IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2020] SGHC 157

High Court — Originating Summons No 1363 of 2019

Between

TYN Investment Group Pte Ltd

… *Plaintiff*

And

(1) ERC Holdings Pte Ltd
(2) Griffin Real Estate Investment Holdings Pte Ltd (in liquidation)

… *Defendants*

JUDGMENT

[Civil Procedure] — [*Mareva* injunctions]

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TYN Investment Group Pte Ltd
v
ERC Holdings Pte Ltd and another

[2020] SGHC 157

High Court — Originating Summons No 1363 of 2019
Vinodh Coomaraswamy J
27 November 2019; 19 February, 23 March, 15 May 2020

28 July 2020 Judgment reserved.

Vinodh Coomaraswamy J:

Introduction

1 The plaintiff brings this application under s 31 of the Arbitration Act (Cap 10, 2002 Rev Ed) ("the Act"). By this application, the plaintiff seeks a *mareva* injunction against the first defendant in aid of an arbitration. The plaintiff also initially sought a *mareva* injunction against the second defendant. The plaintiff and the second defendant have however reached a global settlement of their disputes. As a result, the plaintiff has discontinued this application as against the second defendant.[1]

2 I have considered the plaintiff's and the first defendant's evidence and submissions. I allow the plaintiff's application and grant a *mareva* injunction

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[1] See the plaintiff's Notice of Discontinuance (20 May 2020).

against the first defendant. I now grant that injunction in the terms set out in Annex A. These terms are substantially, but not entirely, the terms sought by the plaintiff. This judgment sets out the reasons for my decision.

Background

The Agreement

3 The dispute between the plaintiff and the first defendant in the arbitration arises out of certain express representations and warranties[2] which the first defendant, as the vendor, made and gave to the plaintiff in a sale and purchase agreement between the parties in September 2013[3] ("the Agreement"). Under the Agreement, the plaintiff bought from the first defendant all of the shares in the first defendant's wholly-owned subsidiary ("the Company") at a price of $73.8m. The Company is a special purpose vehicle which acquired a single asset in September 2012:[4] a substantial property of historical importance on Penang Road in Singapore ("the Property").[5]

4 The first defendant is a vehicle of Mr Ong Siew Kwee (also known as Andy Ong) ("Mr Ong"). Mr Ong was the first defendant's overwhelming majority shareholder at all times.[6] He was a director of the first defendant until February 2016. He was a director of the Company until the plaintiff acquired it in November 2013.

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2 Plaintiff's Written Submissions (15 May 2020) ("PS") at para 3.

3 PS at para 12.

4 Annie Lee's 1st Affidavit (30 October 2019) ("AL-1") at p 388.

5 PS at para 12.

6 Ong Geok Yen's 2nd Affidavit (20 January 2020) ("OGY-2") at para 29; AL-1 at para 11.

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The oppression proceedings

5 Five days after the plaintiff acquired the Company in November 2013, a minority shareholder of the second defendant commenced proceedings against Mr Ong and the second defendant seeking relief under s 216 of the Companies Act (Cap 50, 2006 Rev Ed) ("the Oppression Suit"). The minority shareholder made a number of claims against Mr Ong in the Oppression Suit. The claim which is relevant for present purposes was that Mr Ong had wrongfully diverted the corporate opportunity to acquire the Property away from the second defendant to himself, *ie* through the first defendant and the Company as its wholly-owned subsidiary. Nine other individuals and companies associated with Mr Ong were also named as defendants in the Oppression Suit. These additional defendants included the first defendant and the Company.

6 The Oppression Suit concluded at first instance in April 2017 with a judgment by Judith Prakash JA. That judgment can be found at *Sakae Holdings Ltd v Gryphon Real Estate Investment Corp Pte Ltd and others (Foo Peow Yong Douglas, third party) and another suit* [2017] SGHC 73 ("*Sakae Holdings*"). The outcome of the Oppression Suit is relevant to this application for four reasons.

(a) First, Prakash JA ordered the second defendant to be wound up (*Sakae Holdings* at [293]). The second defendant thus went into solvent liquidation in April 2017.[7]

[7] AL-1 at p 288.

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(b) Second, Prakash JA found as a fact that Mr Ong was a shadow director of the second defendant up until the end of 2012 at least (*Sakae Holdings* at [45]).

(c) Third, she held that Mr Ong – at a time when he was a *de jure* director of both the first defendant and of the Company and a *de facto* director of the second defendant – had wrongfully procured the second defendant to transfer $14.3m to the Company in 2012 which the Company then used to purchase the Property (*Sakae Holdings* at [106]).

(d) Fourth, Prakash JA expressed the opinion, albeit *obiter*, that the second defendant quite clearly had a claim against the Company to recover the $14.3m (*Sakae Holdings* at [320]).

The further proceedings

7 Following up on Prakash JA's findings against Mr Ong and the Company in the Oppression Suit, the second defendant's liquidators commenced proceedings against the Company in August 2018 to recover the $14.3m that had been wrongfully diverted to the Company. In argument before me, the parties referred to the second defendant by the acronym GREIH. I shall therefore refer to this suit as "the GREIH Suit".

8 To safeguard its interests – both its own interests and its interests through the Company – if the second defendant were to succeed in the GREIH Suit, the plaintiff commenced four sets of proceedings:

(a) The plaintiff caused the Company to commence third-party proceedings in the GREIH Suit against Mr Ong and two of his associates seeking contribution or an indemnity from the third parties if the

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Company were found liable to the second defendant in the GREIH Suit ("the Third Party Proceedings").[8]

(b) The plaintiff commenced the arbitration against the first defendant out of which this application arises. Its case in the arbitration is that the Oppression Suit has revealed that the first defendant made several representations and warranties about the Company's financial position in the Agreement which have proven to be false.

(c) The plaintiff sued Mr Ong on a guarantee which he executed in favour of the plaintiff at the same time that the first defendant entered into the Agreement ("the Guarantee Suit"). Under the guarantee, Mr Ong guaranteed the due performance and observance by the first defendant of all of its obligations under the Agreement.[9]

(d) The plaintiff sued Mr Ong and the second defendant in the tort of conspiracy ("the Conspiracy Suit"). Its case is that Mr Ong and the second defendant conspired to cause loss to the plaintiff by unlawful means, *ie* by deceiving the plaintiff into acquiring the Company by fraudulently misrepresenting or deliberately concealing the truth about the Company's $14.3m liability to the second defendant as revealed in the Oppression Suit.[10]

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8 AL-1 at para 43.

9 AL-1 at para 46.

10 AL-1 at para 47, pp 485–486.

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The settlement

9 In April 2020, the plaintiff, the Company and the second defendant arrived at a global settlement of their disputes. Under the settlement, the Company paid the second defendant $1.5m in full and final satisfaction of the GREIH Suit. The GREIH Suit has accordingly been discontinued. As part of

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the settlement, the plaintiff also agreed to discontinue the Conspiracy Suit as against the second defendant[11] (see [8(b)] above) and to withdraw these proceedings as against the second defendant.

10 In May 2020, the parties agreed to resolve the plaintiff's claim on the representations and warranties in the Agreement through litigation in the High Court instead of arbitration. The arbitration is accordingly to be stayed on terms, although the parties disagree on whether they have agreed those terms. In any event, the first defendant has itself applied to the arbitrator to stay the arbitration. The parties' intention now is for the plaintiff to commence an action against the first defendant and then to have that action consolidated with the Third Party Proceedings against Mr Ong and the Guarantee Suit so that all the claims be tried together.[12] The Conspiracy Suit has fallen away because it has now been entirely discontinued, even as against Mr Ong.[13]

Preliminary point

The defendant alleges this application is now irregular

11 When the plaintiff commenced these proceedings, it limited the *mareva* injunction it sought to $17.4m.[14] That sum comprised $14.3m – being the sum wrongfully transferred to the Company and claimed by the second defendant in

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11 PS at para 100.

12 DS at para 82; pp 138–141, p 144 at para 4; PS at paras 36, 39 and 44; Annie Lee's 2nd Affidavit (30 April 2020) ("AL-2") at pp 139 and 153.

13 AL-2 at para 47(b).

14 AL-1 at para 89.

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the GREIH Suit – plus $3.1m being an estimate of the plaintiff's costs and expenses of the arbitration, these proceedings and the GREIH Suit.[15]

15 AL-1 at para 89.

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12 The effect of the settlement is to place a cap on the sum which the plaintiff can recover in respect of the wrongful transfer of $14.3m. As a result, the plaintiff now reduces the limit of the *mareva* injunction to just under $2.7m.[16] That sum comprises the $1.5m settlement sum which the Company paid to the second defendant and $1.2m in anticipated costs and expenses.

13 The first defendant relies on this adjustment to the plaintiff's case to take a preliminary point. The preliminary point is that the plaintiff's application is now irregular in that it no longer comes within the scope of s 31(1)*(d)* of the Act. Section 31(1*)(d*) of the Act gives the court the power to grant an interim injunction "for the purpose of and in relation to an arbitration to which [the] Act applies". The preliminary point proceeds as follows.[17] The plaintiff premised its substantive claim in the arbitration on the second defendant's claim against the plaintiff in the GREIH Suit. But the plaintiff now premises its substantive claim instead on the $1.5m settlement sum. The plaintiff has failed to amend its notice of arbitration to plead the settlement, to plead the new premise of its substantive claim and to plead the reduced quantum which it now claims.[18] The injunction which the plaintiff seeks in this application is therefore no longer "for the purpose of and in relation to" the arbitration. It is accordingly outside the scope of s 31(1)(*d*).[19] The application is therefore irregular and ought to be dismissed *in limine*.[20]

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16 PS at para 35.

