IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2021] SGCA 16

Civil Appeal No 146 of 2019

Between

(1) Nicky Tan Ng Kuang
(the duly appointed joint and several liquidator of Sembawang Engineers and Constructors Pte Ltd (in compulsory liquidation))

(2) Lim Siew Soo
(the duly appointed joint and several liquidator of Sembawang Engineers and Constructors Pte Ltd (in compulsory liquidation))

(3) Brendon Yeo Sau Jin
(the duly appointed joint and several liquidator of Sembawang Engineers and Constructors Pte Ltd (in compulsory liquidation))

… *Appellants*

And

Metax Eco Solutions Pte Ltd

… *Respondent*

In the matter of Companies Winding Up No 90 of 2017

Version No 1: 04 Mar 2021 (15:22 hrs)

In the matter of Sections 253(1)(*f*) and 254(1)(*e*) of the Companies Act (Cap 50)

And

In the matter of Sembawang Engineers and Constructors Pte Ltd (in compulsory liquidation)

Between

Lim Siew Soo

… *Plaintiff*

And

Sembawang Engineers and Constructors Pte Ltd (in compulsory liquidation)

… *Defendant*

And

Metax Eco Solutions Pte Ltd

… *Intervener*

GROUNDS OF DECISION

[Civil Procedure] — [Appeals]

Version No 1: 04 Mar 2021 (15:22 hrs)

This judgment is subject to final editorial corrections approved by the court and/or redaction pursuant to the publisher's duty in compliance with the law, for publication in LawNet and/or the Singapore Law Reports.

Tan Ng Kuang Nicky (the duly appointed joint and several liquidator of Sembawang Engineers and Constructors Pte Ltd (in compulsory liquidation)) and others
v
Metax Eco Solutions Pte Ltd

[2021] SGCA 16

Court of Appeal — Civil Appeal No 146 of 2019
Sundaresh Menon CJ, Andrew Phang Boon Leong JCA, Judith Prakash JCA, Steven Chong JCA and Quentin Loh JAD
20 January 2021

3 March 2021 .

Judith Prakash JCA (delivering the grounds of decision of the court):

Introduction

1 On 20 January 2021, a sitting of a five-judge coram of the Court of Appeal was convened to hear arguments on what had been put forward as an important point of law to be decided for the first time in Singapore. At the end of the hearing, at which only the appellants presented arguments, the appeal was dismissed summarily. In the normal case, these grounds would contain the legal reasons for that dismissal. This is not a normal case. The purpose of these grounds is to explain why we do not think it appropriate to deal in substance with the question of law presented to us and to express our strong disapproval of how the matter came before us.

2 As a brief indication of how this situation arose, we set out below a substantial extract from the official minute sheet of the hearing of the appeal. It should be borne in mind when reading the minutes that the appellants who are the three joint and several liquidators of a company in liquidation had filed their Appellants' Case and other documents necessary for the appeal in the normal course. The respondent, which is a company claiming to be a creditor of the company in liquidation, had on the other hand not filed a Respondent's Case or any other document. Its counsel, however, were present for the hearing of the appeal.

MINUTE SHEET

….

Hearing Date: 20 January 2021

Coram: …

Subject: Insolvency Law – Administration of insolvent estates

Counsel: Seah Zhen Wei Paul and Chin Wan Yew Rachel (Tan Kok Quan Partnership) for the appellants;

Rethnam Chandra Mohan and Chia Ming Yee Doreen (Rajah & Tann Singapore LLP) for the respondent.

1001 hrs: [The Court of Appeal delivers the standard allocution for hearings conducted by Zoom]

1002 hrs: *The Court seeks the respondent's clarification as to why the respondent did not file any documents in the appeal.*

1002 hrs: Counsel for the respondent, Mr Mohan, addresses the Court. Mr Mohan explains that the respondent had entered into an agreement with the appellants in respect of the respondent's involvement in the appeal. One of the terms of the agreement was that the respondent's counsel was not to file a respondent's case. Nevertheless, the respondent's counsel had prepared for the

Version No 1: 04 Mar 2021 (15:22 hrs)

appeal and was ready to assist the Court with any queries the Court might have.

1004 hrs: The Court seeks the appellants' clarification as follows:

'Your clients are officers of the Court, as liquidators. How is it that as officers of the Court they can enter into an agreement to ask a fellow party not to file papers to the Court?'

1005 hrs: Counsel for the appellants, Mr Seah, addresses the Court. Mr Seah explains that the agreement reached was that, if the Court should so direct, the respondent would be at liberty to assist the Court. The spirit of the agreement was ultimately that parties would be available to assist the Court.

1007 hrs: Counsel for the appellants, Mr Seah, addresses the Court on the appeal.

1113 hrs: *The Court seeks the respondent's clarification as to whether the agreement entered into between the appellants and the respondent was in the nature of a settlement.*

1113 hrs: Counsel for the respondent, Mr Mohan, addresses the Court. *Mr Mohan confirms that that agreement was in the form of a settlement.*

1113 hrs: The Court stands down.

1129 hrs: The Court delivers its order as follows:

'The appeal is dismissed. Our reasons would have been evident from the questions that we put to Mr Seah in the course of his submissions. We will nonetheless issue our grounds of decision in due course setting out our views more fully. *We are gravely concerned by the discovery that we made as to what had led to the unsatisfactory manner in which the case was argued before us. It appears from what was said that there has been a settlement between the parties, as a result of which, or as part of which, the liquidators also prevailed upon the respondent that its counsel should not make submissions before us. This seems to us to make a mockery of the fact that a five-judge coram was convened to deal with what was presented as an*

Version No 1: 04 Mar 2021 (15:22 hrs)

> *important and unresolved question of law. The liquidators seemed anxious to secure a ruling in their favour. This raises a number of questions and before we decide what, if any, sanction is to be taken in relation to all concerned – the liquidators, the counsel and the solicitors, officers of the court – in allowing the matter to proceed in this way, we invite the parties and counsel to make disclosure of all facts and to offer any explanations* within seven days. We reserve the question of costs in the meantime.'
>
> 1131 hrs: Counsel for the appellants, Mr Seah, addresses the Court. Mr Seah confirms that he will respond fully to explain the position to the Court. Mr Seah also expresses his apologies to the Court if there has been any misjudgement or falling short of the duties of an officer of the court.
>
> 1132 hrs: Counsel for the respondent, Mr Mohan, addresses the Court. Mr Mohan explains that the respondent had accepted the appellants' offer because it was in their interest to do so, in light of the appellants' insolvency. Mr Mohan further explains that in acting for the respondent, his purpose had been to assist the Court.
>
> 1134 hrs: The Court delivers its order as follows:
>
> '*We invite parties to make full disclosure and to offer the explanations that they each wish to make, and we will consider at that point what further steps, if any, we should take.*'
>
> [emphasis in original omitted; emphasis added in italics]

3 The explanations that we requested were duly delivered. Having studied them, our initial assessment that there had been improper conduct on the part of the liquidators and both sets of counsel was, regrettably, amply confirmed. We explain this conclusion below. First, for context, we will set out the background of the appeal.

Version No 1: 04 Mar 2021 (15:22 hrs)

The background

SEC and Metax

4 The appellants, *viz*, Nicky Tan Ng Kuang, Brendon Yeo Sau Jin and Lim Siew Soo, are the joint and several liquidators ("the Liquidators") of Sembawang Engineers and Constructors Pte Ltd (in compulsory liquidation) ("SEC"). SEC is a Singapore-incorporated private limited company which was placed in compulsory liquidation on 7 August 2017. Prior to its liquidation, SEC was involved in providing engineering and construction services.

5 The respondent is Metax Eco Solutions Pte Ltd ("Metax"), a subcontractor in the construction industry.

6 Sometime in late 2010/early 2011, SEC and Metax entered into a contract for Metax to supply goods to SEC. On 25 July 2011, Metax wrote to SEC purporting to rescind the contract.

7 On 12 November 2012, SEC commenced HC/S 965/2012 ("Suit 965") against Metax for the wrongful repudiation of the contract, claiming damages in the sum of $3,657,037.42. Metax counterclaimed against SEC for, *inter alia*, a sum of $2,134,196.66. Suit 965 was heard over eight days by Justice Vinodh Coomaraswamy ("the Judge") in February 2015. Parties then put in written submissions which were to be followed by oral closing submissions on 25 September 2015. Before this could happen, SEC's financial situation deteriorated.

