IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2021] SGHCR 4

Originating Summonses Nos 1274 and 1275 of 2020

Between

CKR and another

… *Plaintiffs*

And

CKT and another

… *Defendants*

GROUNDS OF DECISION

[Arbitration] — [Enforcement]

TABLE OF CONTENTS

INTRODUCTION **1**

FACTS **2**

THE PARTIES 2

BACKGROUND TO THE DISPUTE 2

THE ARBITRATION PROCEEDINGS 4

The First Partial Award *4*

The Second Partial Award *5*

The Final Award *5*

The Additional Final Award *5*

THE SETTING ASIDE APPLICATIONS 6

THE LEAVE TO ENFORCE APPLICATIONS 7

DECISION **8**

WHETHER LEAVE TO ENFORCE THE SECOND PARTIAL AWARD, THE FINAL AWARD AND THE ADDITIONAL FINAL AWARD OUGHT TO BE GRANTED 8

The relevant legal principles *8*

Application of the legal principles *12*

CONCLUSION **17**

Version No 2: 10 May 2021 (14:41 hrs)

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CKR and another
v
CKT and another

[2021] SGHCR 4

General Division of the High Court — Originating Summonses Nos 1274 and 1275 of 2020
Eunice Chan Swee En AR
16 December 2020, 4 January 2021

26 April 2021

Eunice Chan Swee En AR:

Introduction

1 The enforcement applications in Originating Summonses Nos 1274 and 1275 of 2020 ("OS 1274" and "OS 1275", respectively) are unique. In OS 1274 and OS 1275, the Plaintiffs seek leave to enforce three separate arbitral awards before the Singapore seat court, when there are pending applications to set aside the same arbitral awards before the Singapore seat court. The issue was whether leave should be granted to enforce the arbitral awards. I granted leave and these are the grounds of my decision.

Facts

The parties

2 The Plaintiffs, together with another individual, were the beneficial owners of a company which conducted business in the travel industry ("the Company"). The principal operating company of the Company was CKU. CKU was jointly owned by the Plaintiffs and another individual. CKU is a Malaysian company.

3 The Company was acquired by CKT, which is a Mauritian company. Following CKT's acquisition of the Company, the Plaintiffs remained the Chief Executive Officer and the Chief Technical Officer of CKU.

Background to the dispute

4 In late 2012, the Plaintiffs agreed to sell 100% of the Company to CKT. A Share Purchase Agreement dated 26 September 2012 ("the SPA") was entered into by CKT, the Plaintiffs and two other beneficial owners of the Company. The SPA provided (amongst other things) that:

(a) CKT would acquire 100% ownership and control of the Company at both the shareholder and board level; and

(b) The 1st and 2nd Plaintiff, who were described as "Key Promoters" in the SPA would remain employed by CKU as Chief Executive Officer and Chief Technical Officer respectively, but would resign as directors of the Company. The Plaintiffs' employment was to be pursuant to Promoter Employment Agreements ("PEAs").

Version No 2: 10 May 2021 (14:41 hrs)

5 Under clause 2.2 of the SPA, the purchase price comprised of "Guaranteed Minimum Consideration" of US$25 million plus such "Earn Out Consideration", if any, that became payable.

(a) The Guaranteed Minimum Consideration comprised of an initial consideration of US$15 million to be paid in cash up front and as Escrow Initial Consideration and a "Deferred Consideration" of US$10 million to be paid in tranches of CKT shares.

(b) The Plaintiffs were entitled to be paid the Earn Out Consideration only if they met certain Earn Out Targets, measured against CKU's actual financial performance. The Earn Out Consideration was not to exceed the aggregate of US$35 million for the 2014-2015 Earn Out period and any extension pursuant to clause 12.1 of the SPA.

6 In January 2014, the Plaintiffs were issued termination letters, which dismissed their employment by CKU with immediate effect. The termination letters alleged that they had been terminated "With Cause". The effect of a "With Cause" termination is that the Plaintiffs were not entitled to the "Earn Out Consideration".

7 As the Plaintiffs took the view that they had been dismissed without cause, they commenced proceedings in the Malaysian Industrial Court ("the MIC") for wrongful dismissal as their employment agreements (namely, the PEAs) were governed by Malaysian Law. The MIC granted awards on 6 April 2015 and 29 July 2015 ("the MIC Awards") in favour of the Plaintiffs, finding that their dismissals had been "without just cause" and awarded them compensatory remedies based on their monthly salaries.

