Anwar Patrick Adrian and another *v* Ng Chong & Hue LLC and another [2015] SGCA 49

Case Number	: Civil Appeal No 194 of 2014
Decision Date	: 30 September 2015
Tribunal/Court	: Court of Appeal
Coram	: Chao Hick Tin JA; Andrew Phang Boon Leong JA; Judith Prakash J
Counsel Name(s)	: Tan Cheng Han SC (instructed), P Balachandran and Luo Ling Hui (Robert Wang & Woo LLP) for the appellants; Michael Khoo SC, Josephine Low and Chiok Beng Piow (Michael Khoo & Partners) for the respondents.
Parties	: (1)PATRICK ADRIAN ANWAR — (2)ANDREW FRANCIS ANWAR — (1)NG CHONG & HUE LLC — (2)NG SOON KAI

Damages – Measure of Damages

[LawNet Editorial Note: This was an appeal from the decision of the High Court in [2014] SGHC 234 .]

30 September 2015 Judgment reserved.

Andrew Phang Boon Leong JA (delivering the judgment of the court):

Introduction

1 This is an appeal from the decision of the High Court judge ("the Judge") in *Anwar Patrick Adrian and another v Ng Chong & Hue LLC and another* [2014] SGHC 234 ("the Judgment"), where the Judge held that the settlement between the appellants, Anwar Patrick Adrian ("Adrian") and Andrew Francis Anwar ("Francis") (collectively referred to as "the Appellants"), and the creditor bank, Société Générale Bank & Trust ("SGBT"), was not reasonable. The respondents, Ng Chong & Hue LLC ("NCH") and Ng Soon Kai ("Ng") (collectively referred to as "the Respondents"), were therefore ordered to pay only S$1,000 in nominal damages to the Appellants.

2 When the issue of liability first came before us, we reversed the Judge's earlier decision and held that Ng (and consequently, NCH) was in breach of the implied retainer which he had entered into with the Appellants. In addition, we found that Ng (and consequently, NCH) had failed to take reasonable care in advising the Appellants of the contents of the security documents. The Appellants' claim in negligence therefore succeeded. Having allowed the appeal with regard to the issue of liability, we remitted the question of whether the settlement between the Appellants and SGBT was reasonable to the Judge as he had made no finding on the same at first instance.

3 Before the Judge, both parties took the view that no further evidence had to be adduced in relation to whether the settlement was reasonable. After considering the submissions put forward by both parties, the Judge held that the settlement was not reasonable when it was viewed from the perspective of regarding the settlement payment as a reasonable quantum of damages payable by the Respondents to the Appellants. It was further held that the Appellants should be entitled to only S$1,000 in nominal damages as there was insufficient evidence showing that the Appellants had personally paid any money themselves to SGBT.

4 Before us, the Appellants argued that the Judge erred on two grounds. First, it was submitted

that the application of the benevolence principle rendered it irrelevant whether or not third parties paid the settlement amount on behalf of the Appellants. Secondly, it was contended that there was sufficient evidence to establish that the settlement entered into between the Appellants and SGBT was reasonable.

5 The Respondents submitted that the application of the benevolence principle did not absolve the Appellants from having to prove that the settlement was reasonable. It was further argued that the Appellants had failed to discharge their burden of proof, given the lack of evidence adduced by the Appellants.

Background facts

6 The only outstanding issue before us concerns the measure of damages, specifically, the question of whether the settlement between the Appellants and SGBT was reasonable, such that if the settlement is found to be reasonable, the settlement sum may be taken as the measure of the Appellants' loss. The issue of liability has already been resolved in favour of the Appellants when the matter first came before us in *Anwar Patrick Adrian and another v Ng Chong & Hue LLC and another* [2014] 3 SLR 761 ("the CA Judgment"). Therefore, in this judgment, we will focus mainly on the facts that are relevant to the settlement between the Appellants and SGBT. A more comprehensive account of the background facts, including facts that are only relevant to the issue of liability, can be found at [6]–[29] of the CA Judgment.

The parties

7 Adrian and Francis are the sons of Agus Anwar ("Agus"), the chief protagonist in the entire dispute. Agus was an astute investor who was extremely familiar with the world of finance and banking. He used to be the Chief Executive Officer of PT Bank Pelita, a bank in Indonesia. At the time of the dispute with SGBT, Adrian had already begun working, while Francis was still schooling in the United States.

8 The second respondent is Ng, a lawyer who practised in, and was also one of the directors of, NCH, the first respondent. As we have mentioned at [6] of the CA Judgment, nothing turns on the separation of Ng and NCH's individual identities in so far as the present dispute is concerned.

The credit facility

9 Agus had a credit facility with SGBT. Sometime in July 2008, Agus was requested to provide additional collateral as the market value of the existing collateral held by SGBT had crashed. In October 2008, as share prices continued to plummet, SGBT sold off some of the shares that had previously been pledged by Agus. This was, however, insufficient to meet the shortfall in the collateral, which stood at approximately S$8m then. SGBT demanded that Agus pay the outstanding amount of the loan or provide additional collateral of the same value by 9 October 2008. It was at this particular point in time that Agus approached Ng to act for him. At this juncture, it is useful to point out that Ng had acted for Agus on numerous occasions prior to the dispute with SGBT. This included representing Agus in a dispute in Indonesia, as well as in property transactions.

10 Thereafter, in the course of negotiations between Agus, who was mainly represented by Ng, and SGBT, it was agreed, *inter alia*, that Agus would provide additional collateral in the form of mortgages over four properties. These properties were not held in Agus's name. They had been purchased in the names of the Appellants and companies which the Appellants were shareholders and directors of ("the Companies"). Apart from that, SGBT also wanted personal and corporate guarantees

from the Appellants and the Companies respectively. Agus was agreeable to the Companies providing corporate guarantees but not to the Appellants providing personal guarantees. Agus was of the view that the Appellants would hardly be able to provide any real security to SGBT as they were just "2 young boys".

11 After a period of further negotiations between the parties, SGBT agreed to forgo asking for personal guarantees from the Appellants in a counter-proposal which involved Agus furnishing even more security in addition to the initial four properties. Pursuant to this understanding, a forbearance agreement and other relevant documentation were eventually signed and executed by the parties, including Agus and the Appellants. Although the draft agreements did not require the Appellants to provide personal guarantees in favour of SGBT, the security documents, consisting a mortgage document and a deed of assignment, incorporated such personal guarantees. It was stated that the mortgagor of the property (*ie*, the Appellants and the Companies) shall pay SGBT on demand all sums due and owing to SGBT by Agus.

The commencement of legal proceedings by SGBT

12 Despite having provided additional collateral pursuant to the forbearance agreement, Agus still could not meet his obligations under the credit facility with SGBT. As a result, SGBT commenced legal proceedings against Agus, the Appellants and the Companies in April 2009. The Appellants filed their defence on 25 May 2009. They were still represented by Ng then. Agus and the Companies did not file a defence, and judgment in default was entered against them on 3 June 2009.

13 On 22 June 2009, SGBT filed an application for summary judgment against the Appellants. The application was rejected by the Assistant Registrar ("the AR") at first instance. The Appellants were given unconditional leave to defend the action. Dissatisfied with the AR's decision, SGBT appealed to the High Court. At this juncture, it bears noting that sometime between the dismissal of SGBT's application by the AR and the hearing of the appeal by the High Court, Ng had discharged himself. The Appellants were subsequently represented by Tan Kok Quan Partnership ("TKQP").

14 When the matter came before the High Court, SGBT's appeal was allowed and final judgment was awarded in favour of SGBT. It was held that there was no merit in any of the Appellants' pleaded defences. After taking into account the recovery of S$2,293,864.73 from the sale of shares, payment of dividends and the sale proceeds from two mortgages, final judgment in the sum of S$14,958,718.99, together with contractual interest liable to be paid under the facility agreement, was entered against the Appellants.

15 At this juncture, TKQP wrote to the Respondents on behalf of the Appellants, placing the Respondents on notice that the Appellants would be seeking to recover from the Respondents the amount that had to be paid to SGBT pursuant to the High Court's judgment. In a letter dated 12 November 2009, it was alleged that Ng had failed to explain the security documents prior to execution and that the Appellants' liability to SGBT was caused by Ng's breach of duty. The letter concluded with the following notice:

> In the meantime, we are instructed by our clients [*ie*, the Appellants] to and do put you on notice of their claim against you for the sum of S$14,958,718.99, together with contractual interest pursuant to Clause 9 of [SGBT's] Facility Terms and Conditions on the principal sum from 2 April 2009 to the date of full payment and costs of RA 316, Summons 3302 and the Suit on an indemnity basis arising from the aforesaid breaches.

