DALAM MAHKAMAH TINGGI MALAYA DI JOHOR BAHRU

DALAM NEGERI JOHOR DARUL TAKZIM, MALAYSIA

SAMAN PEMULA JA-24NCvC-200-05/2020

ANTARA

1. SWM GREENTECH Sdn. Bhd.
(Company No: 1068667-X)

2. SWM ENVIRONMENT Sdn. Bhd.
(Company No: 380208-V) …PLAINTIF-PLAINTIFF

DAN

1. KETUA PENGARAH JABATAN PENGURUSAN SISA PEPEJAL NEGARA

2. KERAJAAN MALAYSIA … DEFENDAN-DEFENDAN

YA DATO' FREDRICK INDRAN X.A. NICHOLAS
Judicial Commissioner
High Court of Malaya
at Johor Bahru

Date: 16 December 2020

JUDGEMENT

The Introduction

[1] This is an Originating Summons ('**OS**') dated 6.5.2020 filed by the Plaintiffs seeking declarations pertaining to an indemnity clause, undertaken by the 2nd Defendant above named, found in an Operational & Maintenance Agreement dated 17.7.2017 ('**O & M Agreement**'), between the parties hereto.

The Matrix

[2] What follows is the statement filed by the Plaintiffs pursuant to Order 7, Rule 3(1) of the Rules of Court 2012 which ***inter alia*** incorporates the grounds of this application:

(i) The Plaintiffs had received a letter of demand dated 2/4/2018 from solicitors acting for SAJ Ranhill Sdn Bhd ('**Ranhill**'), who are a water treatment concessionaire who claimed loss and damage to its water treatment business located at Sungai Benut, as a result of what they allege to be pollution and contamination of the river water caused by the escape of

pollutants from the Landfill and Facility operated by the Plaintiffs.

(ii) The Plaintiffs refuted the claims and demands made by Ranhill.

(iii) Ranhill consequently instituted legal action at the Johor Baharu High Court Civil Suit: JA-22NCvC-189-09/2018 ('**Ranhill Action**') for damages as a result of what they allege to be tortious conduct on the part of the Defendants [Plaintiffs in this action] in negligence, nuisance and the principles of *Rylands v Fletcher.*

(iv) The Ranhill action is currently in the midst of trial.

(v) The Plaintiff aver that the demand and the subsequent action filed by Ranhill for damages has triggered the Indemnity in Clause 13.4 and the Defendants are therefore liable to indemnify the Plaintiffs in the event any order or judgment is made against the Plaintiffs in the Ranhill action.

The Plaintiffs' Case

[3] I can do no better than to set out in full the Plaintiff's arguments and supporting authorities as presented by their learned Counsel at the hearing of this matter before this Court on 13.10.2020. To do any less

and/or to abridge or truncate the same would be an unjustified aberration of his clear and concise presentation of the Plaintiffs' position in this case.

[4] To this end, I will shadow his submissions as follows:

<u>Declaratory Orders - Applicability</u>

(i) It is trite that to seek a declaration, there is no prerequisite that there exists an existing cause of action but the Plaintiffs must have an interest in the issue at hand.

(ii) What is paramount is the Plaintiffs possessing legal standing in their declaration sought and that the declarations are not hypothetical or academic.

In the present case, the Plaintiffs are a party to the O & M Agreement as are the Defendants and have rights and interest in the effect of the construction of Clause 13.4 and its application.

[See: ***AFFIN BANK Bhd v MOHD KASIM IBRAHIM*** [2013] 1 CLJ 465, 482].

(iii) The declaration is also to ascertain the rights of the Plaintiffs as an indemnity holder under Clause 13.4 and the liability of the Defendants as an indemnitor or indemnity provider.

(iv) In the end, it is without doubt that the Court's jurisdiction in granting declaration is unlimited and always subject to its own discretion.

