IN THE APPELLATE DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2023] SGHC(A) 39

Appellate Division / Civil Appeal No 56 of 2023

Between

(1) Tan Hong Joo
(2) Goh Siew Ling
(3) Ooi Chooi Teik

… *Appellants*

And

(1) Full House Building Construction Pte Ltd
(2) Tan Hong Chian

… *Respondents*

In the matter of Suit No 74 of 2020

Between

Full House Building Construction Pte Ltd

… *Plaintiff*

And

(1) Tan Hong Joo
(2) Goh Siew Ling
(3) Ooi Chooi Teik

… *Defendants*

And Between

(1) Tan Hong Joo

(2) Goh Siew Ling
(3) Ooi Chooi Teik

… *Plaintiffs in counterclaim*

And

(1) Full House Building Construction Pte Ltd
(2) Tan Hong Chian

… *Defendants in counterclaim*

EX TEMPORE **JUDGMENT**

[Contract — Contractual terms — Warranties]
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28 November 2023

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Audrey Lim J (delivering the judgment of the court *ex tempore*):

1 This appeal concerns the effect of a settlement agreement dated 20 April 2018 ("SA") which was intended to resolve matters in dispute in HC/S 895/2017 ("Suit 895"), HC/OS 67/2016 ("OS 67") and HC/CWU 11/2018 ("CWU 11") (collectively "the Disputes"). Particularly, Suit 895 and OS 67 relate to the first respondent, Full House Building Construction Pte Ltd ("FH").

Background

2 The first appellant ("THJ") and the second respondent ("THC") were equal shareholders and directors of FH when it was incorporated. Later, the second appellant ("Goh") and the third appellant ("Ooi") were appointed FH's directors, and Goh also obtained a minority shareholding in FH when THJ transferred some of his shares to her. Goh is the wife of THJ.

3 Subsequently the relationship between the parties soured and THC filed an application against FH to inspect its documents in OS 67. He also commenced Suit 895 against FH, THJ, Goh and Ooi for oppression and for leave to commence a derivative action. On the other hand, THJ commenced CWU 11, to wind up another company in which both he and THC were the shareholders and directors. During the on-going disputes, THC was removed as FH's director in March 2017, leaving THJ, Goh and Ooi ("the Appellants") as the directors.

4 To resolve their disputes, parties went through mediation which resulted in the SA. In gist, the SA provided that THC would purchase the shares of THJ and Goh in FH for $3.6m and the Appellants would step down as FH's directors.

5 After the shares were transferred to THC (and paid for), THC and/or FH ("the Respondents") took issue with the following (and which are the subject of this appeal):

(a) First, the Appellants, as FH's directors, had wrongfully caused FH to reimburse their legal fees amounting to $251,163.78, which they had personally incurred in defending Suit 895 ("Reimbursement Claim"). The Appellants did this by passing a directors' resolution ("the Resolution") under Art 114 ("Art 114") of FH's Articles of Association to enable them to be so indemnified ("Indemnification Decision"). The reimbursement was a breach of cl 24 of the SA ("Clause 24"). Also, the preconditions to indemnifying the directors for legal costs under Art 114 were not fulfilled.

(b) Second, the Appellants had wrongly warranted under cl 18 of the SA ("Clause 18") that FH's trade receivables were not less than $3.3m as of 28 February 2018 ("the Warranty") when the receivables were below that minimum sum ("Warranty Claim"). This was a breach of the

Warranty as outstanding debts owed to FH by BL Construction Pte Ltd ("BL") and Buildforms Construction (Pte) Ltd ("Buildforms"), which had been included in FH's receivables, were extremely unlikely to be recoverable, and hence could not objectively have been considered "receivables" within Clause 18.

