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

[2023] SGHC 292

District Court Appeal No 3 of 2023

Between

Johnny Lian Tian Yong

… *Appellant*

And

(1) Tan Swee Wan
(2) Kelvin Low Keng Siang

… *Respondents*

In the matter of District Court Suit No 2084 of 2013

Between

Johnny Lian Tian Yong

… *Plaintiff*

And

(1) Tan Swee Wan
(2) Kelvin Low Keng Siang

… *Defendants*

JUDGMENT

[Courts and Jurisdiction — Jurisdiction — Appellate]
[Contract — Formation — Oral agreement]
[Credit and Security — Guarantees and indemnities]
[Equity — Defences — Clean hands]

TABLE OF CONTENTS

Lian Tian Yong Johnny
v
Tan Swee Wan and another

[2023] SGHC 292

General Division of the High Court — District Court Appeal No 3 of 2023
Goh Yihan J
27 July 2023

13 October 2023 Judgment reserved.

Goh Yihan J:

1 This is the appellant's appeal against the whole of the learned District Judge's (the "DJ") decision below. In particular, the appellant appeals against the DJ's decision: to (a) dismiss his claim against the respondents; and (b) allow the respondents' counterclaims against him.

2 Having considered the parties' submissions, I allow the appellant's appeal in part, and reverse the DJ's decision to allow the respondents' counterclaims against the appellant. I provide the reasons for my decision below.

Background facts

3 I begin by setting out the background facts. The appellant, Mr Johnny Lian Tian Yong, and the first and second respondents, Mr Tan Swee Wan and Mr Kelvin Low Keng Siang, were business partners. They incorporated Tecbiz

Sherlock Pte Ltd in August 2001, but subsequently renamed it to Tecbiz Frisman Pte Ltd ("Tecbiz") in September 2001. From 2006 to 2009, Tecbiz developed a software product named "Solvesam". It was intended that Solvesam would eventually be owned by a company that could be listed on NASDAQ, a stock exchange in the United States. The DJ found that, given the respondents' technical expertise, the appellant was likely responsible for fund-raising, whereas the respondents were likely responsible for the development of Solvesam. In December 2010, the parties incorporated another company, Solvesam International Pte Ltd ("SIPL"), with the intention that Tecbiz would eventually transfer the rights in Solvesam to SIPL. SIPL was later renamed to SSI International Pte Ltd ("SSI") in July 2011.

4 The parties' relationship deteriorated in 2011. This was in part due to the spread of online falsehoods about Solvesam in June 2011, which led to the apparent risk of a lawsuit by Microsoft China. No lawsuit was eventually brought. Both respondents resigned as directors of SSI by July 2011 and sold their shares in SSI to the appellant for $1 each. Subsequently, the second respondent resigned as a director of Tecbiz in July 2011, and the first respondent resigned as a director of Tecbiz in November 2011. Tecbiz eventually ceased operations following an extraordinary general meeting ("EGM") called in June 2012.

5 Against this general context, there are three emails from 2011 that are of relevance to the present appeal.

(a) In an email dated 26 February 2011 (the "February 2011 Email") sent by the appellant to the respondents, the appellant stated that he showed "our CEO the agreement between the group and myself, a personal guarantee and assurance that [Solvesam] will not fail and 100%

will list, OR I'll have to be responsible and PAY back all invested amounts".[1]

(b) In an email dated 29 June 2011 (the "June 2011 Email") sent by the appellant to the respondents, in response to the risk of Microsoft China taking legal action against Tecbiz, the appellant stated that "I'll pay you for the next twenty years".[2]

(c) In an email dated 27 July 2011 (the "July 2011 Email") sent by the second respondent to the appellant and the first respondent, the second respondent stated that "this email confirms the completion of the sale transaction of my Tecbiz Frisman shares to [the appellant]. The documents are with [the appellant]."[3]

6 Subsequently, in May 2012, the appellant set up Inquiro Consulting Pte Ltd ("Inquiro"). In an email dated 10 July 2012, the secretary of Tecbiz informed the first respondent that the assets of Tecbiz had been sold to Inquiro for $500. This email was later forwarded by the first respondent to the second respondent.

7 The subject matter of the present appeal and the underlying suit before the DJ relates to loans that Tecbiz had taken out. These loans may be conveniently organised into two groups: (a) a loan from Overseas-Chinese Banking Corporation ("OCBC") in 2008 and two loans from OCBC in 2010, that were all jointly and severally guaranteed by the appellant and the

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1 Affidavit of Tan Swee Wan for HC/DC 2084/2013 dated 4 December 2013 at p 115; Record of Appeal dated 8 April 2023 ("ROA") Vol 8 at p 709.

2 ROA Vol 8 at p 1013.

3 ROA Vol 8 at p 1176.

respondents (the "2008 and 2010 Loans"); and (b) a loan from OCBC and two loans from Standard Chartered Bank ("SCB") in 2009 that were guaranteed by the respondents only (the "2009 Loans"). Where necessary, I will refer to these loans collectively as "the Loans".

8 After Tecbiz defaulted on the Loans, OCBC and SCB sought repayment of the loan amounts in 2012. In particular, OCBC exercised its right of set-off from the appellant's bank accounts and issued a statutory demand to initiate bankruptcy proceedings against the appellant.

9 Therefore, the appellant commenced the underlying suit to claim equitable contribution from both respondents in relation to the 2008 and 2010 Loans.[4] In their defence, the respondents say that the appellant had waived his right to such contribution by way of representations that had been made to them.[5] The respondents also say that the appellant is not entitled to such contribution because he had commenced the suit with unclean hands.[6]

10 The respondents then counterclaimed for a full indemnity of their liability under all the Loans and/or an indemnity equal to the appellant's one-third share under the 2009 Loans.[7] The respondents based these counterclaims on an alleged indemnity agreement between the appellant and the first respondent (the "Swee Wan Indemnity"), as well as an alleged indemnity

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4 Statement of Claim (Amendment No. 1) dated 3 June 2016 at paras 6–7.

5 Defence and Counterclaim (Amendment No. 6) dated 12 December 2020 ("DCC") at para 30.

6 DCC at para 10.

7 DCC at para 40.

agreement between the appellant and the second respondent (the "Kelvin Indemnity").

