HCMP 1284/2022
[2023] HKCFI 2432

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
MISCELLANEOUS PROCEEDINGS NO. 1284 OF 2022

IN THE MATTER OF AN APPLICATION BY CHINA EVERGRANDE GROUP 中國恒大集團 FOR AN ORDER RESTRAINING AND STAYING FURTHER PROCEEDINGS IN ARBITRATION (HKIAC/A22258)

BETWEEN

CHINA EVERGRANDE GROUP 中國恒大集團 Plaintiff

and

TRIUMPH ROC INTERNATIONAL LTD Defendant

Before: Mr Recorder Abraham Chan SC in Chambers

Date of Hearing: 12 September 2023

Date of Decision: 12 September 2023

Date of Reasons for Decision: 25 September 2023

REASONS FOR DECISION

A. INTRODUCTION

1. The Plaintiff ("CEG") and its current financial woes are well known. A winding-up petition against CEG ("the Petition") has been on foot since June 2022 ("the Winding-Up Proceedings"). With CEG pursuing debt restructuring, the Petition has been adjourned several times, most recently until 30 October 2023.

2. It was in these circumstances that the two applications before me arose, both stemming from a claim brought in arbitration proceedings by the Defendant in the present HCMP action ("Triumph") against CEG for HK$862.5 million ("the Arbitration Proceedings").

3. The primary application was CEG's application by originating summons dated 8 September 2022, seeking under sections 181 and 329 of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32) ("the Ordinance") to restrain the Arbitration Proceedings pending final resolution of the Winding-Up Proceedings or further order ("the Restraint Summons").

4. The secondary application was Triumph's application by summons dated 30 December 2022 for security for costs in respect of the Restraint Summons ("the Security Summons").

5. The parties had earlier agreed that the Restraint and Security Summonses be dealt with together at the same hearing. They maintained this position at the hearing before me.

6. At the hearing, Mr Alan Kwong representing Triumph[1] properly accepted that as things stood, whatever the outcome of the Restraint Summons, the Security Summons would fall away in any event.

7. At the end of the hearing, I allowed the Restraint Summons and made these main orders:[2]

(1) Until the resolution of the winding up proceedings commenced by Top Shine Global Limited ("Top Shine") by way of a petition dated 24 June 2022 (and amended as of 17 August 2022) against CEG in Companies Winding-Up Proceedings No. 220 of 2022 (case number HCCW 220/2022) or further order of this Court, Triumph be restrained from taking any further step in the Arbitration Proceedings ("the Restraint Order").

(2) There be no order on the Security for Costs Application save that costs occasioned by the Summons be to the Plaintiff, to be taxed if not agreed.

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[1] Along with Ms Sakinah Sat.

[2] Edited here to track the abbreviations used in these Reasons for Decision, and omitting minor details extraneous or peripheral to these Reasons.

(3) The costs of the Restraint Application be to CEG with a certificate for two counsel, to be taxed if not agreed.

(4) There be liberty to apply.

8. What follows are my main reasons for granting the Restraint Order, set within their essential factual and statutory context.

B. FACTUAL BACKGROUND

B1. CEG's background

9. The factual background in this and later sections is essentially undisputed.

10. CEG is a Cayman-incorporated company listed in Hong Kong. It is an investment holding company with thousands of subsidiaries in offshore jurisdictions, Hong Kong, and the Mainland (together "the Group").

11. CEG serves as one of the main offshore financing platforms for the Group, which is headquartered in Guangzhou and principally engaged in developing, investing and managing property in the Mainland. The Group's business operations are primarily Mainland-based.

12. The Group has faced substantial liquidity challenges and financial difficulties since the second half of 2021.

13. In June 2022, Top Shine presented the earlier mentioned Petition against CEG.

14. The Petition debt of HK$862.5 million arose out of Top Shine's participation in the Group's financing in relation to 房車寶集團股份有限公司 ("FCB") that took place in March 2021 ("FCB Financing").

