IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2021] SGCA 54

Civil Appeal No 167 of 2020

Between

M Asset Pte Ltd

… *Appellant*

And

Inngroup Pte Ltd

… *Respondent*

EX TEMPORE JUDGMENT

[Civil Procedure] — [Costs] — [Principles]

M Asset Pte Ltd
v
Inngroup Pte Ltd

[2021] SGCA 54

Court of Appeal — Civil Appeal No 167 of 2020
Tay Yong Kwang JCA, Belinda Ang Saw Ean JAD and Woo Bih Li JAD
12 May 2021

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Tay Yong Kwang JCA (delivering the judgment of the court *ex tempore*):

1 This is an appeal against the decision of the High Court in *Inngroup Pte Ltd v M Asset Pte Ltd* [2020] SGHC 197 (the "Judgment"). The dispute concerned a settlement agreement that was signed between the parties at around 2.30am on 27 June 2018 (the "Settlement Agreement"). Inngroup Pte Ltd (the "Respondent") alleged that M Asset Pte Ltd (the "Appellant") had acted in breach of the Settlement Agreement and commenced Suit No 405 of 2019 in April 2019, seeking specific performance and other reliefs.

2 The parties are the owners of adjoining shophouses. The Respondent owns 41 Hong Kong Street and the Appellant owns 42 Hong Kong Street. On 13 September 2016, the Respondent commenced an action against the Appellant relating to the use of their properties. With a view to settling the 2016 action, the parties proceeded to mediation. The successful mediation resulted in

the Settlement Agreement and the 2016 action was discontinued by the Respondent subsequently.

3 At [19] of the Judgment, the trial Judge set out the key terms of the Settlement Agreement as follows:

> (a) under clauses 1 to 3, the [Appellant] would contribute $250,000 payable in two tranches (of $100,000 and $150,000) towards the [Respondent's] cost of renovating the [Appellant's] Property;
>
> (b) under clause 4.1, the renovations would be to the [Respondent's] desired requirements and/or specifications ("the Renovation Works") and the [Appellant] would give the [Respondent] access to all floors of the [Appellant's] property;
>
> (c) under clause 4.2, both parties would apply for regulatory approval for change of use of the [Appellant's] Property and the [Respondent] would bear all the costs and expenses with respect to the submissions and applications;
>
> (d) under clause 6, the [Appellant] would lease the second to fifth storeys of the [Appellant's] property to the [Respondent] at $8,000 per month for a term of three years with rent payable three months after 1 August 2018 on the following terms for handover to the [Respondent]:
>
> > (i) the fourth and fifth storeys would be handed over by 1 August 2018 for the Renovation Works to commence;
> >
> > (ii) the second storey would be handed over by end June 2019; and
> >
> > (iii) the third storey would be handed over by end January 2020;
>
> (e) under clause 7, the [Appellant] would lease to the [Respondent] the second to fifth storeys of the [Appellant's] property at the rate of $12,000 per month for two years after the expiry of the lease in [0] above; and
>
> (f) the parties agreed to enter into a tenancy agreement to reflect the key terms set out in [0] and [0] above, with the [Appellant] giving the [Respondent] the first option to renew the tenancy agreement at the conclusion of the first five-year tenancy at the prevailing market rental rate.

4 The contemplated tenancy agreement was not signed. In 2019, the Respondent commenced the present action. The Respondent alleged that the failure to sign the tenancy agreement was caused by the Appellant's unreasonable refusal to abide by the terms of the Settlement Agreement. One of the unreasonable acts alleged against the Appellant was that it kept putting forward draft tenancy agreements which contained terms that were inconsistent with the terms of the Settlement Agreement.

5 The Appellant denied the Respondent's claim. It counterclaimed that the Respondent was in breach of the Settlement Agreement in refusing to consider its numerous proposals for the tenancy agreement and in refusing to have their dispute mediated.

