with the second novation agreement given that he had signed the document on behalf of ICP and he had also signed the Guarantee on behalf of PTJS;

(f) ICP was incorporated by Low for the sole purpose of undertaking the coal mining venture envisaged under the second novation agreement;

(g) Low was the ultimate decision-maker of ICP;

(h) Low's evidence was the cornerstone of ICP's claims in the arbitration.

125 The defendants also referred to Low's testimony under cross-examination (N/E 106-107) where he admitted that he took charge of the arbitration proceedings for ICP. Reliance was also placed on s 19B of The IAA for the argument that the Award bound Low and PTJS.

126 The plaintiffs on the other hand argued that Low and PTJS were only guarantors, and not privies, of ICP. It was pointed out that there was no mention of the Guarantee in the arbitration which was also not with or against Low/PTJS. Kristle could have but did not, invite the two guarantors to participate in the arbitration and must live with the consequences of its omission.

127 The plaintiffs submitted that the court in *Tohru Motobayashi v Official Receiver & Anor* [2000] 4 SLR 529 held that privity was not established merely by having some interest in the outcome of the litigation. It was also Low's testimony (at N/E 147 in re-examination) that his staff members Loo Wai Hoon and Jaspal Singh also attended to the arbitration and instructed ICP's lawyers. Further, the defendants' authority *House of Spring Gardens v Waite* could be clearly distinguished on its facts. Finally, s 19B of The IAA did not apply as neither Low nor PTJS were making any claims or claiming through or under ICP.

128 Section 19B (1) of The IAA states:

> An award made by the arbitral tribunal pursuant to an arbitration agreement is final and binding on the parties and on any persons claiming through or under them and may be relied upon by any of the parties by way of defence, set-off or otherwise in any proceedings in any court of competent jurisdiction.

129 As for issue estoppel, the plaintiffs argued it did not arise as the second suit had new issues that were not raised in the arbitration proceedings. Citing *Lee Tat Development Pte Ltd v Management Corporation of Grange Heights Strata Title No. 301 (No.2)* [2005] 3 SLR 157 ("*Lee Tat*"), the plaintiffs argued that there had to be a final and conclusive judgment on the merits by a court of competent jurisdiction and an identity between the parties to the two actions that were being compared before there can be issue estoppel.

130 The plaintiffs submitted the following new issues were raised in the second suit and not determined at the arbitration:

(a) that the Guarantee was void and unenforceable due to misrepresentations by Kristle that the necessary board approvals had been obtained for Kristle to enter into the first and second novation agreements and those for the coal-mining activities envisaged under the coal mining agreement;

(b) that there was an implied term and/or condition precedent to the second novation agreement that the requisite approvals would be obtained; and

(c) there was no consideration for the first novation agreement which rendered it void and unenforceable and in turn rendered the second novation agreement void and enforceable.

131 It would be appropriate at this juncture to revisit the Award to ascertain the dispute that was determined at the arbitration proceedings. In this regard, I quote from paras 48 to 51 of the Award:

48 In the circumstances, the claimants [ICP] now maintain 3 causes of action against the respondents [Kristle]

(a) that Kristle had misrepresented to ICP that approval of PTBA had been obtained for GBPC to enter into the 3 agreements with ICP or JOC;

(b) PTBA's approval which was necessary for any transfer of rights under the [coal mining agreement] had not been obtained;

(c) Kristle had no rights under the coal mining agreement and would not be entitled to transfer such rights to ICP;

(d) that there was a total failure of consideration for the payment of US$1,000,000 paid to Kristle.

49 ICP therefore claimed a rescission of the second novation agreement and a refund of the US$1,000,000 paid to Kristle. ICP quantified their other losses at S$36,578.20.

50 Kristle's Defences to the claims are principally that:

(a) the contractual provisions cited by ICP do not contain the alleged representations, nor do clauses 30.1 and 30.2 of the coal mining agreement require any PTBA approval for the agreements. In any event, ICP did not rely on the alleged representations but on their own investigations and legal advice.

(b) the rights which were acquired under the 3 agreements were contractual rights against GBPC and not against PTBA. GBPC's position as sole obligor to PTBA for the performance of its

obligations under the coal mining agreement remained unchanged as a result of GBPC entering into the 3 agreements.

(c) the contractual rights of JOC as against GBPC are what ICP bargained for and duly received pursuant to the second novation agreement.