17 First defendant's written submissions (15 May 2020) ("DS") at paras 12–13.

18 DS at para 14.

19 DS at paras 11 and 17.

20 DS at para 18.

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The defendant does not rely on the stay for its preliminary point

14 The first defendant does not take the point that the plaintiff's application is no longer "for the purpose of and in relation to" the arbitration – and therefore outside the scope of s 31(1)(*d*) – simply because the parties now want to stay the arbitration (see [10] above). In any event, even if the first defendant had taken the point, I would have rejected it. The critical points to my mind are that: (a) it is undisputed that the parties have an arbitration agreement; and (b) when the plaintiff commenced the arbitration in September 2019 and when it filed this application in October 2019, there is nothing before me to suggest that its intention was not to proceed in the arbitration to an award in the usual way. In other words, there is nothing to suggest that the arbitration is a pretext, contrived by the plaintiff in bad faith simply to enliven the court's power under s 31(1)(*d*) for some ulterior purpose.

15 I consider that the court's power under s 31(1)(*d*) is available so long as an arbitration commenced *bona fide* continues in existence, even though it may be stayed. The fact of a stay goes only to the court's discretion whether to grant relief and, if so, as to the duration of the relief. I therefore do not consider that the parties' wish to stay the arbitration in May 2020 can deprive me of the power which the Act vested in me at the time the plaintiff commenced these proceedings. That power continues to be vested in me so long as the arbitration is extant and so long as it has not been irrevocably supplanted by another method of resolving the substantive underlying dispute. I will consider the significance of a stay when I consider the exercise of my discretion (see [114]–[116] below).

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This application is not irregular

16 I reject the first defendant's preliminary point. The plaintiff's failure to amend its notice of arbitration to refer to the settlement and the settlement sum does not break the nexus which is necessary between this application and the arbitration to bring it within the scope of s 31(1)(*d*) of the Act.

17 First, on liability, the cause of action which the plaintiff asserts against the first defendant in the arbitration arises from the falsification of the representations and warranties in the Agreement. The settlement undoubtedly has compromised the second defendant's cause of action against the Company. But it does not in any way affect the plaintiff's cause of action against the first defendant under the Agreement. Despite the settlement, that cause of action continues to remain at the foundation of the arbitration, and thereby of the injunction which the plaintiff seeks in this application.

18 Second, on quantum, the tribunal will not be precluded from considering the settlement and its effect on the plaintiff's case simply because the plaintiff has not referred to the settlement or the settlement sum in the notice of arbitration. As it stands, the plaintiff's notice sets the quantum of the plaintiff's alleged loss at large and squarely within the tribunal's jurisdiction. The notice recites the facts underlying the GREIH Suit, recites the background to the Agreement, lists the various representations and warranties which the plaintiff relies on and recites the Oppression Suit and Prakash JA's findings. It concludes by praying for relief. As part of that relief, the plaintiff does not pray for $14.3m – or indeed any liquidated sum – by way of damages. Instead, the plaintiff prays generally for "damages to be assessed".[21]

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21 DS at p 41.

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19 This general prayer suffices to empower – and indeed to oblige – the tribunal to consider all matters which quantify the loss suffered by the plaintiff arising from the cause of action set out in the notice. These matters obviously include the reduction in the amount of the plaintiff's substantive claim by reason of the settlement as well as any allegation that the plaintiff failed to mitigate its loss. If the arbitration is not stayed, the plaintiff's failure to refer to the settlement in the notice of arbitration has no impact on the plaintiff's ability to plead the settlement in its Statement of Claim, to adduce evidence on that fact and on the tribunal's jurisdiction or power to award damages – if it thinks it fit – by reference to the settlement sum.

20 For these reasons, it is clear to me that the *mareva* injunction which the plaintiff seeks in this application was and continues to be sought "for the purposes of" or "in relation to" the arbitration. The plaintiff's application is therefore within s 31(1)(*d*) of the Act. The first defendant's preliminary point is no basis for dismissing the plaintiff's application *in limine*.

21 I make a final point. The first defendant in its submissions refers repeatedly to the plaintiff's failure to "plead" the settlement in the notice of arbitration[22] and also to the principle that a tribunal which decides an issue which has not been properly "pleaded" may go beyond its jurisdiction. I do not consider the notice of arbitration to be a "pleading" in the usual sense of the word. A Statement of Claim and a Statement of Defence in an arbitration governed by the rules of the Singapore International Arbitration Centre ("SIAC") are obviously pleadings. But a notice of arbitration is more fundamental than the pleadings and in fact operates on a higher plane. A notice

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22 DS at paras 14–18.

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of arbitration is constitutional in nature. The notice of arbitration alone exhaustively defines the parameters within which the pleadings, the parties, the tribunal and its award must operate. For the reasons I have given, the plaintiff's notice of arbitration is drawn sufficiently widely to bring within the tribunal's jurisdiction all issues relating to liability and quantum arising from the settlement and the settlement sum.

The law on *mareva* injunctions

22 The parties are agreed on the legal test which I should apply to determine whether to grant a *mareva* injunction against the first defendant. There are therefore two substantive issues for me to determine on this application:

(a) Whether the plaintiff has a good arguable case on the merits of its claim against the first defendant in the arbitration; and

(b) Whether there is a real risk that the first defendant will dissipate its assets.

23 On the first substantive issue, a plaintiff seeking a *mareva* injunction has a good arguable case on the merits if its case is "more than barely capable of serious argument, but not necessarily one which the judge considers would have a better than 50 per cent chance of success": *Bouvier, Yves Charles Edgar and another v Accent Delight International Ltd and another and another appeal* [2015] 5 SLR 558 ("*Bouvier*") at [36].

24 On the second substantive issue, the plaintiff cites the recent decision of the English Court of Appeal in *Lakatamia Shipping Company Limited v Toshiko Morimoto* [2019] EWCA Civ 2203 ("*Lakatamia*"). In that case, the court held

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that a plaintiff need only produce a plausible evidential basis sufficient to establish a good arguable case on the risk of dissipation (at [36], [37] and [38]):

> An applicant for a freezing order does not need to establish the existence of a risk of dissipation on the balance of probabilities. It is sufficient for the applicant to prove a danger of dissipation to the 'good arguable case' standard…
>
> [A] good arguable case is a case "which is more than barely capable of serious argument, and yet not necessarily one which the judge believes to have a better than 50% chance of success"…
>
> [T]he central concept at the heart of the [good arguable case] test was "a plausible evidential basis".

25 In *Bouvier*, the Court of Appeal held (at [37]) that a plaintiff must adduce "solid" evidence to show that there is a real risk of dissipation. I do not consider there to be a material difference between the "solid evidence" to which *Bouvier* refers and the "plausible evidential basis" to which *Lakatamia* refers.

Whether the plaintiff has a good arguable case

26 The first defendant argues that the plaintiff does not have a good arguable case on five grounds:

(a) the plaintiff's claim in the arbitration is an abuse of process;

(b) even if it is not an abuse of process, the first defendant did not breach the Agreement;

(c) even if it did breach the Agreement, the plaintiff suffered no loss which is recoverable in the arbitration;

(d) even if the plaintiff suffered recoverable loss, it has failed to mitigate its loss; and

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(e) even if it mitigated its loss, the plaintiff has failed to comply with the conditions precedent in the Agreement for bringing a claim.

27 For the reasons which follow, I reject all five grounds.

Abuse of process

28 The first defendant argues that the arbitration is an abuse of process because the plaintiff has commenced three other sets of proceedings arising from the GREIH Suit.[23] I have listed those proceedings at [8] above. The short answer to this argument is that the arbitration is the only proceeding involving the first defendant. The other three proceedings involve either Mr Ong and his associates or the second defendant. It is true that the plaintiff and the Company have made several claims through these proceedings for compensation from several parties arising from the same underlying facts. As a result, of course, there will have to be safeguards to ensure that there is no double recovery in respect of the same loss. These safeguards will of course have to consider the plaintiff's and the company's combined economic interests holistically. But these safeguards are quite often required where multiple related companies have multiple related causes of action against multiple related defendants. And the plaintiff accepts that these safeguards will be necessary.[24] A multiplicity of proceedings and an overlap of underlying facts are not in themselves indicative of an abuse of process.

29 It is also telling that the first defendant has taken no steps whatsoever in the arbitration to challenge it as an abuse of process. There is no impediment to

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23 DS at para 79.

24 PS at para 87.

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the first defendant doing so. The tribunal has been duly constituted since 29 January 2020.[25] Instead, the first defendant initially foreshadowed an intent to apply to stay the arbitration pending the resolution of the GREIH Suit.[26] And it has now agreed to stay the arbitration to allow the plaintiff's claim on the Agreement – the very claim which the first defendant claims to be abusive – to be litigated in fresh proceedings to be commenced and consolidated with the Third Party Proceedings and the Guarantee Suit. The first defendant's own conduct is inconsistent with its submission.