[See: ***DATO' RAJA IDERIS BIN RAJA AHMAD v TENG CHANG KHIM*** [2012] 5 MLJ 490, 499].

(v) For avoidance of any doubts, the declaration of rights that are sought in this Summons is not for future rights. It is a declaration on the construction of Clause 13.4 and in light of the demand and claim made by SAJ Ranhill on the Plaintiffs that triggered the liability to indemnify under Clause 13.4.

(vi) The Plaintiffs were appointed to manage incoming waste from 3 districts in Johor by spreading, levelling and compacting the waste on to the available landfill space at the Landfill. The Plaintiffs were initially appointed by Majlis Daerah Simpang Renggam to carry out this function of the local authority, and thereafter for the Federal Government in 2016.

(vii) In July 2016, the Plaintiffs were formally appointed by the 2nd Defendant as the operators of the Landfill through an O&M Agreement dated 17/7/2016 with the 2nd Defendant together with Solid Waste and Public Cleansing Management Corporation.

(a) Under the O & M Agreement, the 2nd Plaintiff was to operate and mange the Landfill and the solid waste management facility constructed by the 2nd Defendant at the Landfill site ('**the Facility'**). The O & M commenced on 1/11/2016.

(b) The 2nd Defendant represented the 1st Defendant whose function is as statutory regulators and controllers of solid waste under the Solid Waste and Public Cleansing Management Act 2007 (Act 672).

(c) Through a Novation Agreement, the 2nd Plaintiff had subsequently novated all its rights and obligations under the O & M Agreement to the 1st Plaintiff.

(viii) The Plaintiffs in short were carrying out the functions as operators of the Landfill and the Facility to treat solid waste for and on behalf of the Defendants.

(ix) The Plaintiffs had received a ***demand*** dated 2/4/2018 from the solicitors acting for SAJ Ranhill, who are a water treatment concessionaire whose treatment plant is located at Sungai Benut, making claims for damages purportedly for losses suffered by them as a result of what they allege to be pollution of the Sungai Benut caused by the escape of pollutants/contaminants from the Landfill and the Facility that

was operated by the Plaintiffs for and on behalf of the Defendants.

(x) SAJ Ranhill instituted legal action against the Plaintiffs at the Johor Bahru High Court Civil Suit No.: JA-22NCvC-189-09/2018 ('**SAJ Ranhill action**') for damages as a result of what they allege to be tortious conduct on the part of the Defendants in negligence, nuisance and the principles of ***RYLANDS v FLETCHER***.

The Plaintiffs refer to the relevant background facts averred to in paragraphs 8-22 of its Affidavit in Support. The Plaintiffs defended this claim and are in the midst of trial before the High Court of Johor Bahru.

(xi) It is also pertinent at this point to note that the Defendants were, at all material times, made aware of the ***demand*** issued by SAJ Ranhill and the SAJ Ranhill action that was subsequently instituted.

Construction of clause 13.4 O & M Agreement

(xii) The Plaintiffs in prayer (1) of the Summons seek a declaration on the true construction of Clause 13.4 of the O & M Agreement.

(xiii) The Construction of clause 13.4 is a necessary incidental exercise for which the interpretation and construction will play a part in determining the Plaintiff's primary relief to seek a declaration on its rights flowing from the said Clause 13.4 as an indemnity holder.

(xiv) It is in these circumstances that the construction and interpretation of Clause 13.4 is pertinent at the outset.

