IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2021] SGCA 100

Civil Appeal No 29 of 2021

Between

(1) Lim Oon Kuin
(2) Lim Huey Ching
(3) Lim Chee Meng

… *Appellants*

And

Ocean Tankers (Pte) Ltd
(Interim Judicial Managers Appointed)

… *Respondent*

In the matter of Suit No 630 of 2020 (Summons No 4234 of 2020)

Between

Ocean Tankers (Pte) Ltd
(Interim Judicial Managers Appointed)

… *Plaintiff*

and

(1) Lim Oon Kuin
(2) Lim Huey Ching
(3) Lim Chee Meng

… *Defendants*

GROUNDS OF DECISION

[Companies] — [Directors] — [Duties]
[Civil Procedure] — [Summary judgment]
[Civil Procedure] — [Costs] — [Indemnity costs]

TABLE OF CONTENTS

Lim Oon Kuin and others
v
Ocean Tankers (Pte) Ltd (interim judicial managers appointed)

[2021] SGCA 100

Court of Appeal — Civil Appeal No 29 of 2021
Andrew Phang Boon Leong JCA and Tay Yong Kwang JCA
14 September 2021

28 October 2021

Andrew Phang Boon Leong JCA (delivering the grounds of decision of the court):

Introduction

1 Expediency is the key rationale that underpins the summary judgment mechanism provided for in our civil procedure rules. This, however, requires that the court be *satisfied* that any defence raised to the plaintiff's claim is ***wholly unsustainable***. Anything short of this is insufficient: expediency *cannot*, and indeed *should not*, give way to equivocality. There is of course good reason for this. Summary judgment entails the determination of the parties' substantive rights without the need for ventilation at trial. The corollary of this is that where there are triable issues or questions, leave to defend ought ordinarily to be granted to allow evidence to be fully adduced and for arguments to be fully canvassed. While this may be *often described* as a ***low*** threshold, it ought however not to be considered an unduly ***lax*** one where even arguments

tantamount to fictions could pass legal muster. This last-mentioned point bears particular emphasis in this case – particularly in light of the nature of the arguments that have been prayed in aid of the present appeal (as we shall see below).

2 The present appeal stemmed from the widely publicised financial troubles of Ocean Tankers (Pte) Ltd ("OTPL") and its sister company, Hin Leong Trading (Pte) Ltd ("HLT"). OTPL is a ship charterer and ship-management company, operating a fleet of vessels and HLT is an oil-trading company, both companies having been incorporated in Singapore. A concatenation of events led to both companies being placed under compulsory liquidation. But leading up to this, and relevant for the present purposes, was OTPL's and HLT's application for interim moratoria relief under s 211B of the Companies Act (Cap 50, 2006 Rev Ed) (the "Act"), which was subsequently withdrawn. In addition, interim judicial managers were later appointed over OTPL and HLT, pursuant to applications filed in HC/OS 452/2020 ("OS 452") and HC/OS 417/2020 ("OS 417"). It was during this time, while the interim judicial managers were appointed, that OTPL commenced HC/S 630/2020 ("the Suit") against Mr Lim Oon Kuin ("Oon"), Ms Lim Huey Ching ("Huey") and Mr Lim Chee Meng Evan ("Chee") (collectively, "the Lims") alleging, among other things, that the Lims had breached their fiduciary duties owed to OTPL.

3 Subsequently, OTPL applied for summary judgment of its claims in the Suit pursuant to O 14 of the Rules of Court (2014 Rev Ed) ("the Rules"). We shall refer to this as the "O 14 Application". In the General Division of the High Court, the judge ("the Judge") granted OTPL the summary judgment that it sought against the Lims, by way of an oral judgment ("the Judgment"). The Judge was satisfied that OTPL had made out its claim for breach of fiduciary

duties on a *prima facie* basis and that the Lims had failed to raise a *bona fide* defence.

4 Dissatisfied, the Lims brought the present appeal against the Judgment. In that ill-advised attempt to seek a different outcome, the Lims repackaged what were essentially the same arguments raised before the Judge. This effort to pour old wine into new wineskins was coupled with them seeking, quite impermissibly, to resile from admissions that they themselves had unreservedly made previously. The entire conduct of this litigation has led to an immensely unsatisfactory state of affairs. We shall elaborate on this below, but it suffices to state at the present juncture that the Lims' attempt, had it been permitted, would have represented a patent disregard for the court's processes that *ought not* to, and *could not*, be condoned.