16 The Respondents replied, by way of a letter sent by Michael Khoo & Partners ("MKP") dated

11 January 2010, in which it was denied that the Respondents were liable to the Appellants in any way. Specifically, the Respondents denied having acted for the Appellants in respect of the security documents, which were the subject matter of SGBT's action against the Appellants. The Respondents took the view that it had only acted for Agus with regard to the "provision of further collateral and security to [SGBT]". It was also contended that the Appellants had not contacted or instructed Ng to act for them in relation to the security documents, and that no advice had been sought from Ng. The letter concluded by stating that there was sufficient equity in the properties and shares, which were presumably held by SGBT as collateral, to satisfy the outstanding loans owed by Agus. In this regard, the Appellants were urged to ensure that Agus took steps to either liquidate the collateral to mitigate any losses or ensure that the value of the collateral was not depleted or diminished in value.

17 TKQP replied by way of a letter dated 19 January 2010, refuting the Respondents' allegations that they had not acted for the Appellants in connection with the security documents and that they owed no duty to explain the terms of the security documents to the Appellants. The Appellants also referred to the Certificate of Correctness in the mortgages, where Ng had signed off as the solicitor for the mortgagors (*ie*, the Appellants and the Companies).

18 No evidence was led as to whether there was any further exchange of correspondence between the Appellants and the Respondents after TKQP's reply on 19 January 2010. Sometime thereafter, Damodara Hazra LLP ("DH LLP") took over conduct of the Appellants' case from TKQP.

19 The appeal against the High Court's decision to grant final judgment in favour of SGBT came before the Court of Appeal on 9 April 2010. After hearing submissions from the parties, the appeal was allowed and the Appellants were given unconditional leave to defend.

The settlement

20 In the midst of trial preparations, it appears that Agus and the Appellants had entered into settlement negotiations with SGBT. Adrian gave evidence that SGBT's initial position was for the Appellants to pay the entire outstanding amount owed by Agus. The meetings took place over several days and after going back and forth a number of times, the parties eventually agreed that the Appellants would pay US$2m to SGBT in settlement of any outstanding liability that they owed to SGBT. The mechanism of payment agreed upon was for SGBT to waive half of the US$2m settlement sum in the event that the Appellants made payment of the first US$1m in accordance with the payment schedule set out in the settlement agreement. The settlement agreement was entered into by SGBT and the Appellants on 10 April 2011.

21 Three further observations can be made in relation to the settlement between the Appellants and SGBT. First, it appears from the evidence that Agus had attended the meetings with SGBT although he was not a party to the settlement agreement. It will be recalled that at that point in time, judgment in default had already been entered against him and he had been declared a bankrupt. Secondly, it is not in dispute that neither the Appellants nor Agus informed the Respondents of the settlement negotiations with SGBT. As a result, the Respondents did not participate in the negotiations with SGBT. Thirdly, it is also not disputed that the Appellants were legally represented by DH LLP in the course of the negotiations with SGBT. According to Adrian, both Mr Damodara and Mr Hazra were involved in the meetings with SGBT. His evidence remained unchallenged in the course of cross-examination.

The payment of the settlement sum

22 The Appellants eventually made payment of US$1m in accordance with the payment schedule

set out in the settlement agreement. In a letter dated 5 March 2013, Allen & Gledhill LLP, the solicitors acting for SGBT in that dispute, confirmed the same and further stated that there were no outstanding payments that were payable under the settlement agreement.

The commencement of legal proceedings by the Appellants

23 The Appellants then commenced the present action against the Respondents to recover the settlement sum of US$1m and the legal costs incurred vis-à-vis the dispute with SGBT. A claim for loss of income was also advanced by Adrian. At first instance, the Judge ruled in favour of the Respondents (see *Anwar Patrick Adrian and another v Ng Chong & Hue LLC and another* [2013] SGHC 202 ("the High Court Judgment on Liability")). The Judge took the view that throughout the relevant times when Agus and SGBT were in negotiations in 2008, the Respondents' client was Agus alone. Therefore, the Respondents did not have a solicitor-client relationship with the Appellants. It was further held that the Respondents did not owe a duty of care to the Appellants (see the High Court Judgment on Liability at [12]).

24 On appeal, we reversed the Judge's decision on two grounds. First, we held that there was an implied retainer as Ng had signed off as the "solicitor for the mortgagors" on the Certificate of Correctness, which formed part of the security documents. Ng (and consequently, NCH) was in breach of this implied retainer between him and the Appellants. Secondly, the absence of any contractual connection between the Appellants and the Respondents did not prevent a duty of care in tort from arising in respect of the Respondents to the Appellants, in so far as Ng had known that the Appellants would rely on his advice. The duty of care was owed not just to Agus but also to the Appellants. In this regard, the Appellants' claim in negligence succeeded as Ng (and consequently, NCH) had failed to take reasonable care in advising on the contents of the security documents.

25 On the issue of damages, we allowed the Appellants' claim for legal fees incurred vis-à-vis the dispute with SGBT, subject to the Official Assignee's further investigation as to whether the monies ought to be applied towards the satisfaction of Agus's debts. In so far as the Appellants' claim for the settlement sum was concerned, we remitted to the High Court the question of the reasonableness of the settlement entered into between the Appellants and SGBT. In our view, this was to furnish both parties the opportunity to lead further evidence on this particular issue. We observed as follows at [201] of the CA Judgment:

> ... In the interests of fairness to Ng (and consequently, NCH), and, as importantly, to also furnish the Appellants an opportunity to prove the reasonableness of their loss by reference to the list of factors in [*Britestone Pte Ltd v Smith & Associates Far East, Ltd* [2007] 4 SLR(R) 855], this specific issue of determining the reasonableness of the settlement should be remitted to the Judge, and we so order. ...

The decision below

26 It appears that both parties took the view that there was *no* need to adduce further evidence before the Judge. Therefore, the Judge only had to consider the parties' legal submissions in the context of the evidence that had already been adduced at first instance.

27 The Judge began by observing that the question of reasonableness of the settlement had more than a single perspective (see the Judgment at [9]). The first concerned the reasonableness of the settlement as between the Appellants and SGBT. The second concerned the effect of the settlement on the Appellants and the Respondents. He further observed that the commercial world expects contracts to be respected and that, to this end, a person's decision to sell his property way below

market value must still be respected. The Judge took the view that no officious bystander, including the court, should tell the person that the contract would not be enforced because it was unreasonable to sell at that price. On this basis, the Judge arrived at the conclusion that the reasonableness of the settlement as between SGBT and the Appellants was not the aspect that he should inquire into (see the Judgment at [9]).

28 The Judge further observed that there was no evidence on how the settlement was concluded, and so far as reasonableness in the conduct of the parties (*ie*, the Appellants and SGBT) was concerned, there was no evidence for him to consider (see the Judgment at [11]).

29 In finding that the settlement was not reasonable, the Judge relied on two main points. First, he acknowledged that the Appellants had claimed that at least some S$300,000 came from a loan by their father's unnamed friend that need not be repaid. The Judge made the finding that the Appellants did not make any payment to SGBT and that the settlement was made effective by Agus alone (see the Judgment at [12]).

30 Secondly, the Judge accepted the Respondents' argument that the Appellants did not act reasonably in failing to ascertain the true amount of the debt and thus failed to consider whether it was a reasonable quantification of the damage suffered by the Appellants (see the Judgment at [13]). It was observed that the Appellants did not and could not have taken steps to ascertain whether the settlement was reasonable as Agus had managed the entire case. The Judge made the following concluding remarks (at the Judgment at [14]):

> ... I am therefore of the view that although it might have been sensible for the [Appellants] to settle with SGBT, I have no reason to believe that the settlement was a reasonable one – certainly not from the perspective of the [*sic*] *regarding the settlement as a reasonable quantum of damage payable by [the Respondents] to [the Appellants]*. The question remains, in the light of my finding, what damages are [the Appellants] entitled? The lack of evidence showing that [the Appellants] had *personally paid any money themselves to SGBT* compels me to make an award for a $1,000 nominal damages only and I so order. ... [emphasis added]

The issues on appeal

31 Having considered the parties' submissions, we are of the view that the following issues have to be resolved in the present appeal:

(a) whether the Judge had erred in awarding nominal damages on the ground that there was insufficient evidence showing that the Appellants had personally paid any money themselves to SGBT ("Issue 1"); and

(b) whether the settlement entered into between the Appellants and SGBT was reasonable such that the settlement sum may be regarded as the measure of loss suffered by the Appellants ("Issue 2").

