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

[2023] SGHC 345

Suit No 355 of 2021

Between

(1) The Enterprise Fund III Ltd
(2) Value Monetization III Ltd

… *Plaintiffs*

And

CNPLaw LLP (formerly known as Colin Ng & Partnership)

… *Defendant*

JUDGMENT

[Tort – Negligence – Breach of duty – Lawyers]

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The Enterprise Fund III Ltd and another
v
CNPLaw LLP (formerly known as Colin Ng & Partnership)

[2023] SGHC 345

General Division of the High Court — Suit No 355 of 2021
Choo Han Teck J
24 – 26 October; 24 November 2023

7 December 2023 Judgment reserved.

Choo Han Teck J:

1 The 1st plaintiff, The Enterprise Fund III Ltd ("EFIII"), is a Singapore incorporated fund that helps small and medium-sized enterprises unable to get financing from banks. The 2nd plaintiff, Value Monetization III Ltd ("VMIII"), is a fund incorporated in the British Virgin Islands. Both plaintiffs are investment funds (collectively referred to as the "Lenders") that are managed by a company called Crest Capital Asia Fund Management Pte Ltd ("Crest"). Mr Peter Chan ("Mr Chan") is a director and investment committee member of the Lenders. Mr Glendon Tan ("Glendon Tan") who joined Crest in 2007, became the head of its Enterprise Fund division, and was responsible for managing EFIII. Mr Lim Chu Pei ("Mr Lim"), an investment analyst, assisted Glendon Tan in transactions involving EFIII.

2 The defendant, CNPLaw LLP ("CNP"), were the lawyers for Crest and its affiliates since 2008. Mr Steven Soh ("Mr Soh"), was a partner at CNP since

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2007, and co-headed its corporate finance team with Ms Tan Min-Li ("Ms Tan") from 2017 to 2019. Mr Soh left CNP in April 2021 after suffering a stroke. Ms Tan was the head of corporate and finance from 2002. The third witness for CNP is Mr Loh Yong Hui ("Mr Loh"). He was an associate of barely two years' standing in the corporate finance practice at CNP previously during the material time and assisted both Mr Soh and Ms Tan.

3 The Lenders suffered a loss due to a flawed loan facility agreement they had executed in 2015 with International Healthway Corporation Ltd (now known as OUE Lippo Healthcare Ltd), which I shall refer to as the "Borrower". This agreement was first drawn up on 6 April 2015, with various changes. It was finally executed on 21 July 2015 but was backdated to 16 April 2015. By the agreement, the purpose of the loan facility was "to be utilised by the [Borrower] for general working capital". The agreement was refinanced and superseded by another substantially similar facility agreement on 30 July 2015, extending the facility. The facts are not disputed.

4 What followed is also largely undisputed. EFIII used the facility's funds to purchase shares in the Borrower in the open market at about 29 cents a share, for a total of $17,332,081.15. The shares were bought between 16 April 2015 and 24 August 2015. EFIII purported to hold these shares in trust for the Borrowers. In September 2015, the Singapore Exchange ("SGX") issued a notice of suspicious trading activities in relation to the Borrower's shares. Subsequently, the Borrower defaulted and in October 2015, CNP was instructed to demand repayment of the loan from the Borrower. In January 2017, the Borrower removed the incumbent board of directors and appointed a new board (the "Board"). Thereafter, on 8 March 2017, the Borrower repudiated the facility agreement on the basis of illegality and proceedings were commenced on 6 April 2017 (OS 380 of 2017). Hoo J allowed the application. The Lenders'

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appeal was dismissed. The Court of Appeal ("CA") held that the entire transaction, namely, the loan facility, the open market purchase, and the trust declarations were void because it violated s 76(1A)(*a*) of the Companies Act (Cap 50, 2006 Rev Ed) ("Companies Act"), that is, the prohibition against a company (the Borrowers) buying its own shares.