5 At the conclusion of the hearing, we accordingly dismissed the Lims' appeal against the Judgment with brief oral grounds and stated that we would furnish our full grounds of decision in due course. This, we now do.

Background to the Suit

6 In summary, the Suit centred around two payments of US$15.02m and US$4m ("the Payments") made by OTPL on 3 April 2020 and 13 April 2020, respectively. At the material time, the Lims were the sole directors of OTPL, and Oon and Huey were its shareholders. These Payments were made from OTPL's accounts, which the Lims procured OTPL to make, to accounts related to the Lims. Specifically, the payment of US$15.02m was made from OTPL's Bank of America ("BoA") account to a Deutsche Bank account in the joint names of Oon and Huey, while the payment of US$4m was made from OTPL's BoA account to a Maybank account in the name of Chee. Chee and Huey

approved the Payments on both occasions. It was the interim judicial managers appointed over OTPL who uncovered the Payments after having conducted internal investigations.

7 In the Suit, OTPL impugned the Payments on the basis that they were made at an undervalue and/or constituted unfair preferences under s 227T of the Act read with ss 98 and 99 of the Bankruptcy Act (Cap 20, 2009 Rev Ed). In the alternative, OTPL contended that by procuring the Payments, the Lims breached their fiduciary duties owed to OTPL.

The O 14 Application

8 OTPL then took out the O 14 Application for summary judgment of its claims in the Suit. OTPL's argument in respect of its claim for breach of fiduciary duties may be simply stated. First, it asserted that OTPL was either insolvent or close to insolvency at the material time. Secondly, and as a result of OTPL's parlous financial position, the Lims, as directors of OTPL, owed fiduciary duties to take into account the interests of OTPL's creditors to ensure that its assets were not dissipated or exploited for their own benefit, to the prejudice of the interests of the creditors. In procuring the Payments, the Lims thus breached their fiduciary duties. OTPL therefore sought equitable compensation on that basis.

9 In response, the Lims resisted the application on the basis that OTPL was neither insolvent nor close to insolvency at the time the Payments were made and, that in any event, the Lims were not privy to OTPL's financial state of affairs at the material time. They submitted that these invariably raised triable issues so as to militate against the grant of summary judgment, such issues being suitable for determination at trial.

10 On 13 April 2021, the Judge delivered the Judgment in clear and comprehensive terms, allowing the O 14 Application. The Judge rejected OTPL's first ground on the basis that a cause of action under s 227T of the Act vests only in the judicial manager upon the making of a judicial management order, rather than in an interim judicial manager. As a result, the claim for transactions at an undervalue and/or an unfair preference had been commenced prematurely. However, on OTPL's second ground, the Judge found that OTPL had made out a *prima facie* case on its alternative claim for a breach of fiduciary duties, and that the Lims had failed to raise a *bona fide* defence. The Judge held that at the time the Payments were made, and at least in the months preceding the Payments, both HLT and OTPL were in a parlous financial situation. As directors of OTPL, the Lims clearly knew of its mounting financial problems, but nevertheless procured the Payments to be made. They had thus breached their fiduciary duties owed to OTPL. OTPL was thus entitled to elect between equitable compensation and an order for account together with a tracing order.

Our decision

The relevant legal principles on fiduciary duties

11 It is well-established that directors of a company owe fiduciary duties to act in the best interests of the company as a whole. But these duties take on a different complexion when a company becomes insolvent or is in a parlous financial position. Directors have a duty to consider the interests of creditors where a company is in a parlous financial position or in a state of near insolvency, as this court's decisions in *Liquidators of Progen Engineering Pte Ltd v Progen Holdings Ltd* [2010] 4 SLR 1089 ("*Progen*") and *Dynasty Line Ltd (in liquidation) v Sukamto Sia and another and another appeal* [2014] 3 SLR 277 ("*Dynasty Line*") make clear. This duty "requires directors to ensure that the company's assets are not dissipated or exploited for their own benefit

to the prejudice of creditors' interests" and is a duty that "mirrors that of the avoidance provisions in seeking to preserve the company's assets for distribution to the company's creditors through the mechanism of insolvency" (see *Progen* at [48], citing the House of Lords decision in *Winkworth v Edward Baron Development Co Ltd* [1987] 1 All ER 114 at 118). The greater the concern over the company's financial health, the more weight the directors must accord to the interests of creditors over those of the shareholders (see the High Court decision in *Parakou Shipping Pte Ltd (in liquidation) v Liu Cheng Chan and others* [2017] SGHC 15 ("*Parakou Shipping*") at [62], citing *Dynasty Line* at [34]). The basis for the duty lies in the coincidence of the company's interests and its creditors' interests where a company is financially imperilled. This is because the company is, at that particular point in time, effectively trading and running the company's business with the creditors' money (see *Progen* at [52]). To be clear, these duties are duties still properly *owed to the company*, such that individual creditors cannot, without the assistance of liquidators, directly recover from the directors for such breaches of duties (see *Progen* at [52]). As V K Rajah JA, delivering the judgment of the court, further explained in *Progen*, where related parties have benefitted from priority payments, the law will usually view such transactions "with a good measure of scepticism" especially where they "appear to undermine the collective procedure of insolvent liquidation" (at [3] and [47]).

