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

[2022] SGHC 7

Suit No 307 of 2021 (Registrar's Appeal No 246 of 2021)

Between

(1) Debenho Pte Ltd
(2) Low Teck Dee

… *Plaintiffs*

And

(1) Envy Global Trading Pte Ltd
(2) Ng Yu Zhi

… *Defendants*

JUDGMENT

[Civil Procedure — Stay of proceedings]

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v
Envy Global Trading Pte Ltd and another

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Ang Cheng Hock J
26 October 2021

14 January 2022 Judgment reserved.

Ang Cheng Hock J:

1 In this matter, the defendant seeks to stay a civil suit that has been brought against him on the ground, amongst others, that he also faces criminal charges arising out of the same facts, and that he will be prejudiced if both the civil suit and criminal case proceed concurrently. He argues he enjoys the right of silence and the privilege against self-incrimination, both of which will be infringed if the civil suit is not stayed. He also argues that he will be compelled to reveal his defence to the criminal charges in the civil suit, and that would give the Prosecution a significant advantage that they would not otherwise have. This stay application thus engages the legal principles that are applicable when the court has to decide whether civil proceedings should be permitted to proceed in the usual course, when there are at the same time pending criminal proceedings, faced by the defendant, that arise out of the same factual matrix.

The parties

2 The first plaintiff, Debenho Pte Ltd ("Debenho"), is a company in the business of building construction.[1] The second plaintiff, Low Teck Dee ("Mr Low"), is the managing director of Debenho.[2]

3 The first defendant is Envy Global Trading Pte Ltd ("EGT"). The second defendant, Ng Yu Zhi ("Mr Ng"), was a director of EGT.[3] EGT is a wholly owned subsidiary of Envy Management Holdings Pte Ltd ("EMH"), in which Mr Ng is an 80% shareholder.[4]

Background

The nickel trading investment scheme

4 Starting from January 2016, Envy Asset Management Pte Ltd ("EAM"), a company in which Mr Ng is a 90% shareholder,[5] offered to investors an investment scheme involving physical nickel trading. Investors would place monies with EAM for the purported purpose of investing in London Metal Exchange ("LME") grade nickel. EAM would then use investor monies to purchase LME grade nickel at a discounted price from sellers, before then selling it on to buyers at a higher price.[6] On the maturity date of their investments, the investors would then be entitled to returns, which would be based on the spread between the discounted purchase price and the subsequent

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1 Statement of Claim ("SOC") at para 1.

2 SOC at para 2.

3 SOC at para 4.

4 1st Affidavit of Low Teck Dee ("Low's Affidavit") at pp 28–29.

5 Low's Affidavit at p 30.

6 Low's Affidavit at p 40.

sale price of the LME grade nickel.[7] Investors were also told that their monies were transferred to Envy Asset Management Trading Ltd ("EAMT"), a British Virgin Islands-incorporated company wholly owned by Mr Ng, that was responsible for making payment to the sellers and/or receiving the sale proceeds from the buyers on behalf of EAM.[8]

5 In or around March 2020, the Monetary Authority of Singapore placed EAM on the Investor Alert List and its business was thereafter transferred to EGT in or around June 2020.[9] From April 2020 onwards, the nickel trading investment scheme also came to be offered by EGT instead of EAM.[10] By this time, EGT's investors no longer invested directly in LME grade nickel, but instead purchased a portion of the receivable that was due from buyers who purportedly purchased LME grade nickel from EGT.[11]

The suit

6 The plaintiffs were two such investors in EGT's nickel trading investment scheme. From November 2020 to January 2021, they entered into a total of five contracts with EGT for the purchase of a portion of EGT's trade receivables that were purportedly due from one Raffemet Pte Ltd ("Raffemet"), which was supposedly a buyer of nickel from EGT. Two of these contracts involved Debenho – one in November 2020 and another in December 2020; while three of them involved Mr Low – one in November 2020, another in December 2020 and a third in January 2021 (separately, "the Contract" and

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7 Low's affidavit at p 40.

8 Low's affidavit at p 40.

9 Low's affidavit at p 28.

10 Low's affidavit at p 40.

11 Low's affidavit at p 39.

collectively, "the Contracts"). The plaintiffs claim they were informed by the defendants that the trade receivables underlying each of the Contracts represented the net purchase price that was payable by Raffemet under a corresponding contract for the purchase of LME grade nickel from EGT that was entered into within the same month as each of the Contracts. The plaintiffs were informed of three such contracts between EGT and Raffemet by the defendants – one in November 2020, another in December 2020, and a third in January 2021 (collectively, "the Corresponding Contracts").[12]

7 In total, the plaintiffs collectively paid $20,108,944.95 as the purchase prices under the Contracts to EGT. Each of the Contracts allegedly provided for the plaintiffs' entitlement to receive a specified percentage of "any and all net amounts received or recovered by EGT from Raffemet" pursuant to the Corresponding Contracts, and that EGT was to remit to the plaintiffs their return within ten business days after EGT's receipt of payment from Raffemet.[13]

8 The plaintiffs claim that EGT had informed them that they had earned net profits of approximately 17% of their purchase price in connection with the Contracts for November and December 2020 ("the Profits"), and that they were entitled to the repayment of their purchase price and the Profits within ten business days upon them making a request to EGT.[14] The plaintiffs duly made the request, which they say was acknowledged by EGT, but payment of those sums was never forthcoming, even after their solicitors sent letters of demand to EGT.[15]

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12 SOC at paras 7, 14 and 20.

13 SOC at paras 8(c)–(d), 11(c)–(d), 15(c)–(d), 17(c)–(d) and 21(c)–(d).

14 SOC at paras 23 and 30.

15 SOC at paras 25–29 and 31–35.

9 The plaintiffs claim that they dealt solely with Mr Ng in relation to each of the Contracts, that Mr Ng "was and is the controlling mind and *alter ego* of EGT", and that the Contracts were "authorised, directed and/or procured" by Mr Ng.[16] The plaintiffs also claim that Mr Ng (who was acting for and on behalf of EGT) either himself or through his agents made representations to them about EGT and Raffemet entering into each of the Corresponding Contracts at the material times (namely, November 2020, December 2020 and January 2021) and that the Corresponding Contracts were valid and binding agreements between EGT and Raffemet ("the Representations").[17]

10 The plaintiffs claim that the Representations were false as they later discovered that none of the Corresponding Contracts ever existed,[18] and that Mr Ng had made the Representations fraudulently, with the knowledge that they were false, or in reckless disregard of whether they were true.[19] The plaintiffs also claim that they had entered into the Contracts and made payment of the purchase price of approximately $20.1m in reliance on the truth of the Representations.[20]

11 The plaintiffs commenced the present suit on 31 March 2021 and made claims against EGT and, in the alternative, against Mr Ng.[21]

(a) As against EGT, on account of its breach of contract, the plaintiffs claim: (i) the return of the purchase price paid under the

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16 SOC at para 36.

17 SOC at para 37.

18 SOC at para 39.

19 SOC at para 40.

20 SOC at para 38.

21 SOC at pp 19–20.

Contracts for November and December 2020; (ii) payment of the Profits due under the Contracts for November and December 2020; and (iii) the repayment of the purchase price paid under the Contract for January 2021. In the alternative, the plaintiffs seek the rescission of the Contracts on account of the Representations, which they say were false and were fraudulently made by EGT and/or Mr Ng, and the return of the total purchase price paid under all of the Contracts, or damages for misrepresentation to be paid by EGT to the plaintiffs.

(b) As against Mr Ng, on account of his "personal liability to the [p]laintiffs for directing, authorising and/or procuring EGT's fraud", the plaintiffs claim the return of the total purchase price paid under all of the Contracts or damages for misrepresentation to be paid by Mr Ng to the plaintiffs.

12 EGT entered an appearance in the suit but (for reasons that will be explained later) did not file its defence. Mr Ng entered an appearance in the suit and filed his defence on 4 May 2021. It is not necessary for present purposes to consider Mr Ng's defence in detail, but it suffices to note the following: (a) he avers that the plaintiffs dealt with one Jordan Chua (and not him) in relation to the Contracts;[22] (b) he denied making or being liable for the Representations;[23] (c) alternatively, he denied making the Representations fraudulently;[24] and (d) he had reasonable grounds to believe and did believe that the Representations

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22 Defence of the 2nd Defendant (Amendment No 1) ("Defence") at paras 5(a) and 9.

