Sakae Holdings Ltd *v* Gryphon Real Estate Investment Corp Pte Ltd and others (Foo Peow Yong Douglas, third party) and another suit
[2017] SGHC 100

Case Number : Suits Nos 1098 and 122 of 2013

Decision Date : 04 May 2017

Tribunal/Court : High Court

Coram : Judith Prakash JA

Counsel Name(s) : Davinder Singh SC, Jaikanth Shankar, Zhuo Jiaxiang, Navin Shanmugaraj, Samantha Tan, V Kumar Sharma and Pradeep Singh Khosa (Drew & Napier LLC) for the plaintiff; R Chandra Mohan, Vikram Nair, Jonathan Yuen, Tan Ruo Yu, Doreen Chia and Khelvin Xu (Rajah & Tann Singapore LLP) for the first to third, fifth, seventh to ninth and 11th defendants; Samuel Chacko, Lim Shack Keong, Charmaine Chan-Richard and Cara Soo Min (Legis Point LLC) for the fourth defendant; Siraj Omar and Alexander Lee (Premier Law LLC) for the third party.

Parties : SAKAE HOLDINGS LTD — GRYPHON REAL ESTATE INVESTMENT CORPORATION PTE LTD — ERC HOLDINGS PTE LTD — ONG SIEW KWEE — HO YEW KONG — ONG HAN BOON — GRIFFIN REAL ESTATE INVESTMENT HOLDINGS PTE LTD — GRYPHON CAPITAL MANAGEMENT PTE LTD — ERC UNICAMPUS PTE LTD — ERC INSTITUTE PTE LTD — TYN INVESTMENT PTE LTD (f.k.a. ERC INTERNATIONAL PTE LTD) — ERC CONSULTING PTE LTD — DOUGLAS FOO PEOW YONG

Civil Procedure – Third Party Proceedings

Companies – Directors – Duties

Companies – Oppression – Minority Shareholders

Civil Procedure – Costs – Principles

[LawNet Editorial Note: Civil Appeal No 86 of 2017 was allowed, Civil Appeal No 87 of 2017 was allowed in part, Civil Appeal No 103 of 2017 was dismissed and no order was made in Civil Appeal No 104 of 2017, while Summons No 126 of 2017 was allowed and no order was made in Originating Sunmoms No 13 of 2017, by the Court of Appeal on 29 June 2018. See [2018] SGCA 33.]

4 May 2017 Judgment reserved.

Judith Prakash JA:

Introduction

1 In these consolidated actions, Suit 1098 of 2013 ("Suit 1098") and Suit 122 of 2013 ("Suit 122"), the plaintiff is Sakae Holdings Ltd ("Sakae"). The defendant in Suit 122 is Ong Siew Kwee who is also known to all the parties as Andy Ong ("Mr Ong"). There are ten extant defendants in Suit 1098, the most important for present purposes being Mr Ong, the third defendant, Ho Yew Kong ("Mr Ho"), the fourth defendant, and Ong Han Boon, the fifth defendant.

2 The consolidated actions were the result of a dispute between the parties regarding a joint venture company, Griffin Real Estate Investment Holdings Pte Ltd ("the Company"), which Sakae and

ERC Holdings Pte Ltd ("ERC Holdings"), a company belonging to Mr Ong, invested in in order to acquire most of the units in a commercial building known as Bugis Cube. Suit 122 was Sakae's action against Mr Ong for breach of his fiduciary duty as a director of Sakae in relation to share options granted by the Company to another company in which Mr Ong had an interest. Suit 1098 was Sakae's action against, *inter alia*, Mr Ong, Mr Ho and Ong Han Boon for conducting the Company's affairs in such a way as to amount to oppression and unfair prejudice to Sakae as a shareholder of the Company.

3 The defendants denied liability to Sakae in the consolidated actions. Additionally, however, they commenced third party proceedings against Douglas Foo Peow Yong ("Mr Foo"). Mr Foo is a director and chairman of Sakae. He was, also, at all material times a director of the Company. The defendants' allegations are that Mr Foo was in breach of his fiduciary duties owed to the Company and that these breaches contributed to the wrongful transactions that Sakae was complaining about. Accordingly, they asserted, if they were found liable to Sakae, Mr Foo in turn would be liable to indemnify them and contribute to any liability that they may have to Sakae. In this judgment, where it is necessary for clarity, I will sometimes refer to Mr Ong, Mr Ho and Ong Han Boon collectively as the "TP Plaintiffs".

4 The trial of the suits was conducted before me. On 7 April 2017, I delivered judgment in respect of Sakae's claims. In my judgment ([2017] SGHC 73) ("the Judgment"), I set out my reasons for finding Mr Ong, Mr Ho and Ong Han Boon liable to Sakae for various acts of oppression. I made orders against them ordering them to pay various amounts to the Company. I also ordered Mr Ong to pay Sakae the amount of its claim made in Suit 122. Since I have found liability on the part of these litigants, I have now to consider their third party claims against Mr Foo and to decide whether or not he bears any liability to them.

5 The Judgment contains a full account of Sakae's claims, the defences put forward by the various defendants and the evidence and submissions that I considered. I will not repeat them here. In so far as anything in this judgment is unclear, please refer to the Judgment. Further, defined terms used herein are used in the same way as in the Judgment unless I state otherwise.

General basis of the third party claims

6 The third party claims against Mr Foo arise as follows:

(a) From a Third Party Notice in Suit 122 filed on 18 August 2014 by Mr Ong;

(b) From a Third Party Notice in Suit 1098 filed on 12 August 2014 by, amongst others, Mr Ong and Ong Han Boon; and

(c) From a Third Party Notice in Suit 1098 filed on 1 December 2014 by Mr Ho.