12 When assessing a company's solvency for this purpose, a broader inquiry is adopted, taking into account the surrounding circumstances of the case. A strict and technical application of the "going concern" test and the "balance sheet" test is, therefore, of limited utility (see *Dynasty Line* at [33]). Put differently, a company need not be technically solvent, and it is sufficient "if the company is in a parlous financial position or perilously close to being

insolvent" (see *Parakou Shipping* at [65], citing *Progen* at [48] and [52]). The question is simply whether the company is in fact financially imperilled at the material time. The purpose of such a broad-based assessment is to prevent errant directors of a company from relying on the technical balance sheet and/or cash flow tests to escape liability for their breaches of duties in relation to the interests of the company's creditors (see the High Court decision in *Traxiar Drilling Partners II Pte Ltd (in liquidation) v Dvergsten, Dag Oivind* [2019] 4 SLR 433 at [89]). Further, the interests of creditors cannot be considered in an arid and technical way as if all such considerations are irrelevant and capable of being ignored until and unless the company is found to be technically insolvent and, indeed, "as long as there are reasons to be concerned that the creditors' interests are or will be at risk because of difficult financial circumstances, ***the directors ignore those interests at their peril***" [emphasis added] (see *Dynasty Line* at [35]).

Analysis

13 In our judgment, we agreed with the Judge that OTPL had demonstrated on a *prima facie* basis that the Payments were made at a time when OTPL was insolvent or near insolvent, or at the very least in a parlous financial position, such that the Lims had breached their fiduciary duties. The Lims were also unable to raise a *bona fide* defence. Accordingly, OTPL was entitled to summary judgment on its claims. The Lims' riposte to OTPL's arguments was that OTPL *was* in fact solvent, and they appeared to proceed on the orthodox balance sheet test or the cash flow test to contend so. This, in our view, was untenable for two main reasons: (a) first, the admissions of insolvency from the affidavits filed, and (b) secondly, the fact that OTPL was clearly in a financially parlous position at the time the Payments were disbursed. Let us explain.

14 We begin with the admissions that were made in the affidavits filed. As alluded to above, forming quite an important context and preceding the commencement of the Suit, were HLT's and OTPL's applications filed on 17 April 2020 seeking interim moratoria relief under s 211B of the Act. These applications were made to prevent, amongst other things, any legal proceedings from being commenced against the companies without the leave of court. Oon and Chee both filed affidavits in HC/OS 405/2020 ("OS 405") and HC/OS 406/2020 ("OS 406") *in support of* HLT's and OTPL's applications respectively (collectively, "the Moratorium Affidavits"). The Moratorium Affidavits formed an integral part of the Judge's reasoning in the Judgment. After all, the Moratorium Affidavits were filed just 14 days after the payment of US$15.02m and four days after the payment of US$4m. This is crucial because, as the Judge pertinently observed, the proximity in time of the Moratorium Affidavits to the Payments provides clear insight into *first*, the financial health and solvency of OTPL, as sketched out by the Lims themselves and *secondly*, what the Lims themselves understood and perceived to be the prevailing financial situation of the companies at the material time. We agree entirely.

15 It also bears mention that OTPL's and HLT's applications to be placed under judicial management *vide* OS 452 and OS 417 were supported by affidavits filed by Chee. The contents of these affidavits were broadly similar to those contained in the Moratorium Affidavits and bolster our observations below. This is significant because an application for a company to be placed under judicial management is premised on a company being unable or likely to become unable to pay its debts, pursuant to s 227B(1)(*a*) of the Act, and the grounds supporting the applications in OS 452 and OS 417 were the same or

substantially similar to those relied upon in the applications in OS 405 and OS 406.