8 On 13 September 2015, SEC applied to the High Court for leave to convene a meeting with its creditors to propose a scheme of arrangement. SEC's application was granted and a stay was ordered by the court in respect of all

Version No 1: 04 Mar 2021 (15:22 hrs)

pending, contingent or fresh actions or proceedings against SEC. On 25 September 2015, because of the possibility of a scheme of arrangement, the Judge adjourned the hearing of Suit 965 to 24 May 2016. Eventually, SEC failed to persuade the majority of its creditors to approve the proposed scheme.

9 In the meantime, on 17 February 2016, SEC had applied to be placed under judicial management. A judicial management order was made on 27 June 2016. Consequently, the hearing of Suit 965 was postponed several times and finally to 30 October 2017.

10 On 7 August 2017, SEC was ordered to be wound up in HC/CWU 90/2017. As at the date of the winding-up order, SEC had about 746 creditors with total claims of approximately $190,764,861 in book value, and contingent claims of approximately $176,754,837, whereas the estimated realisable value of SEC's assets amounted to approximately $24,288,507.

11 On 8 September 2017, Metax filed a proof of debt with the Liquidators for the sum of $2,728,692.46.

Events leading up to the Liquidators' application in SUM 79

12 On 16 October 2017, the Liquidators applied for a stay of proceedings in Suit 965. On 23 October 2017, the Judge granted the Liquidators' application and ordered a stay of the hearing of Suit 965 until 23 October 2018, in order for the Liquidators to take stock of SEC's affairs.

13 On 18 July 2018, Metax's solicitors wrote to the Liquidators' solicitors, requesting an update regarding the adjudication of Metax's proof of debt and whether the Liquidators intended to proceed with Suit 965. On 26 September

Version No 1: 04 Mar 2021 (15:22 hrs)

2018, the Liquidators' solicitors replied suggesting that in lieu of an oral hearing, it would be sensible to request the Judge to determine Suit 965 on the basis of the written closing submissions which the parties had already filed. Metax was not agreeable to this proposal. Thus, the Liquidators then had to decide whether to go ahead with the oral closing submissions, a course that would not only expose them to legal fees payable by SEC but would also incur the risk of SEC being ordered to pay Metax's costs which costs would stand in priority to other claims against SEC. There was a real prospect of SEC's assets being insufficient to pay such costs with the result that the Liquidators might have to bear the costs personally.

14 On 4 January 2019, the Liquidators filed an *ex parte* application ("SUM 79") under s 273(3) of the Companies Act (Cap 50, 2006 Rev Ed) ("Companies Act") for directions on the following matters:

> a. should the Liquidators decide to continue legal proceedings against a defendant (which were commenced before the winding up order was made), and the defendant ultimately succeeds in these legal proceedings, would the successful defendant be entitled to be paid its costs in priority to the other general expenses of the liquidation (*i.e.* including the remuneration and expenses of the Liquidators); and
>
> b. in such event:
>
> (i) would the successful defendant be entitled to be paid such costs only from the point in time when the Liquidators expressly elect to continue the legal proceedings; or
>
> (ii) would the successful defendant be entitled to be paid its entire costs from the beginning of the legal proceedings?

15 Thereafter, Metax filed an application for leave to intervene in SUM 79 and was granted leave to do so by the Judge on 29 April 2019. Thus, when the

Version No 1: 04 Mar 2021 (15:22 hrs)

summons came on for hearing before the Judge, Metax was a party and was able to present arguments against the legal propositions being put forward by the Liquidators.

Summary of arguments below

16 The proceedings below dealt with the applicability of the rule of law known as the Estate Costs Rule to the situation in Suit 965. The Liquidators submitted that the Estate Costs Rule should apply to part heard litigation involving parties who had become insolvent after commencement of the action such that priority in the estate of the insolvent party would only be accorded to costs that were incurred by a counterparty from the *time when the action was continued or adopted* by the liquidator on behalf of the insolvent company. In this regard, the Liquidators sought to persuade the Judge to depart from the position taken by the English, Australian and Hong Kong courts which is that in such circumstances a successful counterparty would be entitled to priority for *all* of its costs incurred from the commencement of the proceedings.

17 The Liquidators made three main arguments in support of this submission. First, the Liquidators submitted that according priority to costs incurred before the making of the winding-up order was contrary to the framework for statutory priorities under s 328 of the Companies Act. This was because s 328(1)(*a*) applied only to costs and expenses incurred post-liquidation. Second, according priority only to costs incurred after the making of the winding-up order would cohere with Singapore's judicial management regime, in particular, the considerations underpinning the imposition of liability on a judicial manager who adopts a company's contracts. Finally, according priority only to costs incurred after the making of the winding-up order would best achieve fairness, justice and equity for all stakeholders.

Version No 1: 04 Mar 2021 (15:22 hrs)

18 Alternatively, the Liquidators submitted that the court should exercise its power under s 283(3) of the Companies Act to direct that in the present case, priority should be accorded only to such costs as may be incurred by Metax from the point in time that the Liquidators expressly elected to continue or adopt Suit 965.

19 In response, Metax submitted that where liquidators adopt an existing action, the successful counterparty should be entitled to be paid its entire costs in priority to the other general expenses of the liquidation. This submission was in line with the approach taken in the UK, Australia, Malaysia and Hong Kong, It also accorded with the principles set out by the Court of Appeal in *Ho Wing On Christopher and others v ECRC Land Pte Ltd (in liquidation)* [2006] 4 SLR(R) 817 ("*ECRC Land*").

20 Metax argued, first, that according priority to the counterparty's costs incurred from the beginning of the proceedings was in line with the purpose of the Estate Costs Rule – to allocate the entire risk of legal action to the party who benefitted from such action. Second, this would give effect to the balance struck by the courts in favour of protecting the counterparty. Finally, given that a liquidator adopts the legal proceedings as a whole, it should not be allowed to shirk responsibility for costs incurred prior to the winding-up order.

21 Metax further submitted that on the facts, there was no basis for the court to override the operation of the Estate Costs Rule. The present case did not fall within any of the exceptional situations set out in *ECRC Land* warranting the exercise of the court's discretion under s 283(3) of the Companies Act. The Liquidators had already stated that SEC did not have sufficient funds to pay an adverse costs order. Furthermore, the Liquidators did not indicate to the court

Version No 1: 04 Mar 2021 (15:22 hrs)

whether they had attempted to obtain an indemnity from the creditors. Metax also noted that such an exercise of discretion had not been prayed for by the Liquidators in SUM 79.

Decision below

22 On 6 May 2019, the Judge delivered his oral grounds of decision and answered the questions set out in SUM 79 (see [14] above) as follows:

> (a) if the Liquidators decide to continue legal proceedings against a defendant (which legal proceedings were not commenced by the Liquidators), and the defendant ultimately succeeds in these legal proceedings, the successful defendant is entitled to be paid its costs in priority to the other general expenses of the liquidation (i.e. including the remuneration and expenses of the Liquidators); and
>
> (b) the successful defendant is entitled to be paid its entire costs from the beginning of the said legal proceedings.

23 The Judge observed that although he was not bound by *ECRC Land* to apply the Estate Costs Rule in cases where the liquidator was *continuing or adopting* pre-existing proceedings, it would be inconsistent with the underlying reasoning in *ECRC Land* to apply the Estate Costs Rule in the manner contended by the Liquidators. According to the Court of Appeal in *ECRC Land*, the Estate Costs Rule was based on "two concepts of mutuality of benefit and burden". First, a party seeking to take the full benefit of a judgment should be willing to take the full burden of the expenses associated with the attempt to obtain that judgment. Second, a party seeking to take the benefit of a costs order in respect of all costs incurred from the commencement of the proceedings should bear the burden of an adverse costs order made on a similar basis.

Version No 1: 04 Mar 2021 (15:22 hrs)

24 In light of these principles, the Judge held that priority could not be granted based on whether the liquidator was commencing proceedings or adopting pre-existing proceedings. In both cases, the liquidator was seeking to obtain the full benefit of the company's claim, with the expectation of recovering the entirety of the company's costs if the claim succeeded. Although the Estate Costs Rule did have a "chilling effect in increasing the personal liability of liquidators", this had been explicitly addressed by the Court of Appeal in *ECRC Land*.

25 Furthermore, the Judge observed that the Estate Costs Rule was not a creature of insolvency law but a well-established principle in equity applicable in the case of any estate. Distinguishing *ECRC Land* on the basis of whether the liquidator was commencing proceedings or adopting pre-existing proceedings was tenuous and could affect the coherence of the Estate Costs Rule across all the fields in which it applied.