6 In the trial Judge's view, there were two issues before her. The first issue was whether the Appellant was in breach of the Settlement Agreement by providing to the Respondent numerous and changing draft tenancy agreements containing terms inconsistent to the thrust of the Settlement Agreement. The trial Judge answered this in favour of the Respondent (Judgment at [166]). The second issue was whether the tenancy agreement that was to be signed between the parties was premised on the Appellant's property being used solely as a hotel, as alleged by the Appellant. The trial Judge held that there was no such agreement or understanding (Judgment at [166]). Accordingly, the trial Judge held that the Respondent succeeded in its claim and she dismissed the Appellant's counterclaim.

7 Based on the evidence at the trial, it is clear to us that the trial Judge was correct in her conclusions as to which party was in breach of the Settlement Agreement. In addition, we agree with the respondent that the appellant had

breached clause 6 of the Settlement Agreement. We therefore affirm the trial Judge's decision on liability.

8 On the question of reliefs, the Respondent abandoned its claim for specific performance due to the COVID-19 pandemic and the fact that the Appellant had decided to sign a new tenancy agreement with a company called Ink and Pixel Pte Ltd on 21 March 2019 for 24 months with effect from 1 June 2019 in respect of the second storey of the Appellant's property (which was supposed to be handed over to the Respondent by end June 2019 under the terms of the Settlement Agreement). In addition, the Respondent also held the view that it would be difficult to have to deal with the Appellant for ten years under the "five plus five" tenancy contemplated in the Settlement Agreement. Accordingly, the Respondent elected to claim damages (Judgment at [168]–[169]). The trial Judge considered the Appellant's decision to sign the new tenancy agreement with Ink and Pixel Pte Ltd to have been made in bad faith (Judgment at [156]).

9 The Respondent's head of claim for $170,000 for August 2018 to December 2019, during which period the Respondent asserted it would have been able to use each floor of the Appellant's property, was dismissed by the trial Judge (Judgment at [170], [177]). The Respondent's head of claim for loss of opportunity for a collective sale for both properties was also dismissed for being too speculative (Judgment at [172], [173]).

10 The trial Judge then went on to assess the Respondent's alternative claims for damages on the assumption that hotel usage on the Appellant's property would have commenced in February 2020 and ended in July 2028, after the last staggered handover on 31 January 2020 (Judgment at [171], [174]–

[176]). This would give the Respondent an operating period of 102 months or eight and a half years.

11 In 2016, the Respondent's entered into a tenancy agreement, intending to lease the first storey of its property to a tenant for it to operate a restaurant there (Judgment at [12]). Separately, the Respondent also entered into a lease with a company, intending for the latter to let out rooms on the second to fifth storeys of the Respondent's property (including the mezzanine floor and the roof terrace) (Judgment at [12]). After the Settlement Agreement was signed, the Respondent and Nuve Holdings Ltd ("Nuve"), a hotel operator, signed a hotel management agreement for the Respondent's property in February 2019. Nuve has been running a boutique hotel on the Respondent's property since December 2019 and occupancy was good (Judgment at [86]).

12 The trial Judge assessed the profits and losses on the basis that the Appellant's property would have been used either as a boutique hotel or a capsule hotel. Based on the expert evidence before her, if the Appellant's property was used for a boutique hotel, based on 80% occupancy rate, the Respondent's loss of profits over the ten-year period of the contemplated tenancy under the Settlement Agreement would be about $4.67m. If it was used for a capsule hotel, based on 75% occupancy rate, the loss of profits would be about $6.89m.

13 The trial Judge was of the view that the Respondent should be compensated adequately for its loss but it should not obtain a windfall at the expense of the Appellant, however reprehensible the Appellant's director's past conduct might have been. She took a pragmatic approach and worked out the average loss of profits by amalgamating the two amounts of about $4.67m and about $6.89m and dividing the total by two. That worked out to be around

$5.78m (Judgment at [174]). Bearing in mind the situation caused by the pandemic, she discounted this average by 50% to arrive at a final figure of approximately $2.89m (Judgment at [176]). The trial Judge reasoned that the projected losses were based on occupancy rates of 80% and 75% and that the intended ten-year lease would expire in July 2028. She believed that it could not be the case that the tourism market and the hotel industry would remain in the doldrums for another eight years (her judgment was delivered on 16 September 2020). She opined that there would be recovery somewhere along the way and that would improve room rates beyond the rates discounted by her at 50%.