30 I do not consider the plaintiff to be guilty of any abuse of process.

Breaches of the Agreement

31 The first defendant's second ground is that the plaintiff does not have a good arguable case that the first defendant made any representations or gave any warranties in the Agreement which are untrue, inaccurate or misleading.

32 Clause 9.1(a) of the Agreement provides that the first defendant "warrants and represents to [the plaintiff] that the statements set out in Schedule 6 are true and accurate and not misleading as of the date of … [the Agreement in 2013]". The plaintiff's case is that the Oppression Suit revealed the representations and warranties in four paragraphs of Schedule 6 to the Agreement to be untrue, inaccurate or misleading: (a) paragraph 3.3; (b) paragraph 4.1; (c) paragraph 5.2; and (d) paragraph 8.

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25 Annie Lee's 3rd Affidavit (8 July 2020) ("AL-3") at p 145.

26 AL-3 at pp 144–145.

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Relevance of reasonableness or honest belief

33 Before dealing with those four paragraphs, I take one aspect of the first defendant's submissions at the outset. The first defendant argues the plaintiff has no good arguable case on cl 9.1(a) of the Agreement because the plaintiff has not adduced a shred of evidence that Mr Ong as a director of the first defendant gave the representations and warranties in the Agreement without a reasonable basis or without an honest belief in their truth.[27]

34 This submission is misconceived. The plaintiff's claim on the Agreement is a claim in breach of contract. The claim rests on express representation and warranties in the Agreement. The plaintiff bargained for these representations and warranties and provided consideration for them. That is why they are expressly incorporated into the Agreement. The plaintiff's claim does not rest on pre-contractual representations unsupported by consideration and supported only by reliance.

35 Liability for breach of contract is ordinarily strict. It does not depend on showing fault, let alone fraud in the sense of *Derry v Peek* (1889) LR 14 App Cas 337. I therefore hold that there is a good arguable case that the first defendant will be liable to the plaintiff under cl 9.1(a) in respect of any express representation or warranty set out in Schedule 6 of the Agreement which the plaintiff can prove is untrue, inaccurate or misleading within the meaning of cl 9.1(a) even if the first defendant made the representation to the plaintiff or gave the warranty to the plaintiff with a reasonable basis or with an honest belief in its truth.

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27 DS at para 40.

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36 That is, of course subject to contrary agreement. Of the four paragraphs of Schedule 6 on which the plaintiff relies, only paragraph 8 imports any requirement of awareness on the first defendant's part. The first defendant's liability on the three remaining paragraphs will be engaged simply if the plaintiff is able to show that the representation or warranty is untrue, inaccurate or misleading.

37 In any event, cl 9.1(b) of the Agreement expressly attributes Mr Ong's knowledge to the first defendant and deems him to have knowledge of any matter which he would have discovered upon reasonable inquiry:

> Any [of the first defendant's] Warranty qualified by the expression 'to the best of [the first defendant's] knowledge, information and belief' or any similar expression shall, unless otherwise stated, be deemed to refer to the knowledge of Ong Siew Kwee, Andy who shall be deemed to have knowledge of such matters as he would have discovered had he made reasonable enquiries.

To the extent that the plaintiff's cause of action in contract on any of the four paragraphs of Schedule 6 requires the plaintiff to show that the first defendant made the representation or gave the warranty which is proven to be false without a reasonable basis or an honest belief in its truth, I consider that the reasonable inferences to be drawn from Prakash JA's findings against Mr Ong coupled with the contractual attribution effected by cl 9.1(b) of the Agreement suffice to establish a good arguable case that the first defendant lacked the necessary basis or belief.

38 I now take the four paragraphs of Schedule 6 on which the plaintiff relies in turn.

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Paragraph 3.3 of Schedule 6 to the Agreement

39 Paragraph 3.3 of Schedule 6 contains a representation and warranty that the Company incurred all of its liabilities in the ordinary course of its business and that those liabilities were either all disclosed or provided for in its accounts or specifically disclosed in or for the purposes of the Agreement itself:

> There are no liabilities, whether actual or contingent, of the Company other than (i) liabilities disclosed or provided for in the [the Company's consolidated accounts for the period commencing from the date of incorporation up to 30 June 2013]; (ii) liabilities incurred in the ordinary and usual course of business, none of which is material; or (iii) liabilities disclosed elsewhere in this Agreement or the [information provided by the first defendant to the plaintiff about the Company and the Property].

40 Mr Ong caused the second defendant wrongfully to transfer $14.3m to the Company. There is therefore a good arguable case that the transfer created a contingent liability in Company to repay the $14.3m to the second defendant. That transfer took place before the date of the Agreement. The contingent liability therefore existed when the parties entered into the Agreement. Further, it was Mr Ong who carried out the wrongful transfer. His knowledge is imputed to the first defendant by cl 9.1(b) of the Agreement.[28]

41 The plaintiff therefore has, at the very least, a good arguable case that the first defendant had knowledge of the transfer of $14.3m, knowledge that the transfer was wrongful and knowledge of the contingent liability arising from the wrongful transfer. On the basis of Prakash JA's findings, this contingent liability was not incurred in the ordinary course of the Company's business. It was not disclosed or provided for in the Company's accounts. There is no suggestion

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[28] PS at para 68.

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that the first defendant ever specifically disclosed this contingent liability in or for the purposes of the Agreement.

42 I therefore find that the plaintiff has a good arguable case that the representation and warranty in paragraph 3.3 of the Agreement was untrue, inaccurate or misleading when it was made.

Paragraphs 4.1.1 and 4.1.2(iii) of Schedule 6

43 By paragraph 4.1.1 of Schedule 6, the first defendant represented and warranted that the Company is the "sole legal and beneficial owner" of the Property. By paragraph 4.1.2(iii), the first defendant warranted that the Property is free of encumbrances, except those disclosed in the same paragraph. Clause 1.1 of the Agreement defines "encumbrance" as:

> … any claim, charge, mortgage, lien, option, equity, power of sale, hypothecation, retention of title, right of pre-emption, right of first refusal or other third party right or security interest of any kind or an agreement, arrangement or obligation to create any of the foregoing.

44 But Prakash JA found in the Oppression Suit that the Company had used the sum of $14.3m – which Mr Ong had wrongfully transferred to it – to purchase the Property (see *Sakae Holdings* at [106]). Clause 9.1(b) expressly provides that Mr Ong's knowledge is attributed to the first defendant. That means that the first defendant knew that the Company purchased the Property with money wrongfully transferred from the second defendant. There is therefore a good arguable case that the second defendant has some sort of an equitable interest or traceable interest in the Property. That was precisely one of the second defendant's claims in the GREIH Suit. If that could be established, that would mean that the Company is not the sole beneficial owner of the

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Property and that the Property is not free of encumbrances as defined in the Agreement.

45 I therefore find that the plaintiff has a good arguable case that the representations and warranties in paragraphs 4.1.1 and 4.1.2(iii) were untrue, inaccurate or misleading when they were made.

Paragraph 5.2 of Schedule 6

46 By paragraph 5.2 of Schedule 6, the first defendant represented and warranted that the Company had entered into all of its transactions in the ordinary course of its business and at arm's length:

> [The Company] is not a party to or subject to any contract, transaction, arrangement, understanding or obligation which … is not in the ordinary and usual course of business; or … is not wholly on an arm's length basis.

47 Prakash JA's findings in the Oppression Suit establishes, at the very least, a good arguable case that the Company was a party to a transaction – under which it received the $14.3m from the second defendant – which was not in the ordinary course of the Company's business and which was not on a wholly arm's length basis.

48 I therefore find that the plaintiff has a good arguable case that the representation and warranty in paragraph 5.2 was untrue, inaccurate or misleading when it was made.

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Paragraph 8 of Schedule 6

49 By paragraph 8 of Schedule 6, the first defendant represented and warranted that it was not aware of anything which would render the information provided about the Company untrue, inaccurate or misleading:

> … [The first defendant] is not aware of any fact or matter or circumstances not disclosed in writing to [the plaintiff] which renders any [information provided by the first defendant about the Company] untrue, inaccurate or misleading in any material respects.

50 I have already found that the plaintiff has a good arguable case that the defendant's representations and warranties in paragraphs 3.3, 4.1.1 and 4.1.2(iii) of Schedule 6 were false, inaccurate or misleading at the time the first defendant made them. Prakash JA's findings against Mr Ong in the Oppression Suit establish a good arguable case, at the very least, that he was aware of facts, matters and circumstances which rendered these representations and warranties untrue, inaccurate or misleading at the time the first defendant made them. The express terms of cl 9.1(b) of the Agreement attribute to the first defendant Mr Ong's knowledge of the underlying facts and matters and also the knowledge he would have had if he had made reasonable inquiries.

51 I therefore find that the plaintiff has a good arguable case that the representation and warranty in paragraph 8 was untrue, inaccurate or misleading when it was made.

Recoverable loss

52 The first defendant's third ground is that the plaintiff does not have a good arguable case that it has suffered recoverable loss. The first defendant makes two submissions to support this ground. First, it submits that the plaintiff

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has not shown that its shares in the Company have reduced in value.[29] Second, it submits that it is liable *either* for losses suffered by the plaintiff *or* the losses suffered by the Company, but cannot be liable for *both*.

