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

[2022] SGHC(A) 3

Originating Summons No 51 of 2021

Between

UD Trading Group Holding Pte Ltd

… *Applicant*

And

(1) TA Private Capital Security Agent Limited
(2) Transasia Private Capital Limited

… *Respondents*

JUDGMENT

[Civil Procedure — Appeals — Leave]

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v
TA Private Capital Security Agent Limited and another

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Appellate Division of the High Court — Originating Summons No 51 of 2021
Woo Bih Li JAD and Chua Lee Ming J
22 November 2021

3 February 2022

Woo Bih Li JAD (delivering the judgment of the court):

Introduction

1 This is an application by UD Trading Group Holding Pte Ltd ("UDTG") for leave to appeal against the decision of a High Court Judge (the "Judge") in HC/RA 138/2021 ("RA 138") in respect of an application for a stay of HC/S 624/2020 ("Suit 624") pending certain legal proceedings in Ontario, Canada.

Background facts and procedural history

2 Suit 624 is an action brought by two plaintiffs, TA Private Capital Security Agent Limited ("P1") and Transasia Private Capital Limited ("P2") (collectively, the "TAP plaintiffs") on 9 July 2020 against UDTG, the first defendant in Suit 624 and a company incorporated in Singapore that is in the

business of trading metals. The TAP plaintiffs are the respondents in the present application. P1 is a security agent for P2, which is the manager for a fund.

3 In Suit 624, the TAP plaintiffs claim against UDTG on a corporate guarantee ("CG"). The CG was initially issued by UDTG to Rutmet Inc ("Rutmet"), a company incorporated pursuant to the laws of Ontario, Canada, that sells metals. The CG was issued by UDTG to guarantee the liabilities owed to Rutmet by various companies related to UDTG ("Operating Companies"). However, Rutmet's rights under the CG were then purportedly assigned by Rutmet to the TAP plaintiffs. The TAP plaintiffs allege that the CG was assigned by Rutmet to them because they had financed Rutmet's purchases from various material suppliers. The assignment was purportedly done through a general security agreement ("GSA") and a security deed ("SD"), each dated 22 November 2019 which were executed as conditions precedent to a forbearance agreement between the TAP plaintiffs and Rutmet ("Forbearance Agreement"), under which the TAP plaintiffs forbore from suing Rutmet for moneys which Rutmet owed P2. The TAP plaintiffs claim that, under the GSA and the SD, they were granted a power of attorney ("POA") by Rutmet to take action in Rutmet's name.

4 Suit 624 was commenced by the TAP plaintiffs against UDTG on the basis of the assignment of Rutmet's rights under the CG to the TAP plaintiffs. The TAP plaintiffs seek to recover an amount of over US$63m owed by UDTG under the CG. Rutmet was initially named the third plaintiff in Suit 624 by the TAP plaintiffs under the POA.

5 UDTG has been resisting the claim in Suit 624 not because the liabilities to Rutmet have been paid, but because it alleges that, under a separate agreement

between the TAP plaintiffs and UDTG and its related companies ("UDTG group"), all liabilities have been paid but the TAP plaintiffs refused to release a charge over shares in a company called Gympie Eldorado Mining Pte Ltd ("GEM"), which was provided to P2 by GEM's owner, Esteem Metal Limited ("Esteem"), for such liabilities. UDTG alleges that, as a result of the refusal by the TAP plaintiffs to release the charge, GEM refused to pay certain amounts to the UDTG group and UDTG now claims damages from the TAP plaintiffs which exceed or meet the amount owing by the Operating Companies to Rutmet.

6 On 18 August 2020, UDTG applied by HC/SUM 3537/2020 ("SUM 3537") to stay Suit 624 pending two proceedings in Ontario, Canada. One was an application commenced on 13 February 2020 by the TAP plaintiffs for appointment of a receiver *vis-à-vis* Rutmet ("the Ontario Receivership Application"). On 11 March 2020, an Ontario court made an interim order, with the consent of Rutmet, for Rutmet to supply certain documents to the TAP plaintiffs.

7 The other action was UDTG's own action in Ontario claiming a declaration that there is no liability to the TAP plaintiffs (the "UDTG Ontario Action"). The UDTG Ontario Action was filed on 12 August 2020 after Suit 624 was filed on 9 July 2020.

