Airtrust (Singapore) Pte Ltd *v* Kao Chai-Chau Linda and another suit
[2014] SGHC 27

Case Number	: Suit No 477 of 2012 (Registrar's Appeal No 246 of 2013; Summons No 4420 of 2013) and Suit No 1015 of 2012 (Registrar's Appeal No 247 of 2013; Summons No 4419 of 2013)
Decision Date	: 14 February 2014
Tribunal/Court	: High Court
Coram	: George Wei JC
Counsel Name(s)	: Daniel Chia / Kenneth Chua (Stamford Law Corporation) for the plaintiff in Suit No 477 of 2012; Manoj Pillay Sandrasegara / Joel Chng / Stephanie Yeo (WongPartnership LLP) for the plaintiff in Suit No 1015 of 2012; Jimmy Yim SC / Daniel Soo Ziyang / Andrew Lee / Alison Tan Ying Xiang (Drew & Napier LLC) for the defendant in Suit No 477 of 2012 and 1st defendant in Suit No 1015 of 2012.
Parties	: Airtrust (Singapore) Pte Ltd — Kao Chai-Chau Linda

Civil procedure – Third Party Proceedings

Companies – Substantial Shareholders

Companies – Directors – Duties

Tort – Conspiracy

14 February 2014 Judgment reserved.

George Wei JC:

Introduction

1 There are two appeals and two applications before the court. The two appeals are against the decision of the learned Assistant Registrar Paul Chan ("the AR") concerning the defendant's commencement of third party proceedings. The proceedings arise out of two separate but related actions brought by Airtrust (Singapore) Pte Ltd ("AT"). The first, Suit No 477 of 2012 ("S 477/2012"), is brought by AT against Linda Kao Chai-Chau ("Linda"), who was formerly the managing director of AT from 1996 up to 2012. Suit 477/2012 is a derivative action brought by Carolyn Fong ("Carolyn"), a shareholder of AT. The second, Suit No 1015 of 2012 ("S 1015/2012"), is brought by the Receivers and Managers ("RMs") of AT. Suit 1015/2012 is brought against Linda and 15 other individuals (including corporate individuals).

2 The key legal issue in this case is whether illegality precludes a claim for indemnity or contribution against a joint tortfeasor. Addressing this issue requires a proper understanding of the development of the law pertaining to joint tortfeasorship and the applicability of case authorities which I will discuss in some detail in this judgment.

3 After hearing the parties, I am allowing the appeals for the commencement of third party proceedings. Consequently, the two applications to amend the third party notices are also allowed.

The Facts

4 Linda was appointed as managing director of AT some time in 1996 by its majority shareholder and then Chairman, Peter Fong ("PF"). PF passed away on 25 April 2008. Suit 477/2012 is a claim against Linda for breach of fiduciary duty in respect of certain transactions which mostly took place whilst PF was still alive and Chairman of AT. After PF's death, Carolyn obtained leave to institute a derivative action on behalf of AT against Linda in respect of these alleged breaches. In granting leave under section 216A of the Companies Act (Cap 50, 2006 Rev Ed) ("CA"), the High Court in Originating Summons No 505 of 2010, found that PF was the controlling mind and will of AT at the material times (see *Fong Wai Lyn Carolyn v Airtrust (Singapore) Pte Ltd and another* [2011] 3 SLR 980). The decision of the High Court to grant leave was subsequently affirmed by the Court of Appeal. The essence of the defence raised by Linda in S 477/2012 was that the transactions complained of were carried out in accordance with the instructions of PF.

5 After S 477/2012 was commenced, Ernst & Young was appointed RMs of AT on 17 January 2012. The appointment was made pursuant to an application by Carolyn. A consent order was subsequently granted pursuant to an apparent agreement between Carolyn and Linda. After their appointment, the RMs took the view that there was evidence of other diversions made by Linda and others to the detriment of AT. These largely concern transactions or events occurring after the death of PF. For this reason, the RMs commenced S 1015/2012, where it was alleged that Linda and 15 others had been in a conspiracy to divert business away from AT. A claim was also brought for breach of fiduciary duty. Linda was, therefore, the defendant in both S 477/2012 and S 1015/2012.

6 The *modus operandi* of the alleged breaches in the two Suits is similar, the main difference being that they concern different transactions. Those complained of by the RMs are mainly concerned with events occurring *after* the death of PF. The defence raised by Linda in both actions is similar – that she had been authorised to act as she did by PF. Different law firms have been engaged to represent AT in the two Suits.

7 Given the multiple actions, I set down certain terms of reference for ease of understanding. Suit 477/2012 will be referred to as "the Derivative Action" while Suit 1015/2012 will be referred to as "the RM Action". I refer to both suits collectively as "the two Suits". For the sake of clarity, the plaintiff in S 477/2012 will be referred to as "AT (Carolyn)", while the plaintiff in S 1015/2012 will be referred to as "AT (RM)". When needed, I refer to both plaintiffs collectively as "the Plaintiffs". The position taken by AT (Carolyn) and AT (RM) in respect of the defence raised by Linda whilst similar is not identical, as will appear below.

Procedural History

8 In the Derivative Action, Linda applied by way of Summons No 2990 of 2013 ("SUM 2990/2013") for leave to serve a third party notice against the Estate of PF for an indemnity (although there is also a further application to amend the notice to include a claim for contribution, as will be elaborated below). AT (Carolyn) objected to the application.