26 For completeness, we note that the Judge subsequently delivered full written grounds in respect of his decision. These can be found in *Lim Siew Soo v Sembawang Engineers and Constructors Pte Ltd (in compulsory liquidation) (Metax Eco Solutions Pte Ltd, intervener)* [2021] SGHC 32 dated 10 February 2021. As these grounds had not been issued at the time of the appeal, they played no part in the arguments put before us.

The appeal

27 The Liquidators were dissatisfied with the Judge's decision and accordingly filed an appeal against it on 26 July 2019. Thereafter, matters initially proceeded in the usual way with the solicitors for Metax engaging with the Registry on various procedural matters that cropped up. On 3 September

Version No 1: 04 Mar 2021 (15:22 hrs)

2020, the Registry wrote to both parties informing them that the Record of Appeal was ready for collection and that the timelines for the filing of the documents in the appeal were starting to run. The parties were also informed that the appeal would be fixed for hearing in the week commencing 18 January 2021. Matters then took an abrupt turn. On 20 October 2020, Metax's solicitors wrote to the Registry to state that their client would not be filing any documents in the appeal. The material part of the letter is para 3 thereof and we set this out below:

> 3. We write to respectfully inform the Honourable Court that the Respondent has instructed us not to file a Respondent's Case, Skeletal Arguments, Appeals Information Sheet or any other document in CA 146. Nevertheless, we stand ready to assist the Honourable Court at the hearing insofar as may be necessary and permitted by the Honourable Court.

28 In the ensuing months, the Liquidators filed all the relevant appellants' papers containing their arguments on the issues before this court. The issues and the arguments so proffered were substantially the same as those dealt with below. It was also clear that the Liquidators were asking this court to depart from the legal position adopted by leading Commonwealth jurisdictions. Accordingly, it was decided that it would be appropriate to convene a five-judge coram of the Court of Appeal to hear and decide the matter.

29 In the event, the appeal was fixed for hearing on 20 January 2021. That morning counsel for both the Liquidators (as appellants) and Metax as named respondent were present for the hearing. The hearing commenced and occupied the court's time for one and a half hours. We have indicated what happened during the hearing in [1] and [2] above. Most of the time was taken up with submissions made by counsel for the Liquidators. At the end of the submissions, we explored the issue of why Metax had not filed any arguments in the appeal.

Version No 1: 04 Mar 2021 (15:22 hrs)

It became clear that the disputes between Metax and SEC had been settled before the hearing of the appeal. This meant that the issue of what costs the Liquidators would have to pay if they pursued SEC's case in Suit 965 was completely moot. No matter the outcome of this appeal, even if we decided in favour of the Liquidators, Suit 965 was a dead letter. In those circumstances, the appeal had been rendered academic. Once the settlement was reached the appeal was rendered nugatory and should have been immediately discontinued. Instead the appeal proceeded thus engaging the court in a consideration of wholly hypothetical issues and arguments. The court's time was totally wasted, not only for the hearing itself, but also in relation to all the preparatory and procedural work that had been done from 20 October 2020 onwards.

30 We could not understand how the Liquidators and counsel, who are all officers of the court, could have allowed, or perhaps worse still connived at, the existence of such an appalling situation. Thus, we ordered the parties to disclose the sequence of events. They have done so and we now turn to consider what these accounts reveal.

The explanation and the correspondence

The Liquidators' explanation

31 As can be seen from the Minute Sheet cited at [2] above, the Liquidators were represented by a team of lawyers from Tan Kok Quan Partnership ("TKQP") led by Mr Paul Seah. Metax was represented by a team of lawyers from Rajah & Tann Singapore LLP ("R&T") led by Mr Rethnam Chandra Mohan.

Version No 1: 04 Mar 2021 (15:22 hrs)

32 Both sets of lawyers wrote to the court on 27 January 2021 to explain how the situation that faced the court on 20 January 2021 had come about. The account that follows is taken from TKQP's letter as it was clear that the events were driven by the decisions and actions of the Liquidators.

33 The Liquidators were appointed as joint and several liquidators of SEC on 7 August 2017. By then, proceedings in Suit 965 were almost complete and it only remained for the parties to put forward their oral submissions before the Judge. The Liquidators therefore had to consider how to resolve Suit 965. They were cognisant of the Estate Costs Rule and were concerned about its impact on potential recovery by the creditors of SEC.

34 On 4 January 2019, with the approval of the Committee of Inspection ("COI") of SEC, the Liquidators filed SUM 79 to seek the High Court's directions on the operation of the Estate Costs Rule. This application was made under s 273(3) of the Companies Act which allows a liquidator to apply to the court for directions in relation to any particular matter arising under the winding up. SUM 79 was an *ex parte* application because the Liquidators were seeking directions. However, Metax subsequently applied for and was granted leave to intervene in SUM 79. We note here that it was not surprising Metax wanted to be joined as the affidavit filed by Liquidators relied on the circumstances of Suit 965 and SEC's possible liability for costs in that suit to justify SUM 79.

35 In due course, SUM 79 was heard by the Judge who rendered his decision endorsing the position taken by Metax. Following this, the Liquidators sought instructions from the COI on, among other things, whether to (a) proceed with Suit 965; and (b) appeal the Judge's direction in respect of SUM 79. The Liquidators informed the COI that in respect of Suit 965, the options were either

Version No 1: 04 Mar 2021 (15:22 hrs)

to resolve the dispute by judicial determination (*ie*, to continue with Suit 965) or for the parties to reach an amicable settlement and drop the action. The Liquidators indicated that they were not prepared to continue with Suit 965 if the creditors did not fund the costs or provide an indemnity against any adverse costs order that may be made against SEC. The Liquidators also asked the COI whether they should proceed with an appeal against the SUM 79 decision and whether the COI members would be prepared to fund the same. In response, the COI directed that the Liquidators should proceed with the second option in respect of Suit 965, *viz*, that of attempting to achieve a settlement. As regards an appeal against SUM 79, the majority of the COI members had no objection to the filing of an appeal but none of them was prepared to fund it.

36 On 29 May 2019, a day after the COI met to discuss the matter, the Liquidators put forward a settlement offer to Metax on a without prejudice basis. Their proposal was that a certain sum of money should be paid by Metax to SEC and after payment both parties would discontinue their claims and counterclaims in Suit 965. It was also proposed that each party would bear its own costs in Suit 965.

37 At around the same time, the Liquidators approached TKQP to request that firm to consider conducting the appeal on a *pro bono* basis in the event that no funding for the appeal was forthcoming from any of the creditors of SEC. The Liquidators took the view that it was important to have the matters in SUM 79 canvassed before the Court of Appeal as:

(a) There were novel questions of law which had wide implications on the conduct of liquidations and other insolvency proceedings. The Estate Costs Rule operates in the corporate insolvency context where companies are insolvent and lack sufficient assets

Version No 1: 04 Mar 2021 (15:22 hrs)

to pay all their liabilities in full. Given their financial difficulties, these insolvent companies may find themselves restrained from pursuing otherwise good actions against potential defendants on account of a lack of resources.

(b) Clarification of this issue by the highest court in the land would be important to boosting Singapore's status as an international insolvency and restructuring hub.

(c) In particular, the issues pertaining to the operation of the Estate Costs Rule were also germane to decisions that the Liquidators had to make in relation to other pre-existing disputes (apart from Suit 965) which SEC was involved in before it went into judicial management.

38 TKQP understood that the Liquidators were prepared to perform any related work on a *pro bono* basis and to personally fund the disbursements incurred in the appeal. TKQP therefore agreed to act on a *pro bono* basis. It filed a Notice of Appeal in respect of SUM 79 on 7 June 2019. This Notice of Appeal was filed one day out of time so TKQP had to make an application for an extension of time to appeal (CA/OS 16/2019 ("OS 16")). This application was opposed by R&T on behalf of Metax. On 22 July 2019, however, the extension was granted and a further Notice of Appeal was filed on 26 July 2019. Thereby, the appeal presently before us was constituted. We will sometimes hereafter refer to this appeal as CA 146.

