Sun Electric Pte Ltd and another *v* Menrva Solutions Pte Ltd and another [2019] SGCA 51

Case Number	: Civil Appeal No 1 of 2019
Decision Date	: 26 September 2019
Tribunal/Court	: Court of Appeal
Coram	: Andrew Phang Boon Leong JA; Belinda Ang Saw Ean J; Woo Bih Li J
Counsel Name(s)	: Koh Swee Yen, Daniel Liu Zhao Xiang, Zoe Kok and Andrew Pflug (WongPartnership LLP) for the appellants; Ng Lip Chih (Foo & Quek LLC) (instructed), Jennifer Sia Pei Ru and Rezvana Fairouse d/o Mazhar Deen (NLC Law Asia LLC) for the respondents.
Parties	: Sun Electric Pte Ltd — Sun Electric Power Pte Ltd — Menrva Solutions Pte Ltd — Chan Lap Fung Bernard

Contract – Breach

Contract – Privity of contract – Common law

Tort – Negligence – Duty of care

Tort – Negligence – Breach of duty

Tort – Negligence – Causation

[LawNet Editorial Note: This was an appeal from the decision of the High Court in [2018] SGHC 264.]

26 September 2019

Andrew Phang Boon Leong JA (delivering the judgment of the court *ex tempore*):

1 This is an appeal by the first appellant, Sun Electric Pte Ltd ("SE"), and the second appellant, Sun Electric Power Pte Ltd ("SE Power"), against the decision of the High Court judge ("the Judge") in *Sun Electric Pte Ltd v Menrva Solutions Pte Ltd* [2018] SGHC 264.

2 Having carefully considered the written as well as oral submissions of the parties, we dismiss the appeal. Turning first to the claims in contract, we agree with the Judge's decision that there was only breach of cl 1(b)(v)(a) of the Consulting Agreement. There was no breach of sub-cll (b) to (e). In any event, we are not persuaded that the losses sustained by SE Power were caused by any of the alleged breaches of sub-cll (b) to (e).

3 The Judge was also entitled to find that, on the relevant facts, there was no causal link between the breach of sub-cl (a) by the first defendant, Menrva Solutions Pte Ltd ("Menrva Solutions"), and the losses sustained by SE Power on the contracts for differences ("CFDs"). The Appellants argued that it was never put to Dr Peloso that he would have disregarded the daily valuations had they been produced. We find, however, that there was no breach of procedural fairness on the facts because Dr Peloso was *not* deprived of the opportunity to put forward his case on the matter. First, a part of the cross-examination of Dr Peloso focused on his failure to ask Menrva Solutions for the daily valuations and on whether the daily valuations were important for SE's

purposes, and he *had responded to these questions*, claiming that the daily valuations were important. Second, Dr Peloso also testified on matters relating to whether he would have taken heed of the daily valuations: he admitted that he did not read most of the SGX market updates SE Power received despite the fact that he knew these updates would give him information as to how the market was performing, and that he did not always read the Reports produced by Tong Teik Pte Ltd containing data on the performance of the CFDs. We are not persuaded that we should interfere with the Judge's finding that it was more likely than not that Dr Peloso would not have read and acted on Menrva Solutions' daily indicative valuations even if Menrva Solutions had produced them.

4 In so far as the issue of privity is concerned, in particular that relating to the fact that SE Power was not a party to the Consulting Agreement and that relating to the question whether the losses it sustained could be claimed by SE under the Consulting Agreement, we agree with the Appellants that the Judge should have given parties the opportunity to address the issue. It is not definitely the case that SE could never claim for the amount of losses sustained by SE Power if it was not a party to the Consulting Agreement. The Appellants argued that on a construction of the Consulting Agreement, SE Power's losses are to be treated as part of SE's losses. In the alternative, they argued that the exception to the general rule that a plaintiff can only recover nominal damages for a breach of contract where it has suffered no loss, referred to in the case law as the "broad ground", applies. The "broad ground", as approved by this court in the cases of *Chia Kok Leong v Prosperland Pte Ltd* [2005] 2 SLR(R) 484 and *Family Food Court (a firm) v Seah Boon Lock and another (trading as Boon Lock Duck and Noodle House)* [2008] 4 SLR(R) 272 ("*Family Food Court*"), permits the plaintiff to recover substantial damages for its own benefit on the basis that it is recovering for its own loss. As we have explained in *Family Food Court* (at [48]), it may be a misnomer to describe the "broad ground" as an exception because it is based on the basic rationale of contract law centring on the performance (or expectation) interest. If successful on this ground, SE can claim for its own loss of performance interest caused by the non-performance of the Consulting Agreement by Menrva Solutions, because SE did not receive the bargain for which it had contracted. The bargain it had contracted was for Menrva Solutions to provide its consultation services to SE Power for the benefit of SE Power. The quantum of this loss of performance interest is reflected by the amount of losses sustained by SE Power caused by Menrva Solutions' breach. On these arguments raised by the Appellants in this appeal, we note that no further evidence is in fact required and that the Respondents are not prejudiced. *However*, because the Appellants are unable to persuade us as to the causal connection between Menrva Solutions' breach of sub-clause (a) and the losses, whether the amount of losses suffered by SE Power can be claimed under the Consulting Agreement, either on the construction of the Consulting Agreement or on the broad ground, is rendered a moot point.