We will elaborate on the parties' submissions as and where appropriate in the course of our analysis below.

Our decision

Issue 1

32 At the outset, we observe that both parties dealt with this aspect of the Judgment only very briefly in the course of their submissions. The main dispute between the parties appears to revolve around the reasonableness of the settlement entered into between the Appellants and SGBT (*ie*, Issue 2), an issue which will be discussed below. Nevertheless, to avoid any potential confusion, we make the following observations on the Appellant's argument that the Judge had erred in awarding nominal damages due to the lack of evidence showing that the Appellants had personally paid any money themselves to SGBT.

33 In support of their argument with respect to Issue 1, the Appellants relied on the following extract from the Judgment (at [14]):

> ... The lack of evidence showing that [the Appellants] had personally paid any money themselves to SGBT compels me to make an award for a $1,000 nominal damages only and I so order. ...

The Appellants took the view that this was the "principal ground" upon which the Judge arrived at his decision to award nominal damages of S$1,000. They also argued that the Judge had erred in "coming to the conclusion that the benevolence of third parties meant that only nominal damages could be awarded to the Appellants".

34 In our view, the Appellant's characterisation of the Judge's reasoning was not, strictly speaking, accurate. The extract set out in the paragraph above, which was cited by the Appellants in their written submissions, was preceded by the following findings (see the Judgment at [14]; also quoted above at [30]):

> ... *I am therefore of the view that although it might have been sensible for [the Appellants] to settle with SGBT, I have no reason to believe that the settlement was a reasonable one – certainly not from the perspective of the [sic] regarding the settlement payment as a reasonable quantum of damage payable by [the Respondents] to [the Appellants].* ***The question remains, in the light of my finding, what damages are [the Appellants] entitled?*** The lack of evidence showing that [the Appellants] had personally paid any money themselves to SGBT compels me to make an award for a $1,000 nominal damages only and I so order. ... [emphasis added in italics and bold italics]

As can be seen from the extract from the Judgment just quoted, the Judge's reasoning as cited by the Appellants was made *after* he had arrived at the finding that the settlement entered into between the Appellants and SGBT was not reasonable. On that basis, given that the settlement sum could no longer be regarded as the proper measure of loss suffered by the Appellants, the Judge had to proceed to consider the issue of whether the Appellants were still entitled to damages and, if so, what was the proper measure of damages. It was in *that* context that the Judge made the finding that he was compelled to award nominal damages due to the lack of evidence showing that the Appellants had personally paid any money themselves to SGBT.

35 As noted above, the Judge had relied on two main grounds in arriving at the conclusion that the settlement was not a reasonable one. The first was in relation to the finding that the Appellants did not make any payment to SGBT and that the settlement was made effective by Agus alone. The second concerned the Appellants' failure to ascertain the true amount of debt, given that the actual amount owing was not S$17m but a lower sum. The Judge took the view that the Appellants had failed to consider whether the settlement sum was a reasonable quantification of the damage suffered. Therefore, we do not agree with the Appellants' argument that the Judge had erred in awarding nominal damages due to the lack of evidence showing that the Appellants had "personally paid any money themselves to SGBT". As we have mentioned above, the Judge had referred to that

after he had made the finding that the settlement was not reasonable.

36 However, this does not conclude our analysis of Issue 1 simply because the first ground relied upon by the Judge did appear not only to be a major point in the Judgment but also did appear to focus on the fact that the Appellants had not made any payment to SGBT. At first glance, this appears to militate against the benevolence principle which has, as we had observed at [195] of the CA Judgment, been recognised under Singapore law: see the decision of this court in *The MARA* [2000] 3 SLR(R) 31 at [28]. At this juncture, it might be appropriate to set out the Judge's reasoning on this particular ground in full (see the Judgment at [12]), as follows:

> I do, however, have the evidence at trial in which the plaintiffs claimed that at least some $300,000 came from a loan by their father's unnamed friend and that that loan need not be repaid. It was unclear whether that $300,000 was in US or Singapore currency because the plaintiffs did not know. Indeed, we have no evidence exactly as to how the US$1m was paid to SGBT. I found as a fact and have no reason to believe otherwise, even now, that the plaintiffs did not make any payment to SGBT. The matter might have been settled, but the settlement was made effective by Anwar alone.

In our view, the aforementioned findings can be approached from two perspectives. The first perspective is effectively the argument that was advanced by the Respondents previously at the hearing before us on the issue of liability, *ie*, that the Appellants cannot claim the settlement sum as damages for their losses in the event that it had been paid for unconditionally by others. This argument is defective in so far as it is inconsistent with the application of the benevolence principle. The fact that the Appellants did not personally make any payment to SGBT does not preclude them from claiming the losses which they would otherwise have had to pay.

37 The second perspective is slightly more nuanced. In ascertaining whether the settlement was reasonable, the court has to take into account what a reasonable business person might have done in the same circumstances. In this regard, the Appellants' lack of knowledge regarding how the payment was effected and their limited participation in the settlement process *may* be relevant to the rubric of reasonableness. In *Britestone Pte Ltd v Smith & Associates Far East, Ltd* [2007] 4 SLR(R) 855 ("*Britestone*"), this court had emphasised that there is often a very real distinction between the disparate considerations of whether the claimant acted reasonably in arriving at the settlement and whether the settlement itself was reasonable. In spite of Singleton LJ's observation in the English Court of Appeal decision of *Biggin & Co Ltd v Permanite Ltd and Others* [1951] 2 KB 314 ("*Biggin & Co*") that the question is *not* whether the plaintiffs acted reasonably in settling the claim, but whether the settlement was a reasonable one, this court in *Britestone* expressed its agreement (at [53]) with Judge Bowsher QC's observation in the English High Court decision of *P & O Developments Ltd* (1998) 62 Con LR 38 that "whether the plaintiffs acted reasonably may have an *evidential* bearing on whether the settlement was reasonable" [emphasis added]. In this regard, it was further observed that the availability of competent advice, legal or otherwise, was a factor which the courts will consider in determining whether the parties had *acted reasonably*, and this will in turn go towards showing whether the *settlement itself is reasonable*. Returning to the Judge's reasoning in the present case, we are of the view that the Appellants' lack of knowledge with regard to how the payment of the settlement sum was effected and their limited participation in the negotiation process *may* be relevant to the issue of whether the settlement itself was reasonable.

38 In summary, we reject the Appellants' argument that the Judge had erred in awarding nominal damages on the basis that the Appellants had not paid SGBT personally. In our view, the Judge was merely addressing his mind to the question of whether the parties had acted reasonably in the settlement process. As discussed in the preceding paragraph, the parties' conduct often has an

impact on whether the settlement itself is reasonable. Put simply, the Judge's views with regard to Issue 1 did *not* constitute an *independent* ground for his decision in the present case but was, rather, a *factor* that had to be considered in relation to the reasonableness of the settlement – which is, in fact, *Issue 2*, to which our attention must now turn.

Issue 2

39 As we have noted above, the parties' disagreement was mainly in relation to the issue of whether the settlement entered into between the Appellants and SGBT was reasonable. Before us, counsel for the Appellants, Prof Tan Cheng Han SC ("Prof Tan"), submitted that the quantum of the settlement sum, although not determinative, was, in fact, a significant factor in the present case. In this regard, the Appellants adopted a double-pronged approach towards the issue of quantum. First, they argued that under the security documents executed by the Appellants, SGBT was entitled to claim the entire outstanding sum from the Appellants without accounting for the value of the collateral. Secondly, the Appellants submitted that even if the value of the collateral were taken into account, the *net* amount outstanding was *still in excess* of the eventual settlement sum of US$1m. Apart from the issue of quantum, Prof Tan also highlighted a number of other relevant factors set out in *Britestone* that are applicable to the present case.