6 The salient terms of the SA are as follows:

> 1. Without any admission of liability on the part of any Party, the Parties agree to a full and final settlement of any and all claims or liabilities arising from or in connection with [Suit 895, CWU 11 and OS 67] … this Agreement is and is intended by the Parties to be a complete settlement of any and all differences and disputes, of whatever nature, and whether known or unknown, between the Parties …
>
> …
>
> 10. No issue or objection shall be taken with the running and management of [FH] … or its affairs prior to the date of signing of the Agreement …
>
> …
>
> 18. … the Current Directors warrant that as of 28 February 2018, the trade payables of [FH] is not more than [$2m], the trade receivables are not less than [$3.3m], the cash in bank balances are not less than [$3.4m], and there are no bank borrowings other than hire purchases and a mortgage.
>
> …
>
> 24. Each Party shall bear his/her own costs for [S 895] and [OS 67].

7 Further, Art 114 of FH's Articles of Association provides as follows:

> Every director … and other officer … of the company shall be indemnified out of the assets of the company against any liability incurred by him in defending any proceedings, whether civil or criminal, in which judgment is given in his favour or in which he is acquitted or in connexion with any application under the Act in which relief is granted to him by the Court in respect of any negligence, default, breach of duty or breach of trust.

8 At the trial below, the Appellants argued as follows:

(a) Clause 24 merely mirrored that of a court making no order as to costs. It did not impose any positive obligation on any party to personally bear the costs of his own legal defence in Suit 895, or any negative obligation to refrain from seeking or accepting reimbursement of such costs from another party. Also, the preconditions in Art 114 should be interpreted as including situations where legal proceedings are resolved by settlement. Additionally, cl 10 of the SA ("Clause 10") precluded any challenge to management decisions the Appellants had made whilst in charge of FH.

(b) There was a realistic prospect of recovering the outstanding debts from BL and Buildforms in full, such that their inclusion as part of FH's receivables could not be said to have been wrong. The decision to include the debts as part of FH's receivables was also a management decision which could not, pursuant to Clause 10, be challenged.

9 The Appellants also made several counterclaims against the Respondents, but they are not the subject of the present appeal.

The decision below

10 The trial judge ("Judge") allowed the Reimbursement Claim and found as follows:

(a) Clause 24 did not preclude FH from reimbursing the Appellants' legal fees. The effect of Clause 24 was simply that no party to Suit 895 could be legally compelled to reimburse the legal costs of another; it did not prohibit a party to the SA from receiving voluntary reimbursement of his legal fees.

(b) However, Art 114 only permitted the indemnification of a director against costs incurred in defending proceedings which were resolved by way of judgment in his favour, by his acquittal, or in which relief is granted to him under the Companies Act. This precondition was not fulfilled as Suit 895 was resolved by the SA. Thus, the Appellants could not invoke Art 114 to justify the Indemnification Decision.

(c) The Appellants could not rely on Clause 10 to prevent the Respondents from bringing the Reimbursement Claim. The Resolution passed was plainly inconsistent with the Articles of Association and *ultra vires* the directors'/Appellants' powers, and hence could not be considered a management decision deserving of the court's deference or the protection of Clause 10.

11 The Judge also allowed the Warranty Claim, and found as follows:

(a) BL's debt of $514,959.15 (the "BL Debt"), out of $614,959.15, could not be considered as part of FH's receivables as of 28 February 2018 as it was "very unlikely" that FH would ever recover the BL Debt. It also appeared unlikely that the Appellants were genuinely under any subjective belief that they would recover the full debt from BL.

(b) Buildforms' debt of $31,458 (the "Buildforms Debt") could not be considered as part of FH's receivables, in light of the Appellants' instructions to its auditors that $31,458 be debited from its financial statements for the financial year 2016 as "provision for impairment of trade receivables (from [Buildforms]) which are outstanding for 2 years". This showed the Appellants themselves opined that the Buildforms Debt was in fact unlikely recoverable.

(c) After deducting the BL Debt and Buildforms Debt (collectively "the Debts") from FH's receivables of $3,381,209.58 (as at 28 February 2018), its actual receivables amounted to $2,834,792.43. This was $465,207.57 less than the $3.3m warranted under Clause 18.

