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

[2023] SGHC 245

Suit No 130 of 2020

Between

Voltas Limited

… *Plaintiff*

And

(1) Ng Theng Swee
(2) Yong Chan Metal Engineering Pte Ltd

… *Defendants*

Counterclaim of Second Defendant

Between

Yong Chan Metal Engineering Pte Ltd

… *Plaintiff in Counterclaim*

And

Voltas Limited

… *Defendant in Counterclaim*

GROUNDS OF DECISION

[Tort — Conspiracy — Whether there was a combination between the director and his company]
[Tort— Misrepresentation — Fraud and deceit]

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v
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5 September 2023

Aedit Abdullah J:

1 The plaintiff, Voltas Limited, has appealed against my decision in this suit that the claims of conspiracy and deceit against the first defendant, Mr Ng Theng Swee, were not made out, and that no costs were ordered against him accordingly. In my decision, I had found in favour of the plaintiff in respect of the claims made against the second defendant, Yong Chan Metal Engineering Pte Ltd, to the sum of S$3,437,937.36. No appeal has been made by the second defendant. These grounds will thus focus on the claims against the first defendant and will only recount briefly the claims and findings made against the second defendant.

Background

2 The plaintiff was the main contractor for tunnel ventilation and environmental control systems works in respect of nine stations of the Thomson

East-Coast Mass Rapid Transit Line.[1] The ducting works for four of the nine stations were subcontracted to the second defendant ("the Subcontract Works") through an agreement that was entered into in 2017 ("the 2017 Subcontract") and various other purchase orders for related works.[2] The first defendant was a director and majority shareholder of the second defendant and made all the business and commercial decisions in relation to the Subcontract Works on the second defendant's behalf.[3] The first defendant was also the sole negotiator and signatory for all the relevant agreements executed by the second defendant in respect of the Subcontract Works.[4]

3 Following various delays to the Subcontract Works caused by the second defendant's liquidity issues and its inability to pay its workers, the plaintiff and the second defendant entered into a supplemental agreement ("the Supplemental Agreement") on 30 November 2018.[5] The Supplemental Agreement set out the terms and conditions on which an advance of S$65,243.42 was made by the plaintiff to the second defendant in consideration for various covenants and commitments made by the second defendant to complete the Subcontract Works on or by 31 December 2018.[6] However, the second defendant did not complete the Subcontract Works by then due its continued liquidity issues. Therefore, at the first defendant's request, the plaintiff took over the employment of 12 of the second defendant's workmen.[7]

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1 Amritpal Singh's Affidavit of Evidence-in-Chief ("AEIC") at para 2; Plaintiff's Closing Submissions ("PCS") at para 2.

2 Statement of Claim (Amendment No 1) ("SOC") at para 7.

3 Notes of Evidence ("NE") dated 16 March 2022 at p 13 lines 20–31.

4 PCS at para 2.

5 PCS at para 3; SOC at para 23.

6 1 Agreed Bundle of Documents ("AB") 66–70.

7 PCS at para 83; Defendants' Closing Submissions ("DCS") at para 117.

This gave rise to the execution of an addendum ("the Addendum") on 18 January 2019 which amended one of the clauses in the Supplemental Agreement to provide:[8]

> [The plaintiff] may sign Employment Contracts with not more than 12 workmen/ supervisors who were employed with [the second defendant]. All costs associated with these workmen till completion of [the second defendant's] scope of works shall be repaid by or recovered from [the second defendant]. Such costs shall include, but not be restricted to, expenditure on salaries, allowances, overtime, accommodation and repatriation (if required) of these workmen/supervisors.

4 Eventually, the Subcontract Works were completed. However, the main question on which this suit turned was when and by whom those works were completed. Relevant also to the claims in conspiracy and deceit, in respect of which the plaintiff has brought an appeal, was the first defendant's state of mind when it entered into the Supplemental Agreement. It is with these in mind that I now turn to the parties' respective cases.

Parties' arguments in respect of the plaintiff's claims

Plaintiff's case

5 The plaintiff's overarching case was that the second defendant did not complete the requisite Subcontract Works by end-December 2018.[9] It was also the plaintiff's position that the second defendant abandoned the Subcontract Works on 18 January 2019 when it executed the Addendum to transfer its remaining workmen to the plaintiff and subsequently sold its factory premises and ducting machinery.[10]

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8 1 AB 71.