23 Defence at para 10(a).

24 Defence at para 11(b).

were true.[25] Mr Ng later made some amendments to his defence on 2 June 2021, the details of which are immaterial for present purposes.[26]

Interim judicial management and subsequent winding up of EGT

13 On 27 April 2021, the court ordered EGT to be placed under interim judicial management.[27] EGT's interim judicial managers issued a report on 25 May 2021 ("the IJM Report") to inform the court and EGT's creditors of the prospects of EGT achieving the purposes of judicial management.

14 The IJM Report stated that the nickel trading investment scheme was a complete fiction as EAM and EGT never made any purchase of nickel from any sellers, nor did they enter into any transaction for the sale of nickel to any buyers like Raffemet.[28] While EGT did enter into a series of contracts for the sale of nickel to Raffemet between August and September 2020,[29] these transactions relate to shipments of nickel, which the IJMs opined had been procured from Raffemet by EGT in the first place for the specific purpose of being shown to investors and hence was unrelated to the nickel trading investment scheme.[30] Accordingly, this meant that none of the Corresponding Contracts, which are the subject of the Representations the plaintiffs claim were made by Mr Ng, ever existed. The IJM Report also stated that investor monies were never transferred to EAMT, but instead to two Singapore bank accounts. Mr Ng was

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25 Defence at para 11(c).

26 1st Affidavit of Ng Yu Zhi ("Ng's 1st Affidavit") at para 30.

27 Ng's 1st Affidavit at para 10.

28 Low's Affidavit at p 41.

29 Low's Affidavit at p 46.

30 Low's Affidavit at pp 45–48 and paras 9(a)–9(d).

the holder of at least one, if not both accounts.[31] The interim judicial management order was thereafter discharged, and EGT was later wound up by the court on 16 August 2021 following an application by its interim judicial managers on the basis that it was hopelessly insolvent.[32]

15 The effect of the interim judicial management order and the subsequent liquidation of EGT meant that the suit as against EGT has been stayed since 27 April 2021, and the plaintiffs are no longer able to pursue their claims in the suit against EGT without first obtaining leave of court to do so. To date, the plaintiffs have not sought leave to do so. Indeed, as explained below, the plaintiffs have undertaken, through their counsel, that they will not pursue such leave (see [20] and [32] below).

The Criminal Proceedings against Mr Ng

16 On 22 March 2021, Mr Ng was charged with two counts of cheating under s 420 of the Penal Code (Cap 224, 2008 Rev Ed) ("the Penal Code") for allegedly deceiving two parties (who were not the plaintiffs) to pay at least $48m in connection with purchasing a portion of the receivables under EGT's sale and purchase contracts with Raffemet, when no such contracts actually existed.[33] On 20 April 2021, Mr Ng was charged with five more similar counts of cheating involving five other individuals.[34] By 23 June 2021, Mr Ng had been charged with 15 counts of cheating, two counts of forgery under s 465 of

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31 Low's Affidavit at p 41.

32 2nd Defendant's Written Submissions ("DWS") at para 6(b); Plaintiff's Written Submissions ("PWS") at para 6(b).

33 Low's Affidavit at p 109.

34 Low's Affidavit at p 116.

the Penal Code and two further counts of fraudulent trading under s 340(5) of the Companies Act (Cap 50, 2006 Rev Ed).[35]

17 At the time of the hearing before me, Mr Ng faced a total of 70 criminal charges.[36] I was informed by counsel for Mr Ng that, of these 70 charges, 49 were cheating charges under s 420 of the Penal Code involving 49 separate alleged victims.[37] Two of these cheating charges allege that Mr Ng had cheated Mr Low (the 16th charge) and Debenho (the 17th charge) (collectively "the Charges") by deceiving them into believing that they were purchasing a portion of the receivables which EGT was to receive from Raffemet under the Corresponding Contracts, a fact which Mr Ng knew to be false, and which induced Mr Low and Debenho to enter into the Contracts and pay the purchase prices, which they otherwise would not have done had they not been so deceived.[38] The Charges were preferred against Mr Ng on 14 May 2021.[39]

18 The news reports annexed to Mr Low's affidavit filed for these proceedings state that Mr Ng is out on bail (and he remains so, as I understand from his counsel at the hearing before me) in the amount of $1.5m. These reports also state that he has been ordered by the court to wear an electronic tag and comply with a 10.00pm to 6.00am curfew,[40] and further, that the alleged fraud to which Mr Ng was linked now involved more than $1bn.[41]

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35 Low's Affidavit at pp 132–133.

36 Notes of Hearing, 26 Oct, p 2 lines 31–32.

37 Notes of Hearing, 26 Oct, p 3 line 2.

38 Ng's 1st Affidavit at para 12.

39 Low's Affidavit at pp 123–124.

40 Low's Affidavit at pp 111 and 121.

41 Low's Affidavit at p 120.

The Stay Application

19 On 11 June 2021, Mr Ng applied in Summons No 2756 of 2021 for the suit as against him to be stayed ("the Stay Application") pending: (a) the final outcome of any application that the plaintiffs may make for leave to continue the suit against EGT; and (b) the final determination of the criminal proceedings in relation to the Charges ("the Criminal Proceedings"), including any appeals. The basis for (a) was that both the plaintiffs' claims against EGT and against Mr Ng were inextricably linked and, as such, the suit against Mr Ng should be stayed on case management grounds to avoid the risk of inconsistent findings. In other words, Mr Ng's position is that the claim against him should not proceed unless it is clear that the plaintiffs will not be permitted to proceed with their claim against EGT. The basis for (b) was that there is a real danger that Mr Ng may be prejudiced in the Criminal Proceedings if the suit was heard before the former given that it involves the same subject matter as the suit.[42]

20 An assistant registrar ("AR") heard the Stay Application on 12 August 2021. Following the hearing, the plaintiffs' solicitors wrote to court on 18 August 2021 to confirm that the plaintiffs would not be filing any application for leave to continue the suit as against EGT which, two days earlier, had been ordered to be wound up.[43]

21 The AR delivered her decision on 19 August 2021. She dismissed the Stay Application. In relation to the application for a stay on the basis that the claims against the two defendants were linked, the AR held that there was little risk of a multiplicity of proceedings to justify a stay. This was because the plaintiffs had confirmed that they would not be applying for leave to continue

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42 Ng's 1st Affidavit at para 17(b).

43 PWS at para 6(c).

the suit against EGT (see [20] above).[44] In relation to the application for a stay because of the Criminal Proceedings, the AR held that Mr Ng had not shown that there was a real danger of injustice in the Criminal Proceedings if the suit was not stayed. This was because it was not known whether the Prosecution will ultimately proceed to trial on the Charges out of the many charges that Mr Ng faces. Also, there was no clarity as to when the trial in the Criminal Proceedings will take place.[45]

The Registrar's Appeal

22 Mr Ng appealed against the AR's decision ("the Registrar's Appeal"). The arguments at the appeal first dealt with whether a stay should be granted until there was clarity as to the plaintiffs' intentions to either proceed or not proceed against EGT. Counsel for Mr Ng argued that the plaintiffs' claims against EGT and Mr Ng are inextricably linked, raise the same issues, and will rely on the same evidence. Counsel submitted that the court can only make a finding that Mr Ng is personally liable *if it first makes a finding that EGT has committed fraud*. That is because the plaintiffs have pleaded that Mr Ng is liable on account of him directing, authorising and/or procuring EGT's fraud (see [11(b)] above). As such, if the court finds that EGT had not acted fraudulently, then the entire premise of the plaintiffs' claims against Mr Ng falls away because there would be nothing that he could be personally liable for.[46] If the claims against EGT and Mr Ng were dealt with in separate proceedings, with the claim against Mr Ng proceeding first, there might be a risk of inconsistent findings and conflicting decisions, *eg*, if Mr Ng is found liable for fraudulent misrepresentation, but in later proceedings, EGT is found not liable for any

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44 Notes of Argument before AR Janice Wong, 19 Aug, p 2.

45 Notes of Argument before AR Janice Wong, 19 Aug, p 3.

46 DWS at para 148.

fraud.[47] Thus, counsel argues that the claim against Mr Ng should be stayed until such time it is made clear that the plaintiffs will not be allowed to proceed with the claim against EGT, *ie*, when any application by the plaintiffs for leave to proceed with their claim against EGT is dismissed.