In each of the Third Party Notices, the TP Plaintiffs claimed against Mr Foo to be indemnified against Sakae's claims against the TP Plaintiffs and the costs of the action and, alternatively, for contribution to such extent of Sakae's claims as the court may deem fit. In their closing submissions, however, the TP Plaintiffs dropped their claims for indemnification and concentrated only on their claims for contribution from Mr Foo.

7 In the Judgment, I have found one or more of the TP Plaintiffs liable to make payment to the Company or Sakae of various amounts. I have held:

(a) Mr Ong and Ong Han Boon jointly and severally liable to pay the Company the sum of

$2,826,335.17 in respect of excessive management fees paid to Gryphon Capital Management Pte Ltd ("GCM") (see [303] of the Judgment).

(b) Mr Ong and Ong Han Boon jointly and severally liable to pay the Company the sum of $7.9m in respect of the First Loan and the First Loan Agreement (see [315]–[316] of the Judgment).

(c) Mr Ong and Mr Ho jointly and severally liable to pay the Company $16m in respect of the Lease Agreement and the payment of compensation to ERC Institute (see [318]–[319] of the Judgment).

(d) Mr Ong and Mr Ho jointly and severally liable to pay the Company the sum of $160,500 in respect of the Consultancy Agreement (see [321]–[322] of the Judgment).

(e) Mr Ong and Mr Ho jointly and severally liable to pay the Company the sum of $8m in respect of the May PMA (see [332] of the Judgment).

(f) Mr Ong liable to pay Sakae the sum of $2,641,975 and interest thereon from the date of the writ in Suit 122 (see [329] of the Judgment).

8 It would be seen from the above list that Mr Ong is liable for all six heads of claim. Ong Han Boon is liable only in respect of the claims referred to in [7(a)] and [7(b)]. As for Mr Ho, he is liable only for the claims referred to in [7(c)], [7(d)] and [(7(e)].

Legal basis for contribution from a third party

9 The TP Plaintiffs and Mr Foo agreed that any entitlement that the TP Plaintiffs may have to contribution from Mr Foo is governed by ss 15 and 16 of the Civil Law Act (Cap 43, 1999 Rev Ed) ("CLA"). So far as is relevant, these sections provide:

15.—(1) Subject to subsections (2) to (5), any person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage (whether jointly with him or otherwise).

…

16.—(1) Subject to subsection (3), in any proceedings for contribution under section 15, the amount of the contribution recoverable from any person shall be such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage in question.

(2) Subject to subsection (3), the court shall have power in any such proceedings to exempt any person from liability to make contribution, or to direct that the contribution to be recovered from any person shall amount to a complete indemnity.

10 There are two points to emphasise here. First, for a claimant to succeed under s 15(1) of the CLA, it is essential that both the person from whom contribution is sought and the person who is claiming the contribution be liable in respect of "*the same damage*". Second, s 16(2) gives the court power to exempt any person from contribution to liability. This power is not circumscribed in any way.

11 The test which is applied to decide the issue of whether the liability is in respect of "the same damage" is the three-step test set out by the Court of Appeal in *Tan Juay Pah v Kimly Construction*

Pte Ltd and others [2012] 2 SLR 549 ("*Tan Juay Pah*") which the court adopted from the English case of *Royal Brompton Hospital NHS Trust v Hammond* [2002] 1 WLR 1397 ("*Royal Brompton*"). Adapted to the circumstances of this case, the three-step test can be stated as follows:

(a) What damage was suffered by Sakae as a result of the actions of the TP Plaintiffs?

(b) Are the TP Plaintiffs liable to Sakae in respect of that damage?

(c) Is Mr Foo also liable to Sakae in respect of that very "same damage" or some of it?

12 I discuss the first question in [29] below.

13 The answer to question (b) depends on the answer to question (a). The parties, making their submissions on the third party claims in advance of my decision on the main action, treated the answer to the question in a very general way. Mr Ong and Ong Han Boon submitted that if any of the transactions were wrongfully entered into, the damage suffered by Sakae would be the losses it allegedly suffered as claimed in Suits 1098 and 122 and they would be liable to Sakae in respect of these losses. Mr Ho made the general point, relying on *Airtrust (Singapore) Pte Ltd v Kao Chai-Chua Linda* [2014] 2 SLR 673, that where one director is found liable to a company for breach of fiduciary duty, he can claim contribution from another director who is also in breach of such duty. In doing so, he indicated that he was regarding himself and Mr Foo as equally liable to the Company. He did not distinguish between damage to the Company and damage to Sakae. Now that findings on liability in the main action have been made, I can answer the second question more specifically and do so later in this judgment.

14 The third question, one that also which needs to be dealt with in this judgment in some detail, is whether Mr Foo is also liable to Sakae in respect of the very same damage or some of it.

15 Prior to dealing with the substantive aspects of the claims, I need to consider a procedural argument which Mr Foo has fielded in answer to the claims of Mr Ong and Ong Han Boon.

The procedural defence

16 At the end of Sakae's case in Suits 122 and 1098, Mr Ong and Ong Han Boon elected to call no evidence on the basis that there was no case to answer. Mr Ho took a different course and that is why the procedural defence was not mounted against him as well.

17 Mr Foo submitted that the claims brought against him by Mr Ong and Ong Han Boon should be dismissed as these TP Plaintiffs did not open their case against Mr Foo in respect of, and did not adduce any evidence to support, their respective third party claims. As such, Mr Foo contended that there was no evidence before the court to support these claims and they could not be maintained.

