CA on appeal from High Court Chancery Division (Mr Justice Jacob) before Carnwath LJ, Mr Justice Maurice Kay, Pill LJ. . 3 July 2003

JUDGMENT : LORD JUSTICE CARNWATH:

1. The Vedatech Corporation was founded by Mr Subramanian in 1991. He is its principal officer and has appeared as its advocate before us, as he did below.

2. The company was formed to help foreign companies market software in Japan. The first defendant, now called Crystal Decisions (UK) Ltd, has gone through various changes of name which do not matter for our purposes. It was founded in the UK in 1985 and specialises in business intelligence software. It was given assistance by Vedatech from October 1995. During that period, in January 1896, a Japanese company, a wholly-owned subsidiary, was established. The English company is now called Crystal Decisions (UK) Ltd and the Japanese company is now called Crystal Decisions (Japan) KK, and they are both wholly owned by an American multinational which I believe is called Crystal Decisions Incorporated, although when it took over in 1996 it was called Seagate Technology Incorporated.

3. The problems began in June 1996 when Seagate Technology, having acquired the other companies, dispensed with the services of Vedatech and there was a dispute as to what obligation, if any, was owed to Vedatech for its previous services. That led, after some exchanges, to proceedings and ultimately to a judgment on liability on 25 May 2002, in which Jacob J decided the liability issue in favour of Vedatech to the extent that they were entitled to reasonable remuneration on a "time and success basis" for the work they had done. That meant that the profitability resulting from their work would be at least a relevant factor in deciding on quantum. There was then a stay of proceedings by consent to enable there to be mediation. That led in due course to what appeared to be a successful mediation at the end of August 2002, and a settlement agreement which was, on its terms, designed to settle all claims between the parties, on a payment of a sum by the defendants. There was what was called an "entire agreement" clause which meant that the external issues could not be relied on by either party to upset the agreement, other than in the case of fraud. There was also provision for an application to be made, following payment of the settlement sum, for dismissal of the court actions in the form of a consent order, which was signed.

4. However, that did not happen as anticipated because Vedatech discovered certain matters which led them to believe that the settlement had been arrived at by fraud in relation to the accounts of the Japanese subsidiary. In effect, what they thought was that there had been some sort of accounting trick which had hidden the profits which would have been relevant to the mediation. That concern, although hotly resisted by the defendants, led to an application in September to the court to set aside the agreement. It was supported by an affidavit from Mr Subramanian, explaining what he regarded as the accounting trick. That application was later amended in November to be an application, not to set aside the agreement, but for case management directions.

5. In the meantime, the defendants had indicated to Mr Subramanian that there were no grounds to set aside the agreement but that, if he wished to do so, the appropriate course was to bring a new action. Also in the meantime, Mr Subramanian on behalf of Vedatech served what he called a formal notice of rescission of the agreement.

6. The matter came before Jacob J on 25 November 2002, and there was also before him an application him by the defendants to dismiss the Vedatech application. There is no formal judgment from him, but his thinking is apparent from the transcript of the hearing. It is clear from that that his main concern was that Mr Subramanian, even if successful before him, was letting himself in for proceedings which would be both costly and unlikely to succeed. Jacob J was understandably seeking to discourage Mr Subramanian from that course. In the course of the discussion he made clear his view that, first, having regard to the entire agreement clause Mr Subramanian would have to establish fraud to upset the agreement and, secondly, that in order to do so he would have to start a separate action. That is apparent at a number of places in the transcript. For example, at page 4 he says: *"To do that, you have to start a separate action, I think. This comes to an end and you set aside that agreement and you have to start a new action. Mr Subramanian, do not do it. I do not even care if they were fraudulent".*

At page 8, again he discourages Mr Subramanian, and he says: *"I think the difficulty with this is this is (not) a binding agreement that has to be sent aside, and the only way you can do that is by fraud. That will require a separate action with proper details of fraud which is extremely difficult to plead and prove."*

7. There was also some discussion of Mr Subramanian's concern that a new action would involve him in applications for security for costs, which he had been subject to in the existing proceedings. Jacob J said this: *"I do not think it matters a row of beans one way or the other actually. Either way there is going to be security for costs. All the things I have said are exactly the same. I would actually dismiss the action or stay this action, requiring to bring separate proceedings. That is the procedure I would go through. It does not matter whether it is new proceedings or old proceedings. It is exactly the same questions of costs will come up."*

8. At page 13 the judge said that he was going to order a stay and he suggested to Mr Norbury (who was appearing for the defendants) that it probably did not matter much whether it was a stay or a dismissal. But in the result the judge said he was going to order a stay.