39 In the meantime, on 3 July 2019, Metax had responded to the Liquidators' settlement offer with a counteroffer. Thereafter, negotiations for a settlement took place between the parties over a period of five months. A final

Version No 1: 04 Mar 2021 (15:22 hrs)

settlement agreement was reached on 28 November 2019. This settlement pertained to all claims, disputes and liabilities between SEC and Metax arising out of or in connection with Suit 965. The main terms of the settlement were that SEC would pay $13,000 to Metax upon its written acceptance of the terms of settlement. It should be noted that this sum represented the costs that had been awarded to Metax in relation to SUM 79 by the Judge and no payment at all was to be made in respect of the claim and counterclaim in Suit 965. It was further agreed that Suit 965 was to be held in abeyance pending the outcome of CA 146 and parties would not take any further steps to prosecute or defend Suit 965.

40 There were specific terms in the settlement agreement in respect of CA 146. The effect of these terms was that Metax agreed not to participate in the appeal and that this court would be informed "only if necessary" that the non-participation arose from the settlement of Suit 965. For clarity, the terms relating to CA 146 are set out verbatim below:

> (c) In respect of CA 146:
>
> (i) [Metax] will write to the Court of Appeal to inform the Court that it will not be filing a Respondent's Case and will be relying on its submissions filed in SUM 79 and request for leave to do so. The grounds for this request will be that [Metax] is taking the same position as in SUM 79. [SEC] agrees to consent to [Metax's] request.
>
> (ii) Should the Court of Appeal reject [Metax's] request or require [Metax] to either file a Respondent's Case or a formal application for leave to dispense with the requirement to file a Respondent's Case and to rely on its submissions filed in SUM 79, [Metax] will file a formal application for leave to dispense with the requirement to file a Respondent's Case and to rely on its submissions filed in SUM 79. The grounds for [Metax's] application will also be that

Version No 1: 04 Mar 2021 (15:22 hrs)

> [Metax] is taking the same position as in SUM 79. [SEC] agrees to consent to [Metax's] application with no order as to costs.
>
> (iii) Should the Court of Appeal raise a query as to why [Metax] is not filing a separate Respondent's Case or on the progress of Suit 965, parties shall be at liberty to inform the Court that among other things, an agreement has been reached (1) in respect of [Metax's] involvement in CA 146, and (2) to hold Suit 965 in abeyance pending the outcome of CA 146. *Only if necessary, parties may explain that such agreement is pursuant to a settlement of the matters arising out of and in connection with Suit 965* on a without admission of liability basis. Without prejudice to the aforementioned matters, the terms of the settlement agreement between the parties are confidential. *For the avoidance of doubt, nothing in this letter requires a party and/or solicitor to act in breach of any law and/or its duties to the Court.*
>
> [emphasis added]

41 The settlement agreement further provided that in the event that any costs order was to be made against either party in CA 146, parties would not enforce such costs order and that the outcome of CA 146 would not bind Suit 965. Additionally, the settlement agreement stated that within three days after the Court of Appeal handed down its decision for CA 146, the following would take place:

(a) SEC would discontinue its claim against Metax in Suit 965;

(b) Metax would discontinue its counterclaim against SEC in Suit 965; and

(c) Metax would withdraw the proof of debt it had lodged with the Liquidators on 5 September 2017.

Version No 1: 04 Mar 2021 (15:22 hrs)

The explanation that Metax gave

42 Whilst it is apparent from the above account that it was the Liquidators who were keen to have the application of the Estate Costs Rule to insolvency situations considered by the court, Metax agreed not to participate in the appeal and not to inform the court of the settlement unless it was "necessary" to do so. An explanation for their conduct was given by R&T in its letter to the court dated 27 January 2021.

43 This letter first covered the background and then went on to deal with the negotiations between the parties in respect of Suit 965. R&T stated that the parties reached an agreement on the quantum and mode of payment relatively quickly but had protracted negotiations over the issue of Metax's participation in CA 146. The third section of the letter dealt with Metax's reasons for accepting the Liquidators' proposal to settle Suit 965. These were as follows:

(a) By the time of the negotiations, Suit 965 had been ongoing for many years and Metax had spent a substantial amount of money, time and effort on the suit.

(b) After the trial of Suit 965 concluded in February 2015, the hearing for submissions had been adjourned numerous times and the suit continued to hang over Metax's head with no prospect of a resolution in sight. Costs were also incurred during this period.

(c) Since SEC was insolvent, Metax was in a position of having everything to lose and nothing to gain. Given SEC's large number of creditors, prospects of recovering any part of its judgment sum of $2,134,196.66 or costs of $594,495.80 were

Version No 1: 04 Mar 2021 (15:22 hrs)

low even if it succeeded in full. But if SEC succeeded in Suit 965, it would be able to recover its claim and costs (which SEC had put at $1,820,261.21).

(d) The Liquidators could have proceeded with CA 146 without Metax's consent. Metax faced the prospect of incurring further legal costs in respect of CA 146 and the prospect of continuing Suit 965 with little chance of recovery of its judgment sum or costs.

(e) In these circumstances, it was in Metax's interests to reach a settlement with the Liquidators in respect of Suit 965.

44 The letter further stated that after the settlement agreement was reached between the Liquidators and Metax, Metax was bound to comply with the settlement terms and R&T could not act in breach of such terms without express instructions from Metax. R&T highlighted that it had informed the Registry that Metax would not be filing the Respondent's Case or any other documents in the appeal and did not need time to make oral submissions. However, counsel had reviewed the documents filed by the Liquidators in CA 146 and was prepared to make oral submissions if the court required the same.

45 We have no difficulty with the fact that negotiations for a settlement of Suit 965 took place. Indeed, it is an important plank of the judicial philosophy adopted by this court that parties should do their utmost to settle their disputes amicably out of court as doing so saves time and effort and expense for the parties and the court. What concerns us is why the negotiations here, albeit resulting in a successful settlement of the commercial dispute, did not have the usual result of removing the dispute from the court altogether. Perhaps even

Version No 1: 04 Mar 2021 (15:22 hrs)

more troubling is why the parties agreed that the settlement would not be disclosed unless strictly necessary pursuant to specific queries from the court. To answer these questions, we turn to consider the settlement correspondence between the parties.

The settlement negotiations

46 As stated in [36] above, this correspondence started on 29 May 2019 when TKQP wrote to R&T proposing "in principle settlement terms in full and final settlement of Suit 965". The proposal was that Metax would pay SEC $100,000, each party would bear its own costs and upon settlement being achieved, both SEC and Metax would discontinue their claims and counterclaims in Suit 965. R&T responded on 3 July 2019 with the counterproposal that SEC would pay Metax $13,000, that sum being the costs awarded to it in respect of SUM 79. Thereafter, both the claim and the counterclaim in Suit 965 were to be discontinued with no order as to costs and Metax would withdraw its proof of debt. In effect, Metax was proposing that each party drop its hands and bear its own costs save for the $13,000 relating to SUM 79.

47 On 8 July 2019, TKQP indicated that the Liquidators were, in-principle, agreeable to the terms of R&T's 3 July 2019 letter. However, it made a counterproposal in relation to its application for an extension of time to appeal, OS 16. This was that Metax would participate in OS 16 and the contemplated appeal as "a nominal respondent" and that, in particular:

> (i) [Metax would] not be required to take any position with regard to the substantive matters in OS 16 and the contemplated appeal, nor [would Metax] take any steps to object to the Liquidators prosecuting OS 16 and the contemplated appeal.

Version No 1: 04 Mar 2021 (15:22 hrs)

> (ii) [Metax] and/or its solicitors [would] not have to attend any hearings for OS 16 and the contemplated appeal. In this regard, [TKQP drew Metax's] attention to Order 57 Rule 18(2) of the Rules of Court.
>
> (iii) Parties [would] agree that there [should] be no orders as to costs for both OS 16 and the contemplated appeal. However, in the event that any costs order [was to be] made against either party in OS 16 and/or the contemplated appeal, [the parties would] undertake not to enforce such cost order(s) against each other.

48 In its response of 16 July 2019, R&T pointed out that if there would be a settlement between the respective clients in respect of Suit 965, there would no longer be any live issue in dispute between the parties. This would render OS 16 and the contemplated appeal against the decision in SUM 79 purely academic. R&T therefore wrote, "Our client thus requests your client reconsider its decision to proceed with OS 16 and the contemplated appeal." R&T also pointed out that it was unlikely that this court would accept the participation of Metax in OS 16 and the contemplated appeal as "a nominal respondent". It stated that if OS 16 and the contemplated appeal were proceeded with, Metax would reserve its right to participate in OS 16 and the contemplated appeal by filing papers and appearing at hearings.