8 On 3 September 2020, UDTG applied for an anti-suit injunction ("ASI") in its Ontario Action to restrain the TAP plaintiffs from continuing with Suit 624. On 22 September 2020, the TAG plaintiffs filed a cross-motion in Ontario for a permanent stay of the UDTG Ontario Action. On 23 November 2020, the TAP plaintiffs filed a Notice of Abandonment of the Ontario

Receivership Application. They alleged that that application had served its purpose with the supply of certain documents by Rutmet to them.

9 On 14 December 2020, Rutmet filed an action in Ontario against the TAP plaintiffs claiming about US$10.5m as excess money retained by the TAP plaintiffs over and above the amount which Rutmet owed them (the "Rutmet Ontario Action").

10 On 17 March 2021, an Ontario court dismissed UDTG's application for the ASI against the TAP plaintiffs. It granted their cross-motion for a permanent stay of the UDTG Ontario Action and ordered UDTG to file its defence in Suit 624.

11 On 6 April 2021, UDTG filed a motion to stay the decision for a permanent stay and sought an expedited appeal against that decision. It did not appeal against the decision dismissing its application for the ASI. On 24 April 2021, the Ontario Court of Appeal dismissed UDTG's application for a stay and for an expedited appeal. We have not been informed of the outcome of UDTG's substantive appeal.

12 On 11 May 2021, an Assistant Registrar (the "AR") dismissed SUM 3537. On 24 May 2021, UDTG filed RA 138 to be heard by a Judge in chambers.

13 After the AR dismissed SUM 3537, Rutmet amended its statement of claim in the Rutmet Ontario Action on 28 June 2021 ("Rutmet Amended Claim"). It alleged that its material suppliers had made claims against it alleging that they had not received payment for materials supplied. The payment was

supposed to have been made by the TAP plaintiffs under the financing arrangement with Rutmet. Rutmet alleged that, if it were true that the suppliers had not been paid, then its assignment of security to the TAP plaintiffs, including the CG, is not valid and neither is the POA, since these plaintiffs would not have discharged their obligations to Rutmet. The Rutmet Amended Claim has become the focus of UDTG's application for a stay of Suit 624, as we will elaborate below.

14 From 8 to 10 June 2021, Rutmet's material suppliers commenced civil suits against Rutmet in Ontario, claiming they had not been paid for selling metal to Rutmet.

15 On 2 July 2021, Rutmet filed HC/SUM 3114/2021 ("SUM 3114") in Suit 624 for leave to discontinue or stay the suit for various reasons. On 19 August 2021, the AR granted Rutmet leave to discontinue Suit 624 as the third plaintiff but required Rutmet to be the second defendant therein. There was no order to stay the suit. Rutmet did not appeal the AR's decision in SUM 3114. However, on 11 October 2021, Rutmet filed HC/SUM 4702/2021 ("SUM 4702") to stay Suit 624 again. More will be said about this application at [18] below.

16 On 11 and 14 October 2021, the Judge heard RA 138, which was UDTG's appeal against the earlier decision by the AR to dismiss SUM 3537 for a stay of Suit 624. Importantly, for RA 138, UDTG raised another reason for the stay, that is, the Rutmet Amended Claim (in the Rutmet Ontario Action). At the time when the AR had dismissed SUM 3537, the statement of claim in the Rutmet Ontario Action had not yet been amended to include the allegation that

the assignment of the CG might not be valid. On 14 October 2021, the Judge dismissed UDTG's appeal in RA 138.

17 On 11 November 2021, UDTG filed the present application for leave to appeal against the Judge's decision. Its intention to appeal for a stay is based only on a case management stay and not on the ground of *forum non conveniens*, although the latter was a ground before the Judge.

18 On 16 November 2021, the AR heard SUM 4702. Rutmet clarified that it was seeking a stay of Suit 624 against it only, as the TAP plaintiffs were not seeking any relief against it, and that it was relying on the ground of *forum non conveniens* for the stay. The AR reserved judgment. On 10 December 2021, the AR issued his decision to dismiss the application (see *TA Private Capital Security Agent Limited & another v UD Trading Group Holding Pte Ltd & another* [2021] SGHCR 10). His reason was that, since there was no claim made against Rutmet, Rutmet could not say that there was a more suitable forum to hear the claim.