18 The basis of the argument is that third party proceedings, while somewhat connected to the main action, are regarded as separate and independent proceedings in their own right. The third party proceedings involve pleadings which are separate and distinct from those in the main action and the defendants in the main action who have filed third party notices stand in the position of plaintiffs against Mr Foo. Under O 35 r 4(2) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("the ROC"), the plaintiff is supposed to begin an action by opening his case. Here, Mr Ong and Ong Han Boon in their roles as plaintiffs should have opened their case against Mr Foo and adduced evidence in support of that case. They elected not to do so. Had they done so, Mr Foo could have tested their evidence by cross-examination of their witnesses. Further, upon the close of the case, Mr Foo would have had the

opportunity to submit that there was no case to answer.

19 Mr Foo further submitted that while he testified in the main action, he did so as a witness for Sakae. He did not give evidence in his personal capacity to address, and defend himself against, the third party proceedings. He had always distinguished between the two actions and therefore filed two AEICs, one for the main action and another for the third party proceedings. Therefore, Mr Foo's evidence in the main action ought not to be considered until Mr Ong and Ong Han Boon had opened their case. Further, the court had asked if Mr Ong and Ong Han Boon intended to adduce any evidence specifically for the third party proceedings. Their counsel, Mr Chandra Mohan, replied that he did not need to because textbook authorities indicated that although the TP Plaintiffs did bear the burden of proving their case against Mr Foo, this burden could be discharged by eliciting evidence from other witnesses. Thus, Mr Foo submitted, Mr Ong and Ong Han Boon also elected not to adduce evidence specifically to support their third party claims.

20 Naturally, Mr Ong and Ong Han Boon did not accept that because they elected to make a submission of no case to answer in response to Sakae's claims, their third party claims against Mr Foo had to be dismissed out of hand. They said that there was evidence to support the third party claims and that this evidence was the testimony of Mr Foo and Ms Voon Sze Yin ("Ms Voon") in their respective AEICs and their responses under cross-examination. They relied on the principle that the party who bears an evidential burden may satisfy that burden either by adducing evidence himself, or by eliciting evidence from the witnesses of his adversary. They were entitled to rely on Mr Foo's evidence to support their third party claims against him. The fact that he and Ms Voon filed two AEICs each, one for the main action and the other for the third party proceedings, did not help as the only substantive assertion in the AEICs filed in the third party proceedings was an adoption of the evidence given in the AEIC filed in the main action. Therefore, the evidence given by Mr Foo and Ms Voon under cross-examination would clearly cover both the proceedings in Suits 122 and 1098, and the third party proceedings.

21 This is a novel point. The parties did not produce direct any authority to assist me in deciding it. I therefore have to approach it from first principles. First principles mandate that a plaintiff has to make his claim against the defendant, being the person whom the plaintiff says has a legal liability of some sort to the plaintiff. To make his claim, the plaintiff has to adduce facts that support the legal basis relied on for the defendant's liability. While the plaintiff is adducing the facts, whether by testimony or by documents, the defendant is entitled to question the authenticity of the facts put forward. At the end of the plaintiff's case, the defendant can decide whether to adduce evidence to challenge the facts put forward by the plaintiff or to rest his case on the basis that the plaintiff's facts are not sufficient in law to make him liable for the cause of action being sued on. If the plaintiff never opens his case, the defendant never has to answer it in any way and can ask for it to be dismissed.

22 Thus, in the normal run of things, the fact that Mr Ong and Ong Han Boon did not call any witnesses of fact, not even themselves, and did not produce any documents in the claim against Mr Foo would be sufficient justification for me to dismiss their claims against him. They said, however, that since all the evidence they wanted to rely on was volunteered by Mr Foo and Ms Voon themselves in their AEICs and cross-examination, I cannot dismiss their claims summarily. I should point out here that in their joint statement of claim in the third party action, Mr Ong and Ong Han Boon made many allegations of verbal agreements to which Mr Ong and Mr Foo were party and of information that Mr Ong had orally conveyed to Mr Foo. In his defence, Mr Foo denied all those assertions. In closing, he contended that since Mr Ong and Ong Han Boon never testified, they were now unable to rely on any of those assertions and could only rely on evidence of Mr Foo's behaviour and knowledge to the extent that he himself had admitted the same. Mr Foo's point here was that to

allow them to do so would in effect be allowing them to call him as the TP Plaintiffs' witness and force him to testify before they have made their case.

23 I have a great deal of sympathy with Mr Foo's submissions. It would seem to be iniquitous that Mr Ong and Ong Han Boon could, without taking the stand at all so that their assertions about Mr Foo's knowledge and behaviour may be challenged directly, rely on the evidence he has given for Sakae whether by way of AEIC or by cross-examination. They have deprived him of the opportunity of testing their credibility and conduct in relation to the matters complained about. However, third party proceedings are closely connected with the main actions and the two are almost always, if not always, tried together. There is no doubt that in the usual course of events, parties to third party proceedings are entitled to rely on all the evidence adduced in the main action in support of their claim or defence, as the case may be, in the third party proceedings. It is also a basic principle that a plaintiff is entitled to conduct his case in whichever way he chooses. Thus, a plaintiff could subpoena the defendant and adduce the defendant's evidence as the evidence, indeed the only evidence, supporting the plaintiff's claim. No doubt to take this course would be a highly risky strategy but it is not prohibited by any law or rule of evidence or procedure.

