HCA 961/2008

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

ACTION NO. 961 OF 2008

BETWEEN

厦門新景地集團有限公司formerly known as 厦門市鑫新景地房地產有限公司 and	Plaintiff
ETON PROPERTIES LIMITED （裕景興業有限公司）	1st Defendant
ETON PROPERTIES (HOLDINGS) LIMITED （裕景興業(集團)有限公司）	2nd Defendant
ETON PROPERTIES GROUP LIMITED formerly known as ETON PROPERTIES (INTERNATIONAL) LIMITED	3rd Defendant
LEGEND PROPERTIES (XIAMEN) COMPANY LIMITED（利景興業（厦門）有限公司）， a limited company incorporated in Hong Kong	4th Defendant
LEGEND PROPERTIES (XIAMEN) COMPANY LIMITED（利景興業（厦門）有	5th Defendant

限公司），
a foreign-owned enterprise
incorporated in
the People's Republic of China

Before: Hon Fok J in Chambers

Date of Hearing: 22 – 25 February 2010

Date of Judgment: 16 March 2010

J U D G M E N T

Introduction

1. The plaintiff has successfully pursued claims against the 1st and 2nd defendants in an arbitration in Beijing and it has obtained leave to enforce the award as a judgment in Hong Kong. This action was commenced in the face of the 1st and 2nd defendants' resistance of the plaintiff's application for leave to register the award.

2. A number of interlocutory applications are now before me. The 1st and 2nd defendants contend that the action should be stayed for arbitration or alternatively struck out and dismissed. For their part, the 3rd, 4th and 5th defendants seek to strike out or stay the action. The plaintiff resists these applications but also seeks leave to amend the statement of claim in the action by adding six additional defendants and various new claims, as well as discovery in aid of an interlocutory injunction granted at the outset of the action.

Background

3. The plaintiff is a PRC company. The 1st and 2nd defendants are Hong Kong companies within the Eton group of companies ("the Eton group"). Until November 2005, the 1st and 2nd defendants were the sole shareholders, holding one share each, of the 4th defendant, a Hong Kong company. The 4th defendant was the sole shareholder of the 5th defendant, a PRC company, which owned a piece of land in Xiamen City, in the PRC ("the Land").

4. The plaintiff and the 1st and 2nd defendants were parties to an agreement dated 4 July 2003 in respect of the Land ("the Agreement"). In the Beijing arbitration between the plaintiff and the 1st and 2nd defendants, the arbitral tribunal described the Agreement as "neither an agreement of share transfer nor an agreement of transfer of land use right" but said it was "a complicated arrangement of rights and obligations closely related to the transfer of shares".

5. Pursuant to the Agreement, the plaintiffs paid the 1st and 2nd defendants a deposit of RMB 5 million on the date of the signing of the Agreement. The 1st and 2nd defendants were required to deliver the Land to the plaintiff within six months from the date of the Agreement. Upon and after the delivery of the Land to the plaintiff, further deposits and instalments of the consideration were due to be paid by the plaintiff to the 1st and 2nd defendants.

6. The 1st and 2nd defendants never delivered the Land to the plaintiff. Instead, on 14 November 2003, the 1st and 2nd defendants sought to return the initial deposit and served a notice to discontinue performance of the Agreement on the ground that performance of the Agreement would be contrary to PRC law. It is the plaintiff's case that the 1st and 2nd defendants knew there was no legitimate basis to terminate the Agreement and that their motivation for seeking to do so was their appreciation around that time of the potential financial rewards that could be derived from the development of the Land as a result of the significant bounce back of the PRC economy after the alleviation of the SARS epidemic in the early part of 2003.

7. The plaintiff did not accept the termination of the Agreement and submitted the dispute between the parties to CIETAC in Beijing on 8 August 2005 seeking specific performance of the Agreement. The 1st and 2nd defendants maintained in the arbitration that the Agreement was contrary to PRC law and, in any event, performance had become impossible because the 1st and 2nd defendants had, in the meantime, begun construction work on the Land, which remained in progress at the time of the arbitration.

8. On 27 October 2006, the arbitral tribunal in Beijing published its award ("the Award"). The tribunal rejected the 1st and 2nd defendants' arguments, including the argument of impossibility of performance, and ordered that:-

> (1) The 1st and 2nd defendants pay RMB 1,275,000 to the plaintiff (by way of interest on the initial deposit up to 1 June 2005);
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> (2) The 1st and 2nd defendants "shall continue to perform the Agreement"; and
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> (3) The 1st and 2nd defendants reimburse the plaintiff its arbitration fees of RMB 101,875.

It is not in dispute that the 1st and 2nd defendants have complied with the monetary parts of the Award. What is left outstanding is the part of the Award regarding the continued performance of the Agreement.

9. In the meantime, between the date of commencement of the arbitration and the publication of the Award, various steps were taken as part of a restructuring exercise of the Eton group, which included the following:-

> (1) On 16 November 2005, the 4th defendant issued and allotted 9,998 new shares to the 3rd defendant;
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> (2) On 6 April 2006, the 1st defendant transferred its one share in the 4th defendant to the 3rd defendant; and
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> (3) On 6 April 2006, the 2nd defendant executed a declaration of trust declaring that it held its one share in the 4th defendant on trust for the 3rd defendant.

10. The above three events have collectively been referred to by the plaintiff as "the Impugned Transactions". Their effect was to dilute and transfer the 1st and 2nd defendants' shares in the 4th defendant to the 3rd defendant, their parent company and the ultimate holding company of the Eton group. This transfer and dilution were not made known by the 1st and 2nd defendants to the plaintiff or to the arbitral tribunal at any time in the course of the arbitration in Beijing leading to the Award. It is the plaintiff's case that the Impugned Transactions were effected in bad faith and with the sole intention of enabling or assisting the 1st and 2nd defendants to avoid their contractual obligation under the Agreement to transfer to the plaintiff the entire shareholding in the 4th defendant and thereby to deprive the plaintiff of the fruits of the Agreement. The plaintiff now seeks to assert that the Impugned Transactions were effected fraudulently on the basis that they were carried out at the time of the arbitration leading to the Award, in which the plaintiff was seeking an order for specific performance of the Agreement, and were concealed from the plaintiff and CIETAC.

Procedural History since the Award

11. On 31 October 2006, the plaintiff commenced proceedings in HCCT 54/2007 and obtained an order on that date granting it leave to enforce the Award in the same manner as a judgment of the Hong Kong court pursuant to ss.2GG and 40B of the Arbitration Ordinance (Cap.341).

12. In March 2007, the plaintiff sought to enforce the Award before the Intermediate People's Court of Xiamen but, on 30 July 2007, that court dismissed the plaintiff's proceedings on the basis that the 1st and 2nd defendants and their assets were not within Xiamen.

13. On 16 April 2007, the 1st and 2nd defendants applied to the Second Intermediate People's Court in Beijing to set aside the Award, but this application was withdrawn by them on 19 June 2007.

14. On 2 January 2008, the 1st and 2nd defendants filed an application in HCCT 54/2008 to set aside the order granting leave to enforce the Award. The principal basis of the application was that it was impossible to continue to perform the Agreement according to its terms and hence that it would be contrary to fundamental notions of justice and thus public policy to enforce that part of the Award.

15. The impossibility argument advanced by the 1st and 2nd defendants was based on two principal facts, namely that (1) the 5th defendant had already developed the Land and sold most of the residential units that had been built so that it was no longer possible for the 1st and 2nd defendants, or the 5th defendant, to deliver possession of the Land to the plaintiff under the Agreement, and (2) the corporate restructuring exercise, and in particular the changes to the 4th defendant's shareholding structure effected by the Impugned Transactions, had resulted in the 3rd defendant replacing the 1st and 2nd defendants as the sole shareholder of the 4th defendant so that it would be impossible for the 1st and 2nd defendants to transfer the shares of the 4th defendant as required under the Agreement.

16. The corporate restructuring exercise, as the basis of the impossibility argument, was first raised in two affirmations made by a Mr Mok Pui Hong (the intended 11th defendant), filed on behalf of the 1st and 2nd defendants on 2 January 2008 and 30 April 2008 respectively.

17. The setting aside application was heard by Reyes J on 30 May 2008 and 19 June 2008 and dismissed by him on 24 June 2008. In the plaintiff's skeleton argument filed in opposition to the application, the plaintiff stated that this action was commenced "[i]n view of the Impossibility Argument raised by the [1st and 2nd defendants]".

18. The 1st and 2nd defendants appealed against the dismissal of the setting aside application in CACV 197/2008.

19. On 9 October 2008, the 1st and 2nd defendants sought to stay the appeal pending the determination of an application made by them on 19 August 2008 to CIETAC for a second arbitration said to be "for further determination on the basis that the Agreement could no longer be performed by the parties and [seeking] a ruling that the parties be discharged from the Agreement". The stay was refused on 20 October 2008.

20. The appeal was then fixed to be heard on 23 December 2008 but that hearing had to be vacated as a result of an exercise which Le Pichon JA, with whom the other two members of the Court of Appeal agreed, described as having "all the hallmarks of a 'filibustering' exercise".

21. Before the adjourned hearing of the appeal, the CIETAC arbitral tribunal notified the parties that the second arbitration would be heard on 21 January 2009. In that arbitration, the only question the 1st and 2nd defendants put before the tribunal was whether the conditions for termination of the Agreement had been satisfied. They did not seek directions from the tribunal as to how the parties were to perform the Agreement. On 22 April 2009, the award in the second arbitration ("the 2nd Award") was published, with the tribunal ruling against the 1st and 2nd defendants.

22. The appeal in CACV 197/2008 was eventually heard on 22 May 2009 and dismissed on that date, with the Reasons for Judgment being handed down on 11 June 2009.

23. On 19 June 2009, the 1st and 2nd defendants made a further application to CIETAC seeking a ruling on the Award, specifically the "alternative approaches" within the tribunal's reference in the Award to the Agreement being "a framework agreement, whose performance may be difficult due to various uncertainties. This needs close cooperation between the parties and reasonable efforts to seek alternative approaches to meet the purpose of the Agreement", and seeking directions "on how it should be performed and/or what relief (including damages or other appropriate reliefs) the [plaintiff] should have for the purpose of meeting the purpose of the Agreement".

