IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2021] SGCA 57

Civil Appeal No 113 of 2020

Between

(1) Crest Capital Asia Pte Ltd
(2) Crest Catalyst Equity Pte Ltd
(3) The Enterprise Fund III Ltd
(4) VMF3 Ltd
(5) Value Monetization III Ltd

… *Appellants*

And

(1) OUE Lippo Healthcare Ltd (formerly known as International Healthway Corporation Ltd)
(2) IHC Medical Re Pte Ltd

… *Respondents*

In the matter of Suit No 441 of 2016

Between

(1) OUE Lippo Healthcare Ltd (formerly known as International Healthway Corporation Ltd)
(2) IHC Medical Re Pte Ltd

… *Plaintiffs*

And

(1) Crest Capital Asia Pte Ltd

Version No 1: 27 May 2021 (15:37 hrs)

(2) Crest Catalyst Equity Pte Ltd
(3) The Enterprise Fund III Ltd
(4) VMF3 Ltd
(5) Value Monetization III Ltd
(6) Fan Kow Hin
(7) Aathar Ah Kong Andrew
(8) Lim Beng Choo

… *Defendants*

JUDGMENT

[Civil Procedure] — [Costs]
[Civil Procedure] — [Judgment and orders]

TABLE OF CONTENTS

INTRODUCTION **1**

CONSEQUENTIAL ORDER ISSUE **3**

BACKGROUND 3

THE PARTIES' POSITIONS 4

VMF3 and VMIII *4*

The respondents *5*

OUR DECISION 7

Policy rationalisation *7*

Unjust enrichment rationalisation *11*

COSTS ISSUE **13**

BACKGROUND 13

THE PARTIES' POSITIONS 13

VMF3 and VMIII *13*

The respondents *14*

OUR DECISION 15

Costs of the trial below *15*

Costs of the appeal *20*

CONCLUSION **21**

Version No 1: 27 May 2021 (15:37 hrs)

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Crest Capital Asia Pte Ltd and others
v
OUE Lippo Healthcare Ltd (formerly known as International Healthway Corp Ltd) and another

[2021] SGCA 57

Court of Appeal — Civil Appeal No 113 of 2020
Judith Prakash JCA, Steven Chong JCA and Belinda Ang Saw Ean JAD
29 January 2021

24 May 2021 Judgment reserved.

Steven Chong JCA (delivering the judgment of the court):

Introduction

1 This judgment deals with two issues occasioned by this court's decision in allowing the appeal by the fourth and fifth appellants in CA/CA 113/2020 ("VMF3" and "VMIII", respectively), while dismissing the appeal by the first to third appellants ("Crest Capital", "Crest Catalyst" and "EFIII", respectively) (collectively, the "Crest Entities"): see *Crest Capital Asia Pte Ltd and others v OUE Lippo Healthcare Ltd (formerly known as International Healthway Corp Ltd) and another and other appeals* [2021] SGCA 25 ("the Appeal Judgment").

2 The first issue pertains to a consequential order ("the Consequential Order") sought by VMF3 and VMIII (the "Consequential Order Issue"):

Version No 1: 27 May 2021 (15:37 hrs)

> that the sums VMIII paid the [respondents] in satisfaction of the judgment sum be restored to VMIII, together with interest at 5.33% p.a. calculated from the date of receipt.

3 The second issue pertains to how costs should be ordered in relation to the respondents' claims against VMF3 and VMIII, both at first instance and on appeal ("the Costs Issue").

4 In the Appeal Judgment at [3], we cautioned that when different principals are represented by the same set of lawyers, it is essential to undertake a separate factual inquiry as to whether the acts or omissions of their representatives and/or agents can be attributed to each of the principals. An omission to do so may lead the parties to overlook this critical distinction, resulting in the court treating these principals alike although they might in fact be situated differently. The risk of unintended consequences in treating all the principals alike can also occur in a post-judgment scenario when *one* of the principals, as a judgment debtor, pays the *full* judgment debt in discharge of the *joint and several liability* of *all* the principals. That risk materialised in this case precisely because one of the appellants, *VMIII*, paid the judgment debt and the costs in discharge of the joint and several liability of *all the Crest Entities*. Through the two issues outlined above, VMIII seeks to *undo* the unintended consequences of its payment of the judgment debt and costs on behalf of all the Crest Entities.