15. In light of CEG's debt restructuring efforts, the Petition is presently adjourned until 30 October 2023.

B2. Background to Triumph's claim and proceedings against CEG

16. Triumph's claim against CEG is also for HK$862.5 million, arising from Triumph's participation in the FCB Financing ("the FCB Financing Dispute"). The claim is premised on an investment agreement dated 28 March 2021. Triumph commenced the Arbitration Proceedings in August 2022 to pursue its claim.

17. On 31 August 2022, Triumph sought emergency relief in the Arbitration Proceedings pursuant to HKIAC's emergency arbitration procedure ("Emergency Arbitration"). On 16 September 2022, the Emergency Arbitrator dismissed Triumph's application.

18. While the Emergency Arbitration has ended, the Arbitration Proceedings are set to continue absent restraint by the Court.

B3. CEG's debt restructuring

19. CEG's debt restructuring efforts include a scheme of arrangement in Hong Kong ("the Scheme"). CEG says that matters on this front have been progressing "steadily". Triumph has not for present purposes challenged this view.

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20. The Scheme compromises CEG's indebtedness, including the Petition debt and Triumph's claim (assuming these are valid).

21. On 24 July 2023, the Court granted an order permitting CEG to convene meetings of creditors ("Scheme Meetings") to consider and, if thought fit, approve (with or without modification) the Scheme.

22. As at the date of the Restraint Summons hearing, the Scheme Meetings were set for 26 September 2023, and pending approval of the Scheme at the Scheme Meetings, CEG was set to proceed to obtain the Court's sanction of the Scheme.

C. POWERS AND PRINCIPLES

C1. Key statutory provisions

23. Where a Hong Kong-incorporated company is subject to a winding-up petition, section 181 of the Ordinance provides:

> "At any time after the presentation of a winding-up petition and before a winding-up order has been made, the company or any creditor or contributory may—
>
> (a) where any action or proceeding against the company is pending in the Court of First Instance or the Court of Appeal, apply to the court in which the action or proceeding is pending for a stay of proceedings therein;
>
> (b) where any action or proceeding against the company is pending in any court or tribunal other than the Court of First Instance or the Court of Appeal, apply to the Court of First Instance to restrain further proceedings in the action or proceeding,
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> and the court to which application is so made may, as the case may be, stay or restrain the proceedings accordingly on such terms as it thinks fit."

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24. For section 181 purposes, "action or proceeding" covers arbitrations: *Re UDL Contracting Ltd* [2000] 1 HKC 390 at p.393D-H (Le Pichon J as she then was).

25. With regard to foreign companies, section 329 of the Ordinance provides that:

> "The provisions of this Ordinance with respect to staying and restraining actions and proceedings against a company at any time after the presentation of a petition for winding up and before the making of a winding-up order shall, in the case of an unregistered company, where the application to stay or restrain is by a creditor, extend to actions and proceedings against any contributory of the company."

26. Triumph does not dispute CEG's position that the section 181 mechanism is available in the present case via section 329.

27. As noted in *Re UDL* (above) at p.393G at p.394H-I, section 181 should also be read in the light of section 186 of the Ordinance, which addresses the position of actions or proceedings against the company upon winding-up in these terms:

> "When a winding-up order has been made, or a provisional liquidator has been appointed, no action or proceeding shall be proceeded with or commenced against the company except by leave of the court, and subject to such terms as the court may impose".

28. The courts have recognised the clear link between sections 181 and 186 and their equivalents. In *Re Paperback Collection* [2019] EWHC 2904 (Ch); [2020] BCC 574, HH Judge Halliwell (sitting in the High Court) noted that while the statutory jurisdiction to grant leave to

a creditor to commence or proceed with an action against a company in compulsory liquidation is distinct from the jurisdiction to stay or restrain proceedings post-presentation (but pre-grant) of a winding-up petition, the applicable principles are "closely analogous". As Le Pichon J put it in *Re UDL* at p.394I, while only section 186 provides for an automatic stay, sections 181 and 186 "complement each other" and share "a common purpose". That purpose is among the matters addressed in the next section.

C2. Exercise of the section 181 discretion

29. While the wording of section 181 leaves the Court with a broad discretion on whether to restrain proceedings against a company in the period after presentation of a petition and before the making of a winding-up order, that discretion must be exercised with the legislative context and purpose in proper view, and consistently with the case law that has developed in this domain.

