IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2020] SGHC 29

Suit No 1212 of 2017

Between

JTrust Asia Pte Ltd

… *Plaintiff*

And

(1) Group Lease Holdings Pte Ltd
(2) Mitsuji Konoshita
(3) Cougar Pacific Pte Ltd
(4) Aref Holdings Limited
(5) Adalene Limited
(6) Bellaven Limited
(7) Baguera Limited
(8) Yoichi Kuga

… *Defendants*

JUDGMENT

[Tort] — [Misrepresentation] — [Fraud and deceit]
[Tort] — [Conspiracy]
[Abuse of Process] — [Striking out]

JTrust Asia Pte Ltd
v
Group Lease Holdings Pte Ltd and others

[2020] SGHC 29

High Court — Suit No 1212 of 2017
Choo Han Teck J
8–11, 15–16, 21–22, 25 and 29–30 October 2019; 14 January 2020

12 February 2020 Judgment reserved.

Choo Han Teck J:

1 The plaintiff ("JTA") is a Singapore subsidiary of J Trust Co Ltd ("J Trust"), a company listed in Japan and carrying on business as an investment company. Group Lease Holdings Pte Ltd ("GLH"), the first defendant, is a Singapore subsidiary of Group Lease Public Co ("GL"), a company listed in Thailand. Mitsuji Konoshita ("Konoshita"), the second defendant, was a director and the Chief Executive Officer of GL and GLH until the Thai Stock Exchange barred him from acting as a director in any Thai listed company in October 2017.

2 JTA injected at least US$210m into GL through the purchase of convertible debentures, warrants, and shares in GL over four distinct periods, namely, 20 March 2015 ("the First Investment"), 6 June 2016 ("the Second Investment"), 1 December 2016 ("the Third Investment"), and between 13 March 2017 and 11 September 2017 ("the Fourth Investment"). JTA paid all

the money under various investment agreements between it and GL, save for the Fourth Investment, which consisted of purchases of GL's shares and warrants on the open market. Under the First Investment, JTA was entitled to convert its convertible debentures into shares, which it did on 30 December 2015.

3 JTA now claims that it made its Second, Third and Fourth Investments and converted its First Investment as a result of the practised fraud and conspiracy of Konoshita and the other defendants, and that Konoshita was the mastermind behind the fraud because he controlled all the defendants and GL, and manipulated the accounts and the parties to entice JTA to invest in GL. It is claiming damages against all the defendants accordingly. Mr Chan Leng Sun SC represents JTA, and Mr Lawrence Teh represents GLH and Konoshita.

4 Cougar Pacific Pte Ltd ("Cougar"), the third defendant, is a Singapore company owned by Pacific Opportunities Holdings ("POH") which was, in turn, wholly owned by Tep Rithivit ("Rithivit"). POH was acquired by a company called Saronic Holdings Ltd ("Saronic") on 12 June 2018, after the present suit was filed but before the trial. One of GLH's submissions is that Saronic is controlled by J Trust and JTA, and thus Cougar found itself stranded behind enemy lines. Yoichi Kuga ("Kuga"), who claimed to be the beneficial owner of the old, friendly Cougar, joined the action as the eighth defendant on 8 May 2019, and affiliates himself with the defendants, whereas Cougar itself now takes a neutral stance in the action. Kuga resigned as a director of Cougar on 5 August 2015, the same day Rithivit, who Kuga claims to be his nominee in POH, took over as the appointee of POH, the new owner of Cougar. The relationship between Rithivit, Kuga, and the defendants is a matter of some

intrigue that has not surfaced in the present proceedings before me, and are not issues in the action in this court, although Kuga has sued Rithivit in Luxembourg for breach of trust in selling the POH shares to Saronic. Cougar is also known in these proceedings as one of "the Singapore Borrowers", the others being its holding company, POH, and a Brazilian company known as Kuga Reflorestamento Ltd which is under the control of Kuga. Mr Daniel Tan represents Cougar and Mr Pradeep Pillay represents Kuga. Miss Deborah Barker SC represents the fourth to seventh defendants, known collectively as "the Cyprus Borrowers" at trial. The Singapore Borrowers and the Cyprus Borrowers are referred to as "the Borrowers".

