IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2018] SGHCR 7

HC/S 620 of 2017
HC/SUM 442 of 2018

Between

HRA Corp (SG) Pte Ltd

… *Plaintiff*

And

(1) Cheng Mun Yip Marcus

(2) DeClout Ltd

(3) Eradite International Pte Ltd

(4) Wong Kok Khun

(5) Nah Nah Guan (Lan Lanyuan)

… *Defendants*

JUDGMENT

[Civil Procedure – Interim Payments]

HRA Corp (SG) Pte Ltd
v
Cheng Mun Yip Marcus and others

[2018] SGHCR 7

High Court — Suit No 620 of 2017 (Summons No 442 of 2018)
Justin Yeo AR
18 April 2018

17 May 2018 Judgment reserved.

Justin Yeo AR:

1 This is an application for interim payment, under O 29 r 10 read with rr 11 and 12 of the Rules of Court (Cap 322, R 5, Rev Ed 2014) ("Rules of Court").

Background Facts

2 HRA Corp (SG) Pte Ltd ("the Plaintiff") is a company incorporated in Singapore. Mr Cheng Mun Yip Marcus ("the 1st Defendant") is the Chief Executive Officer of Acclivis Technologies and Solutions Pte Ltd ("Acclivis"). DeClout Ltd ("the 2nd Defendant"), Eradite International Pte Ltd ("the 3rd Defendant") and the 1st Defendant were shareholders of Acclivis until 22 November 2016, when they disposed of the entire shareholding to CITIC Consultancy 1616 Ltd ("CITIC"). Mr Wong Kok Khun ("the 4th Defendant") is the Chairman and Group Chief Executive of the 2nd Defendant, while Mr Nah

Nah Guan ("the 5th Defendant") is a director of the 3rd Defendant. The present application ("the Application") is taken out by the Plaintiff against the 1st Defendant only.

3 The parties have different accounts of some of the key background facts. However, as the Plaintiff is seeking interim payment on the basis of an alleged *admission* in the 1st Defendant's pleaded case, I have largely proceeded on the basis of the 1st Defendant's account of events, as gleaned from the 1st Defendant's Defence & Counterclaim ("the Defence & Counterclaim") and the various affidavits filed.

4 At all material times, the 1st Defendant dealt with the Plaintiff through one Mr Heiril Amos Jr ("Mr Amos"), who is the son of the sole director of the Plaintiff. Mr Amos is the 2nd Defendant in the Counterclaim. The 1st Defendant and Mr Amos had developed a close friendship, and had explored possible business opportunities together. The 1st Defendant had the impression that Mr Amos was the Plaintiff's owner, decision-maker and alter-ego.

5 Sometime in September 2015, Acclivis required funds to proceed with a business transaction. The 1st Defendant approached Mr Amos and informed him that they could invest by way of subscription of new shares in Acclivis.[1]

6 To this end, sometime in October 2015, the 1st Defendant entered into an understanding with the Plaintiff through Mr Amos ("the Understanding"). Pursuant to the Understanding, the 1st Defendant and the Plaintiff agreed to co-

---

1 1st Defendant's Written Submissions (6 March 2018) at paragraph 22; see also the 1st Defendant's Defence & Counterclaim (11 August 2017), at paragraph 8, and the Statement of Claim (10 July 2017), at paragraph 9.

invest in 2,787,516 shares of Acclivis ("Trust Shares"). Some of the other salient terms of the Understanding include:

(a) The Plaintiff would contribute payment of $3,602,200 towards the acquisition of the Trust Shares.

(b) The 1st Defendant would be the 100% legal owner of the Trust Shares, while the Plaintiff and the 1st Defendant would each retain 50% beneficial interest in the shares.

(c) Upon disposal of the Trust Shares, the net profit earned from the disposal would be divided between the Plaintiff and the 1st Defendant in equal shares, "after the initial contribution of S$3,602,200 is returned to the Plaintiff".[2]

7 Pursuant to the Understanding, the Plaintiff made bank transfers to the 1st Defendant's personal bank accounts, and the 1st Defendant subscribed for the Trust Shares.

8 On the night of 30 October 2015, Mr Amos and one Ms Pamela Chong ("Ms Chong") informed the 1st Defendant that some additional paperwork was required to formalise the Understanding. By way of background, Ms Chong is a solicitor who, according to the 1st Defendant, had acted for him by way of an "implied retainer" in relation to negotiations concerning a shareholders' agreement with the 2nd and 3rd Defendants. Mr Amos and Ms Chong met the 1st Defendant that night at the car park of his residence, and requested him to sign a trust deed ("the Trust Deed"). The 1st Defendant did so, in reliance on Ms

---

2 1st Defendant's Defence & Counterclaim (11 August 2017), at paragraph 9(c).

Chong's representation that this was so as to formalise the Understanding. In his Defence & Counterclaim, the 1st Defendant has averred, amongst other things, that he had not been given an opportunity to review the Trust Deed before signing it, that the legal effect of the Trust Deed had not been explained to him, and that Ms Chong had not advised him of his option to seek independent legal advice. As such, he intended to dispute the validity and contents of the Trust Deed at trial.

9 In the lead up to the sale of Acclivis, the 1st Defendant informed the Plaintiff that there were debts amounting to $6,493,355.43 owed to Acclivis by certain third party entities ("the Bad Debts"), and that these proved an obstacle to the sale of Acclivis. These Bad Debts were owed by entities that had been introduced to Acclivis by the Plaintiff, through Mr Amos. As such, sometime in May 2016, the 1st Defendant and the Plaintiff entered into an agreement ("the Bad Debts Agreement") for the Plaintiff to make repayment of the Bad Debts out of the Plaintiff's portion of the sale proceeds from the sale of the Trust Shares ("the Trust Shares Sale Proceeds") in the event that the Bad Debts were not paid by the time Acclivis was sold.[3] The 1st Defendant would take over liabilities of any outstanding Bad Debts at the time of Acclivis' sale, and deduct these from the Plaintiff's portion of the Trust Shares Sale Proceeds.[4]

10 On 23 June 2016, CITIC entered into a Non-Binding Letter of Intent with the 1st to 3rd Defendants, which required that Acclivis' books be cleared of debts and intercompany loans prior to CITIC's purchase of Acclivis' shares.

