IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2017] SGCA 03

Civil Appeal No 175 of 2015

Between

1. L Capital Jones Ltd
2. Jones the Grocer Group Holdings Pte Ltd

… *Appellants*

And

Maniach Pte Ltd

… *Respondent*

JUDGMENT

[Arbitration]—[Stay of court proceedings]—[Mandatory stay under the International Arbitration Act]

[Civil Procedure]—[Appeals]—[Notice]

L Capital Jones Ltd and another
v
Maniach Pte Ltd

[2017] SGCA 03

Court of Appeal — Civil Appeal No 175 of 2015
Sundaresh Menon CJ, Andrew Phang Boon Leong JA, Judith Prakash JA, Tay Yong Kwang JA, Steven Chong J
31 October 2016

9 January 2017 Judgment reserved.

Sundaresh Menon CJ (delivering the judgment of the court):

1 In Suit No 182 of 2015 ("S 182/2015"), the respondent, Maniach Pte Ltd ("the Respondent"), brought proceedings against the first and second appellants, L Capital Jones Ltd ("L Capital Jones") and Jones the Grocer Group Holdings Pte Ltd ("JtGGH") (collectively, "the Appellants"), for relief under s 216 of the Companies Act (Cap 50, 2006 Rev Ed) ("Companies Act"). The Appellants applied by way of Summons No 998 of 2015 ("SUM 998/2015") and Summons No 1936 of 2015 ("SUM 1936/2015") to stay S 182/2015 in favour of arbitration, but the High Court judge ("the Judge") refused the stay on the sole ground that minority oppression claims were not arbitrable. Although it was not material to his decision, the Judge, for completeness, dealt with certain other issues and on these he ruled against the Respondent.

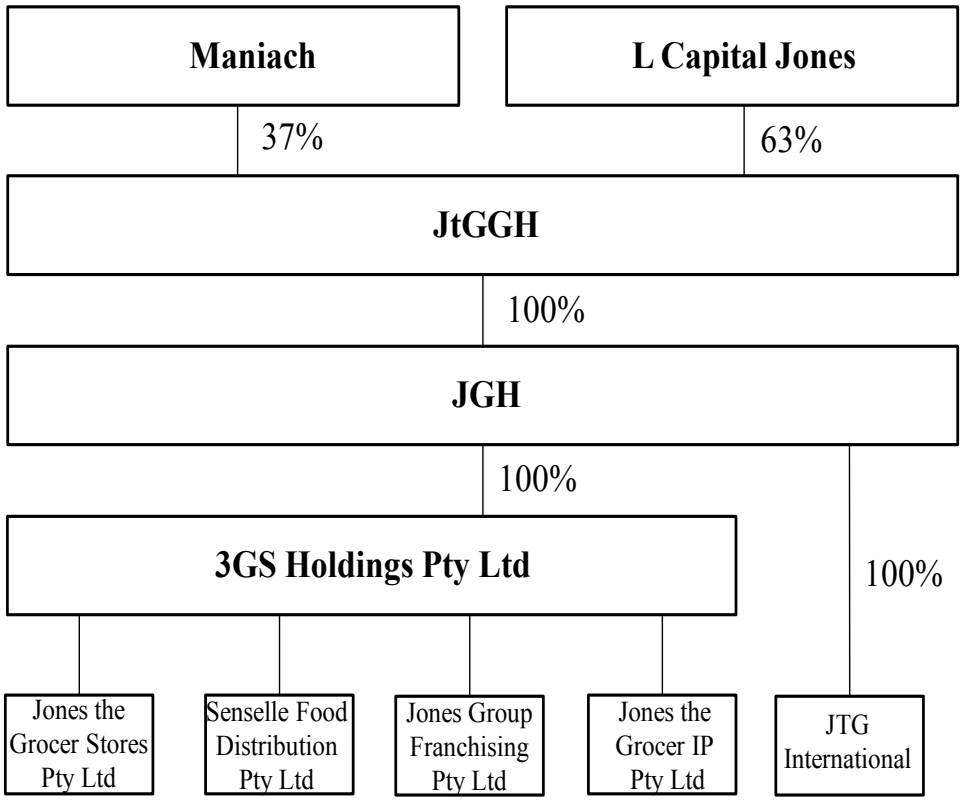
2 In Civil Appeal No 175 of 2015 ("CA 175/2015"), the Appellants appeal against the Judge's finding on arbitrability. The Respondent did not file a cross-appeal, but it presently seeks to rely on O 57 r 9A(5) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("Rules of Court") to challenge the Judge's findings which were adverse to it, namely that (a) the Appellants did not take a step in the proceedings, and (b) the dispute falls within the scope of the arbitration agreement.

3 The present appeal gives us the opportunity to revisit the question of the arbitrability of minority oppression claims with particular reference to whether there is a public policy exception to the general rule stated in our decision in *Tomolugen Holdings Ltd and another v Silica Investors Ltd and other appeals* [2016] 1 SLR 373 ("*Tomolugen*") that minority oppression claims are generally arbitrable. It also raises the important question of how O 57 r 9A(5) of the Rules of Court should be interpreted in relation to successful respondents who wish to challenge certain findings of the court below on appeal without having filed a cross-appeal.

Background facts

4 The Respondent is a Singapore company owned and controlled by John Manos ("Manos"). It owns 37% of the shares in the second appellant, JtGGH. The first appellant, L Capital Jones, is a Mauritius company wholly owned by a private equity firm, L Capital Asia LLC ("L Capital Asia"). L Capital Jones owns the remaining 63% of the shares in JtGGH. JtGGH is a Singapore incorporated company and was essentially the vehicle through which L Capital Jones and the Respondent carried out their joint venture. Prior to April 2015, JtGGH owned 100% of the shares in Jones Group Holdings Pty Ltd ("JGH"), a company incorporated in Australia. JGH owns and runs the entire "Jones the Grocer" business in Singapore, Australia and other countries. A detailed diagram of the group structure can be found at [9] of the Judge's decision, which is reported as

Maniach Pte Ltd v L Capital Jones Ltd and another [2016] 3 SLR 801 ("the GD"). For convenience, we reproduce that diagram here with minor modifications:



5 Manos was one of two founding partners of the "Jones the Grocer" business. He bought his partner out in 2010 and became the sole owner of the business. Acting through the Respondent, he then entered into a joint venture with L Capital Jones pursuant to two shareholder agreements that were entered into between L Capital Jones, the Respondent, Manos and JtGGH in July 2012 and November 2013 (collectively "the Shareholder Agreement"). Pursuant to the Shareholder Agreement, L Capital Jones invested a total of US$21m into the "Jones the Grocer" business in exchange for 63% of the shares in JtGGH. L Capital Jones therefore became the majority shareholder of JtGGH, while Manos, through the Respondent, held the remaining 37% of JtGGH's shares.

6 Clause 42.2 of the Shareholder Agreement contained the following arbitration clause:

> In case any dispute or difference shall arise between the Parties as to the construction of this Agreement or as to *any matter of whatsoever [sic] nature arising thereunder or in connection therewith*, including any question regarding its existence, validity or termination, such dispute or difference shall be submitted to a single arbitrator … Such submission shall be a submission to arbitration in accordance with the SIAC Rules by which the Parties agree to be so [sic] bound … [emphasis added]

(which we refer to as "the Arbitration Agreement").

7 By the end of 2014, the "Jones the Grocer" business slowed down significantly and JtGGH was in financial difficulty. The Respondent claims that an agreement was reached on 21 November 2014 for the parties to inject a further US$14m into the business, but that this capital injection never took place. On 22 November 2014, Manos was informed that a shareholders' and directors' resolution had been passed authorising JtGGH to make an application to the Singapore High Court to place itself in judicial management and to cause a subsidiary of JGH, Jones the Grocer International Pte Ltd ("JtGI"), to do the same. On 28 November 2014, despite Manos' objections, a judicial management application was filed in Singapore in respect of JtGGH and JtGI. Shortly after that, sometime in December 2014, JGH was placed under voluntary administration, which is the equivalent of judicial management, in Australia. There were therefore parallel judicial management and voluntary administration proceedings taking place in Singapore and Australia in respect of JtGGH and JTGI on the one hand, and JGH on the other.

8 Separately, on 3 December 2014, JtGGH terminated the employment of Manos as Chief Executive Officer of JtGGH and of his wife, who until then had been Chief Operating Officer of JtGGH.

Singapore judicial management proceedings

9 On 16 March 2015, the High Court ordered JtGI to be placed in judicial management. The Respondent applied to intervene in the judicial management application in respect of JtGI, but JtGI objected to the Respondent's application and the High Court agreed that the Respondent had no standing to intervene. The Respondent did not appeal against the High Court's decision. The judicial management application in respect of JtGGH did not succeed. Instead, on 18 September 2015, the application was withdrawn.

Australian administration proceedings

10 On or about 19 January 2015, L Capital Asia (which owns L Capital Jones), acting through another wholly owned subsidiary, Fresh Bay Investment Limited ("Fresh Bay"), proposed to enter into Deeds of Company arrangements ("DOCA") with JGH and its administrators in Australia. Under the DOCA, Fresh Bay would repay all of JGH's arms-length non-related creditors in full and in return, acquire *all* the shares in JGH. Despite Manos' protests, the relevant creditors voted in favour of the DOCA on 29 January 2015. The result of the DOCA was that L Capital Asia would acquire the entire "Jones the Grocer" business (given that the relevant businesses and assets were all owned by JGH or its subsidiaries) in exchange for paying approximately A$6.6m to JGH's creditors.