24. On 27 July 2009, CIETAC replied to the first and second defendants stating:-

> "The arbitral tribunal adjudicated the case fully based on arbitration request of the [plaintiff] and made ruling based on the [plaintiff's] arbitration request. After investigation, the [Award] issued by the arbitral tribunal on 27 October 2006 is final, there was no mistake in relation to writing, typing or calculation which needs to be corrected. Also the arbitral tribunal in the Award did not give out any matter which would need to be further determined according to the PRC Arbitration Law and the Arbitration Rules of the Arbitration Commission. Accordingly the tribunal does not accept the abovementioned application of the [1st and 2nd defendants]."

I shall refer to this reply as "the 3rd Award", although it is arguably not an arbitral award as such but a refusal to issue an award or direction.

The Claims in this Action

25. On 27 May 2008, the plaintiff commenced this action against the 1st and 2nd defendants to assert proprietary rights over the shares in the 4th defendant and to seek declarations that the 3rd defendant holds the 9,999 shares registered in its name in the 4th defendant on constructive trust for the plaintiff and that the 2nd defendant holds the one share registered in its name in the 4th defendant on constructive trust for the plaintiff.

26. As pleaded in the Statement of Claim, the claimed constructive trusts are based on the 1st and 2nd defendants' "contractual commitment" under the Agreement. The crux of the claim is encapsulated in paragraph 11 of that pleading which reads as follows:-

> "By reason of the contractual commitment by the 1st and 2nd Defendants to transfer to the Plaintiff the entire issued share capital of the 4th Defendant, the 1st and 2nd Defendants held their shares on constructive trust for the Plaintiff, pending the transfer of those shares to the Plaintiff pursuant to the terms of the Agreement, and the 1st and 2nd Defendants retained a lien on the shares for the price."

27. So far as the 3rd defendant is concerned, the basis of the constructive trust is pleaded as arising from the existence of a fiduciary duty on the part of the 1st and 2nd defendants not to exercise their voting rights attaching to the shares in the 4th defendant registered in their name in a manner that might damage the plaintiff. It is alleged the 1st and 2nd defendants acted in breach of fiduciary duty when, in November 2005, they voted to allot 9,998 shares in the 4th defendant to the 3rd defendant and also that the 1st and 2nd defendants respectively acted in breach of trust when, in April 2006, the 1st defendant transferred its one share in the 4th defendant to the 3rd defendant and the 2nd defendant executed the declaration of trust over its share in the 4th defendant in favour of the 3rd defendant.

28. It is pleaded in paragraphs 19 to 21 of the Statement of Claim:-

> "19. The 3rd Defendant was at all material times an associate company of the 1st and 2nd Defendants, and the management of the 1st, 2nd and 3rd Defendants was common to all 3 companies. In the premises the 3rd Defendant was fully aware of the existence and terms of the Agreement and of the contractual commitments which the 1st and 2nd Defendants had thereby undertaken.
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> 20. In the premises the 3rd Defendant held and holds the 9,998 shares allotted to it on or about 16th November 2005, and the single share transferred to it by the 1st Defendant on or about 6 April 2006, on constructive trust for the Plaintiff.
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> 21. Further, any interest which the 3rd Defendant acquired in the single share which was the subject of the Declaration of Trust executed by the 2nd Defendant on 6th April 2006 is subject to the Plaintiff's equitable interest in that share."

29. There is an additional claim in the action, pleaded under the heading "Lifting the Corporate Veil", in which it is alleged that the Impugned Transactions "were effected in bad faith and with the sole intention of enabling or assisting the 1st and 2nd Defendants to avoid their contractual obligation under the Agreement to transfer to the Plaintiff the entire shareholding in the 4th Defendant" (Statement of Claim, paragraph 27). The plaintiff alleges that the Impugned Transactions were concealed from the plaintiff and the arbitral tribunal and that 1st and 2nd defendants' explanation for the reconstruction is groundless (Statement of Claim, paragraphs 28 and 29). It is therefore pleaded, in paragraph 30 of the Statement of Claim:-

> "In the premises, if, contrary to the Plaintiff's case, the shares in the 4th Defendant registered in the names of the 2nd and 3rd Defendants are not impressed with a trust in favour of the Plaintiff, the Court will be asked to lift the corporate veil and to make an order directing the 3rd Defendant to transfer to the Plaintiff its 9,999 shares in the 4th Defendant, and directing the 2nd Defendant to transfer to the Plaintiff its one share in the 4th Defendant."

30. On the date this action was commenced, the plaintiff obtained an *ex parte* injunction restraining the defendants from further changing the shareholding structure of the 4th defendant and restraining the 5th defendant from disposing of or diminishing the value of its assets. By summons dated 2 June 2008, the plaintiff applied for a continuation of the *ex parte* order and for discovery of certain information from the 3rd and 5th defendants. The injunction order was continued on 6 June 2008 until the final disposal of the action or further order but the application for discovery was adjourned *sine die*.

The Applications

31. There are five applications now before me, namely:-

> (1) the 1st and 2nd defendants' application (by Summons dated 24 June 2008 amended by consent on 11 February 2010) to stay the action against them to arbitration and/or to strike it out;
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> (2) the 3rd, 4th and 5th defendants' application (by their Summons dated 15 July 2008) to strike out alternatively to stay the action against them;
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> (3) the plaintiff's application (by summons dated 30 November 2009) to amend the Writ and Statement of Claim as shown in the copy Amended Writ and Amended Statement of Claim attached to the summons ("AmSOC 1");
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> (4) the plaintiff's application (by summons dated 17 February 2010) seeking leave to amend the Statement of Claim in the action in the manner shown in the copy Amended Statement of Claim attached to the summons ("AmSOC 2"), in place of proposed AmSOC I; and
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> (5) the plaintiff's adjourned application for discovery, referred to above.

32. I shall deal with the applications relating to the amendment of the Statement of Claim first, then the stay and/or strike out applications and finally the discovery application. Although Mr Chan Chi Hung SC, leading counsel for the 1st and 2nd defendants, submitted that it would be pointless to consider the amendment application if I were to accede either to his clients' stay application or to their strike out application, since if the action were stayed or struck out there would be nothing to amend, it seems to me inevitable that I must deal separately with each of the applications before me in any event. In this sense, I must consider the amendment application regardless of the stay or strike out applications, in case I come to the view that the action should not be stayed or struck out as against either the 1st and 2nd defendants or the 3rd, 4th and 5th defendants. The order in which I propose to deal with the applications is also logical, in my view, for the further reason that Mr Chan SC's submissions on the stay application were made on the basis that the action should be stayed to arbitration even if the amendments were allowed.

The Application to Substitute AmSOC 1 with AmSOC 2

33. Although the defendants objected to the lateness of the substitution of proposed AmSOC 1 with proposed AmSOC 2, it is appropriate, in my view for the court to treat the amendment application as an application to amend in terms of proposed AmSOC 2. First, this is the form of the pleading for which the plaintiff now seeks leave and it would therefore be artificial to restrict the plaintiff to proposed AmSOC 1. Secondly, since the proposed pleading contains allegations of fraud, I think it is more appropriate that the pleading also signed by Mr Barrie Barlow SC (as proposed AmSOC 2 is) is the subject of debate rather than one not signed by him (as is the case in respect of proposed AmSOC 1). Thirdly, any consequence that might flow from the late substitution of the proposed amended pleading is, in my view, limited to the question of costs.

The Amendment Application

34. I approach the amendment application on the basis that "It is a guiding principle of cardinal importance on the question of amendment that, generally speaking, all such amendments ought to be made 'for the purpose of determining the real question in controversy between the parties to any proceedings and of correcting any defect or error in any proceedings'": *Hong Kong Civil Procedure 2010* (Vol.1) at Note 20/8/6. However, I also bear in mind the recent introduction of RHC O.20 r.8(1A) which provides that the court should not order a pleading to be amended "unless it is of the opinion that the order is necessary either for disposing fairly of the cause or matter or for saving costs". As a starting point, I propose to examine the proposed amendments to determine if they plead a viable cause of action, that is one which is not susceptible to being struck out either because it does not disclose a reasonable cause of action or because it is bound to fail or is otherwise an abuse of process.

35. Mr Barlow SC, appearing with Mr Anson Wong for the plaintiff , explained that by the proposed amendments in AmSOC 2, the plaintiff was seeking:-

> (1) To delete the "lifting the corporate veil" plea;
>
> (2) To refine the plaintiff's constructive trust plea by identifying the principal two alternative forms of remedy that would facilitate the removal of the corporate restructuring; and
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> (3) To bring additional and alternative damages claims against the individuals responsible for the 1st to 5th defendants' dishonest conduct, namely the proposed 6th to 11th defendants, for conspiracy to defraud the plaintiff and/or for tortious inducement of breach of contract.

Refinement of the constructive trust plea

36. The proposal to delete the "lifting the corporate veil" plea is not controversial, since the defendants maintain that this plea should be struck out in any event. I do not propose to consider this further although it is necessary to consider the viability of the plea which replaces it.

37. It is necessary to analyse the manner in which the plaintiff says it seeks to refine the constructive trust plea in the existing pleading. As noted above, the existing alternative claim to the constructive trust claims is that the Impugned Transactions were "effected in bad faith and with the sole intention of enabling or assisting the 1st and 2nd Defendants to avoid their contractual obligations under the Agreement". The plaintiff now seeks to add "and thereby to defraud the Plaintiff" to this formulation in paragraph 27 of proposed AmSOC 2. Similar additions of an allegation that the Impugned Transactions were effected "to defraud the Plaintiff" or "fraudulently" are proposed to be added to paragraphs 14, 15A, 16, 18 and 28 of AmSOC 2. Hence, instead of asking the court to lift the corporate veil, the plaintiff now asks the court, in paragraph 30 of AmSOC 2 (as also reflected in proposed amended paragraph 1 of the Prayer), "to make orders declaring void each of the fraudulent transactions which have been pleaded in paragraphs 14, 15, 15A, 16, 17 and 18 above and directing the 1st Defendant to transfer to the Plaintiff its one share in the 4th Defendant, and directing the 2nd Defendant to transfer to the Plaintiff its one share in the 4th Defendant".