16 In essence, the Moratorium Affidavits stated that HLT and OTPL were *both* facing substantial financial difficulties. The exact liabilities of HLT, which ran into the sum of US$4.05 billion, were clearly and thoroughly detailed in the Moratorium Affidavits. HLT's secured creditors and the total outstanding debt owed were also specifically identified. A variety of reasons for the financial difficulties were even voluntarily proffered to the court. This did not stop with HLT either. Chee's affidavit filed in support of OS 406 stated that "*HLT's financial woes have impacted OTPL heavily*" [emphasis added]. To that end, it was stated that OTPL had approximately US$58,501,604 in liabilities to trade creditors, and the figures did not even "include the potential liability which OTPL now faces as a result of the bills of lading issued by OTPL in respect of the trades entered into by HLT". Viewed holistically, it can hardly be gainsaid that the entire purpose and tenor of these Moratorium Affidavits was to demonstrate that HLT ***and*** OTPL were both, at the material time, in a *parlous financial state*.

17 Before the Judge, the Lims sought to backtrack from the positions taken in the Moratorium Affidavits, arguing that OTPL was not insolvent at the time when the Payments were made. The Judge rejected these arguments, holding that the Lims "must be held to the position that they took *on oath for the purpose of seeking statutory protection* under s 211B" [emphasis in original]. We are in full agreement with the observations made by the Judge. In the present appeal, the Lims again took a different stance in relation to the Moratorium Affidavits, which may be summarised as follows:

(a) The Moratorium Affidavits merely showed that it was HLT which was embroiled in financial trouble, and not OTPL.

(b) OTPL filed the application in OS 406 seeking interim moratorium relief under s 211B of the Act because it needed to protect its vessels from being arrested and not because it was insolvent.

(c) OTPL's solicitors at the time, Rajah & Tann Singapore LLP ("R&T"), had not advised that OTPL was insolvent or that it be restructured until 15 April 2020.

(d) The proposed restructuring of OTPL did not mean that it was insolvent.

18 In our view, these arguments were simply misplaced, and we rejected them for three reasons. First, the Lims clearly misconstrued the Moratorium Affidavits. For instance, they made the argument that "it was not even suggested" in OTPL's affidavits that HLT's financial difficulties gave the Lims reason to be concerned over OTPL's insolvency. This runs counter to the very language of the Moratorium Affidavits themselves. Secondly, the Lims skirted past the valid points raised by the Judge, to which they had no satisfactory response. For instance, the Judge observed that the Moratorium Affidavits closely mirrored the substance of the supporting affidavits subsequently filed by HLT and OTPL in OS 452 and OS 417 for the purpose of being placed under judicial management (see [2] and [14] above); crucially, the latter were premised on the insolvency of the companies. Yet, this point was left wholly and woefully unaddressed by the Lims. This neatly disposed of the second to fourth points raised by the Lims. Finally, the evidence shows that OTPL *was* affected by HLT's financial woes and did in fact face financial troubles of its own. This is a key point to which we now turn.

19 The Lims sought to distance OTPL's financial situation from HLT's mounting financial woes, primarily on the following grounds:

(a) First, that OTPL's role was circumscribed only as a ship-chartering and management company owned by a group of companies, comprising of Xihe Holdings Pte Ltd, Xihe Capital Pte Ltd and their subsidiaries ("the Xihe Group"), and a number of ship-holding special purpose vehicles owned by the Lims ("the SPVs"). Historically, most of its cargoes were carried for third parties and not HLT.

(b) Secondly, if OTPL had indeed encountered any liquidity issues, the Xihe Group and the SPVs could have provided unsecured, interest free personal loans to OTPL. The fact that OTPL did not think to request for such funds from Xihe Group represents cogent evidence that it did not in fact need such funds.

(c) Thirdly, during the discussions with HLT's and OTPL's then-solicitors, R&T, from 5 April 2020 to 17 April 2020, the Lims had constantly sought R&T's advice on the restructuring of HLT, OTPL and their related companies. The focus of the discussions was on HLT's liquidity issues with no discussion on the liquidity of OTPL. R&T's position was also that there was no indication that OTPL was in financial distress.

20 However, the Lims' argument begins to fall apart at the seams, irrespective of whether we look at it from either the perspective of HLT's or OTPL's own financial woes. To begin with, the parties did not dispute that HLT was insolvent at the time of, and in the months leading up to, the Payments. Indeed, counsel for the Lims candidly accepted at the hearing before us that HLT was at the time facing an *existential* threat. This was owing to, amongst

other things: (a) the fact that bank lenders had withdrawn or reduced credit lines to HLT as a result of decisions to reduce exposure to or exit the commodity trading market, (b) the collapse in oil prices between the end of 2019 and 31 March 2020 that placed a strain on HLT's liquidity, (c) the COVID-19 pandemic that had severely disrupted the operations of both HLT and OTPL, resulting in a significant decrease in demand for oil and bunkers and (d) that HLT's financial statements did not reflect about US$800m in future losses that HLT had sustained over time, as a result of instructions given by Oon. In our view, this would inevitably have had an impact on OTPL, given that its business was *highly intertwined* with that of HLT's.