Clause 13.4 of the O & M Agreement reads as follows:

"*Indemnity*

13.4 The Government hereby agrees and ***undertakes to indemnify****, protect and* ***hold the Operator harmless*** *from and against any loss, damage, expense, claim, fine, penalty,* ***demand*** *or liability for pollution or contamination arising out of or connected with the operations under this Agreement where such pollution or contamination is a result (whether directly or indirectly) or any Deficiencies, inclement weather or otherwise caused by any other design and/or structural defect in the Facility, save and except where the Operator through its willful default, omission or gross negligence caused or otherwise materially contributed to the occurrence of such pollution or contamination."*

(xv) The principles of interpretation and construction of contracts is established in numerous cases by the UK Supreme Court and adopted by our apex court. Noteworthy are the UK Supreme Court case of ***RAINY SKY SA v KOOKMIN*** [2012] 1 All ER 1137, which have been adopted by our Malaysian Federal Court in ***SPM MEMBRANE SWITCH Sdn Bhd v KERAJAAN NEGERI SELANGOR*** [2016] 1 MLJ 464, 491-492.

(xvi) The two-pronged principle of interpretation that is gathered from these authorities are that the task of construction is to ascertained the meaning of the contract and the test is an objective one that is to be gleaned from the words used in a particular clause confined to the background knowledge of the parties as is reflected by the agreement.

(xvii) The other principle of construction is that unless there is ambiguity apparent in a particular term, the natural words and meaning should be ascribed to it and in the event there is an alternative construction, then the Court would adopt the one which is consistent with *business common sense.*

(xviii) In a recent decision of the UK Supreme Court in ***WOOD v CAPITA INSURANCE SERVICES Ltd*** [2017] 4 ALL ER 615, 623-624, the Supreme Court was invited to interpret an

indemnity clause to determine when liability of the indemnitor/indemnity provided is triggered. The Supreme Court adopted and followed the ratio in ***RAINY SKY*** *(supra).*

(i) Lord Hodge providing the leading judgment adopted Lord Clarke's approach in ***RAINY SKY*** that in the interpretation of clauses, what is viewed to be unitary exercise of interpretation is adopted. Where rival meanings are apparent, the Court will give weight to the implication of rival constructions by reaching a view as to which is more consistent with business common sense.

(ii) The Supreme Court also reminded that the Court ought not to lose sight of the possibility that a position may be a negotiated compromise or that the negotiators was not able to agree to more precise terms.

(iii) When interpreting the indemnity clause, the Supreme Court viewed the clause in its contractual context.

(xix) Applying the guidance from ***Wood*** in particular in the context of the construction of an indemnity clause, we breakdown Clause 13.4 in the following manner:

(a) "*undertakes to indemnify*"

In Clause 13.4, the Defendants in essence agreed and undertook to indemnify the Plaintiffs. There is no ambiguity in the *undertaking* that was provided by the Defendants to indemnify. The Plaintiffs now seeks a declaration that the liability under the indemnity has been triggered.

(b) "*hold the Operator harmless"*

- This phrase does not imply that the condition precedent to the liability of the indemnifier is that there must be prior payment by the indemnity holder.

  Lord Goof in ***FIRMA C-TRADE SA v NEWCASTLE PROTECTION AND INDEMNITY ASSOCIATION*** [1991] 2 AC 1, 27-28 held that the rationale behind these words are that the indemnifier holds harmless the indemnity holder against the specified events he promised he would hold the indemnity holder harmless against.

  "…I find myself in agreement with Binghma L.J…, that equity will not override "the clearly expressed contractual agreement of commercial parties", and that the condition of prior payment in the present case constitutes such an agreement. I do not consider that

Mr Sumption has been able to overcome this difficulty, for two reasons.

First of all, I am unable to accept his submission that a condition of prior payment is, at common law, implicit in a contract of indemnity. *I accept that, at common law, a contract of indemnity gives rise to an action for unliquidated damages, arising from the failure of the indemnifier to prevent the indemnified person from suffering damage, for example, by having to pay a third party. I also accept that, at common law, the cause of action does not (unless the contract provides otherwise) arise until the indemnified person can show actual loss or expense. On this basis, no debt can arise before the loss is suffered or the expense incurred; however, once the loss is suffered or the expense incurred, the indemnifier is in breach of contract for having failed to hold the indemnified person harmless against the relevant loss or expense. There is no condition of prior payment; but the remedies available at law (assumpsit for damages, or possibly in certain circumstances the common count for money paid) were not efficacious to give full effect to the contract of indemnity. It is for this reason that equity felt that it could, and should, intervene.* ***If there had been a clear implied condition of prior payment, operable in the relevant circumstances, equity would not have intervened to enforce the contract in a manner inconsistent with that term***. *Equity does not mend men's bargains; but it may grant specific performance of a contract, consistently with its terms, where the remedies at law are inadequate. This is what*