The Judge's decision

19 The Judge's decision to dismiss RA 138 can be summarised as follows. Regarding the issue of *forum non conveniens*, the Judge found that UDTG had not shown "strong cause" as to why it should not be held to its own bargain with Rutmet (and the TAP plaintiffs) in cl 18 of the CG that, once proceedings had been commenced by the TAP plaintiffs at the forum of their choice, UDTG would not challenge that choice on any grounds including inappropriate forum. As intimated at [17] above, UDTG is not seeking leave to appeal this finding.

20 Regarding the case management stay, the Judge reasoned that:

(a) the issue of the assignment of Rutmet's rights under the CG to the TAP plaintiffs was only indirectly related to the Forbearance Agreement, and more closely and directly connected to the GSA and SD;

(b) the GSA and SD both permit the validity of assignment to be decided elsewhere other than Ontario;

(c) there is thus no legal impediment to the parties if they wish to have the issue of the validity of the assignment to be determined in Singapore;

(d) therefore, there is no "contractual legal impediment" to the TAP plaintiffs, if necessary (or even to UDTG and Rutmet if they wish to raise it) to having the validity of the assignment determined in Singapore within the parameters of the jurisdiction clauses in the GSA and the SD;

(e) as such, the Judge rejected UDTG's submission that Suit 624 should be stayed simply because there is an anterior issue (of the validity of the assignment) to the TAP plaintiff's entitlement to sue on the corporate guarantee which can only be determined in Ontario.

The parties' submissions

21 The three grounds for granting leave to appeal are well established: there must be (a) a *prima facie* case of error; (b) a question of general principle decided for the first time; or (c) a question of importance upon which further argument and a decision of a higher tribunal would be to the public advantage:

see *Hwa Aik Engineering Pte Ltd v Munshi Mohammad Faiz and another* [2021] 1 SLR 1288 ("*Hwa Aik Engineering*") at [8]. Regarding the first ground, the general principle is that the *prima facie* error must be one of law and not of fact, though this court in *Engine Holdings Asia Pte Ltd v JTrust Asia Pte Ltd* [2021] SGHC(A) 14 ("*Engine Holdings*") at [10] left open the question of whether, in exceptional circumstances, leave to appeal may be granted if there is an error of fact which is obvious from the record.

22 UDTG relies on two grounds for its application for leave to appeal: (a) *prima facie* cases of error; and (b) a question of importance upon which further argument and a decision of a higher tribunal would be to the public advantage.

23 UDTG submits that there are two *prima facie* cases of error, *ie*, the Judge failed to appreciate or sufficiently appreciate that:

> (a) a case management stay would be consistent with the Judge's finding that there was no strong cause to stay the Singapore proceedings in favour of Ontario, as the case management stay is limited only until the determination of the Rutmet Ontario Action (the "Case Management Issue"); and
>
> (b) UDTG is unable to effectively raise the issue of the validity of the assignment of the CG in Singapore without a prior determination of this issue in the Rutmet Ontario Action, as UDTG does not have the knowledge or evidence to prove that the assignment of the CG by Rutmet to the TAP plaintiffs is invalid, since the issue is entirely between Rutmet and the TAP plaintiffs (the "Assignment Issue").

24 UDTG argues that the Judge erred in finding that the validity of the assignment of the CG (and any other related question) need not be determined in Ontario only. It argues that Rutmet is not obliged to take the issue in Suit 624 because there is a clause in the Forbearance Agreement between Rutmet and the TAP plaintiffs providing for the exclusive jurisdiction of Ontario to hear such a dispute. If Rutmet does not take the issue in Suit 624, UDTG argues that it is at a disadvantage because it cannot effectively raise the issue about the validity of the assignment. This is because it is Rutmet which has the knowledge to identify the relevant witnesses in relation to the question whether the material suppliers have been paid. It is also Rutmet which knows what representations were made by the TAP plaintiffs to it which caused Rutmet to assign the CG to them. Rutmet has stated that the majority of its witnesses who executed the Forbearance Agreement and the security documents with the TAP plaintiffs are not in Singapore.