38. The defendants collectively object to leave being granted to the plaintiff to amend in these terms. It is submitted that the new allegation of fraud is not supported by any particulars and offends against the principle, laid down in cases such as *ADS v. Wheelock Marden & Co. Ltd.* [1994] 2 HKC 264 at 270B-C, that allegations of fraud must be pleaded distinctly and with the utmost particularity.

39. It is also contended, on behalf of the defendants, that the allegations in AmSOC 2 are consistent with innocent conduct on the part of the defendants and therefore the allegation of fraud cannot succeed.

40. I do not agree that the plaintiff's proposed plea that the Impugned Transactions were carried out fraudulently would be susceptible to a strike out application or bound to fail.

41. As noted above, it is the plaintiff's case that the defendants, including the 3rd defendant, knew that there was no legitimate basis to terminate the Agreement, that their motivation for seeking to do so was because they considered they would be better off financially by resiling from the Agreement, that they designed the Impugned Transactions with a view to ensuring that the plaintiff would be deprived of the fruits of the Agreement, that the Impugned Transactions were concealed from the plaintiff and CIETAC and that the purported reason put forward for the reconstruction was false.

42. It seems to me that the proposed pleading in AmSOC 2 is adequate to set out the plaintiff's case along the lines set out and that this case does at least raise a valid basis for alleging, as an alternative case to the plaintiff's primary case, that the Impugned Transactions were carried out fraudulently. It may not be a particularly strong case; indeed it may fail at trial. But that is not the interlocutory pleading stage with which I am now concerned.

43. As for s. 57B of the Companies Ordinance, the defendants submitted that allotments in breach of s. 57B of the Companies Ordinance (Cap.32), as the plaintiff pleads the allotment of additional shares in the 4th defendant to the 3rd defendant was (paragraphs 13A and 15A of AmSOC 2), are not invalid and void by reason of s. 57B(7).

44. I do not think that s. 57B(7) assists the defendants. That sub-section is a saving for an "allotment to the founder members of the company of shares in the company which, by signing the memorandum, they have agreed to take". It has not been suggested that this exception applies in the present case. As Lam J held in *Wong Kam San v. Yeung Wing Keung* [2007] 2 HKLRD 267 at §19, a contravention of s. 57B nullifies the effect of any purported allotment and any allotment in contravention of s. 57B in cases outside the s. 57B(7) exception is invalid in law.

45. In the present case, if the allotment of shares to the 3rd defendant was for the deliberate and improper purpose of defeating the plaintiff's proprietary claims to the shares of the 4th defendant, it seems to me at least arguable that the allotment may be invalid and liable to be set aside on the application of the principles identified by Lam J in *Wong Kam San* at §76.

46. The issue of whether there was an obligation on the part of the 1st and 2nd defendants to obtain the plaintiff's consent before respectively voting in favour of the allotment to the 3rd defendant, transferring and declaring a trust over their respective shareholdings in the 4th defendant is a matter for trial, the plaintiff having pleaded the existence of a trust or the fiduciary duties of a vendor in possession as against the 1st and 2nd defendants (see paragraphs 11 and 12 of AmSOC 2).

47. As to the role of the 3rd defendant, Mr Winston Poon SC, leading counsel for the 3rd, 4th and 5th defendants, submitted that the plea in paragraph 19 of AmSOC 2 that the 1st, 2nd and 3rd defendants were "under the control of the 6th Defendant" was inconsistent with the plea of common management. He also contended that the plea offended against the requirement that management and control of a company was not something to be considered in the round and that it was necessary to identify the natural person or persons having management and control in relation to the act or omission in point: see *El Ajou v. Dollar Land Holdings plc & anor.* [1994] 2 All ER 685 at 696A.

48. Mr Barlow SC's answer to this complaint was that the plaintiff's plea is clearly that the 6th defendant wholly beneficially owned and controlled each of the 1st to 5th defendants and that he exercised that control through the common management of the various companies. I accept that this is what is pleaded in paragraph 19 of AmSOC 2. Whether it is made out at trial is another matter but, for present purposes, I do not see any reason that should preclude the plaintiff making this allegation as a matter of pleading.

49. In respect of the alternative remedy proposed to be pleaded in AmSOC 2 in place of the plea to lift the corporate veil, now in amended paragraphs 27 to 30 of the draft pleading, the defendants opposed these amendments on the basis that the allotment of shares to the 3rd defendant could not have been fraudulent since it was done openly and overtly. The defendants challenged the premise of the plaintiff's plea, in paragraph 29 of AmSOC 2, namely that the reasons put forward by Mr Mok in his affirmations for the corporate reconstruction were untrue and groundless, and contended that the conclusion in this paragraph was simply an invitation to infer fraud without any proper basis.

50. Mr Barlow SC's answer to this complaint was again that the plaintiff's pleading alleges that the Impugned Transactions were effected in bad faith in order to enable or assist the 1st and 2nd defendants to avoid their contractual obligations under the Agreement, and that the 1st and 2nd defendants knowingly concealed them from the plaintiff and the CIETAC arbitrators during the arbitration leading to the Award in October 2006. On this basis, he submitted that the fraud was what he described as the "bogus reconstruction" driven by the 3rd defendant, as owner of the 1st, 2nd, 4th and 5th defendant, in bad faith to enable or assist the 1st and 2nd defendants to resile from the Agreement.

51. It seems to me that the plaintiff's plea should be permitted and tested in due course at trial. If the plaintiff is able to establish the requisite extent of knowledge pleaded as against the 3rd defendant as to the 1st and 2nd defendant's underlying obligations under the Agreement giving rise to the plaintiff's alleged interests in the shares of the 4th defendant, and that the Impugned Transactions were entered into in bad faith and deliberately in order to defeat those interests, the alternative remedy that the Impugned Transactions be declared void may lie. It is not necessary at this interlocutory stage to decide if the plaintiff is right, only that the claim is viable.

52. Subject to the defendants' application to strike out the constructive trust claim altogether, which I shall address below, I would allow the proposed amendments in paragraphs 5H to 30 of AmSOC 2 and to the relief claimed in paragraph 1 of the Prayer.

The economic torts

53. There are two economic torts pleaded in AmSOC 2 against each of the 1st to 5th defendants and also the 6th to 11th defendants sought to be added, namely conspiracy to defraud and inducing or procuring the 1st and 2nd defendants to breach the Agreement with the plaintiff.

54. The 6th to 11th defendants are identified in paragraphs 5A to 5G. The plaintiff alleges that the 1st, 2nd, 4th and 5th defendant companies are ultimately owned or controlled by the 3rd defendant, which in turn was and is beneficially owned and controlled by the 6th defendant, the founder of the Eton group. The 7th to 10th defendants are variously alleged to be directors of the 1st, 2nd, 4th and 5th defendants, while the 11th defendant is alleged to be the group financial controller of the Eton group and responsible for the implementation of the corporate restructuring of which the plaintiff complains.

55. AmSOC 2 proposes to plead conspiracy to defraud (in paragraphs 31 to 33, read with the earlier paragraphs of the pleading) and inducing or procuring the 1st and 2nd defendants to breach the Agreement (in paragraph 34, read with the earlier parts of the pleading, in particular paragraphs 33(3) to 33(11) where the overt acts of the conspiracy are pleaded).

56. The tort of conspiracy takes two forms, namely (1) conspiracy to use unlawful means and (2) conspiracy to injure. The latter does, but the former does not, require a predominant purpose to injure: see *Meretz Investments NV v. ACP Ltd.* [2008] Ch 244 at §117 (per Arden LJ).

57. The ingredients of a conspiracy to use unlawful means were summarised by the English Court of Appeal in *Kuwait Oil Tanker Co SAK v. Al Bader* [2000] 2 All ER (Comm) 271 at §108:-

> "A conspiracy to injure by unlawful means is actionable where the claimant proves that he has suffered loss or damage as a result of unlawful action taken pursuant to a combination or agreement between the defendant and another person or persons to injure him by unlawful means, whether or not it is the predominant purpose of the defendant to do so."

This summary was applied by Arden LJ in *Meretz Investments NV v ACP Ltd* [2008] Ch 244 at §86.

58. Accordingly, proving conspiracy to use unlawful means involves proving each of the following elements of the tort:-

(1) the nature of the agreement,

(2) the unlawful means alleged,

(3) each unlawful act relied upon as causing loss,

(4) the fact that each such act was carried out pursuant to the conspiracy, and

(5) the relevant state of mind of the putative conspirator.

59. When pleading the tort of conspiracy, the pleader has to plead at least one overt act which is the act of all the alleged conspirators or, failing that, a number of overt acts which include at least one act on the part of each conspirator. And the overt act or overt acts pleaded must be such as to show: (1) that the conspiratorial agreement alleged against the defendants had been entered into by each and every one of them, (2) that the agreement, and not merely the intention of one person alone, was implemented, and (3) that such implementation caused the damage complained of: see *ADS v. Wheelock Marden & Co Ltd* [1994] 2 HKC 264 at 272B-D (per Bokhary JA).

60. As for the tort of procuring or inducing a breach of contract, this tort was established in *Lumley v Gye* (1853) 2 E & B 216 and is based on the general principle that "a person who procures another to commit a wrong incurs liability as an accessory": see *OBG Ltd v Allan* [2008] AC 1at §3 per Lord Hoffmann.

61. In *Meretz Investments NV v ACP Ltd* [2008] Ch 244, Arden LJ at §86 stated that "[the] tort of inducing a breach of contract is committed when a person, with the requisite knowledge and intention …, procures or persuades another person to breach his contract with a third party".

62. The tort must consist of the following elements:-

> (1) the existence of knowledge that the defendant is inducing a breach of contract: *OBG* at §§39-40 per Lord Hoffmann and §190 per Lord Nicholls; and
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> (2) an intention on the part of the defendant to procure a breach of contract: *OBG* at §§42-43 and 62 per Lord Hoffmann and §191 per Lord Nicholls.