(a) For the Swee Wan Indemnity, the respondents claim the appellant agreed to indemnify the first respondent "one-third of the [respondents'] liabilities as joint and several guarantors for [the 2009 Loans]".[8]

(b) For the Kelvin Indemnity, the second respondent claims that shortly after his resignation as director of Tecbiz, the appellant offered to buy all of the second respondent's shares in Tecbiz for $100,000. In return, the appellant allegedly promised to indemnify the second respondent against all of his liabilities as co-guarantor for the Loans. This was allegedly contained in an oral agreement made on or about 26 July 2011,[9] pursuant to which the second respondent transferred his shares to the appellant.[10] The appellant paid $100,000 to the second respondent on or about 27 July 2011.[11] The appellant allegedly continued to make representations to the same effect on the Kelvin Indemnity on subsequent occasions: (i) in a telephone conversion with the second respondent on or about January 2012; and (ii) when the appellant did not dispute his liability when reminded by the second respondent of the Kelvin Indemnity on or about July 2012.[12]

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8 DCC at para 40.

9 DCC at paras 19B–19C.

10 DCC at para 19D.

11 DCC at para 19D.

12 DCC at para 19F.

11 For completeness, I note that the parties had been engaged in prior litigation before the High Court in HC/S 1238/2015 (see the decision of *Tan Swee Wan and another v Johnny Lian Tian Yong* [2018] SGHC 169), but that suit concerned contractual payments that are unrelated to the present appeal and the underlying suit before the DJ.

The DJ's decision

12 The DJ below found for the respondents in her decision of *Johnny Lian Tian Yong v Tan Swee Wan and another* [2023] SGDC 42 (the "GD"). The DJ considered four issues as set out below.

(a) In light of the unclean hands defence, was the appellant entitled to claim equitable contribution for the 2008 and 2010 Loans?

(b) Pursuant to loan and further loan representations, did the appellant waive his right to equitable contribution for the 2008 and 2010 Loans?

(c) Did the appellant agree to indemnify the second respondent for his liabilities as co-guarantor for the 2009 Loans?

(d) Did the appellant agree to share liability with the first respondent for the 2009 Loans?

13 In respect of issue (a), the DJ found in favour of the respondents (see the GD at [23]–[30]). The DJ held that the unclean hands defence was valid and regarded it as unconscionable to allow the appellant to succeed in his claims against the respondents. The DJ found that the appellant had mismanaged Tecbiz's affairs and had caused Tecbiz to default on its loan obligations and trigger the enforcement of the personal guarantees. In particular, this was

because: (a) the appellant had failed to actively pursue Tecbiz's overdue account receivables of over $400,000, including an overdue account receivable of $240,291.24 from SSI to Tecbiz; (b) the appellant had set up Inquiro to compete with Tecbiz; and (c) the appellant was in a position to prevent the default of the 2008 and 2010 Loans but failed to do so. As such, the DJ held that the appellant's undesirable behaviour satisfied the requirements set out in the High Court decision of *Hong Leong Singapore Finance Ltd v United Overseas Bank Ltd* [2007] 1 SLR(R) 292 ("*Hong Leong*"), in that the undesirable behaviour involved more than general depravity and had an immediate and necessary relation to the equity sued for.

14 In respect of issue (b), the DJ found that the appellant had waived his right to equitable contribution for the 2008 and 2010 Loans (see the GD at [31]–[33]). This was because the DJ found that the appellant had represented in the February 2011 Email that he would take responsibility and pay back all the invested amounts should Solvesam fail to list. The appellant's words of assurance in the February 2011 Email had to be understood in the context of the appellant's failure to raise necessary funds by October 2010, which he had promised to do. The appellant's failure then necessitated the taking of loans from OCBC in December 2010 (*ie*, part of the 2008 and 2010 Loans). Therefore, the DJ found that the appellant had waived his right to equitable contribution. With that being said, the DJ found that the appellant's representation in the June 2011 Email was limited only to the potential lawsuit by Microsoft China, because the chain of emails preceding that email pertained to that potential lawsuit.

15 In respect of issue (c), the DJ found that the appellant had provided the second respondent with a full indemnity through an oral agreement, *ie*, that the Kelvin Indemnity exists (see the GD at [36]–[40]). The DJ held that it was not

logical for the second respondent to fail to cover his potential liability through an indemnity from the appellant considering that the former had left Tecbiz before the default of the various loans. Thus, the DJ accepted the second respondent's evidence that he would not have divested his shares if the appellant had not provided the Kelvin Indemnity, because the second respondent would have missed out on dividend payments once he had divested the shares. Further, the DJ found that the appellant had subsequently orally represented to the second respondent that the appellant would indemnify the second respondent on three instances, in December 2011, January 2012, and July 2012. Hence, the DJ found that the second respondent was entitled to claim contribution from the appellant in respect of the sums that the second respondent had paid for the 2009 Loans.

16 In respect of issue (d), the DJ accepted that the first respondent had proved that the appellant had provided an oral indemnity to the first respondent that the appellant would bear one-third of the liability for the 2009 Loans, *ie*, that the Swee Wan Indemnity exists (see the GD at [41]–[52]). The DJ found that the 2009 Loans were necessitated because the appellant had not managed to raise the requisite funds in time, even though it was undisputed that fundraising had been the appellant's main role. Thus, the DJ found that in order for the appellant to retain the first respondent's trust, the appellant made some representations to the first respondent, which included representations that the appellant would bear one-third of the liability for Tecbiz's loans. In this regard, the DJ found that while the parties had intended for all three parties to apply for the 2009 Loans, only the respondents were accepted as guarantors for these Loans possibly because of issues relating to the appellant's creditworthiness. As it was conceded by the appellant that the usual practice would have been for the bank to require personal guarantees from the key members of a debtor company,

and because the loans had been taken out for the expansion of Tecbiz, the DJ found it plausible that the appellant, as a key member, would have reached an arrangement where he would share liability. Thus, the DJ found that the respondents only entered into the 2009 Loans on the basis of the appellant's oral indemnity.

17 I shall refer to the DJ's more specific reasoning below, where necessary, for ease of explication.

18 For the purpose of the present appeal, the following issues arise for my determination:

(a) the threshold for appellate intervention;

(b) whether the appellant is entitled to equitable contribution; and

(c) whether the respondents are entitled to their counterclaims, or more specifically: (i) whether the Swee Wan Indemnity exists; and (ii) whether the Kelvin Indemnity exists.

My decision: the appeal is allowed in part

The threshold of appellate intervention

19 Because much of the appellant's submissions are premised on challenging the DJ's findings of fact, it is helpful to set out the threshold of appellate intervention.