5 In the meantime, the Borrower had paid $700,000 (between June and July 2015) under the vitiated facility agreement and $3,800,000 (in December 2015) towards another loan facility (known as the "Geelong" facility). The Lenders refused to treat the $3,800,000 as money paid towards the Geelong facility, and instead treated that as money paid under the vitiated loan facility (for breach of s 76 Companies Act). This led to the Borrower refusing to make further payment to the Geelong facility. The Borrower's Australian properties were placed in receivership and sold as a consequence of the default. The Borrowers sued the Lenders again. Again, the Lenders and Crest lost, although the CA varied the award of damages insofar as Glendon Tan's knowledge was not attributable to VMIII and the other fund not in the present action. This does not concern the present action before me.

6 As a result of the two preceding actions, the Lenders are stuck with the Borrower's shares that they, or rather EFIII, bought with the facility money (that is, money that the Borrower was entitled to as loans). Those shares are worth much less than the original purchase price. Having failed to pass the liability to the Borrower, one of the Lenders, namely, EFIII, commenced an action (Suit 357 of 2021) against Glendon Tan, who was its manager at the material time. Glendon Tan brought a third-party action against Mr Chan and CNP. Glendon Tan had pleaded in his defence to EFIII's claim against him that he had no knowledge of any illegal activity and that the person in charge was

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Mr Chan. In other words, Mr Chan and Glendon Tan were blaming each other for the debacle.

7 Suit 357 of 2021 was settled between EFIII and Glendon Tan. Consequently, Glendon Tan discontinued his third-party claim against Mr Chan and CNP, but this action in Suit 355 of 2021 continues to trial. Here, the Lenders allege that CNP was negligent in failing to properly advise them about the loan facility and the legal implications arising therefrom. Counsel for the Lenders, Mr Siraj Omar SC submits that CNP was informed at the outset of the engagement with Crest that the loan facility was to be used to purchase the Borrower's shares to prevent its price from falling. Counsel submits that CNP had a duty to advise the Lenders of the impact of s 76 Companies Act on the loan facility, but there is no evidence of any such advice having been given at any time. Since CNP had failed to discharge its duty to properly advise the Lenders about s 76 Companies Act and the loan facility, it was a direct cause of the losses which the Lenders now seek. They claim that they would not have disbursed the monies otherwise. Moreover, counsel submits that there is a material inconsistency between CNP's pleaded position that it did not know that the loan facility was used to purchase the Borrower's shares, and its position at trial that CNP was told of the intention to use the loan facility to purchase shares and had advised against this. According to counsel, since it is not CNP's pleaded case that it had advised the Lenders on the s 76 Companies Act issue and that this advice had been ignored, there is no basis for CNP to claim that the Lenders had intentionally breached the s 76 Companies Act prohibition.

8 CNP disagrees with the Lenders. It claims that at the material time the revised draft and execution versions of the facility agreement were sent to the Lenders on 17 April 2015, its lawyers, Mr Soh and Mr Loh were unaware that EFIII had proceeded to purchase the Borrower's shares with funds that were

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debited under the loan facility. And it was not so informed by the Lenders. Counsel for CNP, Mr Narayanan Sreenivasan SC submits that the Lenders have insufficient evidence to make out their claims against CNP. As the sole witness for the Lenders, Mr Chan's evidence is unhelpful because he has no personal knowledge of any of the relevant matters. Glendon Tan was the person dealing with CNP on behalf of Crest and the Lenders. According to counsel, it is highly suspect that Glendon Tan was not called as a witness for the Lender despite being the person at the centre of these transactions. Counsel argues that in contrast, the evidence from CNP's witnesses, Mr Soh, Ms Tan and Mr Loh indicate that at the material times, CNP had no knowledge that the monies from the loan facility was to be used for the purchase of the Borrower's shares. Counsel further submits that the positions taken by the Lenders, the evidence given on behalf of the Lenders by witnesses such as Glendon Tan in the previous related suits (at [4]–[7] above), and the findings of the court in those suits are material, and when taken into consideration, shows that the present claim against CNP is contrived.