63. The defendants contend that the plea of knowledge in paragraph 31 of AmSOC 2 is embarrassing for lack of particulars. That paragraph pleads knowledge on the part of the 3rd to 11th defendants globally of the contractual commitments by the 1st and 2nd defendants under the Agreement to transfer the entire share capital of the 4th defendant to the plaintiff. The basis of the plea of knowledge is their close inter-relationship pleaded in paragraphs 5A to 5G.

64. Mr Barlow SC's answer to this complaint, relying on *Hong Kong Civil Procedure 2010* (Vol.1) Note 18/12/21, is that particulars of knowledge may, but need not, be pleaded. In effect, his submission was that it was sufficient for the pleading to state the particular fact alleged to be known and the party alleged to know that fact. Further particulars could be a matter of request but their lack was not a reason to disallow the amendment.

65. I am not convinced that in the light of the Civil Justice Reform and the trend towards more open litigation that the approach advocated by Mr Barlow SC represents good practice and will suffice to meet a complaint of lack of particularity in every case where leave is required to amend a pleading. However, on the basis that the plaintiff has set out the close corporate inter-relationship of the 1st to 5th defendants and the various directorships in those companies held variously by the 6th to 11th defendants, I am prepared to accept that further particularity of this plea is a matter that can, if necessary, be dealt with by request following the amendment.

66. The defendants' other complaints about the pleas of economic torts were directed to the alleged inadequacy of AmSOC 2 to plead the necessary elements of the torts. Specifically, Mr Poon SC submitted that the acts pleaded on the part of the 3rd, 4th and 5th defendants did not show the alleged conspiratorial agreement had been entered into by each defendant; nor, he submitted, was there any pleading as to how, when and in what manner it was alleged the 3rd, 4th and 5th defendants entered into such an agreement with the other defendants to conspire to injure by unlawful means.

67. In my view, the conspiratorial agreement is adequately pleaded in paragraph 32 of AmSOC 2. The plaintiff's case is reasonably clear: the defendants all knew of the 1st and 2nd defendants' contractual commitments to transfer the shares of the 4th defendant to the plaintiff, yet in spite of this knowledge they agreed to effect the Impugned Transactions with the deliberate intention of defeating the plaintiff's rights under the Agreement.

68. The defendants also complained that the plaintiff's case was premised on the fact of the defendants knowing that the grounds for the 1st and 2nd defendants terminating the Agreement were not genuine but were for an ulterior purpose and that this plea was insufficiently particularised. In this regard, I am of the view that the plaintiff's case is adequately pleaded: it may or may not prevail at trial and requests by the defendants for further particulars may be justified but that is not a sufficient reason, in my view, to refuse leave to amend.

69. It seems to me that, with one exception to which I shall turn, the plaintiff has included in AmSOC 2 the necessary averments covering each of the elements of the two economic torts relied upon, as identified above.

70. The one exception to which I have referred is the necessity expressly and specifically to plead the alleged loss and damage flowing from the tort. This requirement was addressed in *Lonrho plc v. Fayed & ors. (No.5)* [1993] 1 WLR 1489 at 1494 per Dillon LJ:-

> "A plaintiff in a civil action for conspiracy must prove actual pecuniary loss, though if he proves actual pecuniary loss the damages are at large, in the sense that they are not limited to a precise calculation of the amount of the actual pecuniary loss actually proved: see *Quinn v. Leathem* [1901] AC 495 … As Lord Diplock said in *Lonrho Ltd. v. Shall Petroleum Co. Ltd. (No.2)* [1982] AC 173, 188: 'The gist of the cause of action is damage to the plaintiff.' But relying on the proposition that damages are at large, the plaintiffs had, until the opening of the hearing in this court, merely included in their statement of claim in its original form and as amended, the broad conventional allegation, without any particulars as against the defendants, in paragraph 29 that 'by reason of the matters set out above the plaintiffs have suffered loss damage and injury.'
>
> I have no doubt at all that was a grossly inadequate pleading. As Bowen LJ said in *Ratcliffe v. Evans* [1982] 2 QB 524, 532-533, in giving the judgment of this court:
>
> 'In all actions accordingly on the case where the damage actually done is the gist of the action, the character of the acts themselves which produce the damage, and the circumstances under which these acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry.'
>
> This was applied by Peter Gibson J in his judgment in *Sybron Corporation v. Rochem Ltd.* (unreported), 22 November 1982. More recently Sir Donald Nicholls V-C said, in *Joyce v. Sengupta* [1993] 1 WLR 337, 346H, that the plaintiff would need to give particulars of the financial loss claimed sufficient to ensure that the defendants would not be taken by surprise by any evidence adduced on the amount of this loss."

71. At present, AmSOC 2 paragraph 35 simply pleads: "By reason of the matters aforesaid, the Plaintiff has suffered loss and damage for which each of the 1st to 11th Defendants is jointly and severally liable." This pleading is clearly inadequate.

72. Recognising this, Mr Barlow SC produced, in the course of his reply on his amendment application, a reformulation of paragraph 35 of AmSOC 2. This now pleads the following specific heads of loss alleged to flow from the economic torts relied upon, namely:-

> (1) Designers' fees, consultants' fees, workers' wages totalling RMB 3 million incurred by the plaintiff in the expectation that the 1st and 2nd defendants would perform their obligations under the Agreement;
>
> (2) Unrecovered legal costs and expenses in the arbitration leading to the Award of RMB 2.5 million; and
>
> (3) Unrecovered legal costs and expenses in the arbitration leading to the 2nd Award of RMB 1 million.

73. I would observe that the thrust of these particulars appears to differ from the thrust of the conspiracy pleaded in paragraph 32 of AmSOC 2. There, the plaintiff's claim is put on the basis that the conspiracy was to injure and/or defraud the plaintiff "so as to prevent the Plaintiff from obtaining fully and timely such profits, income or benefits to which the Plaintiff should have been entitled had the Agreement been duly performed". One might therefore have expected the loss and damages to reflect the value of the 100% shareholding in the 4th defendant, which the plaintiff would have obtained had the Agreement been fully performed. Instead, Mr Barlow SC has chosen to frame the plaintiff's loss in terms of wasted expenditure under the Agreement. How the claim is framed is, of course, a matter for the plaintiff and its legal advisers but I make this observation to record the fact that the plaintiff has, at least at this stage, chosen not to plead loss and damage on the basis that it has been deprived of the value of the 4th defendant.

74. The production of these amendments to AmSOC 2 were necessarily extremely late and the defendants took strong objection to them. The defendants' objection deserves to be viewed sympathetically since the plaintiff's application to amend its pleading was first made by summons dated 30 November 2009: it has therefore had ample time in which to formulate its amendments properly. It would appear that it was only in the light of the defendants' raising this point (in the skeleton argument served by the 3rd, 4th and 5th defendants) that the plaintiff finally sought to remedy the deficiency.

75. However, I have reached the conclusion that, notwithstanding the lateness of these new particulars, the plaintiff should be allowed to supplement AmSOC 2 with the new particulars of loss and damage. The failure to plead the specific loss and damage resulting from the alleged economic torts is the only reason I would have refused leave to amend the pleading. But the deficiency has now been rectified and the lateness of the curing of the deficiency is a factor that can be accommodated in the disposition of costs in respect of the amendment application.

76. For the above reasons, I conclude, subject to the stay and/or strike out applications, that the plaintiff should have leave to amend its pleading to add the 6th to 11th defendants and the pleas of economic torts as reflected in the amendments in paragraphs 5A to 5G and 31 to 36 of AmSOC 2 and paragraphs 6A and 6B of the Prayer for relief (as substituted by the document served with Annex G to Mr Barlow SC's submissions). The only minor exception to this conclusion is the phrase "or associate" in the proposed amended paragraph 5A, since Mr Barlow SC accepted that this was an immaterial averment: if immaterial, it should not be made and therefore leave to amend to include it will not be given.

77. Finally, I should add that the plaintiff sought to correct a typographical error in paragraph 3 of the Prayer for relief, for which I grant leave.

The Plaintiff's preliminary objection to the Defendants' summonses

78. By way of preliminary objection, Mr Barlow SC submitted that each of the applications by the 1st and 2nd defendants and the 3rd, 4th and 5th defendants to stay or strike out the action was seeking to re-litigate issues already litigated by the 1st and 2nd defendants in HCCT 54/2007 and which have been decided by Reyes J and the Court of Appeal and also issues litigated by them before CIETAC in the arbitrations leading to the Award, 2nd Award and 3rd Award.

79. He contended that the effect of the outcome of the litigation in HCCT 54/2007 was that: (1) the Award is a final award ordering the 1st and 2nd defendants to perform the Agreement; (2) the 1st and 2nd defendants' attempts to set aside the registration of the Award were misconceived; (3) the 1st and 2nd defendants' contentions that the plaintiff's constructive trust claim was unarguable and could not lead to the granting of orders of specific performance were misconceived; and (4) the plaintiff's enforcement of the Award did not constitute a breach of the arbitration clause nor an abuse of the court's process.

80. On this basis, Mr Barlow SC contended that: (1) the 1st and 2nd defendants are fixed with issue estoppel in relation to the above; (2) it would be an abuse of process to permit re-litigation of these questions (relying on *Hong Kong Civil Procedure 2010* (Vol.1) paras. 18/19/11 and 18/19/20, *Mandarin Resources Corporation Ltd v. David Cheng and others* CACV 146/1987, 28.4.87, *House of Spring Gardens Ltd v. Waite and others* [1991] 1 QB 241 and *Yat Tung Co v. Dao Heng Bank* [1975] AC 581; (3) it would amount to a failure to achieve procedural economy and result in duplication of hearings in defiance of the requirements of the CJR; and (4) in the light of the Court of Appeal judgment, this court could only decide the issues against the defendants.

81. In my opinion, the 1st and 2nd defendants are not debarred from making the stay and strike out applications they have made by reason of the matters previously raised in HCCT 54/2007 before Reyes J or the Court of Appeal or in the various arbitration applications that have taken place.