23 In reply, counsel for the plaintiffs submits that, even though their claims against EGT and Mr Ng arise from the same background facts, they are in fact separate and distinct, with each having their own separate issues to be tried. Hence, counsel argues that the proper ventilation of issues in the plaintiffs' claim against Mr Ng is not dependent on the resolution of issues in the plaintiffs' claim against EGT.[48] In any event, counsel also argues that there is no real risk of overlapping issues and inconsistent decisions that weighs in favour of a stay because of his confirmation, as set out in Fullerton Law Chambers' letter of 18 August 2021 to the court, that the plaintiffs will not be filing any application for leave to continue their claim against EGT, given that the company is now in liquidation (see [20] above). At the hearing before me, counsel also informed me that he will state "on the record" that the plaintiffs will not be making any application to continue with the claim against EGT, whether now or in the future.[49]

24 I come now to the arguments in relation to the application for a stay until the final determination of the Criminal Proceedings. Counsel for Mr Ng argues that his client will suffer a real danger of prejudice in the Criminal Proceedings if the suit is not stayed. This arises in two ways. First, given that the elements of the fraudulent misrepresentation claim against Mr Ng are almost identical to

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47 Notes of Hearing, 26 Oct, p 2 lines 5–14; DWS at paras 101, 110 and 127.

48 PWS at para 26.

49 Notes of Hearing, 26 Oct, p 5 lines 29–32; PWS at para 27.

what the Prosecution has to prove in respect of the Charges, if the suit is allowed to proceed, Mr Ng would be required to give evidence on matters which he would raise or rely upon in his defence in the Criminal Proceedings, thereby undermining his right of silence and his privilege against self-incrimination.[50] Second, if Mr Ng has to give evidence in the suit before the Criminal Proceedings are tried, he would be required to disclose the same evidence that he will later rely on in his defence in the Criminal Proceedings, as well as reveal the identity of the witnesses that he will call and the questions which his lawyers might put to the Prosecution's witnesses in cross-examination, at a time when he does not yet know what the Prosecution's case against him will be. That will give the Prosecution an unfair advantage in the Criminal Proceedings as it now has an opportunity to watch a "test run" of its case and, if necessary, improve upon it.[51]

25 Counsel for Mr Ng also points to other factors in favour of a stay until the Criminal Proceedings are completed. First, if the suit is not stayed, Mr Ng will face the huge burden and strain of having to defend both criminal and civil proceedings concurrently.[52] Second, there is nothing in the circumstances which would militate against the grant of a stay since the plaintiffs will suffer no more than the frustration of delay, which is *per se* not a sufficient reason for the refusal of a stay, once it has been shown that there is a real danger of prejudice to Mr Ng in the Criminal Proceedings if the suit were to proceed.[53]

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50 Notes of Hearing, 26 Oct, p 2 lines 26–31; DWS at paras 40–41.

51 Notes of Hearing, 26 Oct, p 3 lines 8–15; DWS at para 39–46.

52 Notes of Hearing, 26 Oct, p 3 lines 14–15; DWS at para 49.

53 Notes of Hearing, 26 Oct, p 4 lines 11–12; DWS at para 50–53.

26 In reply, the plaintiffs submit that Mr Ng has failed to show that there is a real danger of prejudice to him in the Criminal Proceedings if the suit is allowed to proceed. In particular, since Mr Ng has already filed his defence in the suit, counsel submits that it is difficult to see how any further evidence adduced in support Mr Ng's case in the suit would cause prejudice to him in the Criminal Proceedings.[54] The plaintiffs also point to the uncertainty in the progress of the Criminal Proceedings and the potentially indefinite delay they may suffer in pursuing their rather substantial claim against Mr Ng if the suit is stayed.[55]

Issues to be determined

27 There are thus two main issues in the Registrar's Appeal: (a) whether the suit should be stayed until any application by the plaintiffs to proceed with their claims against EGT has been determined; and/or (b) whether the suit should be stayed until the final determination of the Criminal Proceedings, including any appeals arising therefrom.

The claim against EGT

28 The court may, pursuant to its inherent jurisdiction to manage its own internal processes, grant a limited stay of proceedings on case management grounds with a view to ensuring the efficient and fair resolution of the dispute as a whole (*Rex International Holding Ltd and another v Gulf Hibiscus Ltd* [2019] 2 SLR 682 at [16]; *BNP Paribas Wealth Management v Jacob Agam and another* [2017] 3 SLR 27 at [35]). One circumstance in which such a case management stay ought to be granted is where there are separate legal

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54 Notes of Hearing, 26 Oct, p 6 lines 7–10; PWS at paras 43(c) and 47.

55 Notes of Hearing, 26 Oct, p 6 lines 1–5.

proceedings giving rise to a real risk of overlapping issues so that the proper ventilation of the issues in one set of proceedings depends on the resolution of the related proceedings (*Rex* at [11]).

29 In this case, I accept that there is an overlap in issues in the plaintiffs' claims as against EGT and Mr Ng. As set out earlier, the plaintiffs' alternative claim against EGT is the rescission of the Contracts on the ground that EGT and/or Mr Ng made the Representations fraudulently (see [11(a)] above). As a company, EGT can only act through its officers and/or persons authorised to represent it. According to the plaintiffs' pleaded case, Mr Ng was their sole point of contact when they entered into each of the Contracts, and Mr Ng was also solely responsible for the Representations.[56] It therefore follows that EGT can only be found to have made the Representations fraudulently if Mr Ng did so. In these circumstances, the issue of whether Mr Ng had made the Representations and whether he had done so fraudulently, which arises in respect of the plaintiffs' claim against Mr Ng (see [11(b)] above), will also be an issue in the plaintiffs' claim against EGT. The plaintiffs submit that there is no overlap between both claims because their claim against EGT is one for breach of contract, while that against Mr Ng is one for fraudulent misrepresentation.[57] I cannot agree with that submission as it is an inaccurate characterisation of the plaintiffs' claim against EGT and overlooks what the plaintiffs are seeking in their statement of claim against EGT in the alternative, *ie*, rescission of the Contracts, which is ultimately premised on Mr Ng first being found to have made the Representations fraudulently.

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56 SOC at paras 5 and 36(a).

57 PWS at para 26.

30 Be that as it may, I find that a case management stay ought not be granted for two reasons. First, this is not a case where the proper ventilation of issues in the plaintiffs' claim against Mr Ng is dependent on the resolution of the plaintiffs' claim against EGT. Since EGT can only act through its officers and/or persons authorised to represent it, it can only be found to have committed fraud on the plaintiffs if Mr Ng (whom the plaintiffs say was solely responsible for the Representations and their sole point of contact for each of the Contracts) had acted fraudulently. Any finding that EGT has committed fraud will therefore be dependent on Mr Ng first being found liable for fraudulently making the Representations. In other words, Mr Ng's and EGT's liability for fraud will be co-extensive if the plaintiffs' case is made out.

31 Indeed, the plaintiffs go further and say they seek to pierce EGT's corporate veil in their claim against Mr Ng to hold him liable for "directing, authorising and/or procuring EGT's fraud".[58] As such, I do not find that there are issues in the plaintiffs' claim against Mr Ng which depend on the resolution of the plaintiffs' claim against EGT. The reality is that, if a finding is made that Mr Ng had acted fraudulently in making the Representations, it will follow that EGT will also be found to have acted fraudulently in respect of the Contracts. As such, if there is any possible complaint about the plaintiffs' claim against Mr Ng proceeding in this suit, it should be from the liquidators of EGT that they might be prejudiced if the claim against EGT proceeds later. That will, of course, depend on the liquidators' assessment as to whether EGT has a good defence to the plaintiffs' claim. But no complaint thus far has been raised by EGT's liquidators that the court might make inconsistent findings of fact if the claim against Mr Ng were to proceed first, and then later against EGT.

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[58] PWS at para 22.

32 Second, and more critically, counsel for the plaintiffs has already confirmed at the hearing before me that they will not proceed against EGT, whether now or in the future.[59] That being the case, it means that there can be no real risk of overlapping issues because the suit now only involves the plaintiffs' claim against Mr Ng. Counsel for Mr Ng pointed out at the hearing that the plaintiffs should then discontinue their claim against EGT. I think that consequence does flow from the plaintiffs' confirmation that they will not proceed with the suit against EGT. Hence, I hereby direct the plaintiffs to take steps to discontinue their action against EGT and amend their statement of claim accordingly.