5 After due consideration of the parties' respective submissions on the two issues, our decision, in brief, is as follows:

(a) On the Consequential Order Issue, the sums paid by VMIII to the respondents should not be restored to VMIII. The sums paid by VMIII were, in our view, meant to discharge the joint and several

Version No 1: 27 May 2021 (15:37 hrs)

liability of the *same indivisible* judgment debt on behalf of *all the Crest Entities*. Therefore, VMIII should look to Crest Capital, Crest Catalyst and EFIII for reimbursement of the funds that it had paid out on behalf of *all the Crest Entities*.

(b) On the Costs Issue, the costs order at first instance should be upheld. VMIII should likewise look to Crest Capital, Crest Catalyst and EFIII for reimbursement of the costs that it had paid out on behalf of *all the Crest Entities*. As for the costs order on appeal, the respondents are to pay VMF3 and VMIII costs fixed at $30,000 inclusive of disbursements. Such costs are to reflect the limited ground on which their appeals succeeded.

Consequential Order Issue

Background

6 At first instance, the Crest Entities were found to be jointly and severally liable (along with others) to the respondents to the tune of some $12.6m. Thereafter, the respondents' solicitors, Rajah & Tann Singapore LLP ("R&T") wrote to the Crest Entities' solicitors at the time, WongPartnership LLP ("WongP") demanding that the Crest Entities pay the judgment sum by late July 2020. In the same month, the Crest Entities filed a notice of appeal, and applied for a stay of execution. However, the stay application was eventually withdrawn.

7 In early August 2020, the respondents commenced various enforcement proceedings against the Crest Entities. On 18 August 2020, Tham Lijing LLC took over from WongP as solicitor for VMF3 and VMIII. On 28 August 2020, *after* Tham Lijing LLC had taken over as solicitor for VMF3 and VMIII,

Version No 1: 27 May 2021 (15:37 hrs)

WongP proposed to R&T for the judgment sum to be paid over three instalments in return for a stay of the enforcement proceedings. It is not disputed that this proposal by WongP was agreed to by *all the Crest Entities* on 29 August 2020. VMIII thereafter paid the sum of about $10.3m to the respondents for the judgment debt and the interest accruing thereon.

8 After VMF3's and VMIII's appeals were allowed, Tham Lijing LLC wrote to R&T, demanding repayment of the sums referred to in the preceding paragraph with interest. R&T declined to do so.

The parties' positions

VMF3 and VMIII

9 VMF3 and VMIII rely on the established principle that upon a successful appeal, "the appellate court will direct the respondent to restore to the appellant the money paid or the property transferred under the original order": see Charles Mitchell. Paul Mitchell and Stephen Watterson, *Goff & Jones: The Law of Unjust Enrichment* (Sweet & Maxwell, 9th Ed, 2016) ("*Goff & Jones*") at para 26-02. According to them, VMIII paid out the $10.3m under legal compulsion, due to (a) the enforcement proceedings against it; and (b) its joint and several liability for the judgment sum. Since VMIII is no longer liable to the respondents, the bases underlying VMIII's payments are extinguished. Therefore, if the respondents are not ordered to repay the $10.3m to VMIII, it would be tantamount to rendering VMIII's appeal nugatory and penalising VMIII for complying with the orders at first instance.

Version No 1: 27 May 2021 (15:37 hrs)

The respondents

10 The respondents raise six grounds to oppose the Consequential Order sought by VMF3 and VMIII:

(a) First, the $10.3m was neither paid only by VMIII, nor paid to discharge only VMIII's liability. There was no suggestion that (i) the $10.3m was paid *only* on behalf of VMIII and VMF3; or that (ii) the $10.3m was paid in exchange for a stay of the enforcement proceedings *only* as against VMF3 and VMIII. On the contrary, the $10.3m was paid by VMIII on behalf of *all* the Crest Entities, and received by the respondents on that basis. That the money was paid *by* VMIII does not mean that the money was paid *on behalf of* VMIII alone.

(b) Second, the correspondence between R&T and WongP resulted in a binding contract between the respondents and the Crest Entities, where the Crest Entities undertook to make payments to the respondent and in exchange, the respondents agreed to withdraw the enforcement proceedings. There is no provision in this alleged contract that the sums paid by VMIII are to be refunded to VMIII in the event that VMIII's appeal succeeds.