11 Following the creditors' consent to the DOCA, the administrators of JGH applied on 20 March 2015 to the Supreme Court of Victoria for leave to transfer the shares of JGH to Fresh Bay. On 15 April 2015, the Respondent obtained an urgent interim injunction in Singapore against JtGGH to restrain it from taking steps to transfer its shares in JGH to any third party. However, despite the interim injunction granted by the Singapore court, on 16 April 2015, leave from the Supreme Court of Victoria was obtained by JGH's administrators to transfer all of

JtGGH's shares in JGH to Fresh Bay. Thus, on 17 April 2015, Fresh Bay acquired 100% of JGH's shares from JtGGH. This left JtGGH as a shell company with no value and it remains so today.

Oppression proceedings

12 In the meantime, on 18 February 2015, the Respondent commenced the present minority oppression proceedings against the Appellants. As distilled by the Judge in the GD at [18], the main planks of the Respondent's minority oppression claim in S 182/2015, which is the suit that the Appellant seeks to stay in favour of arbitration and from which this appeal arises, are as follows:

(a) L Capital Jones has excluded the Respondent from the management of JtGGH and its subsidiaries, in breach of a common understanding between the Respondent and L Capital Jones.

(b) L Capital Jones falsely claimed that JtGGH and JGH were near insolvency and unilaterally acted to have them placed under external administration in Singapore and in Australia respectively as a pretext to transfer the Company's only asset – its shares in JGH – to a third party related to L Capital Asia for virtually no net consideration.

(c) L Capital Jones has abused its voting powers as the majority shareholder of the JtGGH by exercising those powers in bad faith and for a collateral purpose.

The reliefs sought by the Respondent include a share buy-out order and a rescission of any transfer of JGH shares to third parties.

13 A number of interlocutory applications were made by both the Appellants and the Respondent in S 182/2015. They include:

(a) Summons No 848 of 2015 ("SUM 848/2015") (filed on 18 February 2015), being the Respondent's application for an interlocutory injunction to restrain the Appellants from transferring JtGGH's shares in JGH to a third party.

(b) SUM 998/2015 (filed on 5 March 2015), being JtGGH's application to (a) strike out S 182/2015 on the basis that (i) leave to commence proceedings against JtGGH was required under s 227C(c) of the Companies Act but had not been obtained; and (ii) the endorsement of claim disclosed no reasonable cause of action, was scandalous, frivolous or vexatious, may prejudice, embarrass or delay the fair trial of the action, and/or would otherwise amount to an abuse of process of the court; (b) strike out the interlocutory injunction application in SUM 848/2015; or *alternatively to (a) and (b)*, (c) stay S 182/2015 in favour of arbitration.

(c) Summons No 1734 of 2015 ("SUM 1734/2015") (filed on 15 April 2015), being the Respondent's application for an interlocutory injunction to restrain the Appellants from transferring JtGGH's shares in JGH to a third party until SUM 848/2015 could be heard.

(d) SUM 1936/2015 (filed on 23 April 2015), being L Capital Jones' application to stay S 182/2015 in favour of arbitration.

14 The present appeal arises from the Judge's decision in SUM 998/2015 and SUM 1936/2015 *not* to stay S 182/2015 in favour of arbitration.

The decision below

15 In determining whether to stay S 182/2015, the Judge identified three main issues for resolution: (a) whether the Appellants had taken a step in the proceedings; (b) whether the subject matter of the proceedings fell within the scope

of the Arbitration Agreement; and (c) whether the Respondent's minority oppression claim was arbitrable (the GD at [68]).

16 First, the Judge held that the Appellants had *not* taken a step in the proceedings. He arrived at that conclusion for the following reasons:

(a) the prayer in SUM 998/2015 to strike out the proceedings on the basis of a procedural defect unrelated to the merits (*ie*, the failure to obtain consent under s 227C(c) of the Companies Act) did not amount to a step in the proceedings (the GD at [81]–[84]);

(b) the prayer in SUM 998/2015 to strike out the proceedings on the basis of the grounds set out in O 18 r 19, which was substantiated in the supporting affidavit and presented as the main relief sought, put into play the merits of the parties' claims and came close to being a step in the proceedings but did not cross the line because JtGGH decided not to pursue it at the hearing and the issue was never argued or heard (the GD at [85]–[102]);

(c) JtGGH took the position from the start that the proceedings ought to be stayed in favour of arbitration, and it had not acted inconsistently with this express reservation (the GD at [106]–[109]);

(d) even if the filing of SUM 998/2015 was a step in the proceedings, such a step had only been taken by JtGGH, and cannot be attributed to L Capital Jones (the GD at [111]–[113]); and

(e) opposing the Respondent's application for an interlocutory injunction in SUM 1734/2015 was not a step in the proceedings as the Appellants had acted out of necessity and were simply defending their interests (the GD at [114]–[120]).

17 Second, the Judge held that the subject matter of S 182/2015 fell, at least on a *prima facie* basis, *within* the scope of the Arbitration Agreement. The dispute did not "arise" under the Shareholder Agreement (the GD at [144]); it was, however, "connected with" the Shareholder Agreement. The Judge held that the Shareholder Agreement "regulate[d] the relationship between [the Respondent] and the only other shareholder of [JtGGH] in their capacity as shareholders"; the word "connected" was so "capacious" that the Judge felt compelled to accept that the minority oppression claim was at least *prima facie* connected to the Shareholder Agreement (the GD at [145]).

18 Third, the Judge held that the statutory minority oppression claim was a type of dispute which was *not* arbitrable (the GD at [171]). The Judge reasoned as follows:

> (a) Minority oppression claims, being statutory in nature and being asserted in relation to the affairs of a creature of statute, ought to be supervised and determined by the court in all cases (the GD at [160]).
>
> (b) An arbitral tribunal has no power to grant the full range of reliefs available under s 216 of the Companies Act (the GD at [163]–[167]).
>
> (c) This might lead to a fragmentation of proceedings, given that issues that do not fall within the scope of the arbitration agreement and applications for reliefs which an arbitral tribunal cannot grant might eventually have to be heard before the court (the GD at [168]–[170]).

19 Thus, on the basis that a minority oppression claim was not arbitrable, the Judge declined to grant a stay in favour of arbitration.

The appeal

20 On 3 September 2015, the Appellants filed a notice of appeal against the Judge's decision to refuse the stay. In this appeal, the Appellants are *only* challenging the Judge's finding that minority oppression claims are not arbitrable. This is unsurprising, given that the Judge found in favour of the Appellants on the other points of dispute and this was the *only* basis upon which the Judge dismissed the Appellants' stay applications.

21 The Respondent accepts that our decision in *Tomolugen* has settled the position that minority oppression claims are arbitrable, and the Judge's decision on arbitrability was therefore erroneous. However, it submits that notwithstanding *Tomolugen*, its specific oppression claim in S 182/2015 is not arbitrable because it raises issues of public policy, specifically, the importance of protecting the integrity of the judicial process. Further, the Respondent argues that *despite not having filed a cross-appeal*, it should nevertheless be allowed to challenge the Judge's decision that (a) the Appellants had not taken a step in the proceedings ("the Step Issue"); and (b) the dispute in S 182/2015 fell within the scope of the Arbitration Agreement ("the Scope Issue"), under O 57 r 9A(5) of the Rules of Court. The Respondent submits that the Judge erred in reaching the conclusions he did on both these issues.

22 In the circumstances, the following issues arise in this appeal:

(a) Notwithstanding *Tomolugen*, is the specific minority oppression claim in this case arbitrable?

(b) If the answer to this is yes, should the Respondent be allowed to challenge the Judge's findings on the Step Issue and the Scope Issue even though it did not file a cross-appeal?

If the answer to (b) is yes:

(c) Did the Judge err in finding that the Appellants had not taken a step in the proceedings?

(d) Did the Judge err in finding that the dispute in S 182/2015 fell within the scope of the Arbitration Agreement?

Arbitrability

23 The sole basis for the Judge's decision to dismiss the stay application was that the statutory minority oppression claim was a *type of dispute* which was *not* arbitrable. This has been largely overtaken by our decision in *Tomolugen* where we held that this is *not* the law in Singapore. The issue in this appeal is whether, notwithstanding the decision in *Tomolugen*, public policy considerations that militate against arbitration are raised on the *specific facts* of this case, thus justifying a finding that the Respondent's minority oppression claim is non-arbitrable. It is apposite to first revisit our decision in *Tomolugen* to examine the precise extent of its holding that s 216 claims are arbitrable.

Tomolugen

24 In *Tomolugen*, the plaintiff, Silica Investors Limited, sought relief under s 216 of the Companies Act against a number of defendants. The plaintiff and the second defendant, Lionsgate Holdings Pte Ltd ("Lionsgate"), were parties to a share sale agreement which contained an arbitration clause. Relying on the arbitration clause, Lionsgate applied to stay the court proceedings under s 6 of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("the IAA"). The other defendants were not parties to the share sale agreement, but they applied for a stay pursuant to the court's inherent power of case management. A threshold issue that

arose in *Tomolugen* was whether the statutory oppression claim was arbitrable. We held that it was.