25 In so far as UDTG also submits that there is a question of importance upon which further argument and a decision of a higher tribunal would be to the public advantage, UDTG relies on the presence of the Rutmet Amended Claim in the Rutmet Ontario Action, which it refers to as parallel proceedings to Suit 624. UDTG has framed the question of importance as follows:

> Should there be a case management stay when parallel proceedings started by a third party, in accordance with an applicable exclusive jurisdiction clause, will determine the premise on which the Singapore proceedings were commenced, and the third party (not the applicant) has knowledge of the issues relating to the premise?

26 Lastly, UDTG argues that there is a risk of conflicting judgments. If the validity of the assignment is raised only by UDTG and not Rutmet, the Singapore court may rule against UDTG and order UDTG to pay the TAP

plaintiffs on the CG. However, an Ontario court may decide that the CG was not validly assigned to the TAP plaintiffs in the first place.

Issues to be determined

27 The parties' submissions raise two issues: whether there is a *prima facie* case of error and whether there is a question of importance upon which further argument and a decision of a higher tribunal would be to the public advantage. We will first outline the applicable legal principles on a case management stay before we address the issues in turn.

Applicable law on case management stay

28 UDTG is relying on s 18(2) read with para 9 of the First Schedule of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) ("SCJA") for the case management stay.

(a) Section 18 of the SCJA provides as follows:

> **Powers of General Division**
>
> **18**.—(1) The General Division shall have such powers as are vested in it by any written law for the time being in force in Singapore.
>
> (2) Without prejudice to the generality of subsection (1), *the General Division shall have the powers set out in the First Schedule.*
>
> (3) The powers referred to in subsection (2) shall be exercised in accordance with any written law, Rules of Court or Family Justice Rules relating to them.
>
> [emphasis added]

(b) Paragraph 9 of the First Schedule of the SCJA provides as follows:

> **Stay of proceedings**
>
> 9. Power to dismiss or stay proceedings where the matter in question is *res judicata* between the parties, or where *by reason of multiplicity of proceedings in any court or courts* or by reason of a court in Singapore not being the appropriate forum the proceedings ought not to be continued.
>
> [emphasis added]

29 The grant of a limited stay order pending the conclusion of other proceedings does not strictly require the application of *forum non conveniens* principles because, under s 18 read with para 9 of the First Schedule of the SCJA, or under the inherent jurisdiction of the court, the court has the full discretion to stay any proceedings before it until whatever appropriate conditions are met: see the Court of Appeal's decision in *Chan Chin Cheung v Chan Fatt Cheung and others* [2010] 1 SLR 1192 at [47].

30 More recently, in *BNP Paribas Wealth Management v Jacob Agam and Ruth Agam and another* [2017] 3 SLR 27 ("*BNP Paribas*"), the Singapore International Commercial Court (consisting of Steven Chong J (as he then was), Roger Giles IJ and Dominique Hascher IJ) further explained that the grant of a case management stay is a discretionary exercise of the court's case management powers. This discretion is triggered when there is a multiplicity of proceedings and, in exercising these powers, the court is entitled to consider all the circumstances of the case. The underlying concern is the need to ensure the efficient and fair resolution of the dispute as a whole. Such a case management stay granted on the basis of a multiplicity of court proceedings is distinct from the case management stay that is granted in the context of overlapping court and arbitration proceedings: *BNP Paribas* at [35]–[36].

31 The court in *BNP Paribas* at [34] also endorsed the following non-exhaustive factors as relevant when considering such a case management stay:

(a) which proceeding was commenced first;

(b) whether the termination of one proceeding is likely to have a material effect on the other;

(c) the public interest;

(d) the undesirability of two courts competing to see which of them determines common facts first;

(e) consideration of circumstances relating to witnesses;

(f) whether work done on pleadings, particulars, discovery, interrogatories and preparation might be wasted;

(g) the undesirability of substantial waste of time and effort if it becomes a common practice to bring actions in two courts involving substantially the same issues;

(h) how far advanced the proceedings are in each court;

(i) the law should strive against permitting multiplicity of proceedings in relation to similar issues; and

(j) generally balancing the advantages and disadvantages to each party.

32 The parties do not dispute the foregoing applicable legal principles, and both parties have cited *BNP Paribas* as authoritative.

Is there a *prima facie* case of error?