51 Kristle counterclaimed against ICP for the payment of the balance of the payments due under the second novation agreement of US$3,500,000 and for specific performance under clause 5 thereof for the unconditional return of all rights assigned to ICP thereunder, orders for consequential accounts and inquiries for assessment of damages as may be necessary.

132 In their findings, the arbitration tribunal dealt with the issues of misrepresentations, inducement (to enter into the second novation agreement), breach of implied terms of the second novation agreement, transfer of rights, total failure of consideration, all of which claims of ICP were dismissed while Kristle succeeded on its counterclaim

133 It would be apposite to refer again to certain paragraphs (see [26] and [27]) in the statement of claim in the second suit by way of contrast to the above extracts from the Award. In paras 22 to 26, ICP resuscitated the allegations of misrepresentations by Kristle, the lack of necessary approvals to enter into the two novation agreements and breach of implied term and/or condition precedent in the second novation agreement. In para 31, it was pleaded as an alternative that there was no consideration for the first novation agreement as which result the same was void and unenforceable. This was followed by the plea in para 32 that the consideration for the Guarantee had wholly failed and Low and PTJS were discharged from all liabilities, which pleading I have already alluded to earlier [27]. Clearly, ICP attempted to re-litigate the same issues from the arbitration in the second suit. The company even called the same expert witness Pascoal [36] that it called for the arbitration, although Pascoal attempted to change his testimony in court somewhat, as his expert evidence was apparently not accepted by the arbitration tribunal.

134 It would be helpful now to consider the rationale for the Court of Appeal's decision in *Re Kitchin*, that the guarantor in the case should not be held to be bound by an arbitration award made against the principal debtor. James LJ said (at pp 671-672):

> The guarantee must be expressed in very clear words indeed before I could assent to a construction which might lead to the grossest injustice. If a surety chooses to make himself liable to pay what any person may say is the loss which the creditor has sustained, of course he can do so, and if he has entered into such a contract, he must abide by it….The arbitration is a proceeding to which he is no party; it is a proceeding between the creditor and the person who is alleged to have broken his contract, and if the surety is bound by it, any letter which the principal debtor had written, any expression he had used, or any step he had taken in the arbitration would be binding on the surety. The principal debtor might entirely neglect to defend the surety properly in the arbitration; he might make admissions of various things which would be binding as against him, but which would not, in the absence of agreement, be binding as against the surety.

James LJ's views were endorsed by Robert Goff J who followed *Re Kitchin* in *The Vasso* (supra [110]).

135 It is noteworthy that the facts in both those cases were vastly different from our case, which are much closer to the facts in *Oversea-Chinese Banking Corp Ltd v Ang Thian Soo* at [111]. There, the defendant was found by the judge (in *Oversea-Chinese Banking Corp Ltd v Infocommcentre Pte Ltd* [2005] 4 SLR 30) to be the alter ego of the company Infocommcentre Pte Ltd (of which he was

the guarantor) and was an unreliable witness. Choo J followed *Re Kitchin* and while agreeing that there was a possibility that the defendant might have defences as a guarantor that might not be available or applicable to the company, he could not ignore the connection with the case between the defendant and the company.

136 Similarly, I cannot ignore the close connection between Low and ICP as enumerated by the defendants in [124] above. Low was the alter ego of ICP and played a central role in its arbitration and in this litigation; he was its privy. It was not merely a question (as counsel for the plaintiffs attempted to show in re-examination) of instructing ICP's solicitors in the arbitration (where Low's two staff members were also involved) but of decision-making. That role was occupied by no one else but Low.

137 I revert now to the question of issue estoppel in which regard, I turn to look at an authority relied on by the plaintiffs *viz Johnson v Gore Wood & Co (a firm)* [2002] 2 AC 1 and the headnotes in particular. There, the plaintiff, a businessman, conducted his affairs through a number of companies including W Ltd, in which he held all but two shares. On behalf of W Ltd, he instructed the defendants, a firm of solicitors, who from time to time also acted on behalf of himself personally and of others of his companies, to act for W Ltd in connection with a proposed purchase of land which it planned to develop. It had an option to purchase the land, and the defendants were instructed to serve notice exercising the option. Service of the notice was followed by a dispute as to its validity and consequent proceedings in the Chancery Division where an order for specific performance was made against the vendor. By the time the conveyance was completed, W Ltd had suffered substantial loss because of the cost of the Chancery proceedings, its inability to recover damages and costs from the legally-aided vendor and the collapse of the property market. W Ltd started proceedings in January 191 against the defendants for professional negligence in relation to the exercise of the option.