25 Section 11(1) of the IAA states that "[a]ny dispute which the parties have agreed to submit to arbitration under an arbitration agreement may be determined by arbitration *unless it is contrary to public policy to do s*o" [emphasis added]. Based on this, we held in *Tomolugen* that "the essential criterion of non-arbitrability is whether the subject matter of the dispute is of such a nature as to make it contrary to public policy for that dispute to be resolved by arbitration" (*Tomolugen* at [75]). Applying this to statutory oppression claims under s 216, we observed that this type of claim "*generally* does not engage the public policy considerations involved in [the liquidation of an insolvent company or avoidance claims that arise upon insolvency]" [emphasis in original] (*Tomolugen* at [84]) and that "[t]here is, in general, no public element in disputes of this nature which mandate the conclusion that it would be contrary to public policy for them to be determined by an arbitral tribunal rather than by a court" (*Tomolugen* at [88]). We had several reasons for reaching this conclusion:

(a) First, we found that nothing in the Companies Act precluded the arbitration of a s 216 claim (*Tomolugen* at [84]):

> … There is certainly nothing in the text of s 216 to suggest an express or implied preclusion of arbitration. Nor does the legislative history and statutory purpose of the provision suggest that a dispute over minority oppression or unfair prejudice is of a nature which makes it contrary to public policy for the dispute to be adjudicated by an arbitral tribunal.

(b) Second, we considered the nature of a statutory oppression claim and held that it relates generally to the regulation of the relationship between shareholders, without engaging any further public interest (*Tomolugen* at [88]):

> …the essence of a claim for relief on the ground of oppressive or unfairly prejudicial conduct lies in upholding the commercial agreement between the shareholders of a company. … Section 216 of the Companies Act was not introduced to protect or further any public interest… Section 216 is concerned with protecting the commercial expectations of the parties to such an association. It seems to us that if those persons choose to have their differences resolved by an arbitral tribunal, they should be entitled to do so. …

(c) Third, we considered the position in other jurisdictions, and took cognisance of the fact that "[d]isputes over oppressive or unfairly prejudicial conduct towards minority shareholders have ... been held to be arbitrable ... In fact, our attention was *not* drawn to any jurisdiction which regarded such a dispute as non-arbitrable." [emphasis in the original] (*Tomolugen* at [94])

(d) Fourth, we held that the arbitral tribunal's inability to grant certain reliefs is not relevant to the question of arbitrability (*Tomolugen* at [97]); "[t]he fact that the relief sought might be beyond the power of the tribunal to grant *does not* in and of itself make the subject matter of the dispute non-arbitrable" [emphasis in the original] (*Tomolugen* at [98]).

(e) Fifth, we held that the potential procedural complexity that might arise, for example, from having to resolve the underlying dispute before an arbitral tribunal, and then applying to court for certain types of relief that were beyond the powers of the tribunal, did not render the underlying dispute non-arbitrable because "procedural difficulties fall short of the statutory criterion for non-arbitrability, which is a finding that to enforce the obligation to arbitrate would be contrary to public policy in view of the subject matter of the dispute in question." (*Tomolugen* at [103] and [105])

26 Our decision in *Tomolugen* was therefore focused on whether there was anything *intrinsic* to *all s 216 claims* which raised public policy considerations

against arbitration, hence rendering *all* such claims non-arbitrable. We found that no such considerations exist. However, while s 216 claims *generally* did not raise public policy considerations against arbitration, we left open the possibility that the facts of *particular* s 216 claims might do so. In our judgment, if such policy considerations arise in minority oppression proceedings, it would not be because the claim in question is a minority oppression claim, but because of *other* features of the dispute. The Respondent argues precisely that this case possesses features which raise such policy considerations. Notwithstanding the fact that the dispute in S 182/2015 concerns a minority oppression claim (which *is* arbitrable as a matter of principle), the claim raises considerations about the integrity of the judicial process and the need to prevent its abuse. For this reason, the Respondent contends that the dispute in this case is *not* arbitrable.

Arbitrability of the present dispute

27 The Respondent's minority oppression claim, as we have already noted, rests on three broad planks (see [12] above):

(a) That L Capital Jones excluded the Respondent from the management of JtGGH and its subsidiaries, in breach of a common understanding between the Respondent and L Capital Jones.

(b) That L Capital Jones falsely claimed that JtGGH and JGH were near insolvency and unilaterally acted to have them placed under external administration in Singapore and in Australia respectively as a pretext to transfer JtGGH's only asset – its shares in JGH – to a third party related to L Capital Asia for virtually no net consideration.

(c) That L Capital Jones abused its voting powers as the majority shareholder of the JtGGH by exercising those powers in bad faith and for a collateral purpose.

28 The Respondent claims that the "second plank" of its claim is non-arbitrable. It asserts that the Appellants took up the judicial management applications in bad faith and for the collateral purpose of oppressing the Respondent as a minority shareholder. It contends that the oppression claim is therefore founded on "the abuse of court process in that the court process was used as an instrument of minority shareholder oppression". According to the Respondent, there is a strong public interest in ensuring that it is the courts, rather than private arbitral tribunals, which adjudicate on disputes that involve *bona fide* allegations of abuse of the judicial process.

29 In our judgment, the Respondent's contention is without merit. We say this because, contrary to the Respondent's claim that the integrity of the judicial process is somehow implicated in this part of its minority oppression claim, it is clear to us that the question of an abuse of the judicial process is neither the essence of the present dispute, nor a necessary step in proving the Respondent's claim. The dispute in S 182/2015 centres on whether there was unfairness in the majority shareholder procuring the transfer of all the JGH shares to Fresh Bay in exchange for extinguishing A$6.6m worth of debts. The fact that L Capital Jones chose to effect this transfer by placing JGH in judicial management and then obtaining leave from the Australian court to effect the transfer is of no legal relevance to that question. If the matter were to proceed to arbitration, all that the tribunal would be called on to decide is whether L Capital Jones' conduct in this series of events was commercially unfair and therefore prejudicial to the Respondent. Whether or not the means by which L Capital Jones acted *separately* also amounts to an abuse either of the Singapore or Australian judicial process is *irrelevant* to the resolution of the dispute. The Respondent is not seeking relief for the alleged abuse of the judicial process. The real question in this case is whether the Appellants' conduct was *oppressive*, and not whether there was an abuse of process. Even if a court or tribunal adjudicating this dispute were to find that there

was an abuse of process, such a finding would only be incidental to its resolution of the minority oppression dispute.

30 Indeed, the present oppression proceedings appear to us to be the wrong forum for the Respondent to raise its complaint of an abuse of process. The Respondent should have brought such a complaint before the court hearing the judicial management proceedings which it claims were the subject of the alleged abuse. While the Respondent claims that it was precluded from doing so because it was not granted leave to intervene in the Singapore judicial management proceedings, we note that the Respondent's attempt to intervene was only denied by the Singapore court in the judicial management proceedings relating to *JtGI* (see [9] above). Those proceedings had nothing to do with the Respondent's present allegations of minority oppression. The Appellants obtained leave to transfer the JGH shares to Fresh Bay in the administration proceedings taken up in respect of *JGH*, from the *Supreme Court of Victoria*. The Respondent should have applied to intervene in those proceedings and objected on the basis that the Appellants were committing an abuse of process in taking up those proceedings. We are not aware if the Respondent raised any such objection.

31 In the circumstances, we are satisfied that the Respondent cannot rely on the integrity of the judicial process as its reason for claiming that there are public policy considerations militating against arbitrating the *present dispute*. As we observed in the course of the hearing, the court will not ignore an arbitration agreement just because it wishes to determine whether it would be appropriate for it to issue a public rebuke against the Appellants for abusing the process of the court, especially where such a "rebuke" would relate to matters that had no legal relevance to the dispute before it. In any event, it is clear that this line of reasoning was an afterthought, adopted by the Respondent only after the decision in *Tomolugen* substantially undermined its previous arguments on arbitrability. In the

court below, the Respondent never objected to arbitrability on the ground that the integrity of the court's processes was at stake.

32 In the circumstances, we hold that the present dispute is arbitrable. The Judge's decision that minority oppression claims in general are non-arbitrable is inconsistent with our subsequent decision in *Tomolugen*. We are also satisfied that nothing in the present dispute engages concerns that render this particular dispute non-arbitrable. There is therefore no basis to find that the minority oppression claim that is mounted in this case is non-arbitrable.

The Respondent's reliance on O 57 r 9A(5)

33 The next issue that arises for consideration is whether the Respondent is entitled to challenge the Judge's findings on the Step Issue and the Scope Issue even though it did *not* file a cross-appeal. In this regard, the Respondent relies on O 57 r 9A(5) of the Rules of Court, which states:

> (5) A respondent who, not having appealed from the decision of the Court below, desires to contend on the appeal that the decision of that Court should be varied in the event of an appeal being allowed in whole or in part, or that the *decision of that Court* should be *affirmed* on *grounds other than those relied upon by that Court*, must state so in his Case, specifying the grounds of that contention. [emphasis added]

34 Specifically, the Respondent wishes to ***affirm*** the Judge's ***decision*** to ***refuse the stay*** on grounds other than those relied on by the Judge, namely, that the Appellants have taken a step in the proceedings and/or that the dispute falls outside the scope of the arbitration agreement. The Appellants however contend that the refusal of a stay is not a "decision" within the meaning of O 57 r 9A(5), but merely a *consequence* of the *decision* made by the Judge on the arbitrability issue. It contends on this basis that not having filed a cross-appeal, the Respondent is not entitled to rely on O 57 r 9A(5) to challenge the Judge's decisions on the Step Issue and Scope Issue. The legal question for us is whether the Judge's refusal of the stay

can be considered a "decision" under O 57 r 9A(5), which the Respondent is entitled to have us affirm on grounds other than those relied upon by the Judge.