Version No 2: 10 May 2021 (14:41 hrs)

The arbitration proceedings

8 On 12 July 2016, the Plaintiffs commenced an arbitration against the Defendants pursuant to Article 17.4 of the SPA, on the basis that the Plaintiffs were entitled to the US$35 million in Earn Out Consideration from the Defendants because their terminations were "Without Cause". The seat of the arbitration was Singapore. A three-member tribunal ("the Tribunal") was constituted to hear the arbitration.

The First Partial Award

9 During the arbitration, pursuant to a case management conference and in consultation with the parties, the Tribunal directed (amongst other things) that there would be a hearing of a list of non-evidentiary legal issues for determination by the Tribunal. Parties agreed on the list of legal issues, and the hearing of the list of legal issues was conducted on 6 and 7 December 2017.

10 On 30 April 2018, the Tribunal issued a partial award ("the First Partial Award"). In the First Partial Award, the Tribunal found, amongst other things, that:

(a) The determinations by the MIC that the Plaintiffs were terminated without just cause or excuse were binding on the parties and conclusive as a matter of contract for the purposes of the SPA and the PEAs; and

(b) The Defendants were prevented from arguing that the Plaintiffs were terminated "With Cause" under the SPA and the PEAs by operation of the doctrine of issue estoppel under Singapore law, as the issue had already been determined by the MIC.

Version No 2: 10 May 2021 (14:41 hrs)

11 After the First Partial Award was issued, the Defendants filed an application seeking to review the Tribunal's decision and to set aside the First Partial Award.

The Second Partial Award

12 The Tribunal proceeded with the arbitration and issued a Second Partial Award dated 11 October 2019 ("the Second Partial Award"). The Second Partial Award mainly concerned the Plaintiffs' remaining claims and the issue of whether the Defendants' counterclaims were precluded by the reasoning of the First Partial Award. The Tribunal found in favour of the Plaintiffs and dismissed all the Defendants' counterclaims as being precluded by issue estoppel under Singapore law, save for one which it dealt with in the Final Award.

The Final Award

13 In the final stage of the arbitration, the Tribunal decided the Defendants' remaining counterclaim arising from the Plaintiffs' alleged breach of the warranties under the SPA during the acquisition negotiations ("the Remaining Counterclaim") and costs issues. In its Final Award dated 9 June 2020 ("the Final Award"), the Tribunal dismissed the Remaining Counterclaim for lack of jurisdiction; ordered legal and arbitration costs to be paid to the Plaintiffs; and refused to grant the Plaintiffs' request to recover the costs of their third-party funding arrangement.

The Additional Final Award

14 Further to the Final Award, the Tribunal issued an Additional Final Award dated 3 July 2020 ("the Additional Final Award"). In this Additional

Version No 2: 10 May 2021 (14:41 hrs)

Final Award, the Tribunal ordered the Defendants to pay the Plaintiffs damages for breach of the SPA.

The setting aside applications

15 Shortly after the Tribunal issued the First Partial Award, on 1 June 2018, the Defendants filed Originating Summons No 683 of 2018 ("OS 683") in the High Court seeking to challenge the First Partial Award on the following grounds:

> (a) that the Tribunal had jurisdiction to determine whether the respondents were terminated "Without Cause" for the purposes of the SPA pursuant to s 10(3)(b) of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("the IAA");
>
> (b) in the alternative, that the First Partial Award be set aside pursuant to s 24(b) of the IAA and Art 34(2) of the UNCITRAL Model Law on International Commercial Arbitration ("the Model Law").

16 The High Court dismissed the Defendants' application in full. On appeal, the Court of Appeal dismissed the appeal in Civil Appeal No 178 of 2019 ("CA 178") on 23 October 2020.

17 After the Second Partial Award was issued, on 8 November 2019, the Defendants applied to set aside the Second Partial Award in Originating Summons 1401 of 2019 ("OS 1401"). The Defendants (as in OS 683) sought to review the Tribunal's decision on jurisdiction pursuant to s 10(3)(b) of the IAA

Version No 2: 10 May 2021 (14:41 hrs)

and in the alternative, to set aside the Second Partial Award pursuant to s 24(b) of the IAA and/or Art 34(2) of the Model Law.