9 In my view, there is no material inconsistency between CNP's pleaded defence and its position at trial. I agree with Mr Sreenivasan SC that CNP's position at trial (that they were told of the initial intention to use the loan facility for the purchase of the Borrower's shares, and had advised against it), is not inconsistent with their pleaded position that they did not know that the loan facility was to be used for the purchase of the Borrower's shares. CNP's case is that having advised against the Lender's initial intention, it accepted the client's subsequent instructions that the loan facility was for working capital. Hence, it did not know that the facility money was used for the purchase of the Borrower's shares. Nonetheless, I should consider whether CNP had indeed advised the

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Lenders against using the loan facility for the purposes of purchasing the Borrower's shares.

10 I find that the evidence (from both witnesses at trial and documentary records) supports CNP's narrative that the loan facility was not for the purposes of a purchase of the Borrower's shares, and was meant for the general working capital of the Borrower. From the beginning of the engagement with CNP (around 5 or 6 April 2015), the documentary evidence appears to show that CNP was aware of the risk of a loan facility being used for the purposes of a share buyback by the Borrower. On 6 April 2015, presumably after taking instructions from Mr Soh to draft the loan facility, Mr Loh sent a first draft of the agreement to Mr Soh (at 12.50pm) observing that as per discussions with Mr Soh previously, the loan was sought from Crest for the Borrower "to undertake action to support its share price". At this stage of the drafting, "general working capital" was not yet inserted as the purpose of the loan agreement. Mr Loh then followed up with a second draft of the agreement (at 9.06pm), with questions like "what is the purpose of the loan, share buyback by [the Borrower]?". Once again, Mr Loh left the purpose of the loan blank, with a marking that appears to indicate that this was to be filled in later on. This is consistent with CNP's account that they were aware of the initial purpose of the loan facility and demonstrates that they were aware of the risks of a share buyback by the Borrower.

11 I accept Mr Soh's account that after receiving this email from Mr Loh about the need to clarify the purpose of the loan, and whether it was a "share buyback by [the Borrower]", he would have been reasonably sure that he "would have called Glendon to clarify the position, and [Glendon] would have told [him] to reflect that the purpose of the loan was to finance [the Borrower's] working capital requirements". Thereafter, Mr Soh testified that he would have

informed Mr Loh to make the necessary amendments to the draft. This is what was reflected in the next drafts sent to the Lenders and the documentary evidence is indisputable. The execution copy of the loan facility sent by CNP to the Lenders (on 17 April 2015 at 6.37pm) contains a preamble that the loan facility was "to be utilised by the [Borrower] for general working capital". The "purpose" of the loan facility was also defined to mean utilisation "by the [Borrower] for general working capital". This was similar to the previous drafts that had been circulated by CNP to the Lenders as well, for instance, the marked-up draft sent by CNP to the Lenders on 7 April 2015 (at 6.21pm). Nowhere in the loan agreement was there a suggestion that it was intended to be used for the purchase of the Borrower's shares.

12 I accept that people who intend to break the law normally do not sign a confession in advance. But the contemporaneous documentary evidence corroborates Mr Soh's account of events and I accept that this shows that CNP was aware of the s 76 Companies Act prohibition against financial assistance for share buybacks and had advised the Lenders accordingly. Indeed, this was what Mr Soh had done years ago on another transaction with Crest, when in January 2012, he had given advice to Glendon Tan's predecessor, Ms Angela Tan, that s 76 Companies Act "expressly prohibits a company from giving financial assistance… in connection with the acquisition by any person of shares in the company". There is no evidence that Mr Soh knew that the Lenders were using the description "general working capital" as a façade for its illegal activity. Mr Glendon Tan could have given such evidence, but he saved himself by settling with the Lenders in their suit against him.'

13 The evidence of the other witnesses supports CNP's version of events. Mr Loh gave evidence that it was most likely that Mr Soh had told him that the purpose of the loan facility would be for "working capital" as reflected in the

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various subsequent drafts of the loan agreement. Mr Loh also gave evidence that the first time he was told that the Lenders had used the loan facility to purchase the Borrower's shares was in November 2015. I accept this as Mr Loh's notes (dated 3 November 2015) from a meeting with Mr Soh, Glendon Tan, and a representative from the Borrower, his email to Mr Soh (dated 3 November 2015) and a follow-up email to Mr Soh (dated 11 November 2015) reflects this. Ms Tan testified that she was told by Mr Soh sometime in December 2015 that contrary to the loan facility funds being used as working capital by the Borrowers (as per the executed agreement), they had been used by the Lenders to purchase the Borrower's shares. I accept her testimony as it is corroborated by the exchange between herself and Mr Loh on 5 January 2016, where she assured Mr Loh that they had no idea the loan facility funds would be utilised in the manner that it was.