(d) The measure of damages was what would be required to put the innocent party in the position he would have been in had the warranty been true (*ie*, expectation loss or loss of bargain). The loss was assessed at $465,207.57, being the difference between the actual amount of FH's receivables as ascertained according to established accounting standards, and the amount which the Appellants warranted.

12 Accordingly, the Judge ordered the Appellants to pay:

(a) $251,163.78 to FH (in varying amounts for each of the Appellants) under the Reimbursement Claim, with interest of 5.33% per annum from 24 April 2018 until payment; and

(b) $465,207.57 to THC under the Warranty Claim, with interest of 5.33% per annum from 20 April 2018 until payment.

The Reimbursement Claim

Parties' arguments

13 We deal first with the Reimbursement Claim.

14 On appeal, the Appellants' case is as follows. Clause 1 of the SA ("Clause 1") precluded the Respondents from pursuing the Reimbursement Claim by challenging the Indemnification Decision, as the SA was intended to be a complete settlement of all differences and disputes among the parties to the

SA. Further, the Respondents were bound by Clause 10 which was intended to cover all past decisions made by the Appellants as FH's directors (and not merely management decisions which were not *ultra vires*). As for Art 114, this should also apply to a dispute settled other than by a court adjudication, as Art 114 did not expressly preclude an indemnity in such a circumstance.

15 The Respondents' case is that Clause 10 was not engaged, as FH was not taking issue with the running of its own affairs prior to the date of the SA. Rather, the Reimbursement Claim was premised on the Appellants' failure to meet the pre-condition for indemnification under Art 114, namely, that the Appellants must have obtained a judgment in their favour in Suit 895.

Our decision on the Reimbursement Claim

16 We agree with the Judge that Art 114 applies to indemnify a director against costs incurred only in defending proceedings which are resolved by a court adjudication. The wording of Art 114 is clear. We thus agree that the Appellants could not invoke Art 114 in itself to justify the Indemnification Decision.

17 That said, Art 114 is irrelevant because Clause 1 and Clause 10 applied to the Reimbursement Claim. With respect, we disagree with the Judge that Clause 10 could not apply to an *ultra vires* decision of the directors/Appellants. Clause 10 expressly states that there should be no objection or issue taken with the "running and management" of FH or "its affairs" and is wide enough to cover even the Appellants' *ultra vires* or wrongful acts so long as the acts occurred prior to the signing of the SA. Clause 10 must also be read with Clause 1, which is of very wide import, to encompass the settlement of all claims and disputes among the parties (arising from or in connection with the Disputes)

fully and finally, *whatever nature*, and whether *known or unknown*. Hence, Clauses 1 and 10 taken together, effectively precluded the Respondents from making the Reimbursement Claim, unless there was some other provision in the SA which provided for the contrary.

18 In the above regard, the Respondents raise another argument before us that the reimbursement by the Appellants of their legal costs (*ie*, the Indemnification Decision) was in any event inconsistent with Clause 24; thus submitting that the Judge was incorrect to decide otherwise. We allowed the Respondents to raise this argument, although they should have included this in their Case. Their omission to do so is not fatal and the Appellants are not prejudiced as Clause 24 had been raised and considered by the Judge and no new evidence is required for this matter to be determined by us.

19 The Appellants argue that there was no intention for Clause 24 to override Clause 1 and Clause 10, as Clause 24 did not preclude a third party from paying the costs of the Appellants. In particular, Clause 24 did not prohibit FH from covering (or reimbursing) the costs of the Appellants (by way of the Indemnification Decision).

20 In this regard, we would differ from the Judge's conclusion on the effect of Clause 24 on the Reimbursement Claim. Whilst the Judge is correct that generally such a clause does not prohibit a party to the SA from seeking reimbursement of costs from a third party, the effect of the Indemnification Decision was that FH (*which is a party to the SA and Suit 895*) would bear the Appellants' costs in Suit 895. This is contrary to the spirit and substance of Clause 24, which is that every party (including FH and the Appellants) would bear his or her own costs in Suit 895.