9 In the RM Action, Linda commenced third party proceedings against the Estate of PF on 19 April 2013. On 12 June 2013, the RMs applied by way of Summons No 2989 of 2013 ("SUM 2989/2013") to set aside the third party proceedings.

10 The AR on 19 July 2013 found for AT (RM) and granted SUM 2989/2013 to set aside the third party notice. Naturally, he also refused to grant Linda leave to commence third party proceedings in the claim brought by AT (Carolyn), thereby dismissing SUM 2990/2013.

11 Registrar's Appeal No 247 of 2013 ("RA 247/2013") is the appeal by Linda in the RM Action against the decision of the AR setting aside the third party notice (I refer to this third party notice as "the Notice (RM)"). Registrar's Appeal No 246 of 2013 ("RA 246/2013") is the appeal by Linda in the Derivative Action against the AR's decision not to grant leave to commence third party proceedings against the Estate of PF (I refer to this third party notice as "the Notice (DA)"). The subject matter of the two appeals is largely similar in nature – the setting aside or the granting of leave to commence third party proceedings. As mentioned above, there are also two applications to amend the third party notices – Summons No 4420 of 2013 ("SUM 4420/2013") to amend the Notice (RM) (which has already been served), and Summons No 4419 of 2013 ("SUM 4419/2013") to amend the Notice (DA) (which has yet to be served). Both amendments relate to the addition of a claim in contribution (apart from the existing claim in indemnity).

12 The two appeals (and applications) were heard before me on 2 September 2013 and 11 October 2013. At the hearing on 2 September 2013, the matters were adjourned for the parties to prepare further submissions on the following question:

> Assuming that the Chairman/Director is the controlling mind, directing will and *alter ego* of the Company, does it follow as a matter of law that any other director who blindly follows the instructions of the *alter ego* director will not be in breach of her fiduciary duty or have any liability in law?

I heard further submissions from counsel on 11 October 2013.

13 The Estate of PF, which has its own legal representation, has not taken any part in either Suit. They have not applied to set aside the third party notices or objected to the commencement of third party proceedings. For the sake of clarity, after these appeals were heard, AT (Carolyn) applied for leave to hand over conduct of the Derivative Action to the RMs. The RMs took a neutral position in this application, and the matter came before me on 4 November 2013. At the conclusion of that hearing, judgment was reserved.

The decision below and Linda's claim against the third party

14 Linda's defence in the two Suits was based on her assertion that all the transactions complained of were in fact carried out pursuant to the oral instructions and/or "understanding" of PF. On this basis, Linda applied for leave to serve a third party notice against the Estate of PF seeking an indemnity. In the case of the RM action, Linda actually commenced third party proceedings against the Estate of PF in which she also sought an indemnity. As mentioned above, in both actions, Linda also seeks a claim in contribution from the Estate of PF pursuant to her applications to amend the third party notices. These amendments were not before the AR in the hearing below.

15 At the hearing on 19 July 2013, the AR (delivering oral judgment), found for AT (Carolyn) and AT (RM) on the ground that:

> … it is, in my view, impossible for [Linda] to claim an indemnity or a contribution from [PF] as a matter of law. An indemnity or contribution will only arise if the court finds that [Linda] breached her fiduciary duties to AT. If she has so breached her fiduciary duties, it must also mean that the requisite knowledge to find liability must be imputed to her. This knowledge would by itself preclude [Linda] from claiming an indemnity or contribution under the law of agency.

16 The central point in Linda's case is that all the "business opportunities" that she was alleged to have diverted were not in fact business opportunities for AT. In each case, it is claimed that Linda,

acting on the instructions of PF, had received and disbursed funds "on behalf of [PF's] friends and associates as a favour to them". In relation to the transactions which were not made on the specific instructions of PF, Linda's case is that they were made pursuant to the same "standing instructions of or understanding of" PF, who was then the controlling mind and will of AT when the instructions were given or when the understanding came about.

17 On this basis, Linda's primary defence to the two Suits is that there was no breach of fiduciary or director's duties owed by her as managing director to AT. The alleged business opportunities were not the business opportunities of AT and there could not have been a breach or conspiracy given that she was merely following the instructions of PF, who was then the majority shareholder, Chairman and controlling mind and will of AT.

18 Linda's concern, however, was that the court might after the trial find that she was still liable for breach of her director's and fiduciary duties even though she had believed that she was acting pursuant to the instructions (standing or otherwise) or understanding of PF. To put the argument at its most basic, there was a possibility that the court might find (as a matter of law) that Linda's duties as a managing director were owed to AT, notwithstanding that PF was the majority shareholder and Chairman of AT. The trial court might not necessarily agree that this was a case where PF should be regarded as the *alter ego* or directing mind of AT such that his instructions were effectively the instructions of AT. Alternatively, even if it is accepted that PF was the *alter ego* of AT, it did not necessarily follow that this would be sufficient to absolve Linda of her liability for breach of her director's and fiduciary duties. That being so, the argument was that Linda had a good basis for commencing third party proceedings against the Estate of PF for an indemnity or contribution in the event that she was found liable notwithstanding the fact that she was found to have acted on the instructions of PF.