(c) Third, the respondents were not unjustly enriched. There remains the alleged contract between the Crest Entities and the respondents (see [(b)] above) which bar any claims in unjust enrichment. Further, there is no total failure of consideration since the $10.3m payment discharged Crest Capital, Crest Catalyst and EFIII's liability*, which was upheld on appeal*. For the same reasons, the respondents have detrimentally changed their position.

Version No 1: 27 May 2021 (15:37 hrs)

(d) Fourth, it would be unfair for the respondents to repay the $10.3m and to revert to having an unsatisfied judgment debt against Crest Capital, Crest Catalyst and EFIII. The respondents have proceeded on the basis of the judgment sum being satisfied in full and have therefore not taken any further enforcement steps against Crest Capital, Crest Catalyst and EFIII.

(e) Fifth, the respondents submit that it is for a judgment debtor who is jointly and severally liable with others, and who pays the judgment debt on behalf of all the judgment debtors, to seek contribution from the other judgment debtors. VMIII should therefore look to the other judgment debtors, *ie*, Crest Capital, Crest Catalyst and EFIII, and not the respondents for reimbursement of the $10.3 million or any part thereof.

(f) Sixth, there is neither evidence that the $10.3m actually came from VMIII nor evidence as to why VMIII would pay the entire judgment debt for Crest Capital, Crest Catalyst and EFIII notwithstanding the finding of joint and several liability *of all the Crest Entities* by the court below. In fact, the precise position of these three entities as regards VMIII's application for the Consequential Order remains unknown to this court.

In fact, the post-judgment correspondence suggested otherwise, in that the Crest Entities requested the respondents to inform the banks that they wished to apply the funds *in VMIII's and EFIII's bank accounts* (which were subject to garnishee orders) towards the satisfaction of the judgment sum.

Version No 1: 27 May 2021 (15:37 hrs)

Our decision

11 In our view, it will be helpful to first explain the basis of the rule for the restitution of benefits conferred pursuant to a judgment that is subsequently reversed (which, for convenience, shall be referred to as the "restitutionary rule"). Tham Lijing LLC did not explicitly state that this restitutionary rule is based on unjust enrichment, and we think for good reason. Even the treatise cited by Tham Lijing LLC does not rationalise the restitutionary rule on the basis of unjust enrichment. Instead, the restitutionary rule is justified as part of the court's "procedural mechanisms whose function is to reduce the risk of judicial error": *Goff & Jones* at 26-05. Put differently, the restitutionary rule is rationalised as a practical instrument through which the court can undo the judgment below and results thereof, *ie*, as a rule of judicial policy. As explained by Lord Nicholls in *Nykredit Mortgage Bank PLC v Edward Erdman Group Ltd (formerly Edward Erdman (an unlimited company))* [1997] 1 WLR 1627 at 1637: "when ordering repayment the [court] is unravelling the practical consequences of orders made by the courts below and duly carried out by the unsuccessful party".

12 While we set out our reasons in relation to *both* bases below, in our judgment, the outcome on the facts of this case as regards the Consequential Order would be the same irrespective of whether the restitutionary rule is premised on judicial policy or on unjust enrichment.

Policy rationalisation

13 On the basis that the restitutionary rule is a rule of policy designed by the courts to unravel the practical consequences of the order made by the lower court, we find it important to first understand the *purpose* of the $10.3m

Version No 1: 27 May 2021 (15:37 hrs)

payment. If the payment was meant to discharge *only* VMIII's liability, then the restoration of the $10.3m to VMIII would be eminently fair and just, because it would amount to a direct reversal of the lower court's erroneous finding that VMIII is liable. However, if the payment was meant to discharge *all of the Crest Entities'* liability, then the restoration of the $10.3m to VMIII would not be free from difficulty. This is because such a restoration would also have the effect of reversing the lower court's *correct* finding that Crest Capital, Crest Catalyst and EFIII are liable to the respondents.

14 Having examined the correspondence between R&T and WongP at the material time, we agree with the respondents that the $10.3m was intended to discharge the joint and several liability of *all the Crest Entities*.