21 We are not persuaded by the Judge's reasoning that the Appellants would not have agreed to Clause 24 if their understanding thereof was that they were obliged to return to FH the sums that FH had already reimbursed them at the time of executing the SA. There is no contemporaneous evidence to support this "understanding" and Clause 24 was explicit in its terms. As for Ooi's testimony (which was already in his affidavit of evidence-in-chief) that shortly after the SA was concluded THC had said to him about how fortunate THJ and Goh were to have had their legal fees covered by FH, this was not put to THC for THC to explain. It was thus unclear *when* THC formed this impression that he purportedly conveyed to Ooi, and whether it was before the SA was signed. It must not be forgotten that at the material time, THC did not know about the affairs in FH. The SA came about precisely because of THC's allegations of oppression by the Appellants, and because THC had been left in the dark about matters pertaining to FH and was prevented from inspecting its books.

22 Hence, in so far as Clause 1 and Clause 10 provide for the settlement of all claims, they must be read subject to Clause 24 as they are general provisions while Clause 24 is a specific one.

23 As such, we dismiss the Appellants' appeal on the Reimbursement Claim, but on the basis that Clause 24 prohibited the Appellants from claiming reimbursement for their legal costs in Suit 895 from FH.

The Warranty Claim

Parties' arguments

24 Turning to the Warranty Claim, before us, the Appellants argue that their decisions to include the Debts as FH's trade receivables and not to write off the Debts were management decisions covered by Clause 10. Further, Clause 1

precluded the Respondents from pursuing the Warranty Claim, as they had agreed to a full and final settlement of the Disputes. In any event, THC failed to prove that he had personally suffered any loss, as he had not shown how the alleged breach of the Warranty translated into any loss he suffered on the value of his shares.

25 The Respondents argue that the Warranty Claim was not premised on any alleged wrongful act by the Appellants that fell within the scope of Clause 1, as any breach of the Warranty could only have arisen after the parties had executed the SA. The Warranty Claim was also not premised on challenging the Appellants' past decisions in FH prior to the SA. The Respondents further submit that the Judge's decision on the loss suffered should be upheld. What THC expected to receive, if the Warranty had been true, was full ownership of a company with at least $3.3m in trade receivables. FH's cash position represented the cash which THC, being the sole shareholder, would have expected to be able to extract from FH by way of dividends.

Our decision on the Warranty Claim

26 Although the Appellants' decision to include the Debts as part of FH's trade receivables was a management decision (which would have engaged Clause 10), it is not the Appellants' conduct in running or managing FH that is relevant. Rather, the issue is whether the Debts were in substance FH's trade receivables for the quantum stated (as at 28 February 2018) and which is the Warranty the Appellants expressly provided under Clause 18. If they were not, this would have been a breach of the SA, namely Clause 18. The Appellants cannot rely on Clause 10 to override the express provision in Clause 18, which provision places a positive obligation on the Appellants to warrant or represent

the accuracy of FH's trade receivables. Clause 10 is subject to the warranty in Clause 18, otherwise that warranty would be meaningless.

27 In this regard, we agree with the Judge's determination that the Debts should not have been considered as FH's receivables as of 28 February 2018. We see no reason to disturb the Judge's findings made after a detailed examination of all the relevant evidence before him. Before us, the Appellants also did not challenge the Judge's determination as such and accepted that the Debts were not receivables as of 28 February 2018. Rather, their argument was premised on their decision to treat the debts as trade receivables being a management decision covered by Clause 10 which would prohibit the Respondents from bringing the Warranty Claim. But, as we explained earlier, as the Debts were not in substance trade receivables (as at 28 February 2018), the Appellants had thus breached the Warranty.