has happened in the case of contracts of indemnity. As a general rule, "Indemnity requires that the party to be indemnified shall never be called upon to pay" (see In re Richardson…); and it is to give the effect to that underlying purpose of the contract that equity intervenes the common law remedies being incapable of achieving that result."

[per Lord Goff at pg 35F-36C]

- It can be succinctly stated that the actual obligation of the indemnitor/indemnifier is to prevent the indemnity holder from sustaining any loss or expense in the first place rather than merely to reimburse the indemnity holder once he has paid or sustained the loss. This was held by the High Court in ***DURLEY HOUSE LTD v FIRMDALE HOTELS PLC*** [2014] EWHC 2608, para 108.
- It was to ensure that the indemnity holder would never be called upon to pay the third party. [see in ***Re RICHARDSON*** [1911] 2 KB 705, 716].
- The distinctive feature in Clause 13.4 from the indemnity clauses in other cases is that the clause is not to be construed as a "pay to be paid" provision as was the case of ***FIRMA C-TRADE*** *(supra)*.

- In Clause 13.4, the specified events include the issuance of a ***demand*** and on such issuance, the obligation to hold the Plaintiffs harmless is triggered.

(c) *"indemnify…against any loss, expense,…demand"*

Following what has been submitted above, the indemnity in Clause 13.4 is not triggered only by a loss or damage through a claim or from the finding of liability against the indemnity holder. By the express words in Clause 13.4, the indemnity and the obligation to hold the Operator harmless is triggered by the issuance of a ***demand***.

- A demand, once made, leads or is capable of leading to litigation. This envisages a claim being brought and certainly expenses incurred by the indemnity holder.
- It is these loss and expense flowing from the demand that the indemnitor/indemnifier is supposed to indemnify.
- On a simple construction of the words used, the indemnity and the liability to indemnify is triggered once a demand is made.
- The Supreme Court in ***WOOD*** *(supra)* held that on a contractual interpretation of the indemnity clause, the

triggering event to give rise to the liability to indemnify can be found from the words used in the clause, in the present case, Clause 13.4.

- There is no ambiguity or uncertainty in the use of the words and the intent of the parties as is reflected by the words used.

  [See: ***WOOD*** at para 10-13; 28, 239 & 40].

(xx) It is Plaintiff's submissions that on an objective interpretation, applying the business common sense approach or the *"Hoffman's principle"* as laid down in ***ICS v WEST BROMWICH BUILDING SOCIETY***, the natural and ordinary meaning of the words used in Clause 13.4 irresistibly indicates the triggering of the 2nd Defendants liability as an indemnitor/indemnifier by reason of not only the issuance of the demand by SAJ Ranhill but also the institution of the SAJ Ranhill action. The 2nd Defendant by the indemnity intended, by the words used, to save the operator harmless in the event of a third-party demand or claim on the operations of the Landfill or the Facility.

Declaration of Liability of Indemnity

(xxi) The right to seek a declaration can be traced from the decision of In Re Richardson [1911] 2 KB 705 where the Court of Appeal held that the liability or the determination of liability of an indemnifier can be made even before any actual loss have been suffered by the indemnity holder. The rationale for this seem to be that the indemnifier has given an express undertaking to hold harmless the indemnity holder in the occurrence of an event and on the occurrence, the liability to indemnify crystalizes.