---

3 1st Defendant's Defence & Counterclaim (11 August 2017), at paragraph 40(d).

4 1st Defendant's Defence & Counterclaim (11 August 2017), at paragraph 40(d).

11 As the Bad Debts had yet to be discharged, on 30 September 2016, the 1st Defendant entered into two further agreements:

(a) First, the Receivable Assignment Agreement ("the RAA"), entered into with Acclivis and PT Acclivis Technologies and Solutions (a subsidiary of Acclivis), under which the 1st Defendant was assigned the Bad Debt.

(b) Second, the Shareholder Loan Assignment and Novation Agreement ("the SLA"), entered into with Acclivis and the 2nd Defendant, under which Acclivis assigned to the 1st Defendant the shareholder loan that it owed to the 2nd Defendant.

12 On 12 October 2016, CITIC entered into a Sale and Purchase Agreement ("the SPA") with the 1st to 3rd Defendants for the sale of Acclivis. On the same day, the 1st Defendant entered into two further agreements:

(a) First, a Price Variation Agreement ("the PVA"), entered into with the 2nd and 3rd Defendants,[5] under which the 2nd and 3rd Defendants were to pay the 1st Defendant $8.5 million and $1,136,828 respectively. The rationale for the PVA was to recognise the 1st Defendant's contributions to Acclivis, and also so as to enable the 1st Defendant to make certain commission payments and payments to Acclivis' customers.[6] According to the 1st Defendant, the PVA was a separate agreement amongst the 1st to 3rd Defendants, and the sums received thereunder did not constitute the Trust Shares Sale Proceeds.[7]

---

5 Affidavit of Cheng Mun Yip Marcus (11 August 2017), at paragraph 30(c).

6 Affidavit of Cheng Mun Yip Marcus (11 August 2017), at paragraph 33.

(b) Second, a Side Letter ("the Side Letter"), entered into by CITIC and the 1st Defendant, stipulating that a certain sum of money would be deferred from the Trust Shares Sale Proceeds, and would be paid in accordance with the terms of the Side Letter.

13 The 1st Defendant informed the Plaintiff that, in line with the Bad Debts Agreement, he had to make payments towards the Bad Debts upon receiving the Trust Shares Sale Proceeds. He exhibited a series of WhatsApp messages exchanged between himself and Mr Amos on 24 October 2016, where he referred to the Bad Debts and the fact that he needed to "pay a lot of pl… Incl the bad debts".[8]

14 The above largely reflects the 1st Defendant's account of events. The Plaintiff had a different account in relation to several key points, which may be summarised as follows:[9]

(a) The Understanding did not exist. Instead, the agreement between the parties was that the Plaintiff would be the sole beneficial owner of the Trust Shares, as set out in the Trust Deed. There was never any contemplation or discussion of the beneficial interest in the Trust Shares being shared between the Plaintiff and the 1st Defendant; besides, the entire consideration of $3,602,200 had been paid by the Plaintiff alone.

(b) In relation to the Trust Deed, Ms Chong acted only for the Plaintiff and not the 1st Defendant. It should be kept in mind that the 1st

---

7 Affidavit of Cheng Mun Yip Marcus (11 August 2017), at paragraph 34.

8 1st Defendant's Written Submissions (6 March 2018), at paragraph 39.

9 Plaintiff's Reply to 1st Defendant's Defence (19 September 2017).

Defendant was a "savvy businessman" and the Managing Director of Acclivis.[10] Furthermore, the 1st Defendant had not denied the terms of the Trust Deed despite receiving a copy of it subsequently.

(c) The Bad Debts Agreement did not exist. The parties never discussed the possibility of the Plaintiff having to bear the Bad Debts. Even if the Bad Debts were owed by parties introduced by the Plaintiff, the Plaintiff had no legal obligation to repay the Bad Debts.

(d) In relation to the Trust Shares Sale Proceeds, the Plaintiff alleged that the 1st Defendant had received at least $18,365,565.75 in total from CITIC (under the SPA) and from the 2nd and 3rd Defendants (under the PVA). The payments under the PVA were included in the calculation, in view that the PVA was clearly related and directly referable to the SPA. As mentioned at [12(a)] above, the 1st Defendant's position was that the PVA was a separate agreement altogether; as such, he claimed to have received only $8,728,737.75 as Trust Shares Sale Proceeds (being $18,365,565.75 less the amounts received under the PVA).

15 The Plaintiff commenced the present suit on 10 July 2017, claiming against the 1st Defendant:

(a) a declaration that the 1st Defendant holds the amount of the entire Trust Shares Sale Proceeds on trust for the Plaintiff, an order for account and an order for payment for all sums found due to the Plaintiff on the taking of such account (*viz*, a claim based on the Plaintiff's proprietary interest in the Trust Shares); or

---

10 Plaintiff's Reply to 1st Defendant's Defence (19 September 2017), at paragraph 11.

(b) equitable compensation (*viz*, a claim for breach of fiduciary duties and the Trust Deed).

16 On 5 September 2017, the Plaintiff obtained an order for an interim injunction ("the Interim Injunction"), which restrained the 1st Defendant from using, dealing with or disposing the Trust Shares Sale Proceeds that remain in his possession, pending judgment in the present suit, or until further order. The Interim Injunction remains in place as at the time of this judgment.

The Application

17 On 24 January 2018, the Plaintiff brought the Application, seeking an order that the 1st Defendant pay the Plaintiff the sum of $3,602,200, or such sum as the Court deems fit, by way of interim payment "on account of the 1st Defendant's admissions in respect of the Plaintiff's claim herein". The grounds of the Application state:

> This application is made pursuant to Order 29 rule 10 of the Rules of Court, on the ground briefly, that the 1st Defendant has admitted in the Defence & Counterclaim to be liable to the Plaintiff for at the least the sum of S$3,602,200, and on further grounds as stated in the Affidavit of Heirul Azhar Ahmad filed in support of this application.