5 JTA's case is founded on the basis that GLH and Konoshita made false representations, and it seeks to prove the deceit on the ground that GL's profitability was only evident from its financial statements but those reports were manipulated by GLH's false representations in its own financial data, which were incorporated into GL's statements. JTA alleges that GL made various loans to GLH, who then made loans to the Singapore and Cyprus Borrowers ("the GLH Loans") amounting to US$95m (US$9.8m of this was in Thai Baht amounting to THB$350m). JTA further alleges that a sum of US$25.1m was returned to GL by circuitous routes, described by Mr Chan as "round-tripping", which is understood to mean that the money left GL, went through friendly parties, and ultimately returned to GL. The plaintiff's case is that these loans made no commercial sense because the borrowers invested the loans in projects that yielded lower returns than the interest they had to pay to GLH. The GLH Loans should have been included in the financial accounts as interest-free loans, irrecoverable transfers of money or related-party transactions, and were deliberately concealed to give GLH and, consequentially,

GL the appearance of profitability. In addition to its financial accounts, JTA points to repeated representations by Konoshita that GL's retail financing business in Southeast Asia was highly profitable.

6 The narrative is more complicated because the GLH Loans were disbursed to various parties after first going into the accounts of the Singapore and Cyprus Borrowers, and several parties have been excluded from the action. The money, according to JTA, found their way back to GL through those parties, including Showa Holdings Co Ltd ("Showa"), Wedge Holdings Co Ltd ("Wedge"), Engine Holdings Pte Ltd ("Engine") and APF Group Co Ltd ("APF BVI"), all of which are controlled by Konoshita. Loans were also made to Rithivit, who passed the money through APF Holdings Co Ltd ("APF Thailand"), which JTA alleges is also owned by Konoshita. Showa, Wedge, Engine, APF BVI, APF Thailand and Rithivit are not present in the action. Notably, neither is the recipient of the investments, GL itself.

7 Liability for the tort of conspiracy is joint and several, and a plaintiff is entitled to sue whomever he wishes but where a party omitted from the suit is a protagonist in the alleged conspiracy, then the plaintiff will find it difficult, as a matter of evidence, to prove his case (*JTrust Asia Pte Ltd v Group Lease Holdings Pte Ltd and others* [2018] 2 SLR 159 at [48]). Similarly, although a false representation need not be made by the defendant directly to the plaintiff, a plaintiff proving the misrepresentation may find it difficult, as a matter of evidence, to show the necessary intention on the part of the defendant to communicate it to the plaintiff.

8 A claim in the tort of deceit requires that the representation has to be made with the intention that it should be acted upon by the plaintiff, or by a

class of persons which includes the plaintiff (*Panatron Pte Ltd and another v Lee Cheow Lee and another* [2001] 2 SLR(R) 435 at [14]). JTA's allegation is that GLH manipulated its financial statements with the intention of inducing JTA into investing in GL. It submits that GL and GLH should be treated as the same because the composition of the board of directors of both companies was nearly identical, and three of GL's directors were copied on emails involving JTA's negotiations with GL.

9 It is quite clear that Konoshita was in charge at both GLH and GL, but I do not think JTA has made out its case that GLH's financial statements were prepared with the requisite dishonest intention. First, GL's financial statements were not prepared solely for JTA, or even a class of investors including JTA; they were prepared for the purpose of GL's listing on the Thai exchange. JTA admitted that it obtained GL's financial statements from publicly accessible sources. Second, JTA has not shown how GLH's intent figures into the preparation of GL's financial statements. GL's financial statements incorporated GLH's financial data, but that in itself cannot support JTA's assertion that GLH actively provided that data and thereby made representations to JTA as it intended or knew that such data would be communicated to JTA. The exclusion of GL for reasons unknown unfortunately made it difficult to understand the dynamics between the parties. GL is a listed company with its own board of directors, and I do not think its decisions and the decisions of its subsidiary GLH may be solely attributed to Konoshita. And finally, its financial statements were prepared and audited by professional accountants.