53 I reject both submissions.

Reduction in value of the plaintiff's shares in the Company

54 The plaintiff has arranged its claim for damages against the first defendant under six heads:[30]

(a) the settlement sum of $1.5m paid by the Company;

(b) legal costs and expenses incurred by the plaintiff in the arbitration;

(c) legal costs and expenses incurred by the plaintiff in this application for a *mareva* injunction;

(d) legal costs and expenses incurred by the Company in the GREIH Suit;

(e) legal costs and expenses incurred by the plaintiff in the Conspiracy Suit; and

(f) legal costs and expenses incurred by the plaintiff in the claim on the guarantee against Mr Ong.

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29 DS at para 41.

30 PS at para 90.

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55 The plaintiff's claims in categories (b), (c), (e) and (f) are claims for losses which the plaintiff itself has suffered. If the plaintiff succeeds on liability, it will seek to recover these costs and expenses under one of the two limbs in *Hadley v Baxendale* (1854) 156 ER 145. Legal costs are recoverable as damages for breach of contract, albeit ordinarily only on the standard basis (*British Racing Drivers' Club v Hextall Erskine & Co* [1996] 3 All ER 667). The plaintiff therefore has a good arguable cases that these losses are recoverable.

56 I now consider categories (a) and (d). These are losses suffered by the Company, not by the plaintiff. These claims include the $1.5m[31] which the Company paid to the second defendant to settle the GREIH Suit and the Company's costs of and incidental to that suit. The plaintiff has characterised this claim as "a claim for the diminution in value of the 100% shareholding" in the Company.[32] The first defendant is correct that a shareholder is ordinarily unable to recover damages for this type of loss, commonly known as "reflective loss" (*Johnson v Gore Wood & Co (No 1)* [2002] 2 AC 1; *Townsing Henry George v Jenton Overseas Investment Pte Ltd (in liquidation)* [2007] 2 SLR(R) 597). But the first defendant is incorrect that the reflective loss principle applies to the losses in categories (a) and (d) so as to make them irrecoverable by the plaintiff in the arbitration.

57 The reflective loss principle is an aspect of the proper plaintiff principle established in *Foss v Harbottle* (1843) 67 ER 189. The principle holds that a corporate entity – and not one of its shareholders – is ordinarily the proper plaintiff to recover compensation for a wrong done to that corporate entity.

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31 PS at para 90.

32 PS at para 70.

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58 That principle has no application to the arbitration. The cause of action which the plaintiff pursues in the arbitration is not one vested in the Company or one which the Company can pursue. The plaintiff's cause of action is against the first defendant under the Agreement. The Company is not a party to the Agreement. It has no cause of action against the first defendant under the Agreement. The party against whom the Company has a cause of action is its former director, Mr Ong. But the plaintiff does not assert any cause of action against Mr Ong in the arbitration. If the first defendant is held liable, there is no principle of law which bars the plaintiff from quantifying its loss in categories (a) and (d) by reference to the diminution in the value of its shares in the Company. Of course, as I have noted at [28] above, the plaintiff accepts that there will have to be safeguards to prevent double recovery. But that does not make the loss irrecoverable as damages for breach of contract on the usual principles, unaffected by the reflective loss principle.

59 There is also an express contractual basis on which the plaintiff can recover from the first defendant the diminution in value of its shareholding in the Company. This is under the first defendant's indemnity in cl 9.9 of the Agreement:

> Subject to clause 9.10, [the first defendant] covenants with [the plaintiff] to indemnify and save harmless [the plaintiff] or at *its option*, the Company from and against any and all losses which [the plaintiff] or the Company (as the case may be) may at any time and from time to time sustain, incur or suffer by reason of any breach of the [the first defendant's] Warranty under Paragraph 3.3 of Schedule 6 (No Undisclosed Liabilities).
>
> [emphasis added]

60 If the plaintiff establishes that the first defendant is liable under para 3.3 of Schedule 6, cl 9.9 gives the plaintiff a contractual right to recover an indemnity from the first defendant for a loss which either the plaintiff or the

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Company has suffered, at the plaintiff's option. The plaintiff can therefore opt to recover an indemnity from the first defendant for the diminution in value of the plaintiff's shareholding in the Company.

61 For all of these reasons, I hold that the plaintiff has a good arguable case that it has suffered recoverable loss.

The defendant cannot be liable for two sets of losses

62 Second, the first defendant argues that cl 9.9 renders the first defendant liable *either* for the plaintiff's loss *or* the Company's loss, but not for *both* entities' loss.[33] I have set out cl 9.9 at [59] above.

63 I reject this argument. I have already accepted that, in so far as either the plaintiff or the Company recovers damages for the same loss, safeguards will have to be introduced to prevent double recovery. That does not make the losses irrecoverable.

64 This argument as advanced by the first defendant amounts to saying that the plaintiff cannot claim an indemnity from the first defendant in respect of a certain head of loss under cl 9.9 if, in the same proceedings, it includes a claim for an indemnity in respect of a separate and distinct head of loss suffered by the Company. That construction of cl 9.9 is impractical and uncommercial. It is impractical because it can easily be circumvented by commencing two separate proceedings, in each of which the plaintiff claims an indemnity for loss suffered by only one of the entities. It is uncommercial because the clear intent of cl 9.9 is to require the plaintiff to opt – in respect of each separate and distinct head of

[33] DS at para 46.

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loss – whose loss it intends to pursue. Even then, as the plaintiff points out,[34] the critical question is not when the plaintiff must exercise its option but preventing double recovery.

65 Therefore, even if there are overlapping claims in the plaintiff's case, that does not detract from the plaintiff's good arguable case under cl 9.9 at this stage. The overlap can be resolved later. All that the plaintiff needs to show now is that: (a) there is a good arguable case that one or the other of the two entities is entitled to recover the sums claimed; and (b) there is a good arguable case that this sum should be included in setting the limit of the *mareva* injunction which the plaintiff seeks.

Mitigation

66 The first defendant's fourth ground is that the plaintiff does not have a good arguable case that the settlement sum and the Company's legal costs and expenses in the GREIH Suit are reasonable.[35] The first defendant relies on this argument to argue that plaintiff has failed to mitigate its loss both under the general law and also under its express and specific obligation to do so in paragraph 9.2 of Schedule 3 of the Agreement.[36]

67 On the legal costs and expenses of the GREIH Suit, all that the plaintiff needs to show at this stage to secure the *mareva* injunction which it seeks is that it has a good arguable case to recover these sums by way of damages under the Agreement. I have already found that it does (see [55] above). The plaintiff

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34 PS at para 83.

35 DS at para 52.

36 DS at para 31.

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quantifies the costs now only for the purpose of justifying the limit of the *mareva* injunction which it now seeks. That is a separate point which I deal with separately.

68 As for the settlement sum, the sum of $1.5m is about 10.5% of the sum of $14.3m which the second defendant claimed against the Company in the GREIH Suit. Where a defendant settles an action at such a small fraction of the sum claimed against it, I consider it self-evident there is a good arguable case that that the defendant has acted reasonably, in so far as the quantum of the settlement sum is concerned.

69 The first defendant also takes the point that the Company acted unreasonably in settling the GREIH Suit because the second defendant's claim against the Company was time-barred. The second defendant's case in the GREIH Suit was that Mr Ong wrongfully caused the second defendant to transfer the $14.3m to the Company in September 2012. But the second defendant commenced the GREIH Suit only in November 2018, more than six years after Mr Ong's alleged breach of duty.

70 I reject this argument too. I accept that there was a real risk that the Company could not avail itself of the limitation defence in the GREIH Suit. The second defendant argued in the GREIH Suit that the commencement of the limitation period was postponed because its right of action against the Company to recover the $14.3m had been concealed by fraud. Prakash JA's findings in the Oppression Suit makes it possible, at the very least, that Mr Ong acted fraudulently in the wrongful transfer of $14.3m from the second defendant to the Company (see the Court of Appeal's decision on appeal from Prakash JA in *Ho Yew Kong v Sakae Holdings Ltd and other appeals and other matters* [2018] 2 SLR 333 ("*Sakae Holdings (CA)*") at [126]–[127]). I also consider it possible,

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at the very least, that Mr Ong's fraud was attributable to the Company, with the result that the limitation period would have been postponed despite its change of ownership in 2013 pursuant to the Agreement.

71 I therefore consider there is a good arguable case that the plaintiff acted reasonably in the GREIH Suit and that it mitigated its loss both under the general law and for the purposes of paragraph 9.2 of Schedule 3 of the Agreement.

Conditions precedent

72 The first defendant's final ground is that the plaintiff does not have a good arguable case that it has complied with the conditions precedent in the Agreement for making a claim. The first defendant relies on three provisions of the Agreement:

(a) First, the plaintiff failed to give the first defendant notice in writing of its claim within 18 months after completion under the Agreement, as required by paragraph 4.1 of Schedule 3.[37]

(b) Second, the plaintiff failed to give the first defendant notice of the second defendant's claim in the GREIH Suit as soon as reasonably practicable, contrary to paragraph 8.2(a)(i) of Schedule 3.[38]

(c) Third, the plaintiff settled the GREIH Suit without prior consultation and agreement with the first defendant, contrary to paragraph 8.2(a)(ii) of Schedule 3.[39]

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37 DS at para 26.