24 In the result, I have concluded, with some reluctance, that I cannot dismiss the claims brought against Mr Foo by Mr Ong and Ong Han Boon on the basis that they have not offered any evidence themselves but rely for their claims only on the evidence adduced by Sakae and Mr Ho in the main action which includes the evidence of Mr Foo himself. I therefore turn to consider whether in regard to the various transactions in respect of which I have found the TP Plaintiffs liable to Sakae, they have any right to a contribution from Mr Foo.

The third party claims in Suit 1098

Basis of the claims

25 In the statement of claim against the third party filed by Mr Ong and Ong Han Boon against Mr Foo, they claimed contribution from Mr Foo on two broad bases:

(a) In his capacity as a director of the Company, Mr Foo owed it the same fiduciary duties owed by any director of the Company, including the duty to exercise reasonable diligence and use reasonable care in performing the duties of his office and if he had performed these duties properly the matters that Sakae complained of could never have arisen.

(b) Further, if their conduct in respect of various complaints made by Sakae was found to be in disregard of and/or prejudicial to Sakae's interests as the minority shareholder of the Company, then Mr Foo in his capacity as director of the Company had similarly acted in disregard of and/or in a manner that was prejudicial to Sakae's interests.

26 In their closing submissions, these two TP Plaintiffs elaborated on the duties which Mr Foo owed the Company. They detailed the following director's duties:

(a) The statutory duty under s 157 of the Companies Act (Cap 50, 2006 Rev Ed) to at all times act honestly and use reasonable diligence in the discharge of his duties.

(b) The common law duty to act *bona fide* in the interests of the Company which includes a duty on the director to apply his mind to the Company's interests and exercise his judgment in those interests.

(c) The common law duty to acquire and maintain sufficient knowledge and understanding of the Company's business to enable him to properly discharge his duties as a director.

(d) The statutory duties under ss 199 and 201 of the Companies Act to ensure that the Company complies with the legal requirement to keep proper accounting and other records.

(e) The contractual duties imposed on the directors by cll 11.2 and 12.2 of the JVA.

27 They also asserted in their closing submissions that Mr Foo had failed to discharge the above duties to the Company with reasonable diligence. This failure permeated every transaction that Sakae had complained about in Suit 1098 and on account of such failure Mr Foo was liable to contribute to any liability the court found against them. The submissions went into some detail on how Mr Foo had allegedly breached these duties or failed to carry them out properly. These plaintiffs also repeated their assertion to the effect that if Mr Ong's and/or Ong Han Boon's conduct that was complained about was found to be in disregard of or prejudicial to Sakae's interests as a minority shareholder of the Company, Mr Foo would be similarly liable. They did not, however, elaborate how liability on this basis actually arose.

28 Mr Ho took a similar tack in his third party statement of claim in Suit 1098. In addition, he did make some submissions that were distinct from those proffered by Mr Ong and Ong Han Boon. I deal with those specific arguments below at [39]. At this juncture, I wish to consider, more generally, whether, and if so, to what extent, the TP Plaintiffs are liable to Sakae in respect of the damage it has sustained as a result of their actions.

The three questions revisited

29 I turn to the question of what damage was suffered by Sakae by reason of the TP Plaintiffs' conduct. They appeared to believe that such damage can be equated to the sums that were wrongly paid out of the Company by reason of the transactions Sakae impugned. Apart from Sakae's claim in Suit 122 which I will deal with separately, I do not think such an equation can be made. The reason for this is that Sakae's claim in Suit 1098 was for relief from the consequences of the oppressive conduct of the Company's affairs and for such relief to be provided in a form that is quite different from the straight forward payment of funds to Sakae. The damage that Sakae suffered by reason of the impugned conduct was not the loss of funds *per se* but the more intangible loss of the basis on which it invested in the Company and the subversion of its right to have the Company's affairs managed as fairly in its interests as they were managed in the interests of the other shareholder, Gryphon Real Estate Investment Corporation Pte Ltd ("GREIC"). This damage in turn may have led to financial loss because the true worth of the Company now may not be what it would have been had the oppressive conduct never occurred and the Company's assets not been misused. The remedy for such damage was the decision to wind up the Company so as to halt the oppression and put in place independent managers in the form of the liquidators who could realise the Company's assets, wind-up the Company's affairs and distribute its assets rateably to the contributories, including Sakae. No order has been, or (except in relation to costs) can be, made for the payment of money by the TP Plaintiffs directly to Sakae. The orders for moneys to be paid to the Company by the TP Plaintiffs were a necessary consequence of the winding-up order since such payments must be made to help in the proper ascertainment and collection of the Company's assets. In the strict sense, therefore, there is no payment obligation on the part of the TP Plaintiffs to Sakae.

30 Assuming that I am wrong in this analysis and the moneys that the TP Plaintiffs have to pay the Company represents the damage Sakae has suffered as Mr Ong and Ong Han Boon submitted, can they or Mr Ho get from Mr Foo a contribution towards the respective amounts? In my judgment, there

is a simple answer to the assertion that conduct on the part of the TP Plaintiffs which was in disregard of or prejudicial to Sakae's interests would also be such conduct on the part of Mr Foo because he did not discharge his fiduciary duties to take an active part in the running of the Company and/or actively oversee the way that the Company's affairs were being conducted by the TP Plaintiffs. There is a major difference between their conduct and Mr Foo's: they were running the Company and therefore their conduct was conduct in the affairs of the Company. Mr Foo was not running the Company.