20 It is trite that an appellate court will not readily overturn factual findings, especially if the trial judge would have been better placed to assess the veracity and credibility of the witness. This is unless the trial judge's assessment is

"plainly wrong or manifestly against the weight of the evidence" (see the Court of Appeal decision of *Yong Kheng Leong and another v Panweld Trading Pte Ltd and another* [2013] 1 SLR 173 ("*Yong Kheng Leong*") at [18]). However, it is important to note that the Court of Appeal's observations in *Yong Kheng Leong* were made in relation to *findings of fact*, as opposed to *inferences of fact*. This is clear from a plain reading of what the court had said in full (at [18]):

> … [A]n appellate court's power to review findings of fact will be sparingly exercised. The trial judge, having had the benefit of hearing the entire trial, would generally be in a better position to assess the veracity and credibility of witnesses where oral evidence is concerned. Therefore, parties seeking to reverse *findings of fact* that have been made after assessing the oral evidence will face an uphill task, and in general it will be even more so in cases such as the present where the *findings of fact* were made after hearing many days of evidence. An appellate court will only overturn *factual findings* in such circumstances if it is satisfied that the trial judge's assessment is plainly wrong or manifestly against the weight of the evidence. These basic principles have been reiterated by this court on many occasions (see, for example, *Seah Ting Soon v Indonesian Tractors Co Pte Ltd* [2001] 1 SLR(R) 53 at [22] and *Tat Seng Machine Movers Pte Ltd v Orix Leasing Singapore Ltd* [2009] 4 SLR(R) 1101 at [41]).
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> [emphasis added]

21 Indeed, the general proposition that an appellate court should be slow to overturn a trial judge's findings of fact is subject to several qualifications that have been developed in the case law. In the Court of Appeal decision of *Public Prosecutor v Muhammad Farid bin Mohd Yusop* [2015] 3 SLR 16, the court drew a distinction between the trial judge's findings of fact based on the credibility of the witness and an inference of fact based on the objective evidence. The court summarised this distinction as follows (at [54]):

> … [W]hen faced with an appeal against a judge's findings of fact, an appellate court should first seek to discern whether the finding of fact appealed against is one based on the credibility of the witness, or an inference of fact based on objective evidence. In the latter scenario, an appellate court should look at the objective evidence before the court and then question

> whether the trial judge's assessment was *plainly against the weight of the objective evidence*. In the former scenario, the appellate court should assess whether the trial judge's findings on the credibility of the witness, and hence any acceptance of that particular witness's evidence, are *plainly wrong*. This can be done by examining the internal and external consistency of the witness's evidence …
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> [emphasis in original]

22 More recently, in the High Court decision of *Tan Meow Hiang (trading as Chip Huat) v Ong Kay Yong (trading as Wee Wee Laundry Service)* [2023] SGHC 218 (at [20]–[26]), the court set out in greater detail the applicable principles regarding the threshold of appellate intervention, which I summarise here.

(a) An appellate court should be reluctant to overturn findings made by the trial judge as they are in a less advantageous position compared to the trial judge who has had the benefit of hearing the evidence of the witnesses and observing their demeanour.

(b) However, the deference accorded does not mean that an appellate court should shy away from overturning findings of fact when necessary. This is where (i) the trial judge's assessment is plainly wrong or against the weight of evidence; or (ii) the appellate court can refer to documentary evidence instead of the evidence of witnesses during cross-examination.

(c) Further, an appellate court is in as good a position as a trial court to assess the veracity of a witness's evidence in two situations: (i) where the assessment of the witness's credibility is based on inferences drawn from the internal consistency in the content of the witness's evidence; or (ii) where the assessment of the witness's credibility is based on the

external consistency between the content of the witness's evidence and the extrinsic evidence.

23 In summary, as to findings of facts based on witness's testimony (see the Court of Appeal decision of *Sandz Solutions (Singapore) Pte Ltd and others v Strategic Worldwide Assets Ltd and others* [2014] 3 SLR 562 at [37]–[41]), the trial judge is generally better placed to assess the veracity and credibility of witnesses, and the appellate court should only overturn such findings where the trial judge's assessment is "plainly wrong or against the weight of the evidence". Nevertheless, an appellate judge is in as good a position as the trial judge to assess a witness's credibility where such assessment is based on inferences drawn from the internal consistency of the witness's testimony and the external consistency between the witness's evidence and extrinsic evidence. As to *inferences of fact*, the appellate court is entitled to engage in a *de novo* review. This is because an appellate judge is as competent as any trial judge to draw the necessary inferences of fact from the objective material.

24 In the present case, the respondents took pains to stress that there has been a dearth of documentary evidence. Thus, the respondents submit that the evidence below was primarily focused on the oral testimony of the witnesses, and that I am not in as good a position as the DJ to assess the evidence. I accept this submission, but subject to the qualifications I have stated above (at [20]–[23]). In short, it cannot be that once the DJ has made a finding of fact that I am bound to defer to the DJ's assessment. The court can and should overturn findings that are plainly wrong or against the weight of the evidence. Also, it is important to bear in mind *the circumstances* when an appellate court may not be in as good a position as the trial judge to assess findings of fact, which in turn informs *why* an appellate court should be more restrained in disturbing a trial judge's findings of fact in that regard. Outside of those circumstances, an

appellate court will be in as good a position as the trial judge to assess findings of fact or make inferences based on those findings of fact. Moreover, as will be seen below, many of the supposed "findings of fact" were in fact inferences that the DJ had made based on the evidence. It is clearly established that an appellate court can investigate whether such inferences were properly supported by the evidence.

Whether the appellant is entitled to equitable contribution

25 With the above principles in mind, I uphold the DJ's finding that the appellant is not entitled to an equitable contribution in respect of the 2008 and 2010 Loans.

The parties' arguments

26 The appellant submits that he did not mismanage Tecbiz's affairs because: (a) the appellant's failure to collect the final SSI invoice was not unconscionable;[13] (b) the appellant's failure to collect the other receivables was not unconscionable;[14] (c) the appellant did not sell the assets of Tecbiz at an undervalue;[15] and (d) it would be pointless for the appellant to try to prevent Tecbiz's default because Tecbiz had not been financially viable.[16] Also, the appellant did not waive his right to equitable contribution for the 2008 and 2010 Loans.[17]

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13 Appellant's Case dated 6 April 2023 ("AC") at paras 162–194; Appellant's Written Submissions dated 5 June 2023 ("AWS") at paras 46–47.