The issues before this court

19 The procedure regarding the issuing of third party notices is found in O 16 r 1(1) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("ROC"), which provides that:

> **Third party notice (O. 16, r. 1)**
>
> (1) Where in any action a defendant –
>
> (a) claims against a person not already a party to the action any contribution or indemnity;
>
> (b) claims against such a person any relief or remedy relating to or connected with the original subject-matter of the action and substantially the same as some relief or remedy claimed by the plaintiff; or
>
> (c) requires that any question or issue relating to or connected with the original subject-matter of the action should be determined not only as between the plaintiff and the defendant but also as between either or both of them and a person not already a party to the action,
>
> then, subject to paragraph (2), the defendant may, after having entered an appearance if required to do so under these Rules, issue a notice in Form 16 or 17, whichever is appropriate (referred to in this Order as a third party notice), containing a statement of the nature of the claim made against him and, as the case may be, either of the nature and grounds of the claim

made by him or of the question or issue required to be determined.

20 Where third party proceedings have been commenced, the court possesses the power to terminate the third party proceedings either upon a third party's application for directions under O 16 r 4(3) or at any time under O 16 r 6.

21 In the present case, it will be recalled that the Estate of PF (the intended third party) has not applied to terminate the third party proceedings or to object to the application for leave. The objection instead is solely from the Plaintiffs. As explained in *Singapore Civil Procedure 2013* (G P Selvam gen ed) (Sweet & Maxwell Asia, 2013) ("*Selvam on Singapore Civil Procedure*") at para 16/4/4, if either the plaintiff or the third party decides to object, evidence is to be adduced by way of affidavit to support the grounds of the objection. In this context, it is also stated at para 16/4/5 that:

> … care should be taken that the plaintiff is not unduly embarrassed or put to additional expense, delay or difficulty, for he has nothing to do with the questions which have arisen between the defendant and the third party.

22 On this basis, Linda submits that whilst the Plaintiffs are entitled to object, this can only be on the basis that the third party proceedings will embarrass or delay AT or are too complicated to be properly tried within the original action or may result in the action being unduly delayed. [note: 1]

23 The central argument of AT (Carolyn) and AT (RM) is that the third party proceedings are unnecessary since the claim against the third party replicates the core of the defence pleaded in the two Suits. To put the matter another way, if Linda's claim against the third party is valid, she will not in any event be liable to the Plaintiff for breach of fiduciary and director's duties, or even conspiracy.

24 In the present appeals, the key question is whether Linda has a basis for seeking an indemnity or contribution against the Estate of PF, which can survive a finding of liability against her in the main actions. This question can, for convenience, be broken into a number of (overlapping) subsidiary questions as follows:

(a) First, is it good law that no indemnity or contribution can be claimed as a matter of law where the relevant acts were known to involve illegalities? ("Issue 1")

(b) Second, what is the basis of a claim for contribution or indemnity? ("Issue 2")

(c) Third, irrespective of the above two questions, are the third party proceedings for indemnity or contribution in any event redundant on the basis of an overlap with the pleaded defence in the main actions? ("Issue 3")

25 These questions will now be examined with questions 1 and 2 being addressed together. For convenience, the position of AT (Carolyn) and AT (RM) will be discussed together in respect of each issue, followed by Linda's position, before proceeding to the next question. It goes without saying that in discussing the issues raised and the affidavits that have been tendered, the court acts on the assumption that the claimed facts are established.

Issues 1 and 2 – the basis of the claim for indemnity or contribution and whether illegality precludes any claim for indemnity or contribution

26 The illegality relied upon in the present case is both civil and criminal in nature: conspiracy,

breach of fiduciary duty, breach of director's duty and offences under the CA.

27 In the case of the Derivative Action, the claim was brought in respect of four business opportunities said to have been wrongfully diverted by Linda. The claim for contribution/indemnity was made in relation to only three of these business opportunities. The position taken by AT (Carolyn) in respect of the pleaded defence and the third party claim can be summarised as follows:

(a) AT (Carolyn) does not deny that PF was the *alter ego* of AT. [note: 2]

(b) That said, whilst PF had at the very least "ostensible authority" to give instructions on behalf of AT, the fact is that PF did not know of the transactions in question and/or that the transactions were unauthorised. [note: 3]

(c) It follows that the defence would fail and the claim against the Estate of PF was redundant.

(d) The argument was also raised before the AR that an indemnity could not, in any case, be claimed in respect of an illegal act: *viz* an offence under s 157 of the CA.

28 On the question of illegality, AT (Carolyn) submitted that the claim against the Estate of PF was solely based on agency and not joint tortfeasorship. In the original application for leave to commence third party proceedings (before the AR), the Notice (DA) was limited to an indemnity and there was no assertion that PF himself had committed any wrongdoing. The claim for indemnity was said to have been based solely on the premise that PF had told Linda to act as she did and, therefore, was under an obligation to indemnify her for the consequences. Even if PF did in fact instruct Linda to act as she did, she would still, as a matter of law, be barred from claiming indemnity on the basis of the public policy encapsulated in the legal maxim *ex turpi causa non oritur actio*.