The impact of the Criminal Proceedings

33 It was once a rule of the common law that the court would stay a civil action when criminal prosecutions arising out of the same events or subject matter were also pending (see, *eg*, *Smith and wife v Selwyn* [1914] 3 KB 98 ("*Smith v Selwyn*") at 106; *Wells v Abrahams* (1872) 7 QB 554 at 557, referred to in *Velstra Pte Ltd (in liquidation) v Dexia Bank Belgium* [2003] 4 SLR(R) 592 ("*Velstra*") at [18]). This was the result of an inaptly named "felonious tort rule", which provided that, where injuries are inflicted on an individual under circumstances which constitute a felony, that felony cannot be made the foundation of a civil action at the suit of the person injured against the person who inflicted the injuries, until the latter has been prosecuted or a reasonable excuse shown for his non-prosecution (*Smith v Selwyn* at 105). The apparent justification for that rule was the policy of requiring an injured party to bring serious offenders before the criminal courts before the injured party claims compensation for infringement of his private interests at a time when the

[59] Notes of Hearing, 26 Oct, p 5.

prosecution of offences was still largely left to private persons (see *Wonder Heat Pty Ltd v Bishop* [1960] VR 489 at 491–492). With the abolition of the distinction between felonies and misdemeanours in English law and various other common law jurisdictions, and with the prosecution of serious offences now in the hands of state authorities, the "felonious tort rule" has since been superseded (*McMahon v Gould* (1982) 7 ACLR 202 ("*McMahon*") at 204; *Panton and others v Financial Institutions Services Ltd* [2003] UKPC 86 ("*Panton*") at [7]). Given that our system of criminal law has been based on the Penal Code (which draws no distinction between felonies and misdemeanours), it is quite possible that rule would never have been part of the common law as it applied in Singapore or would have ceased to be part of the common law in Singapore at least since 16 September 1872, when the Straits Settlements Penal Code (SS Ord No 4 of 1871) came into force.

34 In any case, the modern approach at common law is to approach the matter not as a rule, but a question of a judicial discretion as to whether to stay civil proceedings, and which is to be exercised after weighing various competing considerations (see *Panton* at [6]–[7]). The court may stay the civil proceedings if it is of the view that the balance of justice so requires, having regard to the concurrent criminal proceedings and taking into account the defendant's right of silence which he enjoys in those proceedings, as well as after due consideration of the plaintiff's *prima facie* entitlement to have his action proceed in the ordinary course of procedure and business of the court. These principles were first set out by Megaw LJ in *Jefferson Ltd v Bhetcha* [1979] 1 WLR 898 ("*Jefferson Ltd*") at 904–905, an English Court of Appeal decision. They were endorsed and applied by the New South Wales Supreme Court in *McMahon* (at 206) and have come to become known in Australian case law as the "*McMahon* guidelines" (see, *eg*, *Construction, Forestry, Mining and Energy Union and others v Australian Competition and Consumer Commission*

[2016] FCAFC 97 at [26] and [58]). They were also referred to with approval by MPH Rubin J in *Velstra* (at [19]).

35 The burden is on the defendant to show that there is a *real* danger that the continuance of the civil action against him will result in injustice in the criminal proceedings, so that it is just and convenient that the plaintiff's ordinary rights of having his claim heard and decided are interfered with (*Jefferson Ltd* at 905). It will not suffice for the defendant to merely point to *notional* dangers (*Balfron Trustees Ltd v Peterson and others (No 2)* [2001] Lexis Citation 1677 at [23]; *Jefferson Ltd* at 905).

36 In *Jefferson Ltd*, Megaw LJ considered the following factors as relevant in determining whether there was such "real danger" of injustice to the defendant: (a) the possibility that the civil action might obtain such publicity as to influence jurors and deprive the defendant of a fair trial; (b) the proximity in time of the trial of the criminal proceedings to the trial of the civil action; (c) where the disclosure of the defence in the civil action by an accused enables the fabrication of evidence by Prosecution witnesses or interference with Defence witnesses, resulting in a miscarriage of justice in the criminal proceedings (at 905). In *McMahon*, Wootten J added to this list the following factors that the court should consider: (a) the burden on the defendant of preparing for both sets of proceedings concurrently; (b) whether the defendant has already disclosed his defence to the allegations; (c) the conduct of the defendant, such as his own prior invocation of the civil process when it had suited him (at 206).

The defendant's right of silence and privilege against self-incrimination

37 If a civil action is not stayed, the defendant may eventually have to give evidence on matters relating to the concurrent criminal proceedings, in respect of which he may have enjoyed the right of silence and the privilege against self-

incrimination. It is therefore important to consider if the continuance of a civil action will undermine these protections and constitute a real danger of injustice to the defendant in the criminal proceedings, and thus justify a stay of the civil action.

38 I begin by considering what these protections are. The right of silence is a compendious term encompassing several manifestations, as identified by Lord Mustill in *R v Director of Serious Fraud Office, Ex parte Smith* [1993] AC 1 ("*Smith*") at 30, which were referred to by M Karthigesu JA with approval in *Taw Cheng Kong v Public Prosecutor* [1998] 1 SLR(R) 78 ("*Taw Cheng Kong*") at [122]:

> (1) A general immunity, possessed by all persons and bodies, from being compelled on pain of punishment to answer questions posed by other persons or bodies.
>
> (2) A general immunity, possessed by all persons and bodies, from being compelled on pain of punishment to answer questions the answers to which may incriminate them.
>
> (3) A specific immunity, possessed by all persons under suspicion of criminal responsibility whilst being interviewed by police officers or others in similar positions of authority, from being compelled on pain of punishment to answer questions of any kind.
>
> (4) A specific immunity, possessed by accused persons undergoing trial, from being compelled to give evidence, and from being compelled to answer questions put to them in the dock.
>
> (5) A specific immunity, possessed by persons who have been charged with a criminal offence, from having questions material to the offence addressed to them by police officers or persons in a similar position of authority.
>
> (6) A specific immunity … possessed by accused persons undergoing trial, from having adverse comment made on any failure (a) to answer questions before the trial, or (b) to give evidence at the trial.

39 As the above will suggest, the common law right of silence is generally concerned with the legal right of a person to remain silent in the face of compulsory questioning and/or to elect not to give evidence in his own defence against a criminal charge, and the evidential immunity from having adverse inferences drawn against him from such silence (see generally, A R N Cross, "The Right to Silence and the Presumption of Innocence – Sacred Cows or Safeguards of Liberty?" (1970) 11:2 J Soc'y Pub Tchrs L 66; Steven Greer, "The Right to Silence: A Review of the Current Debate" (1990) 53(6) Modern Law Review 709; Colin Tapper, *Cross and Tapper on Evidence* (Oxford University Press, 12th Ed, 2010) ("*Cross and Tapper*") at p 646). As Lord Mustill also recognised in *Smith*, these manifestations can be encroached upon or modified by statute (at 30). For instance, the immunity in (6) is not part of Singapore law: see s 261(1) of the Criminal Procedure Code 2010 (2020 Rev Ed) ("the CPC"), which sets out the court's power to draw adverse inferences from an accused person's failure to mention facts material to his defence in his cautioned statement, and s 230(1)(*m*) of the CPC, which sets out the court's power to draw adverse inferences from an accused person's choice to remain silent after the court has called upon him to give evidence in his own defence. The immunity in (5) is also not part of Singapore law in so far as it concerns a police statement that is admissible under s 258(1) of the CPC (see also *Taw Cheng Kong* at [122]–[123]). On the other hand, the immunity in (4) finds expression in the accused person's right to elect to remain silent at trial when called upon to enter his defence: see s 230(1)(*m*) of the CPC.

40 It might be argued that the right of silence should also entitle the defendant to avoid disclosing his defence or giving evidence in civil proceedings on the ground that they relate to matters in the concurrent criminal proceedings, in connection with which he could have withheld doing either by invoking his right of silence. However, that is not the case. It has been held

that the right of silence, which the defendant enjoys in criminal proceedings, does not extend to give him as a matter of right the same extent of protection in the concurrent civil proceedings (*Jefferson Ltd* ([34] above) at 905; *McMahon* ([33] above) at 206; *Panton* ([33] above) at [11]; *In re DPR Futures Ltd* [1989] 1 WLR 778 ("*DPR Futures*") at 790). As Megaw LJ explained in *Jefferson Ltd* (at 904–905):

> … There is, I say again, in my judgment, no principle of law that a plaintiff in a civil action is to be debarred from pursuing that action in accordance with the normal rules for the conduct of civil actions *merely because so to do would, or might, result in the defendant, if he wished to defend the action, having to disclose, by an affidavit under Order 14, or in the pleading of his defence, or by way of discovery or otherwise, what his defence is or may be, in whole or in part, with the result that he might be giving an indication of what his defence was likely to be in the contemporaneous criminal proceedings.* The protection which is at present given to one facing a criminal charge – the so-called 'right of silence' – does not extend to give the defendant as a matter of right the same protection in contemporaneous civil proceedings.
>
> [emphasis added]

41 It is not difficult to understand the legal basis for this position. When a defendant defends himself in the civil action, whether by filing his defence or giving evidence in support of his defence, he does so of his own choosing and not under any compulsion on pain of punishment, and so he has no grounds for invoking the right of silence. Furthermore, the right of silence only entitles the defendant to stay silent in the face of compulsory questioning that has arisen in connection with criminal proceedings (whether during police investigations or when he is called upon to testify during trial), but not for all other purposes. As a matter of principle therefore, a defendant in a civil action should not be able to invoke the right of silence in connection with any interrogatories served or questions asked of him in the civil proceedings, save where they may encroach upon his privilege against self-incrimination (see [43] below).

