HCCT 45/2010

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

CONSTRUCTION AND ARBITRATION PROCEEDINGS

NO 45 OF 2010

BETWEEN

(1) ASTRO NUSANTARA INTERNATIONAL B.V.

(2) ASTRO NUSANTARA HOLDINGS B.V.

(3) ASTRO MULTIMEDIA CORPORATION N.V.

(4) ASTRO MULTIMEDIA N.V.

(5) ASTRO OVERSEAS LIMITED (formerly known as AAAN (Bermuda) Limited)

(6) ASTRO ALL ASIA NETWORKS PLC

(7) MEASAT BROADCAST NETWORK SYSTEMS SDN BHD

(8) ALL ASIA MULTIMEDIA NETWORK FZ-LLC

Judgment Creditors (Applicants)

and

(1) PT AYUNDA PRIMA MITRA

(2) PT FIRST MEDIA TBK (formerly known as PT BROADBAND MULTIMEDIA TBK)

(3) PT DIRECT VISION

Judgment debtors (Respondents)

and

ACROSSASIA LIMITED Garnishee

Before: Deputy High Court Judge Mayo in Chambers
Dates of Hearing: 9-13, 16-19 September and 19 October 2013
Date of Decision: 31 October 2013

D E C I S I O N

INTRODUCTION

1. This is an application of the judgment creditors (herein after referred to as "Astro") a group of companies based in Malaysia.

2. Astro obtained five arbitral awards against the judgment debtors who for the purposes of this application are represented by the 2nd judgment debtor, PT First Media TBK ("FM").

3. The judgment debtors are part of a group of companies based in Indonesia referred to as The Lippo Group of companies.

4. The awards were made against FM in the Singapore International Arbitration Centre ("SIAC") from May 2009 to August 2010 which were registered as a judgment.

5. In this application the garnishee AcrossAsia Ltd ("AAL") is a company incorporated in the Cayman Islands and is having its principle place of business in Hong Kong.

6. It is relevant to observe that AAL is the parent company of FM. It holds 55.1% of the shares in FM and has a controlling interest in it.

7. FM owes approximately HK$1 billion under the said judgment to Astro.

8. The arbitration awards were made following a bitterly contested dispute relating to a failed satellite television joint venture. ("CVC Venture")

9. From September to December 2010 pursuant to two orders and a judgment of Saunders J Astro obtained leave to enforce the SIAC Awards in Hong Kong.

10. On 30 June 2011 AAL entered into a Facility Agreement with FM. This Agreement was as follows:

'1)	Borrower	AcrossAsia Limited
2)	Lender	PT First Media Tbk
3)	Credit amount	Up to a maximum of USD44,000,000 (US Dollar forty four million); and at all time the facility amount shall be kept below 50% of FM's equity ('the Threshold'): Should the amount withdrawn exceed the Threshold, the Borrower shall repay the excess of FM within 1(one) business day upon receiving written notification from FM
4)	Effective date/ Conditions Precedent	The Credit Facility shall be available upon obtaining of the following documents and the completion of the following actions in form and substance satisfactory to FM:

		(a) A duly signed and executed copy of this Facility Agreement by the Borrower (b) Satisfaction of FM's review of all relevant documents provided by the Borrower pertaining to the Credit Facility (c) All third parties' regulatory (including stock exchange, if applicable) and other consents/approvals, required are satisfied both for the Borrower and FM (d) Fairness Opinion report carried out by internal and/or an independent valuer/consultant regarding the Credit Facility for FM to enter into (e) Approval from board of directors of FM to enter into this Facility Agreement (f) The Borrower has provided a drawdown instruction letter to FM and payment instruction on the beneficiary accounts to receive the Credit Facility (g) Any other documents as may be reasonably requested by FM The availability of the Credit Facility for utilisation by the Borrower shall also be subject to there being no material adverse change in the international financial markets and no Event of Default (as set out in the section entitled 'Events of Default' below) and the availability of funds of FM from time to time and at the time of request for utilisation by the Borrower.
	5) Internal Approval	The availability of the Credit Facility hereunder is subject to the FM's

		(applicable) internal approval, having been obtained and subject to review from time to time at any time at FM's discretion without prior notice to the Borrower
	6) Purpose and Utilisation	General working capital and business development and is available in the following manner: 3 months which shall be automatically rolled over (automatic revolving) for a duration of up to 1(one) year ("Maturity"), except for at least 5 business days' notification in advance in writing by the Borrower, or at FM's [discretionary] call(as set out in the section entitled 'On Call' below) Upon Maturity, the Credit Facility can be renewed at FM's [discretionary] decision upon receiving an extension letter from the Borrower at least 7 business days in advance from the Borrower
	7) Availability period	The Credit Facility is available for withdrawing for 2 months after signing the Indicative Term Sheet which was made on 27 June 2011
	8) Drawdown	Partial drawdown is allowed within the availability period
	9) On Call	Notwithstanding any terms contained in this Agreement or any other documentation to the contrary, the Credit Facility provided by FM hereunder is uncommitted and FM reserves its overriding rights at ANY TIME with at least 5 business days prior written notice to the Borrower and at FM's sole discretion ("On Call") to (a) terminate the Credit Facility, (b) cancel and withdraw the Credit Facility, (c) cancel or withdraw any undrawn or unutilised Credit Facility or the entire Credit Facility should no part have been utilised or outstanding at

		such time, (d) demand immediate repayment of all or any amounts withdrawn by the Borrower or contingently outstanding and accrued interest FM is not obliged to provide a reason for any exercise of its discretion hereunder
10)	Interest rate	Interest rate is based on London Interbank Offered Interest Rate ("LIBOR") for a3-month rate plus a fixed margin currently set at 4.75% per annum: The interest received by FM shall be NET of applicable taxes. The fixed margin may be subject to change at any time taking into account prevailing market conditions
		Interest will be payable in areas on a Quarterly basis and will be calculated on an actual 360-daybasis
		Interest payment date shall be on 30 September, December, March and June("Interest period")
11)	Repayment	Repayment of the withdrawn amount under this Credit Facility shall be a bullet repayment at Maturity
		Repayment shall be including principal and interest secured (if any) from the date of receipt by the Borrower of the Credit Facility up to the date of the payment by the Borrower
		In the Event of On Call:
		Within5 business days after written notification by FM to the Borrower at any time, the Credit Facility shall be repaid together with interest accrued (if any) from the date of receipt by the Borrower of the Facility up to the date of the payment by the Borrower of the said repayment
12)	Prepayment	Subject to at least 5 business days prior written notification to FM, the

		Borrower may prepay the amount withdrawn, in whole or in part, in minimum amount of USD 50 million and in integral multiples of USD 1.0 million in excess thereof, and WITHOUT penalty at the end of any Interest Period, Amounts prepaid shall not be re-borrowed Prepayment on any other date of the Interest Period shall be subject to Break-Funding cost of 0.05% and shall be calculated from the date of receipt of the prepayment to the last day of the applicable Interest Period. Break-funding cost will not apply for FM's call Amounts prepaid shall not be reborrowed In the event of Threshold, the payment from the Borrower to FM is not subject to Breaking [funding] cost
13)	Event of default	Each of the events or circumstances set out therein is an Event of Default: (a) The Borrower does not pay on any date any amount payable pursuant to this Agreement (b) the Borrower fails to comply with or perform any other obligations set out in this Agreement and/or any other related documents and/or any of the conditions contained herein or therein is not met (c) in the event that FM becomes aware that the Borrower is likely to be unable to comply with its obligations under this Facility Agreement, FM becomes entitled to declare a default and accelerate any payment obligation of the Borrower

		(d) the Borrower has a petition for bankruptcy or liquidation served on or commenced by the Borrower
14)	Automatic termination	On or at any time after the occurrence of an Event of Default, it shall be FM's prudence to exercise its rights to terminate this Agreement immediately or at such later time. No failure to exercise not any delay in exercising FM's right to terminate this Agreement shall in any way impair or affect the exercise thereof or operate as a waiver in whole or in part
15)	Cancellation	This Agreement may be cancelled by the Borrower at any time by giving at least 5 business day's written notice to FM. A 0.3% flat fee shall be applied for such cancellation
16)	Covenants by the Borrower	The Borrower covenants and undertakes to FM that: (a) The Borrower obtain FM's written consent prior to execution of any other arrangements that may materially adverse impact the Borrower's financial and leverage position (b) The Borrower shall provide quarterly information including but not limited to financial statements and information package to FM on a timely basis (no later than 45 days from each quarter's closing save for the annual financial statements which should be no later than 4 months after the financial year and) or any other non price sensitive information deemed necessary to FM (c) The Borrower shall obtain FM's written consent prior to execution of any new material borrowings, representing 10% of the

Borrower's total consolidated assets, from banks and financial institutions

In addition, the Borrower shall not create or have outstanding any security over the whole or any part of its assets, save for:

1. Any security existing at the date of this Facility Agreement (and any security to be created over the property or other assets which are subject of such existing security in connection with any extension or refinancing of the Facility which at the date of this Facility Agreement are secured by such existing security but the amount secured by any such security may not be licensed without prior consent from FM), OR