18 The substantive grounds on which interim payment may be sought are provided for in O 29 rr 11(1) and 12 of the Rules of Court, as follows:

> **Order for interim payment in respect of damages (O. 29, r. 11)**
>
> **11**.—(1) If, on the hearing of an application under Rule 10 in an action for damages, the Court is satisfied —
>
> (*a*) that the defendant against whom the order is sought has admitted liability for the plaintiff's damages;

(*b*) that the plaintiff has obtained judgment against the defendant for damages to be assessed; or

(*c*) that, if the action proceeded to trial, the plaintiff would obtain judgment for substantial damages against the defendant or, where there are 2 or more defendants, against any one or more of them,

the Court may, if it thinks fit and subject to paragraph (2), order the defendant to make an interim payment of such amount as it thinks just, not exceeding a reasonable proportion of the damages which in the opinion of the Court are likely to be recovered by the plaintiff after taking into account any relevant contributory negligence and any setoff, crossclaim or counterclaim on which the defendant may be entitled to rely.

…

Order for interim payment in respect of sums other than damages (O. 29, r. 12)

12. If, on the hearing of an application under Rule 10, the Court is satisfied —

(*a*) that the plaintiff has obtained an order for an account to be taken as between himself and the defendant and for any amount certified due on taking the account to be paid;

(*b*) that the plaintiff's action includes a claim for possession of land and, if the action proceeded to trial, the defendant would be held liable to pay to the plaintiff a sum of money in respect of the defendant's use and occupation of the land during the pendency of the action, even if a final judgment or order were given or made in favour of the defendant; or

(*c*) that, if the action proceeded to trial, the plaintiff would obtain judgment against the defendant for a substantial sum of money apart from any damages or costs,

the Court may, if it thinks fit, and without prejudice to any contentions of the parties as to the nature or character of the sum to be paid by the defendant, order the defendant to make an interim payment of such amount as it thinks just, after taking into account any set-off, cross-claim or counterclaim on which the defendant may be entitled to rely.

19 The court approaches an application for interim payment in two stages (*American International Assurance Co Ltd v Wong Cherng Yaw and others* [2009] 3 SLR(R) 1117 ("*American International Assurance (HC)*") at [21]).

(a) At the first stage ("the First Stage"), the court must be satisfied that one of the grounds stated in the sub-paragraphs of O 29 rr 11 or 12 of the Rules of Court is established. If the court is so satisfied, it has the power to grant an order for interim payment.

(b) At the second stage ("the Second Stage"), the court considers whether – after taking into account any set-off, cross-claim or counterclaim on which the defendant may be entitled to rely – it ought to exercise its discretion to order interim payment, and if so, the quantum of such payment. Put another way, the court considers all the circumstances of the case and determines whether it is just to order interim payment.

20 I now address the issues raised at each of the stages.

The First Stage: Whether one of the grounds in O 29 rr 11 or 12 is established

21 There was initially some confusion as to the grounds on which the Plaintiff was proceeding, because the Application did not specify the precise rule and sub-paragraph relied on. The only substantive prayer in the Application referred to interim payment "on account of the 1st Defendant's *admissions* in respect of the Plaintiff's claim herein" (emphasis added). The words "admissions" (in the substantive prayer) and "admitted" (in the specified grounds – see [17] above) suggested that the Application was premised on O 29 r 11(1)(*a*) of the Rules of Court.

22 The Plaintiff subsequently clarified that it intended to proceed under three separate and alternative grounds, namely:

(a) First, O 29 r 11(1)(*a*) of the Rules of Court, *viz*, that in an action for *damages*, the 1st Defendant had *admitted liability* for the Plaintiff's damages.

(b) Second, O 29 r 11(1)(*c*) of the Rules of Court, *viz*, that in an action for *damages*, if the action proceeded to trial, the Plaintiff would *obtain judgment for substantial damages* against the 1st Defendant.

(c) Third, O 29 r 12(*c*) of the Rules of Court, *viz*, that in an action for *other than damages*, if the action proceeded to trial, the Plaintiff would *obtain judgment* against the 1st Defendant *for a substantial sum of money apart from any damages or costs*.

Whether requirements of O 29 r 11(1)(a) or (c) met

23 The arguments in relation to O 29 r 11(1)(*a*) and (*c*) of the Rules of Court can be dealt with together, because counsel for the 1st Defendant, Mr Wendell Wong ("Mr Wong"), objected on the same basis for both sub-paragraphs.

Parties' Arguments on the First Stage

24 Mr Wong's key contention was that because the Plaintiff's claim against the 1st Defendant was founded on the *breach of trust*, the Plaintiff could not be considered to have brought a claim for *damages* under O 29 r 11 of the Rules of Court. As such, the Plaintiff's reliance on *any* sub-paragraph in that rule was "entirely misplaced" and "[did] not even take off".[11] Elaborating on this point,

Mr Wong argued that there was a significant distinction between "equitable compensation" and common law "damages" – in particular, the latter is not available as a remedy for an equitable wrong (citing *Quality Assurance Management Asia Pte Ltd v Zhang Qing* [2013] 3 SLR 631 ("*Quality Assurance Management*") at [32]). This was a "distinction with a difference" and one "of substance", rather than mere semantics, given that it reflected the different starting points of common law and equity, and the very different purposes between the award of damages and equitable compensation (citing *Quality Assurance Management* at [37]–[41]).