42 I accept that the practical consequence of the above means that, if a defendant chooses to defend himself in the concurrent civil action, he may be required to speak about matters touching upon the subject matter of the criminal proceedings. However, that itself cannot be why the right of silence ought to confer on the defendant the same extent of protection in the concurrent civil action as it would in the criminal proceedings. As it is, there are already many instances in the criminal justice process where an accused person's right to not answer questions and remain silent have been modified by statute – such as where he gives statements to the police in the investigation process (see [39] above) or participates in the criminal case disclosure process under the CPC (see ss 160–166 of the CPC). In those situations, the accused person already has to elect to speak truthfully, or otherwise face the risk of possible adverse inferences at trial (see, *eg*, s 261(1) of the CPC). That being so, there is no reason the position should differ where the defendant in a civil suit is confronted with a similar choice to speak or remain silent (see *Cameron's Unit Services Pty Ltd v Kevin R Whelpton Associates (Australia) Pty Ltd and another* (1984) 4 FCR 428 at 434).

43 One specific manifestation of the right of silence (as set out in the immunity at (2) quoted at [38] above) is the privilege against self-incrimination, which allows a person to not say anything or produce evidence, under compulsion, that might expose him to a criminal charge, penalty or forfeiture (see *Law Society of Singapore v Shanmugam Manohar* [2021] SGHC 201 at [94]; *Riedel-de-Haen AG v Liew Keng Pang* [1989] 1 SLR(R) 417 ("*Riedel*") at [12]). The privilege against self-incrimination concerns not merely the right of a person to stay silent, but more specifically, to withhold evidence that may potentially be used against him in a criminal prosecution (see also *Cross and Tapper* ([39] above) at 417).

44 The privilege against self-incrimination applies to steps which a defendant is required to take in a civil action (see, *eg*, *DPR Futures* ([40] above) at 790). Therefore, a defendant may properly invoke the privilege in the context of civil proceedings where he is being interrogated or compelled to produce documents for the purposes of the civil proceedings, and which will tend to incriminate or subject him to a penalty or forfeiture (see *Riedel* at [12]). I mention two examples of this. In *Riedel*, the defendant sold goods which infringed the trade marks of the plaintiff. The plaintiff obtained an Anton Piller order against the defendant, requiring it to disclose, *inter alia*, the identities of the suppliers of those goods and customers who purchased them. Chan Sek Keong J (as he then was) allowed the defendant's application to discharge the order on the ground that compelling the defendant's compliance with the order would expose it to a real and appreciable risk of being prosecuted for offences under the Trade Marks Act (Cap 206, 1970 Rev Ed) and the Consumer Protection (Trade Descriptions and Safety Requirements) Act (Cap 53, 1985 Rev Ed) (at [6]–[8]).

45 In *Reid v Howard and others* (1995) 131 ALR 609 ("*Reid*"), the plaintiff brought proceedings against the defendant accountant who had misappropriated client monies. The plaintiff then sought interrogatories against the defendant requiring disclosure of his assets and the source of funds with which they were acquired. At that time, the defendant had come under criminal investigations for the misappropriation, but no criminal charges had been brought against him because he had only provided a general admission with no details or particulars of his misappropriations. The disclosure of the information sought by the plaintiff would provide precise particulars of the same and provide the basis for the defendant to be prosecuted or further investigated for specific offences (at 612 and 616). The full bench of the High Court of Australia considered that the

defendant was entitled to resist the orders sought by the plaintiff on the basis of his privilege against self-incrimination (at 613, 616 and 620).

46 However, it is certainly not the case that a defendant is always entitled to a stay of a civil action by simply citing his privilege against self-incrimination. It remains necessary to consider if the precise steps which a defendant is required to take in the civil action will have the effect of undermining that privilege. In respect of steps taken pre-trial, the defendant may invoke his privilege against self-incrimination if the plaintiff seeks to *compel* him to provide answers through interrogatories or produce documents that will tend to subject him to a penalty or forfeiture, as in the cases of *Riedel* and *Reid* (see also *VTFL v Clough DIG* [2001] EWCA Civ 1509 ("*VTFL*") at [37]). However, simply requiring the defendant to plead a defence in the civil action would not ordinarily have the effect of undermining his privilege against self-incrimination. In filing his defence, the defendant is free to plead whatever facts he deems fit and considers relevant, for example, by denying the plaintiff's allegations and putting forward a different version of events, or not admitting the plaintiff's allegations and putting him to strict proof of the same (see *VTFL* at [11]). Similarly, in resisting any application for summary judgment under O 14 of the Rules of Court (2014 Rev Ed), the defendant is free to put forward in his affidavit any material or information he deems relevant to show that he has a defence to the claim (see *VTFL* at [11]). There is no compulsion on the defendant to state on affidavit matters that might incriminate himself. In fact, any defence put forward by the defendant, and any evidence given in support of it, would presumably have the effect of tending to exculpate rather than incriminate the defendant (see *VTFL* at [39]).

47 The position in respect of steps taken during the trial of the civil action differs somewhat. Sections 134(1)–(2) of the Evidence Act 1893 (2020 Rev Ed) ("the Evidence Act") provide as follows:

> **Witness not excused from answering on ground that answer will criminate**
>
> **134.**—(1) A witness is not excused from answering any question as to any matter relevant to the matter in issue in any suit, or in any civil or criminal proceeding, upon the ground that the answer to such question will criminate, or may tend, directly or indirectly, to criminate, such witness, or that it will expose, or tend, directly or indirectly, to expose, such witness to a penalty or forfeiture of any kind, or that it will establish or tend to establish that the witness owes a debt or is otherwise subject to a civil suit at the instance of the Government or of any other person.
>
> (2) No answer which a witness is compelled by the court to give shall subject him or her to any arrest or prosecution, or be proved against him or her in any criminal proceeding, except a prosecution for giving false evidence by such answer.

48 As Chan J explained in *Riedel* ([43] above), s 134 of the Evidence Act qualifies the privilege against self-incrimination when a witness gives oral testimony at a trial or other judicial proceeding to which the Evidence Act is applicable (at [20] and [22]). The effect of s 134(1) is that a witness cannot refuse to answer a question which is relevant to the matter in issue by invoking his privilege against self-incrimination. However, in order to remove inducements for falsehoods and encourage witnesses to come forward to assist in the administration of justice, s 134(2) extends a limited protection to the witness by providing that any incriminating answer given by him on compulsion by the court shall not subject him to any arrest or prosecution or be proved against him in any criminal proceeding, except in a case of prosecution for giving false evidence by such an answer (see Sudipto Sarkar & V Kesava Rao, *Sarkar: Law of Evidence* vol 2 (LexisNexis, 20th Ed, 2021) ("*Sarkar*") at pp 2925–2926). However, given that the protection in s 134(2) is only afforded to

answers which a witness "is compelled by the court to give", the protection therein is only afforded to answers which a witness has objected to give or which he has asked to be excused from giving, but nevertheless has been compelled by the court to give (see *Sarkar* at p 2935). Whether there has been such compulsion is a question of fact, and there is no necessity that the witness must raise a formal objection, though a witness who answers a question voluntarily without any protest necessarily does so without compulsion and will not be able to afford himself of the protection in s 134(2) (see *Sarkar* at pp 2935–2936).

49 A defendant who is faced with concurrent criminal and civil proceedings is more likely than not to raise objections to questions, the answers to which he perceives as being likely to incriminate him. While he cannot invoke the privilege against self-incrimination whilst being cross-examined at trial, he is nevertheless afforded the protection of s 134(2) in respect of any such incriminating answers given as part of his testimony. These answers cannot be later proved against him by the Prosecution in the trial of the concurrent criminal proceedings.