30. Historically, sections 181 and 329 of the Ordinance derive from equivalent sections in the UK Companies Act 1929, on which the Ordinance itself is based (see Kwan J as she then was in *Joint and Several Liquidators of B+B Construction Co Ltd v Ulrich Weinmann* HCCW 114/2001, unrep. 8 June 2004 at §43, dealing there with the origins of section 221 of the Ordinance).

31. From the authorities cited to me on CEG's behalf by Mr Maurellet SC,[3] it is evident that the Hong Kong approach to the section 181 discretion essentially tracks the English approach, with both

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[3] Leading Mr Look Chan Ho.

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approaches rooted in the same broad statutory concerns as to the efficacy and integrity of the winding-up process.

32. In summary, I consider that the key concerns which should inform the exercise of discretion in this context are overlapping and include the following:

(1) Ensuring that the assets of the company are administered in an orderly way for the benefit of all its creditors as a class, and preventing particular creditors from gaining an advantage by bringing separate proceedings against the company so as to gain priority over others of their class. See *Bowkett v Fullers United Electric Works Ltd* [1923] 1 KB 160 at pp.163-164 (Bankes LJ); *Get Nice (Union) Finance Company Limited v Luen Cheong Tai International Holdings Limited* HCA 1831/2002, unrep. 31 July 2002 at §7; *Re Paperback Collection* (above) at §27 (citing Widgery LJ in *Langley Constructions (Brixham) v Wells* [1969] 1 WLR 503); also *Re UDL Contracting Ltd* [2000] 1 HKC 390 at p.394H-I.

(2) Protecting and preserving the assets available to the company's creditors as a whole, in aid of the above noted aims of orderly and fair administration: *Re UDL Contracting Ltd* (above) at p.394H-I; *Re Paperback Collection* (above) at §27.

(3) Preventing the issue and pursuit of proceedings to determine issues which can be properly determined in the winding-up – this being part of the concern to preserve assets by *inter alia* avoiding unnecessary expenditure of assets otherwise

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available for distribution amongst creditors: *Re Paperback Collection* (above) at §27, citing *Gardner v Lemma Europe Insurance Co Ltd* [2016] EWCA Civ 484 at §2 (Patten LJ).

33. These important concerns readily explain the general principle and high threshold for the assessment of section 181 applications as identified by Kwan J (as she then was) in *Get Nice (Union) Finance Company Limited* (above) at §7:

> "The general principle is that where a petition has been presented which may result in a winding-up or scheme of arrangement, no creditor may thereafter gain priority over others in his class and that even if the execution has already been commenced, a stay should be granted unless there are very exceptional circumstances."

34. As Kwan J noted earlier in the same paragraph, the stated general principle and approach came from the Court of Appeal's judgment in *Attlee Investments Limited v Lee Chuen t/a Lee Chuen Furniture Co* [1983] 1 HKC 186,[4] and was therefore binding on her at first instance.

35. In this light, and for the further reasons below, I do not consider that Le Pichon J in *Re UDL* was seeking to establish any different general principle or approach than that set in *Attlee Investments* when she referred at p.398C-D to a test of "whether substantial injustice will result if the arbitration is not stayed". Read in context, I take it that the learned judge was there simply marking one aspect of her overall assessment of the facts before her, as conducted within the wider general framework that was

[4] Which in turn drew from the English Court of Appeal's judgment in *Bowkett v Fullers United Electric Works Ltd* (above) at pp.163-164.

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by then well-established under Hong Kong law, since at least the time of *Attlee Investments*.

36. Given the core statutory concerns in this context, it is certainly true that the Court's power under s.181 serves primarily to prevent substantial injustice *to creditors*, particularly due to proceedings that would bypass, impede or otherwise undermine the orderly and fair administration of the company's assets for the benefit of all its creditors as a class. In line with the plain legislative intent that any winding-up process or scheme of arrangement be, as far as possible, overseen and administered in an orderly and self-contained way, the authorities clearly recognise that individual claims brought in separate proceedings generally tend to disrupt or undermine those same objectives.