138 Before the action came to trial, solicitors representing W Ltd notified the defendants' solicitors that the plaintiff had a personal claim against the defendants arising out of the same matters which he would in due course pursue. Subsequently, a solicitor for the plaintiff discussed with a solicitor for the defendants that it would be better to wait until the company's claim had been concluded before dealing with the personal claim. An overall settlement of W Ltd's claim and the plaintiff's claim was discussed, as was a settlement of the plaintiff's claim. The proceedings of W Ltd were eventually compromised during the trial on payment to the company of a substantial portion of the sum claimed.

139 In April 1993 the plaintiff issued a writ against the defendants. In December 1997 the defendants applied to strike out the writ as an abuse of process. They also sought determination of preliminary issues as to whether they had owed the plaintiff a duty of care and whether the damages claimed by him were in principle recoverable on the facts pleaded. The judge declined to strike out the plaintiff's claim, holding that the defendants were estopped by convention from contending that the plaintiff's action was an abuse of process. The Court of Appeal set aside the judge's order on the defendants' appeal and the plaintiff appealed to the House of Lords. His appeal was allowed, the law lords holding that the plaintiff's action was not abusive.

140 The law lords held that there was a public interest in the finality of litigation and in a defendant not being vexed twice in the same matter; but whether an action was an abuse of process as offending against that public interest should be judged broadly on the merits taking account of the public and private interests involved and all the facts of the case, the crucial question being whether the plaintiff was in all the circumstances misusing or abusing the process of the court and that, in all the circumstances, the plaintiff's action was not abusive. The finding against issue estoppel turned on the peculiar facts of the case, as can be seen from the judgments of the two of the law lords

referred to below.

141 Lord Goff of Chieveley (at 41B) noted that the defendants by their conduct in participating in negotiations for settlement of the company's claim on the basis that the plaintiff would thereafter be free to pursue his own personal claim against the firm lulled the plaintiff into a sense of security that he was free to pursue such a claim against the firm, without objections, in separate proceedings with the effect that it became unconscionable for the firm to contend that his personal proceedings constituted an abuse of the process of court. Lord Millet echoed much the same sentiments (at p 61A) – he opined that it would be unconscionable for the firm to raise the issue of estoppel after the way in which it handled the negotiations for the settlement of the company's action.

142 It would be helpful to look at the definitions of issue estoppel at this juncture. The defendants relied on the following definition found in *Halsbury's Laws of England* 4th edition reissue 2003 vol. 16(2) LexisNexis UK (at p 408 para 953):

> Estoppel by record also known as estoppel per rem judicatum arises:
>
> (2) where a legal claim has been judicially determined in a final manner between the parties by a tribunal having jurisdiction, concurrent or exclusive, in the manner and the same issue comes directly in question in subsequent proceedings between the same parties (this is usually known as cause of action estoppel);
>
> (3) where an issue has been judicially determined as a necessary step in reaching a judgment and the issue arises in subsequent proceedings between the same parties this is usually known as issue estoppel).
>
> The line between cause of action estoppel and issue estoppel is not always clear cut. The principles have been explained in a recent Court of Appeal decision as follows. If a claim has been explicitly determined in previous concluded proceedings between the same parties, that claim cannot be raised again, other than on an appeal, unless there is fraud or collusion. If a necessary element of a claim has been explicitly determined in previous concluded proceedings between the same parties, that issue cannot be raised again, if, as is likely but not inevitable, it would be an abuse to raise that issue again; this may also extend to an implicitly necessary element of the previous determination. The previous determination may include a settlement.

143 The defendants also relied on another extract from the same volume of *Halsbury's Laws of England* (at p 436 para 981) which states:

> The conditions for the application of issue estoppel require a final decision on the issue by a court of competent jurisdiction and that:
>
> (1) the issue raised in both proceedings is the same; and
>
> (2) the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

In this regard it would be appropriate to refer to the case cited by the plaintiffs (*supra* [128]) of *Lee Tat*. There, the Court of Appeal (in concluding there was issue estoppel due to earlier similar proceedings between the same parties) applied the test in [143] (at [14]) and cited with approval (at [15]) the following extract from *Arnold v National Westminster Bank Plc* [1991] 2 AC 93:

> Issue estoppel may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action, to which the same issue is relevant, one of the parties seeks to reopen that issue.