25 Counsel for the Plaintiff, Mr Low Chai Chong ("Mr Low"), contended that O 29 rr 11 and 12 of the Rules of Court were to be considered holistically and ought not to be taken as mutually exclusive. Citing the English Court of Appeal decision of *Shearson Lehman Brothers Inc and another v Maclaine Watson & Co Ltd and others* [1987] 1 WLR 480 ("*Shearson Lehman Brothers*"), he argued that the court should simply ask the *single question* of whether the Application fulfilled the requirements of O 29 rr 11 and 12 of the Rules of Court read *as a whole*, rather than considering separately and exclusively an applicant's entitlement under each rule.[12] On the basis of *Shearson Lehman Brothers*, Mr Low submitted that there was no need to determine precisely which sub-paragraph of O 29 rr 11(1) and 12 of the Rules of Court the Application was premised upon.

26 Mr Low further contended that, in any event, equitable compensation ~~fell within the meaning of "damages", as may be seen from two Court of Appeal~~

11 1st Defendant's Supplementary Written Submissions (19 March 2018), at paragraph 22.

12 Plaintiff's Supplemental Written Submissions (15 March 2018), at paragraphs 4 and 5.

decisions (*viz*, *Yong Kheng Leong and another v Panweld Trading Pte Ltd and another* [2013] 1 SLR 173 at [43] ("… equitable compensation is a claim for damages for breach of a fiduciary duty…"); and *Dynasty Line Ltd (in liquidation) v Sukamto Sia and another and another appeal* [2016] 5 SLR 505 ("*Dynasty Line*") at [14] ("… 'damages' is strictly speaking mere shorthand for equitable compensation…")). Mr Low thus argued that it was entirely permissible for the Plaintiff to seek interim payment for equitable compensation under O 29 r 11(1)(*a*) and (*c*) of the Rules of Court.

Decision on the First Stage

27 I begin first by considering Mr Low's proposition that there was no need to specify the sub-paragraphs upon which interim payment is sought, and that the court should simply ask the single question of whether the Application fulfilled the requirements of O 29 rr 11 and 12 of the Rules of Court read as a whole. Mr Low relied on *Shearson Lehman Brothers* for this proposition. *Shearson Lehman Brothers* is of persuasive value in interpreting O 29 rr 11 and 12 of the Rules of Court, particularly in the light that those rules are *in pari materia* with the English rules that the English Court of Appeal had considered. However, I do not think that the decision supports Mr Low's proposition in the context of the present case.

28 In *Shearson Lehman Brothers*, the applicants agreed to sell large quantities of tin to the respondents under standard forms of contract incorporating the rules and regulations of the London Metal Exchange. Before delivery took place, dealings on the tin market were suspended, and when the applicants tried to deliver the tin, the respondents refused to accept it. The committee of the London Metal Exchange subsequently promulgated "Rule M", fixing a settlement price for all tin contracts affected by suspension. The

respondents admitted that they would have been liable to pay £7.2 million if the applicants were willing to accept the validity of "Rule M". However, the applicants had denied the validity of "Rule M", and claimed the full contract price of £23.9 million, or alternatively, a minimum of £7.2 million as damages for non-acceptance. The applicants sought interim payment, relying on their alternative claim for non-acceptance at a minimum figure of £7.2 million. The respondents took the position that if they were liable to pay damages, these would not exceed £5.2 million.

29 At first instance, the High Court Judge found that the applicants would recover either £5.2 million (as "damages" for non-acceptance) or £7.2 million (under "Rule M", which would be a sum of money "apart from any damages"). In determining whether interim payment ought to be ordered, the learned Judge considered two questions: first, whether the applicants would recover damages for non-acceptance – the learned Judge answered "no", because answering "yes" would pre-judge the central question at trial in relation to the validity of "Rule M"; and second, whether the applicants would recover the "Rule M" difference (*viz,* £7.2 million) – the learned Judge again answered "no", because this would also pre-judge the central question. The learned Judge therefore declined to order interim payment.

30 On appeal, the English Court of Appeal, through three separate judgments (*per* Lloyd LJ, Nicholls LJ and Sir John Megaw), reversed the decision and came to the unified conclusion that the applicants should be granted interim payment of £5.2 million in the circumstances.

(a) Lloyd LJ found that the High Court Judge should have asked himself the *single question* of whether the applicants would recover

either damages for non-acceptance, or the "Rule M" difference; had this single question been asked, the answer would clearly have been "yes". While O 29 rr 11(1) and 12 of the Rules of Court were separate rules, the learned Lord Justice opined that to read these rules separately on the facts would produce a result which was "so obviously unsatisfactory that one is driven to look for another solution" (*Shearson Lehman Brothers* at 486G). The learned Lord Justice therefore held that O 29 rr 11(1)(*c*) and 12(*c*) of the Rules of Court ought to be read together in the circumstances, and suggested a possible combined reading as follows (*Shearson Lehman Brothers* at 487A–B):

> If, on the hearing of an application under rule 10 in an action for damages the court is satisfied that … the plaintiff would obtain judgment for substantial damages … or that … the plaintiff would obtain judgment … for a substantial sum of money apart from damages … the court may, if it thinks fit, and without prejudice to any contentions of the parties as to the nature or character of the sum to be paid by the defendant, order the defendant to make an interim payment …..

(b) Nicholls LJ judgment proceeded along similar lines. The learned Lord Justice observed that it would be "repugnant to commonsense and contrary to the purposes of the interim payments code in Order 29" that, by adding a claim for damages, the applicants thereby lost their entitlement to interim payment that they would otherwise have had under O 29 r 12(*c*) of the Rules of Court (*Shearson Lehman Brothers* at 193H).

(c) Sir John Megaw agreed with Lloyd and Nicholls LJJ, and opined that insofar as the court was satisfied that there would be judgment for a substantial sum under either O 29 rr 11(1)(*c*) or 12(*c*) of the Rules of Court, it did not have to be concerned about whether the sum could

technically be classified as "damages" or otherwise (*Shearson Lehman Brothers* at 494–495).