9. There was then an application by Mr Norbury for costs. He said: *"We have strenuously urged Mr Subramanian to adopt precisely the course that your Lordship has forcibly asked him to adopt. I would ask for our costs of today, and that they be deducted from the settlement sum, or from the security that is to be paid out to Mr Subramanian. We are only here because of Mr Subramanian's refusal to accept the finality of the agreement he reached".*

   There then followed something of a Dutch auction on how much the order should be, and in the end the judge ordered costs in the sum of £4,000.

10. That led to the formal order whereby the judge ordered a stay of further proceedings in the claim, ordered that all sums paid into court, less £4,000 as security, be paid out forthwith, with interest to the claimant, and that all sums paid into court by the defendants under Part 36 should be paid out with interest, together with £4,000 from the sum paid into court by way of security by the claimant.

11. There was an appeal against that order. Vedatech's appeal notice, dated 7 February, was, in terms, only an appeal against the costs order, though it is apparent from the grounds that the principal issue being raised was whether the judge had been right to say that new proceedings were required. There was, however, no formal appeal against the order of a stay, although, as I shall explain in a moment, that has been effected today before us.

12. Permission to appeal was granted by Aldous LJ on 19 March 2003. He, in giving permission, made clear he would not encourage Mr Subramanian to continue with the litigation, but he said it was appropriate for the court to consider the issues. He said this: *"In my view, it will be necessary for this court to decide whether the judge was right that it was necessary for a second set of proceedings to be started. If he was, then it is likely that this court would not upset the decision of the judge on costs. If he was wrong, then it would have been appropriate for him to give directions for resolution of the issue, with perhaps the question of costs being reserved. In those circumstances I have come to the conclusion that it would be right to give permission to appeal."*

13. There then followed some correspondence between the parties. We were initially told that much of this was regarded by Mr Subramanian as without prejudice. However, at the hearing both sides have relied on the correspondence and so I understand there is no issue about us being allowed to look at it.

14. On 21 March Vedatech wrote following the grant of permission. They suggested that matters could be taken forward by a consent order, in effect lifting the present stay and providing for directions that both parties be permitted to file statements of case in support of their respective positions on the issues relating to validity of the agreement. Mr Subramanian suggested a format for statements of cases and responses, and indeed he included a draft order giving details and a timescale.

15. That was not accepted by the defendants. On 4 April they wrote to say that, although that proposal was not acceptable, they hoped that the needless expense of an appeal could be avoided. They accepted that it was inevitable that the enforceability would have to be litigated, and indicated that "*Since litigation seems inevitable, we intend to issue fresh proceedings for a declaration that the agreement is enforceable"*. They said that if this was defended Vedatech would be able to run in their defence any arguments they wished, subject, of course, to the right of the other side to apply to strike out. They also proposed to pay

back the £4,000 received from the earlier payments into court as security in relation to the costs before Jacob J, which they suggested should be treated as part of the costs of the fresh proceedings, and indeed they enclosed a cheque of £4,000 in respect of that.

16. Mr Subramanian's response to that letter was that to start new proceedings would be an abuse of process, and he maintained that position. I do not think it is necessary for me to go through the detail of the correspondence. The next significant stage is 17 April, when the defendants wrote enclosing a copy of the new proceedings that they were intending to issue the following week and repeating their contention that this would be the best way of determining the issues. They also raised the point that it would be possible for Mr Subramanian to apply to deal with any of the particular points in the new proceedings as preliminary issues. On 21 April Mr Subramanian repeated his view that that was not the appropriate course. He said that the question of the appropriate form of proceedings was the critical issue to be dealt with and would be dealt with in the forthcoming appeal. He said that it would be prudent to wait for the guidance of the Court of Appeal before creating complications by starting new proceedings and, at the same time, he withdrew his original offer, which was the basis of his letter of 21 March.

17. So at that point the battle lines were drawn. On 21 April, the date of that letter, Mr Subramanian also served an application to the court for the stay in the existing proceedings to be lifted and for directions to be given so that the issues could be determined in those proceedings. There was to be a hearing for directions on that application -- I understand that would have been on 6 June -- but that was adjourned by consent. On 21 April also the defendants issued new proceedings to enforce the settlement agreement.

18. On 6 May the defendants wrote commenting on the procedures. They said that the form of proceedings was less important than achieving final resolution of the issues, and they repeated their view that new proceedings were the best way forward. They also set out their reasons for issuing the new proceedings on 21 April. They also indicated that they would be amenable, in principle, to preliminary issues on suitable points, subject to being able to agree the necessary facts.