15 There is no dispute that the $10.3m was paid by VMIII following negotiations between WongP and R&T (for the avoidance of doubt, this is not to say that this payment was entirely funded by VMIII). The letter from WongP, which initiated the negotiations, referred to a proposal from "our clients". Although by this time, Tham Lijing LLC had already taken over the conduct of the appeals on behalf of VMF3 and VMIII, there was no indication from WongP's letter that the negotiations were done only for the remaining three Crest Entities *ie*, Crest Capital, Crest Catalyst and EFIII. In fact, in early September 2020 before the $10.3m was paid, WongP wrote to R&T to state that their "clients" (without specifying that it was a reference only to Crest Capital, Crest Catalyst and EFIII) would pay the $10.3m using the funds from the bank accounts of EFIII *and VMIII*. It would not make commercial sense to interpret the reference to "clients", to refer only to the clients of WongP as that would mean that the $10.3m was paid by *VMIII* to discharge the liability of *Crest Capital, Crest Catalyst and EFIII only*.

Version No 1: 27 May 2021 (15:37 hrs)

16 In our view, as the $10.3m was paid by *VMIII*, this payment would naturally have been intended to also discharge the liability of at least VMIII and possibly VMF3 as well, as VMF3 was closely aligned with VMIII. At the same time, the $10.3m must also have been paid to discharge the liability of the remaining three Crest Entities, since they were the clients of WongP, which kickstarted the negotiations (see [15] above). Accordingly, the $10.3m was clearly paid to discharge the liability of *all five Crest Entities*. This is reinforced by the fact that all the Crest Entities were found to be jointly and severally liable for the *same indivisible* judgment debt.

17 Our view is further fortified by a letter from Tham Lijing LLC to this court dated 14 April 2021, which stated that:

> On 28 August 2020, WongP wrote to R&T proposing that the judgment sum be paid in 3 instalments in return for the staying of the execution proceedings. The *Appellants* agreed on or about 29 August 2020.
>
> [emphasis added]

Tham Lijing LLC thus accepted that WongP was negotiating on behalf of the "Appellants". The reference to "Appellants", without qualification, must refer to *all of the Crest Entities*, and not just VMF3 and VMIII. This is because in other parts of its letter, Tham Lijing LLC referred to VMF3 and VMIII as the "4th and 5th Appellants", and to the remaining three Crest Entities as the "1st to 3rd Appellants". Given that Tham Lijing LLC accepted that WongP had negotiated on behalf of *all the Crest Entities*, it must follow that Tham Lijing LLC must have also accepted that the $10.3m paid pursuant to the negotiations was likewise meant to discharge the joint and several liability of *all the Crest Entities*.

Version No 1: 27 May 2021 (15:37 hrs)

18 Since the $10.3m was made to discharge the liability of all five Crest Entities, a successful appeal by some but not all the Crest Entities would give rise to the question as to *who* should bear the risk of non-payment of the judgment debt. The full reimbursement of the $10.3m to VMIII would mean that the risk of non-payment would necessarily be borne by the respondents. This would be plainly unsatisfactory because the respondents did succeed in resisting the appeals by Crest Capital, Crest Catalyst and EFIII, whose liability has been discharged by the $10.3m payment. Should the $10.3m be fully reimbursed to VMIII, the respondents would be compelled to retake steps to enforce the judgment against Crest Capital, Crest Catalyst and EFIII. Balanced against this is VMIII's case that it would be wrong for VMIII to bear the risk of non-payment as it had succeeded in its appeal together with VMF3.

19 On the specific facts of this appeal, we are of the view that VMIII should bear the risk of non-payment. VMIII paid the $10.3m to the respondents *after* the Crest Entities had lodged the notice of appeal. Significantly, at the time of the payment, VMIII and VMF3 were already represented by Tham Lijing LLC. By then, it would have been apparent that VMIII's and VMF3's appeals were no longer *completely* aligned with those of the remaining three Crest Entities, and therefore the possibility of VMIII and VMF3 succeeding in their appeals but that the appeals of the other three Crest Entities would fail could not have been ruled out. In the circumstances, the onus was on VMIII to protect itself from the risk of non-payment by requesting contributions from the remaining Crest Entities before it decided to make the $10.3m payment. It is not even clear to us whether this was done by VMIII in relation to the remaining Crest Entities. Instead, VMIII on its face *elected* to pay the judgment debt on behalf of *all* the Crest Entities. If VMIII did not intend to discharge the liability of Crest Capital, Crest Catalyst and EFIII, then it was incumbent upon VMIII to state its position

Version No 1: 27 May 2021 (15:37 hrs)

clearly, which it did not. In fact, for the reasons set out in [15]–[17] above, the evidence is to the contrary.