35 We first consider our previous pronouncements on O 57 r 9A(5). The starting point of this analysis is the oft-cited decision in *Lim Eng Hock Peter v Lin Jian Wei and another and another appeal* [2010] 4 SLR 331 ("*Peter Lim*"). In *Peter Lim*, the appellant appealed against the High Court's dismissal of its defamation claim. The respondent did not file a cross-appeal, but invoked O 57 r 9A(5) to support the High Court's dismissal of the defamation claim on a ground not relied on by the High Court, namely, that the relevant extracts were not defamatory of the appellant. The Court of Appeal rejected the respondent's attempt to rely on O 57 r 9A(5) and held (at [26]):

> … What is the *decision* of the court contemplated by this rule? Given that the rule refers to varying and/or affirming a decision of the court, *the word "decision" implies that it is a finding of law or fact* that can be varied or affirmed and that the party seeking to do it has a material or substantial reason for doing so. The purpose of the rule is to allow a successful respondent to support the court's decision in his favour, by varying or affirming it, on a ground which the court had not relied on. [emphasis added]

36 On the facts, the court held at [27]:

> In the present case, the Judge had made the following decisions: (a) the relevant Extracts were defamatory of the Appellant; (b) they were published on an occasion of qualified privilege and so the Respondents were protected by the privilege; and (c) the Appellant had failed to prove that the Respondents were actuated by malice and therefore the defence of qualified privilege succeeded, and therefore the claim had to be dismissed. *The dismissal of the Appellant's claim was not a separate and independent decision as it was merely a consequence of the Judge's finding that there was no malice.*
>
> [emphasis added]

37 The court accordingly held that the High Court's dismissal of the appellant's defamation claim was not a "separate and independent decision" within the meaning of O 57 r 9A(5), but was "merely a consequence" of the High Court's

other findings of law and/or fact. We observe that in *Peter Lim* at [32], the court nonetheless expressed the view that it would have found, in any event, that the statements were defamatory. Thus, even if a different interpretation of O 57 r 9A(5) had been adopted, the outcome in the appeal would not have changed.

38 *Peter Lim* was subsequently affirmed in *Chiam Heng Hsien (on his own behalf and as partner of Mitre Hotel Proprietors) v Chiam Heng Chow (executor of the estate of Chiam Toh Say, deceased) and others* [2015] 4 SLR 180, *ACTAtek, Inc v Tembusu Growth Fund Ltd* [2016] 5 SLR 335, and *Rals International Pte Ltd v Cassa di Risparmio di Parma e Piacenza SpA* [2016] 5 SLR 455 ("*Rals International*"). However, in all these appeals, the objection to the respondent's reliance on O 57 r 9A(5) did not affect the result of the appeal because the Court of Appeal either ultimately decided the appeal in the respondent's favour, or expressed a view unfavourable to the respondent on the issue sought to be raised by the respondent (as was the case in *Peter Lim*).

39 The only reported case in which the application of *Peter Lim* in relation to a respondent's reliance on O 57 r 9A(5) *might* have made a difference to the outcome of the appeal was in *Lian Kok Hong v Lian Bee Leng and another* [2016] 3 SLR 405 ("*Lian Kok Hong*"). That case concerned a dispute over the validity of a will. The High Court judge found that (a) the necessary formalities for a valid will had been complied with; (b) the testator had testamentary capacity; and (c) the appellant did not exercise undue influence on the testator. However, the judge held that the appellant failed to prove that the testator knew and approved the contents of the will. The appellant appealed against this last finding. The respondent did not cross-appeal, but sought to rely on O 57 r 9A(5) to challenge the other findings. We held at [56]:

> With respect to Issue (a), we held that, in the light of our decisions in *Peter Lim* and *Mitre Hotel*, the respondents could not rely on O 57 r 9A(5) of the Rules of Court to argue before us that the findings

> of the Judge in respect of issues (1), (2) and (4) should be overturned in order to uphold her eventual decision which was based on issue (3) because they had not filed a cross-appeal against those findings.

40 We did not go on to express our views on the issues raised by the Respondent as we have done in some of the other appeals cited above. Thus, it remains conceivable that the outcome of the appeal might have been different if O 57 r 9A(5) had been interpreted more broadly to allow the respondent to challenge the other findings, although it is unnecessary to speculate whether that would in fact have been the case. In any case, the respondent in *Lian Kok Hong* did not mount a challenge against the correctness of *Peter Lim* or the prevailing understanding of the scope of O 57 r 9A(5), and arguments similar to those that have been advanced in the present case were not presented to the court.

41 If *Peter Lim* were to be applied to the present case, the Respondent would *not* be allowed to challenge the Judge's decisions on the Step and Scope Issues. As the Respondent candidly conceded in its submissions, *Rals International* has quite clearly decided how *Peter Lim* should apply to fact patterns such as the present. *Rals International* was also an appeal concerning a stay in favour of arbitration under s 6 of the IAA. The judge found that the respondent was a party to the arbitration agreement on the extended definition of "party" under s 6(5)(*a*) of the IAA (defined in the judgment as "the Party Issue"). The judge however declined to stay the proceedings on the ground that the subject matter of the dispute did not fall within the scope of the arbitration agreement (defined in the judgment as "the Subject Matter Issue"). The appellant appealed against the judge's finding on the Subject Matter Issue. The respondent did not file a cross-appeal but invoked O 57 r 9A(5) to challenge the judge's finding on the Party Issue. We held that the respondent could *not* do so (at [22]–[23]):

> 22 … We agreed with Rals, however, that the failure of Cariparma to file a cross-appeal rendered the Party Issue beyond

> the scope of this appeal. This failure was not ameliorated by O 57 r 9A(5) of the Rules of Court...
>
> 23 Although a literal reading of the rule could suggest that a respondent may challenge any finding of a judge without having to file an appeal, this court clarified in [*Peter Lim*] at [26] that the word "decision" did ***not*** refer only to the ***ultimate determination of the matter***, but also to ***any finding of law or fact that could be varied or affirmed if there was sufficient reason to do so***. The purpose of the rule was to allow a successful respondent to support the court's decision in his favour, by varying or affirming it, *on a ground which the court had not relied on*. ***It was not intended to circumvent the need to file a cross-appeal in a situation in which the respondent was challenging a holding by the court that had gone against him.***
>
> [emphasis in original in italics; emphasis added in bold italics]

42 Much like the position in *Rals International*, the present case involves a situation where the court below refused a stay in favour of arbitration on only *one* of the many grounds put forward by the respondent. The Respondent seeks, without having filed a cross-appeal, to challenge the Judge's rejection of its *other* grounds against a stay of the action, in an appeal brought by the Appellant. This would appear to be precluded by *Peter Lim* because the Judge's refusal of a stay would be deemed to be "merely a consequence" of the Judge's findings on the individual grounds for refusing the stay, rather than a "separate and independent decision" in and of itself.

Re-evaluating the position in Peter Lim

43 Having considered the parties' respective cases, we indicated at the hearing that we were prepared to revisit the holding in *Peter Lim*. Specifically, we were concerned, among other things, as to whether the interpretation of O 57 r 9A(5) that was adopted in *Peter Lim* is consistent with the historical reasons underlying the introduction of O 57 r 9A(5) into the Rules of Court. We directed the parties to tender further written submissions addressing this issue.

44 In their further submissions, the Appellants submit that *Peter Lim* should continue to apply because it has been followed in a number of our recent decisions (as highlighted above). Further, the Appellants submit that even if *Peter Lim* were to be overruled, any change in the way O 57 r 9A(5) is interpreted should only be applied *prospectively*, and not to the present case.

45 The Respondent on the other hand submits that the introduction of O 57 r 9A(5) in 1994 removed the requirement to file a respondent's notice, and was intended to *simplify* the procedure for respondents wishing to raise other issues on appeal. It would be self-defeating if O 57 r 9A(5) were interpreted to require respondents to file a cross-appeal when it could have previously just filed a respondent's notice. This, according to the Respondent, complicates rather than simplifies the procedure for respondents. The Respondent also submits that in any event, it would not have been able to file a cross-appeal because s 29A(1) of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) ("SCJA") states that the Court of Appeal's civil jurisdiction is to hear "appeals from any *judgment or order* of the High Court" [emphasis added]. The Judge's findings on the Step Issue and Scope Issue do not amount to a "judgment" or "order". As was held in *Lee Kuan Yew v Tang Liang Hong and another* [1997] 2 SLR(R) 862 ("*Lee Kuan Yew*") at [24], if "the outcome is accepted by the parties but not the reasons, there can be no appeal against the order"; an appeal only lies against "the order (that is, the outcome) made by the judge, and not the reasons he gives for his decision".

Reasoning in Peter Lim

46 We begin by considering the reasoning in *Peter Lim*. To recapitulate, the court in *Peter Lim* essentially concluded that the judge's decision to dismiss the defamation claim was not a "decision" which could be *varied* or *affirmed* by the respondent on appeal under O 57 r 9A(5) (see [35] and [37] above). In arriving at this conclusion, the court first reasoned as follows: "[g]iven that the rule refers to

varying and/or affirming a decision of the court, the word 'decision' implies that it is a finding of law or fact that can be varied or affirmed" (*Peter Lim* at [26]). With respect, it is not clear to us how the conclusion that a "decision" is a "finding of law or fact", as opposed to a decision on the outcome of the case as a whole, flows from the fact that the rule "refers to varying and/or affirming a decision of the court". In our judgment, a decision on the *outcome* of the case is equally susceptible to being varied or affirmed.

47 In the same paragraph, the court went on to identify the *purpose* of O 57 r 9A(5), which it found was "to allow a successful respondent to support the court's decision in his favour, by varying or affirming it, on a ground which the court had not relied on". Again, it is not clear to us how the identification of this purpose, which is essentially a restatement of the rule, assisted the court in arriving at its interpretation of O 57 r 9A(5).