19. On 12 May the defendants made a Part 36 offer in the new proceedings, which as I understand it was for the same amount as had been the settlement sum, but on terms that other claims against them were withdrawn.

20. Then on 20 May, with the hearing before this court coming up and the time for skeleton arguments to be prepared, an open letter was written by the defendants to Vedatech explaining their position. It indicated the view of the defendants was that the new proceedings were the appropriate means to resolve the issues. They said that they had indicated in open correspondence that they had returned the £4,000 awarded by Jacob J and had offered to pay the costs of the permission hearing, to be assessed if not agreed. They said that they had done everything they could in correspondence to resolve the procedural differences and they also added that *"One consequence of the appeal proceeding is that it is inappropriate for [Vedatech] to pursue [their] application of 21 April 2003."* They said: *"At the hearing of your application for permission to appeal on 19 March 2003 the Court of Appeal identified the underlying question as whether Mr Justice Jacob was correct in granting a stay and requiring you to issue new proceedings, in order to rescind the Settlement Agreement. Until the Court of Appeal has, in July, decided that underlying question it is inappropriate to ask the first instance court to reverse its earlier decision."*

    They repeated their invitation to *"withdraw the appeal, agree to the consolidation of the proceedings .... and to prepare a Defence to our Particulars of Claim."* They also enclosed the particulars of claim which set out their view on the enforceability of the agreement.

21. That then takes us up to the appeal. Before us, the positions of the parties have to some extent shifted from what they were before Jacob J. Vedatech's position is that there are, in summary, five grounds on which they would wish to challenge the settlement, not limited to misrepresentation, which was really all that was in issue before Jacob J. The five issues, as I understand them, are first that the defendants, by refusing to pay the settlement amount except on condition that Vedatech waived all claims including fraud, had in effect renounced the agreement; secondly, that there had been a failure to pay within the

time set by the agreement; thirdly, that there was a defect in the signature on the agreement, that signature being in the name of Crystal Decisions Incorporated, which is the parent company rather than the subsidiaries which are parties to these proceedings; fourthly, that there had been misrepresentation which, albeit innocent, was not barred by the entire agreements clause; and fifthly, that there had been fraud.

22. Mr Subramanian's position, as I understand it, is that he was anxious to litigate these issues in the existing proceedings, on three main grounds. First, he was concerned that new proceedings would involve him in new applications for security for costs, which had been used against him in the earlier proceedings. Secondly, he was anxious to avoid getting involved in trying to prove fraud, or indeed even to plead fraud, unless he had to, and he considered that there were technical and non-contentious issues which would enable him to set aside the agreement without having to plead fraud. Thirdly, he had an instinctive concern that new proceedings would involve greater costs and greater complexity.

23. The defendants' position is that they now concede that it would have been open to Jacob J to order that those issues be dealt with in the existing proceedings. On the other hand, they say it is much more appropriate for them be dealt with in new proceedings, given that there are complex issues involving potential allegations of fraud which are not directly related to the subject-matter of the existing proceedings but rather are solely concerned with the circumstances of the mediation agreement.

24. So I come to the position before us. First, Mr Subramanian has applied to amend his appeal to include a request that the stay be lifted on the basis that it should not have been imposed. That, as I understand it, is not resisted, subject to questions of costs.

25. So there are three issues before us. First, was the costs order rightly made; secondly, was the judge right to order a stay; and, thirdly, if not, how should we deal with the matter hereon and what directions, if any, should we give?

26. On the first point, I would respectfully agree with Aldous LJ that the appropriateness of the costs order really depends on the view one takes about whether the issues could be dealt with in the existing proceedings or not. Since it is now conceded that they could have been dealt with in the existing proceedings, it seems to me that the judge proceeded on an erroneous basis. Mr Norbury suggests that his decision was not based simply on that view of the law, but was more generally an exercise of discretion as to how best to deal with the matter. While there are indications in the passage that I have read that that was also a matter the judge had in mind, it seems to me that principally he took the view, as a matter of law, that there would need to be new proceedings. As I read Mr Norbury's application for costs, it was based on the view that that reflected the position that the defendants had themselves taken quite clearly in the correspondence. Accordingly, it seems to me that on the first point Mr Subramanian is entitled to succeed.

27. That leaves open the question of what the proper order would have been. Aldous LJ suggested that an appropriate order would have been for the costs to be reserved pending the resolution of the new issues. On the other hand, the position before Jacob J was that Mr Subramanian was seeking case management directions on the basis that the existing proceedings could continue, while the defendants were seeking an order that they should be dismissed altogether. It seems to me, in those circumstances, that neither side had really got what they wanted and no order as to costs would have been appropriate.