33 We now turn to the first ground that UDTG raises. The fundamental difficulty with the present application is that, as rightly highlighted by the TAP plaintiffs, it does not raise any *prima facie* case of errors of *law*. As explained by the Court of Appeal in *IW v IX* [2006] 1 SLR(R) 135 at [20]:

> In *Abdul Rahman bin Shariff v Abdul Salim bin Syed*, Tay Yong Kwang JC (as he then was) clarified at [30] that the test of *prima facie* case of error would not be satisfied by the assertion that the judge had reached the wrong conclusion on the evidence. Leave should not be granted when there were mere questions of fact to be considered. *He said that it must be a prima facie case of error of law that had a bearing on the decision of the trial court.* In our opinion, this is a useful amplification of the first guideline set in *Lee Kuan Yew v Tang Liang Hong.*
>
> [emphasis added]

34 In the more recent decision of *Hwa Aik Engineering* at [15] and [24], this court further explained that there is an important distinction between an error of *law* and an error in the *application* of the law. The latter does not suffice to justify the granting of leave to appeal:

> 15 If D3 was proceeding on the premise that the test was the same and took into account the relationship between the permanent employer and the employee, *but D3 was dissatisfied with the application of the test to the facts, then that would not merit an application for leave to appeal to a higher tribunal.* It appeared from the thrust of D3's submissions that that was, in truth, the substance of its concern …
>
> …
>
> 24 Accordingly, we concluded that leave to appeal should not be granted for the Dual Vicarious Liability issue. The appropriate inquiry has been set out in *Ng Huat Seng. The mere*

> *application of that inquiry to a given factual scenario, which is the situation in this case, does not satisfy any of the grounds to grant leave to appeal.*
>
> [emphasis added]

35 In this case, UDTG submits that the Judge made two *prima facie* errors (see [23] above). Significantly, it did not say that these were errors of law. It seems to us that, at most, they were errors in applying the law to the facts and were not such obvious errors, if any, to justify leave being granted.

36 We agree with the TAP plaintiffs that the Judge's decision in RA 138 was fact-specific and that UDTG's submission in this application has not raised any *prima facie* case of error of law.

37 While this court in *Engine Holdings* at [10] left open the question of whether, in exceptional circumstances, leave to appeal may be granted if there is an error of fact which is obvious from the record, UDTG has not cited *Engine Holdings*, and it is not UDTG's case that there is an error of fact which is "obvious from the record". In any event, we note for the following reasons that there is no error of fact which is obvious from the record.

38 Firstly, the way that UDTG framed the Case Management Issue suggested that a case management stay would necessarily be consistent with a finding that there was no strong cause to stay the Singapore proceedings on the ground of *forum non conveniens* because the case management stay is limited to the time when the Rutmet Ontario Action is determined. If UDTG were correct, this would suggest that a defendant would obtain a case management stay even though it fails to obtain a stay on the ground of *forum non conveniens*. This is not correct. A defendant would still have to persuade a court why a case

management stay should be granted when a stay on the ground of *forum non conveniens* is refused. Hence, UDTG's suggestion did not show any error by the Judge.

39 Secondly, UDTG's argument that different considerations apply for a limited case management stay, as compared with a stay for *forums non conveniens*, is too simplistic. It did not show how the Judge had erred in refusing to grant a stay on the ground of case management.

40 On the Assignment Issue, we agree with UDTG that, even if the validity of the assignment of the CG could be raised in Suit 624, it might not be raised by Rutmet as Rutmet is not obliged to raise it in the Singapore proceedings. If Rutmet chose not to raise it, UDTG's argument was that it would be at a disadvantage as it would not have the knowledge or evidence to raise arguments to challenge the validity of the assignment of the CG as that would entail knowledge of discussions and representations between Rutmet and the TAP plaintiffs to which UDTG was not privy.

41 Also, UDTG argues that there would be a risk of conflicting decisions between Ontario and Singapore if a Singapore court were to make a decision on the validity of the assignment of the CG in Suit 624 (based on a challenge by UDTG) and a court in Ontario were also to make a decision on the same issue (based on a challenge by Rutmet).

42 However, these arguments did not show that there was any error which was obvious from the record. A court might come to the same conclusion to dismiss the application for a case management stay after taking into account these arguments of UDTG.