9 PCS at para 4.

10 PCS at para 4.

6 In light of these facts, the plaintiff pursued different claims against the first and second defendants. In respect of the first defendant, the plaintiff claimed in conspiracy on the alleged basis that the first defendant caused the second defendant to breach its contractual obligations under the Supplemental Agreement and/or the 2017 Subcontract.[11] Alternatively, the plaintiff claimed that the first defendant was liable in the tort of deceit for fraudulent misrepresentations which were allegedly made to the plaintiff to induce the plaintiff to pay an additional advance and enter into the Supplemental Agreement.[12] Broadly, the alleged factual basis underlying these claims was that the first defendant had made representations to the plaintiff during a meeting on 29 November 2018, containing certain promises which induced the plaintiff to enter into the Supplemental Agreement with the second defendant, but which the defendants did not intend to follow through on.[13]

7 Against the second defendant, the plaintiff claimed for damages arising from the second defendant's alleged breaches of the Supplemental Agreement. In particular, the plaintiff sought to recover the costs incurred in engaging other subcontractors to perform works which the second defendant ought to have done.[14] Separately, the plaintiff also claimed damages under s 57(*a*) of the Bills of Exchange Act 1949 (2020 Rev Ed) ("BEA") for cheques issued by the second defendant for the Subcontract Works, but which were dishonoured upon presentation for payment. The plaintiff argued that the cheques were intended to be security deposits and/or on-demand performance bonds to guarantee the second defendant's performance of the Subcontract Works. According to the

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11 PCS at para 7.

12 PCS at para 7.

13 PCS at paras 194 and 204.

14 PCS at para 5.

plaintiff, since the second defendant failed to perform the agreed Subcontract Works, the plaintiff was entitled to encash the cheques and recover under the same, subject to the rule on double recovery.[15]

Defendants' case

8 In response, the first defendant argued that it was not sufficient for the plaintiff to merely allege that the only representative of the second defendant with whom the plaintiff had communicated for the Subcontract Works was the first defendant.[16] There were no contracts between the plaintiff and the first defendant, and the first defendant was not personally involved in the contracts with the plaintiff except as a representative/director of the second defendant.[17] Therefore, the first defendant argued that the mere fact of him being a director of the second defendant and a primary contact point between the plaintiff and the second defendant did not mean that he should be liable for damages for any breach of contract by the second defendant.[18] To this end, the first defendant relied[19] on the statement of the Court of Appeal in *PT Sandipala Arthaputra and others v STMicroelectronics Asia Pacific Pte Ltd and others* [2018] 1 SLR 818 ("*PT Sandipala*") at [4] for the principle that liability cannot be imposed on directors merely because they had some involvement in causing the breach.

9 Moreover, in respect of the plaintiff's claim in deceit, the first defendant contended that while the plaintiff had pleaded the first defendant had made certain oral fraudulent misrepresentations which the plaintiff allegedly relied on

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15 PCS at para 9.

16 DCS at para 122.

17 DCS at para 122.

18 DCS at para 124.

19 DCS at para 123.

in entering into the Supplemental Agreement, the plaintiff had adduced no evidence of such oral representations.[20] The first defendant further submitted that the plaintiff's claims against the first defendant were premised on the plaintiff being able to prove that the second defendant had indeed breached the Supplemental Agreement and Addendum. Therefore, the first defendant argued if the plaintiff failed on its claims against the second defendant, it should also have no claims against the first defendant.[21]

10 In relation to the plaintiff's claim to recover the costs allegedly incurred in engaging other subcontractors to perform works which the second defendant ought to have done, the defendants' primary argument was that verification by the second defendant was necessary as a contractually stipulated condition of reimbursement, and that since the second defendant had not verified the sums submitted by the plaintiff, the plaintiff was not entitled to reimbursement.[22] Separately, as regards the plaintiff's claim under the BEA, it was argued that the plaintiff was not entitled to encash the cheques. The second defendant explained that the cheques were meant to be given in exchange for contract deposits which would be provided to the second defendant by the plaintiff.[23] However, the plaintiff did not provide the requisite deposits in respect of some of the cheques in question. Furthermore, the second defendant contended that, even on the plaintiff's case that the cheques were meant to be on-demand performance bonds, the second defendant had completed the relevant part of the Subcontract Works. As such, there was no basis for the plaintiff to encash at

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20 DCS at para 127.

21 DCS at para 131.

22 DCS at para 55.

23 DCS at para 98.

least some of the cheque(s) because there was no consideration provided for these cheque(s).[24]

11 Additionally, the defendants argued that the second defendant was entitled to set off a retention sum of S$98,415.25 ("the Retention Sum") from any sums which might be due to the plaintiff under the 2017 Subcontract.[25]

Parties' arguments in respect of the second defendant's counterclaim

12 The second defendant also counterclaimed for the sum of S$919,225.66, which consisted of unbilled works which were allegedly completed under the 2017 Subcontract, various subsequent purchase orders, and a further subcontract dated 3 August 2018.[26]

13 Against this counterclaim, the plaintiff's broad defence was that the second defendant had not completed the works claimed for in its counterclaim.[27] The plaintiff also submitted that the second defendant was not entitled to the Retention Sum in any event.[28] In support of its position, the plaintiff's primary argument was that the second defendant had abandoned the Subcontract Works as of 18 January 2019, prior to substantial completion of the Subcontract Works.[29] Further or in the alternative, the plaintiff argued that even if the second defendant was entitled to the Retention Sum, the plaintiff was entitled to apply the Retention Sum to mitigate and/or set-off the plaintiff's losses arising from

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24 DCS at para 101.