(xxii) In ***Re RICHARDSON***, the Court held as follows:

"It is settled at common law that, given a contract of indemnity, no action could be maintained until actual loss had been incurred. The common law view was first pay and then come to court under your agreement to indemnify. In equity that was not the view taken. Equity has always recognized the existence of a larger and wider right in the person entitled to indemnity. He was entitled, in a Court of Equity, if he was a surety whose liability to pay had become absolute, to maintain an action against the principal debtor and to obtain an order that he should pay off the creditor and relieve the surety. Another way in which the indemnity was

often worked out in the Court of Chancery was by ordering a fund to be set apart to meet the liability as and when it arose. So that in the view of the Court of Equity it was not necessary for the person entitled to the indemnity be ruined by having to pay the full amount in the first instance. He had full power to take proceedings under which fate might be averted, and he might substantially protect himself and secure his position by coming to the Court…"

[per Cozens-Hardy M.R. at pg 709-710]

(xxiii) The right to seek a declaration was also noted in the judgment of Fletcher Moulton LJ in ***Re RICHARDSON*** when he held as follows:

"…the rule in Chancery was somewhat different, and yet, to my mind, it emphasizes the fundamental principle that you must have paid before you have a right to indemnity because the remedy which equity gave was a declaration of a right. You could file a bill against the principal debtor to make him pay the debt so that you would not be called upon to pay it, and then you obtained a declaration that you were entitled to an indemnity. You could in certain cases have a fund set aside in order that you might be indemnified, to avoid the necessity of your having to pay and then to sue for the

money you had paid, which perhaps would not repair your loss and credit even if it discharged the debt. But I do not think that equity ever compelled a surety to pay money to the person whim he was surety before the latter actually paid. He might be ordered to set a fund aside, but I do not think that he could be ordered to pay…"

[per Fletcher Moulton LJ at pg 712-713]

(xxiv) The merits of seeking a declaration of the right to an indemnity without the indemnifier facing a monetary decree had been laid down by a number of authorities.

(a) In ***McINTOSH v DELLLWOOD*** (No. 3) (1930) 30 SR (NSW) 332, 334 the New South Wales Court held that on an indemnity where there has been a presentation of a demand which the indemnifier has contracted to pay, then without liability being crystalized against the indemnity holder, the Court is entitled to find liability against the indemnitor/indemnifier.

(b) In ***McINTOSH v DELLWOOD*** (No. 4) (1930) 30 SR (NSW) 415, 419 the New South Wales Court had succinctly held that on the ascertainment of the contractual obligation to indemnify, relief can be given to the indemnity holder in a setting akin to a *quia timet*

relief. Reference was made a passage in Fry on Specific Performance for specific performance and it would be useful to reproduce the same below:

"Agreements for indemnity, whether taking the form of a covenant or of an executory contract, appeal equally to attract the jurisdiction of the Court by way of specific relief;

…

But where the contract by A is to indemnify B against all claims and demands of C, there is a breach so soon as C makes the claim, and B may here usefully invoke the aid of a Court of Equity to compel A to satisfy his demand to the relief of B, and thus specifically to perform the contract; and accordingly, in such cases, the Court of Chancery entertained jurisdiction."

(c) The ratio in ***McINTOSH*** was adopted by the full Court in Re Dixon [1994] 1 Qd R 7, 20 where the Court had gone on to hold that on the true construction of the deed of indemnity, the obligation that was expressed by the indemnitor was to relieve the indemnity holder (to save harmless in the context of the present case)

by preventing them to pay any liability that may be found against them.