20 Since VMIII should bear the risk of non-payment, the $10.3m should not be refunded to it. The proper course of action for VMIII to take, assuming that it had funded the entire payment of the $10.3m, would be to look to Crest Capital, Crest Catalyst and EFIII for their contributions to the $10.3m instead of to the respondents. Just to be clear, in our view, it would make no difference even if the entire $10.3m was indeed funded by VMIII. The undeniable fact remains that the $10.3m was intended to discharge the joint and several liability of *all the Crest Entities*.

Unjust enrichment rationalisation

21 It is clear to us that that the respondents had been enriched to the tune of $10.3m, at VMIII's expense. However, the key question is whether such enrichment is unjust.

22 The unjust factors that may in principle apply to this restitutionary rule would be (a) failure of basis; (b) mistaken payment; or (c) legal compulsion (see Anthony J Papamatheos, "What are the juridical bases of reversal of judgment restitution?" (2004) 25 Australian Bar Review 268 ("Papamatheos") at 289). We should add that even taking VMIII's case at its highest *ie*, that there was an unjust factor and hence a *prima facie* claim in unjust enrichment, the respondents would still have been able to avail themselves of the *change of position* defence in resisting the Consequential Order. The respondents received the $10.3m from VMIII on the footing that the sum was intended to discharge the liability of all the Crest Entities. *In reliance* on the $10.3m payment, the

Version No 1: 27 May 2021 (15:37 hrs)

respondents ceased pursuing enforcement proceedings against Crest Capital, Crest Catalyst and EFIII.

23 For completeness, we make some brief observations in relation to each of the three unjust factors. As regards the first unjust factor of failure of basis, as the respondents have correctly pointed out, if the $10.3m payment was meant to discharge the liability of *all the Crest Entities*, it would follow that there was no *total* failure of basis since Crest Capital, Crest Catalyst and EFIII remained liable. Partial failure of basis does not suffice as an unjust factor to support a claim in unjust enrichment.

24 In relation to the second unjust factor of mistake, we do not think that there was any operative mistake on the evidence before us. A mistake is defined by Lord Walker JSC (as he then was) in *Pitt v Holt* [2013] UKSC 26 at [108] as either a "mistaken conscious belief" or an "incorrect tacit assumption" about a state of affairs. However, in the context of VMIII's payment of the judgment that was subsequently appealed against, the very fact of VMIII's appeal (along with the other Crest Entities) against the judgment revealed that *none of them including VMIII*, harboured any mistaken belief or incorrect assumption about the correctness of the decision below (see also Papamatheos at 279).

25 In relation to the third unjust factor of compulsion, we similarly do not think that it applies here. The compulsion that was exerted on VMIII to pay the judgment debt was entirely *legitimate*, since such compulsion emanated from the judgment of the High Court, even though the judgment was subsequently established to have been erroneously decided. While legal compulsion is a recognised unjust factor, its relevance is typically limited to a *three-party situation*: for instance, where a claimant is forced to pay a third-party to

Version No 1: 27 May 2021 (15:37 hrs)

discharge a joint and several liability shared with the defendant, or where a claimant is forced to pay a debt owed by the defendant to the defendant's creditor (see Graham Virgo, *The Principles of the Law of Restitution* (OUP, 3rd Ed, 2015) at p 234). Put differently, the unjust factor of legal compulsion would support a claim by VMIII against *the three unsuccessful Crest Entities* in unjust enrichment, but not against the respondents. As between the VMIII and the respondents, it cannot be said that the payment of the $10.3 was unjust, since the compulsion to effect the payment was to prevent further recourse to legal process which is a normal incident post-judgment (see Peter Birks, *An Introduction to the Law of Restitution* (Oxford, 1989) at p 185).

Costs Issue

Background

26 To recap, the High Court ordered the Crest Entities to pay the respondents costs for the trial to the tune of about $350,000. The $350,000 was fully paid by VMIII in September 2020, together with the $10.3m payment.

The parties' positions

VMF3 and VMIII

27 For the costs of the trial below, VMF3 and VMIII seek a refund of the $350,000 paid by VMIII, for reasons similar to those in relation to the $10.3m payment. They further estimate their share of the costs below to be at about $100,000. They thus submit that the respondents should, after refunding the full sum of $350,000 to VMIII, be allowed to seek recovery of only $250,000 (being $350,000 – $100,000) from Crest Capital, Crest Catalyst and EFIII. In addition, the respondents are also to pay them costs of $100,000.