25 Defendants' Further Submissions dated 26 September 2022 ("DFS") at p 12.

26 DCS at paras 153 and 162.

27 PCS at para 231.

28 PCS at paras 290–292.

29 PCS at para 292.

the second defendant's breaches of the 2017 Subcontract.[30] Moreover, the plaintiff disputed the quantum of the Retention Sum and took the position that it should be S$38,728.98 instead, being derived from the second defendant's financial statements as of the end of December 2018 and December 2019.[31]

My decision and initial Brief Remarks

14 Having considered the submissions and evidence, I concluded that the plaintiff had made out its claims for breach of contract and under the BEA, but not the other claims it had put forward. On the other hand, the second defendant failed in its counterclaim. On 23 December 2022, I issued my Brief Remarks outlining the main points underlying my decision. I also indicated that I would add to these remarks in full grounds if necessary.

Supplemental Agreement and Addendum

15 First, I found that the second defendant had breached the Supplemental Agreement and the Addendum by failing to reimburse the plaintiff for the costs of 12 workmen that the plaintiff engaged, which the second defendant accepted were incurred by the plaintiff in order to complete the works as captured in that agreement. In this regard, I rejected the defendants' primary argument that verification by the second defendant was necessary as a contractually stipulated condition of reimbursement, and that since the second defendant had not verified the sums submitted by the plaintiff, the plaintiff was not entitled to reimbursement.[32] Indeed, I did not see any such contractual obligation in the express words of the contract. There was also no pleading of implication as a

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30 PCS at para 293.

31 PCS at para 296.

32 DCS at para 55.

matter of business necessity. Such a term would not in any event be necessary in all situations; it is entirely conceivable that the parties would have agreed to a process by which only invoices were to be relied upon. The upshot of this was that the plaintiff was entitled to claim on the face of the invoices or orders issued. This would however be subject to the defendants adducing evidence that no work was in fact done, which was an evidential issue to which I now turn.

16 On this issue, while the defendants took issue with the allegation of abandonment and non-completion, I found on the balance of probabilities that the second defendant did not complete and had abandoned the work. This conclusion was in line with much of the documentary evidence, the inherent probabilities of the situation, and the testimony in court. There was little to support the defendants' version on this score. Their attacks, particularly on the documentary evidence, were not enough to show that the plaintiff's case was not more probable. There was extensive testimony and cross examination on the documents, especially the various payments made. In the end, while there were indeed weaknesses in the plaintiff's evidence, including the absence of evidence from the participants of the meeting of 29 November 2018 when the Supplemental Agreement was discussed, I found that the evidence overall was sufficient nonetheless to establish the plaintiff's case on this claim.

The Bills of Exchange Act

17 Turning to the plaintiff's claims under the BEA, I found that the plaintiff was entitled to the face value of the cheques when presented for payment. These cheques were, in the circumstances, a form of a security for the advances given by the plaintiff, although I had some reservations about characterising these as on-demand performance bonds, as asserted by the plaintiff. Moreover, I disagreed with the second defendant's position that no consideration was

provided for at least some of these cheques on the basis that the second defendant had already completed the relevant part of the Subcontract Works when at least some of the cheques were provided. This was because s 27(1)(*b*) of the BEA explicitly provides that valuable consideration for a bill may be constituted by an antecedent debt or liability; such a debt or liability is deemed valuable consideration whether the bill is payable on demand or at a future time. In my view, this would have included the contractual obligations to perform the Subcontract Works. As such, I concluded that the second defendant was liable for damages to the plaintiff under s 57(*a*) of the BEA for the dishonoured cheques.

18 Be that as it may, and as conceded in any event by the plaintiff in its closing submissions, the sum of damages claimable could not exceed the loss suffered. As such, the amount that could be claimed in damages for the breach of the Supplemental Agreement and Addendum would have to be offset by what was claimable on the cheques. This is an issue which I will address subsequently.

Failed claims and counterclaim

19 I did not however find that there was any conspiracy or deceit on the part of the first defendant, as alleged by the plaintiff. The evidence fell short of what was required to establish such torts. The counterclaim of the second defendant failed as well. In sum, liability only attached to the second defendant, and not the first defendant or the plaintiff.