40 On the other hand, counsel for the Respondents, Mr Michael Khoo SC ("Mr Khoo"), submitted that the issue of quantum was not a determinative factor in the present case. He took the view that, had it indeed been the case, we would have disposed of the matter at the hearing on liability instead of remitting the question of reasonableness of the settlement to the Judge. Mr Khoo also submitted that the burden of establishing reasonableness of the settlement rests with the Appellants, and that the Appellants had not discharged this burden due to the failure to adduce further evidence before the Judge. It appears that the main plank of the Respondents' case was in relation to the Appellants' failure to accord an opportunity to the Respondents to be involved in the negotiations with SGBT. Mr Khoo submitted that the Appellants had a good case against SGBT, and that the Respondents would therefore have advised the Appellants *not* to settle the claim had they (*ie*, the Respondents) been aware of the negotiations between the Appellants and SGBT.

41 In the course of oral submissions before us, there appeared to be some confusion as to whether the inquiry into the reasonableness of the settlement ought to be undertaken in two stages. The first stage involves ascertaining whether it was reasonable for parties to effect a settlement, while the second stage deals with the question of whether the settlement entered into by the parties is, in fact, a reasonable settlement. In our view, there is little utility in dividing the inquiry into two separate stages. In addressing the question of whether the settlement was reasonable, the court should assess the relevant factors in a holistic as well as integrated fashion. In *Britestone*, it was emphasised (at [55]) that the factors stated therein were neither exhaustive nor to be viewed as anything more than a "rough-and-ready practical guide". To this end, the factors should be applied *holistically* with respect to both "stages" mentioned above, having regard to the precise factual matrix of each individual case. The fact that it was unreasonable for parties to enter into a settlement may go towards demonstrating that the settlement entered into by the parties was not a reasonable settlement. For instance, the Respondents in the present case have attempted to argue that it was unreasonable for the Appellants to enter into a settlement agreement with SGBT inasmuch as the Appellants had a strong defence against SGBT's claim. Assuming, *arguendo*, that the Appellants had a strong defence against SGBT, this may be a factor that can be relied upon in establishing that the settlement was unreasonable.

42 We are also of the view that a holistic approach, which involves a consideration of all relevant factors of the case, is more consistent with the practical realities involved in such negotiations. For

instance, in a case where a plaintiff has a strong defence against a claim by a third party, it may be argued that a reasonable business person in the plaintiff's position could very well still decide to settle the claim instead of defending the action at trial *if* the settlement sum offered by the third party is of a very low quantum. In fact, it is common knowledge that a party who has successfully defended a claim is generally entitled to only an award of costs on a standard basis. This is, in most circumstances, insufficient to cover the costs that the successful party has to pay its own solicitors. In other words, the successful party will still be out of pocket in spite of having defended the claim. In the circumstances, if the settlement sum offered the third party is sufficiently low in quantum, it may be economically viable for the plaintiff to settle the claim vis-à-vis the third party *notwithstanding* the availability of a strong defence. Put simply, depending on the quantum of the settlement sum, the plaintiff may, in fact, be placed in a better position compared to defending the action at trial. Therefore, we are of the view that the inquiry into the reasonableness of the settlement should be kept flexible to account for a myriad of possible scenarios in the negotiation process. *In the final analysis, the precise facts and context are of the first importance.*

43 Before proceeding to consider the specific arguments proffered by both parties, it will be useful to set out a brief summary of the applicable legal principles, as laid down in the earlier decision of *Britestone*. As discussed previously, the inquiry into the reasonableness of a settlement has to be approached with common sense. In *Britestone*, this court provided (at [54]) a list of factors that may be taken into account in determining whether the settlement is reasonable, as follows:

(a) the duration or period of negotiations as well as their general content;

(b) whether there are any customs of trade or previous business dealings between the parties and/or whether there are any legitimate business considerations or contractual requirements (*eg*, dispute resolution clauses, *etc*) enjoining a settlement;

(c) whether the negotiations were conducted *bona fide*;

(d) the assessment which could properly be made at the time of settlement of the prospects of success or failure of the claim based on materials then available;

(e) the availability of and/or reliance on legal advice, expert advice or independent survey reports taking into account considerations of cost and time;

(f) whether the actual settlement itself was arrived at arm's length;

(g) whether there was an opportunity accorded to the third party/ultimate payor to be involved in the negotiations;

(h) whether there was a positive reception of complaints by the third party/ultimate payor;

(i) whether the settlement amount has been paid, and, if so, how and when;

(j) the bargaining strengths of the parties involved in the settlement, taking into account (among other things) alternative means by which the dispute could have been concluded;

(k) whether, in the round, the settlement figure was objectively assessed and properly calibrated against the context of the entire factual matrix; and

(l) the practical consequences of the decision on reasonableness.

44 It bears emphasising once again that the factors set out in the preceding paragraph are neither exhaustive nor should they be viewed as anything more than a rough-and-ready practical guide (see also above at [41]). In this regard, some of the factors set out above may not be relevant to the inquiry of reasonableness, depending on the *facts and context* of each case. As was highlighted in *Britestone*, each settlement must be assessed on its own merits to ascertain if it is reasonable and, therefore, may be relied upon as a measure of the plaintiff's loss.

45 Before proceeding to discuss the applicable factors on the facts of the present case, we acknowledge that there was a certain degree of confusion over the Judge's observation that there were two different perspectives in approaching the question of the reasonableness of a settlement. It will be recalled that the Judge had arrived at the view that the reasonableness of the settlement as between SGBT and the Appellants was *not* the aspect that he should inquire into (see the Judgment at [9]). The Judge then went on to explain that the *other* aspect of reasonableness concerned the effect of the settlement on the Appellants and the Respondents (see the Judgment at [10]).

46 In our view, the reasonableness of the settlement as between SGBT and the Appellants is, in fact, the inquiry which the court has to engage in. In the event that the settlement between SGBT and the Appellants is found to be reasonable, the settlement amount may then be regarded as the proper measure of loss sustained by the Appellants. On the other hand, if the settlement between SGBT and the Appellants is found to be unreasonable, the consequence must be that the settlement amount cannot be taken as the measure of the Appellants' loss. In this regard, we find it useful to refer to the following observations that we had been made in the CA Judgment (at [205]):

> The purpose of considering the reasonableness of the settlement is that such reasonableness is a *necessary condition for adopting the amount of the settlement as the measure of loss*. This was enunciated in the seminal English Court of Appeal decision of [*Biggin & Co*]. If this is correct, which we think it is, then *the consequence of an unreasonable settlement must be that the settlement amount cannot be taken as the measure of the plaintiff's loss* (see the English High Court decision of *John F Hunt Demolition Ltd v ASME Engineering Ltd* [2008] Bus LR 558 ... at [67]; see also *Courtney* at p 174). [emphasis added]

47 In so far as the Judge's second aspect of reasonableness is concerned, which presumably concerns the effect of the settlement on the Appellants and the Respondents, we have already expressed our tentative views on the same in the CA Judgment. The first approach effectively involves causation-based reasoning, where an unreasonable settlement between the plaintiff and a third party may be regarded as having broken the chain of causation. To this end, the plaintiff will not be able to rely on the settlement as evidence of its loss. The second approach involves the doctrine of mitigation, where the act of entering into an unreasonable settlement with a third party may be treated as a failure on the part of the plaintiff to mitigate its losses. Similarly, the defendant will not be liable for the settlement amount due to the plaintiff's failure to mitigate. In our view, these approaches better account for the effect of the settlement on the Appellants and the Respondents, as opposed to the broad notion of reasonableness that had been alluded to in the Judgment.

48 We further observe that in so far as the non-exhaustive list of factors set out in *Britestone* (referred to above at [43]) is concerned, most of the factors in that list involve a consideration of the relevant facts concerning the negotiation process itself, such as the duration or period of negotiations and the availability of legal advice. The aspect of reasonableness which the court has to concern itself with is generally that as between the negotiating parties, which, in most cases, would be the plaintiff and the third party (unless the defendant also participated in the negotiations). Therefore, we do not, with respect, agree with the Judge's view that the reasonableness of the settlement as between SGBT and the Appellants was not the aspect that the court should inquire

into.

49 Finally, we are of the view that the Judge's reasoning on the sanctity of contract and the enforceability of an unreasonable settlement was, with respect, no more than a legal red herring. The issue which we are concerned with here is *not* the enforceability of the settlement agreement as between SGBT and the Appellants. In other words, even if we were to find that the settlement was unreasonable, in the absence of any other recognised contractual vitiating factor (such as, for instance, mistake, duress or undue influence), that finding has no bearing on the enforceability of the settlement agreement *as between SGBT and the Appellants*. SGBT will still be able to enforce the settlement agreement against the Appellants even if the latter had entered into a bad bargain.