82. As to HCCT 54/2007, the issue before Reyes J was whether it would be contrary to public policy to enforce the Award as provided for in s.40E(3) of the Arbitration Ordinance. It was in this context that the 1st and 2nd defendants argued before Reyes J that the impossibility of performance was such that the Hong Kong court would not grant specific performance of the Agreement so that the Award, on the basis it was or was analogous to an order for specific performance, should not be registered in Hong Kong on the ground of public policy: see paragraph 89 of Reyes J's judgment.

83. It is quite clear that Reyes J had this action in mind when he was considering the application to set aside the registration of the Award as a judgment of the Hong Kong court: see paragraphs 99 and 100 of his judgment. It is also clear that he had in mind that the 1st and 2nd defendants might make an application to stay or strike out that action: see paragraph 112 of his judgment. Notwithstanding the arguments alluded to by counsel then appearing for the 1st and 2nd defendants, Reyes J held (§114) there was nothing contrary to public policy in his allowing the Award to be enforced as a judgment of this court.

84. None of this amounts to a resolution of the issue of whether this action is liable to be stayed or struck out. On the contrary, at paragraph 124 of his judgment, Reyes J specifically referred to the fact that, if the Award had the effect of treating the Agreement as subsisting, this might possibly include the agreement to arbitrate and it would then follow that any future disputes over the substance of the parties' obligations might have to be referred to CIETAC for arbitration in Beijing.

85. Similarly, in the Court of Appeal, the issue was the narrow issue of whether any of the grounds for refusal of enforcement set out in s.40E of the Arbitration Ordinance existed. Counsel then appearing for the plaintiff drew the distinction between converting an award into a judgment of the court, which was the first or registration stage, and execution, which was the second stage: see per Le Pichon JA at paragraph 26. Le Pichon JA agreed with this distinction and noted:-

> "28. In considering whether or not to refuse the enforcement of the award, the court does not look into the merits or at the underlying transaction. Its role is confined to determining whether or not grounds exist for refusing to enforce the award because it would be contrary to public policy. As the judge recognized, the court's role should be as 'mechanistic as possible'.
>
> 29. As regards public policy, the only ground the appellants rely on as justifying a refusal to enforce the award is impossibility of performance. It was said that it is now impossible to deliver the land and, further, because of the restructuring, the shares can no longer be transferred. Since the conversion of an award into a judgment of the court does not involve going into the merits, it is difficult to see how impossibility of performance is relevant at the registration stage. No authority has been cited for the proposition that impossibility of performance is sufficient reason to justify a refusal to enforce an award under public policy grounds."

86. Mr Chan SC noted that it was accepted by Mr Barlow SC that the plaintiff was not entitled to judgment in this action against the 1st and 2nd defendants without a trial. In my view, Mr Barlow SC was right to do so, since there has not been any decision, either in the judgments of Reyes J or the Court of Appeal or by CIETAC in any of the arbitration proceedings between the parties, on the underlying issues raised in this action.

87. I agree with Mr Chan SC that whether the beneficial interest in the shares in the 4th defendant passed to the plaintiff on the signing of the Agreement, whether PRC law applies, whether the 1st and 2nd defendants were constructive trustees under PRC law or Hong Kong law, whether the 1st and 2nd defendants were in breach of trust or fiduciary duty under either system of law, whether the 3rd defendant held any shareholding in the 4th defendant on constructive trust or whether the defendants are liable to account to the plaintiff are all questions which have not yet been decided.

88. None of those issues were raised in the arbitration leading to the Award. Nor, in my view, were they raised in the arbitration leading to the 2nd Award. All that the 2nd Award decided was that the 1st and 2nd defendants had not made out a case to terminate the Agreement. Mr Chan SC was right, in my view, in submitting that the 2nd Award was not premised on whether, in continuing to perform, the plaintiff was to be granted those remedies sought in the present action, whether on the basis of constructive trust or otherwise. It is also relevant to note that, when considering the arbitration leading to the 2nd arbitration, the arbitral tribunal referred to the principle that the party would not be allowed to re-litigate a final award but did not consider that the application then before it offended against that principle.

89. In the third application for arbitration, leading to the so-called 3rd Award, instead of submitting a claim to CIETAC, the 1st and 2nd defendants sought further directions on the Award. The arbitral tribunal simply treated the application as one for correction of the Award and ruled that there was no mistake or omission in the Award. There was no determination as to whether the plaintiff should be entitled to the remedies now sought.

90. I do not think the *Mandarin Resources* case relied on by Mr Barlow SC assists for the simple reason that in that case, the issue sought to be raised before the Court of Appeal in the context of an application to appoint a receiver was precisely the same issue that had already been determined by Jones J in an earlier application between the same parties for injunctive relief, namely whether the plaintiff in that case had in fact and in law a proprietary interest to protect. In the present case, the judgments in HCCT 54/2007 of Reyes J and the Court of Appeal were only concerned with the issue of whether the registration of the Award should be set aside on the grounds of public policy, a different threshold and different stage of inquiry to that raised by the defendants' present application to stay or strike out.

91. I would add that the position in respect of the 3rd, 4th and 5th defendants is, in my opinion, *a fortiori* since they were not parties before Reyes J or the Court of Appeal.

92. However, Mr Barlow SC contended, relying on the wider principle of estoppel laid down in *Yat Tung Co. v. Dao Heng Bank* [1975] AC 581, that it would be an abuse to re-litigate the viability of the present action. He also relied on the case of *House of Spring Garden Ltd. v. Waite* [1991] 1 QB 241 to argue that the 3rd, 4th and 5th defendants could and should have joined in the earlier proceedings in HCCT 54/2007 since it was obvious that the registration of the Award affected their interests.

93. I do not consider that the *Yat Tung* principle applies in the present case. In *Ngai Few Fung v. Cheung Kwai Heung* [2008] 2 HKC 111, Cheung JA noted (at §22) that the true basis of the *Yat Tung* principle is based on an abuse of process and, this being the true basis of the principle, it was not permissible to adopt a mechanistic approach by simply saying that, since the cause of action or defence could have been raised in an earlier proceeding, then it should have been so raised, so that the subsequent raising of those issues in the later proceeding would necessarily be abusive.

94. Approaching the question as a matter of substance, I do not consider that it is an abuse for the 3rd, 4th and 5th defendants to seek to strike out or stay this action.

95. The *House of Spring Gardens* case is distinguishable, in my view, on its facts. In that case, judgment had been obtained in Ireland against three defendants. Two of them applied to set that judgment aside but were unsuccessful in doing so. In an action in England to enforce the Irish judgment, the defendant who had not applied to set aside the original judgment was held to be estopped from alleging that that judgment had been obtained by fraud. That is a far cry from the present case.

96. In short, whilst the plaintiff may be justified in thinking that the defendants are determinedly seeking to frustrate its efforts to obtain any benefit from the Agreement and the Award, I do not consider Mr Barlow SC's description of the defendants as "serial re-litigators" to be justified.

The Strike Out Applications

97. The principles on which the court approaches an application to strike out, whether under RHC O.18 r.19 or the inherent jurisdiction, is clear and was not in dispute. As *Hong Kong Civil Procedure 2010* (Vol.1) succinctly states, at Note 18/19/4, it is only in plain and obvious cases that the court should exercise its summary powers to strike out an action or pleading under this rule. There should be no trial upon affidavits. Disputed facts are to be taken in favour of the party sought to be struck out. Nor should the court decide difficult points of law in striking out proceedings. The claim must be obviously unsustainable, the pleadings unarguably bad and it must be impossible, not just improbable, for the claim to succeed before the court will strike it out.

98. Turning to the substance of the application to strike out, Mr Chan SC and Mr Poon SC both advanced similar contentions in this regard. It should be noted that the contention that the Statement of Claim did not disclose a reasonable cause of action was abandoned by both Mr Poon SC (who sought, and was granted, leave to amend his strike out summons accordingly) and Mr Chan SC. Instead, the grounds of the strike out application were that the claim was frivolous or vexatious and/or an abuse of the process of the court.

99. The primary basis of the application is that, by Article 13(2), the Agreement is subject to PRC law and, on the basis of expert evidence as to that system of law, there is no concept of constructive trust so the claims advanced by the plaintiff simply do not exist as a matter of law.

100. Article 13(2) of the Agreement provides as follows:-

> "2. The Agreement is governed by the laws of the People's Republic of China, but the procedure and validity related to the transfer of the shares of Hong Kong Legend is governed by the laws of Hong Kong Special Administrative Region."

101. As a fallback, the defendants contend that, even if the claims are governed by Hong Kong law, the constructive trusts pleaded are bad in law.

102. The first question is therefore to consider what system of law governs the plaintiff's pleaded constructive trust claims. This turns on the construction of Article 13(2) of the Agreement and it is not a question on which either Reyes J or the Court of Appeal appears to have been addressed. Mr Chan SC and Mr Poon SC contend that the effect of Article 13(2) is clear: PRC law is the proper law of the Agreement in all respects save that Hong Kong law governs the specific item of the actual transfer of the shares in the 4th defendant to the plaintiff pursuant to the Agreement.

103. In this regard, the defendants refer to and rely upon the opinion of the arbitral tribunal expressed in the Award, in which the tribunal, after referring to Article 13(2), stated:-

> "The Arbitral Tribunal finds that, in the Agreement in this case, the two parties primarily specify the respective rights and obligations of the parties before the transfer of shares in Hong Kong Legend is to eventually carry out, and expressly agree that the written agreement on transfer of shares in Hong Kong Legend will be separately executed in the form provided in the annexure to the Agreement in this case after the relevant obligations have been fulfilled. At the same time, the annexure to the Agreement in this case titled 'Sale and Purchase Agreement for Transfer of Shares and Debts of Hong Kong Legend' is also found to state that 'This Agreement shall be governed by and construed in accordance with the laws of Hong Kong', which shows consistency in the main content of the Agreement in this case. For the said reason, the Arbitral Tribunal holds that the law applicable to resolve the dispute over the validity of the Agreement in this case between the two parties shall be the law of the People's Republic of China."