Version No 1: 27 May 2021 (15:37 hrs)

28 For their appeal costs, VMF3 and VMIII are not seeking their full estimated costs of about $100,000. Instead, they seek only costs from the respondents to the tune of $80,000, which, coincidentally or otherwise, is the same amount that Crest Capital, Crest Catalyst and EFIII have been ordered to pay the respondents.

The respondents

29 For the costs of the trial below, the respondents submit that:

(a) No order as to costs should be made in favour of VMF3 and VMIII.

(i) The Crest Entities' positions were aligned during the trial below, as they relied on the same set of pleadings and on the evidence of the same witness. This was notwithstanding an apparent conflict of interest between VMF3 and VMIII on one hand, and the remaining the Crest Entities on the other. Given that the Crest Entities ran their case *jointly* during the trial below, VMF3's and VMIII's costs cannot be *separated* from those of the remaining Crest Entities. In the same vein, the High Court ordered the Crest Entities to pay costs on a joint and several basis. Therefore, if the respondents are to be liable to VMF3 and VMIII for the costs of the trial below, it would have the effect of the respondents *subsidising* the costs of Crest Capital, Crest Catalyst and EFIII.

(ii) Further, the Crest Entities, including VMF3 and VMIII, ran a very wide defence in the trial below, the large part of which failed.

Version No 1: 27 May 2021 (15:37 hrs)

(b) In the alternative, a *Sanderson* order should be made such that Crest Capital, Crest Catalyst and EFIII should be liable for VMF3's and VMIII's costs.

(i) It was reasonable for the respondents to have pursued against VMF3 and VMIII, since they were parties to the Disputed Facilities.

(ii) Further, this court found that VMF3 and VMIII were misled by the investment memorandums for which the remaining Crest Entities were responsible.

30 For their appeal costs, the respondents accept that they should be liable to VMF3 and VMIII for their costs. However, the respondents submit that VMF3's and VMIII's appeals only succeeded on a narrow issue, *ie*, on the issue of *proof* of attribution while the remaining points raised by VMF3 and VMIII on appeal failed. To that extent, the *quantum* of costs should not be the full sum estimated by VMF3 and VMIII at $100,000, but only a quarter of that or $25,000.

Our decision

Costs of the trial below

(i) Refund of the $350,000

31 The first issue with respect to the costs below is whether the $350,000 in costs paid by VMIII should be fully refunded to VMIII. We are of the view that there should be no refund, for the same reasons as those set out in [13]–[20] above. The Crest Entities were found to be jointly and severally liable for the costs below, and the $350,000 paid by VMIII was likewise intended to

Version No 1: 27 May 2021 (15:37 hrs)

discharge the joint and several liability for costs of *all the Crest Entities*. That being the case, it is for VMIII to seek contribution from the remaining Crest Entities in the same way as it would have to look to the remaining Crest Entities for reimbursement of the $10.3m payment (see [20] above).

(ii) Adjustments to the costs order below

32 The second issue relates to the possible adjustment of the costs order below. VMIII and VMF3 succeeded in their appeals on the limited issue of attribution. Ordinarily, costs should follow the event, and on that basis VMIII and VMF3 argue that they should be awarded costs for the trial below in relation to this issue. In response, the respondents raise two arguments that they should not be liable to VMII and VMF3 in costs for the attribution issue. First, they argue that the Crest Entities pursued a joint defence below, and that the specific issue of attribution was not exhaustively ventilated. Second, and in the alternative, they argue that it should be Crest Capital, Crest Catalyst and EFIII which should be liable for VMF3's and VMIII's costs (*ie*, that a *Sanderson* order should be ordered), since they were the parties who concealed the true purpose of the Standby Facility from VMF3 and VMIII.

33 We accept the respondents' first argument. We observed in [119]–[120] of the Appeal Judgment that there *was* some divergence in the court below between VMF3 and VMIII on one hand, and the remaining three Crest Entities on the other, in relation to the attribution issue. This issue might not have been thoroughly and exhaustively explored below, but it was nevertheless explored. However, the purpose of that observation was to make the point that the attribution issue was not a new one that took the respondents by surprise. In other words, it was open to VMF3 and VMIII to pursue the attribution issue on appeal. Whether any costs should be awarded to VMF3 and VMIII in relation

Version No 1: 27 May 2021 (15:37 hrs)

to the attribution issue is another matter altogether. In our view, for the reasons that follow, the costs order below should not be disturbed.