14 I do not think "general working capital" is a red herring. Although the Lenders did provide a term sheet (dated 6 April 2015) to CNP (on 17 April 2015 at 5.14pm) that contains a security which was to be a "pledge of [the Borrower's] shares purchased through Fund", that is not helpful to the Lenders. As explained (at [10]-[11] above), the evidence shows that after Mr Loh's email to Mr Soh (on 6 April at 9.06pm) questioning the purpose of the loan facility, Mr Soh spoke to Glendon Tan, and with Glendon Tan's confirmation, the next draft sent to the Lenders on 7 April at 6.21pm reflected the purpose of the loan agreement as being for "general working capital". In my view, the term sheet (dated 6 April 2015), is the real red herring. In any event, it is illogical for the general working capital of the Borrower to solely consist of the usage of most of the $20,000,000 loan to be for share buybacks. Furthermore, the term sheet itself is ambiguous. It states that the loan was "to fund the general working capital", and that as part of cash control, "funding from the Lender shall be

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remitted directly to the designated bank account or in a form mutually agreed by both parties". This is different from how the money was in fact disbursed. Namely, by EFIII purchasing the Borrower's shares, in contravention of the disbursement mechanism in the facility agreement.

15 The money was disbursed against the terms of the facility agreement. Clause 7 of the execution copy sent by Mr Loh to the Lenders (on 17 April 2015 at 6.37pm) reads as follows:

> 7 Disbursement
>
> 7.1 Subject to the Disbursement Request being in order and to the terms of the Disclosure Letter, if any, and the results of the [Lenders'] due diligence on the Group and/or the Properties being acceptable to the [Lenders], the [Lenders] will procure the Disbursement of the Loan, by way of bank transfer, directly to the Company Account, as soon as practicable and in any event not later than 3 Business Days following receipt of the Disbursement Request.

EFIII directly purchased the Borrower's shares in the open market beginning from 16 April 2015 to 24 August 2015. 13 out of 14 such transactions (totalling $15,621,790.53 expended) were carried out by 6 July 2015, contrary to Clause 7.1, where the loan was to be disbursed to the Borrower's bank account by way of bank transfer. All that was done even before the loan facility was even executed on 21 July 2015 (which was then backdated to 16 April 2015). This behaviour indicates that the Lenders had no intention of disbursing the money legitimately as a loan. The first disbursement took place on 16 April 2015, before CNP had sent over the execution documents to the Lenders on 17 April 2015. It was also before the Lenders had sent CNP the executed term sheet.

16 The crux of the Lenders' case is based on the testimony of Mr Chan, and the claims made by Glendon Tan. With respect to the former, I am not satisfied

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that Mr Chan's testimony is of much use to the Lenders' case. It is not disputed that Glendon Tan was the middleman between the Lenders and the Borrower. He found, made, and managed the facility. He instructed CNP for the legal aspect of the transaction. Mr Chan only came into the picture "at the tail end", when he dealt with Mr Soh on or around 23 December 2015, after the Borrower had effectively "indicated that they would not be paying". In this connection, Mr Chan cannot give a personal account as to the actual interactions between Glendon Tan and CNP, or for that matter, Glendon Tan and the Borrower. His evidence is that he had no knowledge of what Glendon did, and that only Glendon Tan himself would know what instructions and advice were given by Mr Soh.

17 Evidence that CNP had not advised against share buyback has to be given by Glendon Tan. Mr Chan is not a reliable witness when it is in his interests to blame CNP as the last entity left to blame. Mr Chan's excuse that Glendon Tan has breached his "personal trust" and that there was "broken trust" between them is not an adequate reason. In fact, Mr Chan himself acknowledged that Glendon Tan had been "determined by the court as dishonest", therefore, there was no value he could add to the present case. That is all the more reason I should not accept Glendon Tan's account, without him being made available for cross-examination. If Mr Chan cannot trust Glendon Tan to be truthful in court, he should not have settled with Glendon Tan out of court. The facts may have been clearer had Glendon Tan's testimony been pitched against that of Mr Soh.