10 Next, there is the issue of reliance. As became evident during the cross-examination of Nobuyoshi Fujisawa ("Fujisawa"), the CEO of J Trust and

JTA, and Shigeyoshi Asano ("Asano"), a former director of JTA, J Trust's board of directors did not appear to have read GL's financial statements in detail or they would have seen that the GLH Loans were in fact disclosed, albeit without full details. Fujisawa testified that he left those details to Asano, and Asano explained that he thought the loans referenced in the statements referred to retail financing loans, in line with JTA's understanding of its investments. JTA seemed content to rely on a general impression of GL's profitability. Further, JTA does not claim there were fraudulent misrepresentations in GL's financial statements that were published prior to the First Investment, and indeed that would be impossible as the GLH Loans were only made after the First Investment. Although that does not exclude the possibility that JTA had relied on GL's later financial statements when it made the Second to Fourth Investments and converted the convertible debentures from the First Investment, it substantially dilutes the force of counsel's submission. It seems more likely that JTA was satisfied with the performance of its investment thus far, and was prepared to continue investing money into GL.

11 Aside from GLH's financial statements, JTA also points to Konoshita's representations that GL was making great profits. According to JTA, it conducted limited due diligence on GL prior to the First Investment and no due diligence subsequently for this reason. However, JTA is a subsidiary of J Trust, a large and successful listed company. Both companies must be well-aware of the dangers of large investments, and to claim that JTA and J Trust Japan relied purely on Konoshita's verbal assurances of profitability in LINE messages and emails seems overly simplistic. One might say JTA's willingness to take Konoshita's words at face value and its lack of due diligence border on negligence and make any reliance on the representations far less reasonable.

JTA also did not allege that GL was not profitable; it merely pleaded that GL's profits had been overstated and, that had its financial statements been accurate, the profits would have been lower.

12 I turn to the issue of whether the representations were false, wilfully false, or made in the absence of any genuine belief they were true, which is whether the GLH loans were sham loans. Although this is a separate element of the tort of deceit, it is intrinsically tied up in JTA's submissions about GLH and Konoshita's intentions and reliance as JTA's plea is effectively that the round-tripping scheme is so extensive and elaborate that it must have been done with the necessary intent to deceive JTA or other potential investors.

13 Iain Potter ("Potter") testified as JTA's expert witness. He testified that GL's financial statements failed to disclose the GLH Loans as related party transactions and to account for the true nature of the loans, which should have been recorded as irrecoverable loans. The key to the issue of related party transactions is the ownership of the Borrowers. Potter inferred that the Borrowers were related to GLH because Konoshita was a member of the key management personnel of Cougar, repaid interest on behalf of the Singapore borrowers, and secured early repayment of the loans from the Cyprus borrowers.

14 The loans were undoubtedly unusual, but the fact that they might have raised questions at the appropriate levels in appropriate forums is different from using that as a basis to allege fraud. The Borrowers had no substantial commercial activity, or at least none that would justify the loans, and were incorporated shortly before the loans were made. The loan documentation was prepared only after the GLH Loans had been advanced, pursuant to requests by auditors; this means that the money was disbursed to allegedly unrelated parties

with no documentation whatsoever. According to Kuga, loan requests on behalf of the Singapore Borrowers were made orally, and although the alleged purpose was for the development of land in Brazil, he admitted in court that it had not been used for such a purpose. The value of this land in Brazil was also in doubt. Boris Zschorsch, the deputy chief financial officer of GL, only found out about the 2016 loans to the Cyprus Borrowers in 2017, and asked one Savvas Pogiatzis from Fidescorp to prepare the loan documents via email. Savvas Pogiatzis was a director of one of the Cyprus Borrowers, but also performed custodial services for GLH, and had control of the same bank accounts that the GLH Loans were disbursed from. Some of the transfers from GLH to the Cyprus borrowers were also marked as "internal transfer" or "same group transaction".