31 I do not consider that there is any liability to Sakae attributable to Mr Foo as a director of the Company simply because he relied on the Management Agreement and also more or less left everything in the hands of Mr Ong and did not apply his mind to the Company's affairs as he should have. Assuming that Mr Foo was in breach of all his various fiduciary duties to the Company, that breach would still not impose liability on him *vis-à-vis* Sakae under s 216 of the Companies Act. This is because that section requires Sakae to show "that the affairs of [the Company]" are being conducted or "the powers of the director [*ie*, Mr Foo]" are being exercised in a manner "oppressive … or in disregard of … their interests as … shareholders". It is clear from this language that there must be active conduct of the Company's affairs and active exercise of powers in a manner which oppresses Sakae or unfairly disregards or prejudices it. The whole complaint against Mr Foo is not that he actively did something but that he did nothing. Doing nothing may very well be a breach of a director's fiduciary duty and, if it causes harm to his company, the company concerned may well bring an action against that passive director for compensation. In my view, however, a shareholder bringing an action under s 216 cannot complain that oppression arises from inaction except, perhaps, in the situation where the inactive director was aware of the wrongdoing of other directors and acquiesced in it by not alerting the shareholder to what was going on. Even if inaction in such circumstances can itself constitute oppression, that is not what happened here. The TP Plaintiffs have offered no evidence that Mr Foo had knowledge of their various oppressive activities. All they have said is that if he had been a more active director he would have found out what was going on and stopped it.

32 While I deal with the individual transactions in somewhat more detail below, I consider that, overall, the claim of the TP Plaintiffs is not well founded because they cannot meet the third requirement for establishing liability under s 15 of the CLA, *ie*, that Mr Foo is liable to Sakae in respect of the very "same damage" as the TP Plaintiffs are. As I have said, Mr Foo has no liability to Sakae for oppression while the whole rationale of Sakae's claim against the TP Plaintiffs was to obtain a remedy that would allow Sakae to disengage or remove itself from a situation that was commercially unfair to it. Sakae used the various impugned transactions as evidence of its complaint that the affairs of the Company were being conducted in a way that was unfair to it, disregarded its interests and unfairly prejudiced it. Whilst Sakae did make various claims for sums to be repaid by the TP Plaintiffs, those claims were for orders that the sums be repaid to the Company, not to Sakae. As the TP Plaintiffs repeated many times in their submissions in the main action, the amounts in dispute could, ordinarily, only be the subject of claims brought by the Company. They said the Company's claims could not be brought by Sakae as part of its oppression complaint. I rejected this last argument for the reasons set out in the Judgment. The fact remains, however, that the damage represented by these claims is not directly Sakae's damage as the TP Plaintiffs are well aware. Sakae has been damaged because Sakae's interest in the Company and its proper management for the benefit of all shareholders equitably has been prejudiced and because the unauthorised payment out of moneys from the Company has reduced the value of Sakae's shareholding. If the Company is wound up without such sums being returned to it, Sakae will get back less than it should on distribution of the assets of the Company to the contributories. As I have said above, Sakae's damage cannot, however, be equated to the amounts that I have ordered the TP Plaintiffs to pay back to the Company. In no circumstances would such payments directly benefit Sakae in the same amount. Even if the Company took an action for breach of fiduciary duty against Mr Foo and succeeded in obtaining an order that

he pay the Company the very same amounts that I have ordered the TP Plaintiffs to pay, that still will not make Mr Foo liable to Sakae for the very same damage that the TP Plaintiffs caused it.

33 In case I have given "the very same damage" an unduly narrow construction, I turn to consider the individual transactions in respect of which I have found the TP Plaintiffs liable to pay money back to the Company.

The individual transactions involving both Mr Ong and Ong Han Boon

34 As an example of the submissions made by the TP Plaintiffs as to the basis of Mr Foo's liability to them, I turn to my holding that Mr Ong and Ong Han Boon are jointly and severally liable to pay the Company the sum of $2,826,335.17 in respect of excessive management fees paid to GCM. In this connection, the TP Plaintiffs alleged that, as a director of the Company, Mr Foo ought to have known of the fees paid to GCM as they were recorded in the Company's and GCM's management accounts which were sent to Ms Voon who reported to Mr Foo. Mr Foo had admitted that he should have been aware of the Company's financial affairs. As a director, the TP Plaintiffs said, Mr Foo was responsible for the proper preparation and maintenance of the Company's accounts and could not claim to be unaware of the contents of the accounts. Further, in his capacity as director, he could have stopped the payments to GCM as early as 19 July 2011, if he was of the view that the amounts being paid as management fees were incorrect. Mr Foo was under a duty to ensure that the management accounts were accurate and, even if he had delegated that duty to Ms Voon, he was under a duty to supervise her and to make proper enquiries. The accounts clearly showed the sums of management fees, ancillary fees and administrative fees paid by the Company and received by GCM. Sakae was sent the GCM accounts as well which also showed this. As Sakae knew that GCM had only one client, it would have been obvious that any revenue obtained by GCM could only have come from the Company.

35 The above arguments were typical of the submissions that were made to try and affix contributory liability on to Mr Foo. Reduced to their essence, these submissions on the part of the TP Plaintiffs were to the effect that if Mr Foo had been a good boy and done what he was supposed to do, they could not have been bad boys and done what they were not supposed to do. A contention that if Mr Foo had carried out his duty he would have prevented the other directors' breaches of duty is a contention that may assist the Company in a claim against Mr Foo. It is not, however, in my view a contention that has any weight in a claim for contribution by Mr Ong and Ong Han Boon. If I allow them to claim contribution from Mr Foo in respect of the excessive management fees which they are liable to reimburse the Company, I will be allowing them to reduce their liability for wrongs which they wilfully committed. The present case is not a case of injury inflicted by reason of negligence. The injury inflicted by Mr Ong and Ong Han Boon was deliberate. It was in breach of their knowledge and apparent acceptance of what Sakae and Mr Foo had actually agreed to in terms of management fees and it was documented by the Sham Addendum which at [61] of the Judgment I have found to be an *ex post facto* fabrication designed to cloak unauthorised payments with some semblance of legitimacy. Whatever may be Mr Foo's shortcomings as a director, I do not believe that the law requires me to order him to contribute to damage arising out of deliberately wrongful acts. In any event, this is a situation in which he should be exempted from liability under s 16(2) of the CLA.