34 The costs order below was awarded by the Judge after taking into account the respondents' claims and the Crest Entities' *consolidated* defences raised below. The costs incurred by the respondents *vis-à-vis* all the Crest Entities would not have been materially different from the costs incurred *vis-à-vis* the remaining three Crest Entities whose appeals failed. Even on the footing that there was some divergence between the Crest Entities in relation to the attribution issue, such divergence was minimal and would not have caused the costs incurred below to be materially different between VMF3 and VMIII on the one hand and the other three Crest Entities on the other, keeping in mind the following:

(a) The Crest Entities relied on the same set of pleadings, the same Affidavit of Evidence-In-Chief and the same set of submissions for the trial below.

(b) In the Crest Entities' written opening statement for the trial below, there was in fact no reference to the attribution point. The first mention of the attribution point appears to have been only in the oral opening statement.

(c) In the Crest Entities' closing submissions for the trial below, only six paragraphs (out of 490) dealt with the attribution point; in the reply closing submissions, only eight paragraphs (out of 178) were devoted to the attribution point.

35 To that extent, as far as the respondents are concerned, it cannot be said

Version No 1: 27 May 2021 (15:37 hrs)

that they incurred more costs by reason of the defence raised by VMF3 and VMIII generally, or on account of the attribution point specifically. A total of 14 paragraphs was devoted to the attribution issue, a negligible fraction of the whole that does not warrant our intervention in the costs order below. In our view, the costs order below still essentially reflected the same work done by the respondents, albeit *vis-à-vis* three instead of all five Crest Entities. The costs order imposed by the Judge below therefore ought to stand.

36 For completeness, we do not accept the respondents' second and alternative argument for a *Sanderson* order. By way of background, a *Sanderson* order would require the losing defendants (in this case, Crest Capital, Crest Catalyst and EFIII) to be liable for the costs of the successful defendants (in this case, VMF3 and VMIII). The rationale of a *Sanderson* order was explained by this court in *Chua Teck Chew Robert v Goh Eng Wah* [2009] 4 SLR(R) 716 ("*Goh Eng Wah*") at [40]:

> The purpose of a Sanderson order … is to avoid the injustice of a successful claimant having what he recovers in damages eroded by an order to pay costs to successful defendants whom it was reasonable for him, when he does not know which of the defendants to sue, to join … In deciding whether to grant a Sanderson order, the court's principal consideration is whether it would be fair and reasonable for the unsuccessful defendant to bear the costs of the successful defendant(s) …

37 The crux of the respondents' argument is that Crest Capital, Crest Catalyst and EFIII *concealed* the true purpose of the Disputed Facilities from VMF3 and VMIII, and thus the former three should be responsible for any costs incurred by the latter two. We do not find this argument persuasive. As the respondents themselves recognised, the crucial consideration behind the grant of a *Sanderson* order is whether the unsuccessful defendants have *shifted some or all of the liability to the successful defendants, such that the plaintiff was*

Version No 1: 27 May 2021 (15:37 hrs)

forced to join the successful defendants to the proceedings (see *Goh Eng Wah* at [41], *Denis Matthew Harte v Tan Hun Hoe and another* [2001] SGHC 19 at [11(c)]). Here, on the respondents' own case, they would have pursued VMF3 and VMIII regardless, since VMF3 and VMIII were parties to the Disputed Facilities. It cannot be said that the concealment of the true purpose of the Disputed Facilities by Crest Capital, Crest Catalyst and EFIII caused or *forced* the respondents to join VMF3 and VMIII in the suit below.

38 The facts of the present appeal can be contrasted with cases where *Sanderson* orders have been imposed. In *DBS Vickers Securities (Singapore) Pte Ltd v Chin Pang Joo and another* [2009] SGHC 248, the plaintiff bank sued the first defendant for losses incurred on the first defendant's trading account with the plaintiff. The first defendant claimed that the relevant transactions were carried out by the second defendant without authorisation. It was eventually found that the second defendant did have the authorisation to carry out the relevant transactions. On that basis, the High Court issued a *Sanderson* order requiring the first defendant to pay the costs of the second defendant.