31 In my view, *Shearson Lehman Brothers* does not provide support for Mr Low's proposition that there is no need to identify the precise ground upon which the Application was premised. The English Court of Appeal was concerned with a situation where the court was satisfied that the applicant would recover *either* damages *or* a sum of money apart from damages. It was in those circumstances that the English Court of Appeal held that the dichotomy between O 29 rr 11 and 12 of the Rules of Court ought not to be interpreted literally so as to deny the applicants the interim payment simply because it was not possible to tell, at the interlocutory stage, whether the sum claimed would be in the nature of damages or otherwise. The present case is quite different. Here, there is no alternative legal basis for the Plaintiff's claim for $3,602,200 – both counsel proceeded on the basis that the sum was in the nature of equitable compensation. The sole question was whether equitable compensation fell within "damages" for the purposes of O 29 r 11(1) of the Rules of Court.

32 In this regard, I acknowledge that both counsel have cited authorities in support of their respective interpretations of whether "equitable compensation" is a form of "damages"; but it ought to be noted that none of the authorities cited concerned the use of the word "damages" specifically in the context of O 29 rr 11 and 12 of the Rules of Court. I do note the force in Mr Wong's point that equating "damages" with "equitable compensation" would render nugatory the apparent dichotomy between O 29 rr 11 and 12 of the Rules of Court, and that a court would ordinarily be cautious about adopting an interpretation that would have the effect of rendering rules otiose; but as against this argument, it bears noting that O 29 rr 11 and 12 of the Rules of Court have in fact been judicially

criticised for being "difficult and obscure" in "various respects", with the English Court of Appeal going so far as to suggest that the dichotomy ought not to have existed in the first place (*Shearson Lehman Brothers* at 494B–C).

33 It is ultimately unnecessary for me to determine whether a claim for equitable compensation can be brought under O 29 r 11(1) of the Rules of Court. Nothing significant turns on this point in the present case, for two reasons:

(a) First, regardless of whether a claim for equitable compensation can be brought under O 29 r 11(1) of the Rules of Court, the 1st Defendant's alleged admission remains relevant in determining whether the First Stage is established. Of course, if the issue is answered positively, the 1st Defendant's alleged admission may constitute a standalone ground in O 29 r 11(1)(*a*) of the Rules of Court. However, the same admission remains relevant under the broader grounds in O 29 rr 11(1)(*c*) and 12(*c*) of the Rules of Court, as it would go towards finding that the Plaintiff would obtain judgment for "substantial damages" or "a substantial sum of money apart from any damages or costs". Nothing precludes the Plaintiff from relying on an admission under those other rules, and the Plaintiff has in fact indicated that it is proceeding under those other rules in the alternative (see [22] above).

(b) Second, the tail end of O 29 r 12(*c*) of the Rules of Court contains a broad provision stating that it is "without prejudice to any contentions of the parties as to the nature or character of the sum to be paid by the defendant". As Sir John Megaw observed, this phrase must mean that the court need not trouble itself, in a claim under O 29 r 12(*c*) of the Rules of Court, with the issue of the technical legal classification of the "sum to be paid" thereunder (*Shearson Lehman Brothers* at 494F). This

provides further comfort and justification for assessing the Application under O 29 r 12(*c*) of the Rules of Court.

34 In the circumstances, I proceed to assess if the requirements of O 29 r 12(*c*) of the Rules of Court are met in the present case.

Whether requirements of O 29 r 12(c) met

35 Under O 29 r 12(*c*) of the Rules of Court, the Plaintiff has to demonstrate that if the action proceeds to trial, it would obtain judgment against the 1st Defendant for a substantial sum of money.

Parties' Arguments

36 Mr Low's primary argument is that the 1st Defendant had *admitted* that the Plaintiff had paid $3,602,200 for subscription of the Trust Shares, and that the 1st Defendant had *admitted* that the sum had to be returned to the Plaintiff. He relied on paragraph 9(c) of the Defence & Counterclaim, which states:

> Arising from the equal beneficial interest in the Trust Shares, upon disposal of the Trust Shares, the net profit earned from the disposal of the Trust Shares would be divided between the Plaintiff and [the 1st Defendant] in equal shares (*after the initial contribution of S$3,602,200 is returned to the Plaintiff*). [Emphasis added]

37 Mr Low further relied on paragraph 7 of the 1st Defendant's reply affidavit filed in the Application, which states:[13]

> My averment in my Defence and Counterclaim is clear. As part of the Understanding (defined in paragraph 9 of my Defence and Counterclaim), when the Trust Shares were eventually sold, from the monies received from the sale of the Trust Shares, *the*

---

13 Affidavit of Cheng Mun Yip Marcus (9 Feb 2018), at paragraph 7.

> *Plaintiff would first be entitled to the repayment of S$3,602,200. Thereafter, the remaining monies would be divided* equally between the Plaintiff and myself. [Emphasis added]

38 Based on these paragraphs, Mr Low argued that the present case "is on all fours" with the facts in *American International Assurance (HC)* and *American International Assurance (CA)*. In that case, an insurer discovered that it had made a mistake in valuing certain funds, and therefore brought an action against the policyholders for unjust enrichment and conspiracy, alleging that they had knowingly exploited the mistake to their advantage. The policyholders applied for interim payment of the invested capital. In opposing the interim payment application, the insurer did not argue that the policyholders were not entitled to the return of their capital investment; rather, its case was that (a) there might be no capital to be returned in the light of the insurer's counterclaim for damages for conspiracy which should be set-off against the capital investment; and (b) the capital investment was not guaranteed and as such its quantum at the time of the set-off was indeterminate. On appeal, the Court of Appeal found that refusing to order interim payment would effectively be giving the insurer a security for its counterclaims, and would be analogous to granting the insurer a Mareva injunction to meet its counterclaims (*American International Assurance (CA)* at [28]). On the facts, as the insurer had failed to show *prima facie* that the amount it was likely to recover would exceed the policyholders' investments, the Court of Appeal found it proper and reasonable to exercise discretion to order a prudent amount of interim payment.