2. Any security created on any assets acquired by the Borrower after the date of this Facility Agreement for the sole purpose of financing or refinancing acquisition of such assets and securing a principal amount not exceeding the cost of that acquisition, OR

3. Any other security created on any assets provided that during any single financial year, the aggregate value of assets over which security is created is no more than 10% of the total consolidated assets of the Borrower, OR

4. Any other security as shall be approved by FM

17) Costs and Expenses

All legal fees, stamp duty and out-of-pocket and other expenses reasonably incurred in relation to the Credit Facility shall be for the account of the Borrower. In the event that the Credit Facility is not proceeded, all costs

		incurred prior to the cancellation shall be for the account of the Borrower
18)	Counterparts	This Agreement may be signed in any number of counterparts, all of which when taken together shall constitute and be construed in accordance with Indonesia laws
19)	Governing Law and Place of Jurisdiction	All legal relations between the Borrower and FM, including this Agreement, shall be exclusively governed by and construed in accordance with Indonesia laws All disputes, controversies and claims in relation to this agreement, shall be submitted to the Indonesia National Board of Arbitration (Badan Arbitrase Nasional Indonesia BANI) by three arbitrators appointed under the BANIS's rules for arbitration. The place of the arbitration shall be in Jakarta. The arbitration shall be conducted in English language.
20)	Confidentiality	This Facility Agreement is confidential. The Borrower and FM undertake that they will treat, and will produce that their officers, employees, and agents will treat this Facility Agreement as confidential and will not, without both the Borrower's and FM's prior written consent, disclose to any third parties except for the relevant stock exchange, regulators, courts, and other relevant government authorities."

11. By the order of Master Levy dated 22 July 2011 It was ordered that all debts due and owing by AAL to FM be attached to answer the judgment Astro had obtained against FM and AAL was required to attend before a Master to show cause why a garnishee order absolute should not be made against them.

12. AAL has issued summonses to set aside the garnishee order *nisi* and to discharge an order made against them to make payment into court. The issues raised in all these summonses are similar and in each case the burden rests with AAL.

13. Notwithstanding the garnishee order *nisi* FM commenced arbitration proceedings against AAL in Indonesia and obtained an award dated 12 September 2012 ("The BANI Award").

14. In this award AAL was ordered to pay FM US$45,774,403 comprising the principle and interest payable under the Facility Agreement. It was also ordered that this payment should be paid only to FM and paid in Indonesia within 45 days of the award.

15. FM then commenced legal action in Indonesia to enforce payment in Indonesia of the amount due under the award.

16. Put very simply it is the contention of Astro that as AAL is a HK listed company which has submitted to the jurisdiction of the HK Court, the garnishee proceedings can be proceeded with and that Order 49 of the Rules of the HK Court provide that if a garnishee order absolute is made against AAL it would be a discharge from its indebtedness to FM of the amount ordered to be paid to Astro.

17. It is the contention of AAL that all of its dealings with FM were conducted independently at arm's length and that if FM continues to pursue its claim against AAL it will be subject to the real risk or indeed the actuality that it will suffer double jeopardy.

18. One of the main issues in this application is whether AAL and FM did indeed operate at arm's length and independently.

19. Closely associated with this is whether the action taken by FM to enforce the BANI Award was a genuine attempt to recover the moneys they claimed were due owing to them or as is claimed by Astro that it was a *charade* calculated to frustrate Astro's attempts to enforce their HK judgment.

ASTRO'S EVIDENCE

20. Astro only called one *viva voce* witness of fact at the hearing. She was Ms Lakshmi Nadarajah ("Ms Nadarajah"). Ms Gayle Dononne, an accounting expert, provided affidavit evidence. AAL and FM did not seem to cross examine her.

21. Ms Nadarajah is presently the Group general counsel of Astro.

22. She possesses legal qualifications in a number of jurisdictions including being called to the English Bar.

23. She held her present position at all relevant times during the business relationship between Astro and The Lippo Group which are germane to these proceedings.

24. To obtain a necessary understanding of the issues being ventilated it was necessary for Ms Nadarajah to go into a history of the business relationship between Astro and The Lippo Group.

25. What was central in the evidence she gave was that AAL was the parent of and exercised effective control over FM.

26. Both AAL and FM are themselves under the common control of AAL's controlling shareholders, the family of Dr Mochtar Riady. This common control had in turn led to the Group of companies being referred to throughout by FM and AAL as The Lippo Group.

27. The Group has acted as a Group under common or more accurately single control and not independently of one another.

28. Evidence in support of this contention could be seen from the Subscription and Shareholders Agreement ("SSA Agreement") dated 11 March 2005 which is one of the documents evidencing the CVC Venture.

29. The claims which were the subject of the Singapore Arbitration were made pursuant to the CVC Venture.

30. Both AAL and The Lippo Group are defined in the definition clause.

31. The Lippo Group is defined as meaning AAL and all its subsidiaries and each of such persons affiliates.

32. Ms Nadarajah also referred to clause 5.7 of the SSA Agreement which was couched in these terms.

> "5.7 BM Shareholders/LippoGroup. The BM Shareholder and the BM Covenantor shall so long as the BM Shareholder remains a Shareholder holding in excess of five (5) per cent of the issued Share Capital from time to time, each use its

reasonable commercial endeavours to procure that its Affiliates and members of the Lippo Group shall provide on fair and reasonable terms such services as are necessary to support and promote the Business as may be reasonably request by the BOC or the Astro Shareholders, including:

(a) to the extent permitted by Law, any applicable stock exchange regulation and any contractual or license-related obligations of such Person and/or its Affiliates and members of the Lippo Group, sharing of the customer lists and data bases of such Persons;

(b) access to the real estate and other infrastructure assets of such Persons in the build out and maintenance of the Business, on a non-exclusive basis and on commercially reasonable, arm's length terms, subject to any contractual or other obligations of such Person in respect thereof; and

(c) participation of the Company in cross selling and market campaigns. "

33. She also referred to part of a press release which was issued by FM at the time of the CVC Venture. This read:

"Lippo and Astro have today, through their respective subsidiaries, PT Broadband Multimedia Tbk (Kabevision) and Astro All Asia Networks plc, agreed to set up a partnership through a joint venture to provide broad-based multi-channel satellite and multimedia services in Indonesia.

The Astro-Lippo Joint Venture Company will have an initial combined shareholder's fund of US$ 65 million. Total expenditures and investments are expected to reach US$1 billion over a five year period. The additional cash funding is expected to be raised through a combination of third party loans, and equity and quasi-equity instruments.

Commenting on the joint-venture agreement, ASTRO Group Chief Executive Officer Ralph Marshall said: 'We are very pleased to be able to work with the Lippo Group, the leading services and consumer group in Indonesia. We have been very focused on expanding our digital multimedia platform into Indonesia as it is a natural market extension for us. In additional to the immediate synergies with our Malaysian operations, the partnership will allow us to build on our content creation and aggregation skills, accelerate and grow our

> capabilities in Malay language content, benefiting both our Malaysian and Indonesian operations and enabling us to more effectively invest in onscreen programme values. ”

34. BT Broadband Multimedia Tbk is the former name of FM.

35. She also made reference to an extract from the announcement AAL made to the Malaysian Stock Exchange on 5 March 2005.

> “(ii) Obligations of the parties
>
> (a) BM Shareholder
>
> The primary obligation of the BM Shareholder and/or its affiliates is in the provision of distribution networks, call centres, advertising sales and support functions, use of AcrossAsia Limited (the holding company of BM Shareholder) and all its subsidiaries and affiliates (“Lippo Group of Companies”) existing customer lists and data bases on fair and reasonable commercial terms as approved pursuant to the SSA and in accordance with applicable Law, and cross selling and marketing campaigns.
>
> The BM Shareholder shall endeavour to procure that its affiliates and members of the Lippo Group shall provide on fair and reasonable terms such services as are necessary to support and promise the business of PT Direct Vision.”

36. Support for the her contention that AAL was not operated separately and independent of The Lippo Group including FM can be seen on the notes contained in the Annual Report of the consolidated Group accounts.

37. For example under the notes concerning significant accounting policies in the 2010 Annual Report it is stated:

> "(a) Consolidation
>
> The consolidated financial statements include the financial statements of the Company and its subsidiaries made up to 31st December. Subsidiaries are entities over which AcrossAsia Group has control. Control is the power to govern the financial and operating policies of an entity so as to obtain benefits from its activities. The existence and effect of potential voting rights that are currently exercisable or convertible are considered when assessing whether AcrossAsia Group has control.
>
> Subsidiaries are consolidated from the date on which control is transferred to AcrossAsia Group. They are deconsolidated from the date the control ceases."

38. Ms Nadarajah then went on to make reference to the senior officers in The Lippo Group who had shared common management roles in different subsidiaries and affiliates of the Group.

39. Mr Marshall Cooper had been a director inThe Lippo Group since 1998.

40. He had been a Director of AAL from May 2002 to May 2012. He was concurrently a Director and Chief Executive Officer of FM from 2002 to 2006 and a Commissioner of FM from 2006 to 2008.