29 In support of the AR's decision to reject the claim for indemnity as a matter of law, AT (Carolyn) cited the old common law authority of *Burrows v Rhodes and Jameson* [1899] 1 QB 816 ("*Burrows*"). In that case, Kennedy J held at 828 that it has:

> … long been settled law that if any act is manifestly unlawful, or the doer of it knows it to be unlawful, as constituting either a civil wrong or a criminal offence, he cannot maintain an action for contribution or for indemnity against the liability which results to him therefrom. An express promise of indemnity to him for the commission of such an act is void.

30 Thus, it was argued, even if PF had instructed Linda to act as she did and even if there was an implied promise to indemnify Linda for the consequences, she was still not entitled, as a matter of law, to the claim for contribution or indemnity against the Estate of PF.

31 In the RM action, AT (RM) advanced similar arguments and they pointed out that a breach of director's duty is also a criminal offence under s 157 of the CA, punishable by a fine not exceeding $5,000 or to imprisonment for a term not exceeding 12 months. Other possible offences referred to were dishonest misappropriation of property and criminal breach of trust under the Penal Code (Cap 224, 2008 Rev Ed). Given the serious nature of these offences, AT (RM) submitted that the rule in *Burrows* should be applied. AT (RM) further asserted that even if Linda could show that she did not know the acts were unlawful, that would not assist her case as it was sufficient, if in the capacity of an agent, she had knowledge of the facts and circumstances.

32 As mentioned above, in relation to the Derivative Action, there was no claim for contribution

before the AR. Subsequently on 26 August 2013, an application was made to amend the Notice (DA) so as to state that PF, as a director of AT, had owed the same fiduciary duties as Linda, and to add an alternative claim for contribution. There was no pleading that Linda had been misled by PF and that she might not have known that her conduct was unlawful.

33 The response of Linda to the above arguments is that the right to contribution relied on was not derived from the common law but from statute. Section 15(1) of the Civil Law Act (Cap 43, 1999 Rev Ed) ("CLA") provides that:

> **Entitlement to contribution**
>
> 15.—(1) Subject to subsections (2) to (5), any person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage (whether jointly with him or otherwise).

34 Section 19(2) of the CLA also provides that a person is liable in respect of any damage if the person who suffered the damage is entitled to recover compensation from him in respect of that damage (whatever the legal basis of this liability) whether for tort, breach of contract, breach of trust or otherwise. Section 16(2) also states that the trial judge possesses the discretion to determine whether to exempt any person from contribution or to direct that the contribution amounts to a complete indemnity.

35 The question as to whether a claim for contribution (which can, in the trial judge's discretion, amount to an indemnity) under s 15 of the CLA is caught by the rule referred to in *Burrows* has been considered in a number of Singapore and English decisions. It is to be noted that ss 15(1), 16(2), 19(2) and 19(6) are *i n para materia* with ss 1(1), 6(1), 7(3) and 2(2) of the Civil Liability (Contribution) Act 1978 (c 47) (UK) ("the UK Act").

36 In *K and Another v P and Another* [1993] Ch 140 ("*K v P*"), the plaintiffs brought an action for damages against the defendants for conspiracy to defraud. The third defendant issued a third party notice against the accountant of the plaintiff for contribution or indemnity on the basis that the accountant had been negligent in failing to warn the Plaintiff of the risks involved in the defendants' transactions. The claim for contribution was based on s 1(1) of the UK Act.

37 The UK Act had replaced s 6 of the Law Reform (Married Women and Tortfeasors) Act 1935 (c 30) (UK) ("the LRA 1935"). The latter had created a right of contribution between joint tortfeasors that was available "where damage is suffered by any person as a result of a tort (whether a crime or not)." On this basis, Ferris J held that the *ex turpi causa* defence was not available as an answer to a claim for contribution under the UK Act. He held at p 149 that:

> … The specific purpose of that Act, as of the Act of 1935 before it, was to enable claims for contribution to be made as between parties who had no claim to contribution under the general law. To permit the ex turpi causa defence to be relied upon as an answer to such a claim would, in my view, narrow to a substantial extent the deliberately wide wording of section 6(1) of the Act of 1978 and would, in effect, make a claim for contribution subject to a condition precedent which is not to be found in the Act. Moreover, section 2(1) and (2) give the court ample power to fix the amount of the contribution at a level, including a zero level, which takes account of all the factors which, in relation to common law claims, are relevant to the ex turpi causa defence.

38 In Singapore, a similar approach was taken by Judith Prakash J in *Nganthavee Teriya (alias Gan Hui Poo) v Ang Yee Lim Lawrence and others* [2003] 2 SLR(R) 361 ("*Nganthavee*"). In that case, a

claim was brought by the plaintiff and BC Tan (her husband) in separate proceedings against the directors of two Singapore companies for misrepresentation, breach of contract, breach of fiduciary duty and conspiracy. Third party proceedings were commenced against BC Tan for an indemnity or contribution. The third party proceedings were objected to on a number of grounds, including the argument of illegality. The claim for contribution was based on (the then applicable) s 11 of the Civil Law Act (Cap 43, 1994 Rev Ed) ("CLA 1994"), which is similar to s 6 of the LRA 1935. Section 11 provides for a right of contribution between joint and several tortfeasors whenever damage is suffered by any person as a result of a tort (whether a crime or not). Prakash J accordingly held (at [17]) that the third party claim against BC Tan was not precluded on the basis that BC Tan, if liable, was liable as a party to the conspiracy. Even if the tort was a crime, s 11 permitted a claim for contribution. That said, the learned judge also exercised the power set out in s 11(2) to exempt BC Tan from making contributions, as otherwise the defendants would be able to retain part of the wrongfully acquired benefit.