The reliefs awarded

20 I turn now to the reliefs claimed. The overall quantum claimed by the plaintiff on the contract was S$3,437,937.36, including Goods and Services Tax

("GST"). The plaintiff submitted that this amount represented a cap on the damages that the plaintiff was entitled to, taking into account any sums that may also be awarded in respect of the dishonoured cheques, and which thereby did not contravene the rule against double recovery.[33] In contrast, the defendants' argument was that taking the plaintiff's case at its highest and ignoring the issues raised in the defendants' defence and counterclaim, the plaintiff should only be entitled to a maximum sum of S$28,021.87.[34]

21 The plaintiff essentially relied on the tabulation carried out by its witness, based on invoices and records. While the evidence presented by the plaintiff was not absolutely convincing, lacking as it did in immediacy and concreteness in comparison with direct evidence coming from witnesses who carried out the work and who surveyed the materials supplied and used, it was sufficiently cogent and strong enough to make out the plaintiff's case on the balance of probabilities. There was no obvious error or shortcoming in the evidence presented by the plaintiff that would reduce its strength. The defendants also did not provide sufficient evidence that undermined the plaintiff's evidence or rendered its strength below the balance of probabilities. Furthermore, the defendants' own evidence of what transpired in respect of each of the portions of work in question fell short of undermining the plaintiff's evidence or reducing its strength.

22 I was also properly satisfied that any possible double recovery had been properly accounted for in the plaintiff's calculations in reaching the sum of S$3,437,937.36, including GST. I also accepted that the second defendant was

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33 Plaintiff's Further Submissions dated 5 September 2022 ("PFS") at para 4.

34 DFS at para 11.

not entitled to the Retention Sum, given that the Subcontract Works were abandoned before completion.

23 For completeness, given that I have found that the sum S$3,437,937.36 represented a cap on the plaintiff's recovery, any recovery of the face value of the dishonoured cheques of S$1,086,616 and accompanying statutory interest would be subsumed under the award of damages of S$3,437,937.36 in favour of the plaintiff.

24 Flowing from the above, the reliefs I awarded against the second defendant were as follows:

(a) on the basis of the contractual claim in the form of the supplemental agreement and addendum, S$3,437,937.36 inclusive of GST, with the usual interest; and

(b) the sum due on the face of the dishonored cheques, S$1,086,616, and statutory interest which would be subject to any recovery in subparagraph (a) above.

My grounds in relation to the issues raised on appeal

25 Dealing only with the matters concerning the appeal filed by the plaintiff, the issues that arose are whether conspiracy (by unlawful and lawful means) and deceit were made out. Primarily, the complaint of the plaintiff was of the actions or of the breaches by the second defendant, the company. The evidence did not establish a case against the first defendant.

Unlawful means conspiracy

The applicable law for conspiracy claims

26 I turn first to address the plaintiff's claims against the first defendant in unlawful means conspiracy and lawful means conspiracy. These claims were not made out on the facts, as there was insufficient evidence of any combination between them and the damage.

27 To establish a claim in unlawful means conspiracy, the following elements must be proved: (a) two or more persons combined to do certain acts; (b) the conspirators intended to cause damage or injury to the plaintiff by those acts; (c) the acts were unlawful (including intentional acts that are tortious); (d) the acts were performed in furtherance of the agreement; and (e) the acts caused loss (see the Court of Appeal decision of *EFT Holdings, Inc and another v Marinteknik Shipbuilders (S) Pte Ltd and another* [2014] 1 SLR 860 ("*EFT Holdings*") at [112]).

28 In comparison, to make out a claim in lawful means conspiracy, there is no requirement that there be an unlawful act committed by the conspirators. However, it is necessary to show a dominant purpose by all the conspirators to cause damage or injury to the plaintiff, and it must be that the act was carried out and the purpose achieved (see the Court of Appeal decision of *Quah Kay Tee v Ong and Co Pte Ltd* [1996] 3 SLR(R) 637 at [45]).

29 Distilling the arguments by the parties, the broad issues were whether:

(a) there was a combination between the defendants to do certain acts;

(b) whether the acts were unlawful and whether such acts were performed in furtherance of that agreement; and

(c) the defendants intended to cause damage or injury to the plaintiff.

I found that these questions should all be answered in the negative for the following reasons.

The first defendant was not liable in unlawful means conspiracy

(1) There was no combination between the defendants to do unlawful acts

30 I first turn to the plaintiff's claim in unlawful means conspiracy. To begin with, I found that there was no combination between the defendants to do unlawful acts. The plaintiff first relied on the High Court decision of *SH Cogent Logistics Pte Ltd and another v Singapore Agro Agricultural Pte Ltd and others* [2014] 4 SLR 1208 ("*SH Cogent*") to argue that a company and its controlling director may be liable for the tort.[35] The plaintiff further argued that what constitutes an agreement or combination need not be explicit but can be inferred.[36] On this point, the plaintiff contended that the more reprehensible the unlawful acts, the more likely it is that the company would be taken to have agreed to the conspiracy, provided that the company can also be imputed with knowledge of the illegality (see Lee Pey Woan, "Civil Conspiracy in the Corporate Context" (2016) 23(3) Torts Law Journal 257 at 266).[37]

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35 PCS at para 178.