41. Dr Cheng Wen Cheng had been Chief Executive Officer and President of AAL from June 2000 to May 2006. Dr Cheng was concurrently a Commissioner of FM from 2002 to October 2011.

42. Mr Jonathan Limbong Parapak was a Director of AAL from May 2002 to 2006. He was concurrently the President Commissioner of FM from 2002 to 21 October 2011.

43. It was Ms Nadarajah's evidence that these and other officials of The Lippo Group had assumed an active role in the management of FM and AAL and that it was quite unrealistic to contend that the two companies operated separately and independently.

44. Ms Nadarajah commented on the fact that The Lippo Group had during the currency of Astro trading experience with them resorted to the practice of separate individual officers undertaking the work of other subsidiary companies. They would do this while at the same time claiming that all the companies operated independently where this was clearly not the case.

45. This had been claimed during the proceedings in the Singapore Arbitration. This approach had not commended itself to the distinguished panel of arbitrators which had presided over the proceedings.

46. Ms Nadarajah was subjected to a searching and detailed cross examination by Mr Horace Wong SC who was representing AAL on the subject of the extent to which control could be exercised over the activities of a subsidiary company.

47. Mr Wong put it to Ms Nadarajah that the parent company could not simply order its subsidiary to act or refrain from acting in any particular situations.

48. She did not agree with this. She claimed to have some experience in this connection. There are numerous associated and affiliated companies in the Astro group. She said that it had been virtually unheard of in her experience that a subsidiary company had acted contrary to the policy and direction of its parent.

49. When pressed on the topic of how this control would be exercised she said that initially there could be informal discussion with the Directors of the subsidiary. If these discussions were unavailing, pressure would be brought to bear upon the recalcitrants by threatening them with convening a general shareholder's meeting and passing a resolution for their dismissal and the appointment of new Director who would comply with the policy dictated by the parent company.

50. Ms Nadarajah then directed her attention to the history of Astro's endeavours to enforce the Singapore Awards which had been made in their favour.

51. It was her evidence so far as enforcement proceedings had been concerned in HK and elsewhere AAL had exercised control over FM and its subsidiaries in the key events subsequent to the issuance of the Singapore Awards.

52. There had been divestment of FM assets and a simultaneous loan from FM to AAL which in turn resulted in the worldwide Marveva Injunction being granted in the Singapore Court. The loan referred to above was the subject matter of the so called Facility Agreement referred to earlier.

53. The significance of the timing of the Facility Agreement and completion of CVC Venture was that from April 2011 Astro discovered assets in HK and Singapore arising from FM's disposal of a substantial interest in its main business assets in Indonesia.

54. Astro in correspondence expressed its concern to FM.

55. Knowing that the CVC transaction involved a Singapore investor FM sought to obstruct Astro's enforcement endeavours by contesting Singapore proceedings while at the same time expediting the CVC transaction ahead of time.

56. The arrangements surrounding in Facility Agreement were that FM would pay US$14.5 million directly to AAL's bankers in Singapore to repay part of their borrowing and US$29.5 million to their 95% owned subsidiary PT Asia Net Multimedia ("Asia Net") to repay its debts and working capital.

57. So far as the garnishee proceedings in HK were concerned, AAL made every effort to delay the proceedings. It informed Astro of its intention to oppose the application and that it required time to prepare its opposition.

58. On 25 February Astro itself issued an application to stay the garnishee proceedings as FM had made an application to the Singapore court to challenge the enforcement of the awards in Singapore and for an order pending the final determination of setting aside the application. The Hong Kong court also ordered that AAL must pay into court all sums the subject matter of the garnishee proceedings.

59. AAL appealed against that Decision. The Court of Appeal dismissed its appeal.

60. Ms Nadarajah was of the opinion that it was this decision of the Court of Appeal which triggered what has been referred to as the BANI arbitration in Indonesia.

61. It was her contention that AAL and FM demonstrated a high degree of control and coordination in this connection. It was her opinion that the timing of these proceedings was no coincidence. It was on account of the fact that the Hong Kong Court of Appeal ordered payment into court of the moneys subject to the garnishee proceedings that triggered the application by FM for the repayment of the loan payable by virtue of the provisions contained in the Facility Agreement.

62. Here it is of some interest to note that there was no absolute requirement for the moneys to be repaid. There was agreement that AAL could if it was financially embarrassed require that payment be deferred.

63. However a demand was made for payment.

64. This demand was not complied with.

65. The proceedings then went forward in what was described by Mr Ignatius Andy, Astro's expert on Indonesian Law, with remarkable expedition.

66. AAL do not accept that this was the case. They contend that they took all reasonable steps to defend the proceedings and that they were not unduly expeditious.

67. However what is particularly noticeable is the extent of the similarity between FM's petition in bankruptcy and the findings in the arbitration:

> "IN THE MERITS CASE
>
> 1. Accept all the applications of the CLAIMANT.
>
> 2. Declare that the Facility Agreement remains valid and binding between the CLAIMANT and the RESPONDENT under Indonesian law.
>
> 3. Declare that as a matter of Indonesian law, the Indebtedness is situated within the jurisdiction of the Republic of Indonesia.
>
> 4. Declare that as a matter of Indonesian Law, the obligation of the RESPONDENT to make payment of Indebtedness to the CLAIMANT under the Facility Agreement shall not be discharged otherwise than by direct payment of Indebtedness by the RESPONDENT to the CLAIMANT, and to no-one else.
>
> 5. Declare that Indonesian law will NOT recognize any payment by the RESPONDENT of the Indebtedness into the Hong Kong Court of First Instance or to any person other than the CLAIMANT (whether or not such payment is made pursuant to a garnishee order absolute or to any other order made by the courts of the Hong Kong Special Administrative Region) as discharging the RESPONDENT from its liability to pay the Indebtedness to the CLAIMANT.
>
> 6. Declare that if the RESPONDENT makes payment of the indebtedness into the Hong Kong Court of First Instance or to any one or more of the Astro companies pursuant to a garnishee order absolute or to any other order made by the courts of the Hong Kong Special Administrative Region, the CLAIMANT will remain entitled to enforce payment of the Indebtedness against the RESPONDENT.
>
> 7. Order that the RESPONDENT and all the Directors, employees and agents of the RESPONDENT be forbidden, enjoined and restrained, whether by itself, or by its directors, officers, employees or agents, from making payment of the Indebtedness to any person other than the CLAIMANT.

8. Order that the RESPONDENT make full payment of all of the Indebtedness to the CLAIMANT as follows:

a. The principal amount of USD44,000,000.00 (forty four million United States Dollars); and

b. Interest liability in the amount of USD2,774,403.00 (two million and seven hundred seventy four thousand four hundred and three United States Dollars), as at 27th August 2012; and

c. interest liability which continues to accrue after 27th August 2012.

9. Order the RESPONDENT to bear all legal costs and expenses of the CLAIMANT in, and in connection with, this Arbitration, as well as all costs of this Arbitration.

10. Punishing RESPONDENT to comply with this decision;

11. Declare that the award of this case is final and binding;"

68. The relevant part of the final order of the arbitration was in this form:

"IN THE MERITS OF CASE

1. Accepting parts of the Petition of the CLAIMANT;

2. Declaring that the Facility Agreement remains valid and binding to the CLAIMANT and the RESPONDENT under the Indonesian Law;

3. Declaring that pursuant to Indonesian law, the Indebtedness is situated within the jurisdiction of the Republic of Indonesia;

4. Declaring that under the Indonesian Law, the obligation of the RESPONDENT to make payment of Indebtedness to the CLAIMANT under the Facility Agreement shall not be discharged otherwise than by direct payment of Indebtedness by the RESPONDENT to the CLAIMANT and not to any other party;

5. Declaring that Indonesian law will not recognize any payment by the RESPONDENT of the Indebtedness into the Hong Kong Court of First Instance or to any other party other than the CLAIMANT (whether or not such

payment is made pursuant to a Garnishee Order Absolute or to any other order/decision made by the courts of the Hong Kong Special Administrative Region discharging the RESPONDENT from its liability to pay the Indebtedness to the CLAIMANT;

6. Declaring that RESPONDENT is liable to pay the Indebtedness to the CLAIMANT in the amount of USD44,000,000.00 (forty four million United States Dollar) plus interest;

7. Ordering the RESPONDENT to pay the Indebtedness directly to CLAIMANT in the amount of USD44,000,000.00 (forty four million United States Dollar) plus interest;

8. Punishing the CLAIMANT and the RESPONDENT to comply with this decision;

9. Declaring the award of this case is final and binding;

10. Refusing other petitions by the CLAIMANT;

..."

69. For the purpose of this exercise what is significant is the nature of the relief sought and the way in which the arbitration was conducted.

70. As will be seen later when commenting upon Mr Vincente Ang's evidence he was asking the court to believe that all he was concerned about was ensuring that AAL did not have to repay the loan twice. In other words he was just concerned with the issue of double jeopardy.

71. When regard is had to the wording adopted both by FM and to the wording in the Award which was subsequently made this is more than a little disingenuous.