39 The decision of Prakash J did not concern ss 15 and 16 of the CLA. These provisions amended and replaced s 11 of the CLA 1994 but were not applicable since the new provisions only applied to events occurring after 1 January 1999. The learned judge was aware of the new provisions but did not make any specific comment on them. That said, Prakash J discussed at length the case of *K v P* in arriving at her decision. In the circumstances, I have no doubt that the position in Singapore today is the same as that expressed in *K v P* – a claim for contribution under ss 15 and 16 of the CLA is *not affected* by any illegality (tortious or criminal) tainting the transactions or events. A right to seek contribution is provided for in all cases against a person who is liable in respect of the same damage – whether that liability is joint or otherwise. Neither does it matter whether the basis of that liability for the same damage is in tort, breach of contract, breach of trust or otherwise.

40 In reaching this decision, I am reinforced in my view by the fact that in the Parliamentary debates on the amendments to the CLA 1994, the Minister of State for Law (Associate Professor Ho Peng Kee) observed that the amendments were intended to bring Singapore's law on contribution in line with the UK Act and to address anomalies in litigation practice. See *Singapore Parliamentary Debates, Official Report* (26 November 1998), vol 69 at cols 1694–1698 (Associate Professor Ho Peng Kee, Minister of State for Law).

Issue 3 – Whether the third party proceedings are in any case irrelevant or redundant

41 AT (Carolyn) also took the point that quite apart from the question of illegality, the third party proceedings were in any event redundant as they were nothing more than a reproduction of the position taken in the defence. Cases cited in support included *Yemen Salt Mining Corp v Rhodes-Vaughan Steel Ltd* (1976) Carswell BC 141 ("*Yemen*") and *Westcoast Transmission Co v Interprovincial Steel & Pipe Corp* (1985) Carswell BC 48 ("*Westcoast*").

4 2 *Yemen* concerned a suit brought by Y against S for negligence in the manufacture of a pipe delivered within Ontario. The pipe had been transported under the supervision of SW, who was Y's agent. SW had also inspected and tested the pipe. S sought to bring third party proceedings against SW for an indemnity or contribution. SW was said to be liable to contribute on the basis that it had been negligent during the transportation and testing process. At the third party directions stage, the proceedings were set aside on the ground that the basis of the claim against the third party was the same as the defence raised in the main action.

43 The case of *Westcoast* involved similar facts, where a claim was made against the manufacturer for damages arising out of a failed pipe. The third party, H, had been retained to inspect the pipe during the manufacturing process. The plaintiff initially sued both the defendant and H for

breach of contract and negligence. Subsequently, the claim by the plaintiff against the third party was settled. At this stage, the defendant instituted third party proceedings against H for contribution. There was no contract between the defendant and the plaintiff. In striking out the third party proceedings, the court, citing *Yemen*, commented that if H had been acting as an agent of the plaintiff (in carrying out the inspection), any fault of H would be attributable to the plaintiff (through the doctrine of vicarious liability) in respect of the plaintiff's claim against the defendant. That being so, any fault by H would already be attributed to the plaintiff for the purpose of reducing its scale of recovery against the defendant. The argument that H might have acted outside the scope of his authority from the plaintiff, thereby relieving the plaintiff from vicarious liability, was not accepted. The point had never been pleaded. Indeed, the defendant had always taken the position that H was, at all times, acting as an agent for the plaintiff. That being so, the third party claim was in this sense redundant as the acts of the third party would be attributable to the plaintiff.

44 AT (Carolyn), in its submissions, relied on the above Canadian High Court decisions as well as the decision of Prakash J in *Nganthavee* that was discussed earlier. It will be recalled that, in the latter case, a claim was brought by the plaintiff and BC Tan (her husband) in separate proceedings against the directors of two Singapore companies for misrepresentation, breach of contract, breach of fiduciary duty and conspiracy. Third party proceedings were commenced against BC Tan for an indemnity or contribution on the basis that BC Tan was a co-conspirator. Whilst Prakash J accepted that illegality was not itself a bar to the claim for statutory contribution, the proceedings against BC Tan as a third party was redundant. At [24], the learned judge commented that:

> … In any case, if he had been a co-conspirator, since it was admitted that [the third party] was the [plaintiff's] agent, [the plaintiff] would not be able to succeed in her action against the [defendants]. Once this point was brought up as a point of defence and proved it would completely defeat the plaintiff's claim and there could be no issue between the [defendants] and the third party. As [counsel for the plaintiff] submitted, because [the third party] was the plaintiff's agent and *alter ego* in the matters relating to Europa, there was no separate issue to be tried whether of indemnity or contribution or otherwise between the [defendant] and the [the third party]. …

45 Reference has also been made to the decision of the Court of Appeal in *Yong Kheng Leong and another v Panweld Trading Pte Ltd and another* [2013] 1 SLR 173 ("*Panweld*") (where the appeal was dismissed and the decision of the High Court was upheld). The plaintiff, Panweld, had brought an action against the directors for breach of fiduciary duties. The claim was based on the assertion that the first defendant (a director) had placed his wife on the payroll for some 17 years when she was not in fact an employee of Panweld. The defendant director issued a third party notice against L, another director who was also the majority shareholder at that point in time. The basis of the claim for contribution was that L had approved the payments. Before the High Court, Steven Chong JC held that there was no merit in the third party action. On appeal, Sundaresh Menon JA (as he then was) agreed and held at [84] that:

> …the third party claim against [L] had absolutely no merit. If [L] had agreed to the salary payments, then [the defendant director] would not be liable in the first place. On the other hand, if [L] had not agreed to this, then there would be no basis for seeking any indemnity or contribution from [L].