36 PCS at para 179.

37 PCS at para 179.

31 Despite the plaintiff's arguments, there was no combination on the facts. While it is true that directors of a company can be in a conspiracy with the company (see *PT Sandipala* at [51]), the Court of Appeal emphasised in *PT Sandipala* at [4] that liability cannot be imposed on directors merely because they had some involvement in causing the breach. What needs to be shown by the plaintiff as a requirement of liability is that the directors' acts, in their capacity as directors, are in breach of their fiduciary or other personal legal duties owed to the company (see *PT Sandipala* at [62] and [65]). Applied to the tort of conspiracy (whether by unlawful or lawful means), this requirement is relevant to the finding of a combination. The principle is that where a director has breached their fiduciary or other personal legal duties owed to the company by causing the company to commit the unlawful act(s) in question, the law deems that there was a combination between the director and his company to do such acts.

32 Indeed, this principle is grounded on legal policy, as illustrated by the comments of the Court of Appeal in *PT Sandipala* at [63] and [65]:

> 63 … It would also be wrong to treat the director as *conspiring* with the company, given that the director is acting as the company. There is effectively only one legal actor in play, *ie*, the company, and this is typically fatal to the fundamental requirement of a conspiracy that there be two or more persons acting in concert. To hold that the company's agents are nevertheless personally liable for the acts taken by the company in relation to a contract entered into *by the company*, when they act in the company's capacity and in fulfilment of their duties towards the company, undermines the separate legal personality doctrine and makes nonsense of this fiction that undergirds the fundamental tenets of company law.
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> …
>
> 65 … our view is that the most appropriate elucidation of the *Said v Butt* principle is that a director would ordinarily be immune from tortious liability for authorising or procuring his company's breach of contract in his capacity as a director,

> unless his decision is made in breach of any of his personal legal duties to the company. …
>
> [emphasis in original]

33 As can be gleaned from the extract above, it would not ordinarily make sense to conclude that there was a combination between a director and his company. This is because the company, which has an artificial legal personality, must necessarily act through a natural person. If too loose an approach is taken in finding that directors are acting in combination with the company, directors would often be made personally liable for the acts of the company. This would undermine the separate legal personality of the company, which treats the rights and obligations of the company as being separate from that of its shareholders and managers, and which accordingly does not impose liability on them for the contractual breaches of the company. The company is therefore interposed between its directors and third parties, and such third parties do not typically have a cause of action against the directors for the unlawful acts committed by the company. However, the protective function of such imposition does not operate absolutely in all circumstances. As the Court of Appeal has determined in *PT Sandipala*, personal liability may still be visited on a director in the tort of conspiracy where he acts in breach of his fiduciary or other personal legal duties owed to the company in causing the company to commit the acts complained of by the third party.

34 In the present case, the plaintiff argued that the first defendant failed to consider the interests of the plaintiff as a creditor when the second defendant was allegedly insolvent or near insolvent.[38] This was because, as the plaintiff alleged, the first defendant could not have had any reasonable belief that the second defendant could have performed or fulfilled the various obligations and

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38 PCS at para 182.

undertakings which the first defendant had represented to the plaintiff during the 29 November 2018 meeting and which had been captured in the Supplemental Agreement executed the next day.[39]

35 These arguments did not persuade. While the second defendant had breached the Supplemental Agreement, it did not follow that the first defendant should be made liable for it through the tort of unlawful means conspiracy. By causing the second defendant to breach the Supplemental Agreement, I found that the first defendant had not breached his duties owed to the second defendant.

36 In this regard, the plaintiff relied on the Court of Appeal decision of *Liquidators of Progen Engineering Pte Ltd v Progen Holdings Ltd* [2010] 4 SLR 1089 ("*Progen*") for the proposition that that the first defendant had a duty, as part of his duties owed to the second defendant, to consider the plaintiff's interests as a creditor when the second defendant was insolvent or nearing insolvency, and that this duty was breached by causing the second defendant to enter into the Supplemental Agreement with the plaintiff.[40] However, the creditor-regarding duty laid down in *Progen* was not relevant in the present case. Read in its proper context, notwithstanding that the creditor-regarding duty operates when the company is insolvent or near insolvency, any action premised on the breach of this duty is *only relevant* where the company in question has entered into liquidation. Indeed, this is telling from the observations of Street CJ in the New South Wales Court of Appeal decision of *Kinsela v Russell Kinsela Pty Ltd (In Liq)* (1986) 4 NSWLR 722 at 730:

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39 PCS at para 194.

40 PCS at paras 184–194.

> But where a company is insolvent the interests of the creditors intrude. *They become prospectively entitled, through the mechanism of liquidation*, to displace the power of the shareholders and directors to deal with the company's assets.
>
> [emphasis added]

37 It may be discerned from the extract above that any action for breaches of the creditor-regarding duty is only relevant when the "mechanism of liquidation" is engaged. Likewise, the Court of Appeal in *Progen* alluded to this when it opined at [52] that "individual creditors cannot, *without the assistance of liquidators*, directly recover from the directors for such breaches of duty" [emphasis added]. This suggests that, among other things, liquidation is a condition precedent to the *relevance* of the creditor-regarding duty in an action that is premised on its breach. In the present case, while the second defendant was facing financial difficulties, it was not in liquidation. Relatedly, this also highlights that the creditor-regarding duty is owed to the *company* only. As such, it was inappropriate to even invoke the creditor-regarding duty to begin with.