37. Another concern that may be relevant in the exercise of discretion is that of deterring creditors from too readily seeking to pursue their claims outside of the statutory process, and to avoid the further difficulties that may result where attempts by particular creditors to bypass or "short-circuit" that process spur other creditors to similar action. This aligns with (and is essentially the obverse of) the recognition that, as with the provision for an automatic stay in circumstances covered by section 186, the discretionary power to stay under section 181 serves "to support the replacement of a creditor's right to establish a claim by judgment in an action with a right to lodge proof of debt" (*Re Paperback Collection* (above) at §27, citing *Gardner v Lemma Europe Insurance Co Ltd* [2016] EWCA Civ 484 at §2).

38. In my judgment, the nature and importance of such concerns casts clear light on why the test is normally (and in my respectful view

rightly) put in terms of whether there are "very exceptional circumstances" which might "justify the Court in refusing to accede" a stay application, as Bankes LJ put it in the foundational judgment of *Bowkett* (above) at p.164.

39. It may be noted that Le Pichon J's judgment in *Re UDL* does not expressly refer to either the English Court of Appeal's judgment in *Bowkett* or our Court of Appeal's judgment in *Attlee*, which perhaps reinforces the conclusion that the learned judge could not have been intending any deviation from or significant restatement of the prevailing and by the long-established general principle and approach.

40. It is also worth noting that in *Chellic Industries Limited v Datacom Wire & Cable Co Ltd* HCA 11656/1999, unrep. 9 November 1999, Yuen J (as she then was) held that, in exercising the Court's "absolute and unfettered discretion" under section 181 of the Ordinance, a stay "will in ordinary circumstances be ordered with a view to securing equal distribution of assets amongst creditors of the same class", citing the English Court of Appeal in *Bowkett*.

41. Of course, even if Le Pichon J did have in mind a materially different test and approach than that set out by the Court of Appeal *Attlee*, I am required to follow the latter.

42. Given Triumph's particular reliance in this case on its contractual right to arbitration (addressed further below), I also note that, in marking the proper approach to the exercise of discretion under section 181, the Court of Appeal in *Attlee* did not suggest that some fundamentally different approach or threshold should apply where section 181 is invoked against arbitral proceedings. Indeed Le Pichon J in *Re UDL* did not

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anywhere suggest that the approach she took in that case was modified by reason of the proceedings there being arbitral in nature.

43. All that said, to the extent that there is any real difference in principle between the approaches in *Attlee* and *Re UDL*, it should be clear from what follows later below that a stay is in my view fully warranted on either approach or formulation.

44. Before going to the specific reasons for granting a stay in this case, it bears emphasis that what are sufficiently "exceptional circumstances" for refusing an application for stay will depend on the overall circumstances of the particular case.

45. Without attempting to mark out (exhaustively or otherwise) the main factors and dimensions that are essential to the Court's assessment in all cases, I would say in the light of the circumstances and contentions raised in the instant case that the following factors are at least potentially important for most if not all applications in respect of section 181:

(1) <u>The stage and status of the winding-up proceedings and any proposed scheme of arrangement</u>. Section 186 is in my view a significant signpost here. Where a winding-up order has been made or a provisional liquidator appointed, the legislature has considered the prospect of other actions or proceedings against the company ("Outside Proceedings") to be sufficiently adverse to the liquidation process to warrant an automatic stay under section 186. That being so, the closer or more imminent the prospect of winding-up or appointment of provisional liquidators – or put another way, the closer one

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gets to the section 186 line – the more inclined the court may be towards the grant of a stay as a matter of its discretionary assessment under section 181.

(2) The nature and stage of the Outside Proceedings. (a) On the nature of proceedings, as earlier indicated I do not see the fundamental approach and threshold set in *Attlee* as one that is itself displaced or substantially modified depending on the particular nature of the Outside Proceedings. The essential question is still: are there exceptional circumstances for refusing a stay? That said, in considering the particular circumstances before it pursuant to the approach in *Attlee*, the Court in my view will normally have regard to the nature of the proceeding, including both the nature of the rights invoked and any procedural entailments, as part of its overall evaluation of the circumstances. (b) As to the stage reached in the Outside Proceedings, this naturally includes some regard to what processes and procedures lie ahead in the Outside Proceedings, if these were to continue. Amongst other considerations, it may be a relevant factor against a stay where the resisting party offers to undertake against enforcement of any relief order in the Outside Proceedings – although for reasons canvassed below, this may ultimately be of limited weight as a factor in the overall balance.