14 We accept that there was no guarantee that the Respondent's application for a licence to operate a hotel on the Appellant's property would definitely succeed. However, the expert evidence was that it was likely to succeed considering the existing uses on the Respondent's adjoining property. The trial Judge accepted this and we see no reason to disagree with her. We also think that her approach to computing the Respondent's damages was a fair and pragmatic one in the circumstances. We therefore affirm her decision on damages.

15 On the question of costs, we are somewhat perturbed by the trial Judge's approach. She pegged the Respondent's costs at 80% of the Appellant's estimated costs, which had been worked out on an indemnity basis (as confirmed by counsel for the Appellant) and which excluded disbursements, to arrive at an award of $174,200 costs to the Respondent (see Judgment at [157]–[159] and [178]), apparently without considering all the other circumstances of the case. Apart from the costs awarded, the disbursements awarded to the Respondent came up to slightly above $58,000 (inclusive of the fees and charges of the two experts called by the Respondent).

16 The Respondent's own costs estimate was about $131,000 but this included disbursements (Judgment at [158]) which, as seen above, would be $58,000 or so. Deducting the amount for disbursements, this means that the Respondent's costs estimate, on a standard basis and without disbursements, was only in the region of $73,000. Indeed, the Respondent's costs schedule for the trial estimated costs at $71,000 and disbursements as slightly more than $60,000. The Respondent submitted before the trial Judge that the Appellant's costs estimate was exorbitant and unjustified and that if the Respondent succeeded at the trial, it was within the court's discretion to award costs closer to what the Appellant had claimed in its costs schedule, citing the Court of Appeal's decision in *Lipkin International Ltd v Swiber Holdings Ltd and another* [2016] 4 SLR 1079 at [18] ("*Lipkin*").

17 The trial Judge did not say that she was awarding costs on an indemnity basis. The trial Judge said that she agreed with and followed the approach in *Lipkin* in awarding costs to the Respondent. She pegged the costs awarded for the Respondent's claim and the Appellant's counterclaim to the Appellant's costs estimate on the indemnity basis (at $217,750), deducted 20% from that estimate and awarded the Respondent $174,200 costs accordingly (Judgment [159] and [178]).

18 However, the trial Judge appeared to have overlooked the facts and the outcome in *Lipkin*. In that case, the respondent submitted $80,000 costs plus disbursements of $2,310.30 in its estimates. The appellant submitted $60,000 costs plus disbursements of $3,932.80. Initially, the appellant estimated costs at only $45,000 but increased the amount to $60,000 after increased security for costs at $60,000 was ordered against it before the appeal.

19 After the appeal was dismissed by the Court of Appeal, the appellant submitted that costs at $60,000 were not warranted as the appeal turned purely on facts. The appellant further submitted that the costs should not even exceed the appellant's original estimate of $45,000 and that such an amount would already be generous.

20 The Court of Appeal in *Lipkin* (at [16]) agreed with the appellant that, having regard to the costs guidelines in Appendix G of the Practice Directions issued by the Supreme Court, even $45,000 for costs would be generous. The Court of Appeal went to say (at [17]) that the court may and often should take into account and assign the appropriate weight to the submissions of the parties on costs as part of the multi-factorial analysis that undergirds the exercise of its discretion in assessing and awarding costs. The Court of Appeal then made the statement (at [18], cited by the trial Judge at Judgment [159]):

> Given that the Appellant's own claim for costs would have been on the high side (at $60,000) had it prevailed, we consider this to be a factor that should be taken into account in deciding the costs payable by it now that it has failed. We therefore fix costs at $50,000 all-in (inclusive of reasonable disbursements) and make the usual consequential orders.