38 DS at para 28.

39 DS at para 30.

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73 Paragraph 4.1 of Schedule 3 requires the plaintiff to give the first defendant notice of a claim in respect of any of its representations or warranties within 18 months of completion under the Agreement:

> Subject to paragraph 4.2 below, no claim shall be brought by [the plaintiff] against [the first defendant] in respect of any breach of [the first defendant]'s Warranties (*other than warranties under Clause 9.3 and Paragraphs 1.1 and 4.1.1 of Schedule 6*) unless notice in writing of any such claim has been given by [the plaintiff] to [the first defendant] in accordance with paragraph 8.2 below within 18 months after the Completion Date.
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> [emphasis added]

By its express terms, this 18-month time limit does not apply to claims under paragraph 4.1.1 of Schedule 6. One of the plaintiff's claims in the arbitration is brought under paragraph 4.1.1 of Schedule 6. The good arguable case which I have found the plaintiff to have under paragraph 4.1.1 of Schedule 6 (see [43] to [45] above) is therefore unaffected by paragraph 4.1 of Schedule 3.

74 Paragraph 8.2(a) of Schedule 3 obliges the plaintiff to give the first defendant reasonable notice of a claim which may entail the first defendant's liability on the warranties and not to compromise the claim without consulting the first defendant:

> If any claim comes to the notice of [the plaintiff] by reason or in consequence of which [the first defendant] may be liable under the [first defendant's] Warranties, [the plaintiff] shall:
>
> > (i) as soon as reasonably practicable give written notice thereof contemporaneously to [the first defendant] specifying in sufficient detail the nature of the breach and the amount claimed in respect thereof together with supporting documentation and/or documentary evidence of such breach, but any failure to give such notice shall not operate or be construed as a waiver of any of [the plaintiff]'s rights and remedies in respect of such breach; and

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> (ii) not make any admission of liability, agreement or compromise with any person, body or authority in relation thereto without prior consultation with and agreement of [the first defendant] (such agreement not to be unreasonably withheld or delayed).

75 But paragraph 10 of Schedule 3 of the Agreement excludes the limitations in Schedule 3 in the case of fraud, gross negligence or wilful concealment by the first defendant, the Company or its directors:

> None of the limitations contained in this Schedule shall apply to any claim which arises or is increased, or to the extent to which it arises or is increased, as the consequence of, or which is delayed as a result of, fraud, wilful misconduct, wilful concealment or gross negligence by [the first defendant], the Company or any of their respective directors, officers, employees or agents.

76 I accept the plaintiff's submission that Prakash JA's findings in the Oppression Suit suffice to establish, at the very least, a good arguable case that Mr Ong – then a director of both the first defendant and the Company – acted fraudulently or at the very least grossly negligently and wilfully concealed from the plaintiff the matters giving rise to the GREIH Suit.

77 I therefore consider there is a good arguable case that the plaintiff has complied with the conditions precedent under the Agreement in bringing its claim against the first defendant in the arbitration.

Whether there is a real risk of dissipation of assets

78 I find that the plaintiff has established a good arguable case that there is a real risk that, without the *mareva* injunction which the plaintiff now seeks, the first defendant will dissipate its assets while the plaintiff's claim on the Agreement is determined. The plaintiff has produced substantial evidence of a propensity on the part of the first defendant to move its assets to put them

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beyond the reach of potential creditors both after it was notified of the plaintiff's claim in the arbitration and also after the plaintiff took out this very application.

79 To establish this risk, the plaintiff points to three transactions which the first defendant has entered into:

(a) A deed of assignment of dividends which the first defendant and the second defendant entered into in 20 February 2019 ("the Deed");

(b) A funding agreement which the first defendant entered into with one of its subsidiaries ("GCM") in September 2019 ("the Funding Agreement"); and

(c) A payment of $40,000 which the first defendant made pursuant to the Funding Agreement in February 2020, *ie* while this application was pending.

80 In considering these three transactions, I bear in mind as an overarching point that Prakash JA's findings against Mr Ong in the Oppression Suit, which were upheld on appeal, suggest a certain enthusiasm on Mr Ong's part to enter into and document sham transactions and to shuffle funds around his corporate vehicles to advance his own personal interests (*Sakae Holdings* at [57]–[61], [112], [123] and [143]; *Sakae Holdings (CA)* at [126]–[127]).

81 As the Court of Appeal put it when upholding Prakash JA's findings against Mr Ong in *Sakae Holdings (CA)* (at [126]):

> In our view, the facts of the present case, taken as a whole, present a picture of systemic abuse by Andy Ong, the key figure behind all the impugned transactions, and Ong Han Boon in relation to the management of the Company's affairs. They misappropriated large sums from the Company without Sakae's knowledge. Sakae had entered into the joint venture as an

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> investor and had partially funded the joint venture, and it would clearly have been its legitimate expectation that its funds would not be mismanaged, much less siphoned away in the way that was done by Andy Ong and Ong Han Boon. As is evident from the numerous sham documents that were fabricated, Andy Ong and Ong Han Boon also engaged in fraudulent schemes to mislead Sakae and Foo and conceal the true nature of the transactions from them.

The Deed

82 The first transaction that the plaintiff relies on is the Deed. Before summarising the effect of the Deed, it is necessary first to describe in more detail the group of companies to which the first defendant belongs. The first defendant is a shareholder of a company known as Gryphon Real Estate Investment Corporation Pte Ltd ("GREIC"). GREIC is in turn a shareholder of the second defendant. GREIC – like the second defendant, and also as a result of the Oppression Suit – is in solvent liquidation.

83 The plaintiff estimates that dividends of between $12.4m to $16.2m are due to the first defendant as the shareholders' surplus in GREIC's liquidation. The first defendant does not challenge this.

84 Under the Deed,[40] the first defendant assigned these dividends to the second defendant. The purpose of the assignment was to satisfy a judgment debt which Mr Ong and his associate owe the second defendant as a result of the judgment against them in the Oppression Suit. The plaintiff has asserted that the first defendant received no consideration for this assignment.[41] The first defendant does not challenge this assertion. It is also telling that this transaction

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40 PS at para 26.

41 PS at para 27.

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was given effect to by way of deed, and thereby bind the first defendant without consideration.

85 It makes no commercial sense for the first defendant to give away its substantial dividends in GREIC's liquidation to the second defendant. First of all, only Mr Ong is liable to the second defendant under the judgment in the Oppression Suit. The first defendant has absolutely no liability to the second defendant, whether as a result of that judgment or otherwise. Second, and in any event, there is even less commercial sense for the first defendant to discharge the liability of Mr Ong's *associate.*

86 I consider that there is a good arguable case that the Deed is an attempt by the first defendant to dissipate its assets in anticipation of an adverse result in the plaintiff's claim on the Agreement.

87 The only reason put forward to explain why the first defendant entered into the Deed to satisfy Mr Ong's judgment debt is that the first defendant wanted to stave off bankruptcy proceedings against Mr Ong. The second defendant had brought these bankruptcy proceedings against Mr Ong when he failed to pay the judgment debt.[42] The first defendant's evidence was that the reason for wanting to stave off Mr Ong's bankruptcy was that Mr Ong's bankruptcy would badly affect the first defendant's business by reason of Mr Ong's beneficial shareholding in the first defendant.

88 The first defendant's case on this is internally inconsistent. The first defendant also says that, in 2016 and 2017, as a result of the negative press

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42 OGY-2 at para 30.

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coverage arising from the Oppression Suit, Mr Ong's continued association with the first defendant was causing damage to the first defendant's business reputation. To protect its reputation and re-establish its relationship with its business partners, the first defendant took steps to distance itself from Mr Ong.[43] Mr Ong therefore stepped down as a director of the first defendant and transferred his shareholding in the first defendant to his sister to hold on trust for him. All this is inconsistent with the first defendant's stated reason for wanting to stave off Mr Ong's bankruptcy.

89 There is therefore a good arguable case that the Deed was not entered into in the first defendant's corporate interest but was instead entered into to reduce the assets of the first defendant that the plaintiff could have recourse to if it succeeded in its claim on the Agreement.

90 The first defendant also submits that the Deed is not an attempt to dissipate its assets because it entered into the Deed in February 2019, well before the plaintiff commenced the arbitration in September 2019.[44] I reject this submission. It is true that the arbitration commenced only in September 2019. But the plaintiff put the first defendant on notice of a potential claim on the representations and warranties in the Agreement as early as November 2018.[45] The first defendant denies having received this notice.[46] The plaintiff has produced evidence that the first defendant acknowledged receipt of the notice.[47] I accept that there is a good arguable case that the first defendant actually did

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43 OGY-2 at paras 27–29.

44 DS at para 86.

45 PS at para 23.

46 OGY-2 at para 22.

47 AL-1 at paras 38–40.

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receive the notice and was aware of the plaintiff's impending claim under the Agreement from November 2018.[48]

91 In the circumstances, I consider that the first defendant's entry into the Deed in February 2019 establishes a good arguable case that there is a real risk that, unless restrained by injunction, the first defendant will dissipate its assets in anticipation of an adverse result in the plaintiff's claim on the Agreement.