39 In the same vein, in *Goh Eng Wah*, the titular plaintiff ("Goh"), Robert Chua Teck Chew ("Chua") and Daikin Industries Limited ("Daikin Japan"), were shareholders of Daikin Airconditioning (Singapore) Pte Ltd ("Daikin Singapore"). Goh sued Chua, Daikin Japan and Daikin Singapore (amongst others) for payments due under an incentive scheme entered into between them. At the trial below, Goh succeeded in his claim against Chua but failed in his claims against the other defendants. Chua appealed against the High Court's decision in finding him liable, while Goh appealed against the High Court's refusal to order Chua to pay the costs of the other successful defendants (*ie*, to make a *Sanderson* order).

Version No 1: 27 May 2021 (15:37 hrs)

40 On appeal, this court noted that Chua had repeatedly tried to lay blame for the shortfall in the incentive payments on Daikin Japan and Daikin Singapore, and continued to do so throughout the course of the trial below (at [41], [43]). In those circumstances, this court found it just to make Chua liable for half the costs of Daikin Japan and Daikin Singapore.

41 It can thus be observed that the unsuccessful defendants in the two authorities mentioned above had all tried to shift the blame on the successful defendants. In the present case, there was no question of Crest Capital, Crest Catalyst and EFIII shifting the blame to VMF3 and VMIII. The former might have misled the latter as to the true purpose of the Disputed Facilities, but that, if anything, merely meant that VMF3 and VMIII were *not* blameworthy in contrast with the remaining three Crest Entities. In this regard, we note that the remaining three Crest Entities were content for VMF3 and VMIII to pursue this argument below. Therefore, we are not satisfied that the grant of a *Sanderson* order would be appropriate in this case. While the fact remains that VMF3 and VMIII were misled as to the true purpose of the Disputed Facilities, the prerogative rests with *them* as to whether they wish to pursue any claim against the remaining Crest Entities.

Costs of the appeal

42 The parties agree that the respondents are liable for VMF3's and VMIII's costs. The disagreement only concerns the *quantum* of such costs.

43 We agree with the respondents that VMF3 and VMIII should not be awarded the full sum of $100,000, or the alternative amount of $80,000. As the respondents have pointed out, VMF3 and VMIII succeeded in their appeals only on a narrow point of *proof* of attribution, while their remaining arguments were

Version No 1: 27 May 2021 (15:37 hrs)

rejected. While we did engage Mr Toby Landau *QC*, counsel for VMF3 and VMIII, primarily on the attribution issue during the oral hearing, the remaining arguments which we did not accept were nonetheless prominently featured in VMF3's and VMIII's written case on appeal. Further, the questions posed to Mr Landau on the attribution issue also concerned the sub-issue of *pleadings*, on which VMF3 and VMIII did not succeed.

44 We are of the view that VMF3 and VMIII should only be awarded slightly less than one-third of their estimated costs, or $30,000 inclusive of disbursements.

Conclusion

45 In conclusion, we dismiss the Consequential Order sought by VMF3 and VMIII. VMIII should look to Crest Capital, Crest Catalyst and EFIII instead of the respondents for reimbursement of the $10.3m payment if indeed it was funded entirely by VMIII. We observe that the information as to which party *actually* funded the payment of $10.3m resides exclusively with all the Crest Entities. We find it rather odd that this vital aspect of the payment was inexplicably omitted by VMIII.

46 In relation to the Costs Issue:

(a) For the costs for the trial below, VMIII should again look to Crest Capital, Crest Catalyst and EFIII for the reimbursement of the $350,000, and not the respondents. The costs order imposed below stands.

(b) In relation to the appeal, the respondents are to pay VMF3 and

Version No 1: 27 May 2021 (15:37 hrs)

VMIII costs fixed at $30,000 inclusive of disbursements.

Judith Prakash
Justice of the Court of Appeal

Steven Chong
Justice of the Court of Appeal

Belinda Ang Saw Ean
Judge of the Appellate Division

Tan Chee Meng *SC*, Chng Zi Zhao Joel, Leo Zhen Wei Lionel, Wong Zheng Hui Daryl and Li Yiling Eden (WongPartnership LLP) for the first to third appellants;
Toby Landau *QC* (instructed), Tham Lijing and Rachel Low Tze-Lynn (Tham Lijing LLC) for the fourth and fifth appellants;
Lee Eng Beng *SC*, Cheng Wai Yuen Mark, Chow Chao Wu Jansen, Sasha Anselm Gonsalves and Dawn Seow (Rajah & Tann Singapore LLP) for the respondents.

Version No 1: 27 May 2021 (15:37 hrs)