14 AC at paras 195–213; AWS at paras 48–52.

15 AC at paras 220–247; AWS at paras 53–62.

16 AC at paras 251–256; AWS at paras 63–70.

17 AC at paras 62–93; AWS at paras 41–45.

27 In response, the respondents primarily submit that the DJ's findings of facts are not plainly wrong or manifestly against the weight of the evidence, and therefore cannot be overturned by the court on appeal.[18] The respondents also submit that the appellant mismanaged Tecbiz's affairs because: (a) the appellant conceded that he made no effort to pursue the final SSI Invoice;[19] (b) Solvesam was sold to Inquiro as part of the assets of Tecbiz;[20] (c) the appellant was in a position to prevent Tecbiz's default and he owed a fiduciary duty to Tecbiz to prioritise Tecbiz's interests over his own;[21] and (d) the appellant could have injected funds into Tecbiz to bring it under judicial management.[22]

The applicable legal principles

28 Before explaining the reasons for my decision, I briefly set out the applicable legal principles regarding the unclean hands defence. For simplicity, I use the terminology "unclean hands defence" in this judgment to refer broadly to the equitable maxim of clean hands, regardless of whether it arises as a defence or not. It is well established that a person seeking equitable relief must come to a court of equity with "clean hands", *ie*, they must not have behaved unconscionably themselves (see the High Court decision of *Keppel Tatlee Bank Ltd v Teck Koon Investment Pte Ltd and others* [2000] 1 SLR(R) 355 ("*Keppel Tatlee Bank*") at [29]). More specifically, the legal requirements for invoking

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18 Respondents' Case dated 6 May 2023 ("RC") at paras 23–38; Respondents' Written Submissions dated 5 June 2023 ("RWS") at para 8.

19 RC at pp 154–157; RWS at para 35(g).

20 RC at pp 158–159; RWS at para 35(i).

21 RC at p 163; RWS at para 35(i).

22 RC at pp 164–165; RWS at para 35(j).

the unclean hands defence have been set out by Sundaresh Menon JC (as he then was) in *Hong Leong* (at [225]–[226]):

> 225 It is true that a plaintiff in equity must approach the court with clean hands but this does not mean he must be blameless in all ways. Firstly, the undesirable behaviour in question must involve more than general depravity. "[I]t must have an immediate and necessary relation to the equity sued for; it must be a depravity in a legal as well as in a moral sense": see *Dering v Earl of Winchelsea* [1775–1802] All ER Rep 140. This principle was similarly followed in *Moody v Cox* [1917] 2 Ch 71 where it was held by Warrington LJ at 85:
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> > [I]n order to prevent a man coming for relief in connection with a transaction so tainted it must be shown that the taint has a necessary and essential relation to the contract which is sued upon, and it is not enough to say in general that the man is not coming with clean hands when the relief he seeks is not based on the contract which was obtained by fraud, but is to have the contract annulled on a ground which exists quite independently of the fact that a bribe has been given and received.
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> 226 Moreover, the principle has lost some of its vitality over time. The position is set out thus in *Halsbury's Laws of Singapore* vol 9(2) (LexisNexis, 2003) at para 110.016:
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> > The maxim has been relaxed over time and is no longer strictly enforced. The question is whether in all the circumstances it would be a travesty of justice to assist the plaintiff given his blameworthy participation or role in the transaction. The whole circumstances must be taken into account having regard to the relief sought, for the relative blameworthiness only emerges after a complete and exhaustive scrutiny and relief which is less drastic need not be defeated by conduct that is less opprobrious. It has been said that the "the conduct complained of must have an immediate and necessary relation to the equity sued for" and "it must be a depravity in the legal as well as moral sense".

Further, as summarised in the High Court decision of *Eller, Urs v Cheong Kiat Wah* [2020] SGHC 106 (at [72]), two features of the unclean hands defence are apparent. First, the conduct complained of must bear an immediate and necessary relation to the equity sued for. Second, the court must undertake a

complete and exhaustive scrutiny of all the circumstances in a particular case in order to ascertain whether it would be a travesty of justice to grant a claimant relief.

29 The unclean hands defence has been considered in a variety of contexts, including the following:

(a) the denial of an application for pre-action discovery (see the Court of Appeal decision of *Goh Seng Heng v Liberty Sky Investments Ltd and another* [2017] 2 SLR 1113);

(b) the granting of an anti-suit injunction (see the High Court decision of *Beckkett Pte Ltd v Deutsche Bank AG and another* [2011] 1 SLR 524);

(c) an action for minority oppression under s 216 of the Companies Act (Cap 50, 2006 Rev Ed) (see the High Court decision of *Tan Yong San v Neo Kok Eng and others* [2011] SGHC 30); and

(d) the delivery of vacant possession of mortgaged property (see *Keppel Tatlee Bank*).

With that being said, I should caveat that the unclean hands defence is not a rule that is either "precise or capable of satisfactory operation", and "it is necessary to examine precisely the rules and practices which have been established and followed by courts of equity and which are generally referable to such established considerations as fraud, misrepresentation, illegality or unfairness" (see I C F Spry, *The Principles of Equitable Remedies: Specific Performance, Injunctions, Rectification and Equitable Damages* (Sweet & Maxwell, 8th Ed, 2010) ("*The Principles of Equitable Remedies*") at pp 5–6).

30 Before me, counsel for the appellant, Mr Uthayasurian s/o Sidambaram ("Mr Uthayasurian"), argued that when the appellant set up Inquiro, Tecbiz's business had already been decimated, and therefore the appellant's conduct caused no adverse effect on Tecbiz's business. In other words, Mr Uthayasurian urged the court, in its determination of the unclean hands defence, to consider the effect of the conduct, rather than the conduct itself.

31 I disagree with Mr Uthayasurian on this point. In my view, the unclean hands defence is concerned with the conduct, rather than the effect of the conduct. This much is clear from the Court of Appeal decision of *E C Investment Holding Pte Ltd v Ridout Residence Pte Ltd and others and another appeal* [2012] 1 SLR 32 (at [92]), where the court held that for the unclean hands defence, "any *conduct* which disentitles a party from equitable relief must stem from the facts relied upon to invoke the court's conscience" and "the *conduct* complained of must have an immediate and necessary relation to the equity sued for, and it must be a depravity in the legal as well as moral sense" [emphasis added]. This is consistent with the description of the unclean hands defence by the learned authors in *The Principles of Equitable Remedies* (at p 247), who interpret the requirement for an immediate and necessary relation as "the fact that the plaintiff seeks to derive advantage from his dishonest *conduct* in so direct a manner that is considered to be unjust to grant him relief" [emphasis added].

32 More fundamentally, in so far as the unclean hands defence is rooted in equity, it should not excuse a party's conduct simply because the effect of his conduct hypothetically caused no prejudice. Were it otherwise, this would be inconsistent with the fact that "no court of equity will aid a man to derive advantage from his own wrong" (see the High Court of Australia decision of

Meyers v Casey (1913) 17 CLR 90 at 124). Instead, a wrongdoing party must be judged based on his conduct alone.