The Funding Agreement

92 The second transaction that the plaintiff relies on is the Funding Agreement. GCM is in insolvent liquidation. The first defendant's case is that, under the Funding Agreement, it is obliged to fund GCM in the sum of up to $1.3m. The purpose of the funding is to allow GCM to pursue four sets of proceedings:[49]

(a) GCM's claim against the second defendant arising out of a management agreement entered into between GCM and the second defendant;

(b) the second defendant's claim against GCM to recover excessive management fees;

(c) the second defendant's appeal against the decision of GCM's liquidators to reject the second defendant's proof of debt; and

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48 PS at para 23.

49 Ong Geok Yen's 3rd Affidavit (11 May 2020) ("OGY-3") at pp 82–85.

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(d) GCM's appeal against the decision of the second defendant's liquidators to reject GCM's proof of debt.

93 The first defendant further alleges that, in exchange for the funding, the Funding Agreement provides that the first defendant is entitled to receive from GCM the higher of: (a) three times the funding it actually provides to GCM; or (b) 30% of GCM's total recoveries in these four proceedings. However, if GCM recovers less than three times the funding which the first defendant actually provides, the first defendant is entitled to receive 100% of GCM's recoveries.[50]

94 As described, the Funding Agreement is a transaction for consideration, unlike the Deed. So there appears to be a valid commercial benefit to the first defendant from entering into it. However, this apparent commercial reason must be seen in context. First, the first defendant has provided no estimate of what GCM realistically stands to recover in the four proceedings. Further, there is no evidence of the first defendant's own financial position. It has not filed its annual returns since March 2018. The first defendant was therefore entering into a transaction which was risky on two counts, both as to the burden and also as to the benefit.

95 Second, the timing of the Funding Agreement raises suspicion. I have accepted that there is a good arguable case that the first defendant had notice in November 2018 of a potential claim by the plaintiff for breach of the Agreement. The first defendant says that it began negotiating the Funding Agreement with GCM in June 2019.[51] It is also undisputed that the plaintiff sent

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50 OGY-3 at p 82.

51 OGY-3 at paras 160–161.

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the first defendant a letter before action in August 2019 in respect of a claim under the Agreement. The plaintiff commenced the arbitration in September 2019. A few days later, the first defendant entered into the Funding Agreement.

96 In the circumstances, I consider that the first defendant's entry into the Funding Agreement in September 2019 adds considerable weight to the plaintiff's good arguable case that, unless restrained by injunction, there is a real risk that the first defendant will dissipate its assets in anticipation of an adverse result in the plaintiff's claim on the Agreement.

$40,000 payment to GCM

97 The third transaction that the plaintiff relies on is a payment of $40,000 which the first defendant made to GCM's solicitors in February 2020. In order to explain this aspect of the plaintiff's case, I must first explain the procedural history of this application.

98 This application first came before me in November 2019 as an opposed *ex parte* application.[52] I adjourned it to be heard *inter partes* on the first defendant's undertaking to comply voluntarily with the asset-freezing provision of the plaintiff's application. Although the plaintiff's application includes a proviso allowing the first defendant to spend money on its own legal costs, the first defendant's undertaking contained no such proviso.

99 The *inter partes* hearing was fixed for February 2020. On the day of the hearing, at the parties' request and in view of the settlement discussions between the plaintiff and the second defendant, I adjourned the hearing to March 2020.

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[52] Transcript (27 November 2019), page 2, line 14–15.

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At the same hearing, the parties agreed to add a costs proviso to the first defendant's undertaking, allowing the first defendant "to use up to $40,000 of its assets towards the payment of its legal and associated costs".

100 The first defendant relied on this proviso to pay $40,000 to GCM's solicitors in February 2020 expressly as "funding pursuant to the Funding Agreement".[53] The plaintiff's position is that this amounts to a breach of the first defendant's undertaking. The first defendant takes the position that the proviso permits the first defendant to pay $40,000 towards not just its legal fees but also its "associated costs", *ie* that the proviso was not intended to be confined to paying its own legal fees.[54]

101 I agree with the plaintiff. The first defendant's position is disingenuous at best and dishonest at worst. It will have to be determined on another occasion, if it becomes necessary, which of the two it is.

102 It was not the intent of the proviso to allow the first defendant to pay GCM up to $40,000 to fund GCM's legal costs in completely separate proceedings. The intent of the proviso was to allow the first defendant to pay *its own* solicitors for *its own* legal costs in *these proceedings*, as the plaintiff had prayed for in the costs proviso in its application. That was the clear impression which the parties gave me at the hearing itself. I approved the proviso because I agreed that fairness required the first defendant to be able to pay its own solicitors for its own legal costs in these proceedings. The proviso makes express reference to the *first defendant's* legal fees through the pronoun "its".

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53 PS at para 136.

54 OGY-3 at para 149.

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The proviso also permitted the first defendant to make payment of "*its* … associated costs" [emphasis added]. There is just no other way to read the words of the proviso. A payment to a third party under the Funding Agreement is not one of the first defendant's "associated costs". It is performance of what is said to be the first defendant's contractual obligation. This payment was outside the scope of the proviso.

103 There is, at the very least, a good arguable case that the first defendant breached its undertaking to the Court by making this payment.

104 In the circumstances, I consider that the first defendant's payment of $40,000 to GCM in February 2020 adds considerable weight to the plaintiff's good arguable case that there is a real risk that, unless restrained by injunction, the first defendant will dissipate its assets in anticipation of an adverse result in the plaintiff's claim on the Agreement.

The discretion

105 Establishing a good arguable case on the merits of its claim and on the risk of dissipation does not mean that the plaintiff is automatically entitled to a *mareva* injunction. It remains a matter of discretion, both in equity and under s 31(1)(*d*) of the Act.

Clean hands

106 On the exercise of the discretion in equity, the first defendant submits that the plaintiff has not come to court with clean hands because it excluded the first defendant from the settlement negotiations with the second defendant.[55]

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55 DS at para 81.

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107 I reject this submission for two reasons. First, the first defendant was not a party to the GREIH Suit. There is no basis for the first defendant to assert that the plaintiff behaved inequitably by not involving the first defendant in the negotiations to settle proceedings to which the first defendant was not even a party. Second, Prakash JA found in the Oppression Suit that Mr Ong had wrongfully procured the transfer of $14.3m from the second defendant to the Company. That wrongful transfer has now spawned the proceedings listed in [8] above, as well as this application. Mr Ong continues to be beneficially interested in over 90% of the shares in the first defendant.[56] Although Mr Ong resigned as a director of the first defendant in 2016, and despite the first defendant's self-serving protestations to the contrary, I also accept that there is a good arguable case that Mr Ong continues to be a shadow or *de facto* director of the first defendant.

108 The plaintiff's exclusion of the first defendant in the settlement negotiations with the second defendant in the GREIH Suit was entirely understandable and perfectly reasonable. The plaintiff does not come to court with unclean hands.

The tribunal's power to grant interim relief

109 My findings thus far would suffice for me to grant *mareva* relief in civil litigation. But I also have a statutory discretion under s 31(1)(*d*) of the Act to which I must have regard.

110 Clause 27.2 of the Agreement adopts the SIAC Rules ("Rules"). The Rules now in force are the 2016 edition. Rule 30.1 of the 2016 edition Rules

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[56] OGY-2 at para 29.

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allows the tribunal to grant interim relief. That includes *mareva* relief. The tribunal therefore has the jurisdiction to grant the plaintiff the interim relief which it seeks by this application. Where that is the case, the courts should generally decline to grant interim relief (see *NCC International AB v Alliance Concrete Singapore Pte Ltd* [2008] 2 SLR(R) 565 at [51]–[52], [61]).

111 The plaintiff filed this application shortly after lodging its notice of arbitration, in circumstances of urgency. At that time, the tribunal had yet to be constituted. There was therefore no tribunal which was able to act. Since then, however, the tribunal has been constituted.[57] In these circumstances, I must consider whether it remains appropriate for me rather than the tribunal to grant the plaintiff the interim relief which it seeks in this application.

112 I am satisfied that it remains appropriate for me to grant the relief. The critical feature is that the tribunal was constituted *after* the plaintiff commenced this application. I am also satisfied that, when the plaintiff commenced this application, there were circumstances of urgency warranting this application without waiting for the tribunal to be constituted. In those circumstances, the plaintiff could have secured this interim relief only from the court.

113 It is also the case that the parties want to stay the arbitration and to resolve the plaintiff's claim on the Agreement through litigation. The parties intend to return to the arbitration only when the litigation is concluded. In these circumstances, I am satisfied that I need not defer to the tribunal in granting the *mareva* injunction, subject only to the point as to duration which I discuss next.

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57 Transcript (23 March 2020), page 2, line 14–18.

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The duration of the order

114 The plaintiff now asks that the *mareva* injunction continue in force until the final determination of the plaintiff's claim under the Agreement, without making any reference to the arbitration. The plaintiff is therefore asking for the injunction to continue even though, as the plaintiff and the first defendant have now agreed, their dispute is to be resolved through litigation rather than arbitration.