(3) The relative costs and benefits / detriments in either staying or allowing the Outside Proceedings to continue in parallel with the primary winding-up or scheme proceedings. This

will naturally take into account matters relevant to (1) and (2) above. A further baseline consideration here would be the extent to which the issues pursued in the Outside Proceedings can be properly determined in the winding-up. It may also be relevant to consider matters such as: (a) the scope for any lasting adverse impact due to a stay on the Outside Proceedings having regard to the likely duration of the stay (see *Re UDL* (above) at p.398E); and (b) the extent to which the product of any steps already taken in the Outside Proceedings, say the formulation of pleaded claims or the collation of evidence, may be redeployed in the winding-up or scheme process going forward.

46. In thinking through the above matters in a given case, a few other points should be kept in mind:

(1) In affirming the general principle that a stay should be granted where a petition has been presented which might result in a winding-up or scheme of arrangement, the Court of Appeal in *Attlee* (above) made clear that this approach applies "even if the execution has already commenced" (p.188F; my emphasis). In other words, even where Outside Proceedings are at an advanced stage, with in-principle liability already determined, that is unlikely to itself constitute an exceptional circumstance warranting a refusal of stay.

(2) As the core concerns of section 181 include avoiding unnecessary expenditure of assets by way of legal costs (see §32(3) above), it is right to recognise that the ordinary process

of winding-up and the determination of proofs of debt in that context is "inherently less expensive" (*per* Patten LJ in *Gardner v Lemma Europe Insurance Co Ltd* [2016] EWCA Civ 484 at §2). Indeed the ordinary centralised and unified process will normally be far more efficient as an overall means of determining all relevant debts, than an atomised free-for-all where individual creditors pursue individual redress through separate legal proceedings.

(3) While a stay would for its duration preclude a party pursuing Outside Proceedings from exercising any right it otherwise has to do so, it will at the same time be recognised that (a) the lodging of a proof of debt in the ordinary way itself "carries with it a right of access to the Companies Court in the event that the proof is rejected": *Gardner v Lemma Europe Insurance Co Ltd* (above) at §2 (see further rule 95 of the Companies Winding Up Rules (Cap 32H); and (b) the duration of any stay may be limited to a specific timeframe or particular conditions, and the Court may (as it has in the present case) specifically provide for liberty to apply, such that a party may resume pursuing Outside Proceedings where there has been a material change in circumstances, such as the withdrawal of a petition.

47. As earlier noted, what constitutes sufficiently "exceptional circumstances" for refusing an application for stay will ultimately depend on the overall circumstances of the particular case. The above matters are

highlighted as some of the potentially important considerations that may go into the discretionary balance.

D. REASONS FOR THE RESTRAINT ORDER

48. The above considerations are among those that have informed my analysis in the present case as specific reasons for or against the grant of the Restraint Order or as part of my overall discretionary assessment.

49. In outlining my main reasons for granting the Restraint Order, I will start with the primary concern of orderly administration and preservation of CEG's assets for the purposes of fair treatment between all creditors as a class.

50. One of Triumph's key claims in this regard is that, because the Arbitration Proceedings are focused on liability rather than enforcement, they are (as Triumph's written submissions assert) "simply incapable of jeopardising the interest of other creditors".

51. This however is too narrow a view for assessing what the interests of an orderly administration of CEG's assets and the best interests of its creditors require. In my view, as a separate and substantial set of legal mechanisms and processes the Arbitration Proceedings unless restrained do clearly threaten to disrupt and undermine the orderly and equitable progression of the usual claims and distribution process.