My decision: the appellant is not entitled to equitable contribution

33 Turning to my decision, I do not think that the appellant raises any viable challenge to the DJ's finding that the appellant had mismanaged Tecbiz's affairs for the following reasons.

34 First, I agree with the DJ that the appellant did not make sufficient effort to pursue the overdue account receivables of over $400,000 as of 1 August 2012. The appellant's primary contention in this regard relates to the overdue account receivables from SSI to Tecbiz in the sum of $240,291.24. The appellant argues that this invoice was bogus and that it is the respondents' burden to prove otherwise. In response, the respondents say that they led evidence in the trial below that the invoice was genuine, which was consistent with Tecbiz's internal accounting records.[23] Yet, as counsel for the respondents, Mr Wendell Wong, submitted before me, the appellant did not file a report alleging that the invoice was bogus, but instead unilaterally wrote off the overdue amount. Therefore, the respondents' position is that it is the appellant who must now discharge his burden of proving that the invoice was bogus. I agree with the respondents that this has not been proven to be so, nor did the DJ find this to be the case. Instead, there is no evidence that the appellant, who had full control of SSI by 1 August 2012, made efforts to recover this sum.

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[23] ROA Vol 9 at p 1398.

35 Further, the respondents argue that the appellant had given evidence in the trial below that he did not know that the invoice existed.[24] The respondents take the position that the appellant cannot simultaneously challenge the *bona fides* of the invoice while claiming that he did not know of its existence.[25] I agree with the respondents.

36 Second, I agree with the DJ that the appellant had set up Inquiro in May 2012 to compete with Tecbiz's business before the EGM was called on 4 June 2012, and that Tecbiz's assets were sold to Inquiro for a mere $500. A preliminary issue which the DJ had not addressed, and which I now address, is whether Solvesam was an asset of Tecbiz. Since the respondents have relied on this fact to suggest that the appellant had mismanaged Tecbiz's affairs, they bear the burden of proving that Solvesam was an asset of Tecbiz. The appellant argues that the respondents have taken inconsistent positions on this issue in their pleadings, because the respondents have referred to Solvesam as being "owned by" Tecbiz,[26] but yet failed to include Solvesam in the list of assets.[27] I am satisfied that the respondents have discharged their burden of proof. Although the respondents omitted to include Solvesam in the list of assets in their pleadings, I do not think that this omission is material to its case. Based on the objective evidence, it is clear that Solvesam was a software developed by Tecbiz, and is therefore, on balance, an asset of Tecbiz, regardless of how the respondents have subjectively described Solvesam in their pleadings. In the trial

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24 RC at p 156; RWS at para 35(b).

25 RC at pp 156–157; RWS at para 35(b).

26 ROA Vol 6 at p 33.

27 ROA Vol 6 at p 42.

below, the appellant also conceded that the intellectual property rights to Solvesam continued to reside in Tecbiz.[28]

37 Having established that Solvesam is an asset of Tecbiz, I do not think that the appellant adequately explains why Solvesam, which the parties had high aspirations for, was part of the transfer of assets to Inquiro for merely $500. The appellant's explanation that the real value in Solvesam is its "future iterations" does not make sense because those iterations will be based on the original version, making the original version with the base code valuable as well. I agree with the DJ that this was highly suspicious conduct by the appellant. The proper inference is that the appellant had intended to sacrifice Tecbiz in favour of Inquiro.

38 In any event, even if I am wrong and Solvesam was not an asset of Tecbiz, I do not think that this alone will change the DJ's finding as to why the appellant had mismanaged Tecbiz's affairs. The fact that the appellant sold Solvesam, alongside Tecbiz's other assets, for a mere $500 is but one factor demonstrating how the appellant had mismanaged Tecbiz's affairs.

39 Third, I agree with the DJ that the appellant, despite having received over $600,000 in director's fees from SSI, did not act to prevent the default of the OCBC loan. In this regard, I make two observations. The first is that although SSI was financially able to declare such a large sum in favour of the appellant, it is unclear whether this was at the expense of SSI's profitability. The second is that a director has no legal obligation to sacrifice their personal entitlement to fees in order to prevent the company from defaulting on a loan.

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[28] ROA Vol 1 at pp 300 lines 6–8, 323 lines 13–32, and 324 lines 1–9; Letter from Drew & Napier LLC dated 28 July 2023.

Notwithstanding these two observations, I find that it was reasonable for the DJ to infer that the appellant could have acted to prevent the default of the OCBC loan. Nevertheless, in the event that the DJ is wrong, I find that this is merely one factor suggesting that the appellant had mismanaged Tecbiz's affairs.

40 Fourth, I agree with the DJ that the appellant failed to negotiate with OCBC to prevent the default by, for example, placing Tecbiz under judicial management. In my view, the appellant has not provided any credible explanation for failing to do so. Instead, there is ample evidence showing otherwise. For instance, the appellant urged the solicitors of OCBC to pursue the debt against the respondents and urged his then-solicitors to pursue bankruptcy proceedings against the respondents. The appellant had done so instead of injecting funds into Tecbiz to place it under judicial management.

41 Accordingly, I find that the appellant is not entitled to an equitable contribution in respect of the 2008 and 2010 Loans by virtue of his conduct. This is sufficient to deal with the appellant's appeal against the dismissal of his claim.

Whether the respondents are entitled to their counterclaims

42 Despite my finding that the DJ was correct in dismissing the appellant's claim, I respectfully disagree with the DJ's decision to allow the respondents' counterclaims in respect of the Swee Wan Indemnity and the Kelvin Indemnity.

Whether the Swee Wan Indemnity exists

(1) The parties' arguments

43 Turning first to the Swee Wan Indemnity, the appellant submits that the DJ erred in finding that this particular indemnity exists. The appellant argues that the DJ erred in making the following findings: (a) that SCB and OCBC required the appellant to be a guarantor for the 2009 Loans;[29] (b) that the parties intended for the appellant to be a guarantor for the 2009 Loans;[30] (c) that the Swee Wan Indemnity was evinced by or contained in the February 2011 Email;[31] (d) that the Swee Wan Indemnity was evinced by or contained in the alleged oral representations by the appellant to the first respondent;[32] and (e) that the Swee Wan Indemnity exists despite the lack of documentary evidence.[33]

44 In response, the respondents submit that the DJ's finding that the Swee Wan Indemnity exists is not plainly wrong or manifestly against the evidence. This is because: (a) it is undisputed that OCBC required all three parties to be guarantors for the 2008 Loan and it is fanciful to think that OCBC and SCB would deviate from this practice for the 2009 Loans;[34] (b) the appellant's own evidence was that his role in Tecbiz had been to raise funds;[35] (c) there were oral representations that the three parties were to be guarantors for the 2009 Loans;[36]

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29 AC at paras 7–33; AWS at paras 5–16.