49 The next letter from TKQP was sent after the extension of time to appeal had been granted on 22 July 2019. The letter was dated 25 July 2019 and stated that TKQP had been instructed to proceed with the filing of the Notice of Appeal against the decision in SUM 79. TKQP wrote that the Liquidators' decision to proceed with the appeal was motivated by an interest in clarifying an important issue of insolvency law and practice. It then counter-proposed terms for consideration by Metax and these included the following main terms:

> (a) SEC would pay Metax $13,000 within three days of Metax's acceptance of the terms;

Version No 1: 04 Mar 2021 (15:22 hrs)

(b) parties would undertake not to take any further steps to prosecute or defend Suit 965;

(c) Metax would not be required to take any substantive position on the matters in the contemplated appeal or to object to the position taken by the Liquidators;

(d) within three days after the Court of Appeal handed down its decision on the appeal, parties would file their respective Notices of Discontinuance;

(e) there would be no order as to the costs of the appeal; and

(f) parties would undertake not to enforce against each other any of the Court of Appeal's orders or directions in respect of the appeal.

Further, TKQP asked Metax to reconsider the above proposal "given [its] clients' motivation for the [a]ppeal and in the interests of saving time and costs".

50 In its reply of 23 August 2019, R&T conveyed the in-principle agreement of Metax to the terms of TKQP's 25 July 2019 letter stated above at [49]. It set out certain refinements to the proposal and, in respect of the proposed appeal, R&T stated that Metax was agreeable to relying on its submissions made in respect of SUM 79 provided that it was not precluded from filing a Respondent's Case and/or making any submissions after having had sight of the Liquidators' Appellants' Case.

51 The next letter from TKQP contained a counterproposal dealing mainly with the issue of the participation of Metax in CA 146. The terms of the

Version No 1: 04 Mar 2021 (15:22 hrs)

counterproposal dealing with this issue were paras 3(c) and 3(d). These read as follows:

> (c) [Metax] will not take any substantive position on the matters in CA 146. Should [Metax] be required to file a Respondent's Case and/or make any submissions in CA 146, [Metax] shall inform the Court that [Metax] does not have further submissions to add beyond the submissions made in SUM 79.
>
> (d) While these negotiations are conducted on a without prejudice basis and the contents of any agreement are confidential, in the interests of transparency, should the Court raise a query as to the progress of Suit 965, parties shall be at liberty to inform the Court that they have agreed to hold Suit 965 in abeyance pending the outcome of CA 146.

52 On 26 September 2019, R&T wrote again and effectively accepted the settlement proposal in the 10 September 2019 letter from TKQP. However, in relation to para 3(c) of the same dealing with CA 146, R&T stated that it was inconsistent for Metax to, on the one hand, take no position in respect of CA 146 and, on the other, to rely on its submissions in SUM 79. Consequently, in relation to CA 146, R&T proposed in paras 4(c) and 4(d) of its letter:

> (c) [Metax] will rely solely on its submissions filed in respect of SUM 79 for CA 146 and will inform the Court of Appeal accordingly at the appropriate juncture, and will only make submissions (whether by way of a Respondent's Case or otherwise) if expressly requested to do so by the Court of Appeal.
>
> (d) Should the Court of Appeal raise a query as to the progress of Suit 965, parties shall be at liberty to inform the Court that they have agreed to hold Suit 965 in abeyance pending the outcome of CA 146. For the avoidance of doubt, should the Court of Appeal raise a query as to whether a settlement has been reached in respect of Suit 965, parties are at liberty to confirm to the Court that a settlement has been reached in respect of Suit 965. Without prejudice to the abovementioned matters, the terms of the settlement agreement between the parties are confidential.

Version No 1: 04 Mar 2021 (15:22 hrs)

Accordingly, the proposal was that if the court queried the position on settlement, parties would be at liberty to confirm such settlement to the court.

53 The Liquidators rejected para 4(c) of R&T's proposal. In their reply of 3 October 2019, TKQP stated at para 2 that the Liquidators counter-proposed the following terms:

> (a) [Metax] will not make any submissions in CA 146. In other words, no substantive position on the matters in CA 146 will be taken by [Metax].
>
> (b) However, if [Metax] is expressly requested by the Court of Appeal to make any submissions (whether by way of a Respondent's Case or otherwise) in CA 146, [Metax] shall inform the Court of Appeal that [Metax] does not have further submissions to add beyond the submissions made in SUM 79.

Further, in relation to para 4(d) of R&T's proposal, the Liquidators were of the view that it would suffice to state without more that Suit 965 was held in abeyance pending the outcome of CA 146 (*ie*, that it was not necessary to mention the settlement) and proposed the following term instead:

> Should the Court of Appeal raise a query as to the progress of Suit 965, parties shall be at liberty to inform the Court that they have agreed to hold Suit 965 in abeyance pending the outcome of CA 146. Without prejudice to the aforementioned matters, the terms of the settlement agreement between the parties are confidential.

54 The Liquidators' suggested paras 4(c) and 4(d) did not find favour with R&T. In their letter dated 30 October 2019, R&T stated that as the named respondent in CA 146 and as Metax's solicitors on record, it would be improper for Metax and for them to simply take no position in CA 146 without providing a proper explanation to the Court of Appeal. They then put forward the following suggestion:

Version No 1: 04 Mar 2021 (15:22 hrs)

(a) In respect of paragraph 4(c) of [TKQP's letter dated 3 October 2019]:

i. [Metax] will write to the Court of Appeal to inform the Court that it will not be filing a Respondent's Case and will be relying on its submissions filed in SUM 79 and request for leave to do so. The grounds for this request will be that [Metax] is taking the same position as in SUM 79. [The Liquidators are] to consent to [Metax's] request.

ii. Should the Court of Appeal reject [Metax's] request or require [Metax] to either file a Respondent's Case or a formal application for leave to dispense with the requirement to file a Respondent's Case and to rely on its submissions filed in SUM 79, [Metax] will file a formal application for leave to dispense with the requirement to file a Respondent's Case and to rely on its submissions filed in SUM 79. The grounds for [Metax's] application will also be that [Metax] is taking the same position as in SUM 79. [The Liquidators are] to consent to [Metax's] application with no order as to costs.

(b) In respect of paragraph 4(d) of [TKQP's letter dated 3 October 2019]: [Metax] proposes that paragraph 4(d) of the [letter] be amended per the underlined portions as follows:

i. '*Should the Court of Appeal raise a query as to why [Metax] is not filing a separate Respondent's Case or on the progress of Suit 965, parties shall be at liberty to inform the Court that they have agreed to hold Suit 965 in abeyance pending the outcome of CA 146 and (only if necessary) that a settlement has been reached in respect of Suit 965. Without prejudice to the aforementioned matters, the terms of the settlement agreement between the parties are confidential. For the avoidance of doubt, nothing in this letter requires a party and/or solicitor to act in breach of any law and/or its duties to the Court*.'

[emphasis in original]

55 On 15 November 2019, TKQP put forward amendments to para 4(d) (quoted immediately above) which resulted in that paragraph taking its final

Version No 1: 04 Mar 2021 (15:22 hrs)

form as it appeared in the settlement agreement (see [39]–[40] above). On 28 November 2019, R&T informed TKQP that the settlement terms set out in its letter of 15 November 2019, including the reformulated para 4(d), had been accepted by Metax. It should be noted that in accordance with the terms of the settlement this written acceptance meant that within three days thereof SEC had to pay Metax the sum of $13,000.

The practical effect of the parties' agreement

56 It is plain, from the correspondence and the settlement terms, that all parties and their counsel *deliberately* entered into an agreement to suppress the disclosure of relevant information to the court unless the court should specifically ask for the same. It is equally plain that R&T were aware from as early as July 2019 that a settlement of Suit 965 would render CA 146 "merely academic" and told TKQP as much. Notwithstanding their understanding of the legal effect of a settlement, the parties proceeded with the negotiations to try and arrive at a formula which would allow the Liquidators to proceed with CA 146 without the involvement of Metax, albeit that Metax would still appear on the court papers as an "opposing" respondent.

57 In its explanatory letter of 27 January 2021, under the heading "There is no intention to mislead this Honourable Court or cause the perversion of justice in CA 146", TKQP made four points to "clarify the circumstances surrounding the said settlement". We summarise these as follows:

(a) CA 146 was not a frivolous or vexatious appeal as it concerned novel and important issues on which the Liquidators sought the Court of Appeal's consideration and guidance. The legal issue involved had wide implications on the conduct of liquidations and other insolvency

Version No 1: 04 Mar 2021 (15:22 hrs)

proceedings. The Liquidators and TKQP undertook work for the appeal *pro bono* because of the importance of the issue.