38 Even if the creditor-regarding duty were relevant, I did not think that the first defendant breached this duty. In my view, a breach of the creditor-regarding duty is concerned with the taking of "illegitimate risks" (see *Progen* at [52]), and the law should not punish directors for taking legitimate risks to bring the company back to solvency when a company is insolvent or nearing insolvency. The UK Supreme Court had the opportunity to consider this point (as part of a broader restatement of the creditor-regarding duty) in its recent decision of *BTI 2014 LLC v Sequana SA and others* [2022] 3 WLR 709, and the judgments of Lords Reed and Briggs are instructive in this respect. To explain this point, I can do no better than to repeat the observations of Lord Reed at [58]:

> … In practice, the general body of creditors may well stand to benefit, as well as the shareholders, if the company can be turned around or its business can be disposed of advantageously, since they may have little prospect of receiving any significant distribution in an insolvent winding up. Nevertheless, the creditors will usually remain the primary bearers of the risks involved, and decisions in relation to a rescue strategy should therefore be taken with regard to their interests. *That is not, of course, to say that a rescue strategy is ruled out: depending on the circumstances, the directors may well consider in good faith that such a strategy is in the interests of the company, having regard to the interests both of the creditors and also of the shareholders as a whole.*
>
> [emphasis added]

And those of Lord Briggs at [164]:

> Nor is it a duty, once engaged, always to treat creditors' interests as paramount. Section 172(3) speaks in the alternative of a duty to consider creditors' interests or a duty to act in accordance with them. Creditors are not to be treated as having the main economic stake in the company at least while a company is solvent or, if insolvent, while there is still light at the end of the tunnel. It is not enough to say that, once there is a risk of insolvency, the implicit risk that they as a class will get hurt in their pockets is a sufficient reason for elevating them to the status of paramount stakeholders, still less as a class whose interests must always predominate. *It is inherent in the law's encouragement of risk-taking and commercial enterprise under limited liability that creditors of limited companies will get hurt from time to time. Most creditors are voluntary. They are therefore able to make their own judgment about those risks and to take such precautions against them by a demand for security as they think fit, armed with such public information about the financial position of the company as the law makes available, or the company chooses to provide.*
>
> [emphasis added]

While the UK Supreme Court's restatement of the creditor-regarding duty has yet to be fully considered by the Singapore courts, and it is not necessary to do so here, it is nonetheless clear that the creditor-regarding duty is subject to qualifications, one of which being that legitimate risk-taking behaviour by directors should not be punished.

39 Applied to the present facts, I did not think that the creditor-regarding duty was breached as I found that the first defendant's choice to cause the second defendant to enter into the Supplemental Agreement fell within the acceptable bounds of legitimate risk taking. When the Supplemental Agreement was entered into on 30 November 2018, the Subcontract Works were already substantially underway. On the plaintiff's own case, at least 60% of the Subcontract Works were already completed on or around May and June 2018.[41] It would not make commercial sense for the first defendant to completely abandon the Subcontract Works by then even if the second defendant were facing issues with completing the works. The Supplemental Agreement was therefore a reasonable means for the second defendant to increase its odds of fulfilling its remaining contractual obligations to the plaintiff under the 2017 Subcontract, entitling the second defendant to progress payments which might consequently turn the financial situation of the second defendant around.

40 Moreover, it was crucial that the plaintiff *knew* of the second defendant's liquidity issues and nevertheless entered into the Supplemental Agreement on that basis; indeed, p 2 of the Supplemental Agreement explicitly mentions this:[42]

> The certification for [the 2017 Subcontract] was done based on percentage (85.58%) of Coils fabricated. Although the scope included Fabrication, Delivery, Installation, Testing and Commissioning, due to unavailability of labor with the subcontractor *owing to his liquidity issues*, most of the work towards installation of fabricated ducts were carried out by the

41 NE dated 9 March 2022 at p 42 lines 9–17.

42 Amritpal Singh's AEIC at p 141.

> contractor by engaging other agencies as per the details below …
>
> [emphasis added]

Therefore, this was not a case where the plaintiff's interests were prejudiced because it was unaware of the second defendant's liquidity issues when it entered into the Supplemental Agreement, thereby resulting in prejudice which the creditor-regarding duty was meant to guard against. Instead, the plaintiff knew of the risks of entering into the Supplemental Agreement. This was further evidenced by the undisputed fact that despite the second defendant's failure to complete the Subcontract Works even by the extended deadline provided for in the Supplemental Agreement, the plaintiff subsequently still chose to execute the Addendum giving more concessions to the second defendant (see [3] above). It did not lie in the mouth of the plaintiff to say in this suit that it had been prejudiced because it had entered into the Supplemental Agreement at a time when the second defendant faced liquidity issues.