30 AC at paras 34–48; AWS at paras 17–20.

31 AC at paras 49–51; AWS at paras 21–23.

32 AWS at paras 24–25.

33 AC at paras 52–60; AWS at para 27.

34 RC at pp 24–28; RWS at paras 21(a) and 21(d).

35 RC at pp 53–54; RWS at para 23(c).

36 RC at pp 56–59; RWS at para 25(b).

and (d) the DJ correctly found that the February 2011 Email contained a representation that the appellant would pay back all invested sums, including the personal guarantees for the Loans.[37]

(2) The premise of the DJ's decision

45 Having considered the parties' arguments, I turn to the premise of the DJ's decision. At the outset, while the appellant spent much of his submissions dealing with the DJ's inference that the banks required the appellant to be a guarantor of the 2009 Loans, the DJ's decision ultimately turned on the existence of an oral agreement between the parties that the appellant would assume equal liability for the 2009 Loans despite not being a guarantor. Indeed, the DJ acknowledged that without documentary or oral evidence from the banks and their officers, she was "unable to definitively make the finding that the reason why the [appellant] did not stand as guarantor as suggested by the [respondents] was mainly due to [the appellant's] unsatisfactory credit history" (see the GD at [47]), and repeatedly emphasised that it was clear that only the respondents had been required to stand as guarantors (see the GD at [44], [46], and [47]).

46 Seen broadly, the DJ's decision that there was an oral agreement between the parties was really an *inference* drawn from her finding that the appellant was responsible for fundraising. Thus, because it was only the respondents who eventually stood as guarantors for the 2009 Loans by contract, the DJ *inferred* that the parties must have intended to share equal liability as between themselves. Indeed, I am not able to agree with the respondents that the DJ had made any *direct* findings of fact as to the existence of the Swee Wan

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[37] RC at pp 69–79; RWS at para 27(a).

Indemnity. This is because the DJ did not refer to any specific part of the oral testimony that was elicited during the trial either in the main body or references of the GD. This makes it difficult to conclude that the DJ came to her determinations as to the existence of the Swee Wan Indemnity based *directly* on the oral testimony she heard. As such, as a starting point, I would be in as good a position as the DJ to assess whether the inferences of fact drawn are correct.

(3) My decision: the Swee Wan Indemnity does not exist

(A) THE RESPONDENTS HAVE NOT PLEADED THE SWEE WAN INDEMNITY WITH SUFFICIENT PARTICULARISATION

47 In my judgment, for reasons that I will explain below, the Swee Wan Indemnity does not exist. However, as a preliminary point, I find that the respondents' claim in this regard fails because they have not pleaded the Swee Wan Indemnity with sufficient particularisation.

48 The respondents' pleadings in relation to the Swee Wan Indemnity is devoid of particularisation as to *when* and *how* this alleged Swee Wan Indemnity arose. In this regard, it is trite that a party's pleading should contain material facts, not evidence. The purpose of this is to allow the opposing party to know the case that they will have to meet; this purpose is of heightened importance in the context of an oral agreement where there is no written document. In the present case, given the paucity of material facts establishing the oral agreement in the respondents' pleading, there was nothing that the DJ could have proceeded on in finding that there was evidence of an oral agreement which underlaid the Swee Wan Indemnity. Moreover, while the respondents rightly submit that reliance on unpleaded facts may be permitted when there is

no prejudice caused to the other party,[38] given the imprecision of the respondents' pleadings in this regard, it appears that the appellant did not quite know the case that he has to meet.

49 For this reason alone, I respectfully disagree with the DJ that the respondents should succeed on the Swee Wan Indemnity. But even if I am wrong that the respondents have not pleaded the Swee Wan Indemnity with sufficient particularisation, I also conclude that the respondents have not discharged *their* burden of proving the existence of this indemnity by way of an oral agreement.

(B) THE RESPONDENTS HAVE NOT ESTABLISHED THAT THE LEGAL REQUIREMENTS OF AN ORAL AGREEMENT ARE SATISFIED

50 As I have said, I am not convinced that the respondents have discharged *their* burden of showing that the Swee Wan Indemnity existed in the form of an oral agreement. In the High Court decision of *Chan Tam Hoi (alias Paul Chan) v Wang Jian and other matters* [2022] SGHC 192 ("*Chan Tam Hoi*") (at [63]), the court observed that "the principles for ascertaining the formation of an oral agreement, which would necessarily include the consideration of whether there was offer and acceptance, are not different from those applicable to the finding of a written contract (see *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2nd Ed, 2022) at p 184)". In proving those substantive requirements, the starting point is that the court "must consider the relevant documentary evidence and contemporaneous conduct of the parties at the material time in an *objective manner*" [emphasis in original] (see *Chan Tam Hoi* at [66]).

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[38] RC at para 43.

51 Applied to the present case, I respectfully do not think the DJ explained why the substantive requirements needed for an oral agreement had been satisfied. As I stated above, these requirements are no different from those applicable to the finding of a written contract, and it appears that the DJ may have inadvertently failed to consider whether these requirements have been satisfied on the facts.

52 More importantly, I also find that the respondents have failed to discharge their burden of satisfying the requirements of an oral agreement. This really flows from the respondents' imprecise pleading, which is that "the [appellant] agreed to contribute a one-third share (by way of a promise to indemnify the [respondents]) towards the [respondents'] liabilities under their joint and several guarantees to OCBC and SCB in respect of the [2009 Loans]".[39] Because the respondents' pleaded case is so imprecise, it is not possible to ascertain whether and when the requirements of an oral agreement have been satisfied. Further, even if the respondents wished to discharge *their* burden of proving the existence of an oral agreement by pointing to the DJ's supposed cognisance of the elements from her citation of the Court of Appeal decision of *Tribune Investment Trust Inc v Soosan Trading Co Ltd* [2000] 2 SLR(R) 407 ("*Tribune*") (see the GD at [36]), I do not think that they can succeed in doing so. As mentioned above (at [51]), the DJ did not make it clear whether these elements have been satisfied. Moreover, the respondents themselves have not quite explained whether these elements have been satisfied except to rely almost entirely on the DJ's general finding of an oral agreement in their favour.

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[39] DCC at paras 7A and 40.