52. In particular, the Arbitration Proceedings will inevitably involve substantial legal costs, including the costs of a 5-day trial. Absent any reason why the issues that would be addressed in the Arbitration

Proceedings could not be properly determined under the Scheme or in a winding-up – and no substantial reasons are established on the evidence and submissions before me – such legal costs would in my view be an unnecessary expenditure of assets otherwise available for distribution amongst creditors. The need to separately deal with the Arbitration Proceedings will also tend to detract from an orderly and efficient primary process with regard to all other creditor claims.

53. Triumph's reliance on its purportedly clear and simple entitlement to judgment in the Arbitration Proceedings does not assist it. If the matter really were so simple, that is all the more reason why it can and should be dealt with in the ordinary way along with all other creditor claims, rather than as the subject of separate legal proceedings. This is a particularly pertinent given the absence of any mechanism for summary determination in the Arbitration Proceedings.

54. I now turn to one of Triumph's main objections to the Restraint Order, namely that it be would be wrong in principle to ignore or "defeat" Triumph's contractual entitlement to have the FCB Financing Dispute resolved by way of arbitration.

55. I accept that a contractual right to commence and pursue arbitration is something that a court will ordinarily (i.e. in most contexts) be very slow to interfere with. I also that accept Triumph's right to seek arbitration is a relevant factor before me. But I do not think that this right is in itself a weighty factor in the present case and context:

(1) By including arbitrations within the scope of "actions or proceedings" under section 181 of the Ordinance, and with no

qualification as to how the Court's broad discretion under section 181 may be exercised depending on whether the proceeding is arbitral, the Legislature has plainly recognised that there are strong reasons for generally empowering the Court to stay proceedings in the full range circumstances covered by section 181. These necessarily encompass arbitral proceedings brought against a company.

(2) In a similar vein, while Triumph has a contractual right to arbitrate, that right is one that here conflicts (or at least potentially conflicts) with other rights, interests and expectations – in particular, those of all other creditors of CEG with regard to the orderly, efficient and fair functioning of the ordinary or standard processes of liquidation or schemes of arrangement as provided for under statute. Likewise at hand is the broader public interest in the orderly administration of the assets of a company in accordance with the ordinary or standard processes carefully prescribed or permitted by Hong Kong's insolvency regime.

56. I also take into account that the period of restriction of Triumph's right to pursue arbitration under the Restraint Order is likely to be relatively limited: as matters presently stand, the Scheme may well be in place within weeks. This timing may considered against the current timeline of the Arbitration Proceedings, pursuant to which there are no major scheduled events, such as any substantial hearing, until at least sometime next year.

57. If for whatever reason the Scheme fails to materialise in the near term, that may then well hasten "the resolution of the winding up proceedings" (per (1) of the Restraint Order) by other means. The Restraint Order moreover limits the duration of restraint until the time any further order of court, with express liberty to apply in that regard.

58. In considering the potential scope of impact on Outside Proceedings due to a section 181 order, it will also be kept in mind that, were a winding-up order later made or a provisional liquidator later appointed, section 186 would in any event kick in so as to automatically the Outside Proceedings. At that stage, the staying of the Outside Proceedings would result from the operation of section 186 and not any order under section 181.

59. Lastly, as Triumph properly accepted at the hearing, this is not a case where the costs and other resources so far expended in the Arbitration Proceedings would necessarily be wasted upon the grant of the Restraint Order. There is, at the least, a realistic prospect that the fruit of any efforts made in the Arbitration Proceedings towards identifying the purported legal and evidential grounds for Triumph's claim against CEG may be redeployed in some form or other going forward.

60. In sum, I find that is just and appropriate in the prevailing circumstances of this case to restrain the Arbitration Proceedings pending further developments.

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E. CONCLUSION

61. For the above reasons, I granted the Restraint Order with a certificate for two counsel.

62. As noted, I made no order on the Security Summons save that costs occasioned by the summons be to the CEG, to be taxed if not agreed.

63. I am grateful to counsel and their supporting legal teams on both sides for their able assistance.

(Abraham Chan SC)
Recorder of the High Court

Mr Jose Maurellet SC and Mr Look Chan Ho, instructed by Sidley Austin, for the Plaintiff

Mr Alan Kwong, Ms Sakinah Sat and Mr William KW Leung (Solicitor Advocate), instructed by William KW Leung & Co, for the Defendant

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