(b) Neither the Liquidators nor any of the counsel intended to pervert the course of justice in CA 146. The crux of the terms agreed to between the Liquidators and Metax was that Metax would take the same position that it did in SUM 79 which meant it was opposing CA 146. On 22 December 2020, R&T informed the court that Metax's legal position remained the same as in CA 146. The parties' motivation was to accommodate Metax's costs exposure in CA 146 given that they had reached a settlement and there was no incentive for Metax to incur any further costs.

(c) The confidentiality provisions in the settlement agreement were not intended to mislead or misdirect the court. Instead, the settlement agreement made provision for the parties to explain that the agreement was pursuant to settlement of matters arising out of Suit 965.

(d) Neither Metax nor the creditors of SEC had been prejudiced by the settlement. Metax was not coerced to agree to the terms. It had the benefit of legal advice and every opportunity to put forward counterproposals. The funds of SEC were not used for the appeal. Neither counsel nor the Liquidators had obtained any financial benefit from proceeding with CA 146.

58 TKQP ended its letter by stating it would like to apologise to the court "for any concern and inconvenience" that had been occasioned by the conduct of CA 146. They then repeated that the Liquidators had proceeded with the appeal solely to clarify an important and novel point of law that impacted on the

Version No 1: 04 Mar 2021 (15:22 hrs)

way they carried out their duties. The work done for CA 146 was done *pro bono* by the Liquidators because of their belief in the importance of the legal question at issue.

59 In its letter R&T *highlighted* (to use its own words) that neither it nor Metax took the position that there was an important question of law involved in CA 146. It further *highlighted* that at no time did it make any misrepresentation to or mislead the court. When questioned by the Honourable the Chief Justice Sundaresh Menon, Mr Chandra Mohan had immediately informed the court of the reasons why Metax had not filed any papers "in accordance with the terms of the settlement agreement". When the Chief Justice then queried whether the agreement between the parties was in the form of a settlement, Mr Chandra Mohan immediately answered in the affirmative. In conclusion, R&T said it had acted in accordance with the terms of the settlement agreement and at the same time sought to assist the court in every possible way. R&T then apologised in the following terms: "We apologise if there are any areas in which we could have done better in respect of the above matters."

60 It is clear from the letters we have cited that, for all the apologies given, neither the Liquidators nor any of the lawyers involved in CA 146 have acknowledged how greatly they have failed in their duty to the court as officers of the court. Before we comment further on this failure it may be helpful if we set out the legal position on how a settlement of a dispute impacts further court proceedings in respect of that dispute.

The impact of a settlement agreement on court proceedings

61 There are two situations in which a settlement reached between parties to a dispute may have an impact on pending legal proceedings. The first is where

Version No 1: 04 Mar 2021 (15:22 hrs)

the settlement is arrived at after proceedings have commenced but before the hearing of the dispute by the court. The second is where the parties settle after the conclusion of the hearing but before judgment has been delivered. It is the first situation which we are concerned with here and we therefore deal with it in some detail.

Settlement before hearing

Singapore

62 In Singapore, the general principle is that the court will decline to hear cases or arguments that do not involve an issue that is "live" between the parties. This arises from the essential duty of the court which is to determine disputes, not to render advice or comment upon hypothetical issues. The Singapore courts have on numerous occasions endorsed this principle as expressed in the English House of Lords decision of *Sun Life Assurance Company of Canada v Jervis* [1944] AC 111 ("*Sun Life Assurance*").

63 In *Sun Life Assurance* the appellant was granted leave to appeal on the condition that the appellant undertake to pay the respondent's costs in any event and not to ask for the return of any money ordered to be paid under the order granting leave to appeal. The House of Lords declined to hear the appeal as "there [was] no issue before [the court] to be decided between the parties" (see *Sun Life Assurance* at 113). The House of Lords observed at 113–114 that:

> … The difficulty is that the terms put on the appellants by the Court of Appeal are such as to make it a matter of complete indifference to the respondent whether the appellants win or lose. The respondent will be in exactly the same position in either case. He has nothing to fight for, because he has already got everything that he can possibly get, however the appeal turns out, and cannot be deprived of it. *I do not think that it would be a proper exercise of the authority which this House*

Version No 1: 04 Mar 2021 (15:22 hrs)

> *possesses to hear appeals if it occupies time in this case in deciding an academic question, the answer to which cannot affect the respondent in any way.* If the House undertook to do so, it would not be deciding an existing lis between the parties who are before it, but would merely be expressing its view on a legal conundrum which the appellants hope to get decided in their favour without in any way affecting the position between the parties. …
>
> …
>
> No doubt, the appellants are concerned to obtain, if they can, a favourable decision from this House because they fear that other cases may arise under similar documents in which others who have taken out policies of endowment assurance with them will rely on the decision of the Court of Appeal, but if the appellants desire to have the view of the House of Lords … their proper and more convenient course is to await a further claim and to bring that claim, if necessary, up to the House of Lords with a party on the record whose interest it is to resist the appeal. The research which has been given to the matter does not discover any previous decision in which the House of Lords has undertaken, on the petition of an unsuccessful appellant, to review the decision below when the opposite party has been finally settled with, and *I think it is an essential quality of an appeal fit to be disposed of by this House that there should exist between the parties a matter in actual controversy which the House undertakes to decide as a living issue.*
>
> [emphasis added]

64 The *Sun Life Assurance* case has been cited and its principles adopted by this court in at least three decisions. The first of these is *Attorney-General v Joo Yee Construction Pte Ltd (in liquidation)* [1992] 2 SLR(R) 165 ("*Joo Yee*"). The respondent in that appeal had entered into a building contract with the Ministry of Health as well as into subcontracts with four nominated subcontractors. After the respondent was placed in liquidation, an issue arose as to whether it was proper for the Ministry of Health to make direct payment to the four subcontractors. The High Court held that such payments would contravene the relevant statute and would be void as against the liquidators of the respondent. At the High Court, the Ministry of Health did not take a position

Version No 1: 04 Mar 2021 (15:22 hrs)

but stated only that it required an order of court. The four subcontractors subsequently withdrew their appeals, such that only the Ministry of Health remained seeking to pursue the appeal. In those circumstances, this court observed (at [7]) that:

> … [T]he real issue was whether the direction [as to whether direct payments to the subcontractors were valid] having been given, a party who had taken a neutral stand and who was not affected by the direction given by the court in the sense that whether the payment was made to the one or the other, a payment of no more or no less will nevertheless have to be paid, has such an interest in the matter to maintain the right of appeal. …

65 In answer, this court declined to hear the appeal. There was nothing to be gained by the Ministry of Health in maintaining the appeal since "its liability to pay the amounts certified under the building contract would not be affected one bit whether the Ministry of Health succeeded in the appeal or not" and the "parties who [were] in actual controversy, namely, the four nominated subcontractors, and who would gain something if the respondent lost [were] not before [the] court" (see *Joo Yee* at [15]). In doing so, this court applied the principles in *Sun Life Assurance*, quoting the passage that we have set out in [63] above. It also referred to another decision of the House of Lords, *Ainsbury v Millington* [1987] 1 WLR 379 ("*Ainsbury*"), in which Lord Bridge of Harwich had observed at 381B:

> … It has always been a fundamental feature of our judicial system that the courts decide disputes between the parties before them; they do not pronounce on abstract questions of law when there is no dispute to be resolved.

The court found the principles in the two cases "extremely persuasive" (see *Joo Yee* at [18]).

Version No 1: 04 Mar 2021 (15:22 hrs)

66 The court also appeared to suggest that in declining to hear the appeal, it was exercising its "inherent jurisdiction" (see *Joo Yee* at [11]).

67 *Joo Yee, Ainsbury* and *Sun Life Assurance* were cited by this court in two later cases. First there was *Heng Holdings SEA (Pte) Ltd v Tomongo Shipping Co Ltd* [1997] 2 SLR(R) 669 ("*Heng Holdings*"). There, in relation to a mandatory injunction granted and subsequently discharged by the High Court, there was no longer any live issue as the parties had entered final judgment by consent in respect of the claim giving rise to the injunction. Accordingly, this court did not deal with the appellant's contention that the injunction ought not to have been granted in the first place or ought to have been discharged or set aside earlier (see *Heng Holdings* at [28] and [29]).