46 On the basis of these decisions, AT (Carolyn) submitted that, with reference to the pleadings, Linda would have to prove the same facts in order to succeed in her defence and her third party claim. However, in the event that she succeeds in the defence, the third party claim would be redundant. Meanwhile, if her defence fails, the third party claim will likewise not be able to succeed.

In the written submissions, AT (Carolyn) accepts that PF did have, at the very least, ostensible authority to act on behalf of AT – that is to give instructions to Linda. Whether he did in fact do so was the centre piece of both the defence and the third party claim.

47 In the RM Action, AT (RM) took a similar stand and also submitted that the third party proceedings were not necessary. AT (RM) further submitted that whilst an action to strike out a third party claim is typically brought by the third party, there is nothing which prevents the plaintiff in the main action from taking that step. In support, AT (RM) relied on O 18 r 19 of the ROC which provides that a court may, at any stage of the proceedings, order a pleading to be struck out on these grounds: (a) no reasonable cause of action is disclosed; (b) it is scandalous, frivolous and/or vexatious; (c) it will prejudice, embarrass or delay the fair trial of the action; and (d) it is an abuse of process.

48 AT (RM) submits that *Nganthavee* applies since Linda's defence was that she did not commit any of the alleged breaches because she was complying with the directions of PF who was the *alter ego* (or controlling mind and will) of AT. Instructions from PF were to be treated as the instructions of AT. AT (RM) also asserts that if Linda's position is that PF and AT are not one and the same (in order to validate the third party claim), Linda would be adopting contrary positions. For completeness, it is noted that AT (RM) has also submitted (in their closing submissions) that the claim, as set out in the third party notice, was inherently improbable. To this end, why would PF, as the alleged *alter ego* and controlling mind of AT, instruct Linda to commit acts against AT such that AT would lose almost its entire business?

49 The question, therefore, is whether the third party claim by Linda against the Estate of PF is redundant – in other words, is there any basis upon which Linda might fail in her defence in the main action brought by AT and yet, on the same facts, still have grounds to succeed in her claim for contribution from the Estate of PF? Linda's defence to the main actions in the two Suits is that she did not commit any of the alleged breaches since all the impugned transactions were carried out on the instructions or directions of PF. If that can be established as a matter of fact, Linda submits that she will not be liable for breach of duty on the basis that PF was the *alter ego* or controlling mind and will of AT. If it is assumed that the facts alleged by Linda can be established, the question of law as to whether this absolves her from any claim by AT will have to be decided. Whilst the High Court, in granting leave to Carolyn to commence the Derivative Action, has held that PF was the controlling mind and will prior to his demise, this was said in the context of the leave application. Until the evidence is heard and the issues are properly ventilated, there is no telling whether the trial judge will come to a similar conclusion on the evidence placed before the court. In any case, even if PF, as the majority shareholder and Chairman of AT, had instructed Linda to act as she did (to the apparent detriment of AT), this will not necessarily, as a matter of law, absolve Linda from liability vis-à-vis AT.

50 AT (RM) submitted, in their closing submissions, that even if PF had directed the conspiracy to be perpetrated (and was in breach of his own duties owed to AT), Linda, as the managing director, owed an independent duty to AT. To merely follow the instructions of the Chairman (and majority shareholder) may not relieve her from that duty.

51 The basis of the claim for contribution in the two Suits, as stated above, is founded on s 15(1) of the CLA. To succeed, it is necessary to show that another person (*ie*, the third party) is liable in respect of the "same damage". In this case, the damage would be the losses sustained by AT as a result of the business diversions. The claim for contribution does not have to be based on joint tortfeasorship. Section 15(1) of the CLA makes it clear that contribution can be sought even against another party who is severally liable for the same damage. If Linda is found liable in the main actions, this will be on the basis that she has breached her director's and fiduciary duties in carrying out the

transactions. This could be because:

(a) the trial judge finds that PF did not in fact know of or consent to the transactions; or

(b) even if he did, his consent was not sufficient, as a matter of law, to absolve Linda from performing her independent duties owed to AT.

52 It is in the latter case, that Linda appears to have some grounds for seeking contribution from the Estate of PF. PF, being the Chairman and director of AT at that point in time, would also have owed a fiduciary duty to AT. Whether or not he was in breach or is absolved because he was the *alter ego* of the company is a matter that can only be determined at trial. Even though leave was granted to commence the Derivative Action against Linda, the possibility remains that the trial judge will find that, at the material time(s), PF was not the *alter ego* (or indeed the majority shareholder). The possibility remains that the trial judge will find that PF, by directing Linda to act as she did, was himself in breach of his fiduciary duties. If so, this will result in a situation where two persons, the managing director and the Chairman, are in breach of fiduciary duties such as to cause losses to AT. It is for such an eventuality that Linda seeks to commence third party proceedings against the Estate of PF.