104. It was the submission of Mr Poon SC (adopted by Mr Chan SC) that it was clear that PRC law is the proper law of the Agreement and that the extent to which Hong Kong law applies to the Agreement is not engaged. This is because the contemplated share transfer under the Agreement has not eventuated. It is that transfer, and that transfer alone, to which Hong Kong law applies. Since the basis of the alleged constructive trust is that it arises out of the contractual commitments undertaken by the 1st and 2nd defendants, it must follow that any such claim is governed by PRC law. Reliance was placed on *Dicey, Morris and Collins on The Conflicts of Laws* (14th Ed.) Vol. 2 at para.29-063 and *The Conflict of Laws in Hong Kong* by Graeme Johnston at para.8-092.

105. On the footing that PRC law applies to the claimed constructive trust, the defendants relied on the expert evidence of Professor Anthony Dicks QC, SC, which, was to the effect that there was no concept of constructive trust under PRC law and that, under that system of law, the concept of fiduciary duty has no independent existence in the PRC.

106. I see the force in the defendants' submissions. If I were persuaded that PRC law is the governing law of the alleged constructive trust, there would be a strong case for striking out the claim on the basis of Professor Dicks' evidence. That is because I do not read the expert evidence filed by the plaintiff, in a joint expert report of Professor Haung Jin and Mr Fei Ning, as contradicting Professor Dicks' evidence that the concepts of constructive trust and the alleged fiduciary duty pleaded by the plaintiff do not exist under the laws of the PRC.

107. However, I am not persuaded that it is plain and obvious that the proper law of the alleged constructive trust is the law of the PRC. This was not a question on which the arbitral tribunal has expressed any view. The passage from *Dicey, Morris and Collins* relied upon is equivocal as it states (at p.1328): "For example, where a specifically enforceable contract is alleged to give rise to a constructive trust, a court may apply the law applicable to the contract to determine the matter" (emphasis added). So far as the extract from *The Conflict of Laws in Hong Kong* is concerned, the author suggests (at p.514) that, in the case of foreign constructive trusts, the common law rule of closest connection should apply to the choice of law. In the present case, it is by no means clear at this stage that that rule would dictate that PRC law should apply to the alleged constructive trust.

108. There is a dispute between the parties as to the proper law of the alleged constructive trust as a matter of law and also as a matter of fact, since the plaintiff contends it will depend on matters of PRC law as to the construction of the Agreement.

109. In the circumstances, I do not consider that it has been shown at this stage that the alleged constructive trust claim is governed by PRC law and is therefore bound to fail.

110. It is therefore necessary to turn to consider Mr Poon SC's alternative submission (adopted by Mr Chan SC) that, even if Hong Kong law is the relevant proper law of the alleged constructive trust, the claims are bound to fail. The crux of the defendants' submissions in this regard was that no constructive trust could arise if the contract was not capable of specific performance, in reliance on *Snell's Equity* (31st Ed.) para.22-04 and *Sainsbury plc v. O'Connor* [1991] 1 WLR 963.

111. In this regard, Mr Poon SC took me through various provisions in the Agreement in support of his argument that the Agreement only confers an option on the plaintiff to purchase the shares of the 4th defendant at the very end of the project. He then referred me to the Award, in which the arbitral tribunal, in describing the nature of the Agreement and holding that the Agreement was not an agreement for share transfer, stated (amongst other things):-

> "The main provisions of the Agreement in this case all concern the respective rights and obligations of the parties before the conditions precedent to the sale and purchase of the shares to Hong Kong Legend are satisfied or have occurred; … It is the view of the Tribunal that such an arrangement fully illustrates the true intent of the parties to progressively transfer the right to develop, operate and obtain benefits from No.22 Lot first and, after all the terms and conditions provided in the Agreement have been met, then proceed to execute the legal documentations on the transfer of shares in the target company … In other words, the main rights and obligations of the parties in the Agreement in this case do not involve how to specifically transfer the shares in Hong Kong Legend in detail, but instead involve how to perform certain specific obligations so as to satisfy the conditions whereby the contemplated share transfer may ultimately take place."

112. A further point made by Mr Poon SC in this context was that no constructive trust could arise since he submitted, in reliance on *Co-operative Insurance Society Ltd. v. Argyll Stores (Holdings) Ltd.* [1998] 1 AC 1, the court would not grant specific performance of the Agreement as it would require constant supervision.

113. Mr Barlow SC's answer was that the Agreement did not simply confer an option on the part of the plaintiff to purchase the shares in the 4th defendant. He pointed to Article 8(3) of the Agreement which, he submitted, made it clear that the plaintiff had no option but to accept the shares to be transferred. He also submitted, relying on *Lewin on Trusts* (18th Ed.) at para.10-05, that a contract is not conditional in the relevant sense (that is, of rendering a claim for specific performance unavailable) if fulfillment of the supposed condition is within the control of a contracting party. Here, he submitted, the 1st and 2nd defendants were seeking to rely on their own breach of contract to suggest a condition was not fulfilled by them.

114. I do not propose to resolve the differences between Mr Poon SC and Mr Barlow SC in this regard. It suffices for present purposes that I indicate that I do not consider it plain and obvious that the defendants' arguments are right and that the plaintiff's constructive trust claim is bound to fail. I think the position is arguable and should be allowed to proceed to trial.

115. It is also apparent that it is not plain and obvious that the Agreement is not capable of specific enforcement. The Award orders the parties to continue to perform the Agreement and the arbitral tribunal did not appear to consider that there was any impediment to this order. It was also the view of Reyes J in HCCT 54/2007 that it was not obviously the case that the Agreement was incapable of performance (see esp. §§95, 110 and 125), a view with which the Court of Appeal agreed.

116. Mr Poon SC advanced two separate additional arguments, specific to the 3rd defendant's position, in support of the strike out application. First, he submitted that the 9,998 shares in the 4th defendant allotted to the 3rd defendant could not be subject to a constructive trust since such liability is premised on the disposal of the plaintiff's assets in breach of trust or fidicuary duty. He submitted, relying on *Musselwhite v. C.H. Musselwhite & Son Ltd.* [1962] Ch 964, that an unpaid vendor in possession of shares was entitled to vote the shares as he liked and did not owe a fiduciary duty towards the purchaser in this regard. He also submitted that the 9,998 shares never belonged to the plaintiff and so could not have been beneficially received by the 3rd defendant in breach of trust or fiduciary duty.

117. Secondly, he submitted that knowledge of the Agreement could not be imputed to the 3rd defendant since the fact of common directors of two companies did not fix each company with notice of everything that was done by the other company, relying on *Re Marseilles Extension Rly. Co.* (1871) LR 7 Ch App 161 at 168. He further submitted that the plaintiff's plea as to the 3rd defendant's knowledge of the Agreement was defective in that the general plea of common management was insufficient. Instead, he submitted, it was necessary to identify the person who had management and control in relation to the act complained of: see *El Ajou v. Dollar Holdings plc* [1994] 2 All ER 685 at 702.

118. Again, I am not persuaded the position is so clear as to render the plaintiff's claim against the 3rd defendant plainly and obviously unsustainable.

119. It is necessary to treat *Musselwhite v. C.H. Musselwhite & Son Ltd.* with some caution and its application or otherwise will be dependent on the facts of any particular case: see, for example, the discussion of that case by Robert Walker LJ (as he then was) in *Michaels v. Harley House Ltd.* [2000] Ch 104 at 117-118. In my view, it is arguable, as Mr Barlow SC contended, that a partly-paid vendor's right to vote the shares does not entitle him to vote his shares in breach of his fiduciary duty. The plaintiff pleads (at paragraphs 12 and 14 of AmSOC 2) the existence of a fiduciary duty not to vote the shares of the 4th defendant in a manner damaging to the plaintiff's interest and that such voting in favour of the allotment was in breach of such duty.

120. I also consider it is arguable, as Mr Barlow SC contended, relying on cases such as *Tradepower (Holdings) Limited v. Tradepower (Hong Kong) Limted & ors.*, FACV 5/2009, 30.11.09, that the allotted shares amounted to a disposition of the plaintiff's beneficial assets.

121. As to the imputation of knowledge of the Agreement to the 3rd defendant, I am not persuaded that the plaintiff's pleading is defective as alleged. AmSOC 2 pleads that the common management of the 1st, 2nd and 3rd defendants. It also pleads that the 3rd defendant was beneficially owned and controlled by the 6th defendant, who is alleged to beneficially own and control the Eton group. The extent of his knowledge will be directly material to the question of whether the 3rd defendant was aware of the terms of the Agreement and the plaintiff's alleged rights arising thereunder. That is a matter for trial. As for the case of *Re Marseilles Extension Rly Co*, it seems to me that there is merit in Mr Barlow SC's observation that the principle laid down in that case only applies where the fiduciary or agent, whose knowledge is sought to be attributed to a company, is engaged in a fraud against his company, which is not the plaintiff's case here.

122. I bear in mind the observation of Barker J in *Cheung Chui Sou-ying v. The Personal Representatives of Cheung Yuk-luen & ors* [1981] HKLR 585 at 588, that "plain is not the same thing as simple and obvious is not the same as short" but, for all the above reasons, I am not persuaded that I should strike out the plaintiff's constructive trust claims against the defendants and I decline to exercise my discretion to do so. As I observed in discussing the plaintiff's application to amend, the claim may or may not ultimately be established at trial. That is, however, a different question to that with which I am now concerned, which is simply whether the claim is so obviously bad that it should not be permitted to go to trial.

The Stay Applications

The 1st and 2nd defendants' application

123. The 1st and 2nd defendants' stay application is made on the basis that the Agreement contains an arbitration clause (Article 13(1)) and the claim is a dispute arising from the performance of the Agreement and therefore liable to be stayed in favour of arbitration pursuant to s.6 of the Arbitration Ordinance.

124. Article 13(1) of the Agreement provides as follows:-

> "Parties shall make every effort to negotiate to resolve the disputes arising from the performance of this Agreement. In the case where no agreement is reached through negotiation, any party has the right to submit the dispute to the China International Trade Arbitration Commission in Beijing for arbitration, the arbitration rules of the Arbitration Commission at the time when the dispute occurs should be adopted."

125. As noted by Ma J (as he then was) in *Tommy CP Sze & Co v. Li & Fung (Trading) Ltd &* Ors [2003] 1 HKC 418 at 425-426, the court will generally deal with the following four questions when faced with an application for a stay to arbitration:-

> (1) Is the clause in question an arbitration agreement?
>
> (2) Is the arbitration agreement null and void, inoperative or incapable of being performed?
>
> (3) Is there in reality a dispute or difference between the parties?
>
> (4) Is the dispute or difference between the parties within the ambit of the arbitration agreement?