72. What is being prayed for is an order that repayment of the amount owing is to be made to FM in Indonesia and that payment to any other person outside the jurisdiction of the Indonesia court will not discharge the indebtedness.

73. A declaration is also sought and made that the *situs* of the debt is Indonesia.

74. This disregards the generally accepted principle which will later in this judgment be considered that the primary rule relating to the *situs* of a debt is the jurisdiction where the debtor is resident. Here clearly AAL being a company listed on the GEM Stock Exchange is a HK company and that it is HK law which governs the debt.

75. To put the matter simply it is not seeking directions from the tribunal. What it is doing is seeking to reinforce the position which was being maintained by AAL that if it was to comply with an order absolute made by a Hong Kong court it would definitely lead to a situation where double jeopardy would arise.

76. Ms Nadarajah's fears particularly when taken in conjunction with all the other action being taken by members of The Lippo Group, were fully justified and it was obvious that both AAL and FM were attempting to obtain a further means of frustrating Astro's legitimate efforts to enforce their rights flowing from the Singapore Awards made in their favour.

77. On 21 September 2012 the Lippo Group through one of its subsidiaries Direct Vision filed a civil action in the South Jakarta District

Court against Astro subsidiaries for US$20 billion for alleged loss of Lippo Group reputation. This claim repeated claims made previously by another Lippo subsidiary company APM being the first named judgment debtors in these proceedings. APM is a shelf company having no assets.

78. It is Ms Nadarajah's belief that this was intended to apply further pressure upon Astro to discontinue its enforcement action.

79. On 20 December 2012 FM instituted proceedings pursuant to the BANI arbitration seeking an order for the Suspension of Payments ("SOP") by AAL.

80. The effect of this order was to prevent AAL making any payments without the authority of the Administrators who were appointed subsequent to the BANI arbitration.

81. It would appear that FM and AAL have colluded in this and the purpose of it was to enable AAL to make representations to the Hong Kong court that it was unable to comply with its order for payment into court of the moneys previously referred to.

82. This was clearly a further attempt to frustrate the garnishee proceedings.

83. It is very clear from hearings in the High Court in Hong Kong that FM and AAL have been acting in conjunction with each other in their mutual attempts to delay and frustrate the garnishee proceedings.

84. Ms Nadarajah was subjected to a lengthy and detailed cross examination. She was an impressive witness. She clearly has a wide

ranging knowledge of this litigation and its background. She answered questions put to her clearly and I am convinced that she was an honest and reliable witness.

85. Certainly where her evidence is at variance with the evidence of Mr Cheok, Mr Vicente Ang and/or Mr Chan Yuk Hung I much prefer her evidence.

AAL evidence

86. Three *viva voce* witnesses were called by AAL. Mr Horace Wong called Mr Albert Say Chuan Cheok as a witness. He is the chairman of the Board of Directors of AAL.

87. He adopted as his evidence in chief five affidavits which he swore during the preparation of these proceedings.

88. He gave a short history of the garnishee's involvement in this case.

89. He was adamant that although AAL had a major shareholding in FM, AAL operated as a totally independent listed company with no involvement in the operation of FM.

90. The only exception to this was attendance at AGMs, and EGMs and communications with accountants in relation to maintaining consolidated group accounts and compliance with the requirements of the HK Stock Exchange.

91. He referred to the embarrassment suffered consequential upon being sandwiched between the HK garnishee proceedings and the court proceedings in Indonesia.

92. He accepted that AAL owed the moneys which were being claimed by FM.

93. However, AAL had been unable to discharge this indebtedness due to the garnishee proceedings in Hong Kong.

94. What he was anxious to do was to avoid making a payment and finding that the payment did not discharge AAL's indebtedness.

95. In this connection his main concern was to protect all of AAL's shareholders.

96. He had been disappointed that FM had seen fit to commence legal proceedings in Indonesia.

97. He had at all times done everything in his power to rigorously defend the proceedings. He categorically denied that he or anyone else had entered into any collusive agreement or arrangement with FM with the intention of frustrating the ongoing garnishee proceedings in Hong Kong.

98. The proceedings in Indonesia had been commenced by FM instituting the BANI arbitration. AAL had placed before the tribunal particulars of the dilemma facing AAL but the tribunal had proceeded to make an award in FM's favour.

99. This in turn had been referred to the Central Jakarta District Court where the award was registered.

100. The Chief Judge of the said court heard submissions from parties and on 27 November 2012. A final warning was issued by the court requiring AAL to make good the payment which had been ordered to FM.

101. As AAL was unable to comply with the warning FM proceeded to obtain a SOP Order which had the effect of restraining AAL from continuing its business activities in Indonesia. This was followed by a PKPO petition being presented to the court which was the initial step in bankruptcy proceedings.

102. While all of this was taking place AAL was having to deal with the garnishee proceedings in Hong Kong.

103. It had not been feasible for AAL to comply with the court order issued by Hong Kong courts on account of the Indonesian action which had been taken against them.

104. What AAL was facing was double jeopardy of having the actual risk of having to pay their indebtedness twice.

105. Mr Cheok was anxious that the whole situation could be resolved expeditiously.

106. Mr Cheok was crossed examined at some length by Mr Joseph QC. Mr Cheok accepted that AAL had been incorporated in

the Cayman Islands and that it was registered as a company under Part XI of the HK Companies Ordinance.

107. Its place of business had been registered as the 43/F of Lippo Centre in Hong Kong. It was also clear that AAL had submitted to the jurisdiction of the Hong Kong court by virtue of the fact that it had taken part in the present litigation and indeed had itself initiated various steps in the proceedings.

108. Near to the conclusion of the first day of the cross examination, Mr Cheok had made the important admission that it was possible for AAL to control the voting rights of its 55.1% owned subsidiary company FM.

109. He also accepted that at the relevant time FM was the only remaining subsidiary company of AAL and that as such they would have been concerned to ensure that they could continue to obtain the benefit they were receiving from FM.

110. Next morning Mr Cheok attempted to resile from these admissions.

111. He said that what he had been attempting to agree to was that from simply an accounting prospection control could be exercised. It will be necessary later in this judgment to consider this in more detail.

112. Mr Joseph then turned to the issue of the exercise of control over FM.

113. He referred Mr Cheok to the SOP Order which had been made on 15 January 2013 and the Bankruptcy Order which had been made on 5 March 2013.

114. He went on to put it to Mr Cheok that it had all along been AAL's case that once these orders had been made they had no control over FM.

115. Mr Cheok's response to this was that as from 15 January 2013 the assets in Indonesia were managed by the administrators who had been appointed.

116. However, he had been advised that so far as the assets outside Indonesia were concerned they could continue to have control over them.

117. Mr Joseph then referred to the 2010 Annual Report of AAL. This has been signed by Mr Cheok and contained the usual assurance that the contents thereof were true and accurate to the best of his knowledge, information and belief.

118. In the notes to the financial statement, there is a section on the subject of the policies relating to consolidated accounts. As AAL holds 55.1% of the shares in FM its accounts fall within the consolidated accounts.

119. The difficulty which Mr Cheok encountered was that notwithstanding the existence of the two orders made pursuant to the BANI arbitration AAL had continued to publish the Annual Report

containing consolidated accounts including FM. Mr Cheok said that AAL could continue to operate outside Indonesia.

120. This explanation however appeared to overlook the fact that the administrators in Indonesia had the Indonesian Records in their possession and AAL would not have access to them.

121. Over and above this Mr Cheok had earlier in his evidence testified that FM was the sole remaining subsidiary company of AAL and that other than this litigation the company was involved in with Astro it had no ongoing business outside Indonesia.

122. Mr Cheok gave evidence that the accounts mainly focused upon adhering to various accounting requirements and did not provide much guidance on the exercise of control by AAL over FM. He overlooked the presumptions concerning control being exercised over a subsidiary by a parent company.

123. He said control would be exercised by voting to the FM Board Directors who are nominated by AAL and who would concern themselves with ensuring that AAL's interests were protected.

124. However, Mr Cheok did accept that following the disposal of two of the large subsidiary companies in 2009 FM was the only subsidiary company which was then trading.

125. He also accepted that this being the case all of their attention could be directed towards FM.

126. What does however emerge for all of this is that it is manifest from a perusal of the consolidated accounts and the fact that FM is the only remaining subsidiary of AAL that the interests of the two companies are closely intertwined and that if the garnishee order is made absolute this would be highly detrimental to the interests of AAL.

127. When this was put to Mr Cheok by Mr Joseph he did not at first accept that this would be the position.

128. Mr Joseph then went on to refer to the Articles of Association of FM.

129. Directors were normally appointed at an Annual General Meeting of the company.

130. Appointment of Directors would be within the control of a majority shareholder.

131. Mr Marshall Cooper had been an Executive Director of FM from 2002 until 2012. From 2002 to 2008 he had also been Chief Executive of AAL. This being the case AAL was clearly in a position to exercise control over FM.

132. It was apparent from the 2010 Annual Report that Mr Cooper's remuneration was nearly 10 times more than the remuneration of other directors and he had been in charge of investment in Indonesia.