50 Therefore, in my judgment, it will not suffice for a defendant, who seeks to stay a civil action on the ground of concurrent criminal proceedings, to invoke his right of silence and privilege against self-incrimination, both of which are not automatically engaged (albeit for different reasons), merely because he has been called upon to defend himself in the civil action. Instead, to obtain a stay of the concurrent civil proceedings, as *per* the principles set out in *Jefferson Ltd* ([34] above), the defendant must show how requiring him to defend himself in the civil action will give rise to a real danger of prejudice to him in the criminal proceedings. The court will then consider the factors set out in *Jefferson Ltd* and *McMahon* ([33] above), in assessing whether there is such a real danger of prejudice on the facts as presented (see [36] above).

Where the continuance of the civil action provides the Prosecution with an advantage in the criminal proceedings

51 Where a civil action relating to identical or a similar subject matter as that in concurrent criminal proceedings is tried before the latter, the Prosecution will theoretically enjoy some advantage in that it will likely have a preview of the defendant's case before the trial of the criminal proceedings takes place. This is one of the main contentions raised by Mr Ng's counsel in his oral and written submissions as to why the suit against Mr Ng should be stayed – counsel argues that the advantage which the Prosecution would derive from seeing Mr Ng's evidence and the evidence of his witnesses tested in cross-examination at the trial of the suit would necessarily make the trial of the Criminal Proceedings unfair and constitute a real danger of prejudice to Mr Ng in the same.

52 For this submission, Mr Ng's counsel relies on *State of Queensland v Shaw* [2003] QSC 436 ("*Shaw*"), a decision of the Queensland Supreme Court.[60] In that case, the defendant was charged under s 10A of the Drugs Misuse Act 1984 (Qld) for possession of property reasonably suspected of being the proceeds, or having been acquired with the proceeds, of a drug-related offence. Separately, proceedings for the forfeiture of the defendant's property were commenced by the state. In connection with the latter proceedings, the defendant could apply for an order that his property be excluded from forfeiture if he was able to satisfy the court that it is more probable than not that the property was not illegally acquired property (at [7] and [10]). As such, the fundamental question in both sets of proceedings was whether the defendant's property had been unlawfully acquired with the proceeds of criminal offences (at [10]). The defendant applied for the forfeiture proceedings to be stayed, on the ground that the evidence which he would be relying on in his attempt to

60 DWS at paras 29–32.

exclude his property from forfeiture would directly disclose the grounds upon which he would defend the criminal proceedings, and thereby prejudice him if the forfeiture proceedings were heard before the criminal proceedings (at [14]–[15]).

53 Mackenzie J ordered a stay of the forfeiture proceedings until the determination of the criminal proceedings. He considered that, since the issues were identical in the forfeiture and criminal proceedings, allowing the former to proceed first would expose defects in the case which the defendant would raise in the criminal proceedings, and afford the Prosecution an opportunity to in effect have a test-run of its case in the criminal proceedings, repair any deficiencies in its own evidence and potentially improve on its case. That would allow the Prosecution to gain an undue advantage in the criminal proceedings, and the interests of justice would not be served if the forfeiture proceedings were heard before the criminal proceedings (at [23]–[24]).

54 In my judgment, in so far as counsel for Mr Ng relies on *Shaw* for the proposition that Mr Ng will suffer a real danger of prejudice merely because the continuance of the suit would provide the Prosecution with some advantage in the Criminal Proceedings, I am unable to accept this submission. Let me explain.

55 First, *Shaw* is distinguishable because it involved a different context from the one presently under consideration. The concurrent civil action in *Shaw* was a statutory proceeding commenced by a state body against the defendant in connection with subject matter identical to that in the criminal proceedings, and not an ordinary civil action commenced by a plaintiff to enforce his rights against the defendant. By its nature, *Shaw* would not have been concerned with the "balance of justice" between the plaintiff's entitlement to pursue his action

in the ordinary course of the procedure and business of the court, and the rights and protections ordinarily afforded to a defendant in criminal proceedings. Instead, the court would have been concerned with the appropriate balance to be struck between the latter and the right of the state body to proceed against the defendant under the relevant legislative framework. In such a case, the competing considerations weighed by the court in exercising its discretion as to whether to grant a stay of the civil action, and the manner in which a defendant can discharge his burden of satisfying the court of a real danger of prejudice to him if the concurrent civil action is not stayed, will necessarily differ.

56 Second, I find that counsel's submission is tantamount to saying that the defendant has an *unconditional* right to a stay of the civil action whenever there are concurrent related criminal proceedings and when the continuation of the civil action has the practical result of requiring the defendant to take steps that can disadvantage him in the criminal proceedings. That is plainly inconsistent with the established principles as it makes a nonsense of the requirement that the defendant must *establish* a real danger of prejudice to him in the criminal proceedings before the court will grant a stay. Such a suggestion has been rejected by Megaw LJ in *Jefferson Ltd* (albeit implicitly) (see [40] above), and also by the Australian courts themselves (see, *eg*, *Craig Robert White v Australian Securities and Investments Commission and others* [2013] QCA 357 at [23] and [25]). Indeed, if this submission were accepted, it would result in the grant of a stay simply to preserve for the defendant the tactical advantage of remaining silent at the criminal trial until the end of the Prosecution's case against him, an outcome which courts have cautioned against (see *Panton* ([33] above) at [11]; *McMahon* ([33] above) at 208).

57 For completeness, I note that there are cases where the Australian courts appear to have been satisfied of a real danger of prejudice to the defendant on

account of the Prosecution enjoying the advantage of having a preview of his case in the criminal proceedings if the civil action is tried first: see, *eg*, *Winters v Fogarty (No 2)* [2020] FCA 220 ("*Fogarty*") at [12]; *Qing Zhao and another v The Commissioner of the Australian Federal Police* [2014] VSCA 137 ("*Zhao*") at [59]–[60]; *Adelaide Brighton Cement Ltd v Burgess* [2018] SASC 134 ("*Adelaide Brighton*") at [29]; *McLachlan v Browne (No 9)* [2019] NSWSC 10 at [37]–[38]. However, a closer reading of these cases indicates that the courts were satisfied of a real danger of prejudice, not simply because of any notional advantage enjoyed by the Prosecution, but because any such advantage stood to undermine the defendant's right of silence and/or privilege against self-incrimination in the criminal proceedings on the particular facts of the case (see *Fogarty* at [12]; *Zhao* at [60]; *Adelaide Brighton* at [33]–[34]; *McLachlan* at [39]–[40] and [47]). Hence, in each of those cases, the court, in finding that there was a real danger of prejudice to the defendant, had been satisfied of *something more* than a mere disadvantage to the defendant as a result of the civil action being tried first.

58 Third, and with respect, it is unnecessary to accept this submission to give effect to the protections which a defendant enjoys in the concurrent criminal proceedings. The advantage of staying silent until the conclusion of the Prosecution's case is a mere coincidence of the defendant enjoying the right of silence and is not part of the protections which that right confers on the defendant, which is only limited to an immunity *vis-à-vis* any compulsory questioning that has arisen in connection with the criminal proceedings (see also *McMahon* at 208). Indeed, under Singapore law, an accused person is already confronted with the choice to speak or remain silent at various pre-trial stages of the criminal justice process (see [42] above). Further, even if the Prosecution enjoys a preview of the defendant's case as a result of the civil action being tried before the criminal proceedings, it does not follow as a matter of course that any

evidence given or adduced by the defendant in the former can in turn be relied upon by the Prosecution in the latter, which is what is necessary to provide grounds for any complaint about the defendant's right of silence and/or privilege against self-incrimination being encroached on. In most cases, the possibility that any such evidence will be relied upon by the Prosecution in the concurrent criminal proceedings is a hypothetical one – by virtue of the protection conferred by s 134(2) of the Evidence Act, any incriminating answer given by the defendant on compulsion by the court during the trial of the civil action cannot be proved in any subsequent criminal proceedings against him (see [48]–[49] above). The Prosecution therefore remains limited to proving its case on the basis of evidence which has been admitted in the criminal proceedings, and not any evidence which has emerged in the course of the concurrent civil action.