50 However, the reasonableness of the settlement agreement comes to the fore in the present case when the court has to determine the appropriate measure of loss suffered by the Appellants. As was discussed above, for the settlement sum to be taken as the proper measure of loss suffered by the Appellants, the settlement entered into between the Appellants and SGBT has to be a reasonable one. In other words, the present issue concerns the measure of damages (between the Appellants and the Respondents), as opposed to the enforceability of the settlement agreement (between SGBT and the Appellants). To this end, we do not find the Judge's reasoning on the sanctity of contract to be relevant to the issue at hand.

51 Returning to the facts of the present case, we will first consider the factors relied upon by the Appellants before proceeding to consider the factors relied upon by the Respondents.

The quantum of the settlement sum

52 As discussed above, the Appellants adopted a double-pronged approach towards the issue of quantum. First, it was argued that pursuant to the security documents executed by the Appellants, SGBT was entitled to seek the entire outstanding amount owed by Agus without accounting for the value of the collateral. Secondly, the Appellants submitted that even if the value of the collateral were taken into consideration, the *net* amount outstanding was still in excess of the settlement sum. We now deal with these arguments in turn.

53 In so far as the Appellants' first argument is concerned, we find it useful to refer to the Privy Council decision of *China and South Sea Bank Ltd v Tan Soon Gin (alias George Tan)* [1990] 1 AC 536 ("*China and South Sea Bank*") (on appeal from the Court of Appeal of Hong Kong). Lord Templeman, in delivering the judgment of the Board, made the following instructive observations (at 59–60):

> In the present case the security was neither surrendered nor lost nor imperfect nor altered in condition by reason of what was done by the creditor. *The creditor had three sources of repayment. The creditor could sue the debtor, sell the mortgage securities or sue the surety. All these remedies could be exercised at any time or times simultaneously or contemporaneously or successively or not at all. If the creditor chose to sue the surety and not pursue any other remedy, the creditor on being paid in full was bound to assign the mortgaged securities to the surety.* If the creditor chose to exercise his power of sale over the mortgaged security he must sell for the current market value but the creditor must decide in his own interest if and when he should sell. The creditor does not become a trustee of the mortgaged securities and the power of sale for the surety unless and until the creditor is paid in full and the surety, having paid the whole of the debt is entitled to a transfer of the mortgaged securities to procure recovery of the whole or part of the sum he has paid to the creditor. [emphasis added]

The learned Law Lord proceeded to observe that the creditor was not obligated to do anything. In

the event that the creditor is unable to recover the debt from the debtor or the mortgage securities, he will lose nothing if the surety remains capable of repaying the debt. The surety contracts to pay the creditor if the debtor does not pay and, to this end, the surety remains bound by his contract. If the surety is worried that the mortgaged securities may decline in value, he may request the creditor to sell them. If, however, the creditor remains idle, the surety may pay off the debt and take over the benefit of the mortgage securities before selling them. Lord Templeman emphasised that no creditor could carry on the business of lending if he could become liable to a mortgagor or to a surety for a decline in the value of mortgaged property, unless the creditor was itself *personally responsible* for the decline.

54 The approach in *China and South Sea Bank* was followed in the local decision of *Teo Siew Har v Oversea-Chinese Banking Corp Ltd* [1999] 2 SLR(R) 619, where this court made the following observations (at [20]):

> The question is whether in these circumstances, particularly during the period in or around March 1997 when Mr Tang on behalf of the appellant requested the respondents to sell the property, and over the next two or three months when the appellant was unable to sell the property herself, the respondents as the mortgagees of the property were under a duty to lend their assistance to the appellant and exercise the power of sale. It should be noted that at that time the power of sale had not accrued and no demand for payment had as yet been made by the respondents. In our opinion, on the authority of *China and South Sea Bank Ltd* and *Countrywide Banking Corporation*, the answer is clearly "No". *In the words of Lord Templeman, the respondents as the mortgagees were not obliged to do anything. They did no act injurious to the appellant, did no act inconsistent with the rights of the appellant and did not omit to do any act which their duty enjoined them to do. They were not under any duty to exercise their power of sale over the property at that or any other particular time or at all.* [emphasis added]

55 Applying the principles set out above, given the way that the guarantee clause was worded in the security documents, we agree with the Appellants that SGBT was not obliged to liquidate the collateral, and that SGBT was fully entitled to proceed against the Appellants for the entire outstanding amount. In Geraldine Mary Andrews & Richard Millett, *Law of Guarantees* (Sweet & Maxwell, 6th Ed, 2011) ("*Law of Guarantees*"), it was observed (at para 7–009) that there was no rule that a creditor had to avail itself of other securities which the debtor may have given or sue a co-surety, before looking to the surety for payment. The exception would be in a case where it is stated in the contract that it (*ie*, the creditor) must do so, or if it is obliged to do so by a relevant statutory provision. In so far as the guarantee clause in the security documents is concerned, this exception does not apply in the present case. It was further acknowledged in the work just cited that in general terms, the creditor has a "completely unfettered choice as to how, and against whom, he should proceed to recover the debt or damages to which he is entitled" (see *Law of Guarantees* at para 7–009).

56 For completeness, we note that a similar position was taken in Kevin McGuinness, *The Law of Guarantee* (LexisNexis, 3rd Ed, 2013), where it was observed (at para 7.61) that a creditor was not obliged to pursue other remedies first:

> Unless the parties otherwise agree, a creditor is under no obligation to enforce any security interest that it holds, to call on any other guarantor, to demand payment under any letter of credit or otherwise to seek to enforce the claim that it has against the principal, either directly or indirectly, before calling upon the surety to honor his or own obligations under a guarantee. The creditor is entitled to make his or her own decision *as to how to pursue those different sources of payment. The creditor may pursue them simultaneously or successively or not at all*. While

> [a] surety enjoys a right of subrogation to the rights of the creditor, there is no principle of law which renders the creditor a trustee or fiduciary for the benefit of the surety with respect to those other rights. Put simply, the creditor is not under an obligation to the surety to do anything — other than, as noted, to call upon the principal to perform, to accept the performance of the principal if tendered, and not to require the surety to pay (or otherwise perform) when the principal is not liable to pay. ... [emphasis added]

The learned author further explained that a major attraction of a guarantee was to simplify the process of enforcing the primary obligation. If, in fact, a creditor is obliged to exercise its rights before seeking payment or performance from a surety, the attraction of guarantees as a performance securing mechanism would be greatly diminished or even eliminated.

57 Returning to the facts of the present case, the Respondents may have taken the view that it would be unfair and unreasonable for SGBT to insist on being paid the entire outstanding amount when it was, in fact, holding on to collateral which was not insignificant in market value. However, the Appellants' remedy, when faced with such a situation, would be to make full payment and be subrogated to the rights that the creditor possessed, including any security interest such as the collaterals in question. The evidence suggests that the Appellants even had difficulties trying to raise the settlement sum of US$1m. In this regard, it would not be realistic to expect the Appellants to be in a position to make full payment and be subrogated to the security interest held by SGBT. Therefore, in the absence of full payment by the Appellants, SGBT was fully entitled to proceed against the Appellants for the entire outstanding amount, as it in fact did in the present case.

58 Moving on to the Appellants' second argument, we are of the view that there is still *a significant discount* to the settlement sum even if the value of the collateral were taken into account. At the outset, we observe that both parties have put forward a number of different calculations as regards the net amount outstanding after accounting for the value of the collateral held by SGBT. Before we proceed to consider the different permutations, it will be useful to first set out the basic figures that were not disputed by both parties.

59 First, both parties have proceeded on the basis that the exchange rate of the Singapore dollar to the US dollar on 11 April 2011 was S$1.25 to US$1. This is relevant as the settlement sum was denominated in US dollars. For the purpose of comparison, the settlement amount between SGBT and the Appellants is taken to be S$1.25m.

60 Secondly, the closing price of the Keppel Telecommunications & Transportation Ltd ("KTT") shares on 10 April 2011 was S$1.35. It is also not in dispute that SGBT was holding onto 5,821,000 KTT shares as collateral at the point in time when the settlement agreement was entered into between SGBT and the Appellants. The estimated value of the KTT shares was therefore S$7,858,350.

61 Thirdly, the closing price of the Symphony International Holdings Ltd ("Symphony") shares on 10 April 2011 was US$0.72. SGBT was holding onto 3,507,500 shares as collateral and the estimated value of the Symphony shares was S$3,156,750 (*ie*, US$2,525,400).