133. Mr Cheok's answer to this was that in 2010 he had assisted in the disposal of various investments and this input had been reflected in his remuneration.

134. Mr Joseph then pointed out that he had enjoyed this level of remuneration for the years 2009, 2010 and 2011. Mr Cheok said that he had also been acting as his own personal assistant.

135. Mr Joseph put it to Mr Cheok that it was clear from all of the evidence that both FM and AAL all come within the close control of The Lippo Group of companies which in turn were under the control of the Riady family.

136. Mr Joseph then went on to ask Mr Cheok questions concerning the CVC Joint Venture transaction. Mr Cheok continued to maintain that it was entirely FM that was involved in this and that AAL's only involvement was complying with the requirements of the Hong Kong Stock Exchange and ensuring that at least three of the four Directors of the company had agreed to the venture being proceeded with.

137. In this judgment it is not necessary to go into great detail concerning CVC joint venture.

138. Suffice it to say that a series of transactions were involved including the very substantial disposal of assets all of which were described in some details in the announcement made to the HK Stock Exchange on 18 April 2011.

139. The announcement was signed by Mr Marshall Cooper on behalf of AAL.

140. An announcement of the completion of the very substantial disposal by AAL was made to the HK Stock Exchange on 30 June 2011. This was signed by Mr Marshall Cooper.

141. The overall purpose of the transaction was to bring in a strategic investor CVC and reduce the group's indebtedness.

142. On the same day in 30 June 2011 AAL entered into the Facility Agreement particulars of which have been given earlier in this judgment. This was signed by Mr Marshall Cooper on behalf of AAL.

143. It will be recalled that under this Agreement US$44 million was loaned by FM to AAL.

144. Mr Joseph asked Mr Cheok whether the timing of this agreement was entirely a coincidence.

145. Mr Cheok maintained that his only interest in the matter concerned making sure that the requirements of the HK Stock Exchange were complied with and that he personally had not been involved in the Facility Agreement.

146. A further indication of AAL's involvement can be seen from a passage in the Half Yearly Report of AAL where when describing the Financial Resources and Structure of the company it is stated at p 13:

> "During the Half-year Period, AcrossAsia Group implemented and is continuing to implement the following management plan

> to further improve its financial position: restructuring of current borrowings to long-term loans; enhancement of operational efficiency; procurement of long-term debt/equity financing; extension of the penetration of the Cable TV and other services; and exploration of new business opportunities. AcrossAsia Group's gearing ratio, representing total borrowings divided by equity attributable to owners of the Company, was 2.3 times as at 30th June 2010. The accumulated losses of AcrossAsia Group also reduced to HK$106.5 million as at 30th June 2011 from HK$560.3million as at 31st December2010. The improvements in the aforesaid gearing ratio and accumulated losses were attributable to the completion of the CVC Transactions."

147. Mr Joseph drew Mr Cheok's attention to the Order of the HK Court of Appeal dated 10 August 2012 when it dismissed FM's appeal against the order made by Deputy Judge Lok that AAL must pay into court all sums due and payable to FM pending the determination of proceedings taken by FM to set aside orders made by the High Court of Singapore in relation to the enforcement of the five arbitration awards in favour of Astro.

148. Mr Cheok accepted that he had heard about this order and that he had been the decision maker referred to in the correspondence exchanged between the respective solicitors.

149. On 30 August 2012 AAL and FM lodged with the Chairman of the Indonesian International Board of Arbitration ("BANI") a petition for the arbitration of the dispute between the parties as to whether AAL should comply with the orders being made by Hong Kong courts or whether AAL's discharge of their indebtedness to FM should be made to them in Indonesia.

150. It is germane to consider the relief which the parties were seeking:

"FM in its MERITS CASE

12. Accept all the applications of the CLAIMANT.

13. Declare that the Facility Agreement remains valid and binding between the CLAIMANT and the RESPONDENT under Indonesian law.

14. Declare that as a matter of Indonesian law, the Indebtedness is situated within the jurisdiction of the Republic of Indonesia.

15. Declare that as a matter of Indonesian Law, the obligation of the RESPONDENT to make payment of Indebtedness to the CLAIMANT under the Facility Agreement shall not be discharged otherwise than by direct payment of Indebtedness by the RESPONDENT to the CLAIMANT, and to no-one else.

16. Declare that Indonesian law will NOT recognize any payment by the RESPONDENT of the Indebtedness into the Hong Kong Court of First Instance or to any person other than the CLAIMANT (whether or not such payment is made pursuant to a garnishee order absolute or to any other order made by the courts of the Hong Kong Special Administrative Region) as discharging the RESPONDENT from its liability to pay the Indebtedness to the CLAIMANT.

17. Declare that if the RESPONDENT makes payment of the indebtedness into the Hong Kong Court of First Instance or to any one or more of the Astro companies pursuant to a garnishee order absolute or to any other order made by the courts of the Hong Kong Special Administrative Region, the CLAIMANT will remain entitled to enforce payment of the Indebtedness against the RESPONDENT.

18. Order that the RESPONDENT and all the directions, employees and agents of the RESPONDENT be forbidden, enjoined and restrained, whether by itself, or by its directors, officers, employees or agents, from making payment of the Indebtedness to any person other than the CLAIMANT.

19. Order that the RESPONDENT make full payment of all of the Indebtedness to the CLAIMANT as follows:

d. The principal amount of USD44,000,000.00 (forty four million United States Dollars); and

e. Interest liability in the amount of USD2,774,403.00 (two million and seven hundred seventy four thousand four hundred and three United States Dollars), as at 27th August 2012; and

f. Interest liability which continues to accrue after 27th August 2012.

20. Order the RESPONDENT to bear all legal costs and expenses of the CLAIMANT in, and in connection with, this Arbitration, as well as all costs of this Arbitration.

21. Punishing RESPONDENT to comply with this decision;

22. Declare that the award of this case is final and binding;"

151. AAL replied to this on 5 September 2012. The relevant paragraphs in the Reply almost exactly duplicate the wording of the petition.

152. The arbitration did take place.

153. It took the Board only eight working days to make an award in virtually identical terms to those contained in the petition and AAL's response.

154. Mr Cheok did not accept that there had been any collusion between AAL and FM or that the object of the exercise had been to frustrate or prevent the Hong Kong garnishee proceedings being proceeded with.

155. He said that all that AAL had been attempting to do was to avoid having to pay the debt twice over.

156. Mr Joseph put it to Mr Cheok that if the Hong Kong courts made a garnishee order *nisi* The Lippo Group of companies taken as a whole would have to pay US$44 million plus interest.

157. However if the order was not made no payment would have to paid to Astro.

158. Mr Cheok did not agree that this would be the case.

159. I regret that I did not form a favourable view of Mr Cheok as a witness.

160. He was extremely evasive.

161. On numerous occasions he simply would not answer questions which Mr Joseph put to him. What he did was to embark upon a series of lectures or explanations which usually had little or no relevance to the questions being asked.

162. Overwhelming evidence was put to him that clearly indicated that The Lippo Group operated as a whole and that his evidence that each subsidiary acted separately and independently was unsustainable.

163. One small example of the unreality of his evidence could be seen when Mr Joseph invited him to comment upon the fact that one of his fellow directors Mr Billy Sindoro had been convicted of attempting to

bribe a judge in Indonesia and had been sentenced to serve a sentence of imprisonment.

164. Mr Cheok claimed he had no knowledge of this.

165. Altogether I have come to the conclusion that unless Mr Cheok's evidence could be corroborated from some reliable source I would be unable to place reliance upon it if it was contested.

166. The second witness to give evidence for AAL was Mr Vicente Ang.

167. He is presently the Chief Executive Officer of AAL. He has held this appointment since May 2012.

168. He now and at all relevant times in these proceedings resided in the Philippines. He said that he regarded Mr Cheok as the Officer in AAL that he was accountable to.

169. So far as these garnishee proceedings are concerned Mr Ang first came into the picture immediately following The Hong Kong Court of Appeal's dismissal of the appeal against Deputy J Lok's order that AAL must pay into court in Hong Kong the moneys which would be payable in the event of the garnishee order *nisi* being made absolute.

170. It was virtually contemporaneous with this that the BANI arbitration proceedings were commenced in Indonesia. He accepted that while he was seeking indulgence from the Hong Kong courts for additional time to be granted to AAL to comply with Deputy Judge Lok's Order the endeavours to obtain an arbitration award in Indonesia were

being pressed forward with the utmost expedition and that AAL had not seen fit to inform Astro or the Hong Kong court of this.

171. Mr Ang attempted to justify his action by referring to the provisions contained in the Facility Agreement providing that the law governing the agreement was to be Indonesian law and that payment thereunder must be effected in Indonesia to FM.

172. He had feared that if the garnishee order was made absolute there was a great risk that AAL would find itself in a position of double jeopardy namely that it would end up having to discharge its indebtedness twice.

173. Mr Ang went on to outline the problems which would be encountered if the order was made absolute.

174. He accepted that AAL was a publicly listed company in Hong Kong which would have to report to the HK Regulatory Authorities.