68 Secondly the three authorities were cited again in *Foo Jong Peng and others v Phua Kiah Mai and another* [2012] 4 SLR 1267 ("*Foo Jong Peng*"). In that case, the respondents submitted that this court should decline to hear the appeal as there was no longer a live issue to be decided given that the respondents' term of office as members of the Management Committee had lapsed. The court observed that the respondents had relied on the decision in *Joo Yee* "for the proposition that the Court of Appeal should exercise its inherent jurisdiction to decline to decide an issue which the [a]ppellants retain[ed] no interest in" (see *Foo Jong Peng* at [22]). Although the court distinguished *Joo Yee, Ainsbury* and *Sun Life Assurance* on the basis that costs remained a live issue in the appeal, it observed at [25] that:

> … It was an integral part of the reasoning in … [*Joo Yee, Ainsbury* and *Sun Life Assurance*] that any ruling made on the dispute would have no effect on the parties' rights and obligations not only because the subject matter of the appeal was moot or would have no direct legal consequences for the parties if resolved either way, *but also* because *none of the*

Version No 1: 04 Mar 2021 (15:22 hrs)

> *parties had a monetary interest in the outcome* as all questions of costs had been disposed with. … [emphasis in original]

69 None of the local cases mentioned above deals directly with the situation where the parties have arrived at a settlement prior to the hearing of the appeal. It is, however, clear from the pronouncements of this court that in the absence of a live issue the court will decline to hear arguments either on the appeal generally or in relation to that issue in particular. There is some uncertainty whether the basis of the court's refusal to hear is because the absence of a *lis* deprives the court of its jurisdiction in the matter or whether the court is exercising a discretion to decline to exercise its jurisdiction. It is unnecessary for us to resolve the juridical basis of the refusal here and we do not do so as we have not heard arguments on the point. What is unarguable is that when a dispute is settled before the hearing, all existing issues die a natural death and become moot.

England

70 This refusal to hear hypothetical issues is also the position taken by courts in England albeit that they do admit of an exception to it. The basic principle is as set out in *Sun Life Assurance* and *Ainsbury*. There is, however, an exception to the rule which applies to cases involving public law issues. The English courts have held that in certain very limited circumstances they have a discretion to hear cases involving important public law questions notwithstanding that there is no longer a live issue between the parties.

71 The leading case in this regard is *R v Secretary of State for the Home Department, ex parte Salem* [1999] 1 AC 450 ("*Salem*"). In *Salem* at 456G–457A, the House of Lords interpreted *Sun Life Assurance* as being "limited to disputes concerning private law rights between the parties to the case". The

Version No 1: 04 Mar 2021 (15:22 hrs)

House of Lords held that in cases "involving a public authority as to a question of public law", the court has a discretion to hear the appeal if "there is a good reason in the public interest for doing so", even if such appeals are academic. This exception was extended in *Bowman v Fels (Bar Council and others intervening)* [2005] 1 WLR 3083 ("*Bowman*") to private law litigation involving public law duties. Although the substantive litigation between the parties had been settled by the time of the appeal, the English Court of Appeal proceeded to hear the appeal as the public law issues were of great importance and all the parties wanted to continue the hearing (see *Bowman* at [15]).

72 The exception was further extended in *Gawler (Michael Victor) v Raettig (Paul)* [2007] EWCA Civ 1560 ("*Gawler*") to private litigation cases involving private law issues although the correctness of this extension has been doubted.

73 *Gawler* concerned a claim for damages for personal injuries but a subsequent agreement between the parties rendered the appeal academic. The English Court of Appeal opined that, even in private law cases, the court has a discretion to hear academic cases. Sir Anthony Clarke (with whom Lord Justice Waller and Lady Justice Smith agreed) reasoned at [36] and [37] as follows:

> 36 … This consideration of the cases leads, in my opinion, to the conclusion that the court will not entertain an appeal between private parties in private litigation unless it is in the public interest to do so. Moreover, this is likely to be a very rare event, especially where the rights and duties to be considered are private and not public. …
>
> 37 All will depend upon the facts of the particular case and in what follows I do not intend to be too prescriptive. However, such cases are likely to have a number of characteristics in addition to the critical requirement that an academic appeal is in the public interest. They include the necessity that all sides of the argument will be fully and properly put … It seems to me

Version No 1: 04 Mar 2021 (15:22 hrs)

> that in the vast majority of such cases, this must involve counsel being instructed by solicitors instructed by those with a real interest in the outcome of the appeal. … Further, before giving permission the court will wish to consider what the other options are and how the proposed issues could otherwise be resolved without doing so by way of academic appeal.

74 *Gawler* and *Bowman* were cited by the English Court of Appeal in *Hutcheson v Popdog Ltd (News Group Newspapers Ltd, third party)* [2012] 1 WLR 782 ("*Hutcheson*"), which was also a private law case concerning the publishing or communicating of certain information. In *Hutcheson*, Lord Neuberger, sitting in the English Court of Appeal, declined to grant permission to appeal, observing at [15] that:

> Both the cases and general principle seem to suggest that, save in exceptional circumstances, three requirements have to be satisfied before an appeal, which is academic as between the parties, may (and I mean 'may') be allowed to proceed: (i) the court is satisfied that the appeal would raise a point of some general importance; (ii) the respondent to the appeal agrees to it proceeding, or is at least completely indemnified on costs and is not otherwise inappropriately prejudiced; (iii) the court is satisfied that both sides of the argument will be fully and properly ventilated.

75 *Hutcheson* was applied by the English High Court in *Redman v Zurich Insurance plc and another* [2018] 1 WLR 280. However, the correctness of *Hutcheson* (specifically, its application of the exception in *Salem* to private law cases) was recently questioned by the English High Court in *dicta* in *A local authority v AG (No 2)* [2020] 2 FLR 747 at [9] and [10].

76 We would emphasise here that the exception that is applied in England, an exception which is not a part of Singapore law at present, is an exception that only comes into play if parties inform the court of the true position and apply for leave to continue the appeal nevertheless. Thus, to invoke the exception in England requires as an absolute precondition full disclosure of the academic

Version No 1: 04 Mar 2021 (15:22 hrs)

nature of the appeal. The court would then consider whether the circumstances come within the requirements for such leave to be granted.

Australia

77 The position in Australia appears to be largely the same as that in England. The general position that academic cases should not be heard has been expressed by courts in a number of Australian states. In *Hole v Insurance Commissioner* [1962] VR 394 ("*Hole*"), the parties agreed that the appellant (who had paid the respondent the judgment sum awarded at trial) would not seek to have the moneys returned if he succeeded in the appeal nor did he desire a retrial. The Supreme Court of Victoria declined to proceed with the appeal, as there was "no real contest between the parties" and that "what the Court [was] really being asked to do [was] give an advisory opinion".

78 *Hole* was cited with approval by the Supreme Court of Tasmania in *Burnie Port Corp Pty Ltd v Burnie City Council* [1999] TASSC 72. This case concerned a consent order rather than a settlement agreement between the parties. However, it is notable that Crawford J summarised the relevant principles at [11] as follows:

> It is stated in Halsbury's Laws of Australia, vol 20, para [325 – 11570]:
>
> > 'The courts will not advise parties to proceedings upon their rights under a hypothetical state of facts, or give to them advisory opinions, or give hypothetical decisions the effectiveness of which depends on varied states of facts which remain to be determined in the future. Thus, an appellate court will not decide an appeal if the parties have settled their differences and seek from the court what in effect is an advisory opinion.'
>
> Thus in Hole v Insurance Commissioner [1962] VR 394 the Full Court of Victoria refused to entertain an appeal where there was no longer any real contest between the parties. See also Swift

Version No 1: 04 Mar 2021 (15:22 hrs)

> Australian Co (Pty) Ltd v South British Ins Co Ltd [1970] VR 368, Glasgow Navigation Coy v Iron Ore Coy [1910] AC 293 and Sumner v William Henderson & Sons Ltd [1963] 2 All ER 712.