21 We deal first with the point centring on OTPL's role in the Xihe Group as being separate from HLT. With respect, this appeared to us to be an argument that was rife with misdirection on the part of the Lims. In this regard, we agreed with the Judge's observation at [20] of the Judgment, as follows:

> … OTPL's sea transportation expertise 'allowed HLT [with its trading capabilities and network] to optimise and synergise' the sale and purchase of physical oil. As a result, significant intercompany receivables of about US$185,054,244 were owed by HLT to OTPL as at 29 February 2020. Based on OTPL's balance sheet, the receivables from HLT were by far the single largest debt owed to OTPL. Accordingly, putting to one side the fact that HLT and OTPL conducted significant business together, HLT's ability to make payment of its indebtedness to OTPL would have clear implications for the financial health of OTPL.

22 The Lims simply relied on their own affidavits (for example, Chee's affidavit filed in the O 14 Application) to assert these "historical" figures. Similarly, OTPL's second point centring on the possibility of unsecured personal loans from the Xihe Group also faces the problems from mere assertion without more – in particular, such a possibility is based solely on Chee's affidavit that that was the practice, without any real proof as such.

Indeed, as OTPL points out, the Lims had "entirely failed to prove the existence of such practice or that they had access to sufficient cash". The Lims' argument that OTPL was solvent because it *could* have but *opted not to* tap on such a practice is circuitous and does not address the fact that OTPL eventually *did* face financial difficulties. Finally, this bare assertion is not sufficient as a defendant seeking leave to defend must "adduce some evidence, direct or indirect, to support the bare assertions made in his affidavit" and mere logical possibility alone is insufficient (see the decisions of the High Court in *Goh Chok Tong v Chee Soon Juan* [2003] 3 SLR(R) 32 at [25]; *M2B World Asia Pacific Pte Ltd v Matsumura Akihiko* [2015] 1 SLR 325 at [19]; *Wiseway Global Co Ltd v Qian Feng Group Ltd* [2015] SGHC 85 at [33]; and *Calvin Klein, Inc and another v HS International Pte Ltd and others* [2016] 5 SLR 1183 at [45]).

23 In so far as the Lims' point regarding the discussions with R&T was concerned, this simply took the time period concerned out of context. The repeated emphasis by the Lims here appeared to be that R&T had not received any express instructions relating to *OTPL's* financial woes and that there was no suggestion that OTPL was insolvent or close to insolvency. This argument, however, erroneously presumed that HLT's financial problems were divorced from that of OTPL's, which is the very matter that OTPL was seeking to prove in this case. Further, if it is accepted that OTPL was not facing financial woes simply because it was not expressly mentioned, by the same token, it must then be asked why the Lims had expressly sought to restructure the companies *as an entire group*, instead of confining the inquiry only to HLT. The fact that the Lims were focussed more on HLT is quite natural, and indeed unsurprising, given the circumstances at the time. That, however, does not mean that the concerns regarding OTPL's financial situation were or could be completely ignored.

24 OTPL was also said to face significant contingent liabilities. However, that is not all. The Moratorium Affidavits also made clear that a significant portion of contingent liabilities was a result of Oon's own conduct, and certainly that his conduct raised the real prospect of liability being visited upon OTPL (as well as HLT). As detailed in the Judgment, these contingent liabilities related to: (a) cargo carried by OTPL for HLT, with such cargo having been discharged by OTPL on Oon's instructions and/or on the basis of letters of indemnity issued by HLT to OTPL rather than to the holders of the bills of lading and (b) inventory stored in Floating Storage Units ("the FSU Inventory"). These amounted to a contingent exposure of potentially US$2.67bn. The Lims' response to this was as follows:

(a) OTPL had a practice of discharging cargoes on letters of indemnities from HLT. Its auditors had known about this but did not consider it necessary to mention any potential exposure in the audited financial statements ("AFS"). OTPL's position was also not such that the information should have been disclosed in the AFS.

(b) These matters were not, in fact, contingent liabilities. This was because the auditors had not included them in the AFS; the Singapore Financial Reporting Standard ("FRS") defines contingent liability as a "possible obligation that may arise pending the outcome of a future event" – which is a lower standard than that which is probable. Further, the Lims' lawyers, R&T, who had acted for them for 23 years did not discuss such matters at a meeting on 8 April 2020.