59 On a related point, I note that, in relatively recent times, there have been decisions of the Australian courts which have considered that the *McMahon* guidelines (which are not overruled and remain good law in Australia: see *Fogarty* ([57] above) at [9]) do not sufficiently give effect to a defendant's right of silence and privilege against self-incrimination, which he enjoys in the criminal proceedings (see, *eg*, *Re AWB Ltd (No 1)* (2008) 252 ALR 566 at [56] and [58]; *Adelaide Brighton* at [27]). However, even so, there is no suggestion in those cases that the court will necessarily be satisfied of a real danger of prejudice simply because the defendant will suffer a disadvantage from having the civil action tried first.

60 In any event, I am of the view that this so-called advantage of the Prosecution having some insight into the accused's possible defence is overstated. Just as the Prosecution may have a preview of the accused's defence and his evidence in the civil proceedings, the accused person has the

corresponding advantage of having a similar preview of the Prosecution's case and its evidence, given that it is likely that the same witnesses will be called by the plaintiff to prove its case in the civil suit. Significantly, the strength of the Prosecution's evidence can be tested by the defendant in the trial of the civil suit. So, at the end of the day, any advantage enjoyed by the Prosecution is counter-balanced against the advantage enjoyed by the accused person.

61 Finally, coming back to *Shaw* ([52] above), the circumstances of the case were such that any advantage accruing to the Prosecution constituted a real danger of prejudice to him in the criminal proceedings. That was because the burden of proof in the criminal proceedings had been on the defendant to show, on a balance of probabilities, that the property (forming the subject matter of the offence and the forfeiture proceedings) was lawfully acquired (see [4]–[5] and [10]). There was also no statutory obligation on the defendant to disclose beforehand the evidence which he wished to rely on in the criminal proceedings (see [21]). Requiring the defendant to take steps in the forfeiture proceedings and reveal in advance evidence which he was also intending to rely on in the criminal proceedings would provide the Prosecution the distinct benefit of being able to consider how they might respond to the defendant's evidence in the criminal proceedings. That benefit was not a mere advantage, but posed a real danger of injustice to the defendant because it potentially rendered it more onerous for the defendant to successfully discharge his burden of proof in the criminal proceedings, as compared to a similarly placed defendant who did not have to reveal in advance his evidence and/or defence in the same way.

62 Accordingly, in my view, it will not suffice for the defendant, in seeking a stay of the civil action to merely point to some advantage which the Prosecution will enjoy in the criminal proceedings if the civil action is not stayed. In each case, the defendant must establish that any putative advantage

which the Prosecution would enjoy from the continuance of the civil action poses a real danger of prejudice to him in the criminal proceedings.

The plaintiff's prima facie entitlement to pursue the civil action in the ordinary course

63 In determining if a stay of the civil action ought to be granted, the court assesses the balance of justice as between the plaintiff and the defendant. As such, even if a defendant has established that he will suffer a real danger of prejudice in the criminal proceedings from the continuance of the civil action, that remains to be balanced against the plaintiff's *prima facie* entitlement to pursue its civil action. A court may well find, following such a balancing exercise, that any dangers of injustice can be ameliorated by measures other than an indefinite stay of the civil action.

64 For example, in *DPR Futures* ([40] above), the defendants were directors of a company that received monies from its clients and engaged in commodities and futures trading on their behalf. The company was subsequently liquidated, and the defendants were charged with conspiracy to defraud and for offences under the Companies Act 1985 (c 6) (UK) in connection with their operation of the company. The liquidators of the company also commenced proceedings against the directors to recover sums which they had allegedly misappropriated from the company. The directors applied for the civil proceedings commenced by the liquidator to be stayed until after the conclusion of the criminal proceedings.

65 Millett J (as he then was) held that he was satisfied that, if the civil proceedings were heard first, there would be a real risk of prejudice to the defendants' right to a fair trial in the criminal proceedings, especially if the two took place in close proximity in time. However, he did not consider that real

risk of prejudice to be a sufficient reason for the civil proceedings to be stayed, because serious injustice would be caused to large numbers of people (the company's former clients) who would have no chance to pursue recourse to recover the moneys they had lost to the company, until the conclusion of the criminal proceedings (at 790). He found that the defendants' right to a fair trial could be safeguarded in other ways, such as by the liquidators' undertaking that they would not disclose to any third party (other than their own solicitors and counsel), prior to the criminal trial, copies or contents of any affidavit or document served or disclosed by the directors in the civil proceedings, save with their prior written consent or with leave of the court (at 791).

Is there a real danger of prejudice to Mr Ng in the Criminal Proceedings if the suit is not stayed?

66 On the facts before me, both parties are in agreement that the Charges against Mr Ng have the same factual foundation as the fraudulent misrepresentation claim brought against Mr Ng in the suit.[61] In relation to the latter, Mr Ng has already filed his defence, the gist of which is that the plaintiffs dealt with one Jordan Chua (and not him) in relation to the Contracts and that he was not responsible for making the Representations, and if he did make them, he did not do so fraudulently, or had reasonable grounds to believe and did believe that the Representations were true (see [12] above). That being so, I accept the plaintiffs' submission that Mr Ng has effectively disclosed his defence to the Charges. In a manner of speaking, the horse has already bolted. The only question that remains is whether Mr Ng's *continued participation* in the suit will cause a real danger of an injustice to Mr Ng in the Criminal Proceedings.

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61 DWS at paras 37–38; PWS at para 41.

67 I reject Mr Ng's submission that requiring him to file affidavits in opposition to any summary judgment proceedings, or affidavits of evidence-in chief in the suit, will undermine his privilege against self-incrimination and therefore constitute a sufficient reason for the suit to be stayed. All this affidavit evidence will presumably be in line with his defence, which has already been filed, and can thus be expected to be exculpatory in nature. As already explained, the privilege against self-incrimination is not encroached on simply because a defendant is called upon to give evidence, the substance of which is likely intended to be exculpatory in effect (see [46] above). Similarly, since any right of silence which Mr Ng enjoys in connection with the Criminal Proceedings does not apply in connection with any steps that Mr Ng may be required to take in a related civil action, that will also not entitle him to withhold his evidence in the suit.

68 It is for Mr Ng to establish precisely how he will suffer a real, and not a notional, danger of prejudice. I find that he has not done this, other than to refer in general terms to his right of silence and his privilege against self-incrimination. A consideration of the factors in *Jefferson Ltd* ([34] above) and *McMahon* ([33] above), which I have referred to above (at [36]), does not assist his case. The risk of jury contamination is not a relevant factor in the context of our system of criminal trials, which does not involve juries. Significantly, given that there is at present no certainty that the Prosecution will proceed to trial on the Charges out of the 70 charges that Mr Ng faces (as at the time of the hearing before me), there might not even be any question of prejudice to Mr Ng by the suit being allowed to continue. Even if the Prosecution does proceed on the Charges, there is also no way to tell presently when the criminal trial will take place. As such, Mr Ng cannot show that there is prejudice to him arising from any proximity in time between the trial of the Criminal Proceedings and that of the suit. Mr Ng has also not suggested that his further participation and

giving of evidence in the suit is likely to cause a miscarriage of justice in the Criminal Proceedings because it would enable the fabrication of evidence by Prosecution witnesses or interference with Defence witnesses. Indeed, given that a major part of Mr Ng's defence is premised on the plaintiffs having dealt with one Jordan Chua (and not him), it appears that Mr Ng has already disclosed the identity of the witnesses whom he perceives as being critical to his defence to the Charges. He must therefore be taken to have implicitly accepted that there is no risk of any interference with possible Defence witnesses if they give evidence in the suit before the Criminal Proceedings are tried.

69 That leaves me with Mr Ng's submission that he will suffer prejudice if the suit is not stayed because of the burden of having to prepare for both the Criminal Proceedings and the suit concurrently. I am unable to accept this submission. While the burden of preparing for concurrent actions is a relevant factor (see [36] above), whether it will constitute a real danger of prejudice to the defendant in the criminal proceedings is ultimately dependent on the precise facts of the case. In *Websyte Corporation Pty Ltd v Alexander (No 2)* [2012] FCA 562 ("*Websyte Corporation*"), Dodds-Streeton J, who considered that the continuance of a civil action posed a real danger of prejudice to the defendants in related criminal proceedings, accepted that the defendants would suffer "significant strains" in having to prepare for concurrent criminal and civil trials. In that case, both defendants were impecunious and were dependent on *pro bono* representation, the continued provision of which appeared uncertain and precarious (at [124]). In stark contrast, in the present case, Mr Ng clearly has the financial means to retain a team of lawyers, led by Senior Counsel, for both this suit and the Criminal Proceedings against him. There is no evidence to suggest that he might run out of funds if he has to fight on two fronts, or that defending both the suit and the Criminal Proceedings will be an undue burden on him. In particular, at this stage, there is no indication as to when either the

trial of the suit or the Criminal Proceedings will be held, and so the question of any burden caused by defending both proceedings in close proximity in time is entirely hypothetical.