115 I do not think that that can be correct. Although I have disregarded the fact that the parties want to stay the arbitration when exercising my discretion to grant interim relief under s 31(1)(*d*) of the Act, I cannot ignore a stay in fixing the duration of the injunction. When the plaintiff commences litigation, the resolution of the parties' substantive dispute on the merits will move to the High Court. When that happens, it will no longer be appropriate for the plaintiff to continue to have the benefit of injunctive relief under s 31(1)(*d*) in aid of an arbitration when that arbitration will no longer resolve the parties' substantive dispute on the merits. The injunctive relief to prevent the first defendant from dissipating its assets should then be granted directly in that litigation under Order 29 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) and not indirectly through s 31(1)(*d*) in aid of a stayed arbitration. The only part of the sum to be enjoined which is referable to the arbitration at that point will be the costs of the arbitration. The bulk of the sum enjoined will no longer be enjoined "for the purpose of and in relation to an arbitration to which [the] Act applies" within the meaning of s 31(1)(*d*). I consider that in those circumstances, the first defendant's preliminary point (see [11]–[20] above) will have significantly more force.

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116 The injunction I grant today will therefore last only until one of the three following events occurs, whichever is sooner:

(a) An interim award in the arbitration which expressly relates to the whole or part of the injunctive relief granted by this order. This injunction would, in any event, cease to have effect in that event by virtue of s 31(2) of the Act.

(b) A final award in the arbitration on the merits.

(c) A further order of the Court, whether in this application or in other proceedings between the plaintiff and the first defendant in relation to the subject-matter of the arbitration.

Ancillary issues

117 I have now dealt with the substantive issues raised by the parties. The parties also raise four ancillary issues:

(a) The defendant asks for provisos to be inserted into the *mareva* injunction to allow it to make certain payments;

(b) The plaintiff asks the first defendant to disclose its assets;

(c) The plaintiff asks for a sealing order to preserve the confidentiality of the settlement agreement; and

(d) The plaintiff asks for an order that it be at liberty to endorse a penal notice on the *mareva* injunction.

I deal with these four ancillary issues in turn.

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The provisos sought by the defendant

118 The first ancillary issue is the first defendant's request to include provisos in the *mareva* injunction permitting it to:

(a) Pay its own legal fees for both the arbitration and this application; and

(b) Perform its alleged obligations under the Funding Agreement.

The first defendant's own legal costs

119 I will include the first proviso in the injunction. The plaintiff has prayed for a *mareva* injunction in the usual form. That form incorporates the usual proviso permitting the first defendant to spend, subject to the usual conditions, $4,000 a week on legal expenses. This proviso and the applicable conditions are set out in paragraph 3 of the *mareva* injunction which I now make, and which appears at Annex A to this judgment.

120 The proviso will operate only in relation to the first defendant's own legal fees and disbursements and only in relation to this application and the arbitration. The first defendant can draw under this proviso either to pay fees and disbursements which are due and owing to its own solicitors or which its solicitors require as money to hold on account for anticipated costs and disbursements. The proviso will not operate in relation to the litigation which the plaintiff intends to commence to resolve its claims against the first defendant under the Agreement. The proviso will not operate in relation to any other proceedings involving any other companies related to the first defendant.

121 The sum of $4,000 a week may appear low. But this limit of $4,000 per week will apply with effect from 27 November 2019. From 27 November 2019

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to 29 July 2020 encompasses 35 weeks. The proviso will therefore operate to establish a fund of $140,000 for the first defendant's legal fees as at 29 July 2020, with a further $4,000 added to the fund every week thereafter.

122 This is more than enough for the first defendant's legal fees. I have already permitted the first defendant by written directions dated 20 April 2020 to pay the first defendant's solicitors the sum of $32,782.49 for legal costs incurred in these proceedings up to 20 April 2020. It appears also that the first defendant's solicitors are owed a further $46,672.25. That totals just under $80,000.

123 That leave just over $60,000 available to the first defendant to draw upon. But with this judgment, these proceedings are concluded save for residual issues which will not entail significant costs, if any at all. Further, the parties want to stay the arbitration. The first defendant is unlikely to incur substantial additional costs in it.

The funding agreement

124 I will not include the second proviso. The plaintiff's application includes the usual proviso allowing the first defendant to make payments in the ordinary course of its business (*Tribune Investment Trust Inc v Dalzavod Joint Stock Co* [1997] 3 SLR(R) 813 at [19]–[21]). But the payments which the first defendant proposes to make under the Funding Agreement are not payments in the ordinary course of its business. That is no doubt why the first defendant has specifically asked for a new proviso rather than relying on the proviso already offered in the plaintiff's application.

125 The first defendant is asking for a proviso to allow it to make payments to perform what it alleges are its contractual obligations. But the obligations are

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owed to a related party, GCM. The obligations fall outside the ordinary course of its business. The first defendant presumably does not have sufficient assets above the enjoined limit to make these payments. Otherwise, it would not need to seek this proviso. Finally, I bear in mind the defendant's conduct in making the payment of $40,000 pursuant to the Funding Agreement.

126 In all the circumstances, I decline to include this proviso.

Disclosure of assets

127 The next ancillary issue that I have to deal with is the plaintiff's prayer for disclosure in aid of its *mareva* injunction. The plaintiff's application includes a prayer that the first defendant be ordered to file and serve an affidavit which sets out all of the first defendant's assets in Singapore as at 3.00 pm on 25 November 2019. That is the date and time at which the plaintiff notified the first defendant of this application.

128 At the first hearing of this application on 27 November 2019, I was not inclined to make an order for disclosure of assets *ex parte*. I did not see the urgency in having the disclosure order made and complied with. My concern also was that once the first defendant had disclosed its assets to the plaintiff, that disclosure could not be undone if I held against the plaintiff on an *inter partes* or setting aside application.

129 Instead, at my suggestion, the first defendant offered an undertaking to have an appropriate deponent from the first defendant who has personal knowledge of its assets swear or affirm – but not file or serve – an affidavit setting out all of the first defendant's assets in Singapore as at 3.00 pm on 25 November 2019. The first defendant further undertook that that affidavit would

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be held by the first defendant's solicitors in a sealed and dated envelope pending my further order on the *inter partes* hearing.

130 I have now held in favour of the plaintiff. I am also satisfied, for the reasons I have set out in these grounds, that the first defendant's conduct preceding and during the pendency of this application, taken together with Mr Ong's conduct as revealed in the Oppression Suit, warrants an order that it disclose its assets.

131 I therefore order that the first defendant now file the affidavit which its deponent swore or affirmed pursuant to its undertaking on 27 November 2019 and serve it on the plaintiff within three days of this judgment.

The sealing order sought by the plaintiff

132 The next ancillary issue which I have to deal with is the plaintiff's application to seal certain documents in the court's file in order to maintain the confidentiality of the settlement agreement. These documents to be sealed are three affidavits, the parties' submissions and the parties' bundle of documents.[58] As the plaintiff accepts, the question of whether to seal a particular document or the court's file as a whole entails balancing the principle of open justice against countervailing factors (*Hi-P International Ltd v Tan Chai Hau and others* [2020] SGHC 128 at [23]).

133 I decline to seal the file. I accept that the plaintiff is under a contractual obligation to keep the existence and the terms of the settlement agreement

[58] PS at para 156.

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confidential.[59] But a private obligation of confidentiality is not a basis, in and of itself, to outweigh the fundamental principle of open justice. The countervailing factor must be something more, *eg* a need to protect a trade secret, to protect unpublished price-sensitive information, to safeguard a vulnerable individual or to safeguard national security. In any event, the plaintiff's obligation of confidentiality is subject to an express contractual exception allowing it to reveal the existence and the terms of the settlement agreement in order to enforce or protect its legal rights. There is thus no risk that the plaintiff will be exposed to any contractual liability if no sealing order is granted.

Endorsement of penal notice

134 The plaintiff also seeks my permission to endorse a penal notice on the *mareva* injunction. I do not consider that the plaintiff requires my permission to endorse a penal notice on the *mareva* injunction. As Tan Puay Boon JC held in *URU v URV* [2018] SGHCF 22, a party does not require the court's permission to endorse a penal notice upon the order. Tan JC set out the policy considerations and then concluded (at [38]):

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[59] AL-3 at pp 46–47.

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> Having weighed the policy considerations, I am of the view that, on balance, it is preferable that litigants should not have to obtain leave for the endorsement of a penal notice on a copy of an order of court. The starting point is that those who have obtained judgments and orders in their favour are entitled to see that such orders are complied with, and those who are subject of such orders ought to recognise the seriousness of such orders, and the possibility of facing adverse consequences if they do not obey them. Seen in this light, it must be asked why a party should have to obtain the court's prior approval before informing the person subject to the order that if he does not comply, he may be compelled to do so.

135 Tan JC adds three subsidiary points to this general principle. First, it is of course open to a party to ask the court to insert a penal notice in an order and for the court to accede to that request. A penal order of this nature emanates from the court. But it carries no additional penal or procedural consequences as compared to a penal notice endorsed by a party without the court's permission. Second, a party who endorses a penal notice on an order of court without the court's permission should not draft it or endorse it in such a manner as to suggest misleadingly that it emanates from the court (*URU v URV* at [25(b)]. Second, there are certain classes of orders which are, by their very nature, so harsh that endorsing a penal notice upon the order will be oppressive (*URU v URV* at [37]). The example of the latter which Tan JC gives, citing *Robert Arnold Tuohy and others v Gary Bell (As Trustee in Bankruptcy of the Appellant)* [2002] EWCA Civ 423 at [59] is an order for possession of a defendant's home.