48 Further, at [27], the court stated that "[t]he dismissal of the Appellant's claim was not a separate and independent decision as it was merely a consequence of the Judge's finding that there was no malice". With respect, this conclusion seemed to have been reached without any consideration or explanation of when a decision of the court is a *mere consequence* of other prior findings, and when it may be considered to be a "separate and independent decision". The court in *Peter Lim* did not fully explain why the decision that the plaintiff's defamation claim fails could not be considered a "separate and independent decision". Indeed, this raises the more general question as to how the court should distinguish a "mere consequence" of other findings from a "separate and independent decision" when issues and even sub-issues can often be broken down further. In relation, for example, to the defence of qualified privilege, would an acceptance or rejection of the defence be a "separate and independent decision", or would it be a "mere consequence" of the court's discrete findings, among other things, on (a) the

occasion on which the words were published; and (b) whether there was malice? Given that the final outcome of any dispute must flow – if the court's decision is to make any logical sense – from the court's determination of discrete disputed issues before it, it is difficult to imagine (if one applies the logic in *Peter Lim*) a scenario in which one would conclude that the court's decision to allow or dismiss the claim is a "separate and independent decision" as opposed to a "mere consequence" of its subsidiary findings.

49 It seems to us that the court in *Peter Lim* did not fully consider the range of issues raised by its interpretation of O 57 r 9A(5). The court also appears not to have had the benefit of full arguments on the matter. Additionally, the subsequent decisions applying *Peter Lim* have not gone further in scrutinising the interpretation of O 57 r 9A(5) that was laid down in that case. In the circumstances, we take this opportunity to reconsider more fully the scope and operation of O 57 r 9A(5).

Historical development

50 O 57 r 9A(5) was introduced into the Rules of Court by the Rules of the Supreme Court (Amendment) Rules 1994 (S 194 of 1994) ("the 1994 Amendment"). It was intended to replace O 57 r 7 of the Rules of Supreme Court (Cap 322, R 5, 1990 Ed) ("the 1990 Rules"), which required a respondent to file a ***respondent's notice*** if it wished to contend in the appeal that the decision of the court below "should be varied" or "should be affirmed on grounds other than those relied upon by [the court below]". We reproduce the relevant portion of O 57 r 7 of the 1990 Rules:

> 7.—(1) A respondent who, not having appealed from the decision of the Court below, desires to contend on the appeal that the decision of that Court should be *varied*, either in any event or in the event of the appeal being allowed in whole or in part, *must give notice to that effect*, specifying the grounds of that contention.

> (2) A respondent who desires to contend on the appeal that the decision of the Court below should be *affirmed on grounds other than those relied upon by that Court* must give *notice* to that effect specifying the grounds of that contention.
>
> (3) Except with the leave of the Court of Appeal, a respondent shall not be entitled on the hearing of the appeal to contend that the decision of the Court below should be varied upon grounds not specified in a notice given under this Rule, to apply for any relief not so specified, or to support the decision of the Court below on any grounds not relied upon by that Court or specified in such a notice.
>
> [emphasis added]

The respondent's notice had to be filed within seven or 14 days after the service of the petition of appeal on the respondent, depending on whether the order appealed against was an interlocutory order (O 57 r 7(4) of the 1990 Rules).

51 The 1994 Amendment abolished the need to file a respondent's notice. It introduced O 57 r 9A(5), which only required a respondent to *state in its case* that it desired to contend on appeal that the decision below should be varied or affirmed on other grounds not relied on by the court below, and to specify the grounds of its contention. As is explained in the "Recommendation of the RSC Working Party, 8th Report" dated 18 January 1994 ("1994 Report") at p 9, the proposed amendment was motivated by a desire to simplify the procedure for respondents by doing away with "otiose documents" such as the petition of appeal and the need to file a separate respondent's notice.

52 Given that O 57 r 9A(5) was introduced with the limited purpose of changing the manner in which a respondent is to give notice to the appellant of its desire to vary or affirm on other grounds the *decision* of the court below, it is instructive to consider how the word "decision" in O 57 r 7 of the 1990 Rules had previously been interpreted by the courts. In this regard, our review of the case law suggests that the term "decision" in O 57 r 7 was *not* interpreted in the same restrictive manner as was adopted in *Peter Lim*.

53 In *Ikumene Singapore Pte Ltd and another v Leong Chee Leng (trading as Elizabeth Leong & Co)* [1993] 2 SLR(R) 480, the respondent accountant was sued by the appellant for negligence in her audit of certain accounts. The trial judge found that the respondent was negligent, but dismissed the appellants' claim because he found that (a) the respondent did not owe a duty of care to the second appellant; and (b) the appellants had not proven that their losses were caused by the respondent's negligence. The appellants appealed against the judge's decision on duty of care and causation. The respondent contended by way of a respondent's notice that she had not been negligent (see [37]). While her contention was ultimately unsuccessful, what is important for present purposes is that the respondent's notice was filed to enable the respondent to contend that the judge's *ultimate decision* to dismiss the negligence claim should be affirmed on grounds other than those relied upon by the judge (namely, on the ground that the respondent was not negligent).

54 In *Hongkong & Shanghai Banking Corp v San's Rent A-Car Pte Ltd (trading as San's Tours & Car Rentals)* [1994] 3 SLR(R) 26, the respondent agreed to purchase the appellant's interest in a property. The respondent subsequently refused to complete the sale and the appellant sued the respondent for wrongful rescission. The trial judge found for the respondent on the ground that there had been no meeting of the minds between the parties since the offer made was to purchase the legal title, whereas the purported acceptance related only to the equitable title. The trial judge, however, rejected the respondent's other defences that (a) the appellant was not the party with whom the sale contract had been made; and (b) the appellant had no power to sell because this had been vested in the receivers. The appellant appealed and the respondent filed a respondent's notice challenging the trial judge's rejection of the other defences at (a) and (b) above. While the appeal was dismissed, this again serves as another example where the

court accepted the respondent's attempt to affirm the judge's *ultimate decision* to dismiss the appellant's claim by way of its respondent's notice.

55 These cases demonstrate that O 57 r 7 of the 1990 Rules had been used by successful respondents to argue on appeal that the judge's ultimate decision in its favour should be affirmed on other grounds and in effect to challenge the judge's rejection of the alternative arguments it had run below. Contrary to the position adopted in *Peter Lim*, a "decision" under O 57 r 7 of the 1990 Rules was not construed as being confined to individual findings of law or fact; neither was the *ultimate decision* of the court below to accept or reject a claim treated as a "mere consequence" of its other findings, falling outside the scope of O 57 r 7.

56 Against this backdrop, it is evident that the effect of *Peter Lim*, in its construction of O 57 r 9A(5), was to make things more onerous for respondents by requiring them to file a cross-appeal when they could previously have just filed a respondent's notice. This was in fact *contrary* to the apparent intent of the Rules Committee, inasmuch as it was stated in the 1994 Report at p 9, that "with the deletion of the respondent's notice", a respondent needs to file a cross-appeal only if it "wishes to contend that the decision of the court below should be varied in any event". Hence, *Peter Lim*'s restrictive interpretation of the meaning of a "decision" under O 57 r 9A(5) had the unfortunate effect of reintroducing procedural complexity and increasing the corresponding burden on respondents, which the 1994 Amendment was intended to eliminate.

Logical and practical difficulties with the Peter Lim approach

57 As we alluded to at [48] above, the approach in *Peter Lim* also raises a more fundamental logical and practical difficulty. The distinction drawn between a "mere consequence" and a "finding of law or fact" in *Peter Lim* requires the court to identify when a legal or factual conclusion reached is a "finding of law or fact",

and when it is a "mere consequence" of logically anterior findings of law or fact. Leaving aside the fact that this analytical approach does not appear to have enjoyed any statutory or judicial support prior to the decision in *Peter Lim*, it is not easy to distinguish between what are properly to be treated as findings on the one hand, and consequences of anterior findings on the other, since many of the decisions that a court reaches on the primary issues before it will be premised on its findings on sub-issues, which themselves may be premised on decisions on further sub-issues.

58 For example, it is conceivable that in a claim for breach of contract, the court may have to decide (a) whether there was a binding contract; (b) whether there was a breach; and (c) the extent of loss. Put together, these determine whether the claim for breach of contract should ultimately be accepted or dismissed. In determining issue (a), sub-issues such as whether consideration was provided and whether there was an intention to create legal relations may have to be decided. In such cases, would a finding on the absence or presence of consideration be a relevant "decision" under O 57 r 9A(5), and the finding on the absence or presence of a binding contract be treated as "a mere consequence" of the prior finding on consideration? Or would the finding on the absence or presence of a binding contract be treated as the relevant "decision" under O 57 r 9A(5) which may be varied or affirmed on other grounds not relied upon by the court below? On the basis of *Peter Lim*, the *ultimate* decision to allow or dismiss the contractual cause of action *as a whole* would seem not to be a "decision" under O 57 r 9A(5). This seems wrong in principle. Furthermore, insofar as the discrete issues before the court may be further broken down into sub-issues, it would be more difficult to define which is the relevant "decision" for the purpose of O 57 r 9A(5).

59 Thus, while the various categories of "findings of law or fact" and "mere consequences" of those findings were coined in *Peter Lim*, it seems that the difficulties which may arise in applying those categories were not fully considered

by the court. We would add that this is not just a theoretical problem but one that potentially creates logically unsatisfactory distinctions in the law. This also is a source of uncertainty for many respondents who must decide whether to file a cross-appeal or simply rely on O 57 r 9A(5) – a reality that is reflected in the number of times the issue has arisen in this court in recent years.