70 I also do not accept Mr Ng's submission that any advantage which might accrue to the Prosecution if he were required to defend the suit would constitute a real danger of prejudice to him in the Criminal Proceedings and so justify a stay of the suit. I accept that if the suit is not stayed, and if Mr Ng and his witnesses were to be cross-examined at trial, the Prosecution will enjoy some notional advantage in that the prosecutors may get a preview of Mr Ng's evidence if he is eventually tried on the Charges for the Criminal Proceedings. However, this is not, in itself, sufficient to show that there is a real danger of prejudice to him (see [54]–[62] above). Furthermore, the safeguard under s 134(2) of the Evidence Act precludes any incriminating answers that Mr Ng may give under cross-examination, under compulsion by the court, from being proved against him in the criminal trial of the Charges, if that proceeds. As for any incriminating evidence given by Mr Ng's witnesses under cross-examination, such evidence is *prima facie* inadmissible against Mr Ng in the criminal trial as it would be hearsay.

71 Moreover, the effect of any such advantage is overstated (see also [60] above). Crucially, Mr Ng has already filed a defence in the suit, which is not merely a bare denial of the plaintiffs' allegations but substantially outlines his defence to the claim against him for fraudulent misrepresentation. As his counsel informed me during the hearing, Mr Ng will also be participating in the criminal case disclosure process under the CPC,[62] under which Mr Ng will be required to provide to the Prosecution, as part of the Case for the Defence, a

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62 DWS at para 70; Notes of Hearing, 26 Oct 2021, p 4 lines 27–32.

summary of his defence, a list of witnesses which he intends to call and the exhibits which he seeks to rely on, after the Case for the Prosecution ("CFP") is served on him (see s 165(1) of the CPC). All this will be done well in advance of the criminal trial. In these circumstances, I cannot accept that any putative advantage that may accrue to the Prosecution from the continuance of the suit will constitute a real danger of injustice to Mr Ng in the Criminal Proceedings.

72 I will add that the present case is distinguishable from *Websyte Corporation*, which counsel for Mr Ng has relied on heavily in his submissions. In *Websyte Corporation*, the plaintiff commenced civil proceedings against the defendants for unauthorised access and modification of its computer data. The plaintiff later (in breach of court undertakings) provided its pleadings in the civil proceedings, which contained information obtained pursuant to search orders executed for the purposes of the civil proceedings, to the Victorian Police, which then pressed charges against the defendants in respect of the same conduct (at [9]–[21], [33] and [42]). Like Mr Ng, the defendants also sought a stay of the civil action after they had filed their defence in the same (at [22]–[23]). The court accepted that, notwithstanding that the defendants' defence to the criminal charges had already been disclosed, requiring them to further defend the action by filing affidavits, giving evidence at trial and being cross-examined would significantly compromise the defendants' legitimate interests in the criminal trial and prejudice them in the same (at [121]).

73 From my review of *Websyte Corporation* ([69] above), however, the court did not find that the defendants would suffer a real danger of prejudice in the criminal proceedings from the mere fact that they were required to further defend the civil action. Instead, that conclusion was reached after a consideration of the circumstances of the case as a whole (at [119]–[125]). In addition to the burden of having to defend both sets of proceedings despite the

prospect of continued *pro bono* legal representation being uncertain (see [69] above), the proximity in time of the trial of the criminal and civil proceedings, which the court found were "not unlikely" to overlap at least in terms of preparation for trial, if the latter was not stayed, was another factor which the court relied on in finding that there was a real danger of prejudice to the defendants in the criminal proceedings (at [123]).

74 Counsel for Mr Ng submits that *Websyte Corporation* shows that, even when a defendant has already filed his defence in the civil action, he can nevertheless suffer prejudice if he is required to defend the civil action by filing affidavits and giving evidence on matters which are the subject of criminal charges, which he otherwise would not have done in connection with the criminal proceedings. I reject that submission. As I have already explained, it does not follow as a matter of course that a defendant will suffer a real danger of prejudice simply because he is called upon to give evidence and defend himself in the civil action. I reiterate that the burden is on the defendant who seeks a stay of the civil action to demonstrate why taking those steps will occasion a real danger of prejudice to him. This is a fact-sensitive exercise that is not dependent simply on whether the defendant has already disclosed his defence.

75 In this case, it appears to me that the balance of justice lies in favour of the plaintiffs' *prima facie* entitlement to pursue their claims against Mr Ng. I agree with the AR that the suit should not be stayed because of the Criminal Proceedings.

76 In the course of the hearing before me, counsel for Mr Ng also made an alternative submission that the court should consider granting a limited stay of the suit until the Prosecution serves its CFP pursuant to s 161 of the CPC as part

of the criminal case disclosure process. As already mentioned, counsel for Mr Ng confirmed that his client will be participating in the criminal case disclosure process (see [71] above).

77 This submission was made by counsel in an attempt to counter the point that, at present, there is no certainty that the Prosecution will even proceed to trial on the Charges, out of the 49 cheating charges that Mr Ng faces under s 420 of the Penal Code. As such, counsel argues that it would be prudent to grant a stay until the position is made clear by the Prosecution. He relies on *Hamilton Island Enterprises Ltd and another v Johnston* [2010] QSC 38 ("*Hamilton*"), a decision of the Queensland Supreme Court. In that case, the plaintiffs commenced a civil action against the defendant (a former employee of the first plaintiff) for breach of contract and breach of fiduciary duties. Criminal charges were also brought against the defendant arising out of the same conduct complained of by the plaintiffs. However, the criminal proceedings remained at a very early stage and the defendant had yet to receive the full particulars of the charges against him (at [19]). McMeekin J ordered the civil action to be stayed until the conclusion of the committal proceedings, following which the defendant would receive full particulars of the charges against him, and so that he would then be in a position to particularise any prejudice, if any, that he might suffer by a continuation of the civil action (at [35]). Relying on *Hamilton*, counsel for Mr Ng argues that it is only when Mr Ng receives the CFP that he will be able to properly understand what the Prosecution's case will be at trial, what charges they are proceeding on, and so particularise the prejudice that he may suffer if the suit was not stayed but tried first, like the defendant in *Hamilton*.

78 I cannot accept this submission. Unlike in *Hamilton*, the full particulars of the Charges have already been made known to Mr Ng (copies of which he

has also exhibited in affidavits filed for the present proceedings). The Charges set out the various factual and legal elements which the Prosecution will seek to prove in its case against Mr Ng. While the CFP does set out more information than the Charges, and will include a summary of facts in support of the proceeded charge(s), a list of the names of the Prosecution's witnesses, a list of exhibits intended by the Prosecution to be admitted at trial, and the accused's statements which the Prosecution intends to adduce in evidence as part of its case at trial (see s 162(1) of the CPC), these contents relate more to *how* the Prosecution will prove its case against Mr Ng, rather than just *what* the Prosecution's case is. Not only that, it is clear from the defence filed by Mr Ng in the suit that he understands quite clearly the allegations of cheating and fraud being made against him. In other words, I do not think that the additional contents of the CFP are of such a nature that Mr Ng would not be able to understand or appreciate the Prosecution's case against him in their absence. I therefore do not agree that Mr Ng cannot particularise any possible prejudice until after he has been served with the CFP.

79 Further, the submission proceeds on the erroneous basis that a stay will almost certainly be granted if the CFP indicates that the Prosecution intends to proceed to trial on the Charges. Even if the Prosecution intends to try Mr Ng on the Charges, that still does not *per se* constitute a real danger of prejudice because, as already mentioned, Mr Ng will already be disclosing his defence in the criminal proceedings by way of his participation in the criminal case disclosure process under the CPC. His counsel candidly accepted at the hearing that the substance of Mr Ng's defence to the Charges will be the same as the defence he has filed in the suit, given the common factual foundation for both the Criminal Proceedings and the fraudulent misrepresentation claim in the

suit.[63] That being so, I cannot agree that there will be any real danger of prejudice in the Criminal Proceedings if the suit is not stayed.

Conclusion

80 For the reasons set out in this judgment, I dismiss the Registrar's Appeal. I will deal separately with the issue of costs.

Ang Cheng Hock
Judge of the High Court

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63 Notes of Hearing, 26 Oct, p 2 lines 26–31; p 3 lines 8–12; p 5 lines 13–16.