28. As to the second issue, it seems to me that now that the question of the appropriateness of the stay has been put in issue by the amendment asked for and allowed today, we have to consider the matter in the present circumstances.

29. Unfortunately both parties got themselves into a position where they were over-exercised by formality and insufficiently attentive to the substance. The correspondence shows both parties getting to the position that they accept that all the issues can be dealt with within either separate proceedings or new proceedings. Mr Norbury says that new proceedings are more appropriate because of complexity but, for my part, I find it difficult to understand why any of the matters which would be pleaded in new proceedings could not equally well be pleaded and dealt with in the existing proceedings. The case management powers are quite sufficient to enable that to be done. On the other hand, I think that Mr

Subramanian -- perhaps understandably, as a litigant in person -- was over-suspicious of the problems of new proceedings. He seemed to believe that by staying within the existing proceedings it would be easier for him to litigate first the points not involving fraud, and that that would be cheaper and indeed less offensive. He also seemed to think that there would be fewer problems with security for costs. But, as the judge said in colourful language, it really did not matter a row of beans which procedure one followed. Either would have exactly the same potential consequences in relation to the issues which needed to be covered, security for costs and so on. Certainly, in so far as Mr Subramanian thought that he could pick off his issues one by one in the existing proceedings, he was in my view mistaken. The defendants were in principle entitled to expect him to bring forward his case for challenging the agreement at one time.

30. So how should matters proceed, as we stand? Here I do fmd it difficult to make a clear choice. On the one hand, I see the force of the view that, as the judge took a wrong turning, we should now put it back on the turning that he might have taken if correctly advised on the law. On the other hand, we have now the position where new proceedings have been commenced by the defendants. It seems to me that the circumstances in which they began those new proceedings are wholly understandable and are clearly explained in their letter of 20 May. Mr Norbury fairly says that at that stage there was a stay on the existing proceedings. Accordingly it was not possible to do anything within those proceedings until that stay was lifted. He perhaps exaggerated the problem of going back before Jacob J or the procedure judge for a consent order. On the other hand, the advantage of what he there proposed is that it got things moving. He set out his client's position in particulars of claim which, it seems to me, raised the issues fully and clearly. It was certainly open to Mr Subramanian to plead to that, and I can see no disadvantage at all if he is now required to do so. Furthermore, the fact that these proceedings have been begun by the defendants does at least put Mr Subramanian in a slightly stronger position in relation to potential applications for security for costs.

31. So, on balance, it seems to me that, from where we are today, the correct procedure is not to lift the stay but to allow the proceedings commenced by the defendants to continue, in the recognition that all the issues that Mr Subramanian wants to take can be taken in those proceedings, and that the case should now go forward in that way.

32. So for those reasons, I would allow the appeal in relation to the costs order and substitute an order below that there should be no order as to costs. Otherwise I would dismiss the appeal.

MR JUSTICE MAURICE KAY:

33. I agree. For my part I have hesitated to conclude that Jacob J erred when ordering a stay, thereby leaving Vedatech with the option of commencing new proceedings. It seems to me that, on a proper exercise of discretion, either of the courses then under consideration would have been justifiable. However, as the only perceptible reason was the paternalistic one of giving Vedatech time to reflect on the judge's advice before pursuing the matter, I am persuaded that, although the judge had, as he said, read all the material and considered the position with care, it is inappropriate for us to attribute to him possible reasons which he had not articulated.

34. Having overcome my initial hesitation on that issue, I agree with Lord Justice Carnwath that it now falls to this court to exercise the discretion anew, and I would exercise it in the same way, for the same reasons and with the same consequences, that he has stated.

35. Mr Subramanian has addressed us, if I may say so, most helpfully and courteously. However, his submissions and the correspondence to which he has taken us have in my judgment consistently and pessimistically misinterpreted the procedural implications of the new proceedings. The perceived disadvantages are either illusory or insignificant and in the present circumstances it is expedient and consistent with the overriding objective, as expressed in the Civil Procedure Rules, for the outstanding issues to be litigated in the new proceedings. Where I apprehend I may respectfully differ from Lord Justice Pill is that, in my judgment, any unreasonableness in the conduct of this litigation is distributed far more evenly between the parties.