18 Subsequently, on 9 September 2020, the Defendants applied to set aside parts of the Final Award and the Additional Final Award in Originating Summons No 874 of 2020 ("OS 874") , on the same grounds as the grounds for challenging the First Partial Award and the Second Partial Award.

19 Parties had agreed for OS 1401 and OS 874 to be held in abeyance pending the final determination of the appeal against the High Court's decision to dismiss the Defendants' application to set aside the First Partial Award. However, after the decision by the Court of Appeal in CA 178, the Defendants took the position that they would nevertheless proceed with OS 1401 and OS 874.

The leave to enforce applications

20 It is in above context that the Plaintiffs seek to enforce the orders in:

(a) the Second Partial Award in OS 1274; and

(b) the Final Award and the Additional Final Award in OS 1275.

21 Crucially, the Plaintiffs seek leave to enforce these awards notwithstanding that in OS 1401 and OS 874, the Defendants have filed applications to set aside the same awards.

22 The Plaintiffs' position was that leave to enforce the Second Partial Award, the Final Award and the Additional Final Award may be granted even when there are pending setting aside applications for the following reasons:

Version No 2: 10 May 2021 (14:41 hrs)

(a) There is nothing in the IAA or the Rules of Court (Cap 322, R 5, 2014 Rev Ed)("Rules of Court") which provides that leave to enforce cannot be given when there are pending setting aside applications and/or that the Court has no power to grant such leave;

(b) The awards are final and binding under the terms of the arbitration agreement and s 19B of the IAA;

(c) Case law supports the submission that a pending setting aside application did not affect the Court's ability to exercise its discretion in favour of enforcement; and

(d) Order 69A r 6(4) of the Rules of Court provides a mechanism for a debtor to challenge an order granting leave to enforce. Therefore, there was nothing which prohibits leave to enforce from being granted if there were ongoing setting aside applications.

Decision

Whether leave to enforce the Second Partial Award, the Final Award and the Additional Final Award ought to be granted

The relevant legal principles

23 Enforcement of arbitral awards is a two-stage process in Singapore. First, an *ex parte* application is filed by the applicant for leave to enforce an award. The supporting affidavit filed in support must satisfy the requirements of s 30(1) of the IAA (in the case of enforcement of a foreign award) and O69A rr 6(1) and 6(1A) of the Rules of Court; in particular, the affidavit must:

(a) exhibit the arbitration agreement and the award

Version No 2: 10 May 2021 (14:41 hrs)

(b) state the name and the usual or last known place of business of the award creditor and debtor, and

(c) state either that the award has not been complied with or the extent to which it has not been complied with at the date of the application.

24 Once the formal requirements of O 69A rr 6(1) and 6(1A) of the Rules of Court are met, the Court would grant leave to enforce. The award creditor must serve the order granting leave on the award debtor pursuant to O 69A r 6(2) of the Rules of Court.

25 The approach at the first *ex parte* stage was considered by the High Court in *Aloe Vera of America, Inc v Asianic Food (S) Pte Ltd* [2006] 3 SLR(R) 174 ("*Aloe Vera*"). The High Court held (at [27] and [39] – [42]) that the examination that the court must make of the documents under O 69A r 6 is a *mechanistic/formalist* one, and not a substantive one:

> 27 This case was used by Mr Loh to substantiate the proposition that whether an arbitration agreement existed had to be decided on the basis of Singapore law. This reliance does not, however, take him very far. The court in the ***Hålogaland*** case held that "the contents of the E-mails appear obscure and incomplete and reflect just fragments of an agreement". Obviously, these documents did not even satisfy the formalities for the enforcement of an award as they did not constitute an arbitration agreement in writing as required by Arts II and IV of the Convention. *The Singapore court too would look at the document produced as the arbitration agreement under which the award had been made and consider whether under our law such document is capable of constituting an arbitration agreement. This would be a fairly formalistic examination as stated in [39] below.* Applying the ***Hålogaland*** case would not

Version No 2: 10 May 2021 (14:41 hrs)

require me to undertake a re-examination of the Arbitrator's decision on its merits.