62 Fourthly, although both parties appeared to have some disagreement over the value of the Ferrari held by SGBT as collateral, in the calculations put forward by the parties, they were prepared to accept that it had a value of S$270,000.

63 With the basic parameters set out above, we will now consider the various permutations in turn.

Calculation 1

64 We will first address the Appellants' best case scenario, which gives rise to the highest possible net amount outstanding. The starting premise for the first calculation is SGBT's proof of debt against Agus for the outstanding debt, interest and costs as at the date of the bankruptcy order on 3 March 2011, which was reflected as S$18,923,053.67.

65 As regards the value of the collateral held by SGBT, the Appellants relied on the following figures:

S/No	Description	Value (S$)
1	5,821,000 KTT shares at S$1.35 per share	7,858,350
2	3,507,500 Symphony shares at US$0.72 per share	3,156,750
3	Amount recovered by SGBT through sale of Devonshire properties and KTT shares	Nil (already liquidated)
4	Scotts Road properties (repossessed by developer)	Nil (no longer held as collateral)
5	Ferrari	270,000
Estimated Value of Collateral held by SGBT		11,285,100

66 On this basis, the Appellants submitted that the net amount outstanding was S$18,923,053.67 - S$11,285,100 = S$7,637,953.67. At this juncture, we note that this figure is almost six times the settlement amount of S$1.25m.

67 Nevertheless, we have difficulties accepting this calculation in so far as there was no detailed breakdown on how the sum of S$18,923,053.67 was arrived at. In fact, the Appellants had, in their written skeletal submissions, referred to the calculation set out in the Respondents' case, where the sum of S$18,923,053.67 had been derived from levying interest on the judgment sum of S$17,252,583.72 that was entered against Agus in 2009. If that were the case, the Appellants would have to account for the fact that SGBT had already received S$2,293,864.73 from the liquidation of the collateral as at the date of the judgment against Agus. It appears that they have not done so and we are therefore not prepared to accept this calculation as constituting an accurate reflection of the state of affairs between the parties.

Calculation 2

68 The second calculation, also put forward by the Appellants, is similar to the first calculation, with the exception that it has a different starting premise. Unlike the first calculation, which uses the proof of debt filed by SGBT as the starting position, the second calculation takes reference from the High Court's judgment in SGBT's application for summary judgment. It will be recalled that the High Court had granted final judgment against the Appellants in the sum of S$14,958,718.99, together with contractual interest pursuant to the terms and conditions of the credit facility on the principal sum from 2 April 2009 to the date of full payment. Although the Court of Appeal subsequently reversed the High Court's decision, the figure arrived at in the decision of High Court may be used as a yardstick to determine the net amount outstanding as at the date the settlement agreement was entered into.

69 In this regard, if we were to disregard the contractual interest that SGBT was entitled to for the period between 2 April 2009 and 10 April 2011, the net amount outstanding still stands at S$14,958,718.99 - S$11,285,100 = S$3,673,618.99. It bears emphasising that this is nearly three times the eventual settlement amount of S$1.25m.

Calculation 3

70 The final calculation was put forward by the Respondents in their case. As with the second calculation, the Respondents also relied on the High Court judgment as the starting position in their calculations. The Respondents calculated the contractual interest as follows:

> The Settlement Agreement was concluded on 10 April 2011. From 2 April 2009 to 10 April 2011, interest of 5.25% per annum calculated for 2 years and 8 days would amount to a total amount of $1,587,878.26 (i.e. 5.25% x $14,958,718.99 x 2 years and 8 days).

On this basis, the Respondents submitted that the amount owed to SGBT as at the date of the settlement agreement was, taken at its highest, S$14,958,718.99 + S$1,587,878.26 = S$16,546,597.25.

71 As regards the value of the collateral, the Respondents relied primarily on Exhibit D4, which was adduced in the course of the trial at first instance. The value of the KTT shares, the Symphony shares and the Ferrari corresponds with the Appellants' calculations (see [65] above). Over and above that, the Respondents also included the following amounts:

S/No	Description	Value (S$)
1	Amount recovered by SGBT from the sale of the Devonshire properties and the KTT shares	2,293,864.73
2	8 Scotts Road #35-08 Scotts Square	1,035,421
3	8 Scotts Road #36-04 Scotts Square	1,028,778

The Respondents set out two variations in Exhibit D4. The first includes the value of the Scotts Road properties, *ie*, S$11,285,100 + S$2,293,864.73 + S$1,035,421 + S$1,028,778 = S$15,643,163.73. On this basis, the Respondents submitted that the net amount outstanding came up to only $903,433.52. It was argued that this was below the settlement amount of S$1.25m.

72 The Respondents also provided an alternative calculation, which does not take into account the value of the Scotts Road properties. The value of the collateral was S$13,578,964.73 and the net amount outstanding was therefore S$2,967,632.52.

73 We are unable to accept the Respondents' calculations for two reasons. First, it was not disputed that the Scotts Road properties had already been repossessed by the developer as at the date of the settlement agreement. Neither the Appellants nor SGBT managed to sub-sell the Scotts Road properties. In the circumstances, it appears that SGBT did not receive any value from the Scotts Road properties. This was accepted by Ng under cross-examination:

> Q: Mr Ng, I also just want to clarify that actually (4) and (5) on your new revised table, the two properties numbered (4) and (5), #35-08 Scotts Square and #36-04 Scotts Square, these properties were not realised in favour of the bank; correct?

A: Correct.

Q: So that's why in your table you mention the figure of $15.6 million and below that you mention the figure of $13.5 million after deducting items (4) and (5) above.

A: Correct.

Q: Just to clarify, Mr Ng, to be on the page, (4) and (5) were never realised because the developer seized the properties.

A: They took it back.

Q: Yes.

A: Sorry, I have to clarify. I assume they took it back because that happened after I handed the file over.

Given that both parties do not dispute that the Scotts Road properties were repossessed by the developer, there was no reason to include the *full* value of the Scotts Road properties in assessing the value of the collateral held by SGBT, as the Respondents had done in their calculations.

74 Secondly, the calculation put forth by the Respondents is also plainly erroneous due to the double deduction of the value of the collateral liquidated as at the date of the High Court's order for final judgment to be entered against the Appellants. It will be recalled that the High Court had arrived at the sum of S$14,958,718.99 *after* deducting the sum of S$2,293,864.73, which was the value of the collateral that had been liquidated up to that point in time, from the original claim of S$17,252,583.72. In the Respondents' calculation, although they had adopted the sum of S$14,958,718.99 as their starting position, they continued to take into account the sum of S$2,293,864.73 in assessing the value of the collateral held by SGBT. This effectively resulted in a double deduction in the process of deriving the *net* amount outstanding, given that the value of the liquidated collateral was accounted for *twice*.

75 After rectifying the aforementioned errors in the Respondents' calculation, the net amount outstanding would amount to S$5,261,497.25. This is derived by deducting S$11,285,100, which is the total value of the collateral held by SGBT (*ie*, the KTT shares, the Symphony shares and the Ferrari), from the outstanding amount of S$16,546,597.25, as reflected in the Appellants' case (see [70] above). It bears emphasising that the net amount outstanding is more than four times the eventual settlement amount of S$1.25m, even on the basis of the Respondents' own calculations.

76 In summary, we are prepared to accept that, *regardless of* which calculation was adopted, the settlement amount was, in any event, significantly *lower* than the net amount outstanding as at the date of the settlement agreement. This was a relevant factor towards finding that the settlement entered into between SGBT and the Appellants was a reasonable settlement, although we would emphasise once again that based on the legal principles discussed above, SGBT was entitled to claim the *entire* outstanding amount from the Appellants without accounting for the value of the collateral it was holding onto.

Legal advice

77 The other factor heavily relied upon by the Appellants was the fact that they had entered into the settlement agreement with the benefit of legal advice. In this regard, the evidence given by

Adrian on the involvement of DH LLP in the negotiation process remained unrebutted under cross-examination by Mr Khoo:

Q: So you had your counsel with you at that meeting?

A: We did. We had --

Q: And Mr Damodara appeared with you?

A: Both Mr Damodara and Mr Hazra appeared.

Q: And the bank were [*sic*] also represented by their lawyers from Allen & Gledhill?

A: I don't recall. I recall they were at a couple of the more penultimate meetings but I don't remember which ones.

Adrian's evidence that the parties had been represented by lawyers was also consistent with the evidence given by Agus under cross-examination, reproduced as follows:

Q: Remember that you had to take part in the settlement talks with the bank?