53 The factual question remains as to whether the possibilities referred to above are fanciful or inherently so improbable that they should not be taken into account. As far as the question as to whether PF was either the *alter ego* or controlling mind and will of AT is concerned, AT (Carolyn) does accept that PF, at least, possessed ostensible authority to direct Linda to act. That said, Linda has submitted that AT (Carolyn) has not in its pleadings admitted that PF was either the *alter ego* or controlling mind of AT. On this point, it must be noted, however, that the response of counsel for AT (Carolyn) was that it was accepted that PF was the *alter ego* and controlling will of AT *up till his death* and that this was the position taken before Prakash J in *Fong Wai Lyn Carolyn v Airtrust (Singapore) Pte Ltd and another* [2011] 3 SLR 980 (the application for leave to commence derivative proceedings). In the RM action, AT (RM) has, on the other hand, expressly denied that PF was the *alter ego* or controlling mind of AT. Linda, in her closing submissions, pointed out that PF was not the sole shareholder or even a major shareholder of AT since 2006. That was when it is said PF had transferred the majority of his shares to the Fong Foundation charitable trust. At the date of his death, the point is made that PF only held 3.6% of the shares while the Fong Foundation held some 51%. The rest of the shares were held in varying amounts by 11 other persons including Carolyn who had owned 6.2% of the shares. It will be recalled that the RM Action was largely in respect of transactions said to have taken place *after* PF's death. That said, the transactions raised in the Derivative Action appear to be largely concerned with events taking place *before* his death, indeed before 2006.

54 If, at trial, the court finds that at the material times (*ie*, when the transactions were carried out), PF despite his shareholding was not to be treated as the *alter ego* or controlling mind of AT (such that his acts can be treated as AT's acts), it must follow that Linda may well be in breach of her duties even if she proves that she had acted with PF's knowledge and consent. On the other hand, Linda also submits that in the event PF is found to be the controlling mind of AT, it does not follow that, as a matter of law, PF was free to do whatever he wished with AT's assets and business. Reference was made to the English case of *In re W & M Roith Ltd* [1967] 1 WLR 432. That was a case where R held more than two-thirds of the shares and was the controlling spirit of the plaintiff company which he had founded. R directed the company to sign a covenant to pay his wife an annual pension after his death. The court found that the covenant was not made *bona fide* for the benefit of the company. In reaching this conclusion, Plowman J noted that there was no evidence of any other director explaining the reasons for the agreement.

55 In any case, a question also arises as to what it means to be regarded as the "controlling mind" or "moving spirit" or "*alter ego*" of a company. Linda submitted that the key element is such that the person has "singular control" and who is, in substance, carrying out his own business through the company. For this proposition, the High Court decision of *Lim Leong Huat v Chip Hup Hup Kee Construction Pte Ltd* [2009] 2 SLR(R) 318 ("*Lim Leong Huat*") was cited. In that case, Andrew Ang J, in passing, commented at [29] that even where a business is managed solely by one person, that one person and the company are in law, nevertheless, separate legal entities. This statement was made in relation to the question of whether a combination between a director and the company could form the basis of a conspiracy. Issues as to whether a director/shareholder is the *alter ego* or controlling mind can arise in cases where an outsider (such as a trade creditor) sues the company for a debt and wishes to lift the veil of incorporation in order to establish personal liability against the director/shareholder. It may also be relevant in the context of determining the state of mind of a company. Indeed, this issue also arises in the context of whether a director may be held personally liable for the torts of the company. The question can also arise in cases where it is the company itself which wishes to bring a claim against a defaulting director. Such was the case in *Lim Leong Huat* where an application was made to join the controlling director as second defendant on the basis that he was a co-conspirator with the company. Andrew Ang J, at [22], cites (with approval) *Walter Woon on Company Law* (Tan Cheng Han gen ed) (Sweet and Maxwell, 3rd Ed, 2005) at para 3.106, which states that:

> … Where the person who represents the company's directing mind is acting in fraud of the company, his knowledge or intention will not be imputed to the company where the company is suing its officers in respect of breach of their duties. Thus, where the directors of a company conspire to defraud the company, the company is not a party to the conspiracy even if the directors in question are its 'brain'.

56 For this reason, the learned judge concluded, and with respect, rightly so, at [23], that where the company is a victim of a conspiracy of its directors and sues the directors in respect of breach of duties, the company does not become a co-conspirator with its directors merely because its directors are the conspirators. The position is different where the company and its directors were in an established arrangement which benefited the company to the detriment of third parties. Here, Andrew Ang J commented at [24] that the company would no longer be the victim. Instead, the third party is the victim of the alleged conspiracy between the company and its directors. There was, applying *Belmont Finance Corporation Ltd v Williams Furniture Ltd and Others* [1979] Ch 250, no reason why the assets of a limited company and/or that of its errant director, even one who was the controlling mind of the company, should not be made liable to answer for conspiracy. English cases taking a similar line include *Attorney-General's Reference (No 2 of 1982)* [1984] QB 624 which dealt with the issue of whether a person in total control of a limited liability company (by reason of shareholding and directorship) is capable of stealing the property of the company. Given that AT (RM)'s position is that Linda, as the managing director, owed an independent fiduciary duty to AT, Linda has submitted that the court might find that even if PF gave her instructions (as Chairman and major shareholder), that she could not (as a matter of law) act on those instructions without breaching her duties.