LORD JUSTICE PILL:

36. The basic facts which have led to the present position can be stated quite briefly. Vedatech brought an action for damages against Crystal Decisions. The claim was heard by Jacob J, who found in favour of Vedatech. The question then arose as to the manner in which damages were to be assessed. By consent, the issue went to mediation and an agreement was reached between the parties, Mr Subramanian, who appears as a representative of Vedatech today, having made an agreement with representatives of the defendants. Subsequent to that, Mr Subramanian formed the view that there had been fraudulent conduct by the defendant's representatives in the mediation proceedings. For that and other reasons, he wishes to challenge the figure reached by the mediator and subsequently agreed by the parties. This court has not been told what the figures are. We do not know the extent of this claim.

37. There are five grounds which my Lord, Lord Justice Carnwath has set out on which the claimants seek to challenge the validity of the agreement which was made. One of those, it is common ground, is capable of being considered as a preliminary point and that is, to use the language as it has been put to us, as to whether the defendants themselves have renounced the agreement made. Others relate to an alleged failure to comply with the agreement by the defendants, to a formal defect in the proceedings, to misrepresentation and finally to fraud. Mr Subramanian has underlined that he does not wish to make the allegation of fraud unless he has to. He strongly favours that the preliminary point in the remaining dispute between them, that is the renunciation point, should be dealt with first, before he has to plead to the other matters, which would, of course, involve him pleading, and plainly pleading, the allegations of fraud which he makes.

38. It was in those circumstances that the issue came before Jacob J. Nothing I say in this judgment is intended as in any way departing from the advice which Aldous LJ gave, having heard Mr Subramanian address him on the question of permission to appeal. Aldous LJ stated at paragraph 11:
"I do not wish to encourage Mr Subramanian to continue with this litigation, as it may well be that the judge's view as the advisability of proceeding with the litigation could turn out to be correct."

    The judge's view was that Mr Subramanian, and therefore Vedatech Corporation, should walk away from this litigation. They should take what they have been awarded in the mediation and that should be an end to it.

39. It was in that context that on 25 November 2002 Jacob J heard an application by the defendants that the proceedings should be dismissed. We have a transcript of the proceedings. Jacob J was not prepared to dismiss them -- Mr Subramanian says with some force it would not have been open to the judge to do that in the circumstances -- but the learned judge did stay the proceedings, which was a substantial victory for the defendants. He then ordered that Vedatech pay the costs of the proceedings before him, which he assessed at £4,000. I agree with Carnwath LJ, first that Jacob J's decision cannot stand, and secondly that the order for costs should not stand, for the reasons given by Carnwath LJ. I agree with his conclusion that there should be no order for costs, and therefore that the appeal should be allowed on that ground.

40. The remaining question is whether, as Mr Subramanian contends, the stay should be removed by this court or whether, as Mr Norbury for the defendants submits, the stay should for a time remain in force, albeit Mr Norbury contemplates that the proceedings would come back to life because they would be consolidated with the new proceedings which he has commenced.

41. On 22 April 2003 the defendants commenced proceedings, seeking a declaration that the agreement made between the parties following the mediation should stand. The issue is as to whether the stay should be removed and appropriate directions given in the action heard by Jacob J, or whether Vedatech should plead to the fresh action, particulars of claim having been served.

42. I agree with Carnwath LJ that there can be no advantage, in terms of case management, in having to proceed in the new proceedings. It may be that the issues are, as Mr Norbury has told us, complex, and that this is a multifaceted dispute, but I see no reason whatever why it is easier to have case management in a new proceedings, or in consolidated proceedings, rather than to have exactly the same case management considerations taken into account and decisions made in the existing action.

43. I also see force in Mr Subramanian's view that to have the preliminary issue in the existing action has the beneficial effect that it can be treated as a discrete issue and there would be no need to make the comprehensive pleading, including allegations of fraud, which are involved if the whole matter is to be considered. Mr Subramanian should, however, be disabused of any impression that, whichever course is followed, he can take each of his five points one at a time. The general rule is that it is an abuse of process if fresh actions are brought on matters which could have been brought in the earlier action; that all points which are to be taken, are taken in one action -- though it is strongly arguable, in my view, that what the parties agree is a preliminary point could be such in the existing action.