(c) There was no evidence that there was any information about such matters as at the date of the Payments which made it possible to form a commercial view and take these liabilities into account.

25 In our view, the fact that OTPL may have had a practice of discharging cargoes on indemnity letters from HLT did not dispel the fact that there *was* potential contingent exposure. At its core, the cargoes and the FSU Inventory were subject to conflicting claims by the holders of the bills of lading. OTPL had opted to discharge the cargoes *even though* the holders remained unpaid. That is what gave rise to the contingent liability. Such liability was not removed simply because the auditors had failed to include such sums in the AFS and R&T had failed to bring this up on 8 April 2020.

26 Further, the Lims' points raised here were in effect, an attempt to resile from Oon's admission on oath that his conduct had "raised the real prospect of liability being visited upon OTPL" (see the Judgment at [31]). In fact, the Judge emphasised repeatedly that this had been acknowledged by Oon. The Lims cannot simply now assert that these were not contingent liabilities, and further that they were not aware of them. Certainly, and as the Judge observed, the Moratorium Affidavits made clear that it was Oon's own conduct that had led to the contingent liabilities, and this being the case, the Lims must have known that the liabilities were real and significant, regardless of whether they had the time or the opportunity to fully assess them at the time OS 405 and OS 406 were filed (see the Judgment at [32]). This also deals with the Lims' argument that there was insufficient information at the time that the Payments were made. For completeness, we also agreed with the Judge's findings in the Judgment that the Lims had expressly acknowledged that most if not all of the cargo that was given as security *had been wrongfully sold*. The necessary implication, as the Judge also found, was that the Lims believed that the liability was "*real substantial, and imminent*" [emphasis in original] (see the Judgment at [32]).

27 It is also telling, in our judgment, that the Lims had proffered no satisfactory response to the Judge's observation that because OS 405 and

OS 406 were filed in a rush under s 211B of the Act seeking interim moratoria relief, this constituted a clear admission that the Lims had perceived such risks to be real, especially given that debtors were seeking relief under s 211B of the Act *precisely* because they "[needed] *urgent* protection from claims by creditors" [emphasis in original] (see the Judgment at [33]). Indeed, the moratorium afforded under s 211B of the Act is conditional upon the statutory conditions being met, and relevant for present purposes are (a) if a compromise or arrangement had been or was intended to be proposed, (b) the applicant undertook to file an application under s 210(1) of the Act for the compromise to be voted on at a meeting of creditors and (c) there was evidence of creditor support for the proposed compromise or the continuation of the moratorium (in the event that a compromise was intended to be proposed but had yet to be proposed), the latter requirement being a strong indicia that an application under s 211B of the Act was for the purpose of formulating a debt restructuring plan. As the Judge stated at [36] of the Judgment, with which we agree entirely, the restructuring plan bore the classic hallmarks of a company in financial distress:

> [Oon's] and [Chee's] affidavits in OS 405 and OS 406 make it clear that the restructuring plan that was contemplated involved the proposed injection of fresh liquidity and the restructuring of liabilities and debt obligations. [Chee] states that OTPL would work on developing a 'debt restructuring plan' consisting of the raising of additional capital — through debt financing, the sale of assets, and the injection of cash and assets by investors and assets by the Lim Family — and schemes of arrangement for the debts of HLT and OTPL. The schemes would likely involve disposing non-core assets, procuring further banking facilities, converting part of existing debt into long-term sustainable debt, writing off debt that was not sustainable, and/or restructuring or rescheduling sustainable debt. It is plain that the [Lims] were looking to raise liquidity and assets from various sources, including third parties and themselves, and to restructure, write down and reschedule debts and liabilities of OTPL and HLT. A large part of such liabilities were the contingent liabilities. It cannot be gainsaid that the plan bore the classic hallmarks of a company in financial distress; an insolvent company.

28 For completeness, we deal with a final point that was pursued by the Lims in oral arguments before us. This particular aspect of OTPL's argument was that the Payments were made in the exercise of Oon's rights as a creditor to "demand payment and to instruct how monies due to him are to be paid". Oon argued that he had supported OTPL by providing "unsecured and interest free loans" over the years, amounting to approximately US$225m as at 31 March 2020. The Payments were part repayments of those loans. Such shareholder's loans from Oon ought to be properly regarded as equity in OTPL's balance sheets. Yet, as the Judge also rightly noted, the shareholder's loans would nevertheless be considered debts in the context of insolvency, and at the very least would be considered contingent liabilities that would be properly considered for the purposes of the balance sheet test (see the decision of the High Court in *Kon Yin Tong and another v Leow Boon Cher and others* [2011] SGHC 228 at [39]–[40]). In addition, we agree with OTPL that the shareholder's loans were, in fact, regarded as debts, as is made clear from the Lims' own Defence filed in the Suit, averring that the shareholder's loans were "repayable on demand" and that Oon had "all the rights of a creditor" to recall them.