21 The trial Judge here added that she agreed with the Court of Appeal's approach and that it was "a timely reminder to parties that their claims for excessive, inflated or unjustified costs can backfire on them" (Judgment at [159]).

22 It can be seen that in the outcome, the Court of Appeal in *Lipkin* not only did not award costs at the respondent's higher amount of $80,000, it also did not award the amount estimated by the unsuccessful appellant at $60,000. Instead, the Court of Appeal, after considering all the circumstances in that case, moderated the amount to $50,000.

23 We note of course that *Lipkin* concerned costs for an appeal while we are now discussing the costs for the trial. Even so, the Court of Appeal there first considered all the circumstances of the appeal (at [16]) before concluding that even $45,000 would have been generous. The Court of Appeal did not look merely at what the appellant there estimated for costs without considering what the appropriate amount might have been for the appeal before it.

24 Let us look at the circumstances of the trial here. It lasted three days and the parties then filed written submissions on 2 June 2020. There were five witnesses for the respondent, with two being experts (a quantity surveyor and a licensed appraiser). The trial was essentially on facts which do not appear particularly complex as the facts concerned breaches of a Settlement Agreement and the expert evidence related mainly to the potential damages. There was a counterclaim involving the same facts about the tenancy agreement with an additional averment that the respondent refused mediation. Judgment was reserved and the Judgment was fairly long at 67 pages. Further, the respondent did not succeed in its claim for $170,000 for the period August 2018 to December 2019 (Judgment at [170] and [177]) or in its claim for the loss of opportunity to effect a collective sale of both properties (Judgment at [172]–[173]). The respondent should not be penalised of course for abandoning its claim for specific performance because the reasons for doing so were not due to its fault. We agree with the trial Judge's finding that the appellant's decision to sign the new tenancy agreement with Ink and Pixel Pte Ltd was made in bad faith.

25 Would all these factors justify an award of $174,200 in costs (excluding disbursements and the fees for the two experts)? We do not think so, particularly where costs were awarded on a standard basis. The award was about $100,000 more than the Respondent's estimate of about $71,000 and therefore more than

double the Respondent's estimate. To award a quantum leap from $71,000 to $174,200 for the apparent reason that the Appellant was unreasonable in its conduct at the trial and in its costs estimate appears to us to be quite unjustified. As stated in *Lipkin*, a party's submissions on costs is one consideration in a multi-factorial analysis. We do not think that costs should be used to punish a litigant's or its witness' conduct where there is no evidence that such conduct led to a longer trial or made the issues a lot more complex than originally expected, such that the other party's costs estimate could be deemed to be an under-estimate.

26 Considering all the circumstances of this case, we think that the costs for the trial should be $85,000 and we so order. This is worked out on the basis of $25,000 for each of the three days for trial and $10,000 for the submissions. The disbursements awarded by the trial Judge are to stand.

27 For costs of the appeal, both parties are fairly close in their costs estimates at $55,000 and $4,400 for the Appellant and $56,000 and $20,353.32 for the Respondent. The Respondent's costs include the costs for the application for stay of execution taken out by the Appellant, estimated at $8,000. However, the Respondent's disbursements appear inordinately high, especially if they relate mainly to photocopy charges and considering that it was the Appellant which had to prepare most of the documents. Counsel for the Respondent has explained that the $10,085.95 disbursements for the appeal were due largely to the fact that the Respondent had to file supplementary core bundles to include documents which the Appellant omitted in its core bundles. She accepted that the $9,767.37 disbursements incurred for the stay application could have been an error.

28 We would have ordered the Appellant to pay the Respondent $45,000

costs for the appeal excluding disbursements. However, we deduct $5,000 for the trial costs issue. The Appellant is therefore to pay the Respondent $40,000 costs and $10,000 disbursements for this appeal. The usual consequential orders relating to the security for costs are to apply.

Tay Yong Kwang
Justice of the Court of Appeal

Belinda Ang Saw Ean
Judge of the Appellate Division

Woo Bih Li
Judge of the Appellate Division

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(Joseph Tan Jude Benny LLP) for the appellant;
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