(xxv) The right to apply for and obtain a declaratory order declaring liability on the part of the indemnitor is also found in the case of ***HUGHES-HALLET v INDIAN MAMMOTH GOLD MINES Company*** [1882] 22 Ch D 561, 565 where the Court held as follows:

"There have been, undoubtedly, cases in which, where a contract for indemnity existed, and a right to sue upon that contract had arisen, the Court has declared the right to indemnity generally, and has put matters in such a train that when the subsequent right to indemnity should arise, the indemnity might be worked out. Some forms of judgments in that class of cases are to be found in the last edition of Seton on Decrees, and they ***shew that where a person has taken shares for another, and a call has been made which has not been met by the person liable to pay it, the trustee who is entitled to an indemnity may obtain a declaration of his title generally, and may possibly obtain liberty to apply from time to time to work it out.***"

[per Fry J at pg 565]

(xxvi) It is in these circumstances that the Plaintiffs respectfully submit that the Plaintiffs are entitled to a declaration that by reason of the demand issued by SAJ Ranhill against the Plaintiffs followed by the institution of legal proceedings currently pending in the High Court, the indemnity in Clause 13.4 has been triggered and the 2nd Defendant's liability to indemnify is crystallized.

The Plaintiffs would be entitled, after having such a declaration ordered, be allowed to apply under the liberty to apply to work out any monetary orders made against them in the SAJ Ranhill action to be claimed from the Defendants. This is in line with the decision in ***HUGHESS-HELLAT*** *(supra)*."

The Defendants' Resistance

[5] The Defendants advanced 2 grounds to resist this OS:

(i) that this application is premature; and

(ii) that the Defendants should have been made parties in the SAJ Ranhill Action.

The Plaintiffs Response

[6] (a) On the construction of Clause 13.4, the summons to seek the declarations is not premature. The right to obtain a declaration of the Plaintiffs rights and entitlement is available and can rightfully be determined by this court.

(b) The declaration is not of a future right but a present entitlement as the indemnity has been triggered.

(c) It was open to the Plaintiffs to include the Defendants as 3rd parties in the SAJ Ranhill action but it does not preclude the Plaintiffs to seek the declarations now sought on the strength of the undertaking by the Defendants to indemnify the Plaintiffs.

(d) The Plaintiffs are not seeking to assign blameworthiness on the claims and allegations advanced by SAJ Ranhill. It merely seeks to enforce their rights under Clause 13.4 of the O & M Agreement which unequivocally expresses the Defendants undertaking to indemnify the Plaintiffs in the event a demand is made against them in connection to the operations under the O & M Agreement.

The Conclusion

[7] (a) In the light of the facts and the law stated above, this Court stands persuaded that the declaratory reliefs sought by the Plaintiffs are legitimately due and available to the Plaintiffs both in law and in equity;

And

(b) This Court is satisfied that the threshold requirements under section 41 of the Specific Reliefs Act 1956; read together with Order 15, Rule 16 of the Rules of Court 2012 have been met.

[8] In the circumstances, the following are the reliefs now ordered by this Court:

(i) A declaration that upon the true construction of the Indemnity undertaken by 2nd Defendant in Clause 13.4 of the O & M Agreement dated 17/7/2017, that the 2nd Defendant will hold harmless and indemnify the 1st and the 2nd Plaintiffs of any claims, demands, penalty, liability, loss expenses and damages in relation to any pollution or contamination

connected to the operations under the O & M Agreement dated 17/7/2017;

(ii) A declaration that by reason of the demand, claim and action instituted by SAJ Ranhill Sdn Bhd against the Plaintiffs in Johor Bahru High Court Civil Suit No JA-22NCvC-189-09/2018, the Indemnity in Clause 13.4 of the O & M Agreement dated 17/7/2017 has been triggered and becomes enforceable;

(iii) A declaration that the Defendants are liable to indemnify the Plaintiffs under Clause 13.4 of the O & M Agreement dated 17/7/2017 for and against any judgment or order that may be decreed by the High Court of Johor Bahru in Civil Suit No JA-22NCvC-189-09/2018 against the Plaintiffs;

(iv) That parties be at liberty to apply;

(v) There be no costs awarded for this application.

-Signed-

…….....

(YA Dato' Fredrick Indran X.A. Nicholas)
Judicial Commissioner
High Court of Malaya at Johor Bahru

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