…

39 The arguments put forward on behalf of Mr Chiew were rejected by the assistant registrar who considered that it was sufficient for the purpose of satisfying O 69A r 6 of the Rules for AVA to prove that Mr Chiew was mentioned in the arbitration agreement that was exhibited by AVA and that the arbitral tribunal had made a finding that Mr Chiew was a party to the arbitration agreement. *His conclusion was that the examination that the court must make of the documents under O 69A r 6 is a formalistic one and not a subtantive one.*

…

41 *After carefully considering the arguments, I have come to the conclusion that the assistant registrar was correct.* In the present case, there was a contract, the Agreement, between Asianic and AVA that contained an arbitration clause. The Agreement was signed by Mr Chiew on behalf of Asianic and it is not disputed that Mr Chiew had set up Asianic and was active in running its business with AVA pursuant to the Agreement. The provisions of the Agreement evidenced that the parties had agreed to disputes relating to the business established by that contract being resolved by arbitration and it was therefore capable of being considered as "an agreement in writing under which the parties undertake to submit to arbitration … differences which have arisen" within the meaning of that term in Art II of the Convention for an arbitration involving not only Asianic and AVA but also Mr Chiew himself. There can be no doubt that at the time he signed it, Mr Chiew anticipated that disputes arising from the business under the Agreement would be settled by arbitration although, probably, he was not contemplating that he himself would personally be a party to the arbitration proceedings. This holding is in line with the views expressed in *Proctor v Schellenberg* ([17] *supra*).

42 *The approach adopted by the assistant registrar is also supported by authority. The idea that the enforcement process is a mechanistic one which does not require judicial investigation by the court of the jurisdiction in which enforcement is sought was expressed in Robert Merkin, Arbitration Law (LLP, 1991)* (Service Issue No 42: 5 December 2005) at para 19.48 as follows:

> The Arbitration Act 1996, s 101(2) provides that a New York Convention award may, by permission of the court,

Version No 2: 10 May 2021 (14:41 hrs)

> be enforced in the same manner as a judgment or order of the court to the same effect, and s 101(3) goes on to state that "where leave is so given, judgment may be entered in terms of the award". This wording makes it clear that the enforcement process is a mechanistic one, and that the court may simply give a judgment which implements the award itself. It follows that the award cannot be enforced on terms not specified in the award, and in particular it can only be enforced against a person who was the losing party in the arbitration.
>
> [emphasis added in italics]

26 The mechanistic approach laid down in *Aloe Vera* was endorsed by the High Court in *Denmark Skibstekniske Konsulenter A/s I Livkidation (formerly known as Knud E Hansen A/S) v Ultrapolis 300 Investments Ltd (formerly known as Ultrapolis 3000 Theme Park Investments Ltd)* [2010] 3 SLR 661 (at [15]–[22]).

27 At the second *inter partes* stage, recognition and enforcement may be refused only if the award debtor applies to set aside the order granting leave on any of the exhaustive grounds under ss 31(2) and 31(4) of the IAA (in the case of a foreign international award) or under s 19 of the IAA read with Art 36 of the Model Law (in the case of a domestic international award).

28 The approach at the second stage is different from the mechanistic approach at the first stage. At the second stage, the award debtor must prove on a balance of probabilities the grounds relied on to resist enforcement. In this regard, the High Court in *Glasworthy Ltd of the Republic of Liberia v Glory Wealth Shipping Pte Ltd* [2011] 1 SLR 727 observed (at [11]) that:

> The reference in *Aloe Vera* to a "mechanistic process" referred to the first stage and not the second stage. With regard to the second stage, it is clear from the express wording of s 31(2) that a party ought to prove the grounds relied on a balance of probabilities, as was held in *Strandore*. The comments made in *Strandore* endorsed the above bifurcated analysis, and

Version No 2: 10 May 2021 (14:41 hrs)

> standards required in each stage ought not to be conflated with each other. I agree.

Application of the legal principles

29 Applying a *mechanistic* approach to the examination of the documents filed pursuant to O 69A r 6(1) of the Rules of Court, there is no doubt that the requirements under O 69A r 6(1) have been satisfied in the present case. The duly certified copy of the awards and a copy of the SPA containing the arbitration agreement have been exhibited to the supporting affidavit. The supporting affidavit further contains the information required under O 69A rr 6(1)(b)–(c) of the Rules of Court.