79 Similarly, the Supreme Court of the Australian Capital Territory in *Denham Constructions Project Company 810 Pty Ltd v Smithies (No 2)* [2015] ACTSC 30 ("*Denham Constructions*") cited *Sun Life Assurance* with approval and observed at [54]–[59] that:

> 54. The authorities are clear that, where an appeal is moot, that is where there is no lis pendens between the parties, the Court can and, indeed probably should, decline to hear the appeal. As the Full Court of the Supreme Court of Victoria stated in *Swift Australia Co (Pty) Ltd v South British Insurance Co Ltd* [1970] VR 368 at 367, relying on high authority:
>
> > the courts will not advise parties to actions upon their rights under a hypothetical state of facts; or give them advisory opinions or give hypothetical decisions the effectiveness of which depends on varied states of facts which remain to be determined in the future.
>
> …
>
> 56. It is sometimes stated that an appeal will be dismissed or stayed where it has no practical utility.
>
> …
>
> 58. The courts have identified a number of circumstances where an appeal should be stayed or dismissed because it has no practical utility. Thus, in *Sun Life Assurance Company of Canada v Jervis* [1944] AC 111, the House of Lords had to consider an appeal where the appellant had undertaken to pay the costs of the appeal on a solicitor and client basis in any event and also not to seek repayment of the judgment sum which it had paid under the judgment the subject of the appeal.
> …
>
> 59. A similar position applied in *Hole v Insurance Commissioner* [1962] VR 394, where the Full Court of the Supreme Court of Victoria declined to hear an appeal as the judgment sum had been paid and the parties agreed that it would not be repaid, or a retrial sought, if the appeal should succeed. Similarly, in *Cadbury-Fry-Pascall Pty Ltd v Federal Commissioner of Taxation* (1944) 70 CLR 362 at 386.

Version No 1: 04 Mar 2021 (15:22 hrs)

80 Notably, the court stated that it "can and, indeed probably should, decline to hear" appeals that had been rendered moot. This appears to suggest that the decision not to hear such appeals is considered, in the Australian Capital Territory at least, a matter of the court's discretion and power, rather than as a matter of jurisdiction.

Settlement after hearing

81 Where a settlement is reached between the parties after the hearing but before the judgment is released, the general position is that the court has a discretion whether or not to release its judgment. The authority for this in Singapore is this court's decision in *Bumi Armada Offshore Holdings Ltd and another v Tozzi Srl (formerly known as Tozzi Industries SpA)* [2019] 1 SLR 10. In that case, following the conclusion of the hearing of the appeal, the parties had informed the court that they had settled their differences. The Court of Appeal observed at [62] that in such circumstances, "the court has a discretion whether or not to issue its judgment". Given that the parties did not object to the release of the judgment and that the points considered in the judgment were potentially of some significance, the court exercised its discretion to publish its judgment.

82 This is also the position in England and Australia. In *Barclays Bank plc v Nylon Capital LLP* [2012] 1 All ER (Comm) 912 ("*Barclays Bank*"), the parties notified the court after the conclusion of the hearing that they had reached agreement and requested the court not to give judgment. The English Court of Appeal held at [74] that "[w]here a case has been fully argued … and it then settles or is withdrawn or is in some other way disposed of, the court retains the right to decide whether or not to proceed to give judgment". The court considered the following factors relevant in deciding whether or not to

Version No 1: 04 Mar 2021 (15:22 hrs)

give judgment: (a) whether the case raises a point which it is in the public interest to ventilate in a judgment; (b) the progress of the judgment; and (c) the concerns of the parties to the litigation (see *Barclays Bank* at [74]–[77]). Applying this test, the court decided to hand down its judgment.

83 Turning to the Australian authorities, the case of *Harrington v Rich* [2008] FCAFC 61 ("*Harrington*") is pertinent. In that case, after the court reserved judgment, the underlying proceeding was disposed of by consent, such that the substantive controversy and any dispute regarding costs were resolved (see *Harrington* at [20]). However, the parties agreed for the appeal to continue, as the judgment was "of import to the [a]ppellants beyond the context of the underlying proceeding" (see *Harrington* at [10]). The Federal Court of Australia held that the court should refuse to address an advisory opinion where there is no longer a controversy between the parties, although the court retains a discretion to continue to hear the appeal. This discretion is exercised based on non-exhaustive factors including (see *Harrington* at [21]–[22]):

(a) whether it is in the public interest that the issue be resolved;

(b) whether the appeal reflects adversely on one of the parties' reputation and the determination of which may serve to vindicate that party's reputation;

(c) whether a finding of bad faith by the decision-maker has been made;

(d) whether there is doubt over the correctness of the decision under appeal; and

Version No 1: 04 Mar 2021 (15:22 hrs)

(e) the amount of judicial resources required to hear and determine the appeal.

84 Applying these factors, the court found that "[t]o proceed to judgment on the application for leave to appeal would involve the Court in providing what amounts in substance to an advisory opinion on an interlocutory question" (see *Harrington* at [36]). It therefore ordered a permanent stay of the proceedings instead (see *Harrington* at [38]).

Our views

85 It will be appreciated from the brief summary of the relevant law set out above that the long established legal position is that a court in Singapore will not answer hypothetical questions or opine on an academic point merely because a party to the proceedings would like the court to set down the law on the point. Counsel in this case should have known that that is the law. Indeed, they actually did know that the result of any settlement reached would be that the appeal would be rendered academic. Yet they proceeded to conclude a settlement and thereafter allowed the appeal to continue as if the issue was still live. In taking this course, rather than apprise this court of the true state of affairs, the parties chose to deliberately mislead this court. Both counsel and the Liquidators were patently in serious breach of their duties to the court.

86 Further, it is evident that, contrary to TKQP's suggestion that Metax was disinclined to spend more money, there were extensive negotiations to prevail upon Metax to stay quiet and say as little as possible. The Liquidators' starting position was that Metax should be a nominal respondent. They even went to considerable lengths to agree on exactly what could and should be said to this court if questions were to be posed. As we have pointed out, the Liquidators and

Version No 1: 04 Mar 2021 (15:22 hrs)

TKQP obtained agreement from R&T and Metax that if this court pressed the issue of why Metax was not participating fully in CA 146 they would say that Suit 965 was being held in abeyance. But this was in fact untrue because they had agreed to settle Suit 965 and undertook to file the notice of discontinuance within three days of the decision of this court, whatever that was. The true position would only be revealed if this court persisted in its queries.

87 It is shocking to us that none of the counsel who appeared, all of whom are from established and reputable law firms, seemed to appreciate the gravity of their breach of duties. The apologies that were proffered to the court appeared to be *pro forma* without any real acknowledgment of the default. Counsel from TKQP asserted that they did not pervert the course of justice and apologised for causing "inconvenience". R&T's apology appeared conditional as it only applied "if there [were] any areas in respect of which [it] could have done better".

88 As for the Liquidators, all of them are experienced in the field and have acted as insolvency professionals over many years, sometimes as liquidators and sometimes in other positions. It was plain that they were determined to have a go at persuading this court to take a different position from that of the Judge. The reluctance of the COI to fund this venture did not stop them and they took the opportunity granted by the settlement negotiations to contrive a situation in which their submissions would be proffered to this court without having to contend directly with those of a controverting party. They, in other words, attempted to stage a walkover in CA 146. The court does not sit simply because a party wants a legal question answered. The Liquidators must have known this, which is why they insisted on terms in the settlement agreement that ensured the true position was concealed. Their conduct was reprehensible.

Version No 1: 04 Mar 2021 (15:22 hrs)

89 In a compulsory winding up like that of SEC, the appointment of a liquidator is always subject to the discretion of the court. The court in exercising its discretion on any proposed appointment is entitled to take into account the conduct or, more precisely, the misconduct in previous cases of the nominated liquidator.

Conclusion

90 When it came before this court, CA 146 was moot and there was no live issue for the court to address. Thus, the fact that the appeal was dismissed had no implications for the legal issues put before us. Perhaps it would have been more appropriate to make "No Order" on the appeal but in the circumstances the dismissal had the same effect.

91 This was a sorry state of affairs indeed. We deplore the conduct of all involved in the strongest possible terms.

Sundaresh Menon
Chief Justice

Andrew Phang Boon Leong
Justice of the Court of Appeal

Judith Prakash
Justice of the Court of Appeal

Steven Chong
Justice of the Court of Appeal

Version No 1: 04 Mar 2021 (15:22 hrs)

Quentin Loh
Judge of the Appellate Division

Seah Zhen Wei Paul and Chin Wan Yew Rachel
(Tan Kok Quan Partnership) for the appellants;
Rethnam Chandra Mohan and Chia Ming Yee Doreen
(Rajah & Tann Singapore LLP) for the respondent.

Version No 1: 04 Mar 2021 (15:22 hrs)