29 The analysis above led us to conclude that the Lims did not have a *bona fide* defence to the *prima facie* case raised by OTPL. That sufficed to dismiss the present appeal. We return, however, to a point that we made at the beginning: the Lims' conduct of the present litigation. We consider it apposite, more generally, to also provide some views on the principles of summary judgment.

Observations on the conduct of the litigation

30 We are cognisant that the threshold for granting summary judgment is a high one, and it must be clear that there is no real substantial question to be tried further (see *Singapore Civil Procedure 2020* vol 1 (Chua Lee Ming gen ed) (Sweet & Maxwell, 2020) ("*Singapore Civil Procedure*") at para 14/4/5). We are also cognisant of the fact that an appellate court hearing an appeal against an order granting summary judgment ought not to regard the appeal as reviewing the exercise of the judge's discretion but should approach the appeal as a rehearing (see *Singapore Civil Procedure* at para 14/4/41, citing the Malaysian Supreme Court decision of *Koh Siak Poo v Perkayuan OKS Sdn Bhd and others* [1989] 3 MLJ 164 at 165).

31 In the same vein, however, this does not mean that any appeal *should* simply be brought against a summary judgment granted, without due regard to the merits of the case. What underpins the enquiry is that there cannot be any dispute as to facts or law that raises a reasonable doubt that the plaintiff is entitled to judgment (see *Singapore Civil Procedure* at para 14/4/5). This remains true even on appeal and a court would not grant leave to defend if all the appellant provides is a mere assertion, bereft of any *factual* or *legal* basis.

32 Two interconnected points arise out of this. First, if an appeal is brought against a decision granting summary judgment, it is incumbent on the appellant to raise *reasonable* points and, where available, evidence to support the assertions that are made, in order to ***validly*** raise a triable issue or question that would warrant ventilation at a full trial. Secondly, and relatedly, it simply would *not generally suffice* for an appeal to be mounted based on the *exact same* arguments that were raised before the judge in the lower court. The need to conduct the appeal as a rehearing in summary judgment applications relates to

the *approach* taken by an appellate court; however even then, the observations of the lower court judge cannot simply be disregarded. In doing so, all the appellant is asserting is that it *disagrees* with the judge for the *very reasons* that it raised before the judge; in other words, an appellant would, in the general course of things, be simply impermissibly seeking a second bite of the cherry before a differently empanelled *coram*. It is only in the situation where a gravely demonstrable error has been committed that the same arguments on appeal *may* suffice. These points appeared to have been overlooked by the Lims who had, in an unfortunately long and rambling appellants' case, tracked the same arguments made before the Judge. These were arguments that were *raised*, ***considered***, and ***rejected*** by the Judge. This approach was not helpful, least of all with regard to the Lims' own case.

33 It bears pointing out that the Lims' main arguments on appeal were aimed at slicing and dicing the timelines so finely and intricately such as to show that there were no concerns regarding OTPL's state of affairs. This was most evident from the fact that they pointed to R&T's letter that stated that it was "on or about 13 April 2020 … that OTPL began to see the knock-on effect of HLT's financial troubles", as proof that "the first time the question of the effect of HLT's difficulties on OTPL" arose after the first payment of US$15.02m and possibly after the second payment of US$4m. This, however, was highly improbable. The fact remains that Oon had acknowledged on affidavit that HLT was unprofitable during the past few years, and that he had given instructions not to reflect approximately US$800m in futures losses that it had sustained. It was simply inconceivable that as directors in *both* HLT and OTPL, the Lims would have been unaware of how closely the two companies worked, and that any troubles by HLT would inevitably spill over to OTPL. There was nothing to be gained by running a case in this unhelpful manner.