39 Mr Wong maintained that the cited paragraphs had to be understood in the proper context, and that upon a holistic appreciation of the Defence & Counterclaim, the 1st Defendant had not in fact made any admission at all. To

this end, the 1st Defendant's understanding of the mechanics on the apportionment of the Trust Shares Sale Proceeds is as follows:[14]

> **Sum X** = the sales proceeds obtained from the sale of the [Trust] Shares
>
> [1st Defendant's] share of **Sum X** = (**Sum X** – S$3,602,200) /2
>
> Plaintiff's share of **Sum X** (hereinafter "**Sum Y**") = (**Sum X** – S$3,602,200) / 2 + S$3,602,200
>
> [emphasis in original]

40 The amount of the Trust Shares Sale Proceeds (*viz*, what the 1st Defendant referred to as "Sum X") is currently disputed. The Plaintiff has claimed that Sum X is $18,365,565.75, whereas the 1st Defendant has taken the position that Sum X is $8,728,737.75 (see [14(d)] above). If the 1st Defendant's version is accepted, the Plaintiff's share of Sum X (*viz*, what the 1st Defendant referred to as "Sum Y") would be $6,165,468.88. However, the Bad Debts Agreement must also be taken into account, and if so, a Sum Y of $6,165,468.88 would be insufficient to pay off the Bad Debts, which amount to $6,493,355.43 (see [9] above). In other words, it is not presently possible to determine whether Sum Y is larger or smaller than the Bad Debts. The exact amounts of Sums X and Y remain to be adjudicated at trial. If it transpires that Sum Y is larger than the Bad Debts, then the court may order the 1st Defendant to pay the Plaintiff the excess money; but if Sum Y is smaller than the Bad Debts, then Sum Y could be extinguished by the Bad Debts and the result would be that the 1st Defendant would not be liable to pay the Plaintiff any money. Mr Wong therefore argued that the 1st Defendant cannot be taken to have admitted any liability in relation to the $3,602,200.

---

[14] Affidavit of Cheng Mun Yip Marcus (9 Feb 2018), at paragraph 8.

41 Mr Low objected to the 1st Defendant's reliance on the Bad Debts Agreement, for two reasons.

(a) First, only defences and counterclaims which qualify as set-offs were to be considered at the First Stage (citing *American International Assurance (HC)* at [28]–[34]). In this regard, the 1st Defendant's claim in relation to the Bad Debts Agreement was a mere counterclaim that did not amount to a set-off, and therefore should be disregarded for the purposes of the First Stage. To elaborate:

(i) There was no *legal set-off* because: (A) the debts allegedly owed under the Bad Debts Agreement were not due and payable; (B) the total amount of the Plaintiff's share of the Trust Shares Sale Proceeds is presently indeterminate in view of the Side Letter; (C) the Plaintiff's proprietary claim for the Trust Shares Sale Proceeds cannot be set off against a monetary claim for a debt owing under the Bad Debts Agreement (citing *Blue Sky One Ltd v Mahan Air* [2010] EWHC 631 at [118]); and (D) the Bad Debts were owed by third parties instead of the Plaintiff.

(ii) There was also no *equitable set-off*, because only cross-claims which were so closely connected to the main claim that it would be manifestly unjust to allow a claimant to enforce a payment without taking into account the cross-claim would qualify as an equitable set-off (citing *Pacific Rim Investments Pte LTd v Lam Seng Tiong* [1995] 2 SLR(R) 643 at [35]–[37]). In this regard, the Bad Debts Agreement was an entirely different transaction from the Understanding or the Trust Deed. Furthermore, they served different purposes – the Trust Deed

and Understanding governed the Plaintiff's interest in the Trust Shares, whereas the Bad Debts Agreement governed payments owed by third parties to Acclivis.

(b) Second, in any event, the Plaintiff has denied the existence of the Bad Debts Agreement, and the 1st Defendant's claim in relation to the Bad Debts Agreement was "simply unsustainable" for four reasons:[15]

(i) First, the Plaintiff would not have agreed to undertake such onerous obligations "without executing any formal written agreement to this effect".[16] To date, the 1st Defendant had produced "absolutely no evidence" to support the existence of the Bad Debts Agreement, even after general discovery had been completed. While the 1st Defendant claimed that the Bad Debts Agreement was entered into "in or around May 2016" both "orally and in writing" via "numerous conversations" and "Whatsapp messages exchanged", none of the Whatsapp messages bore this out. Furthermore, as late as 31 May 2016, the 1st Defendant was still requesting Mr Amos to "press" one of the entities liable for the Bad Debts; had the Bad Debts Agreement been in place, the 1st Defendant would not have been making such requests.

(ii) Second, the Bad Debts Agreement, as pleaded, was unsustainable in law because the 1st Defendant had failed to plead any consideration for the agreement.

---

15 Plaintiff's Supplemental Written Submissions (15 March 2018), at paragraph 49 *et seq*.

16 Plaintiff's Reply to 1st Defendant's Defence (19 September 2017), at paragraph 22.

(iii) Third, the terms of the Bad Debts Agreement were unclear – in particular, it was uncertain whether the Plaintiff's share of the Trust Shares Sale Proceeds to be applied to the Bad Debts included the sum of $3,602,200.

(iv) Fourth, the existence of the Bad Debts Agreement was contradicted by the 1st Defendant's subsequent conduct. In particular, the 1st Defendant had already received an assignment of the Bad Debt receivables under the SLA, and had obtained judgment against one of the three entities liable for the Bad Debts. If the Plaintiff truly bore liability for the Bad Debts, the receivables ought to have been assigned to the Plaintiff instead.