175. AAL's core business interest was the 55% interest in FM. In this connection he appears to have got his mathematics confused. RFK another affiliate of The Lippo Group owned 33% of the shares in FM. This would mean The Lippo Group's total interest in FM was 88%.

176. Mr Ang then referred to the difficulties which would be encountered if the US$44 million and interest had to be paid into court.

177. AAL would have to sell its shares in FM which constituted almost all its assets.

178. If it was a forced sale the purchase price realized would be much reduced.

179. So far as the transfer of money to Asia Net earlier referred to Mr Ang could give no satisfactory or convincing explanation either why it was necessary for FM to make the payments under the Facility Agreement to AAL at that particular point of time or why it was necessary then to on pay money to Asia Net.

180. By the same token it was by no means clear why it was not possible for Asia Net to repay the money to AAL in its time of need.

181. What does emerge from all of this is that moneys could readily be transferred between different subsidiary and associated companies within The Lippo Group with the minimum of formality.

182. During the course of his cross examination Mr Ang accepted that AAL could exercise control over FM.

183. I have no doubt that this part of Mr Ang's evidence was true.

184. When Mr Ang's evidence is considered as a whole it is difficult not to come to the conclusion that the different subsidiary and affiliated companies within The Lippo Group were acting in concert to do everything possible to frustrate and delay the enforcement of Astro's Singapore awards in their favour.

185. The third witness to give evidence for AAL was Mr Chan Yuk Hung. He used to be the Chief Accountant but now the Financial Officer of AAL.

186. He maintained that all of the subsidiaries and affiliated companies within The Lippo Group operated separately and independently.

187. He was cross examined by Mr Joseph on this.

188. He accepted a reading of the consolidated accounts of the Group that they were prepared on the basis of including the accounting records of all the subsidiaries.

189. His attention in particular was drawn to the section in the 2011 Annual Report of the Group. He accepted that the Annual Reports for other years were prepared in a similar manner. This read:

> "3. SIGNIFCIANT ACCOUNTING POLICIES
>
> These financial statements have been prepared in accordance with IFRSs and the applicable disclosures required by the Rules Governing the Listing of Securities on the Growth Enterprise Market of The Stock Exchange of Hong Kong Limited and by the Hong Kong Companies Ordinance.
>
> These financial statements have been prepared under the historical cost convention, as modified by the revaluation of certain investments and derivative financial instruments which are carried at their fair values.
>
> The preparation of financial statements in conformity with IFRSs requires the use of certain key assumptions and estimates. It also requires the Directors to exercise their judgments in the process of applying the accounting policies. The areas involving critical judgments and areas where assumptions and estimates are significant to these financial statements, are disclosed in Note 4 to the financial statements.
>
> The significant accounting policies applied in the preparation of these financial statements are set out below.
>
> (1) Consolidation

> The consolidated financial statements include the financial statements of the Company and its subsidiaries made up to 31st December. Subsidiaries are entities over which AcrossAsia Group has control. Control is the power to govern the financial and operating policies of an entity so as to obtain benefits from its activities. The existence and effect of potential voting rights that are currently exercisable or convertible are considered when assessing whether AcrossAsia Group has control.
>
> Subsidiaries are consolidated from the date on which control is transferred to AcrossAsia Group. They are deconsolidated from the date the control ceases.
>
> The gain or loss on the disposal of a subsidiary that results in a loss of control represents the difference between (i) the fair value of the consideration of the sale plus the fair value of any investment retained in that subsidiary and (ii) the Company's share of the net assets of that subsidiary plus any remaining goodwill relating to that subsidiary and any related accumulated translation reserve.
>
> Intragroup transactions, balances and unrealised profits are eliminated. Unrealised losses are also eliminated unless the transaction provides evidence of an impairment of the asset transferred. Accounting policies of subsidiaries have been changed where necessary to ensure consistency with the policies adopted by AcrossAsia Group."

190. Mr Chan accepted that this was the relevant policy of the Group.

191. Mr Joseph then invited Mr Chan to make comment upon the fact that the loan from FM which was a subsidiary company within the Group to AAL had not been recorded in the accounts.

192. Mr Joseph went on to put it to Mr Chan that if each subsidiary operated separately and was not controlled by another company within the Group the debt would have been a debt to a third

party and having regard to the size of the debt should most certainly have been recorded in the accounts.

193. Mr Chan was unable to give any satisfactory explanation for this state of affairs.

194. Mr Joseph then put to Mr Chan Mr Cheok's evidence concerning the manner in which subsidiary companies reported back to him with particulars of transactions which they had under taken. Mr Cheok had said that this had been done on a daily basis.

195. Mr Chan said that this was not correct. The correct position was that information would be relayed back to him on a "regular and continual basis".

196. His evidence on re-examination by Mr Horace Wong was rather different. He said that the most substantial part of the financial information would be given within a few days of the period ending which was covered by the accounts in question.

197. Mr Chan was not a very satisfactory witness. It was strongly my impression that the evidence he gave was mostly to support the interest of The Lippo Group rather than an attempt to tell the truth.

198. My conclusion at the end of his testimony was that it reinforced my overall impression that AAL in conjunction with FM were doing everything within their power to frustrate and delay Astro in enforcing the awards in their favour in the Singapore Arbitration.

Expert evidence

199. AAL and Astro each called expert evidence on Indonesian law. AAL called Professor Darus and Astro called Mr Ignatius Andy. They were the only experts to give *viva voce* evidence. Other experts gave evidence by way of affidavits.

200. I do not purpose attempting a detailed analysis of this evidence as I am satisfied for the reasons I will be giving later in this judgment that as AAL and FM have undoubtedly submitted to the jurisdiction of the Hong Kong courts it is the law in Hong Kong which governs the issue as to whether I should make a garnishee order *nisi* absolute.

201. I accept that it is however necessary for me to have regard to Indonesian law when it comes to consider in the efficacy of the BANI proceedings and whether AAL faces a risk of being subjected to double jeopardy.

202. The problem of considering at depth Professor Darus' evidence is that it is predicated upon the premise that the Facility Agreement and all the various proceedings which flowed from it were undertaken on the basis that AAL and FM were acting independently without any collusion being involved.

203. As I will be attempting to make clear in this judgment I do not for a moment accept that this was the case.

204. There are however two matters which I consider require comment.

205. The first is that I much prefer the evidence of Mr Ang to that of Professor Darus on the question of the extremely expeditious disposal of the BANI arbitration proceedings. Having regard to the overall context of the situation which prevailed I have no doubt whatever that the proceedings were conducted in a much shorter span of time than would normally be the case.

206. Also it was very obvious from the petition, AAL's response and the conclusion of the award that it was prepared and tailor cut to assist AAL in resisting this present application.

207. The other matter I would refer to is to further question what AAL and FM where trying to achieve. If these as bankruptcy proceedings were properly motivated and conducted at arm's length it would have been incumbent upon the curator who with the Administrators administer the Bankruptcy to comply with Articles 184 and 185 of the Law of Bankruptcy and Suspension of Obligation for Payment of debts:

> "Article 184
>
> (1) With due attention to the provision in Article 15 paragraph (1), the Curator must begin the liquidation and sale of the entire bankruptcy estate without the need to obtain the approval or assistance of debtors if:
>
> a. the proposal to manage the debtor's company is not submitted within the period as set forth under this Law, or such proposal has been submitted but was rejected; or

b. the management of the debtor's company is terminated.

(2) If the company continues, the goods which are not needed may be sold for the continuation of the company.

(3) Nevertheless, the Bankrupt debtor can be given the household appliances and equipment, medical devices for health maintenance or office furniture as may be designated by the Supervisory Judge.

Article 185

(1) The sale of the goods shall be made in public in accordance with the procedure prescribed in the prevailing laws and regulations.

(2) In case of the failure to hold public sale as referred to in paragraph (1), upon the permission of the Supervisory Judge, the sale may also be carried out in private.

(3) Concerning all goods that are not immediately or cannot be completely liquidated, the Curator shall take a decision in the manner which is approved by the Supervisory Judge.

(4) With regard to the goods which may be subject to a retention right by the Creditors, the Curator shall return them to the bankruptcy estate for payment of the claims on debt, if this will be beneficial to the bankruptcy estate."

208. It might be thought slightly bizarre that FM may in conjunction with curator be required to sell AAL's share in FM to satisfy a debt due and owing to it.

209. This would seem to me to illustrate the artificiality of the BANI proceedings undertaken in Indonesia and the consequences flowing therefrom.

FM's position

210. At this point it is necessary to refer to the role adopted by FM on these applications.

211. Mr Phillip Rompotis a solicitor represented FM at this hearing. He did not call any *viva voce* witnesses.

212. Nor did he cross examine at length any of Astro's witnesses when they were giving evidence.

213. What he did do was to place reliance on the evidence given by AAL witnesses and criticize the evidence given by Astro's witnesses, particularly Ms Nadarajah.