36 The points that I have made at [35] above apply equally to Mr Ong's and Ong Han Boon's claims for contribution in relation to their liability to the Company in respect of the First Loan. I have found at [92]–[93] of the Judgment that the First Loan was not validly authorised by the directors or shareholders of the Company and that it was obtained for the sole purpose of assisting ERC Unicampus, a company in which Sakae had no interest, fund the purchase of the Big Hotel. It was subsequently covered up by the creation of two different versions of the First Loan Agreement, a document which was created to give the First Loan a veneer of respectability. In the circumstances,

I am unable to find any liability on the part of Mr Foo to contribute to Mr Ong and Ong Han Boon's liability to repay the balance of the First Loan to the Company.

The claims made by Mr Ong and Mr Ho

37 As stated earlier, there are three claims for which I have held Mr Ong and Mr Ho jointly and severally liable. To recapitulate, these are:

(a) The $16m payment arising out of the Lease Agreement and its termination.

(b) The sum of $160,500 arising out of the Consultancy Agreement.

(c) The $8m payment arising out of the May PMA.

38 For the reasons given in respect of the claims made by Mr Ong and Ong Han Boon, I reject the submission that any damage to the Company in respect of these matters for which Mr Foo may be responsible by reason of any breach of fiduciary duty on his part, would be the same damage suffered by Sakae as a result of Mr Ong's and Mr Ho's breaches of duty in relation to the three matters enumerated in [37] above. In each of these cases, also, the harm to the Company was deliberately inflicted and steps were taken to manufacture documentation to give the impression, falsely, that there were legal obligations on the part of the Company to pay the sums due and/or that good consideration was being given for such payments by way of the provision of services. In the case of the payments made pursuant to the Lease Agreement and the May PMA, the reasons for such payment had clearly nothing at all to do with the welfare of the Company. Instead, the moneys were needed to assist Mr Ong and his other ventures. In these circumstances, it would be wrong to impose any liability on Mr Foo to contribute to the sums that Mr Ong and Mr Ho have to pay the Company.

39 In his closing submissions, Mr Ho did make some arguments that were distinct from those proffered on behalf of Mr Ong and Ong Han Boon. His submissions were:

(a) Mr Foo had participated and acquiesced in the creation of the structure within the Company by which Mr Foo: (i) abdicated his role and responsibilities as a director of the Company to Mr Ong; and (ii) failed to work with Mr Ho.

(b) Given that Mr Ong was a director of Sakae, Mr Ho was entitled to assume that, in relation to the related party transactions entered into between the Company and either Mr Ong or a company he controlled or in which he had an interest, all matters of internal management within Sakae such as the granting of approvals and clearance of conflicts had been complied with.

(c) Given that Mr Ho was entitled to assume that all of Sakae's internal management matters had been complied with, Mr Foo should reasonably have known that, by creating an environment in which he worked with Mr Ho "through Mr Andy Ong" as Mr Foo testified, he effectively gave Mr Ong *carte blanche* to procure the Company's entry into the related party transactions.

(d) Mr Foo should also have been aware that since Mr Ong was a director of Sakae and Mr Foo chose to work with Mr Ho "through Mr Andy Ong", Mr Ho would not have been put on notice of any objections that Sakae might have had to the related party transactions and indeed, would have been entitled to assume that Sakae knew and had no objections to the same.

40 The submissions summarised in [39] above are essentially Mr Ho's Established Norm defence with a slightly different slant. I discussed this defence at [249]–[261] of the Judgment and rejected it

for the reasons set out in those paragraphs. Mr Ho cannot resuscitate the same arguments and use them as the basis to claim a contribution from Mr Foo. Mr Ho had a duty to act independently in the interests of the Company. He knew that Mr Foo had more or less left the management of the Company in the hands of Mr Ong and if he was aware that Mr Ong was acting against the Company's interests, he had a duty to alert Mr Foo to what was going on. He did not do so. Instead, he connived with Mr Ong and did whatever the latter wanted him to do without applying an independent mind. He was not merely a sleeping director but was an active party to sham documents such as the Lease Agreement, the May PMA, the Consultancy Agreement and the HYK Version of the First Loan Agreement. In all the circumstances, Mr Ho is no better placed to claim a contribution from Mr Foo than Mr Ong is.

The claim made by Mr Ong in Suit 122

41 I have held Mr Ong liable to pay Sakae the sum of $2,641,975 in respect of the subscription money it had to pay to the Company in order to maintain its percentage shareholding in the Company when the ERC Option was exercised by ERC Holdings. This liability was found in Suit 122 in which Sakae was the plaintiff and was suing Mr Ong for a direct breach of fiduciary duty to itself. Mr Foo also owed Sakae fiduciary duties. If Mr Foo's breach of fiduciary duty to Sakae was a contributory factor for the payment of the $2,641,975 for shares in the Company, then the "same damage" requirement would be met. Mr Ong, however, based his claim for contribution on Mr Foo's alleged breach of fiduciary duty to the Company rather than on any breach of duty to Sakae. He has not even asserted such breach of duty.