42 Mr Wong argued that the 1st Defendant's pleading in relation to the Bad Debts Agreement formed part of his *primary defence*, separately and distinctly from any set-off or counterclaim.[17] The Plaintiff should not be allowed to selectively rely on part of the 1st Defendant's defence relating to the Understanding, without addressing the Bad Debts Agreement, given that they were all part of an entire transaction relating to the Trust Shares Sale Proceeds. He further argued that despite the Plaintiff's objections to the 1st Defendant's reliance on the Bad Debts Agreement, the Plaintiff had not sought to obtain judgment (under O 27 of the Rules of Court) or strike out the 1st Defendant's pleadings (under O 18 r 19 of the Rules of Court). This, Mr Wong submitted, was in recognition of the reality that the Bad Debts Agreement raised numerous contentious issues of fact and law which could only be determined at trial.

---

17 1st Defendant's Supplementary Written Submissions (19 March 2018) at paragraph 34.

Decision

43 At the First Stage, the Plaintiff must demonstrate, on the balance of probabilities, something more than a *prima facie* case that he would obtain judgment for a substantial sum (*Shearson Lehman Brothers* at 489B). Other than the Plaintiff's case, the court will also consider any defences and counterclaims which qualify as set-offs (*American International Assurance (HC)* at [23]; *American International Assurance (CA)* at [16]).

44 I pause to note that there is some uncertainty as to whether independent counterclaims (*viz*, counterclaims which do not qualify as set-offs) should be considered at the First Stage. In *American International Assurance (HC)*, the High Court opined that there was *no* need to consider any independent counterclaims at the First Stage, dissenting from the approach that had apparently been taken in an English case (*American International Assurance (HC)* at [28]–[34]). On appeal, the Court of Appeal ultimately declined to decide on the "true position under our O 29 r 12(*c*)" in view that the matter did not turn on this issue (*American International Assurance (CA)* at [17]–[19]). In the present case, it is unnecessary for me to express a view on this issue because the Bad Debts Agreement was expressly pleaded as part of the *defence* itself and must therefore clearly be considered at the First Stage.

45 I found the 1st Defendant's explanation in relation to the mechanics for apportionment of the Trust Shares Sale Proceeds (see [39] above) somewhat difficult to reconcile with the language in paragraph 9(c) of the Defence & Counterclaim and paragraph 7 of his affidavit (see [36] and [37] above). The language used did indeed suggest – as Mr Low contended – that the 1st Defendant was obliged to *first* repay to the Plaintiff the sum of $3,602,200 out of the Trust Shares Sale Proceeds. Furthermore, while Sum X is presently

disputed, even if one were to proceed on the 1st Defendant's premise that Sum X is $8,728,737.75, there would still be a sufficient money to render $3,602,200 the minimum amount payable. The mere fact that Sum X is disputed therefore does not detract from the fact that under the Understanding (and ignoring the Bad Debts Agreement for the moment), the Plaintiff could well be entitled to a minimum sum of $3,602,200.

46 However, I agree with Mr Wong that the Defence & Counterclaim must be read in its entirety. In this regard, I accept that the Bad Debts Agreement was expressly pleaded as a defence to liability. Based on the pleadings as they stand, the 1st Defendant's case is that the Bad Debts Agreement is very much part of an entire transaction that had commenced with the Understanding.

47 Despite Mr Low's arguments (see [41(b)] above), I am not convinced that the Bad Debts Agreement ought to be ignored in assessing whether the First Stage is satisfied. The law does not preclude the Bad Debts Agreement from being a valid agreement simply because it may be oral in nature; and in any case, the 1st Defendant has exhibited some documentary evidence evincing that there might have been conversations in relation to management of the Bad Debts. I am also not convinced that the Bad Debts Agreement lacked contractual consideration – indeed, it is not fantastical to recognise that unless the Bad Debts were dealt with, they may have been an impediment to the sale of Acclivis' shares (see [9]–[10] above). As to whether the 1st Defendant's subsequent conduct contradicted the existence of the Bad Debts Agreement, this is an issue that ought to be determined at trial; it is not possible to determine this issue on the basis of affidavit evidence at the interlocutory stage.

48 In the circumstances, I disagree with Mr Low that the present case is "on all fours" with *American International Assurance*. Unlike the insurer in *American International Assurance*, the 1st Defendant has expressly taken the position that whether the Plaintiff is entitled to a return of the $3,602,200 is an issue that is *in itself* indeterminate, because the Understanding (which is the source of the Plaintiff's alleged entitlement for payment of $3,602,200) must be understood in the light of the Bad Debts Agreement. Furthermore, unlike in *American International Assurance* where the insurer failed to show *prima facie* that the amount it was likely to recover would exceed the policyholders' investments, in the present case, if the 1st Defendant's valuation of the Trust Shares Sale Proceeds is accepted and the Bad Debts Agreement is taken into consideration, the Bad Debts would exceed the sum payable to the Plaintiff; in which case, the Plaintiff would not be entitled to a minimum sum of $3,602,200 (see [40] above).

49 In view of the foregoing, I find that the Plaintiff has failed to establish any ground in O 29 rr 11 or 12 of the Rules of Court. Accordingly, the Plaintiff has failed to satisfy the First Stage.

The Second Stage: Whether the court should exercise discretion to order interim payment

50 Having found that the Plaintiff has failed to satisfy the First Stage, it is not necessary for me to consider the Second Stage. However, even if I had found that the requirements of the First Stage were met, I would not have exercised discretion in favour of ordering interim payment.

Parties' Arguments on the Second Stage

51 Mr Low argued that it would be just to order interim payment in the present case. He pointed out that it was no longer necessary for an applicant to demonstrate any need or prejudice so as to justify an order for interim payment (citing *Main-Line Corporate Holdings Ltd v United Overseas Bank Ltd* [2010] 2 SLR 986 ("*Main-Line Corporate Holdings*") at [32]). Therefore, if the Plaintiff was entitled to a minimum sum of $3,602,200, the 1st Defendant ought to make such payment without further delay.