44. The flavour of Jacob J's approach emerges from the discussion before him. Jacob J was doing his best, as Mr Subramanian accepts, to assist Mr Subramanian and Jacob J plainly formed a strong view that Mr Subramanian should walk away from his action on the basis which I have mentioned. I cite a few passages from the transcript. Page 5: *"If it is possible for you to say I am going to walk away from this and rid of it today, go on a plane and go back and then do everything you possibly can, burn all the papers so you do not have anything to go back and look at. When you wake up and say 'What about so and so?' You cannot do it, it is burnt. That is what I suggest you do."*

    I should add that I understand Vedatech and Mr Subramanian himself are from the United States. At page 9: *"Before you get anywhere, that is the first thing that is going to happen [that is that the defendants are going to ask for security for costs on new proceedings, though I have to say that, like Lord Justice Carnwath, I do not consider that to be inevitable]. Take the money, go and burn the papers. It is not as much as maybe you deserve, I do not know; it may be more than you deserve, I do not know either. That is my strongest possible advice man to man."*

    At page 15: *"Quite frankly I think the best thing to do is simply to stay this and all related proceedings, bang."*

    At page 28: *"Better to go and make some money"*,

    having given further advice in relation to proceedings.

45. That is as far as I have known a judge to go, and indeed as far as a judge could properly go in advising a litigant before him not to proceed with an action.

46. I have indicated Mr Subramanian's positive view of the attitude of the learned judge, and it is not one in circumstances which I criticise, or which, on the limited information I have about the whole action (greatly less, of course, than the learned judge) I in any way dissent from. However, that approach appears to me to colour, inevitably, the view which the judge took as to the stay of proceedings. There was no reasoning, with respect, by the learned judge as to why the proceedings should be stayed. The learned judge took the view -- and I agree with Lord Justice Carnwath -- that the appropriate course was a new action. There is clear authority that matters such as this can be dealt with in an existing action - see ***Eden v Naish*** (1878) LR 7 ChD 781.

47. The suspicion which a reasonable litigant may have, and which, with respect, I have, is that the learned judge's decision was coloured, and strongly coloured, by the view he had formed that Vedatech should not pursue this litigation. Plainly, if that view is taken, it is more likely that effect will be given to it and the advice strongly tendered accepted if the existing action is stayed, with the result that the burden arises of either renouncing or fighting a fresh action. Like Lord Justice Carnwath, I have no doubt that, with the best motives Jacob J had, his decision that the proceedings should be stayed cannot be upheld in the circumstances.

48. Like Lord Justice Carnwath, I reject Mr Norbury's submission that any case management is easier in a new action and if Crystal Decisions are to succeed -- and they do succeed on the basis of the judgments of my Lords - - it can in my judgment only be on the basis that in some way the conduct of Mr Subramanian and the Vedatech Corporation has been such that they acted reasonably in commencing a new action rather than taking the simple step, once the parties had focused on the issue -- as plainly from the correspondence they did -- of setting aside the stay in the existing action.

49. In my judgment the court should scrutinise carefully any attempt by a party to bring a fresh action when steps can be taken in the existing proceedings. This is not a neutral matter, in my judgment. It is abusing

the process of the court, and the court should protect its procedures, to bring a fresh action without good reason if the matters can be resolved within an existing action. Moreover, in my judgment the burden on a party who seeks to bring a fresh action is a heavy one. He must show real and significant grounds as to why he takes that course rather than proceed in the existing action.

50. The point taken by Mr Norbury is that the notice of appeal does not seek the removal of the stay, but only appeals against the order for costs, an appeal which has succeeded. In my judgment that argument does not have force when one considers the correspondence and when one considers the attitude taken by the defendants -- on this point a wholly commendable one -- that they would not wish to take the nature of the pleading in the notice of appeal as shutting out the claimants from the appeal they now seek to bring. I see some force in Mr Subramanian's argument that it is implicit in his grounds of appeal that he was attacking the stay though it should have been pleaded expressly. Mr Norbury has made no objection to that point being taken, which I consider a proper course. However, I also consider it to be an inevitable course once one looks at the correspondence and once one sees that the parties identified at an early stage that the real issue, "the underlying issue", as it is described in some of the documents, was not the question of costs, but whether matters should proceed in the existing action or whether a fresh action should be started. Aldous LJ put it in this way: *"The defendants issued their own application on 19th November to have the material claims dismissed on the basis the parties had settled the claims by the signed settlement agreement of 30th August 2002."*

Then, at paragraph 11: *"However, I believe it appropriate for this court to consider the issues raised by [Mr Subramanian] on this application with the assistance of counsel instructed by the defendants. In my view, it will be necessary for this court to decide whether the judge was right that it was necessary for a second set of proceedings to be started. If he was, then it is likely that this court would not upset the decision of the judge on costs. If it was wrong, then it would have been appropriate for him to give directions for resolution of the issue, with perhaps the question of costs being reserved."*