(C) IN ANY EVENT, THE EVIDENCE DOES NOT SUPPORT THE DJ'S INFERENCE THAT THE SWEE WAN INDEMNITY EXISTED

53 In any event, I find that the evidence does not support the DJ's inference that the Swee Wan Indemnity existed. First, I find that the DJ gave undue weight to the oral testimony of the appellant, who had supposedly conceded during cross-examination that: (a) it was the usual practice of banks to require personal guarantees from key members of the company seeking bank loans; and (b) he was a key member of Tecbiz. The DJ found that these concessions made it "completely plausible" that the parties would come to an agreement regarding the sharing of liability for the 2009 Loans. This, as I explained above (see [45]–[46]), is really the DJ's *inference* of fact, as opposed to a finding of fact.

54 However, I do not think that this inference is sufficiently supported by the documentary evidence or oral testimony of the parties so as to prove that an oral agreement setting out the Swee Wan Indemnity existed. In the first place, the appellant's supposed concessions had come in relation to the 2008 Loan. This is clear from the relevant cross-examination:[40]

> **MR WONG**: Okay. Now, the Defence puts to you that you Mr. Lian, you agreed to be a guarantor of the company for this 2008 OCBC loan because you were a core team member, a core team member on the board of directors together with Tan Swee Wan and Kelvin Low, do you agree or disagree?
>
> **LIAN**: I agree because I was needed to be guarantor for the bank according to Mr. Tan.
>
> …
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> **MR WONG**: And so, that is the only reason why you agreed to be a director, wrong --- agreed to be a guarantor of the 2008 OCBC loan seen at page 368 to 374 of volume 1 of the Agreed Bundle, do you agree or disagree?

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[40] ROA Vol 1 at p 102 lines 21–26 and p 103 lines 20–25.

> **LIAN**: I agree to be guarantor only because Mr. Tan told me that OCBC require me to be a guarantor.

55 However, the appellant did not make any concession in relation to the 2009 Loan. As such, I do not think it is safe for the DJ to base her inference that the Swee Wan Indemnity existed on the appellant's supposed concessions in relation to a *different* loan altogether.

56 Second, I do not think that the DJ could infer the existence of the Swee Wan Indemnity from the various representations in, among others, the February 2011 Email. This email was sent *after* the alleged representation had been made for the 2009 Loans to be taken out. It therefore has limited probative value in relation to the Swee Wan Indemnity, which presumably must have been formed when the 2009 Loans were taken out. Moreover, the email itself does not refer to the 2009 Loans, let alone document an indemnity in respect of it. The most that can be said about this email is the appellant had said that "I've showed our CEO the agreement between the group and myself, a personal guarantee and assurance that [Solvesam] will not fail and 100% will list, OR I'll have to be responsible and PAY back all invested amounts". While the reference to the "personal guarantee and assurance" and promise to "PAY back all invested amounts" may suggest that the appellant was referring to the Swee Wan Indemnity, I would be slow to reach such an inference because the sentence is ambiguous and makes no reference to any particular loan. For these reasons, I find the February 2011 Email not to be sufficiently probative of the fact that the appellant had made any representation to the respondents with regard to the 2009 Loans.

57 Third, the circumstances in 2009 were such that it would be reasonable to expect the parties to have confirmed any indemnity in writing. I agree with the appellant that it is curious that there is nothing about this indemnity in

writing from 2009 (when it was allegedly formed), to until the parties took each other to court in July 2013. This is especially so after the relationship between all three parties broke down in *July 2011*. After the relationship had broken down in 2011, the first respondent's evidence is that he avoided communicating with the appellant other than by email. As such, given the circumstances, it would be reasonable to expect the respondents to have documented the Swee Wan Indemnity in some form so as to preserve their rights. Indeed, there is also nothing in evidence between the respondents themselves alluding to the Swee Wan Indemnity. It would be reasonable to think that once OCBC and SCB took steps to reclaim their monies in 2012, the respondents would have at least communicated between themselves how they might lean on the Swee Wan Indemnity to avoid liability. It is therefore not believable that there is no written record of the Swee Wan Indemnity, considering its importance to all the parties. The reasonable inference in the totality of the circumstances must be that it does not exist.

58 For all these reasons, I find that the Swee Wan Indemnity did not exist. I thus respectfully disagree with the DJ on her finding that the respondents succeed in their counterclaim premised on the Swee Wan Indemnity. I therefore allow the appellant's appeal in this regard.

Whether the Kelvin Indemnity exists

(1) The parties' arguments

59 Similar to his argument on the Swee Wan Indemnity, the appellant argues that the DJ erred in finding that the Kelvin Indemnity exists. He submits that the DJ erred in: (a) failing to consider the July 2011 Email where the second respondent documented the completion of the sale of his Tecbiz shares to the

appellant;[41] (b) failing to consider that the second respondent's testimony was not credible;[42] and (c) finding that the appellant had made oral representations affirming the Kelvin Indemnity in December 2011, January 2012, or July 2012.[43]

60 The respondents argue that the DJ's finding that the Kelvin Indemnity exists is not plainly wrong or manifestly against the evidence. This is because: (a) the lack of documentary evidence of the Kelvin Indemnity does not mean it does not exist;[44] (b) the second respondent's testimony was credible;[45] (c) the appellant agreed under cross-examination that it is commercially reasonable for the second respondent to ask for an indemnity upon the exit of a company;[46] and (d) the appellant acknowledged the existence of the Kelvin Indemnity during the July 2012 meeting.[47]

(2) My decision: the Kelvin Indemnity does not exist

61 Bearing in mind the importance of satisfying the substantive requirements needed for an oral agreement, I do not agree with the DJ's finding that the Kelvin Indemnity exists. It bears repeating that the DJ's decision was premised on: (a) an oral agreement between the appellant and the second respondent; (b) three subsequent instances in December 2011, January 2012,

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41 AC at paras 102–106; AWS at para 28.

42 AC at paras 107–114; AWS at para 29.

43 AC at paras 126–138; AWS at paras 35–40.

44 RCC at pp 115–117; RWS at para 34(b).

45 RCC at pp 122–124; RWS at para 34(d).

46 RC at pp 128–132; RWS at para 34(f).

47 RC at p 137; RWS at para 34(j).

and July 2012 when the appellant had orally represented to the second respondent about the Kelvin Indemnity; and (c) the fact that it would be illogical for the second respondent to not cover his potential liability through an indemnity from the appellant. I am not satisfied that these three grounds are sufficient to show that there was an oral agreement giving rise to the Kelvin Indemnity.