214. He did this to support the contentions he sought to advance in a 63 page final written submission.

215. Mr Rompotis was highly critical of the way in which the Singapore Arbitration had been conducted.

216. His main criticism related to the joinder of the 6th, 7th and 8th Applicants despite the fact that none of them had been parties to the SSA Agreement.

217. It was for this reason that FM had resisted and continued to resist the enforcement of the Singapore Awards. Mr Rompotis did however go on to claim that this opposition had been undertaken by legitimate means.

218. Be that as it may, it remains a fact that notwithstanding the various attempts made to reverse the Awards they still subsist and have effect and accordingly we have to proceed upon the basis that they are valid and subsisting.

219. Mr Rompotis then outlined the commercial considerations surrounding the "CVC Transaction".

220. He was adamant that Astro's contention that FM was attempting to dissipate its assets was misconceived.

221. He claimed that on the contrary the actions taken by FM made commercial sense.

222. He supported in particular the evidence which had been given by Mr Cheok.

223. As indicated earlier in this judgment I have been unable to place much reliance upon Mr Cheok's evidence.

224. Mr Rompotis then went on to make comment upon the circumstances surrounding the decision for FM and AAL to enter into the Facility Agreement.

225. In my view he did not advance any valid reason for this decision.

226. He submitted that when it became clear that AAL was unable to comply with its obligations under the agreement to repay the moneys which had been advanced to them it had been incumbent upon the

Directors of FM which was a publicly listed company in Indonesia to take all necessary action by legal means to recover the moneys.

227. This then led onto an analysis of the BANI Arbitration.

228. He insisted that this had been pursued in good faith and that there had been no collusion between FM and AAL.

229. Nothing contained in his submission caused me to doubt the conclusions I reached which are given earlier in this judgment.

230. These observations similarly apply to the subsequent steps which were taken pursuant to the Bankruptcy adjudication of the District Court of Jakarta.

231. I will deal with the legal implications of FM's and AAL's involvement in these applications in the following part of this judgement which analyses the law in general terms.

CONCLUSIONS ON THE EVIDENCE

(1) AAL accepts it is indebted to FM in the sum of US$44 million and interest;

(2) AAL is registered in the jurisdiction of the Hong Kong court; and has submitted to the HK courts jurisdiction;

(3) AAL does not reside in Indonesia;

(4) FM has submitted to the jurisdiction of the Hong Kong court;

(5) As earlier indicated I much preferred the evidence of Ms Nadarajah to the evidence of AAL's witnesses. This being the case I am satisfied that there has been collusion on the part of companies coming within The Lippo Group; and

(6) I accept Ms Nadarajah's evidence that the Facility Agreement, the BANI arbitration and the action consequential thereon amounted in her words to a "charade".

232. This being the case I am satisfied that there is no risk of AAL suffering double jeopardy or any other injustice if a garnishee order absolute is made.

THE LAW

233. The relevant parts of Order 49 of the High Court Rules are as follows:

> "1. Attachment of debt due to judgment debtor (O. 49, r. 1)
>
> (1) Where a person (in this Order referred to as "the judgment creditor") has obtained a judgment or order for the payment by some other person (in this Order referred to as "the judgment debtor") of a sum of money amounting in value to at least $1000, not being a judgment or order for the payment of money into court, and any other person within the jurisdiction (in this Order referred to as "the garnishee") is indebted to the judgment debtor, the Court may, subject to the provisions of this Order and of any written law, order the garnishee to pay the judgment creditor the amount of any debt due or accruing due to the judgment debtor from the garnishee, or so much thereof as is sufficient to satisfy that judgment or order and the costs of the garnishee proceedings. (See App. A, Forms 72-74)
>
> (2) An order under this rule shall in the first instance be an order to show cause, specifying the time and place for further consideration of the matter, and in the meantime attaching such debt as is mentioned in paragraph (1), or so much thereof as may be specified in the order, to answer the judgment or order

mentioned in that paragraph and the costs of the garnishee proceedings.

2. Application for order (O. 49, r. 2)

An application for an order under rule 1 must be made ex parte supported by an affidavit-

(a) stating the name and the last known address of the judgment debtor,

(b) identifying the judgment or order to be enforced and stating the amount remaining unpaid under it at the time of the application,

(ba) if the amount remaining unpaid under the judgment or order is arrears of maintenance, stating-

(i) the interest payable in respect of the arrears of maintenance that the judgment creditor is entitled to under section 20A (2) of the Guardianship of Minors Ordinance (Cap 13), section 9B (2) of the Separation and Maintenance Orders Ordinance (Cap 16), section 53A (2) of the Matrimonial Causes Ordinance (Cap 179) or section 28AA (2) of the Matrimonial Proceedings and Property Ordinance (Cap 192), as the case may be; and

(ii) the surcharge payable in respect of the arrears of maintenance under section 20B (1) of the Guardianship of Minors Ordinance (Cap 13), section 9C (1) of the Separation and Maintenance Orders Ordinance (Cap 16), section 53B (1) of the Matrimonial Causes Ordinance (Cap 179) or section 28AB (1) of the Matrimonial Proceedings and Property Ordinance (Cap 192), as the case may be; (18 of 2003 s. 13)

(c) stating that to the best of the information or belief of the deponent the garnishee (naming him) is within the jurisdiction and is indebted to the judgment debtor and stating the sources of the deponent's information or the grounds for his belief, and

(d) stating, where the garnishee is a bank having more than one place of business, the name and address of the branch at which the judgment debtor's account is believed to be held or, if it be the case, that this information is not known to the deponent.

8. Discharge of garnishee (O. 49, r. 8)

Any payment made by a garnishee in compliance with an order absolute under this Order, and any execution levied against him

> in pursuance of such an order, shall be a valid discharge of his liability to the judgment debtor to the extent of the amount paid or levied notwithstanding that the garnishee proceedings are subsequently set aside or the judgment or order from which they arose reversed."

234. As indicated in my conclusions on the evidence AAL accepts that it is indebted to FM for US$44 million plus interest.

235. I am also satisfied that AAL is resident in the jurisdiction of the Hong Kong court as is required by Order 49.

Situs of the debt

236. There is a useful commentary on this subject in Rule 128 in Vol 2 of the 15th Edition of Dicey Morris and Collins on *The Conflict of Laws* 15th Edition Sweet and Maxwell (Dicey). In the commentary contained in 22-026 to 22-029 it is clear that prima face that a debt is situated in the country where the debtor resides:

> "(1) *debts*. Subject to the exceptions set out below, a debt is situate in the country where the debtor resides. The reason usually given is that the country of the debtor's residence is normally the place where the creditor can enforce payment. It may not, however, be the only place: English courts may take jurisdiction against non-residents on the basis of temporary presence, or under CPR, r6.33, CPR r6.36 and CPR PD 6B, para 3.1 and Arts 5-24 of the Brussels I Regulation; foreign courts have similar rules for extended jurisdiction. Nevertheless, the possibility that an English court may take jurisdiction against a non-resident defendant under CPR, r6.33, CPR r6.36 and CPR PD 6B, para 3.1 does not make a debt situate in England if the debtor is not resident here; the same is no doubt true with regard to a foreign court. The result is that enforceability and *situs* do not fully coincide: a debt will not normally be situate in a country if it is not enforceable there. But the fact that it is enforceable in a particular country does not necessarily mean that it is situate there.

> Where the debtor is a corporation, 'residence' in this context must be equated with residence for the purpose of jurisdiction. Residence for tax purposes is irrelevant. Except where the Brussels I Regulation or the Lugano Convention applies, jurisdiction over a corporation depends on whether or not it does business in the country concerned, and, for the purpose of determining *situs*, a corporation is resident wherever it carries on business. English courts also have jurisdiction over a corporation if it was incorporated in England, even if it does no business here, and it seems that a corporation is also resident for *situs* purposes where it is incorporated.
>
> …
>
> A stipulation that payment should be made in a country where the debtor has no residence does not affect the general rule although the debtor's failure to pay in that country may give his creditor a right to damages for breach of contract. Where, however, the debtor has two or more places of residence and the creditor either expressly or impliedly stipulates for payment at one of them, then the debt will be there situate. This refinement is important in connection with bank accounts where (as in English law) under the applicable law of the contract between banker and customer the bank's obligation to repay is performable primarily at the breach where the account is kept, and accordingly in such a case all accounts kept at a particular branch are to be held there situate. Where the debtor has more than one place of residence but there is no express or implied promise to pay at any one of them then the debt is situate at that place of residence where it would be paid in the ordinary course of business."

237. I am satisfied that this is an accurate statement of the law. Equally as already stated AAL is resident in Hong Kong particularly as it is quoted on the GEM HK Stock Exchange.

238. The fact that AAL may recently have opened a representative office in Indonesia in no way detracts from this.

239. The business of AAL was essentially to be a holding company and its income was derived from dividends payable by its

subsidiary and associated companies. After the decision was made by The Lippo Group to divest itself of interests in various subsidiary companies the only substantial asset of AAL was its 55% interests in FM.

240. What is also clear from commentary in Dicey is that what determines the *situs* of a debt is solely a matter for the *lex fori* which here is Hong Kong by virtue of AAL and FM's submissions to the jurisdiction of the Hong Kong court.