42 In his closing submissions relating to this claim, Mr Ong emphasised the various documents signed by Mr Foo as a director of the Company. To summarise, these were various directors' resolutions of the Company relating to the exercise of the ERC Option. They included resolutions approving the issue and allotment of 8,058,025 ordinary shares in the Company to ERC Holdings in accordance with the ERC Option and the issue and allotment of 2,641,975 ordinary shares in the Company to Sakae. Mr Ong pointed out that Mr Foo had admitted in court that he knew exactly what the documents he signed were for, and that by signing them, he was allowing ERC Holdings to exercise its option. By allowing the allotment of shares to ERC Holdings, Mr Foo acted in breach of his duty to act in the Company's best interests. Mr Foo clearly failed to apply his mind and exercise his judgment in relation to the ERC Option and was in breach of his duty to exercise reasonable diligence. It was Mr Foo's signing of all the documents that allowed the Company to allot the new shares to Sakae in ERC Holdings. But for this conduct, Sakae would not have had to pay the sum of $2,641,975 to the Company. As such, if the conduct of GREIC, ERC Holdings, and Mr Ong and/or Ong Han Boon were found to be in breach of the JVA and/or in disregard of and/or prejudicial to Sakae's interests as a minority shareholder of the Company, Mr Foo would be similarly liable. Mr Ong emphasised that the foregoing submissions applied to his claim against Mr Foo as a third party in both Suits 1098 and 122.

43 To reiterate, in relation to the ERC Option, I have found Mr Ong liable in Suit 122. This action was brought against Mr Ong only and in his capacity as director of Sakae. No liability was asserted against Ong Han Boon, GREIC or ERC Holdings. The basis of Mr Ong's liability, as explained in [210]–[213] of the Judgment, was that despite knowing about the prohibition on share options in the JVA he failed to give Sakae relevant information. If there was a valid share option in September 2010, he had a duty to inform Sakae of it before it was concluded and should not have concluded it on behalf of ERC Holdings without Sakae's consent. If there was no valid share option prior to May 2012, he should not have deceived Sakae and Mr Foo into believing that there was such an option thus leading Mr Foo into signing the various documents by which the Company gave effect to the option and issued additional shares to Sakae to maintain its percentage shareholdings.

44 If there had been a valid share option, Mr Foo would have been acting in the Company's interests in giving effect to it by signing all the documentation as otherwise the Company could be sued for non-compliance with its legal obligations. In the event, I held that there was no valid share option in existence in May/June 2012. That being the case, Mr Foo's breach of duty to the Company, if any, was in failing to investigate and ascertain that the Company was not obliged to issue new shares to ERC Holdings. The Company, however, was not harmed by this failure as the result of the issue and allotment of new shares was the acquisition of extra capital from both ERC Holdings and Sakae. The Company still holds this capital.

45 It was Sakae that suffered from having to invest additional capital in the Company. Mr Ong, however, has not made any submissions on how Mr Foo was in breach of his fiduciary duties to Sakae in relation to this transaction. Even if he had done so, it would be a difficult task for Mr Ong to convince me that Mr Foo should contribute to this liability when the evidence in court was that it was Mr Ong who misled Mr Foo into believing that there was a valid share option. Further, had Sakae not subscribed for the additional shares, Mr Ong would have succeeded in increasing his companies' interests in the Company beyond the 75.31% that was provided for in the JVA. He was, therefore, the intended beneficiary of the whole exercise. In these circumstances, it would be inequitable to order Mr Foo to contribute to Mr Ong's liability and I would have exempted Mr Foo from the same pursuant to s 16(2) of the CLA.

Costs

46 For the reasons given above, I dismiss each of the third party claims by Mr Ong, Ong Han Boon and Mr Ho against Mr Foo.

47 I have now to deal with the issue of costs. As the TP Plaintiffs have failed in the third party claims, they must bear Mr Foo's costs in those actions. The question that arises is on what basis the costs should be awarded. Mr Foo submitted that he should be awarded costs on the indemnity basis.

48 The award of indemnity costs is in the court's discretion. However, O 59 r 5 of the ROC sets out several matters which the court may take into account, as appropriate, in deciding whether costs should be ordered on the indemnity basis. Among these is the conduct of all the parties, including conduct before and during the proceedings. In *Tan Chin Yew Joseph v Saxo Capital Markets Pte Ltd* [2013] SGHC 274 ("*Joseph Tan*") at [98], Vinodh Coomaraswamy J observed that apart from the factors set out in O 59 r 5, the factors mentioned by Millett J in *Macmillan Inc v Bishopsgate Investment Trust plc (10 December 1993, unreported)* ("*Macmillan*") could also be relied on to justify such an award. These were where litigants had conducted their cases in bad faith or caused costs to be incurred irrationally. Coomaraswamy J also referred to *Three Rivers District Council v The Governor and Co of the Bank of England (No 6)* [2006] EWHC 816 (Comm) where the court indicated that when the conduct of the unsuccessful claimant was relied on as a ground for ordering indemnity costs, the test was that of unreasonableness and that conduct attracting moral condemnation was an *a fortiori* ground.

49 Mr Foo relied on the principles espoused in *Joseph Tan*. He submitted that the TP Plaintiffs acted unreasonably in their conduct of the third party proceedings. The particulars that he relied on were the following:

(a) At the judicial pre-trial conference for this matter, counsel for Mr Ong and Ong Han Boon stated that his clients had commenced the third party proceedings in order to compel Mr Foo to testify in court. Given that Mr Foo had, by that time, confirmed that he would be testifying on behalf of Sakae and had filed his AEIC, they were invited to withdraw the third party proceedings

but they declined to do so.