52 He further argued that the 1st Defendant had sufficient funds to meet an order for the interim payment of $3,602,200. This was because the 1st Defendant had confirmed that $2,927,682.32 of the Trust Shares Sale Proceeds remained in his possession,[18] an amount which was secured by way of the Interim Injunction. In addition, the 1st Defendant's counsel had given an undertaking in relation to $600,000 of the Trust Shares Sale Proceeds paid to them by the 1st Defendant. The total amount available to the 1st Defendant would therefore be $3,527,682.32, which was close to the $3,602,200 sought. Mr Low further expressed that if the court was unwilling to order $3,602,200, the Plaintiff would be satisfied with an interim payment of $3,527,682.32.

53 Mr Wong argued that discretion should not be exercised in favour of interim payment, for four reasons.

(a) First, the objectives of interim payment were not met in the present case. This was because the Plaintiff had not shown any evidence of hardship of prejudice. Indeed, there would be no prejudice to the

---

[18] Affidavit of Cheng Mun Yip Marcus (26 November 2017), at paragraph 4.

Plaintiff if interim payment was not made, in view that the Plaintiff's interests were sufficiently protected by the Interim Injunction.

(b) Second, and related to the above, the Trust Shares Sale Proceeds were already the subject of the Interim Injunction. Seeking interim payment of $3,602,200 would be to vary the Interim Injunction "via the back door".[19] This was improper and could result in contradictory court orders being made against the 1st Defendant.

(c) Third, the present dispute involved complex issues of fact or law. While this in itself was not a bar to an order for interim payment, it would not be appropriate to invoke the court's power to order interim payment where the factual and legal issues raised were difficult.[20]

(d) Fourth, there was every possibility that the Plaintiff would not be entitled to any payment in the light of the Bad Debts Agreement; in fact, depending on the valuation of Sum X, the Plaintiff may instead be liable to the 1st Defendant for $327,886.55, being the Bad Debts ($6,493,355.43) less Sum Y ($6,165,468.88) (see [40] above).

Decision on the Second Stage

54 At the Second Stage, the court has a wide discretion in deciding whether to exercise its power to grant interim payment (*American International Assurance (HC)* at [54]). Some of the factors that the court may take into consideration include the following:

---

19 1st Defendant's Written Submissions (6 March 2018) at para 96.

20 1st Defendant's Written Submissions (6 March 2018) at para 84.

(a) First, whether there is hardship, need or prejudice to the applicant (see *American International Assurance (HC)* at [54] and *Main-Line Corporate Holdings* at [32]; also see *Shearson Lehman Brothers* at 492G). Where interim payment is needed to mitigate hardship or need, or to avoid prejudice, a court would more readily exercise its discretion to order such payment. I pause here to acknowledge that the Court of Appeal had held in *Main-Line Corporate Holdings* that it may not be necessary for an applicant to show need or prejudice before an interim order may be made. However, this proposition has to be understood in its proper context – it was a response to an argument that interim payment should not be ordered because the applicant had not suffered any hardship. As the Court of Appeal observed, there was no basis for such a restriction on the court's discretion (*Main-Line Corporate Holdings* at [32]). It is also important to note that the Court of Appeal did not at any point state that hardship, need or prejudice was irrelevant or no longer a factor for consideration in assessing whether interim payment should be ordered; indeed, quite the contrary, the Court of Appeal expressly recognised that need or prejudice was the "usual basis" for seeking interim payment (*Main-Line Corporate Holdings* at [32]).

(b) Second, whether liability had already been established in the proceedings. If liability had been established, as was the case in *Main-Line Corporate Holdings*, it would be "generally appropriate and just to make an interim order where there will be some delay until the final disposal of the case" (*Main-Line Corporate Holdings* at [33]).

(c) Third, whether the case discloses sufficient complex issues of fact and law that require resolution by trial, although this factor would not preclude the ordering of interim payment if there is evidence establishing with reasonable certainty the minimum sum that the applicant is likely to recover at trial (*American International Assurance (CA)* at [32]).

55 I turn now to the present facts. Even assuming that the Plaintiff had successfully established the First Stage, I do not think that discretion should be exercised in favour of ordering interim payment, because I am not satisfied that any of the three factors outlined above (or, indeed, any other relevant factor) operate in favour of ordering interim payment.

(a) First, Mr Low did not demonstrate any hardship, need or prejudice to the Plaintiff. In my view, there appears to be no (or negligible) prejudice to the Plaintiff because the Interim Injunction is already in place to protect the Plaintiff's interests insofar as the present suit is concerned.

(b) Second, the main plank of Mr Low's argument was that the Plaintiff had a strong case for repayment of the $3,602,200, and that it would be appropriate to order interim payment because there would be some delay before the case is finally disposed of. However, it must be kept in mind that unlike in *Main-Line Corporate Holdings*, liability has not yet been established in the present case; as such, this factor would not operate with equal strength here. Indeed, the existence of the 1st Defendant's counterclaims – which must certainly be considered at the Second Stage regardless of whether they are independent counterclaims

or otherwise – means that the Plaintiff might not ultimately be awarded the $3,602,200 sought.

(c) Third, there are legal and factual issues that require resolution by trial. It would not be possible to determine these issues without engaging in a microscopic examination of the facts, some of which are disputed. For instance, it is not possible to determine the veracity of the arguments concerning the Bad Debts Agreement (whether as a defence, a counterclaim amounting to a set-off, or an independent counterclaim) in these interlocutory proceedings. It is also not possible to assess the validity of the Trust Deed without the benefit of the trial, given that the 1st Defendant has contended that it was signed by mistake and has cited numerous factual circumstances surrounding its signing. Before me, there is insufficient evidence to establish with reasonable certainty the minimum sum that the Plaintiff is likely to recover at trial.

Conclusion

56 I therefore dismiss the Application, and will hear parties on costs.

Justin Yeo
Assistant Registrar

Mr Low Chai Chong, Mr Zhulkarnain Abdul Rahim and Ms Michelle Lee Ying-Ying (Dentons Rodyk & Davidson LLP) for the Plaintiff;
Mr Wendell Wong, Ms Denise Teo and Ms Evelyn Tan (Drew & Napier LLC) for the 1st Defendant.