A: Yes, I did.

Q: Together with your sons?

A: Yes.

Q: Together with your lawyers?

A: Yes.

Q: And the bank's lawyers?

A: Yes.

...

Q: Before the settlement agreement was reached, you, your sons, your lawyers, and the bank's representative and their lawyers sat down to negotiate a settlement.

A: Yes.

Q: Correct?

A: Yes.

78 It appears that the Respondents do not dispute the fact that the Appellants were legally represented in the course of negotiations with SGBT. Instead, the Respondents took issue with the Appellants' decision not to call their lawyers to give evidence in the present proceedings. The Respondents argued that that it was not sufficient for the Appellants to rely on the fact that they had been *accompanied* by their lawyers during the negotiations with SGBT. It was argued that the Appellants had to prove that that they had settled the claim based on *the advice given by their*

lawyers. To this end, the Respondents submitted that an adverse inference ought to be drawn against the Appellants under s 116(*g*) of the Evidence Act (Cap 87, 1997 Rev Ed) for failing to call their previous lawyers to give evidence on the legal advice provided during the negotiations with SGBT and on the reasonableness of the settlement, including the prospects of successfully defending the claim by SGBT.

79 At the outset, we note that the approach in various jurisdictions is often to regard the issue as to whether legal advice was undertaken as a predominant factor in assessing the reasonableness of a settlement (see *Britestone* at [41]). Nevertheless, this court cautioned against elevating this factor into an "evidential presumption or inexorable rule of practice" (see *Britestone* at [44]). Therefore, the presence (or absence) of legal advice is merely one factor to be taken into account in the holistic approach towards ascertaining whether or not a particular settlement is reasonable.

80 In this regard, we do *not*, with respect, identify with the Respondents' attempt to draw a distinction between lawyers *accompanying* their clients for negotiations and lawyers actually *giving advice* on the settlement itself. In the absence of any evidence to the contrary, one can reasonably assume that the lawyers would have advised their clients in the course of accompanying them at the negotiations. Why else would the lawyers be there? Further, we do not agree with the Respondents' view that an adverse inference ought to be drawn against the Appellants for having failed to call their previous solicitors, DH LLP, to give evidence. In our view, it is neither prudent nor necessary to impose a strict requirement for parties to call their solicitors to give evidence on the legal advice given in the course of the negotiations. While it can be envisaged that evidence from the solicitors will often be useful in allowing the court to have a better understanding of the thought process of the parties involved, we are of the view that it would not be appropriate to impose a blanket requirement across all factual patterns. It should be emphasised, once again, that every settlement turns on the facts (as well as the relevant context). In a case where the quantum of the settlement sum is close to the maximum liability a plaintiff is exposed to and where the settlement appears to have been hastily arrived at in order to preserve business relationships, the court may very well take the view that a greater level of scrutiny is required. In such circumstances, the plaintiff concerned may have no choice but to call its lawyers to shed light on the settlement process in order to discharge its burden of proof that the settlement arrived at with the third party is reasonable. This stands in stark contrast to the present case where, as we have already noted above, the settlement sum was reasonably low in quantum if one takes into account factors such as the wording of the guarantee clause, the outstanding amount and the value of the collateral held by SGBT. Therefore, in cases such as the present, the party who had entered into the settlement would not be required to call on its solicitors to give evidence in order to discharge its burden of establishing a *prima facie* case of reasonableness. In arriving at this conclusion, we find it useful to also refer to the following observations by Somervell LJ in *Biggin & Co* on the evidence required to establish reasonableness (at 321):

> ... The question, in my opinion, is: what evidence is necessary to establish reasonableness? I think it relevant to prove that the settlement was made under advice legally taken. The client himself could do that, but I do not think that the advisers would normally be relevant or admissible witnesses. I say "normally". It may be that in special cases they might be. ...

In *Britestone*, this court made the following observations on Somervell LJ's view concerning the relevance of evidence from legal advisers (at [30]):

> With regard to Somervell LJ's comments at 321 that the evidence of advisers would not "normally be relevant", it should be noted that Somervell LJ went on to add that:

> [I]f there is evidence ... on which the court can come to the conclusion that this was a reasonable settlement in the circumstances, then ... it should be the measure.

It is our view that Somervell LJ, by the above comments, was merely emphasising the importance of the plaintiff leading evidence to prove that the settlement was reasonable.

Hence, for the reasons set out above, we are of the view that it would be counterproductive to impose a strict rule for solicitors to be called to give evidence in all cases where settlements were entered into with legal advice.

81 In arriving at this view, we also took into account the emphasis made in *Britestone* that reliance on legal advice is not necessarily or invariably a decisive consideration in the "crucible of reasonableness". It was further reiterated that this must be a question of fact assessed in the totality of the factual matrix. In any event, the reliance on legal advice is but one of many factors which the court is entitled to take into account of in arriving at the determination of whether the settlement was reasonable. Therefore, a strict rule dictating that the solicitors must *invariably* give evidence in all circumstances would be inconsistent with the aforementioned observations.

82 It should be further observed that this court had adopted a practical approach towards the issue of legal advice in the decision of *Brown Noel Trading Pte Ltd v Donald & McArthy Pte Ltd* [1996] 3 SLR(R) 760 ("*Brown Noel Trading*"), a case which preceded *Britestone*. In that case, this court made the following concluding remarks on whether the settlement was reasonable (at [67]):

> In reaching the settlement the defendants were advised by their solicitors and there was nothing to suggest that their solicitors' advice was patently wrong or that there was anything suspicious. In all the circumstances, the settlement arrived at was reasonable, and the amount the defendants had paid to Sintra should have been allowed.

Returning to the facts of the present case, there was also no evidence to suggest that the legal advice rendered by DH LLP was "patently wrong or that there was anything suspicious". Looking at the factual matrix as a whole, we are satisfied that the Appellants' decision not to call their solicitors to give evidence was not fatal to its case. It is also our view that it would not be appropriate to draw an adverse inference against the Appellants, as was argued by the Respondents.

Opportunity to participate in negotiations

83 One of the relevant factors in the present inquiry is whether there had been an opportunity accorded to the third party or ultimate payor, *ie*, the Respondents in the present case, to be involved in the negotiations. Before us, Mr Khoo referred to this factor as constituting the key to the Respondents' case.

84 It is not disputed by the parties that the Appellants had not invited the Respondents to play a role in the negotiations with SGBT and that the settlement had been entered into without the Respondents' input. We are, however, of the view that it is important to view this in the context of what had transpired between the Appellants and the Respondents prior to the commencement of negotiations with SGBT.

85 It will be recalled that on 12 November 2009, TKQP had sent a letter to the Respondents, informing them that SGBT managed to obtain summary judgment against the Appellants. It was stated that the Appellants' liabilities under the judgment were caused by the breach of various duties on the part of the Respondents. It was also alleged that Ng was acting in conflict of interest and that he

had failed to advise the Appellants to seek independent legal advice in respect of the execution of the security documents, even though the presumption of undue influence would have arisen in those circumstances. The letter concluded with the following notice:

> 11. In the meantime, we are instructed by our clients to and do put you on notice of their claim against you for the sum of S$14,958,718.99, together with contractual interest pursuant to Clause 9 of [SGBT's] Facility Terms and Conditions on the principal sum from 2 April 2009 to the date of full payment and costs of RA 316, Summons 3302 and the Suit on an indemnity basis arising from the aforesaid breaches.
>
> 12. Please let us hear from you within 7 days from the date hereof whether you admit liability in respect of the said claim. If we do not hear from you by then, our clients will assume that you have no response to the claim and will act accordingly.

86 The Respondents' solicitors responded by way of a letter dated 11 January 2010. In that letter, the Respondents denied having acted for Adrian and Francis in connection with the security documents that had been executed. It was stated that the Respondents had only acted for Agus in respect of the provision of further collateral and security to SGBT. The Respondents also pointed out that the security held by SGBT was sufficient to satisfy the outstanding loan and/or judgment sum, and that the Appellants should ensure that Agus takes steps to liquidate the security in order to mitigate his loss. The letter concluded with the following denial:

> Our clients therefore deny that they are liable to your clients or at all. In the meantime all their rights are reserved.

87 TKQP subsequently replied by way of a letter dated 19 January 2010, refuting the Respondents' allegations that they had not acted for the Appellants in connection with the security documents and that they owed no duty to explain the terms of the security documents to the Appellants. As we have noted above (at [18]), no evidence appears to have been led as to whether there was any further exchange of correspondence between the parties after the Appellants' letter dated 19 January 2010.