(b) At the close of Sakae's case, Mr Ong and Ong Han Boon elected not to open their case against Mr Foo or to adduce any evidence in support of their claims but still insisted on pursuing the third party claims.

(c) Mr Ho did adduce evidence in support of his third party claims but his evidence was barely credible in that:

(i) He argued that he was entitled to a contribution from Mr Foo solely because Mr Foo had not consulted him prior to procuring Sakae to commence the main action.

(ii) He argued that Mr Foo knew or ought to have known of various facts as a result of management accounts and other financial information that had been provided to Ms Voon. Yet he admitted under cross-examination that (A) he did not have any personal knowledge that Mr Foo had knowledge of these documents; (B) he had not been told by anyone that Mr Foo had knowledge of these documents; (C) he had not seen Ms Voon pass these documents to Mr Foo; and (D) he had not been told by anyone that they had seen Ms Voon pass these documents to Mr Foo. He merely *assumed* (based on his own "logic") that Mr Foo must have known of these documents.

(iii) He sought to rely on hearsay evidence of conversations to which he was not a party, relying solely on what Mr Ong had allegedly told him of these conversations.

(d) Mr Ho sought an indemnity from Mr Foo claiming, in effect, that Mr Foo was just as culpable or careless as he himself was, and yet he sought to have Mr Foo bear all the liability while he bore none.

(e) In contrast to his claim against Mr Foo, Mr Ho did not seek any indemnity or contribution from Mr Ong or Ong Han Boon despite repeatedly acknowledging that: (i) he had relied on them in relation to the transaction that Sakae was complaining about; (ii) he had relied on them to sort out all the paperwork and protocols for the documents he had signed in relation to this transactions; and (iii) he had signed documents without reading them fully because he trusted and relied on Mr Ong.

(f) All the third party claims were unsustainable and the TP Plaintiffs must have known, on an objective analysis, that they had no legal or factual basis to sustain the claims they made. Yet they unreasonably commenced and pursued them against Mr Foo.

50 In my judgment, it is not unreasonable conduct *per se* to bring a case that is weak or to give some evidence which is not credible. Nor is it unreasonable to choose to sue one person rather than another. A plaintiff is free to try to pin liability on one defendant and is not obliged to bring action against all possible defendants. Further, it is not unreasonable for someone (A) to bring a case against someone else (B) and rely only on B's evidence to make out the case against him, however risky a strategy that may be. It is however, unreasonable for A to bring a case against B for the sole purpose of making B testify and subject to cross-examination by A so that A can support his own defence in a different, though connected, action. If A needs B's testimony so badly in that other action there are other ways of obtaining it. Had Mr Ong and Ong Han Boon brought third party proceedings against Mr Foo for the sole purpose of making him testify in Sakae's action against them, then that would be an abuse of process justifying an award of indemnity costs.

51 Mr Ong and Ong Han Boon denied that the third party proceedings were motivated by a desire to force Mr Foo to testify. Whatever was said at the judicial pre-trial conference, they said that they considered that they had a valid cause of action against Mr Foo for breach of his director's duties to the Company and were entitled to pursue the same. Further, they had clearly set out their legal and factual bases for the third party claims in their pleadings and no action had been taken by Mr Foo to have the same struck out as providing no reasonable cause of action. It was therefore an afterthought for Mr Foo to make this allegation now. On consideration, I accept that on the face of the pleadings there was no reason to infer that Mr Ong and Ong Han Boon did not have any factual basis for their claims against Mr Foo. This was because the pleadings contained many references to Mr Foo's knowledge of what was going on and expressly stated that such knowledge had been conveyed to him by Mr Ong. In the case of Mr Ho, his pleadings also indicated a factual basis for his claims. Also, there is no evidence of any of the TP Plaintiffs having been advised that their claims were legally unsustainable. However, it is also correct that throughout the proceedings, one of the main defences run in the main action was that Sakae had no standing because any cause of action arising out of the conduct of the directors vested in the Company and not in its shareholders. If this was an argument that the TP Plaintiffs truly endorsed, it would seem unreasonable for them to turn round and claim an indemnity from Mr Foo for similar directorial lapses. I suppose the response to that would be that it was not unreasonable to take action to protect themselves in the event they turned out to be wrong about the law.

52 Having said all of the above, there is a further point and one that tells strongly against the TP Plaintiffs. I refer to the factor mentioned by Millet J in the *Macmillan* case, which is that indemnity costs are justified where a party is found to have conducted a case in bad faith. On the facts that I have found in the Judgment, it clearly appears that the transactions that Sakae complained of were orchestrated by Mr Ong and his assistants Mr Ho and Ong Han Boon for the purpose of benefitting Mr Ong's other interests without regard to the interests of Sakae and the Company itself. Mr Ong took full advantage of the trust that Mr Foo reposed in him to carry out activities which he was aware Sakae would object to. In these circumstances, for him and the other TP Plaintiffs to bring third party claims against Mr Foo and make the latter incur the costs and stresses of defending himself is a plain instance of suing in bad faith. I am satisfied on a consideration of all of the facts, therefore, that it would be correct to make them bear Mr Foo's costs on the indemnity basis.

Conclusion

53 For the reasons given above, I dismiss the third party claims and order the TP Plaintiffs to bear Mr Foo's costs incurred in defending the respective claims on the indemnity basis.