126. There was no dispute that Article 13(1) is an arbitration agreement. However, Mr Barlow SC contended that the arbitration agreement was effectively inoperative or incapable of being performed because of CIETAC's ruling in the 3rd Award and because the arbitral tribunal was *functus officio* by reason of having dealt with the matters said to be in dispute in this action in the Award and the 2nd Award.

127. The term "inoperative" was addressed by Kaplan J in *Lucky-Goldstar International (HK) Ltd. v. Ng Moo Kee Engineering Limited*, HCA 94/1993, 5.5.93, at §12 where he quoted from a textbook on the New York Arbitration Convention 1958 by Professor Albert Jan van den Berg which stated:-

> "The word 'inoperative' can be deemed to cover those cases where the arbitration agreement has ceased to have effect. The ceasing of effect to the arbitration agreement may occur for a variety of reasons. One reason may be that the parties have implicitly or explicitly revoked the agreement to arbitrate. Another may be that the same dispute between the same parties has already been decided in arbitration or court proceedings (principles of res judicata …)".

128. I do not consider that the arbitration agreement is inoperative. I have already addressed above, in dealing with the plaintiff's preliminary objection, why I do not consider the arbitral tribunal has already dealt in the arbitrations leading to the Award and the 2nd Award with the same issues that are raised in this action.

129. As for the argument based on the 3rd Award, I do not regard that ruling as indicating that the arbitration agreement is inoperative or incapable of being performed. In substance, the ruling was a refusal to amend the Award by reason of any mistake in relation to writing, typing or calculation which needed to be corrected. Insofar as it was also a ruling, as at that stage, that there was nothing in the Award which the arbitral tribunal needed to further determine, that was made in the absence of any dispute between the parties. The arbitral tribunal is not, in my opinion, *functus officio*.

130. Nor do I consider that the arbitration agreement is "incapable of being performed". Guidance on the meaning of that phrase can be found in the case of *Gatoil International Inc. v. National Iranian Oil Company*, unrep., Lexis transcript, 22.2.90, where Bingham LJ (as he then was) said:-

> "The words 'incapable of being performed' are a strong expression, in my judgment denoting impossibility, or practical impossibility, and certainly not mere inconvenience or difficulty. A mere change of circumstances rendering arbitration a less attractive mode of resolving a dispute or rendering the forum or the procedural rules chosen for any reason unattractive, could never be enough. For a party who has agreed to resolve any dispute by arbitration to be freed from his obligation under section 1(1) [of the Arbitration Act 1975] it is, in my judgment, necessary for him to show that the arbitration agreement simply cannot, with the best will in the world, be performed. I am satisfied that the words of exception should be strictly construed so as to reflect the intention of the Convention and the Act."

131. I do not consider that the plaintiff has demonstrated, the burden being on it to do so, that it is impossible for the arbitration agreement to be complied with. The arbitral tribunal has not, by its 3rd Award, indicated that it will not consider any properly constituted dispute between the parties to the arbitration agreement should that matter be referred to it in the future.

132. Mr Barlow SC also submitted, in respect of the 3rd question posed in the *Tommy Sze* case, that there was no unresolved difference between the parties and that the plaintiff's claims are outside the ambit of the arbitration clause. The only reason suggested by him as to why this was the case appears to be his contention that any differences have been finally and conclusively adjudicated by the arbitral tribunal who have expressly stated in the 3rd Award that there is nothing further to determine.

133. For the same reason as that given above as to why I do not regard the 3rd Award as demonstrating that the arbitration agreement is inoperative or incapable of being performed, I do not consider that the arbitral tribunal has expressly stated in the 3rd Award that there is nothing further to determine.

134. The real issue in the present case is whether the dispute or difference between the parties is within the ambit of the arbitration agreement.

135. In deciding whether a dispute or difference comes within the ambit of an arbitration agreement, the court must construe the arbitration agreement itself and then analyse the nature of the dispute or difference by reference to the claim which is made: see the *Tommy CP Sze* case at 435H (§59).

136. When approaching the question of construction of an arbitration clause, it is appropriate to bear in mind the following observations of Lord Hoffmann in *Fiona Trust & Holding Corporation & Ors v. Privalov & Ors* [2007] 4 All ER 951:-

> "6. In approaching the question of construction, it is therefore necessary to inquire into the purpose of the arbitration clause. As to this, I think there can be no doubt. The parties have entered into a relationship, an agreement or what is alleged to be an agreement or what appears on its face to be an agreement, which may give rise to disputes. They want those disputes decided by a tribunal which they have chosen, commonly on the grounds of such matters as its neutrality, expertise and privacy, the availability of legal services at the seat of the arbitration and the unobtrusive efficiency of its supervisory law. Particularly in the case of international contracts, they want a quick and efficient adjudication and do not want to take the risks of delay and, in too many cases, partiality, in proceedings before a national jurisdiction.
>
> 7. If one accepts that this is the purpose of an arbitration clause, its construction must be influenced by whether the parties, as rational businessmen, were likely to have intended that only some of the questions arising out of their relationship were to be submitted to arbitration and others were to be decided by national courts. Could they have intended that the question of whether the contract was repudiated should be decided by arbitration but the question of whether it was induced by misrepresentation should be decided by a court? If, as appears to be generally accepted, there is no rational basis upon which businessmen would be likely to wish to have questions of the validity or enforcement of the contract decided by one tribunal and questions about its performance decided by another, one would need to find very clear language for deciding that they must have had such an intention.
>
> …
>
> 13. In my opinion the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction. …"

137. As to the nature of the dispute or difference by reference to the claim which is made, I refer to the section above in which I have summarised the claims in this action as set out in the Statement of Claim. In my view, it is clear that the dispute between the plaintiff and the first and second defendants concerns the nature and consequences of the contractual obligations arising from the Agreement and is therefore a dispute arising from the performance of the Agreement. The very basis of the constructive trust claimed against the first and second defendants is pleaded as "the contractual commitment by the 1st and 2nd Defendants to transfer to the Plaintiff the entire issued share capital of the 4th Defendant". The present claim, so far as it comprises the constructive trust claim, is brought by the plaintiff against the 1st and 2nd defendants on the basis that this is a reflection of how the parties are to continue to perform the Agreement. There is plainly, in my opinion, a dispute between the parties as to whether this is how the Agreement is to be performed.

138. It then falls to consider the economic tort claims proposed to be made against the 1st and 2nd defendants, which are the subject of the amendment application. These claims are confined to the conspiracy claim pleaded in AmSOC 2 and not the claim for procuring or inducing breach of contract, since the latter cause of action is not pleaded against the 1st and 2nd defendants (see AmSOC 2, paragraph 34). Do the conspiracy claims fall within the ambit of the arbitration agreement?

139. The operative words of the arbitration agreement, as set out in Article 13(1) of the Agreement, are "the disputes arising from the performance of this Agreement". Are the conspiracy claims to be brought against the 1st and 2nd defendants disputes arising from the performance of the Agreement?

140. As a matter of first impression, it might be thought that the phrase "arising from the performance of this Agreement" would not obviously appear apt to cover the claims for conspiracy now sought to be advanced by the plaintiff against the 1st and 2nd defendants. The very crux of the conspiracy claims is that the defendants did not perform the Agreement but instead combined together to defeat the plaintiff's alleged interests arising from the contractual commitments under the Agreement.

141. Mr Chan SC submitted, however, that the conspiracy claims were covered by the arbitration agreement. He relied on a number of cases in which tortious claims had been held to be covered by an arbitration agreement.

142. First, he referred to *SA v. Welter* [2005] EWHC 2115 (Comm). In that case the arbitration agreement provided that: "The Parties hereby agree to submit any potential disputes regarding the performance or the interpretation of this Contract to an arbitration tribunal …". Gross J construed the relevant arbitration agreement (at §41) as meaning that it covered any potential disputes concerning the performance or non-performance or construction of the contract and added:-

> "If this is right, then there is no warrant as a matter of language for excluding tortious claims, provided they are sufficiently connected to the performance or non-performance of the contract so as to satisfy the requirement contained in the word 'regarding', i.e. the language of the clause extends to disputes going beyond the four corners of the contract. There is thus no basis in the language for concluding that the clause covers contractual claims between ET Plus and Eurotunnel regarding non-performance of the contract but not closely connected tortious claims relying on the same facts."

143. Gross J also referred (at §42) to a presumption, in English law, in favour of 'one-stop adjudication' such that the court should be slow to attribute to reasonable commercial parties an intention that there should in any foreseeable eventuality be two sets of proceedings between the same parties. At §45, he held that the arbitration clause extended beyond the four corners of the contract and would cover disputes as to its true construction and further extend to both contractual and tortious claims, provided these were sufficiently connected to the non-performance of the contract so as to satisfy the test encapsulated in the word 'regarding'.

144. Accordingly, he concluded that tortious claims for procuring breach of contract and conspiracy should be stayed for arbitration. At §49, in relation to the claims for unlawful interference and conspiracy, he held:-

> "… these allegations largely centre on the same facts (the misuse of confidential information and the preparation and distribution of the First and/or Second Eurotunnel Circulars) but reformulate them in legal terms and add the ingredient of intention to injure the Claimants. For my part, I have no real hesitation in viewing these claims as giving rise to disputes 'regarding' the 'performance' of the contract; instead of performing a contract with ET Plus, Eurotunnel was (for example) conspiring with others to use unlawful means against the Claimants."