15 After the money was transferred to the Borrowers, it passed through other companies before it was used to purchase shares in GL, artificially increasing GL's share value, and the shares were then put up as collateral for the loans. The defendants do not contest that they were used for this purpose, but submit that there is nothing fraudulent about it. The loans to the Cyprus Borrowers were also used to acquire two villas in Cyprus, one of which was recorded as Konoshita's personal residence when he applied for Cypriot citizenship, and to purchase government bonds and shares in various businesses, including a bakery. Again, GLH does not dispute this, but submits that these were regular commercial investments. Potter highlights that the rate of return on these investments would have been so low, particularly compared to the interest rates charged on the GLH loans, that they made no commercial sense whatsoever.

16 GLH's defence is that the GLH Loans were advanced on the strength of the relationship GL and Konoshita shared with the "beneficial owners" of the Borrowers, namely, the Kuga family for the Singapore Borrowers and the Kiasrithanakorn family for the Cyprus Borrowers. Konoshita referred to the latter as the "Honda family" because of their relationship with Honda and their involvement in the motorcycle leasing business. It considered the loans to be effectively underwritten by those families, and hence had no qualms about the Borrowers' lack of commercial activity or the question of whether they would be repaid. The Cyprus Borrowers did not call any witnesses at trial.

17 Several aspects of Potter's analysis are questionable. For example, he asserted that the loans were suspicious because of the high interest rates, but JTA's own witnesses admitted that interest rates were not unjustifiable in the context. As for the early repayment of the loans by the Cyprus Borrowers, JTA's case is that Konoshita ordered this to be done to quell suspicion after the Securities and Exchange Commission of Thailand announced it had filed a criminal complaint against Konoshita, but Potter conceded that the Cyprus Borrowers could have repaid the loans because they were concerned about being dragged into investigations. Potter also claimed that Konoshita was in control of the Cyprus Borrowers, pointing to the existence of the GLH Loans as evidence, but the circularity of his reasoning is evident — JTA would like the court to find that the loans are shams because the parties are related, and the parties are related because the sham loans exist.

18 JTA submitted that its investments were only intended to be used for retail financing in Southeast Asia and not for injections into Singapore or Cyprus companies, but only US$95m of its US$210m investment, or less than

half, might be traceable to the GLH Loans. Importantly, it appears that by early 2017, JTA was aware of the use of the Singapore and Cyprus Borrowers for tax reasons and included this information in their internal materials. They were aware that the Cyprus companies were corporate vehicles of the "Honda family". This was a family or a business directly linked to the industry JTA thought it was investing in. In fact, GL and Konoshita publicly addressed the loans made to the Singapore and Cyprus borrowers in March 2017, prior to JTA's Fourth Investment. Fujisawa acknowledged that JTA's purchases of GL's shares on the open market in the Fourth Investment were done with the full knowledge of the GLH Loans. GL and Konoshita did not keep their activities in Cyprus a secret. Fujisawa himself applied for Cyprus citizenship with the assistance of Konoshita.

19 I find that the claim in deceit against GLH and Konoshita is not made out. It requires the court to accept all of JTA's submissions and find an extensive long-term plan to defraud investors. The GLH Loans, though suspicious, could be explained as GLH maintains that they were advanced on a goodwill basis between Konoshita and the Borrowers. Konoshita testified that he repaid the loans on behalf of Cougar because it had paid him first or through other sources, an allegation that was not impossible given the numerous transactions. Potter only alleged that Konoshita is a member of the key management personnel of Cougar on the basis of the consulting agreements, but as the defendants pointed out, this was an agreement for consulting and not management services.

20 The conduct of GLH and Konoshita may fall far short of the standards of good corporate governance, but JTA has not shown that it had crossed the threshold into dishonest intent. Fraud is an easy allegation to make but difficult

to prove. The burden of proof is always on the plaintiff to prove its case on the balance of probabilities (*Alwie Handoyo v Tjong Very Sumito and another and another appeal* [2013] 4 SLR 308 at [159]). This is particularly true in a case like the present one, which involves large and established listed companies, complex commercial structures and international transactions. The court's task is not made easier when parties limit the scope of evidence by excluding parties or causes of action. GL's absence means it was denied the opportunity to refute or explain the allegations of fraud during the trial. Even though Konoshita appeared as a witness, he could only speak for the subsidiary, GLH, and himself.