43 There were other factors which UDTG omitted to mention.

44 Firstly, according to the TAP plaintiffs, UDTG did not argue before the Judge that it would not have the knowledge or evidence to challenge the validity of the assignment of the CG to the TAP plaintiffs.

45 Secondly, it is questionable whether it is even open to UDTG to challenge the validity of the assignment if UDTG is relying on grounds which may be available only to Rutmet. While it is open to UDTG to alert the court hearing Suit 624 that the validity of the assignment is in question in the Rutmet Ontario Action, it does not necessarily follow that UDTG has the *locus standi* to raise the challenge in Suit 624.

46 Thirdly, assuming that the issue is raised to and considered by the court hearing Suit 624 and there is a risk of conflicting decisions in Singapore and in Ontario, this risk does not necessarily mean that there should be a case management stay of Suit 624. An important factor is the status of the Rutmet Ontario Action.

47 The TAP plaintiffs have drawn our attention to the remarks of Justice Gilmore in respect of an application in another action in Ontario, which appears to have been commenced by the TAP plaintiffs against an insurer Export Development Canada ("EDC") where EDC had provided insurance cover for outstanding receivables due to Rutmet from UDTG and/or its related entities. There, EDC had applied on 20 April 2021 for a case management stay pending the determination of the Rutmet Ontario Action. On 13 July 2021, Gilmore J dismissed EDC's application for a stay because:

(a) the Ontario court had previously ruled that the issue of receivables should not be litigated in Canada but in Singapore; and

(b) the Rutmet Ontario Action was progressing very slowly. Gilmore J remarked that Rutmet was still in the process of serving overseas defendants and the TAP plaintiffs "would be left at the mercy of Rutmet's glacial prosecution of its Claim".

48 We also note the circumstances surrounding the claim of Rutmet's material suppliers, which in turn led to the Rutmet Amended Claim. They claim that they have not been paid (by Rutmet or otherwise) an aggregate sum of more than US$73m since about mid-2019. Yet their actions against Rutmet were filed between 8 and 10 June 2021, about two years later. Furthermore, Rutmet alleges that it did not know whether the suppliers have been paid all this while. It is a strange situation where Rutmet alleges that it did not know and, presumably, did not seek to ascertain at the material time whether its suppliers have been paid. It was therefore not surprising that the TAP plaintiffs have argued that Rutmet and UDTG have double-teamed to put obstacles in the pursuit of Suit 624. That said, we clarify that we do not express any view on the merits of Rutmet Amended Claim which is not before us. However, in view of the circumstances and the glacial progress of the Rutmet Ontario Action, a decision to decline to stay Suit 624 against UDTG pending the outcome of Rutmet Ontario Action cannot be said to have arisen from an error of fact which is obvious from the record.

49 Furthermore, the refusal to grant a stay does not mean that UDTG has no defence in Suit 624. UDTG's main substantive defence is its claim for

damages arising from the alleged breach by the TAP plaintiffs under a separate agreement as mentioned at [5] above.

Question of public importance

50 We next turn to the purported question of importance raised by UDTG as a ground for this application. This purported question is highlighted at [25] above.

51 In our view, the existence of purported parallel proceedings in another jurisdiction, whether pursuant to an applicable exclusive jurisdiction clause or not, which will determine the validity of the premise on which Singapore proceedings are commenced does not necessarily provide an answer to an application for a stay of Singapore proceedings. In other words, no general answer can be given. Each application depends on the facts of each case, as we have elaborated above.

Costs below

52 Although UDTG's application for leave to appeal covered the costs order made by the Judge, that was incidental to its application for leave to appeal in respect of the stay application as no separate argument was advanced on the costs order. Since there is no merit in the application for leave to appeal in respect of the stay application, we need not address the costs order of the Judge.

Conclusion

53 For the foregoing reasons, we dismiss this application. After taking into account the costs submissions of the parties, we order UDTG to pay the costs

of this application fixed at $8,000 (all-in) to the TAP plaintiffs. The usual consequential orders will apply.

Woo Bih Li
Judge of the Appellate Division

Chua Lee Ming
Judge of the High Court

Eugene Thuraisingam, Chooi Jing Yen and Hamza Malik (Eugene Thuraisingam LLP) for the applicant;
Bazul Ashhab, Jerald Foo and Nicholas Chang (Oon & Bazul LLP) for the respondents.