41 For these reasons, I concluded that the first defendant had not breached any creditor-regarding duty (if it were even relevant to begin with) owed to the second defendant. Applying the rule in *PT Sandipala* (at [31] above), it followed that no combination between the defendants was found.

42 The absence of any combination was fatal to the claim by the plaintiff, but for completeness, the other elements of unlawful means conspiracy will also be briefly considered.

(2) The unlawful means alleged did not assist the plaintiff

43 I turn now to consider whether the unlawful acts alleged by the plaintiff were performed. In this regard, the plaintiff's primary argument was that the

second defendant's breach of contract (*ie*, the Supplemental Agreement and Addendum) amounted to the unlawful act for the purposes of unlawful means conspiracy.[43] Further or alternatively, the plaintiff argued that the unlawful acts here involved the first defendant's "crime and torts" in the form of the tort of deceit and/or the crime of cheating pursuant to s 415 of the Penal Code (Cap 224, 2008 Rev Ed) ("Penal Code").[44]

44 While I accepted that a breach of contract would in principle satisfy the element of "unlawful means" (see *PT Sandipala* at [52]), the outcome of the plaintiff's claim in unlawful means conspiracy did not ultimately turn on this finding as I had found that there was no combination between the defendants. But for completeness, it leaves me to briefly deal with the plaintiff's further or alternative argument that the first defendant was liable in deceit and/or s 415 of the Penal Code by causing the second defendant to enter into the Supplemental Agreement with the plaintiff.

45 As regards deceit, I did not find that the tort was established. The plaintiff's case rested on alleged false representations that the first defendant had made at the meeting on 29 November 2018, which the plaintiff said was captured in the Supplemental Agreement executed by the defendants. Essentially, these alleged representations were statements of the first defendant's intent to perform certain acts in the future. These concerned matters relating to the payment of an advance by the plaintiff, the repayment of moneys to the plaintiff, the completion of the Subcontract Works, salary issues between the workmen, and the certification of the works completed by 29 November

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43 PCS at para 180.

44 PCS at para 180.

2018.[45] The plaintiff stated in its submissions that these representations were made by the first defendant with the knowledge that they were false or without any reasonable grounds that they were true.[46] However, the plaintiff in effect appeared to really hinge its case on the basis that there were no reasonable grounds on the first defendant's part to regard his statements of intent as true. This was because the only evidence relied upon by the plaintiff in this regard was the admission by the first defendant during cross examination that, if the Subcontract Works were not almost complete as of end-November 2018, there would have been no reasonable basis for the first defendant to say that the second defendant could fulfil all its obligations.[47]

46 However, even if the alleged promises were made, I did not find that there was an actionable misrepresentation of fact that would ground any allegation of deceit. As a starting point, it is important to emphasise that there is "a crucial distinction between actionable misrepresentations and a *future promise or statement of intention*" [emphasis in original], and that "[o]nly false statements *as to present fact* can constitute the subject matter of a misrepresentation claim" [emphasis added] (see the High Court decision of *Tonny Permana v One Tree Capital Management Pte Ltd and another* [2021] 5 SLR 477 at [183]). Applied to the context where a statement of intention is the alleged misstatement of fact, it must be shown that misrepresentation was as to the state of the representor's mind *at the time he made the statement* (see the Court of Appeal decision of *Tan Chin Seng and others v Raffles Town Club Pte Ltd* [2003] 3 SLR(R) 307 at [12]; see also the High Court decision of *Yong Khong Yoong Mark and others v Ting Choon Meng Meng and another* [2021]

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45 PCS at para 204.

46 PCS at para 209.

47 PCS at para 193.

SGHC 246 at [159]). In other words, the plaintiff had to show that at the time when the alleged oral representations were made, the first defendant did not intend to follow through with his promises.

47 Relatedly, while the plaintiff had attempted to characterise the first defendant's statements of intent as lacking in reasonable basis, I did not think that the mere unreasonableness of a representor's belief should *ipso facto* amount to a lack of intent on the representor's part to follow through with his promises. As the Court of Appeal emphasised in *Wee Chiaw Sek Anna v Ng Li-Ann Genevieve (sole executrix of the estate of Ng Hock Seng, deceased) and another* [2013] 3 SLR 801 at [37], in the same context of fraudulent misrepresentation, it is the representor's *subjective* belief that is crucial. While such subjective belief must be ascertained by the court on the objective evidence available, the court "*cannot substitute its own view as to what it thinks the representor's belief was*" [emphasis in original]. The concept of objectivity is only to be applied to the *evidence* demonstrating what the representor's subjective belief was, and not to whether the court thinks that a reasonable person would find the representor's belief unreasonable.