21 As for JTA's claim in conspiracy against Cougar and the Cyprus borrowers, it has similarly to show those defendants' intention to cause injury to JTA (*Turf Club Auto Emporium Pte Ltd and others v Yeo Boong Hua and others and another appeal* [2018] 2 SLR 655 at [310]), which it has not, and for that reason the claim against them must fail. JTA submits that Konoshita's fraudulent intention is attributable to Cougar and the Cyprus borrowers as they were merely instruments under his control, and the nature of the loans suggests an intention to injure the plaintiff. No conclusive evidence was tendered in this regard, and JTA is asking the court to infer the Borrower's intention merely on the existence of the GLH Loans. Though unusual, the loans themselves cannot amount to sufficient evidence for a finding of dishonesty.

22 Finally, the defendants argue that JTA's act of taking control of Cougar is an abuse of process justifying the Court's dismissal of the plaintiff's claim in its entirety. The issue of the beneficial ownership of Cougar may be currently before the Luxembourg court, but it was clear from the trial that Cougar is under the control, indirect or otherwise, of J Trust, which has funded Saronic's role in

the litigation. After Saronic obtained control of Cougar, the company capitulated to JTA's demands. Cougar maintains a neutral stance and the only witness it cross-examined was Kuga himself. Nothing had turned on that cross-examination. Aside from JTA's conduct in relation to Cougar, Mr Teh also submits that the entire suit is an abuse of process that arises out of J Trust's demonstrated desire to acquire GL, a desire thwarted by Konoshita. He submits that JTA has acted oppressively to assert commercial pressure on the GL group and force a merger.

23 In my view, even if JTA was so motivated as Mr Teh suggests, its conduct does not rise to the level where striking out its entire claim is justified. That would deny JTA the opportunity to pursue its claim in the courts on procedural grounds. Although I find that JTA's claim has not been proved on the balance of probabilities, it is not wholly unmeritorious in light of the unusual nature of the GLH Loans. The court is not in a position to speculate on what might have been JTA's motives in pursuing such an action before all the evidence has been adduced.

24 My final point has nothing to do with the merits of the case, only on the adherence to proper conduct in litigation. When a court announces that it will reserve judgment, nothing more needs to be said or done by counsel. In this case, shortly after I had reserved judgment, the lawyers for the plaintiff and the first and second defendants began a long and protracted exchange of acrimonious letters and copying them to the court until I directed the lawyers to desist. Lawyers are entitled to write to each other but their letters should not be copied to the court in breach of the peace in which the court is considering their final submissions without further material that might influence the court. The

letters here number 13 in a total of 70 pages. They were rude and provocative letters oozing venom at every turn and achieved nothing but the death by poison of all that is gracious and noble in the craft of advocacy.

25 For the reasons above, I dismiss the plaintiff's claims in the torts of deceit and conspiracy against all the defendants and I order the plaintiff to pay the costs of the defendants. The costs are to be taxed if not agreed.

- Sgd -
Choo Han Teck
Judge

Chan Leng Sun SC and Colin Liew (instructed counsel), Ang Hsueh Ling Celeste, Lee Zhe Xu, Shirleen Low and Yiu Kai Tai (Wong & Leow LLC) for the Plaintiff;
Lawrence Teh Kee Wee, Edric Pan Xingzheng, Melvin See Hsien Huei, Melissa Thng Huilin, Chia Huai Yuan, Zheng Huaice, Elias Benyamin Arun and Sean Sim Zhi Quan (Dentons Rodyk & Davidson LLP) for the 1st and 2nd Defendants;
Daniel Tan Shi Min, Nigel Ignatius Teo Yi Hao and Chia Shi Mei (WongPartnership LLP) for the 3rd Defendant;
Deborah Barker SC, Hewage Ushan Saminda Premaratne and Kenneth Yap Meng (Withers KhattarWong LLP) for the 4th to 7th Defendants;
Pillai Pradeep, Simren Kaur Sandhu and Caleb Tan Jia Chween (PRP Law LLC) for the 8th Defendant.