28 We also agree with the Judge that the appropriate measure of damages for breach of the Warranty is what would be required to put the innocent party in the position he would have been had the Warranty been true (*ie*, expectation loss). We agree with the Judge that THC had agreed to buy out the Appellants' shares in FH for a certain price, on the basis of the Warranty that its receivables were at least $3.3m. As such, we agree that the Appellants were liable to make good the $465,207.57 difference between the actual amount of FH's receivables and the amount which the Appellants had warranted. That said, although the Warranty was given to THC, the breach is addressed by making good the Warranty. In this regard, but for the breach, it is FH that would receive the moneys.

29 The Appellants argue that in the proceedings below, THC referred to his loss as the diminution in the value of his shares but he failed to prove that loss.

While that may be the case, THC did also refer to payment of the difference as what he would be contractually entitled to and the Judge agreed.

30 As such, we dismiss the appeal on the Warranty Claim, but order that the $465,207.57 be paid by the Appellants to FH. The Respondents agree that the appropriate order should be for the sum to be paid to FH rather than to THC.

Interest

31 The Judge had further ordered the interest of 5.33% on: (a) the Reimbursement Claim to run from 24 April 2018 (being the date of the last reimbursement sum made by FH to the Appellants); and (b) the $465,207.57 pertaining to the Warranty Claim to run from 20 April 2018 (being the date of the SA).

32 In relation to the Reimbursement Claim, the Appellants argue that pre-judgment interest should not have been awarded as Clause 24 did not impose an obligation on them to reimburse FH the legal fees paid on their behalf. The Respondents argue that the Judge's decision should not be disturbed as their cause of action on the Reimbursement Claim arose from the time the SA was executed (for reimbursements made prior to the execution of the SA) or the time of the reimbursement (if made on or after the SA was executed).

33 As for the Warranty Claim, the Appellants argue that pre-judgment interest should not have been awarded as there could not have been any loss of use of the moneys because THC's own case was that such moneys should never have been recorded in FH's accounts in the first place. The Respondents argue that the Judge's award of pre-judgment interest should not be disturbed as the cause of action arose on 20 April 2018.

34 We are not minded to disturb the Judge's decision in awarding pre-judgment interest from 24 April 2018, for the Reimbursement Claim. By that date, the Appellants had caused FH to pay their legal fees pursuant to the Indemnification Decision in the aggregate of $251,163.78. FH's cause of action on the Reimbursement Claim would have accrued for the entire sum of $251,163.78 and FH would have been kept out of pocket from that date (see *Grains and Industrial Products Trading Pte Ltd v Bank of India and another* [2016] 3 SLR 1308 at [137]).

35 As for the Warranty Claim, whilst the breach of the Warranty would have occurred at the time the SA was executed, the loss would not have occurred immediately. The Debts were trade receivables that would have required FH to call in from its debtors, BL and Buildforms, and which would have taken some time. Although pre-judgment interest is at the court's discretion, it should be exercised after taking into account relevant facts. It appears that the Judge omitted to consider that the receivables were not likely to have been paid immediately upon execution of the SA. In the absence of more evidence, we adjust the interest period on the Warranty Claim to start from 20 October 2018 (*ie*, six months from the date of the SA) instead.

Costs

36 The Appellants submit they should be awarded costs of $35,000 (excluding disbursements) if their appeal were allowed. The Respondents submit that costs should be fixed at $45,000 (excluding disbursements) if the appeal were dismissed.

37 As we dismiss the appeal in its entirety, we order costs of $40,000 inclusive of disbursements to be paid by the Appellants to the Respondents. There will be the usual consequential orders.

Woo Bih Li
Judge of the Appellate Division

Debbie Ong
Judge of the Appellate Division

Audrey Lim
Judge of the High Court

Lee Kok Weng, Mark (Li Guorong), Sarah Yeo Qi Wei and Tan Han Ru, Amelia (WMH Law Corporation) for the appellants;
Wong Thai Yong (Wong Thai Yong LLC) for the respondents.