88 In our view, the exchange of correspondence set out in the preceding paragraphs, specifically, the Respondents' denial of the Appellants' claim against them, is relevant to the factor of whether the Respondents had been given an opportunity to participate in the Appellants' negotiations with SGBT. The Respondents' position was extremely clear in so far as they denied that the Appellants were even their clients. On this basis, the Respondents denied that they were liable to the Appellants at all. At the particular point in time when the Appellants were negotiating with SGBT, they could very well have been proceeding on the assumption that they did not have a valid claim against the Respondents.

89 Further, it must not be overlooked that unlike a sub-sale arrangement, where the seller and the sub-seller will usually share a common interest in denying the claim by the downstream buyer (*eg*, that there was no defect in the product), the facts in the present case were very different in so far as the defences adopted by the Appellants and the Respondents might possibly be incompatible. The Respondents' position was that the Appellants were not even their clients, whilst the Appellants' defences against SGBT would presumably have included defences such as misrepresentation, mistake and undue influence. In this regard, the Respondents might very well have chosen to take the position that there was *no* undue influence on the facts of the case in order to disclaim liability, given that the Appellants had alleged in their letter dated 12 November 2009 that the Respondents had failed to advise the Appellants to seek independent legal advice in spite of the presumption of undue

influence. Looking at the evidence as a whole, there was a real risk that the defences relied upon by the Appellants and the Respondents might, to a certain extent at least, have been inconsistent with one another. In the circumstances, it is our view that the Appellants' failure to involve the Respondents in the negotiations with SGBT should be given considerably less weight.

90 Further, in the course of the hearing before us, Mr Khoo also acknowledged that the quantum of US$2m (and further reduction to US$1m in the event that payment was made in accordance with the payment schedule in the settlement agreement) was reasonable and that it was a "commercially good settlement" from the perspective of the Appellants and SGBT. Upon further inquiry by this court, the main plank of Mr Khoo's argument appears to be that the Respondents would have advised the Appellants *not* to settle on the basis that they had a reasonably good defence against SGBT. In other words, the Respondents were not arguing that they could have obtained a lower quantum had they been given the opportunity to be involved in the negotiations with SGBT. Their contribution would have been to *prevent* the settlement from materialising on account of the Appellants' strong defence against SGBT's claim. As will be seen in our analysis below, we do not accept the Respondents' argument that the settlement was unreasonable on the basis that the Appellants had a strong defence against SGBT. It is, therefore, our view that less weight ought to be accorded to the Appellants' failure to involve the Respondents in the negotiations with SGBT.

Strong defence against SGBT's claim

91 The Respondents also relied on the fact that the Court of Appeal had reversed the High Court's decision to award summary judgment in favour of SGBT. It was argued that this was on the basis that the Appellants had a "credible defence", which, if successful, would have defeated SGBT's claim in its entirety.

92 We do not accept the Respondents' arguments for the following reasons. First, it must be recognised that the threshold for summary judgment to be granted is not a low one. From a correlative perspective, a defendant resisting a summary judgment only has to raise a triable issue in order to be given unconditional leave to defend the action. In Jeffrey Pinsler, *Principles of Civil Procedure* (Academy Publishing, 2013), the principles applicable to summary judgment were usefully summarised as follows (at para 08.009):

> If the defendant raises a triable issue, he will be given unconditional leave to defend. If he is not able to show that there is a triable issue, the court may give unconditional leave to defend if there is a good reason why there should be a trial.

The learned author went on to make the following observations on what may be regarded as a triable issue for unconditional leave to defend to be granted (at para 08.010):

> Literally construed, these words require the defendant to show that there is at least an issue or question which cannot be finally resolved in the plaintiff's favour in the hearing of the application for summary judgment. The defendant *does not have to satisfy the court that he is more like to succeed on the issue or question*. He merely has to *satisfy the court that there is a question or issue which can only be properly determined at a trial proper*. Over a century ago, the House of Lords pointed out that it is *not for the court hearing an application for summary judgment to investigate the merits of the issues raised by the defendant*. The court should only ascertain whether an issue has been raised which should be tried. ... [emphasis added]

93 Therefore, the Respondents' argument that the grant of unconditional leave to defend by the Court of Appeal meant that the Appellants had a reasonably strong or "credible defence" involves a

logical leap which is inconsistent with the principles applicable to an application for summary judgment as set out above.

94 Secondly, the fact that the High Court had arrived at the diametrically opposed view that SGBT was entitled to enter summary judgment against the Appellants is not a wholly irrelevant consideration. Whilst the High Court's decision was eventually reversed by the Court of Appeal, some weight has to be given to the fact that SGBT had managed to successfully obtain summary judgment before the High Court. In other words, this was not a straightforward case in which SGBT's application was wholly unmeritorious. It would not be unreasonable to draw an inference that the Appellants' defences, contrary to what the Respondents have attempted to portray, were, in fact, not that strong.

95 Thirdly, the Respondents appear to have completely ignored the important consideration that litigation risks always exist in every dispute. No matter how strong the Appellants' defences were, there was always a possibility that they might have been held liable for the entire outstanding amount. As discussed above, SGBT was fully entitled to proceed against the Appellants for the entire outstanding amount without accounting for the collateral it had against the debt. In addition, the evidence appears to show that the Appellants were in a rather financially strapped position. In the circumstances, even if judgment had been entered against the Appellants for the *net* outstanding amount (*ie*, after accounting for the market value of the collaterals held by SGBT), there was a possibility that the Appellants would *still* be *unable to satisfy* the judgment debt. Therefore, looking at the potential liability that the Appellants were facing in the claim by SGBT, it is our view that it was "commercially sensible" and reasonable for the Appellants to settle the claim for a fraction of the original claim amount.

96 Finally, we observe that there has, in any event, been a lack of evidence to support the Respondents' argument that the Appellants had a credible defence against SGBT. In this regard, the Respondents could have led evidence from other third parties (*eg*, SGBT) or even cross-examined the Appellants and Agus on this specific issue. This was, however, not done in spite of this court having remitted the question of the reasonableness of the settlement to the Judge for further evidence to be taken. In conclusion, looking at the evidence that has been led at first instance, we are unable to accept the Respondents' argument on the presence of a credible defence in favour of the Appellants.

Other relevant factors

97 Having dealt with both the Appellants' and Respondents' main arguments, we now proceed to consider a number of other relevant factors that were also raised by both parties in their written submissions.

98 First, the negotiations between SGBT and the Appellants appear to have taken place on multiple occasions. Adrian's evidence was that SGBT had initially demanded that the Appellants pay the entire outstanding amount and that both parties subsequently had to go "back and forth" in trying to arrive at an agreed settlement sum. In other words, unlike what the Respondents have attempted to portray, the Appellants certainly did not cave in to SGBT's demands without any form of resistance whatsoever. In fact, we are of the view that the payment schedule involving the waiver of US$1m upon payment of the first US$1m within the stipulated timeline suggests that some degree of negotiation must have taken place between the parties. Otherwise, SGBT would not have agreed to a waiver which amounted to the not inconsiderable sum of US$1m.

99 Secondly, there was no evidence to suggest that the negotiations were not conducted in a *bona fide* manner. The evidence demonstrates that both parties were represented by their respective

legal counsel towards the later part of the negotiation. In fact, Mr Khoo clarified, in the course of the hearing, that it was not the Respondents' case that there had been any bad faith involved. He conceded (correctly, in our view) that there was no evidence on the record to support such a finding. Therefore, in the absence of any evidence to the contrary, the fact that the settlement was entered into with the benefit of legal advice lends some support to the factor that the settlement was negotiated at arm's length.

100 Thirdly, it is not disputed by the parties that the settlement sum was eventually paid to SGBT in accordance with the payment schedule set out in the settlement agreement. The only dispute between the parties was in relation to the source of funds, which, as discussed above, was merely a legal red herring in the light of the application of the benevolence principle.

Conclusion

101 For the reasons set out above, the appeal is allowed on the basis that the settlement entered into between the Appellants and SGBT was reasonable, and that it may be regarded as reflecting the proper measure of loss suffered by the Appellants. The Respondents are to pay US$1m to the Appellants. We will hear parties on costs in relation to both the present appeal and the earlier appeal on liability (*ie*, Civil Appeal No 138 of 2013).

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