60 A separate practical difficulty that we think the decision in *Peter Lim* has created is that successful respondents, such as the Respondent in the present case, may find itself in the invidious position of having to file an application for an extension of time to file a cross-appeal if the opposing party had filed its appeal at the last minute. The Respondent in this case successfully resisted an application for a stay of proceedings. It therefore had *no interest* in seeking to appeal against the Judge's decision and its interest in filing a cross-appeal on the Step and Scope Issues only arose *after* the Appellants had been granted leave and had then filed their notice of appeal. By that time, any application by the Respondent for leave to file a cross-appeal would have been out of time. While the Respondent might well have been able reasonably to explain to the court its need for an extension of time, it would, at the very least, be inconvenienced in having to do so. Indeed, this is likely to be true for all successful respondents who have no interest in filing a cross-appeal except as a *response* to the fact that the outcome in the case is being contested on appeal by the other party. It seems to us that a more generous reading of what constitutes a "decision" under O 57 r 9A(5) would remove this practical difficulty by simply allowing a successful respondent to indicate in its respondent's case that it intends to contend at the appeal that the judge's decision in its favour should additionally or alternatively be affirmed on other grounds that were not relied upon by the judge.

The asserted impossibility of a cross-appeal

61 The Respondent raises a further argument in its effort to persuade us to revisit *Peter Lim*. As explained at [45] above, the Respondent submits that it should be able to rely on O 57 r 9A(5) to challenge the Step and Scope Issues because it would not have been able to file a cross-appeal against the Judge's findings on those issues. In this regard, the Respondent finds support primarily in the decision in *Lee Kuan Yew*. That case concerned an application for leave to appeal against a costs order. The plaintiff had applied for leave to delete certain statements from his affidavit, and the judge allowed the application on the ground that the defendant had abused the process of the court by using the affidavits for a collateral purpose. The defendant was content to accept the judge's decision on the main application and did not file an appeal against it. However, the judge also awarded costs against the defendant because of his finding that the defendant had abused the process of the court. An issue arose in the defendant's application for leave to appeal against the costs order as to whether the judge's decision on abuse of process could be revisited in the cost appeal. The plaintiff argued that the court was bound to assume that there was an abuse of process of the court because there was no appeal against the substantive order (*Lee Kuan Yew* at [22] and [23]).

62 In that context, this court held (*Lee Kuan Yew* at [24] and [25]):

> 24 The argument was flawed because it is a well-established principle that an appeal lies against the order (that is, the outcome) made by the judge, and not the reasons he gives for his decision: see *Lake v Lake* [1955] P 336. Therefore, if the outcome is accepted by the parties but not the reasons, there can be no appeal against the order. This is so even if the reasons in support of that outcome are absurd. So, if a judge had allowed the deletion because he did not like the colour of Tang's hair, Tang could not appeal against the substantive order to delete if he did not dispute the outcome, however ridiculous the reasons might be.
>
> 25 This distinction between the *outcome* and the *reasons* given for the outcome was crucial. Since there could be no appeal against the reasons when the outcome was not contested, this meant that the reasons given by the judge need not necessarily be

> accepted and therefore binding and no longer open to challenge. It followed that, if the reasons later had an impact on the costs order, then the way was still open to argue against these reasons to oppose the order of costs. We could not see how else a costs order could ever be challenged if it were otherwise. Accordingly, this court could not be bound as contended by Mr Davinder Singh, and it must be free to examine whether there was an abuse of process.
>
> [emphasis in original]

63 The observations in *Lee Kuan Yew* were made in a context where neither party was disputing the *outcome* of the case. In that situation, the court held that the parties could not bring an appeal solely to dispute the judge's *reasoning*. To this extent, *Lee Kuan Yew* has some, but limited, bearing on the present case. We agree on the basis of *Lee Kuan Yew* that the Respondent would not have been able to file an appeal to challenge the Judge's findings on the Step and Scope Issue, but only if the Appellants had not yet filed an appeal. This was because the Respondent would then have had no real interest in overturning the Judge's findings on the Step and Scope Issue given that it had successfully obtained a dismissal of the stay application.

64 The situation in the present case is, however, somewhat different. The Appellant did file an appeal, putting the *outcome* of the decision in question. Any cross-appeal by the Respondent would have been filed with the intent of defending the outcome reached by the Judge, which was under challenge. The Respondent thus did have a real interest in filing a cross-appeal *after* the Appellants had filed their appeal. The observations in *Lee Kuan Yew* therefore would not have applied directly to the present case. But it does seem somewhat unsatisfactory that a party in the Respondent's position would have to remain in a state of uncertainty as to whether it has a right of appeal and to await the action of the other party before it could come to a conclusion on this.

Conclusion on Peter Lim

65 In our judgment, given all that we have said, we are satisfied that a departure from *Peter Lim* is necessary and justified. A broader interpretation of what counts as a "decision" under O 57 r 9A(5) should be adopted such that the court's ultimate decision on the claim or application falls within the meaning of "decision". This would allow successful respondents to mount a case to affirm the judge's ultimate decision by raising other arguments which did not find favour with the court below, without needing to file a cross-appeal. While our reasons for reaching this conclusion should be evident from the discussion above, we briefly summarise our reasons for departing from *Peter Lim*.

66 First, we think that the approach that underlies *Peter Lim* runs *contrary* to the intent behind the introduction of O 57 r 9A(5), which was to simplify procedures by doing away even with the relatively uncomplicated requirement of filing a respondent's notice. The introduction of the more onerous requirement of filing a cross-appeal would all the more run contrary to that intent. Further, the amendment to the Rules of Court was not intended to change the definition of a "decision" that may be varied or affirmed on other grounds without an appeal. It was only intended to change the *mechanism* through which a respondent gives notice to the appellant of its intention to contend that the decision below should be varied or affirmed on grounds not relied upon by the judge. Indeed, it seems to us that *Peter Lim* departed from the prevailing understanding of the position without fully appreciating the history that preceded O 57 r 9A(5).

67 Second, a broader interpretation of what counts as a "decision" would obviate many of the practical and logical difficulties that have arisen as a consequence of *Peter Lim*, as we have noted. Successful respondents would not have to apply for an extension of time to file a cross-appeal out of time after receiving notice of the appellant's intention to appeal. Further, the parties and the

court will not be faced with the difficulty of trying to distinguish between findings that are "merely a consequence" of the judge's anterior findings on logically prior sub-issues, and findings that can properly be characterised as "separate and independent decision[s]". Simply put, under O 57 r 9A(5), a respondent is entitled, without filing a cross-appeal, to seek to persuade this court either to vary (in the event of a successful appeal) or otherwise to affirm the decision of the court below, relying on grounds that that court did not accept or rely on in reaching its ultimate decision. It is not helpful in this context to distinguish between a decision on a sub-issue from one on the main issue, or, for that matter from the final outcome of the case. It follows, therefore, that there is no need to distinguish where in the logical hierarchy a decision or finding stands; nor is there a need to distinguish a "finding of law or fact" from a consequence of those findings.

68 While it is true that the approach in *Peter Lim* has been applied by this court on a number of occasions, we reiterate that the holding in *Peter Lim* would have made no difference to the outcome in most, if not all, of those cases (see [38] above). We repeat that in none of those decisions applying *Peter Lim* did the court critically evaluate the reasoning behind the decision. *Peter Lim* was simply applied as a relevant precedent, without further interrogation of its merits.

Prospective overruling

69 Given our conclusion that *Peter Lim* should be overruled, it follows that in this case, the Respondent can rely on O 57 r 9A(5) to challenge the Judge's decision on the Step and Scope Issues as part of its effort to affirm the Judge's ultimate decision to dismiss the stay application. However, the Appellant argues that *Peter Lim* should, if at all, be overruled only *prospectively* such that our decision to this effect should not affect the outcome of *this case*.

70 In *Public Prosecutor v Hue An Li* [2014] 4 SLR 661 ("*PP v Hue An Li*"), the court comprehensively considered the doctrine of prospective overruling and the situations in which a court might decide that a judicial pronouncement that runs contrary to a settled line of authority should not apply retrospectively. The court held that while judicial pronouncements were, by default, fully retroactive in nature, appellate courts have the discretion, in exceptional circumstances, to restrict the retroactive effect of their pronouncements (*PP v Hue An Li* at [124]). In exercising their discretion, appellate courts would be guided by (a) the extent to which the law or legal principle concerned is entrenched; (b) the extent of the change to the law; (c) the extent to which the change to the law was foreseeable; and (d) the extent of reliance on the law or legal principle concerned (*PP v Hue An Li* at [124]).

71 Prospective overruling has thus far only been applied in criminal cases in our courts. In that context, there will often be a more compelling need to protect a party's legitimate expectations and/or its reasonable reliance on the previously prevailing line of authority. As the court in *PP v Hue An Li* observed at [110], "special considerations must come into play in the criminal context, especially where a person's physical liberty is at stake". This does not mean, however, that prospective overruling can never be justified in civil cases. Indeed, the court further observed that "the arguments in favour of prospective overruling... cannot be restricted solely to criminal law" (*PP v Hue An Li* at [123]). It nevertheless seems to us that, in contrast to criminal cases, civil cases presenting exceptional circumstances that justify invoking the doctrine of prospective overruling are likely to be few and far between.