34 The Lims' treatment of their very own concessions made in the interim moratoria and judicial management applications was, quite simply, worthy of the strongest disapprobation. One clear example was the production of the expert report ("the Report") prepared by Mr Jonathan Humphrey ("Mr Humphrey"), an expert engaged by the Lims to provide his opinion on OTPL's balance sheet. The Report, however, was completed and issued on 6 November 2020, a considerable period *after* HLT and OTPL had begun facing financial difficulties, and *after* the interim moratoria and judicial management applications had been filed. The assessment of OTPL's financial problems ought to have been made with regard to the information available at the time that the Payments were made. Further, the Report was also clearly aimed at *contradicting* the Moratorium Affidavits, without due regard to the fact that the contingent liabilities arose due to Oon's conduct that he had himself admitted to on oath. As the Judge observed, the report was nothing less than an attempt "to reconstruct the balance sheet *ex post facto*" and "an attempt to conceive a defence where there is none" (see the Judgment at [47]). We echo this observation.

Costs

35 This sufficed to dispose of the present appeal. But we also considered, for completeness, the issue of costs since OTPL sought an order that the Lims bear the costs of the appeal on the indemnity basis, citing the Lims' unreasonable conduct of the present appeal. OTPL thus asked us to exercise our discretion under O 59 r 27 of the Rules to award costs against the Lims on an indemnity basis. We agreed with OTPL's submission.

36 A court, in deciding whether to make an order for indemnity costs, should necessarily have regard to *all the circumstances of the case*, with the

touchstone being that of *unreasonable conduct*, as opposed to conduct that attracts moral condemnation (see the English High Court decision of *Three Rivers District Council v The Governor and Co of the Bank of England (No 6)* [2006] EWHC 816 (Comm) at [25]). Some examples of unreasonable conduct include situations where (a) the action is speculative, hypothetical or clearly without basis, (b) a party's conduct in the course of proceedings is dishonest, abusive or improper, or (c) where the action amounts to wasteful or duplicative litigation or would otherwise constitute an abuse of process (see the decision of the High Court in *Airtrust (Hong Kong) Ltd v PH Hydraulics & Engineering Pte Ltd* [2016] 5 SLR 103 at [22] and [49]). While such a discretion to order indemnity costs "is unfettered, it must necessarily be exercised judicially" (see the decision of the High Court in *CIMB Bank Bhd v Italmatic Tyre & Retreading Equipment (Asia) Pte Ltd* [2021] 4 SLR 883 at [222]).

37 In recent times, this court has also repeatedly observed that the existence of an appeal mechanism "should not be interpreted as giving litigants (and counsel) *carte blanche* to pursue arguments that are wholly unmeritorious, devoid of any legal and factual basis" (see *Tecnomar & Associates Pte Ltd v SBM Offshore NV* [2021] SGCA 36 at [29]; see also the same point made in differing contexts in *Dextra Partners Pte Ltd and another v Lavrentiadis, Lavrentios and another appeal and another matter* [2021] SGCA 24 at [7]–[9]; *Ong Jane Rebecca v Lim Lie Hoa and other appeals and other matters* [2021] 2 SLR 584 at [57]; *Mah Kiat Seng v Public Prosecutor* [2021] SGCA 79 at [73]–[74]; and *Miya Manik v Public Prosecutor and another matter* [2021] SGCA 90 at [1]). Regrettably, this was such a case.

38 Following from our observations on the Lims' conduct of the present appeal as described above, we deemed this an appropriate case to award costs against the Lims on an indemnity basis. The Lims' arguments, with respect,

were simply without any factual or legal basis, given the fact that they were simply irreconcilable with the contemporaneous documents placed before the court. Indeed, the Lims' arguments that the Moratorium Affidavits did not disclose such insolvency and that OTPL was not insolvent because the Lims would procure cash for OTPL to meet its needs ran contrary to their own depositions made on oath in affidavits to the effect that OTPL was insolvent, or at least in a parlous financial state at the time the Payments were disbursed. In arriving at our decision, we also considered it relevant that the Lims had enlisted expert witnesses to provide a panoply of reasons as to why OTPL ought to be considered solvent at the material time. Apart from disregarding the admissions made in affidavits by the Lims, it can hardly be doubted that this has resulted in further unnecessary litigation, that has tended to obfuscate rather than to illuminate. Having had regard to the parties' submissions on costs, we awarded costs against the Lims on an indemnity basis, fixed at $42,000, inclusive of disbursements.

39 The present appeal was, in our view, a Sisyphean attempt to raise triable issues to avoid the prospect of summary judgment – one that was, by its very nature, ultimately bound to fail.

Conclusion

40 For the reasons set out above, we dismissed the appeal and made the costs order as set out above, with the usual consequential orders to apply.

Andrew Phang Boon Leong
Justice of the Court of Appeal

Tay Yong Kwang
Justice of the Court of Appeal

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