62 First, similar to the DJ's finding on the Swee Wan Indemnity, I do not think the DJ explained why the substantive requirements for an oral agreement have been satisfied, such that the Kelvin Indemnity exists. The DJ found that "after [the second respondent]'s resignation as director and COO of [Tecbiz], [the appellant] offered to [the second respondent] to buy his shares in [Tecbiz] for $100,000. [The appellant] also promised to indemnify [the second respondent] against all his liabilities as co-guarantor for all [Tecbiz]'s loans" (see the GD at [38]). In essence, the DJ agreed with the second respondent's version of the events which, to be fair, was pleaded with sufficient particularisation this time. However, it is unclear whether the DJ was independently satisfied that the substantive requirements needed for an oral agreement have been satisfied by the evidence. Rather, the DJ appeared to have been satisfied by the overall circumstances that these substantive requirements were automatically satisfied. It is therefore important to examine these other circumstances which the DJ relied on. Moreover, in so far as the respondents say that the DJ was cognisant because of her citation of *Tribune*, that still does not mean that the respondents have discharged *their* burden of proving the existence of the Kelvin Indemnity.[48]

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[48] RC at p 115.

63 Second, the DJ found that the "relationship between [the appellant] and [the respondents] had turned sour and was full of distrust and suspicion" (see the GD at [39]). From this finding, the DJ concluded that the second respondent would not have divested his shares had the appellant not provided the Kelvin Indemnity. However, with respect, it is difficult to conceive why, assuming an agreement had been reached, the appellant and the second respondent would not have documented this agreement in a written form in order to prevent future dispute, precisely because their relationship was "full of distrust and suspicion". In this regard, the second respondent's testimony was that he did not document the Kelvin Indemnity because he "trusted [the appellant] as a friend that he's going to [carry out the Kelvin Indemnity] to prove his worthiness".[49] I do not accept this to be consistent with the objective evidence that the parties' relationship had deteriorated at the time when the Kelvin Indemnity was allegedly entered into. Even if it were true that the second respondent continued to trust the appellant as a friend, I also do not accept his testimony to be consistent with the objective evidence of the July 2011 Email. The second respondent saw fit to state in that email that he sold his Tecbiz shares to the appellant. There was no good reason why he did not also state the alleged Kelvin Indemnity in that email.

64 Further, and with respect, I disagree with the DJ's reasoning that it would be illogical for the second respondent not to have covered his potential liability through an indemnity from the appellant. In this regard, the DJ reasoned that the second respondent "would not have divested his shares [in Tecbiz] if [the appellant] had not provided the [Kelvin] Indemnity for [Tecbiz]'s loans as [the second respondent] would have missed out [*sic*] dividend payments once

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[49] AWS at para 29(a); ROA Vol 2 at p 205 lines 9–13.

he had divested his shares" (see the GD at [39]). This was against what the DJ had found to be a relationship "full of distrust and suspicion" between the appellant and the second respondent. However, I fail to see how the second respondent's potential liability in respect of the Loans is related to the dividend payments from the shares. This is because the second respondent is receiving presumably fair consideration for his shares. This is quite different from the liability in respect of the Loans as a co-guarantor. Put differently, the second respondent's continued ownership of the shares does not provide him with protective cover against liability as a co-guarantor. As such, I fail to see the connection between the second respondent's decision to divest his shares in favour of the appellant for $100,000, and the appellant's alleged decision to agree to the Kelvin Indemnity.

65 Finally, I find, with respect, that the DJ erred in finding that the appellant had made oral representations affirming the Kelvin Indemnity in December 2011, January 2012, and July 2012.

(a) For the December 2011 representation, it was not the respondents' pleaded case that there was any such representation, and neither did the second respondent give any evidence proving the same.[50] Indeed, the respondents' pleaded case focuses only on the January 2012 and July 2012 representations.[51]

(b) Turning next to the January 2012 representation, I find that the DJ did not clearly explain why she accepted the second respondent's

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50 AC at para 126; AWS at para 35.

51 DCC at para 19F.

testimony.[52] In any event, I am not convinced on the totality of the evidence that it is safe to make this inference.

(c) Turning finally to the July 2012 representation, the appellant argues that it was not the second respondent's case that the appellant made this oral representation to him, but the respondents' pleaded case was instead that the second respondent mentioned the Kelvin Indemnity at a meeting in July 2012, and the appellant did not respond before leaving the meeting.[53] However, the pleading clearly states "[o]n or about July 2012, [the appellant] did not dispute his liability when the [second respondent] reminded [the appellant] about his said promise of [the Kelvin] Indemnity to the [second respondent]."[54] I therefore accept that the second respondent's case was that an oral representation had been made in July 2012. However, this is not sufficient to conclude that the appellant *had indeed* made such an oral representation. To the contrary, I find that the DJ did not explain why she accepted the second respondent's testimony in this regard. Further, it would be dangerous, without more, to make a finding that an oral agreement existed simply because the promisee did not reject a representation to such effect by the promisor. This would place an unbearable onus on individuals to disclaim liability when a claim is asserted against them. Rather, it has to remembered that the onus lies on one who asserts a fact. In this case, the second respondent cannot discharge that burden on the basis that the

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52 AWS at para 36.

53 AWS at para 38.

54 ROA Vol 6 at p 31 para 19F(b).

appellant did not reject his (the second respondent's) representation that the Kelvin Indemnity existed.

66 For all these reasons, I find that the Kelvin Indemnity did not exist. I thus respectfully disagree with the DJ on her finding that the respondents succeed in their counterclaim premised on the Kelvin Indemnity. I therefore also allow the appellant's appeal in this regard.

Conclusion

67 For all these reasons, I allow the appellant's appeal in part and reverse the DJ's decision that the respondents succeed in their counterclaims against the appellant.

68 Ultimately, while the respondents are correct that an appellate court should generally be slow to interfere with a trial judge's findings of fact, this starting point is never immutable. Indeed, an appellate court may be in as good a position as the trial judge when *inferences* of fact are not premised on the assessment of a witness's credibility *per se*. In the present case, the respondents probably took the adage that an appellate court should not lightly overturn a trial judge's findings of fact too far by basing their submissions primarily on how the DJ's findings of fact should not be overturned. But, as I have explained above, many of the DJ's findings were actually inferences based on the evidence, which I am in as good a position to assess as well. Also, it must be remembered that the respondents bear the burden of proof with respect to their counterclaims, and cannot only rely on defending the DJ's determinations as being immutable on appeal.

69 Unless the parties are able to agree on costs, they are to tender written submissions on the appropriate costs order with 14 days of this decision, limited to seven pages each.

Goh Yihan
Judge of the High Court

Uthayasurian s/o Sidambaram, Suriya Prakash Uthayasurian and Derek Wong Kim Siong (Phoenix Law Corporation) for the appellant;
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