72 The question in the present case is whether any such exceptional circumstances exist that justify the exercise of our discretion to restrict the retroactive effect of our overruling of *Peter Lim*. In our view, there are none. While

it is arguable that the decision in *Peter Lim* appears to be relatively entrenched given that it has been applied in several subsequent decisions of this court, the Appellants have in no sense relied on the decision to their detriment. First, the Respondent had given the Appellants notice of its intention to challenge the Judge's decision on the Step and Scope Issues by way of a letter to the court dated 26 May 2016. This gave the Appellants the opportunity to address those issues in its Appellants' Case, which was only filed on 11 July 2016. Second, the Appellants did indeed fully address the Step and Scope Issues in their Appellants' Case and Appellants' Reply, as well as in oral arguments before us. In the circumstances, we are of the view that the Appellants placed no reliance on *Peter Lim* and thus there is no good reason to foreclose the Respondent's arguments on the Step and Scope Issues.

73 On the contrary, it is the Respondent that stands to be prejudiced if the overruling of *Peter Lim* is only given prospective effect. The Respondent would be denied of what we have found to be its *right* to rely on O 57 r 9A(5) to challenge the Judge's decision on the Step and Scope Issues. As the court held in *PP v Hue An Li* at [107], "[i]f a judicial decision changes the law, there must be good reason for that change, and it is difficult to justify not applying the change to a class of persons simply because they fall on the wrong side of an arbitrary date". In our judgment, there is no reason to apply *Peter Lim* to bar the Respondent from relying on O 57 r 9A(5) when we have found that *Peter Lim* was wrongly decided. The Respondent may therefore rely on O 57 r 9A(5) to seek to affirm the Judge's decision that the stay applications should be dismissed on grounds not relied upon by the Judge (namely, by contending that the Judge's findings on the Step and Scope Issue were wrong). It is to these issues that we now turn.

Step Issue

74 Section 6(1) of the IAA states as follows:

> **6.**—(1) Notwithstanding Article 8 of the Model Law, where any party to an arbitration agreement to which this Act applies institutes any proceedings in any court against any other party to the agreement in respect of any matter which is the subject of the agreement, any party to the agreement may, at any time after appearance and *before delivering any pleading or taking any other step in the proceedings*, apply to that court to stay the proceedings so far as the proceedings relate to that matter. [emphasis added]

75 The Respondent submits that the Appellants did take a step in S 182/2015 in the following ways:

(a) By applying in SUM 998/2015 to strike out S 182/2015 on the ground that it lacked merit, JtGGH took a step in the proceedings.

(b) JtGGH was acting as a proxy or agent for L Capital Jones in taking up SUM 998/2015 given that it was in control of JtGGH at all material times, and hence L Capital Jones also took a step in the proceedings by virtue of SUM 998/2015.

(c) L Capital Jones took a step in the proceedings by opposing the interim injunction application in SUM 1734/2015.

76 As to the third point in the preceding paragraph, we agree in general terms with the Judge that opposing the interim injunction application in SUM 1734/2015 was not a step in the proceedings, in particular having regard to the urgency of the matter and the circumstances in which the application had been made. That leaves us to consider whether filing SUM 998/2015 constituted a step in the proceedings by JtGGH and/or L Capital Jones.

77 The Judge accepted that an application to strike out the proceedings *on the merits* would ordinarily be a step in the proceedings, sufficient to preclude the applicant from applying for a stay (the GD at [109]). In our view, this is clearly correct. In *Carona Holdings Pte Ltd and others v Go Go Delicacy Pte Ltd* [2008] 4

SLR(R) 460 ("*Carona Holdings*") at [55], we summarised the approach in England and expressed our agreement with that approach:

> … It now seems to be fairly settled that a "step" is deemed to have been taken if the applicant employs court procedures to enable him to defeat or defend those proceedings *on their merits* and/or the applicant proceeds, from a procedural point of view, beyond a mere acknowledgment of service of process by evincing an unequivocal intention to participate in the court proceedings in preference to arbitration. Accordingly, the courts have held the following acts as steps in the proceedings such as seeking leave to defend or ***to strike out***... [emphasis in original in italics; emphasis added in bold italics]

78 An application to strike out proceedings on the basis that it is unmeritorious is an act that signifies a submission to the court's jurisdiction to resolve the dispute on the *merits* (*Carona Holdings* at [93]). Far from repudiating the court proceedings, an application to strike out a claim on its merits is an affirmation of the court's jurisdiction to resolve the matter. Further, as the Respondent points out, should the court have determined the striking out application in JtGGH's favour, this would have created some form of estoppel or *res judicata*, precluding the matter from being re-litigated before an arbitral tribunal. Thus, filing an application to strike out S 182/2015 on its merits certainly evinces "an unequivocal intention to participate in the court proceedings in preference to arbitration" (*Carona Holdings* at [55]).

79 In the present case, the *primary relief* sought in SUM 998/2015 was to strike out the suit, *not* to stay the proceedings. SUM 998/2015 was drafted in the following manner:

> Let all parties concerned attend before the Court on the date and time to be assigned for a hearing of an application by the 2nd Defendant for the following orders:-
>
> 1. That the Plaintiff's action be struck out;
>
> 2. That the Plaintiff's application by way of HC/SUM 848/2015 ("Summons 848") filed on 18 February 2015 against the 1st and 2nd Defendants be struck out;

> 3. *In the alternative to prayers (1) and (2)*, that the action be stayed in favour of arbitration;
>
> ...
>
> The grounds of the application are:
>
> 1. that the Plaintiff failed to obtain leave to commence proceedings against the 2nd Defendant pursuant to section 277C(c) of the Companies Act (Cap. 50);
>
> 2. that the proceedings are in respect of matters which are the subject of an arbitration agreement;
>
> 3. *that the Endorsement of Claim and Summons 848 (a) disclose no reasonable cause of action, (b) are scandalous, frivolous or vexatious, (c) may prejudice, embarrass or delay the fair trial of the action, and/or (d) would otherwise amount to an abuse of the process of the Court...*
>
> [emphasis added]

80 It can be seen that one of the two grounds for striking out relied on by JtGGH was, in essence, that the Respondent's claim lacked merit (para 3 of the grounds of application). A stay in favour of arbitration was only prayed for in the *alternative*. In our judgment, this forecloses any argument that JtGGH had reserved its right to arbitrate the matter. SUM 998/2015 clearly prays *first* for a striking out on the merits, and, only if that was rejected, a stay in favour of arbitration as an *alternative*. Therefore, by filing SUM 998/2015, JtGGH had taken a step in the proceedings.

81 The Judge however found that because JtGGH never followed through on its intention to strike out the suit, it did not ultimately take a step in the proceedings. JtGGH did not in fact present oral arguments to the court on the merits of the suit (the GD at [109]), and the part of the application to strike out S 182/2015 under O 18 r 19 was never ultimately heard or argued (the GD at [86]). On this basis, the Judge found that even though JtGGH had filed SUM 998/2015, when viewed as a whole, it cannot be treated as having taken a step in the proceedings.

82 In our respectful view, the Judge erred in finding that a step in the proceedings had not been taken by JtGGH just because the striking out application was not pursued at the *oral hearing*. We note, momentarily leaving aside the issue of JtGGH's striking out application in SUM 998/2015, that JtGGH had taken the following further steps to advance its application to strike out S 182/2015 on its merits:

(a) in paras 26–58 of Shantaku Mukerji's affidavit dated 5 March 2015 filed in support of SUM 998/2015, and paras 20–31 of Shantaku Mukerji's affidavit dated 30 March 2015, JtGGH's reasons for asserting that S 182/2015 should be struck out on the grounds set out in O 18 r 19 of the Rules of Court were explained extensively;

(b) in its combined written submissions for SUM 998/2015 and Originating Summons No 210 of 2015 ("OS 210/2015") (application for retrospective leave to be granted under s 227C(c) of the Companies Act to commence S 182/2015 against JtGGH), JtGGH made substantial submissions on the merits of S 182/2015 in support of its application to strike out the suit; and

(c) at the hearing on 8 April 2015, JtGGH's counsel *initially* indicated to the Judge that its striking out application in SUM 998/2015 was premised on the O 18 r 19 grounds as well (hence giving no indication that it did not intend to pursue striking out on that basis); *only subsequently*, at the end of the hearing, did JtGGH's counsel state that if leave was granted to the Respondent in OS 210/2015, it would not be pursuing its striking out application on any other grounds.

83 In this case, given the several steps that JtGGH took to advance its striking out application on the merits, it cannot be said that JtGGH did not take a step in the

proceedings just because it decided not to pursue its striking out application at the last moment. But even assuming that JtGGH had not yet filed any affidavits or submissions in support of its striking out application, we would have been inclined to hold that the very act of filing an application to strike out the suit on its merits would have constituted a step in the proceedings because, as we have noted at [78] above, this was an invocation of the court's jurisdiction. Once such a step is taken, it will generally be irrevocable. Even if the application is subsequently withdrawn, or the party indicates that it no longer wishes to prosecute the application, that cannot change the fact that a step has been taken under s 6(1) of the IAA.

84 We are therefore satisfied that JtGGH did take a step in the proceedings by filing its striking out application in SUM 998/2015.

Ascribing the step to L Capital Jones

85 SUM 998/2015, on its face, is an application taken out by JtGGH alone. The Respondent, however, submits that the application was, in fact, made on behalf of L Capital Jones as well. In this regard, we accept that a "pragmatic approach" should be taken to assessing whether a step in the proceedings has been taken, and the court should not place "an undue premium on procedural subtleties rather than on the substance of the issue at hand" (*Carona Holdings* at [94]). In our judgment, whether a party has taken a step in the proceedings is a fact-sensitive inquiry that should not be approached with undue technicality or formalism; rather, the court must look at the substance of the events that transpired to determine whether the party in question had taken a step in the proceedings.