51. Two days after that hearing, Mr Subramanian wrote to the defendants' solicitors:
"Vedatech's Settlement Offer regarding the above appeal [permission to appeal having just been granted]
A consent order is entered and sealed to the effect that the effect of both the Settlement Agreement of 30 Aug 2002 and the subsequent notice of rescission be dealt with within the current proceedings as Defendants' application for a declaration that the Settlement Agreement is valid and subsisting in spite of the various reasons advanced by the Claimant that it is void or voided or discharged .... and this be determined as a preliminary issue within the current proceedings before any directions towards a trial on quantum could be given. Additionally, the consent order includes directions that both parties be permitted to file statements of case in support of their respective positions on Defendants' application, and that a case management conference be set after service and filing of such statements of case."

A draft consent order was attached which included, at paragraph 3: *"The Preliminary Issue be treated as Defendants' application for a declaration that the Settlement Agreement of 30th August 2002 is valid and subsisting notwithstanding Claimant's Notices of Rescission/Termination."*

That appears to me to been an entirely appropriate and indeed a helpful way of suggesting that progress be made.

52. On 8 April Mr Subramanian wrote (paragraph 7): *"Abuse of Process*
In light of the above, I think your proposals to bring new proceedings or otherwise insist on the effectiveness of the Settlement Agreement would be an abuse of process and misconceived. I suggest that the most appropriate approach would be to have this matter adjudicated within the current proceedings (as explained in the accompanying letter.)"

Within the accompanying letter was the following at paragraph 23:
"Futility of New' Proceedings given your renunciation of the Agreement.
As noted above, you have the freedom to issue any kind of proceedings that you want to. It should be noted though that the issue of your non-payment of the settlement sum and my notices of termination regarding the same is a dispositive matter that will moot these 'new' proceedings. Your own renunciation of the Settlement Agreement has in all likelihood made these new proceedings needless and an abuse of process. Even with the need to introduce parol

evidence, which may be necessary in this case, it would be very cost effective to have this point regarding the renunciation/repudiation arising from your refusal to honour the Settlement Agreement (that you say is subsisting) be determined within the current proceedings. It would surely be a shame to waste the large amount of costs on formulating pleadings for all of the other remaining issues if this matter is to be determined on this point alone."

At paragraph 25 he wrote: *"In this case, if you issue new proceedings, I plan on applying to the Court to stay those proceedings until this issue of the renunciation/repudiation by non-payment of the Settlement Sum can be determined in the current proceedings. I believe this will be consistent with the CPR's goals of minimising needless costs of litigation."*

On 21 April, he wrote to the defendants' solicitors as follows: *"Purpose of the Appeal*

1. *You will note that the purpose of the appeal was to resolve the matter of £4,000 in costs and the critical issue of whether the dispute over the 30th August compromise can be settled within the current proceedings without recourse to expensive new proceedings with all the attendant costs and uncertainties (since that formed the basis of the costs order and your counsel's submissions).*
2. *It is obvious by now that your counsel is to be faulted for not bringing such cases as Eden v Naish to the attention of Mr Justice Jacob.*
3. *In spite of the fact that this issue of the need for new proceedings is squarely before the Court of Appeal, you propose to short-cut the whole process by bringing new proceedings for other tactical reasons (noted below).*
7. *Although it would seem that technically you have a right to issue any kind of proceedings you want, it would seem that it is a direct affront to the subject matter before the Court of Appeal for you to issue these new proceedings when the very questions of whether there is a need for such new proceedings is before the Court of Appeal and to be heard in early July 2003. It would be prudent for us to wait to see the guidance of the Court of Appeal before we rush off and create more complications on this point."*

That is underlined and elaborated at paragraph 8, which I need not read out.

53. There is then a heading: "*Your newfound enthusiasm for these 'new' proceedings*," under which Mr Subramanian makes comment on what he regards as a "sudden eagerness" to issue new proceedings and he suggests motives which may or may not be right. I do not consider it necessary to explore them, or even to set them out.

54. What I do underline is my view that the burden is upon the party who wants to bring a new action to show a justification for doing so. It appears to me that in the suggestions made, Mr Subramanian has provided good reason why it would be an abuse of the process of the court to bring fresh proceedings in the circumstances of this case.