57 AT (Carolyn) also relied on the principle that it was trite law that a director can avoid liability for breach of fiduciary duty by making a full disclosure to the company: that is to say the shareholders of the company. It was argued that following *Panweld*, no actual shareholder resolution was needed – it would be sufficient if all shareholders did assent to the course of action. In *Panweld*, there were only two director shareholders of a company. The company brought an action against the first director shareholder for placing his wife on the company's pay roll even though she was not an employee. The first director shareholder applied for a third party notice against the second director shareholder. The application was dismissed on the basis that in the event the second director

shareholder had agreed to the payments, the first director shareholder would have obtained the consent of all the shareholders.

58 In the case of the Derivative Action, Linda, however, points out that PF and Linda collectively only held 17.2% of the shares at the date of PF's death. Prior to that, in 2006, some 51% of the shares had been transferred to the Fong Foundation charitable trust. The remaining shares, at the date of death, were held by various family members. This included Carolyn Fong who had owned 6.2% of the shares. It follows that the line of cases similar to *Panweld* does not provide much assistance on the facts of this case. In relation to the RM Action, the transactions that were complained of occurred largely *after* the death of PF, at a point in time when PF's shareholding had already been greatly reduced. With regard to the Derivative Action, whilst the relevant transactions had occurred mainly *before* PF's demise (some time before 2006), it does not appear that PF and Linda had owned all the shares in AT at the relevant times. The first claim, for which contribution is sought, concerns alleged diversions of business opportunities from Chinese chemical companies. It is asserted that the diversions took place between 2000 to the date of the writ. The second claim, for which contribution is also sought, is in respect of diversions from another Chinese company from around 2001. The third claim relates to acts occurring around 2002 and 2004. It has been said that all the shareholders and directors of AT were, in general, content to acquiesce in PF's management of AT whilst he was alive and that if a shareholders' meeting had been called, they would "probably have voted in favour of Peter Fong's proposals". It was also submitted that the reality of family-run companies is such that the directors and shareholders are understandably content to acquiesce with the founder *alter ego*, at least whilst he is still alive and personally managing the business. [note: 4] Whilst I have sympathy for the argument, and whilst it is acknowledged that the alleged degree of acquiescence may be proved at trial, it is not clear at this stage that this will *inevitably* be the position. Even though Linda has herself referred to PF as the controlling mind of AT, it does not follow that all the shareholders would have necessarily agreed with all the transactions in issue.

59 I, therefore, found that the third party notices were not redundant, although the grounds for the third party notices shared primarily the same facts as Linda's defence in the two Suits.

60 For the avoidance of doubt, in arriving at the above decision, I have noted the submissions made by AT (Carolyn) and AT (RM) concerning the delay and expense that will arise from the third party proceedings. That said, I am satisfied that there is a close connection between the main action against Linda in the two Suits and her claim for contribution from the Estate of PF. In these circumstances, I am of the view that the third party proceedings should be allowed such that the issues can be properly ventilated in the interest of all concerned.

Discretion of the trial court and contribution

61 The point has been mentioned above that under s 16(2) of the CLA, the court enjoys the power in any such proceedings for contribution, to exempt a person from liability to make contribution. For example, if it should transpire that the result of a successful claim for contribution is such that the defendant is unjustly enriched in respect of the gains, the court may very well decide that this is an appropriate case to exercise the discretion. Indeed, this was a possibility that Linda recognised in her submissions. The point made, however, was that this was a decision which could only be made by the trial court after all the facts and issues had been fully ventilated and decided upon, including the question of any benefit received by Linda. Other factors which may have a bearing on the exercise of this discretion after the trial might include those touching on *ex turpi causa*. Whilst I am sympathetic to the argument by AT (RM) that this matter can be decided today, especially in light of the result in *Nganthavee* where the discretion was exercised, in my view, it will be fairer and more appropriate for this issue to be addressed at the end of the trial.

The application to amend the third party notice

62 Given my decision on the availability of third party proceedings in respect of Linda's claim for contribution, I am also granting the applications to amend the third party notices.

Conclusion

63 The appeals (RA 246/2013 and RA 247/2013) are allowed. The applications by Linda to amend the relevant third party notices (SUM 4419/2013 and SUM 4420/2013) are also allowed. I will hear parties on costs at a later date.

[note: 1] Defendant's Written Submissions dated 30 August 2013, p 9, para 29.

[note: 2] Plaintiff's (AT (Carolyn)) Written Submissions dated 2 September 2013, p 2, para 3; Plaintiff's (AT (Carolyn)) Further Written Submissions dated 11 October 2013, p 2, paras 3, 5.

[note: 3] Plaintiff's (AT (Carolyn)) Written Submissions dated 2 September 2013, pp 2–3, paras 3–4.

[note: 4] Plaintiff's (AT (Carolyn)) Further Written Submissions dated 11 October 2013, pp 14–15, paras 40–42.