145. Next, Mr Chan SC relied on *Ashgar & ors v. Legal Services Commission* [2004] EWHC 1803 (Ch), 22.7.04, where Lightman J held:-

> "In my judgment, the expression 'disputes concerning alleged breaches of the Contract' is very wide. No authority or text book has been cited to me which has considered the meaning of any such expression or the word 'concerning' in this context. I am accordingly neither assisted nor trammelled by any such guidance. The use of the expression makes plain that the jurisdiction of the arbitrator is not confined to the consideration of the parties' causes of action for breach of the contract. It is only necessary to establish jurisdiction that the dispute concerns what is alleged to be a breach of contract, but not that the dispute is exclusively concerned with what are alleged to be breaches of contract. If the determination of a claim in tort by the Claimants requires determination whether one or other party has committed a breach as part of the Contract, the arbitrator has jurisdiction to determine the claim in tort. The arbitrator has jurisdiction to determine whether a party has not merely acted in breach of the Contract but committed a tort. By use of the expression 'disputes concerning alleged breaches of the Contract' the parties have made plain their intention that there shall be one-stop adjudication for all disputes in which the issue of breach of contract arises and that the occasion shall not arise for the determination of the issue of breach of contract which the parties have agreed in the arbitration clause shall be determined by arbitration being determined in some other way. In a word the provision for arbitration is not to be by-passed without the consent of the parties by raising that issue and having it determined as an issue in court proceedings however framed."

146. Finally, in this context, Mr Chan SC relied upon the *Fiona Trust* case (*supra.*) in which a claim that a charterparty had been rescinded on the basis they had been induced by bribery was stayed for arbitration where the arbitration clause provided that "Any dispute arising under this charter shall be decided by the English courts". Mr Chan SC sought to point out, by reference to the judgments of Morison J at first instance and the Court of Appeal in that case (see [2006] EWHC 2583 (Comm) and [2007] 2 LLR 267 respectively), that the litigation that had been commenced included claims for damages for the tort of conspiracy.

147. I do not think that the *Fiona Trust* case assists Mr Chan SC. It would appear that the issue as to the stay for arbitration concerned the claim for rescission on the grounds that the charterparty had been induced by bribery and not the claim for damages for the tort of conspiracy. This appears clear from §7 of Longmore LJ's judgment in the Court of Appeal. There is no reference in the Court of Appeal or House of Lords judgments to the tortious conspiracy claims being stayed.

148. The cases of *SA v. Welter* and *Ashgar & ors v. Legal Services Commission* do, however, seem to me to support Mr Chan SC's submissions in favour of a stay. In my view, the operative words of the arbitration agreement in the present case, namely "arising from the performance of this Agreement", are self-evidently intended to cover disputes arising from the manner in which the Agreement has been performed. In AmSOC 2 paragraph 32, in which the conspiracy agreement is pleaded, the plaintiff's claim is put on the basis that the conspiracy was to injure and/or defraud the plaintiff:-

> "… by taking the steps complained of herein to obstruct, hinder, delay or attempt to obstruct, hinder or delay the performance of the Agreement by the Plaintiff so as to prevent the Plaintiff from obtaining fully and timely such profits, income or benefits to which the Plaintiff should have been entitled had the Agreement been duly performed."

149. The disputes concerning the claims for conspiracy against the 1st and 2nd defendants therefore do arise out of the performance of the Agreement since it is the plaintiff's own case that the conspiracy was to obstruct, hinder or delay the due performance of the Agreement by the plaintiff.

150. I therefore conclude that the conspiracy claims against the 1st and 2nd defendants are within the ambit of the arbitration agreement and, as such, should be stayed to arbitration.

The 3rd, 4th and 5th defendants' application

151. The 3rd, 4th and 5th defendants' application for a stay was made under the inherent jurisdiction of the court and was contingent on the 1st and 2nd defendants' application for a stay being granted.

152. Mr Poon SC relied upon the following passage in *Russell on Arbitration* (23rd Ed.) at para.7-055:-

> "Related claims extending beyond the parties to an arbitration but involving parties closely connected to those parties are brought and it would be wasteful of costs and risk conflicting outcomes to allow the closely related legal proceedings to proceed in tandem with the arbitration. It is not enough however that the claims involving third parties not party to the agreement to arbitrate raise similar issues to those being arbitrated separately. It is possible that a stay on this basis may be granted in cases involving the alleged application of the so-called group of companies theory, where for example one company in the group has signed a contract containing an arbitration clause and another group company has performed the contract and legal proceedings are brought against the latter company. In light of the decision in *Peterson Farms* the granting of a stay would be based on the desire to avoid conflicting outcomes and to save costs rather than to provide support for the group of companies theory."

153. In the course of his reply submissions on the 1st and 2nd defendants' stay application, Mr Chan SC referred to the decision in *SA v. Welter* (*supra.*) at §91 in support of the jurisdiction to order a case management stay under the inherent jurisdiction of the court. He also referred to the case of *Reichhold Norway ASA & anor v. Goldman Sachs International* [2000] 1 WLR 173.

154. I do not think it appropriate to exercise my discretion to stay the plaintiff's claims against the 3rd, 4th and 5th defendants as a matter of case management. As to the *SA v. Welter* case, there were already pending arbitration proceedings in Paris in favour of which the London court proceedings were stayed, which is not presently the case here. It is clear from the *Reichhold Norway* case that such a course would only be granted in exceptional and compelling circumstances (per Lord Bingham CJ at 186C). I do not think the circumstances in the present case are so exceptional and compelling to require me to exercise my discretion in favour of granting a stay of the plaintiff's claims against the 3rd, 4th and 5th defendants. Insofar as there may be a risk of inconsistent findings or wasted costs in the event the plaintiff's claims against the other defendants are pursued in this litigation whilst its claims against the 1st and 2nd defendants are pursued in an arbitration, this is an inevitable risk in any case in which multiple defendants are sued, some of which are parties to an arbitration agreement whilst others are not.

The Discovery Application

155. I was informed that the plaintiff's discovery application was adjourned when it was before Burrell J on 6 June 2008 due to the fact the 3rd and 5th defendants had not yet been served.

156. The plaintiff seeks a discovery order from the 3rd defendants of the names and correspondence addresses of each of its directors and shareholders, and a discovery order against the 5th defendant of all its assets of an individual value of RMB 100,000 or more in Hong Kong, the PRC or elsewhere in the world.

157. Mr Barlow SC submitted that, in the event the action was not stopped from proceeding, these discovery orders should be made in accordance with established principles, those principles being established in cases such as *A v. C* [1981] QB 956 and *Bankers Trust v. Shapira* [1980] 1 WLR 1274.

158. I am not persuaded that the order seeking disclosure of the names and addresses of the 3rd defendant's directors and shareholders should be made. This discovery request is not, in my opinion, supported by the cases of *A v. C* or *Bankers Trust v. Shapira*. The application for this discovery does not appear to me to be related to the proper operation of the injunction itself. Moreover, it is difficult to see why the plaintiff requires this information now that it is asserting in AmSOC 2 that the 3rd defendant is and was at all material times beneficially owned and controlled by the 6th defendant.

159. I did not understand Mr Poon SC to advance any substantive reason in opposition to the making of the discovery order against the 5th defendant in respect of its assets. This type of order is often made as an adjunct to an interlocutory proprietary injunction of the type granted in favour of the plaintiff and I therefore consider the plaintiff should have an order in terms of paragraph 3 of its summons dated 2 June 2008 and that the information so required to be disclosed be confirmed in the manner requested in paragraph 4 of that summons.

Disposition and costs

160. I therefore conclude that:-

(1) The plaintiff's application to substitute AmSOC 1 with AmSOC 2 be allowed;

(2) The plaintiff's application to amend the Statement of Claim be allowed to the extent set out in paragraphs 52, 76 and 77 above;

(3) The 1st and 2nd defendants' application for a stay to arbitration (paragraph 1 of their summons) be granted in respect of all the plaintiff's claims against them in this action but their application to strike out the action (paragraph 2 of their summons) be dismissed;

(4) The 3rd, 4th and 5th defendants' application to strike out or stay the action against them be dismissed;

(5) The plaintiff's application for discovery against the 5th defendant be granted (paragraphs 2 and 4 of its summons) but its application for discovery against the 3rd defendant be dismissed (paragraph 3 of its summons).

161. As to the costs of the various applications before me, subject to my apportionment of the costs of the hearing itself (dealt with in the following paragraph), I make orders *nisi* on the various summonses that:-

(1) The plaintiff is to pay the 1st and 2nd defendants the costs of the action, including the 1st and 2nd defendants' summons for a stay, to be taxed if not agreed;

(2) The plaintiff is to pay, to the 1st and 2nd defendants and to the 3rd, 4th and 5th defendants, the costs of and occasioned by the application to amend the Statement of Claim, including the costs to substitute AmSOC 1 with AmSOC 2;

(3) The 3rd, 4th and 5th defendants are to pay the plaintiff the costs of their summons to strike out and/or stay the action;

(4) The 3rd, 4th and 5th defendants are to pay the plaintiff the costs of the plaintiff's summons for discovery.

162. As regards the apportionment of the costs of the hearing before me, I make an order *nisi* that:-

(1) The plaintiff pay 2/3rds of the costs of the hearing to the 1st and 2nd defendants; and

(2) The 3rd, 4th and 5th defendants pay 1/3rd of the costs of the hearing to the plaintiff.

163. I have arrived at this apportionment to reflect:-

(1) the fact the plaintiff's success in the amendment application was attributable to the late substitution of AmSOC 2 for AmSOC 1 and the even later provision of particulars of loss and damage in respect of the economic tort claims;

(2) the 1st and 2nd defendants' overall success in the stay application; and

(3) the fact the 3rd, 4th and 5th defendants were ultimately unsuccessful in their application to strike out or stay the action against them but should not have to bear the costs of the hearing so far as it related to the amendment application because of factor (1).

(J.P. Fok)
Judge of the Court of First Instance
High Court

Mr Barrie Barlow SC and Mr Anson Wong, instructed by Messrs Li & Partners, for the Plaintiff

Mr Chan Chi Hung SC and Mr Richard Khaw, instructed by JSM, for the 1st and 2nd Defendants

Mr Winston Poon SC, Mr Jin Pao and Ms Elizabeth Cheung, instructed by Wilkinson & Grist, for the 3rd, 4th and 5th Defendants

(I) Plaintiff's appeal allowed and Defendant's appeal dismissed by Court of Appeal. Please refer to CACV88/2010 and CACV89/2010 dated 15 December 2010 (II) Please refer to HCCL13/2011 for the relevant appeal(s) to the Court of Appeal.