144 The plaintiffs on the other hand cited the following passage from *Halsbury's Laws of Singapore* (2003) reissue vol. 2 LexisNexis Singapore (at p 112 para 20.119):

> An award does not bind third parties as it operates only in personam between the parties to the arbitration. However, persons claiming rights under a party to the arbitration are bound by the terms of the award made in the arbitration.

to argue that issue estoppel did not apply to the second suit. I note however that *Johnson v Gore Wood* (if not for the finding of unconscionability in favour of the plaintiff) would seem to support the defendants' contention that there was indeed issue estoppel in ICP re-litigating the same issues that were canvassed and determined at the arbitration.

145 The law lords *Johnson v Gore Wood* had applied the following rule formulated by Sir James Wigram V-C in *Henderson v Henderson* (1843) 3 Hare 100 (at 114-115) of what constituted an abuse of process:

> In trying this question, I believe I state the rule of the court correctly, when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence , or even accident, omitted part of their case. *The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.* (emphasis added).

146 It had been conceded by the plaintiff in *Johnson v Gore Wood* that he was indeed a privy of W Ltd. Otherwise, the law lords would have made such a finding as Lord Millet had observed (at p 60) that the plaintiff was in a position to decide when to pursue the two claims and whether to pursue them together or separately. I am of the view that the same observation would equally apply to Low vis a vis the claims of ICP and PTJS. I would add that the case of *Tohru Motobayashi v Official Receiver & Anor* (supra [127]) does not assist the plaintiffs as the facts there are easily distinguishable from our case.

147 The House of Lords had also referred to the Court of Appeal's decision in *House of Spring Gardens Ltd v Waite* (*supra* [115]) which the defendants submitted should, but which the plaintiffs argued should not, be followed. The headnotes of the case reads as follows:

> The plaintiffs, in an action in Ireland against the three defendants for misuse of confidential information and breach of copyright, obtained judgment for some £3m damages. Following the dismissal of the defendants' appeal by the Supreme Court, the first and second defendants brought an action to set aside the judgment alleging that it was obtained by fraud. The action was dismissed. On the plaintiffs' claim against all three defendants in respect of the sum awarded by the Irish court, the judge, in the absence of any new evidence, held that the defendants were

estopped from alleging in the present proceedings that the judgment in question was obtained by fraud. On appeal by the third defendant:-

Held, dismissing the appeal,

(i) that on the facts, the judge had correctly held that the first and second defendants were estopped from alleging that the prior Irish judgment was obtained by fraud and, since that judgment was a judgment against the defendants jointly and severally, the third defendant, even though he did not join in the Irish proceedings to set it aside, was well aware of those proceedings and was privy to them and, therefore, in the absence of any new evidence affecting the issue of fraud, the third defendant was similarly estopped.

(ii) Further, that even if the judgment did not create an estoppel, it was an abuse of the process of the court and contrary to justice and public policy for the issue of fraud to be re-litigated in the English court after the issue had been tried and decided by the Irish court.

148 Looking at the facts and applying the principles culled from the two English cases as well as from *Lee Tat*, I am of the view that the plaintiffs are estopped and cannot succeed in the second suit. I reject in this regard the plaintiffs' closing submissions (at paras 239 to 251) of the purportedly subtle differences between issues litigated in the arbitration and here. Further, contrary to the plaintiffs' submissions, it was for Low (who was effectively the claimant in the arbitration and therefore the privy of ICP) and not the defendants to bring the issue of the Guarantee into the arbitration. As Low could have/should have and failed to do so (bearing in mind the italicised portion of the rule in *Henderson v Henderson* in [145] above). I hold that it would be an abuse of process for him to do so now in the second suit. The Award was final and conclusive under s 19B(1) of The IAA [128] and cannot be impugned.

Conclusion

149 In the light of my findings, the plaintiffs fail in their claims and I dismiss both the first and second suits with costs to the defendants. I find for Kristle on its counterclaim and award it judgment in the sum of US$3.5m with interest and costs against PTJS and Low as the first and second plaintiffs respectively, under prayer 24(A) of the counterclaim.

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