241. There is an illuminating discussion on this in paragraphs 1-0821 to 1-087 of Vol 1 of Dicey. It is clear from the opinions expressed by the learned editors that in the present case the *lex fori* determines the *lex situs* of the debt.

242. It therefore does not assist AAL that it is stated in the BANI Award that the law governing the Facility Agreement was Indonesian law or that a declaration was made by that Tribunal that the repayment of the debt should be made to FM in Indonesia or that payment pursuant to a HK Order would not discharge the indebtedness.

243. On the issue of whether a garnishee order absolute discharges a debt which may arise in another jurisdiction the principles laid down by Lord Goff at p 354 in *Deutsch Schachtban v S.I.T. company* [HLCE] (1990) 1 AC 295 are of assistance:

> "... I think, established law. But the question arises whether cases of this kind are to be solved by exclusive reference to this assumption. The point may arise in two ways. First, let it be supposed that one or other of the two criteria is not fulfilled, i.e. that the English court is not, by accepted principles of international law, competent with regard to the underlying

> judgment against the judgement debtor, or alternatively that the situs of the attached debt is not England. Will the English court in such circumstances automatically decline to make the garnishee order absolute, on the ground that there is a real risk that a foreign court may, despite payment by the garnish pursuant to such a garnishee order absolute, nevertheless enforce the attached debt against the garnishee overseas? Second, let it be supposed that both criteria are fulfilled. Will an English court, in such circumstances, make a garnishee order absolute in accordance with the assumption, and exclude as irrelevant and inadmissible any evidence that a foreign court will nevertheless not recognise payment under the English order as effective to discharge the attached debt?
>
> I have mentioned that there are these two questions, for the sake of completeness; but I doubt whether the answer to the first question has much bearing on the answer to the second question with which your Lordships' House is here concerned. In fact, *Martin v. Nadel* indicates that, in that case at least, there was consideration whether the courts in Berlin (the situs of the attached debt) would or would not recognise a payment under a garnishee order absolute in England as effective to discharge the attached debt. It was taken to be the fact that they would not, though this was by admission. In any event, the court was there concerned with a situation where the assumption was not available to provide a solution with reference to the position in this country. All that can be said of the case is that the question whether there was a real risk of the garnishee being compelled to pay twice over was being answered by reference to the factual situation."

244. Mr Horace Wong submitted that in the light of the BANI Award and the declarations referred to that payment to Astro by virtue of the garnishee proceedings would not discharge the indebtedness there was a distinct risk that AAL would be liable to double jeopardy. He placed reliance upon the passage in the speech of Lord Oliver at 342 of *Deutsches Schachtban* which advised that it was necessary to go into the factual details of the case if there was any risk of double jeopardy. The passage reads"

> "What is entirely clear however, is that the risk, if it becomes translated into actuality, will be so translated as a result of an

> exorbitant claim to jurisdiction which transcends the bounds of what, at any rate in English law, are considered to be generally accepted norms and that the judgment is not one which has any prospect of being recognised or enforced in an English court or, I think, in any other court which accepts those principles of private international law which are applied in this country. Is it, therefore, to be ignored? To put the matter in another way, is there a conclusive presumption of law that the execution of a regularly obtained judgment which, according to accepted principles of private international law, would be generally recognised as effectively discharging the garnishee's obligation to his creditor will in fact be treated, whatever the evidence may show, as being universally recognised?"

245. This however has to be considered in the context of the present case. If the garnishee has brought upon itself the hazard of double jeopardy the court would not forebear to make a garnishee order absolute. Authority for this preposition can be derived from *Joint Stock Asset Management Co v BNP Paribus SA* [2012] 2 CLC 312.

246. In that case as in this one the court had ordered anti suit injunctive relief against the garnishee who notwithstanding the injunction proceeded to attempt to bring about a situation which it hoped would impede the enforcement of a judgment against it.

247. Although the facts in that case were quite complicated and involved transactions undertaken in Russia the court held that where in reality the double jeopardy was self inflicted the court would not hesitate to make a garnishee order absolute. The facts of that case are considered at paragraphs 50-59.

248. When analyzing the evidence in this case I concluded that there had been collusion on the part of The Lippo Group of companies which had been involved in this case. I also concluded that the BANI

Award and the action consequential thereon could accurately be characterized as a charade.

249. This being the case the reservations referred to by Lord Oliver in *Deutsch Schachtban v SIT* would have no application here and the principles propounded by Lord Woolf in joint stock asset management would have application.

250. It will be appreciated from all of this that all of the requirements laid down in Order 49 of the High Court Rules have been complied with and the HK court exclusively has the jurisdiction to make a garnishee order absolute and on the facts found in this case should do so.

251. There is also no reason whatever to believe that any question of double jeopardy arises. Even if it did it would have been self inflicted.

252. The submission made by Mr Rompotis closely follows the reasoning advanced by Mr Horace Wong on behalf of AAL.

253. This was that on account of the provisions contained in the Facility Agreement that Indonesian law is to be applicable to any disputes which may arise under the agreement. It was therefore manifest that the debt is governed by Indonesian law.

254. He went on to contend that this assessment of the position was fortified by the stance taken in the BANI Arbitration upholding the position that it was Indonesian law which governs the matter. As stated earlier this contention is unsustainable.

255. What is very clear is that FM has submitted to the jurisdiction of the HK courts.

256. I am satisfied that FM is bound by the decision of the HK court and that the provisions contained in the Facility Agreement and the position stated in the BANI Award have no binding effect upon a determination by the HK court.

257. Authority for this proposition can be obtained from Rules 32, 42 and 43 of Dicey.

> "RULE 32 – Subject to Rule 36, the court has jurisdiction to entertain a claim *in personam* against a person who submits to the jurisdiction of the court.
>
> RULE 42 – (1) Subject to the Exceptions hereinafter mentioned and to Rule 62 (international conventions), a foreign judgment *in personam* given by the court of a foreign country with jurisdiction to give that judgment in accordance with the principles set out in Rules 43 to 46, and which is not impeachable under any of Rules 49 to 54, may be enforced by a claim or counterclaim for the amount due under it if the judgment by a claim or counterclaim for the amount due under it if the judgment is
>
> > (a) for a debt, or definite sum of money (not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty); and
> >
> > (b) final and conclusive, but not otherwise.
>
> Provided that a foreign judgment may be final and conclusive, though it is subject to an appeal, and though an appeal against it is actually pending in the foreign country where it was given.
>
> (2) A foreign judgment given by the court of a foreign country with jurisdiction to give that judgment in accordance with the principles set out in Rules 43 to 46, which is not impeachable under any of Rules 49 to 54 and which is final and conclusive on the merits, is entitled to recognition at common law and may be relied on in proceedings in England.

> (3) No proceedings may be brought by a person on a cause of action in respect of a judgment which has been given in his favour in proceedings between the same parties or their privies in a court in another part of the United Kingdom or in a court in an overseas country unless that judgment is not enforceable according to clause (1), or not entitled to recognition according to clause (2), of this Rule.
>
> This Rule must be read subject to Rule 59.
>
> RULE 43 – Subject to Rules 44 to 46, a court of a foreign country outside the United Kingdom has jurisdiction to give a judgment *in personam* capable of enforcement or recognition as against the person against whom it was given in the following cases:
>
> *First case* – If the person against whom the judgment was given was, at the time the proceedings were instituted, present in the foreign country.
>
> *Second Case* – If the person against whom the judgment was given was claimant, or counterclaimed, in the proceedings in the foreign court.
>
> *Third Case* – If the person against whom the judgment was given, submitted to the jurisdiction of that court by voluntarily appearing in the proceedings.
>
> *Fourth Case* – If the person against whom the judgment was given had before the commencement of the proceedings agreed, in respect of the subject matter of the proceedings, to submit to the jurisdiction of that court or of the courts of that country."

258. Whether the Indonesian courts would in fact enforce the HK Court Order is a separate and distinct matter. Certainly by virtue of the provisions contained in the New York Convention they should do so.

259. However in the circumstances of this case and what I have held to be the relationship between AAL and FM I have no doubt there is no risk of any injustice being occasioned to any company in the Lippo Group of companies.

260. Accordingly I would grant the order being sought by Astro that the garnishee order be made absolute and dismiss AAL's application to set aside the garnishee order *nisi* and discharge Deputy Judge Lok's order for payment into court. I so order.

261. I also make an order *nisi* that Astro is to have its costs and there will be a certificate for two counsels.

(Simon Mayo)
Deputy High Court Judge

Mr David Joseph QC, Mr Clifford Smith SC and Mr Bernard Man, instructed by Clifford Chance, for the Judgment Creditors (Applicants)

The 1st Judgment Debtor (Respondent) was not represented and did not appear

Mr Philip Rompotis, instructed by Stephenson Harwood, for the 2nd Judgment Debtor (Respondent)

The 3rd Judgment Debtor (Respondent) was not represented and did not appear

Mr Horace Wong SC and Mr Mankin Liu, instructed by Reed Smith Richards Butler, for the Garnishee