30 Even though there are pending applications to set aside the Second Partial Award, the Final Award and the Additional Final Award, this is not a reason to refuse leave to enforce. A pending application to set aside an award is not even a ground to refuse recognition and enforcement of an award under section 19 of the IAA read with Article 36 of the Model Law. Even if it were a valid ground for refusing recognition and enforcement, this is not an issue to be determined at the first *ex parte* stage in deciding whether leave to enforce an award should be granted.

31 Accordingly, simply because there are pending setting aside applications is not a reason to refuse leave to enforce the arbitral awards. This conclusion is consistent with the principle of finality. In this regard, the fact that there are *pending* setting aside applications does not affect the final and binding nature of arbitral awards.

32 In *PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara International BV and others and another appeal* [2014]

Version No 2: 10 May 2021 (14:41 hrs)

1 SLR 372, the Court of Appeal observed that Parliament's intention in aligning the effect of interim awards with that of final awards under s 19B of the IAA was driven by its object of providing that all awards – interim and final – should reflect the principle of finality. That said, an award is not unimpeachable. There are curial remedies available to challenge an award. However, the fact that such curial remedies are available, *per se,* does not affect the final and binding consequences of an award. The Court of Appeal stated (at [140] and [142]) that:

> 140 *It can be seen from Assoc Prof Ho's speech in the Second Reading of the Amendment Bill (see [137] above) that Parliament's intention to align the effect of interim awards with that of final awards was driven by its object of providing that all awards – interim and final – should reflect the principle of finality. What this meant was that an award, once issued, was to be final and conclusive as to the merits of the subject-matter determined under that award; and it could thereafter only be altered in the limited circumstances provided for in Arts 33 and 34(4) of the Model Law.* This is nothing more than another way of saying that the issues determined under the award are *res judicata*. This was also how Gloster J interpreted the equivalent provision in the 1996 English Arbitration Act, s 69, in *Shell Egypt West Manzala GmbH v Dana Gas Egypt Limited (formerly Centurion Petroleum Corporation)* [2009] 2 CLC 481. Section 69 provides that "[u]nless otherwise agreed by the parties, a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) appeal to the court on a question of law arising out of an award made in the proceedings". As the right of appeal under s 69 can be contracted out, the award creditor submitted that cl 14.3 of the arbitration agreement which states that the award shall be "final, conclusive and binding on the parties" manifested the parties' intention to do so.
>
> …
>
> 142 *In our view, it is clear that s 19B(1) had everything to do with res judicata of issues which results in the tribunal being functus officio in relation to awards already made, and nothing to do with the availability of curial remedies.* While s 19B(4) does talk about curial remedies, its effect was misconstrued by the Judge. We disagree that s 19B(4) imposes a positive obligation on the award debtor to challenge the award in an active manner, viz, setting aside, if it wishes to extricate itself from the otherwise "final and binding" consequences of the award. *The point of s 19B(4) is a negative one. As Gloster J pointed out,*

Version No 2: 10 May 2021 (14:41 hrs)

> *although issues determined under the award are res judicata, it was important to dispel the misconception that the award then becomes unimpeachable. On the contrary, it may still be challenged in accordance with the available processes of appeal or review of the award permitted by the law governing the arbitration. In short, s 19B(4) in fact clarifies what "final and binding" does not amount to.*
>
> [emphasis added in italics]

33 In similar vein, the Hong Kong Court in *L v B* [2016] 4 HKC 254, held (at [12]–[13]) in the context of an application for security, that the fact that an award is being challenged in the supervisory court does not mean that the award has become not binding:

> 12 As for the Respondent's reliance on s 89(2)(f) of the Ordinance, and the ground that the Award has not yet become binding on the parties, *the mere existence of some challenge made in the supervisory court does not automatically mean that the Award has become not binding.* It depends on the nature of challenge which is available under the law of the country in which the Award was made (*Guo Shun Kai v Wing Shing Chemical Co Co*). *An appeal to set aside an award is to be distinguished from an appeal on the merits. An arbitral award is not binding only if it is open to appeal on the merits before a judge or an appeal arbitral tribunal…*
>
> 13 Under Article III of the New York Convention (Convention), each contracting state shall recognise arbitral awards as 'binding' and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the Convention. *'Binding' is used, rather than 'final', the intention being that party is entitled to apply for recognition and enforcement of an award once it was issued by the arbitral tribunal. The fact that there are proceedings in the Bahamian court to set aside the Award on grounds of irregularities, and not on the merits, does not render the Award invalid or not binding.*
>
> [emphasis in italics]