18 Finally, another important part of the Lenders' case is the fact that there is a lack of written records showing that advice had been given by Mr Soh to the Lenders (as CNP now claims is likely to have happened). Counsel for the Lenders submits that this lack of any "written record of any such advice" is

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indicative that CNP had never advised the Lenders on the impact of s 76 Companies Act on the intended usage of the loan facility for the purchase of the Borrower's shares. Counsel further argues that the lack of written record of Mr Soh having expressed his surprise that the Lenders had used the funds to acquire the Borrower's shares is another factor that must be counted against CNP. I agree with counsel in part. The present case is a good example of why it is important for lawyers to keep proper written records of discussions held, and advice rendered to clients. However, the lack of written records from Mr Soh is but one factor to be considered and is not fatal to CNP's case here. In my view, other contemporaneous documents (as at [10]–[15] above) sufficiently supports CNP's claim that advice on s 76 Companies Act had been rendered to the Lenders.

19 Notwithstanding the above, I must add that a consideration of the previous suits the Lenders were involved in is inevitable. I agree with counsel for CNP that the findings from the previous suits are relevant for the present action. This is especially so for findings relating to Glendon Tan, the Lenders and their related entities. Findings from the previous suit such as Glendon Tan being found by the CA to have knowledge of both the statutory prohibition against share buyback and his knowledge of the contravention of such prohibition (*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] 1 SLR 1337 ("*Crest Capital*") at [83]–[98]), and that his knowledge was attributable to Crest and EFIII (*Crest Capital* at [99]–[110]), are hurdles that the Lenders must overcome to make out their case against CNP. The Lenders cannot claim that they were unaware of the statutory provision against share buyback (due to CNP's negligence in not advising them so),

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without first providing an adequate explanation for these findings. In my view, no satisfactory explanation was provided by the Lenders.

20 In *International Healthway Corp Ltd v The Enterprise Fund III Ltd and others* [2018] SGHC 246 at [32] before Hoo J, the Lenders took the position that "nothing in the [loan facility] stated that the funds had to be used for the acquisition of the [Borrower's] shares". They also claimed that "the purchase and pledge of the [Borrower's] shares was never a term of the [loan facility], and was at best a separate agreement reached after the [loan facility] had been granted". This is a markedly different case from the one the Lender seeks to run now. The Lenders cannot now claim that the loan facility was always intended to be for the purchase of the Borrower's shares (and that CNP knew of this all along), without first providing an adequate explanation for this inconsistency. In my view, no satisfactory explanation was given.

21 For completeness, I agree with counsel for CNP that there was no duty for CNP to advise on the loan facility well into the November and December 2015 period, in contrast to the closing submissions of Mr Omar SC. It was never part of the Lenders' pleaded case that CNP had a continuing duty to provide advice on the legality and enforceability of the loan facility, long after the loan agreements were executed. As I understand the Lenders' pleadings, the Lenders' complaint about CNP really centres on the omissions that took place prior to the execution of the agreements. Therefore, I agree with counsel that CNP's duty to provide further drafting and advice ended on 3 August 2015 when the invoice was rendered to the Lenders. There must be clear and explicit evidence that the Lenders' reliance on CNP for this legal issue continues after the job has been done, but there is none.

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22 Given the reasons above, I am not satisfied that the Lenders have made out their claim against CNP for negligence. The Lenders' claim against them is therefore dismissed.

23 I will hear parties on costs if they are unable to agree.

- Sgd -
Choo Han Teck
Judge of the High Court

Siraj Omar SC, Allister Tan, Joelle Tan (instructed counsel), Richard Yeoh Kar Hoe and Ng Wei Jin (David Lim & Partners LLP) for the plaintiffs;
Narayanan Sreenivasan SC, Ang Mei-Ling Valerie Freda, Lim Wei Liang Jason and Tan Kai Ning Claire (K&L Gates Straits Law LLC) for the defendant.

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