86 On this basis, we do not think that the fact that SUM 998/2015 was, technically, an application filed by JtGGH (and not also by L Capital Jones) in and of itself precludes the possibility that such a step may be attributed to L Capital Jones as well. While it would only be in exceptional circumstances that the court

would attribute an application taken up by one defendant to a co-defendant, we find that such circumstances exist in this case.

87 First, we observe that on 5 March 2015, the date SUM 998/2015 was filed, L Capital Jones was the majority shareholder (63%) of JtGGH. Further, as counsel for L Capital Jones, Ms Koh Swee Yen, clarified during oral arguments, as at 5 March 2015, JtGGH's board of directors comprised Mr Ravinder Singh Thakran and Mr Shantanu Mukerji, both of whom were appointed by L Capital Jones, and Manos. Although Manos remained a director of JtGGH, JtGGH terminated his employment as Chief Executive Officer on 3 December 2014 and he alleges that he was effectively excluded from all management decisions. Indeed, Mr Mukerji was the one who affirmed the affidavit in support of SUM 998/2015. It is clear that at the time SUM 998/2015 was filed, L Capital Jones had majority control over JtGGH and it seems reasonable to infer in the circumstances that it could and did direct JtGGH to file SUM 998/2015.

88 Second, as the parties agreed before us, JtGGH is in fact a nominal defendant in the present proceedings. Following the transfer of the JGH shares to Fresh Bay, JtGGH became a shell company. On its own, therefore, JtGGH had absolutely no interest in pursuing any striking out application. The party with a real interest in this regard is L Capital Jones and in our judgment, JtGGH brought the application in order to further L Capital Jones' interests.

89 Third, the reliefs sought in SUM 998/2015 are clearly sought on behalf of L Capital Jones as well. Looking first at the summons application, JtGGH sought various reliefs including these:

> 1. That the Plaintiff's action be struck out;
>
> 2. That the Plaintiff's application by way of HC/SUM 848/2015 ("Summons 848") filed on 18 February 2015 against the 1st and 2nd Defendants be struck out;

These two prayers for relief are clearly sought on behalf of L Capital Jones as well. In particular, the first prayer is not limited to striking out the Respondent's action *against JtGGH*, but extends to striking out the Respondent's action entirely.

90 This interpretation of the summons application is also supported by the affidavit filed by Mr Mukerji in support of the SUM 998/2015 on 5 March 2015. We cite some paragraphs from the said affidavit to illustrate our point:

> 27. Further, I understand and believe that the Plaintiff does not have a reasonable cause of action against the 1st and/or 2nd Defendants.
>
> 28. It would appear that the main (and interlocutory) relief sought by the Plaintiff is an injunction to restrain the transfer of the 2nd Defendant's shares in JGH to third parties. However, the 1st and 2nd Defendants, by themselves, do not have the power or ability to transfer the 2nd Defendant's shares in JGH in the first place.
>
> ...
>
> 30. There is therefore no merit to the Plaintiff's action or the Injunction Application, since the 1st and 2nd Defendants would not, in any event, be able to transfer the 2nd Defendant's shares in JGH without the Plaintiff's consent.

It is evident from this that the striking out application was, *in substance*, not merely sought on JtGGH's behalf, but also on L Capital Jones' behalf. No attempt was ever made by L Capital Jones to dissociate itself from this "step".

91 Ms Koh submits that the step taken by JtGGH cannot be attributed to L Capital Jones because at that time, the statement of claim filed in S 182/2015 had not even been served on L Capital Jones. However, it is evident that L Capital Jones was fully aware of the proceedings in S 182/2015. At all material times, JtGGH and L Capital Jones had instructed the same set of solicitors. Further, as the majority shareholder of JtGGH, L Capital Jones was undoubtedly informed of the proceedings through the papers served on JtGGH. In our judgment, the fact that the papers had not been served on L Capital Jones neither legally, nor factually, precludes the finding that L Capital Jones took a step in the proceedings by

directing JtGGH to file SUM 998/2015. Instead, the factual circumstances irresistibly point to the conclusion that JtGGH was merely a nominal defendant directed by L Capital Jones, and that the real purpose behind the filing of SUM 998/2015 was to strike out the claim against L Capital Jones.

92 Thus, given the unique factual matrix that is before us, we are satisfied that L Capital Jones too had taken a step in the proceedings even though SUM 998/2015 was technically an application brought by JtGGH alone. This means that both JtGGH and L Capital Jones' stay applications filed pursuant to s 6(1) of the IAA must be dismissed because they were not filed *before* taking any other step in the proceedings.

Scope Issue

93 Given our decision that both JtGGH and L Capital Jones had taken a step in the proceedings before filing their stay applications, there is no need for us to decide the Scope Issue. But we would observe briefly that should it have been necessary to decide the issue, we would have affirmed the Judge's finding that the dispute fell within the scope of the arbitration agreement.

94 To recapitulate, the arbitration agreement entered into between the parties states as follows:

> In case any dispute or difference shall arise between the Parties as to the construction of this Agreement or as to any matter of whatsoever [*sic*] nature arising thereunder or in connection therewith, including any question regarding its existence, validity or termination, such dispute or difference shall be submitted to a single arbitrator … Such submission shall be a submission to arbitration in accordance with the SIAC Rules by which the Parties agree to be so [*sic*] bound …

The Judge found that the three broad planks of the Respondent's claim did not "arise" under the arbitration agreement, but that it was "connected with" the agreement given that the word "connected" is "so capacious" (the GD at [145]).

95 With respect, we must disagree with the Judge's overly broad analysis of the Scope Issue. In our judgment, it is critical to consider in some detail the distinct strands of the Respondent's minority oppression claim in order to determine whether they fall within the scope of the arbitration agreement. As we made clear in *Tomolugen* at [134], not all shareholder disputes necessarily fall within the scope of an arbitration agreement found in a share purchase agreement.

96 As stated at [12] above, the Respondent's minority oppression claim rests on three broad planks:

(a) That L Capital Jones excluded the Respondent from the management of JtGGH and its subsidiaries, in breach of a common understanding between the Respondent and L Capital Jones.

(b) That L Capital Jones falsely claimed that JtGGH and JGH were near insolvency and unilaterally applied to have them placed under external administration in Singapore and in Australia respectively as a pretext to transfer the Company's only asset – its shares in JGH – to a third party related to L Capital Asia for virtually no net consideration.

(c) That L Capital Jones abused its voting powers as the majority shareholder of the JtGGH by exercising those powers in bad faith and for a collateral purpose.

97 The allegation at (a) clearly falls within the scope of the arbitration agreement. At para 40(b) of its Statement of Claim, the Respondent pleaded that L Capital Jones:

> … has excluded the Plaintiff [*ie* the Respondent] from the management of [JtGGH] and its subsidiaries, in breach of the common understanding between the Plaintiff and the 1st Defendant [*ie,* L Capital Jones], *inter alia* as reflected in the [Shareholder Agreement].

Given that the common understanding is "reflected in" the Shareholder Agreement, the complaint regarding exclusion from management is clearly at least "connected with" the Shareholder Agreement.

98 The allegations at (b) and (c) above relate to L Capital Jones' conduct in placing JtGGH and the other related companies in administration or judicial management, and then procuring the transfer of JtGGH's JGH shares to Fresh Bay. In our judgment, while the complaints here are not directly premised on any duties undertaken in the Shareholder Agreement, they are nevertheless "connected with" the Shareholder Agreement. Ms Koh referred us to the Respondent's letter of demand dated 7 January 2015, sent to the Appellants, in which the allegations at (b) and (c) above were framed as breaches of the Shareholder Agreement. While references to the contractual breaches were removed from the Statement of Claim, the 7 January 2015 letter of demand demonstrates the close connection between the Shareholder Agreement and the pleaded unfair conduct.

99 Further, we also observe that an obligation to act fairly and with regard to the other shareholder's interest is set out in cl 37 of the Shareholder Agreement:

> In entering into this Agreement, the Shareholders recognise that it is impractical to make provision for every contingency that may arise in the course of the observance or performance thereof. Accordingly, the Shareholders hereby declare it to be a cardinal principle of this Agreement and it to be their common intention that this Agreement shall operate between them with fairness and without detriment to the interests of any of them and if in the course of the performance of this Agreement unfairness to a Party is disclosed or anticipated then the Shareholders shall use their best endeavours to agree upon such action as may be necessary and equitable to remove the cause or causes of the same.

In our view, this clause inevitably influences the understandings and expectations of fair treatment among the shareholders, and is hence likely to affect the court's determination of what constitutes oppression.

100 Thus, in our judgment, the present minority oppression dispute falls within the scope of the arbitration agreement. If not for the fact that the Appellants had taken a step in the proceedings, the matter should have been submitted for arbitration.

Conclusion

101 In conclusion, we dismiss CA 175/2015. Given, however, that the Respondent did not succeed on the majority of the points it had taken on appeal, as well as the fact that it would not have been able to pursue its challenge on the Step Issue had we not overruled *Peter Lim*, we consider it appropriate to reserve the costs of this appeal and of the applications before the Judge to the court hearing the oppression action.

Sundaresh Menon Chief Justice	Andrew Phang Judge of Appeal	Judith Prakash Judge of Appeal
Tay Yong Kwang Judge of Appeal	Steven Chong Judge	

Koh Swee Yen, Jill Ann Koh Ying, Mak Shin Yi and Qabir Singh Sandhu (WongPartnership LLP) for the appellants;
Chew Kei-Jin, Tham Lijing and Stephanie Tan Silin (Ascendant Legal LLC) for the respondent.