136 Tan JC arrived at his decision on a construction of Rule 696 of the Family Justice Rules (S 813/2014). I accept, however, that his analysis applies with equal force to O 45 r 7 of the Rules of Court.

137 Although a *mareva* injunction is an exceptionally harsh order, I do not consider that leave is required before endorsing a penal notice on *mareva* injections as a class. Endorsing a penal notice on a *mareva* injunction could be

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said to be necessary to advance the intended purpose of the *mareva* injunction, which is to prevent a dissipation of assets upon pain of contempt of court. In that sense, a penal notice operates as a service to the defendant rather than oppressing the defendant.

138 The plaintiff is at liberty to endorse a penal notice on the *mareva* inunction in the usual way without my permission. I therefore make no order on the request for leave.

Conclusion

139 Attached at Annex A to this judgment is the *mareva* injunction which I pronounce today restraining the first defendant from disposing of its assets in Singapore up to the limit of $2,693,143.32 subject to the terms and provisos set out in it. With this injunction granted today, the first defendant is released from its undertaking to maintain the *status quo* pending the final resolution of this application. The release is, of course, without prejudice to the consequences to the first defendant and its officers for any breaches of the undertaking.

140 The injunction reserves the costs of this application to be determined separately. The parties have liberty to apply to me in the future for an order awarding the costs of this application to one or other party and either fixing the costs or ordering the costs to be taxed.

Vinodh Coomaraswamy
Judge

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Benjamin Koh, Daniel Seow and Victor Leong (Allen & Gledhill LLP)
for the plaintiff;
Daniel Koh and Ng Jia En (Eldan Law LLP) for the first defendant;
Nawaz Kamil, Danny Quah and Kenny Lau (Providence Law Asia LLC)
for the second defendant.

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ANNEX A

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

HC/OS 1363/2019

In the matter of Section 31 of the Arbitration Act (Cap. 10)

And

In the matter of Order 69, Rule 3 of the Rules of Court

Between

TYN INVESTMENT GROUP PTE. LTD.
(Singapore UEN No. 201325528W)
... Plaintiff

And

1. **ERC HOLDINGS PTE. LTD.**
(Singapore UEN No. 199902535N)

2. **GRIFFIN REAL ESTATE INVESTMENT HOLDINGS PTE. LTD. (IN LIQUIDATION)**
(Singapore UEN No. 200804528W)
... Defendants

BEFORE THE HONOURABLE JUSTICE VINODH COOMARASWAMY **IN CHAMBERS**

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INJUNCTION PROHIBITING DISPOSAL OF ASSETS IN SINGAPORE

IMPORTANT: NOTICE TO THE FIRST DEFENDANT

(a) This order prohibits you from dealing with your assets up to the amount stated. The order is subject to the exceptions stated at the end of the order. You should read all the terms of the order very carefully. You are advised to consult a solicitor as soon as possible. You have a right to ask the Court to vary or discharge this order.

(b) If you disobey this order you will be guilty of contempt of Court and may be sent to prison or fined.

THE ORDER

An application was made today by counsel for the plaintiff, Messrs Allen & Gledhill LLP to Justice Vinodh Coomaraswamy by way of HC/OS 1363/2019. Justice Vinodh Coomaraswamy heard the application and read the following affidavits: (a) the affidavits of Annie Lee filed on 31 October 2019, 30 April 2020 and 8 July 2020; (b) the affidavits of Ong Geok Yen filed on 20 January 2020, 11 May 2020 and 15 May 2020; and (c) the affidavit of Koh Zhen-Xi, Benjamin filed on 30 April 2020.

AS A RESULT OF THE APPLICATION, IT IS ORDERED by Justice Vinodh Coomaraswamy that:

DISPOSAL OF ASSETS

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1. (a) The first defendant must not remove from Singapore in any way dispose of or deal with or diminish the value of any of its assets which are in Singapore whether in its own name or not and whether solely or jointly owned up to the value $2,693,143.32 ("the Limit").

(b) This prohibition includes the following assets, in particular:

(i) the 2,105,000 shares in Gryphon Real Estate Investment Corporation Pte Ltd held in its own name (1,105,000 shares) and in the name of Ho Yew Kong (1,000,000 shares).

(ii) The monies in Account No. 2013299651 maintained with United Overseas Bank Limited, Singapore.

(iii) The monies in any other bank account maintained by the first defendant in Singapore.

(c) If the total unencumbered value of the first defendant's assets in Singapore exceeds the Limit, the first defendant may remove any of those assets from Singapore or may dispose of or deal with them so long as the total unencumbered value of its assets still in Singapore remains not less than the Limit.

DISCLOSURE OF INFORMATION

2. The first defendant shall file and serve upon the plaintiff within three (3) days of the date of this order the affidavit which the appropriate deponent of the first defendant swore or affirmed in accordance with the

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undertaking which the first defendant gave to the Court on 27 November 2019 and which affidavit sets out all of the first defendant's assets in Singapore as at 3.00 pm on 25 November 2019.

EXCEPTIONS TO THIS ORDER

3. This order does not prohibit the first defendant: (a) from spending $4,000 a week on its own legal advice and representation in respect of HC/OS 1363/2019 and Singapore International Arbitration Centre Arbitration No. ARB295/19/TEV ("the Arbitration"); or (b) from making in full any payments or deposits requested by the Singapore International Arbitration Centre in connection with the Arbitration. But before spending any money, the first defendant must tell the plaintiff's solicitors where the money is to come from.

4. This order does not prohibit the first defendant from making any payments or dealing with or disposing of any of its assets in the ordinary and proper course of business. The first defendant shall account to the plaintiff on the first working day of every month for the amount of money spent in this regard.

5. The first defendant may agree with the plaintiff's solicitors that the above spending limits should be increased or that this order should be varied in any other respect but any such agreement must be in writing.

EFFECT OF THIS ORDER

6. A Defendant who is an individual who is ordered not to do something must not do it himself or in any other way. He must not do it through

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others acting on his behalf or on his instructions or with his encouragement.

7. A Defendant which is a corporation and which is ordered not to do something must not do it itself or by its directors, officers, employees or agents or in any other way.

THIRD PARTIES

Effect of this order

8. It is a contempt of Court for any person notified of this order knowingly to assist in or permit a breach of the order. Any person doing so may be sent to prison or fined.

Set-off by banks

9. This injunction does not prevent any bank from exercising any right of set-off it may have in respect of any facility which it gave to the first defendant before it was notified of the order.

Withdrawals by the first defendant

10. No bank need enquire as to the application or proposed application of any money withdrawn by the first defendant if the withdrawal appears to be permitted by this order.

UNDERTAKINGS

11. The plaintiff gives to the Court the undertakings set out in Schedule 1 to this order.

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DURATION OF THIS ORDER

12. This order will remain in force until any of the three following alternatives occurs, whichever is sooner:

    (a) an interim award in the Arbitration which expressly relates to the whole or part of this order;

    (b) a final award in the Arbitration which deals on the merits with the subject-matter of the Arbitration; or

    (c) an order of the High Court, whether in this application or in other proceedings in the High Court between the plaintiff and the first defendant in relation to the subject-matter of the Arbitration.

VARIATION OR DISCHARGE OF THIS ORDER

13. The first defendant (or anyone notified of this order) may apply to the Court at any time to vary or discharge this order (or so much of it as affects that person), but anyone wishing to do so must inform the plaintiff's solicitors.

NAME AND ADDRESS OF PLAINTIFF'S SOLICITORS

14. The plaintiff's solicitors are:

    Mr. Jason Chan SC, Mr. Benjamin Koh and Mr. Daniel Seow

    Messrs Allen & Gledhill LLP
    One Marina Boulevard #28-00 Singapore 018989
    Tel: 6890 7872 / 7845 / 7896 / 7447

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INTERPRETATION OF THIS ORDER

15. (a) In this order references to "he", "him" or "his" include "she" or "her" and "it" or "its".

(b) Where there are 2 or more Defendants then (unless the context indicates differently):

(i) References to "the Defendants" mean both or all of them;

(ii) An order requiring "the Defendants" to do or not to do anything requires each Defendant to do or not to do the specified thing; and

(iii) A requirement relating to service of this order or of any legal proceedings on "the Defendants" means service on each of them.

COSTS

16. The costs of and incidental to this application are reserved. The parties have liberty to apply to have the costs awarded and fixed or awarded and taxed.

Dated this 28th day of July 2020.

[Registrar]

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SCHEDULE

1. If the Court later finds that this order has caused loss to the first defendant, and decides that the first defendant should be compensated for that loss, the plaintiff shall comply with any order the Court may make.

2. Anyone notified of this order shall be given a copy of it by the plaintiff's solicitors.

3. The plaintiff shall pay the reasonable costs of anyone other than the first defendant which have been incurred as a result of this order including the costs of ascertaining whether that person holds any of the first defendant's assets and if the Court later finds that this order has caused such person loss, and decides that such person should be compensated for that loss, the plaintiff will comply with any order the Court may make.

4. If this order ceases to have effect, the plaintiff will immediately take all reasonable steps to inform in writing anyone to whom it has given notice of this order, or who it has reasonable grounds for supposing may act upon this order, that it has ceased to have effect.

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