48 On the present facts, while the evidence showed non-fulfilment of the promises made, nothing showed that the first defendant did not subjectively intend to follow through with his promises at the time when the alleged oral representations were made. It was plausible that the non-fulfilment of the promises made at the 29 November 2018 meeting could have been due to the inability on the part of the defendants to do so, or due to their subsequent choice to pursue other objectives after the alleged oral representations were made. The latter explanations would have breached the agreement with the plaintiff but would not have amounted to deceit.

49 Similarly, I did not think that the first defendant committed the crime of cheating under s 415 of the Penal Code. The elements of the crime of cheating are threefold: (a) the victim had to be deceived; (b) there had to have been an inducement such that the victim delivered any property to any person; and (c) there had to have been a dishonest or fraudulent intent on the part of the deceiving person to induce the victim to deliver the property (see the Court of Appeal decision of *Gunasegeran s/o Pavadaisamy v Public Prosecutor* [1997] 2 SLR(R) 946 at [42]–[44]). As I had found that there was no evidence to show that the first defendant had no intention to follow through with his promises at the time the alleged representations were made, I likewise did not find that the defendant had a fraudulent intent to induce the plaintiff from paying the additional advance after the meeting on 29 November 2018.

50 Accordingly, in relation to the element of unlawful means, I found that the plaintiff had not made out its allegations that the first defendant had committed the tort of deceit and/or the crime of cheating under s 415 of the Penal Code.

(3) The defendants did not intend to cause damage or injury to the plaintiff

51 I turn now to the element of an intention to cause damage or injury, which I found was not made out. To establish this element, a plaintiff has to show that the unlawful means and the conspiracy were targeted and directed at the plaintiff. It is not sufficient that harm to the claimant would be a likely, probable, or even inevitable consequence of the defendant's conduct. Lesser states of mind, such as an appreciation that a course of conduct would inevitably harm the claimant, would not amount to an intention to injure, although it may be a factor supporting an inference of intention on the factual circumstances of

the case. Damage or injury to the plaintiff must have been intended as a means to an end or as an end in itself (see *EFT Holdings* at [101]).

52 The plaintiff relied on the High Court decision of *SH Cogent* in arguing that if a defendant acts against his commercial interest, this might lend an inference that the defendant in question intended to cause damage or injury to the plaintiff through his actions.[48] In this regard, the plaintiff argued that the second defendant should have halted work rather than continue trading when it was in "extreme dire financial straits" at the time the Supplemental Agreement was entered into.[49]

53 In my judgment, the defendants did not intend to cause damage or injury to the plaintiff as a means to an end or as an end in itself. As regards the plaintiff's reliance on *SH Cogent*, I was not convinced that the commercially sensible thing for the second defendant to do was to halt the Subcontract Works rather than continue working. Indeed, beyond pointing generally to the financial statements of the second defendant,[50] the plaintiff had not proven how these statements showed that the second defendant was in "extreme dire financial straits". Accordingly, the plaintiff had not shown that it could not have reasonably been in the second defendant's commercial interest to attempt to trade out of its difficult financial situation. I was therefore not persuaded that the most plausible inference from the facts was that the defendants intended to cause damage or injury to the plaintiff.

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48 PCS at para 196.

49 PCS at para 197.

50 PCS at para 87.

(4) Summary of conclusions

54 For these reasons, I found that the plaintiff's claim in unlawful means conspiracy failed. To summarise my conclusions: (a) there was no combination between the defendants to do unlawful acts; (b) while the first defendant had had caused the second defendant to breach the Supplemental Agreement, the outcome of the plaintiff's claim in unlawful means conspiracy did not ultimately turn on this finding as I had found that there was no combination between the defendants; for completeness, I also found that the plaintiff's allegations that the first defendant had committed the tort of deceit and/or cheating under s 415 of the Penal Code were not made out; (c) regarding the plaintiff's other allegations in relation to the unlawful means element, it was not proven that the first defendant had engaged in deceit and/or cheating as defined in s 415 of the Penal Code; and (d) the plaintiff failed to establish that the defendants intended to cause damage or injury to the plaintiff.

Lawful means conspiracy and deceit

55 In view of my conclusions above in relation to unlawful means conspiracy, it followed that the plaintiff's claims in lawful means conspiracy and deceit were also not made out. The claim in lawful means conspiracy failed as I had found that there was no combination between the defendants and, more importantly, the defendants did not have the intention to cause damage or injury to the plaintiff, much less a "dominant purpose" to do so, as required by the tort (see [28] above). In relation to the claim in deceit, I had also found earlier that this was not made out (see [45]–[48] above).

Conclusion

56 For the above reasons, I found that the claims of conspiracy and deceit, which are the subject of an appeal, were not made out against the first defendant.

Aedit Abdullah
Judge of the High Court

Lee Wei Han Shaun and Adly Rizal bin Said (Bird & Bird ATMD LLP) for the plaintiff;
Darrell Low Kim Boon and Chua Siew Ling Aileen (Bih Li & Lee LLP) for the defendants.