34 Gary B. Born in *International Commercial Arbitration* (Kluwer Law International, 3rd Ed, 2020) (at [3613]) takes the similar view that the final and

Version No 2: 10 May 2021 (14:41 hrs)

binding nature of an award is not affected by a pending application to challenge an award:

> Other authorities hold that *an award can be "binding" even if it is subject to a pending action to annul in the place where it was made*… This conclusion is decisively supported by Article VI of the Convention, which permits national courts to discretionarily stay recognition proceedings pending the resolution of applications to annul an award in the arbitral seat (i.e., "[i]f an application for the setting aside or suspension of the award" has been made). It is impossible to reconcile Article VI's grant of discretion to suspend recognition proceedings, based on a pending annulment action, with an interpretation of Article V(1)(e) that would treat awards subject to annulment as non-binding; *the premise of Article VI is that an award is subject to recognition, and therefore "binding," even if it is subject to an annulment action, and instead that recognition may be suspended as a consequence of the annulment proceeding.*
>
> [emphasis in italics]

35 Thus, it may be gleaned from the above that an award made by the tribunal is final and binding on the parties as to the merits of the subject-matter determined under that award. The fact that a party has curial remedies to challenge an award does not affect the final and binding nature of an award. Further, an award is binding on the parties even though there may be pending applications to set aside that award.

36 As a final point, while it might appear pertinent to consider whether enforcement proceedings ought to be adjourned, especially when the Plaintiffs are seeking to enforce awards at the seat court which is hearing the pending applications to set aside the same awards, this is an issue that would be more appropriately dealt with at the second *inter partes* stage of the enforcement proceedings.

37 In this regard, the High Court has observed in *Man Diesel Turbo SE v IM Skaugen Marine Services Pte Ltd* [2019] 4 SLR 537 (at [37]) that an

Version No 2: 10 May 2021 (14:41 hrs)

adjournment pursuant to s 31(5) of the IAA "can only be made" at the second stage of enforcement:

> *The language in s 31(5) [which is in pari materia to Article 36(2) of the Model Law] makes clear that an adjournment pursuant to this provision can only be made at the second stage of enforcement.* The adjournment application is likely to be heard at the same time as the application to challenge the *ex parte* leave order (ie, where a court is asked to refuse enforcement of a foreign award under s 31 of the IAA). Significantly, after a judgment on the foreign award is affirmed, the enforcing court has no power to adjourn under s 31(5)(a). After entry of judgment, the judgment is much like any other judgment rendered by the court and the plaintiff would seek an execution order. The other party seeking a stay of the execution order would have to turn to the procedural principles of stay of execution of a civil judgment.
>
> [emphasis added in italics]

38 The Court at the second *inter partes* stage of enforcement proceedings may decide whether to refuse recognition or enforcement of an award on any of the grounds under Article 36(1) of the Model Law or adjourn its decision if an application for setting aside has been made under Article 36(2) of the Model Law. The Court may also consider whether security ought to be provided.

39 At the first *ex parte* stage of enforcement proceedings, the approach is to consider if the requirements of O 69A r 6 of the Rules of Court have been met; rather than to consider the merits of any ground for refusing recognition or enforcement or if an adjournment is proper. Given the requirements of O 69A r 6 of the Rules of Court have been met in the present case, leave to enforce the Second Partial Award, the Final Award and the Additional Final Award ought to be granted.

Version No 2: 10 May 2021 (14:41 hrs)

Conclusion

40 For the reasons above, I granted the Plaintiffs leave to enforce the Second Partial Award, the Final Award and the Additional Final Award.

Eunice Chan Swee En
Assistant Registrar

Mr Chew Kei-Jin, Ms Stephanie Tan Silin and Ms Tyne Lam Yan-Ting (Ascendant Legal LLC) for the Plaintiffs

Version No 2: 10 May 2021 (14:41 hrs)