55. Further application was then made to come back before Jacob J, when it was becoming clear that in substance there was nothing between the parties, at least in the sense that by this stage the defendants had accepted that it was open, one way or another, for the claimants to take the points on the validity of the settlement, and the only issue was how that should be done. It appears that the defendants also served a notice of application for 7 June. They wanted directions in the new action. Mr Subramanian wanted directions in the existing action. Since they were not in agreement then, sensibly in my judgment, the hearing was adjourned. I cannot imagine Jacob J going back on his earlier order if the parties were still at odds. However, if they had been at one, and having regard to the correspondence I see no sensible reason why they could not have been at one, Jacob J, with respect, is not so proud a judge that he would not have reversed the order which he made. He was plainly trying very hard to prevent Mr Subramanian from continuing with the action. Mr Subramanian had demonstrated by his behaviour that he was not prepared to be so deterred, and I have little doubt that Jacob J would have seen the reality of that and would have set aside the stay -- though, of course, by then the fresh action had been commenced (it had not been commenced during the earlier part of this correspondence) and he, like us, might have had to determine the issue created, in my judgment, by the defendants as to whether the new action should be permitted to proceed.

56. Having come forward to 7 June to refer to the application to the court, I go back in time to interpose the date of 25 April, when Mr Subramanian wrote a letter in which he once again put the points that there

was no reason for fresh proceedings and indeed it was appropriate for the matter to proceed in the existing action: *"I believe that it is quite appropriate for my application to be heard before Mr Justice Jacob in the current proceedings independent of which way the appeal goes."*

57. Mr Norbury has relied upon the letter from his instructing solicitor of 20 May, which appears at page 245 of the bundle. He has also referred to a letter which he himself wrote to the court office on the same date. The solicitors' letter, in my judgment, does not support the defendants' contention upon a full analysis. It brings up the question of consolidation of the actions. Why there should be need for a fresh action and consolidation when the matters could have been resolved in the existing action, I fail to see. There is a plain recognition in that letter, and inevitably so, that the defendants' solicitors were well aware of what the underlying issue was: it was whether the stay should survive.

58. I refer in passing to one other issue which has arisen. That is the dispute as to whether the claimants are in a position to take the money which has been paid into court out of court. Mr Norbury's argument that the condition placed upon that by his client, namely that all other allegations should be withdrawn, is in my submission an unattractive one. While there may be a dispute as to precisely how much the claimants are entitled to on the existing findings, there is no challenge to those findings by the defendants. Mr Norbury accept that some money is due and I find no justification for any failure to make or offer some kind of interim payment in this case. Baldly to oppose the payment of the sum, unless the condition is satisfied that all other proceedings are dropped, in my view gives Mr Subramanian grounds for suspicion as to the motives of the defendants in taking the action which they have proposed.

59. I regret that I am unable to take the view of the majority of this court that, the new case being where it is and the actions having been taken which have been taken, that in itself justifies the upholding of a position whereby the new action is permitted to proceed. That would be to license a party to bring a fresh action and then to present the court with that fait accompli as a reason for not removing a stay on an earlier action. With respect, I do not regard that point as a sound one. The court should form a judgment as to whether the second action has been brought reasonably. I have indicated that in my view there is a substantial burden upon a party which seeks to do that, when for all case management reasons the matter can fairly -- possibly more fairly -- and effectively be dealt with in the existing proceedings.

60. I regret dissenting from my Lords, but in my judgment the defendants have entirely failed to discharge that burden. I find no justification whatever, against the background which I have indicated, for there being two actions before the court dealing with the same subject matter. It is in my view unfortunate that the excellent motives, with respect, of Jacob J in attempting by his advice to assist Mr Subramanian as a litigant in person have now recoiled against Mr Subramanian because the fact that the stay was imposed, in the circumstances I have indicated, is now being used as an argument why the second proceedings are justified. I regard that as a most unfortunate result.

61. It may be that in the end there is little difference between the two procedures. I hope that is so. I would regard it as an injustice if the claimant company in these circumstances suffers in any way procedurally as a result of the decision of this court. Of course I make no comment upon the merits of the action. It is unfortunate that the reluctance of the defendants' legal advisers in the light of the correspondence to await the outcome of the appeal or to go back before Jacob J -- for reasons I do not understand: they would have been as aware of the motives by which the judge was acting as I am -- has led to the costs which have now been incurred and the course which events have taken.

62. However, I am in a minority and this appeal is, save to the extent indicated on the question of costs, dismissed.

ORDER : Appeal dismissed by a majority save as to substitution of the order on costs below of an order of no order as to costs. No order as to costs on this appeal. (Order not part of approved judgment)

MR M SUBRAMANIAN, as Director of the Appellant company, appeared on behalf of the Appellant

MR H NORBURY (instructed by Freshfields Bruckhaus Deringer, London EC4Y 1HS) appeared on behalf of the Respondents