5 Turning to the claim in tort, we are, with respect, unable to agree with the Judge that there was no duty of care owed by Menvra Solutions to SE Power (pursuant to the principles laid down by this court in the seminal decision of *Spandeck (S) Pte Ltd v Defence Science & Technology Agency* [2007] 1 SLR(R) 720). The reason for SE, instead of SE Power, entering into the Consulting Agreement is a vital consideration in determining whether the parties had intended to exclude a duty of care owed by Menrva Solutions to SE Power. The parties had intended all along for the consultancy services to benefit SE Power, as it was the participant in the Enhanced Forward Sales Contract Scheme. A joint venture was originally envisaged between SE Power, the MM Partner and Abundance Way. To this end, a memorandum of understanding was signed between SE Power and Abundance Way. However, pursuant to SGX's suggestion, the idea of a joint venture was dropped. Mr Chan, the second respondent, testified that the Consulting Agreement was entered into between SE and Menrva Solutions because Dr Peloso had wanted him to be a shareholder of SE. There is no indication of an intention of the parties for SE to enter into the Consulting Agreement so that no obligation would be owed to SE Power.

6 Factual foreseeability is fulfilled because the parties knew that SE Power was relying on the services provided by Menrva Solutions and that SE Power would suffer losses if the services were performed in a negligent manner. There is also sufficient legal proximity for a duty of care to arise: Menrva Solutions undertook a voluntary assumption of responsibility in providing its consultancy services to SE Power, as evidenced by the Consulting Agreement it entered into with SE, and SE Power had relied on these services. Policy reasons support the finding of a duty of care. Given that SE Power is not a party to the Consulting Agreement, it may have no claim in contract, and while its losses may be claimed by SE, SE Power's own cause of action, as the party relying on Menrva Solutions' consultancy services, may lie only in tort. Thus, we find that there was a duty of care owed by Menrva Solutions to advise SE Power and act with reasonable skill and care as and when Menrva Solutions performed the services.

7 However, we find that Menrva Solutions had *not* breached its duty of care. First, the duty of care did not encompass an obligation to SE Power to proactively advise it to enter into CFDs or for monitoring, managing or reporting on the performance of the CFDs. Such an obligation would be inconsistent with the framework of the Consulting Agreement. Second, Menrva Solutions did not fail to assess the existence and extent of the potential market manipulation, because it had originally provided the opinion that any potential market manipulation was unlikely. Third, in so far as the Appellants' argument that Menrva Solutions had failed to properly consider and advise on the purpose for placing the last CFD is concerned, the evidence showed that the risks were not fully eliminated at the time the last CFD was placed so Menrva Solutions was not wrong to consider that it was a hedge with some directional element. The idea of assessing the CFD as a directional trade was Dr Peloso's, and it cannot be said that Menrva Solutions failed to exercise reasonable care and skill in giving advice because Mr Chan did not characterise the CFD according to Dr Peloso's indication exactly. In any event, even if there were any breaches of the duty of care, we are not satisfied that they caused the losses suffered by SE Power.

8 As for the Appellants' claim that Mr Chan owed a duty of care to SE Power, we agree with the Judge below that the interposition of Menrva Solutions as the company through which the consultancy services of Mr Chan were provided shows that the parties intended to exclude any duty in tort owed by Mr Chan. The parties were aware of Mr Chan's deliberate use of the corporate form to enter into the Consulting Agreement. We are not persuaded by the Appellants' argument that Mr Chan had voluntarily assumed the responsibility of negotiating and placing the trades by entering into CFDs on SE Power's behalf, in the light of the instances where Mr Chan stated outright that he would not be too involved in the actual implementation of managing the portfolio and trading CFDs.

9 We also find that the Judge did not err in holding that there was no ground to pierce the corporate veil between Menrva Solutions and Mr Chan to hold Mr Chan personally liable. The Judge pointed out that the UK Supreme Court decision in *Prest v Petrodel* [2013] 2 AC 415 ("*Prest v Petrodel*"), the leading English case on lifting of the corporate veil, has yet to be considered by this court. The Supreme Court in *Prest v Petrodel* endorsed the concealment principle and the evasion principle. Unlike the current Singapore position, the alter ego ground is not sufficient in itself to warrant lifting the corporate veil. In the present case, however, the alter ego ground for lifting the corporate veil is not satisfied and no abuse of the corporate form to further an improper purpose was argued before the Judge. In the circumstances, we are of the view that a definitive view on *Prest v Petrodel* should be expressed only when it is next directly in issue before this court.

10 We also see no reason to disturb the Judge's decision on the counterclaim. In holding that the counterclaim was allowed, the Judge must have held that the counterclaim was to be satisfied by SE alone, as his view was that SE was the counterparty to the Consulting Agreement. The Respondents' arguments to the effect that the Judge's decision in ordering assessment of damages for the

counterclaim is wrong have to be disregarded because (as counsel for the respondents correctly admitted at the commencement of the oral hearing) no cross-appeal against the Judge's decision was filed.

11 For the reasons given above, we dismiss this appeal.