IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2016] SGHC 203

Suit No 715 of 2011

Between

(1) MAX-SUN TRADING LTD
(2) E-TEX TRADING LTD

… Plaintiffs

And

(1) TANG MUN KIT
(2) TEO SU HUANG

… Defendants

And

TAN SIEW MOI

… Third Party

JUDGMENT

[Contract] – [Formation]
[Equity] – [Fiduciary relationships]
[Tort] – [Conspiracy]
[Tort] – [Inducement of breach of contract]

TABLE OF CONTENTS

Max-Sun Trading Ltd and another
v
Tang Mun Kit and another (Tan Siew Moi, third party)

[2016] SGHC 203

High Court — Suit No 715 of 2011
Judith Prakash JA
14–15 October 2015; 17–18, 21–24 March; 24 June 2016

26 September 2016 Judgment reserved.

Judith Prakash JA:

Introduction

1 This is a suit brought by two associated Hong Kong-incorporated companies, Max-Sun Trading Limited ("the first plaintiff") and E-Tex Trading Limited ("the second plaintiff"), in respect of numerous alleged breaches of obligations arising in the course of a garment manufacturing and supply arrangement involving the defendants. The first plaintiff is a fabric manufacturer. The second plaintiff is a buying house, which means it enters into contracts to supply garments to clothing companies and then sub-contracts the actual manufacturing to other companies. Mr Leonard Mok Chi Wing ("Mr Mok") was at all times the representative and spokesperson of both plaintiffs although (either directly or through his wife) he had no more than a

30% interest in each of them. Mr Mok was also involved in the running of other associated companies (collectively, "Mr Mok's group of companies" or "the Group"). In all this, Mr Mok supposedly answered to one Mr Wong Beng San ("Mr Wong") of Macau, although little turned on this fact.

2 The defendants are Mr Tang Mun Kit ("the first defendant"), also known as Steven, and Mdm Teo Su Huang ("the second defendant"). They are married to each other and used to run their own business in the garment industry, Instinct Silkscreen Pte Ltd ("Instinct Silkscreen"), specialising in the printing of designs on garments. The other major players in this dispute are Mr Tan Siew Kah, also known as Peter ("Mr Peter Tan"), and his wife, Mdm Tan Siew Moi ("the third party"; collectively, "the Tans"). Mr Peter Tan is an undischarged bankrupt who previously ran his own garment manufacturing business, assisted by the third party. Looming large in the background, but not involved in the dispute, is the Esprit group of companies ("Esprit"), which at various points was the sole customer of the second plaintiff and a major customer of the first plaintiff, the defendants, and the Tans.

3 Mr Mok, the defendants, and the Tans became personally acquainted through their commercial activities in the garment industry in Singapore. The defendants describe the relationship as being that of business associates; the others describe it as one of friendship. Their dealings began around 2000 and were by all accounts mutually beneficial. In those days, the Tans' Singapore company would take orders from Esprit's Singapore buying house and then produce the finished garments to Esprit's specifications using fabric

manufactured by the first plaintiff and printed with designs by Instinct Silkscreen.

4 Subsequently, the business environment in Singapore changed and it became very difficult for garment manufacturers such as the Tans' company to operate in Singapore. Esprit closed its buying house in Singapore. Thereafter, Mr Mok's group of companies started supplying finished garments directly to Esprit and began looking for subcontractors to manufacture the garments.

5 In July 2006, Mr Mok, the first defendant, and Mr Peter Tan engaged in discussions (which I shall refer to as "the July 2006 Discussions") regarding the setting up of a garment factory in Vietnam. The details of those discussions – in particular, the nature of Mr Mok's and the plaintiffs' involvement and the existence and content of the understanding which allegedly arose – are disputed. What is undisputed is that following the July 2006 Discussions, the first defendant and Mr Peter Tan made a number of trips to Vietnam to look for possible factory locations. Eventually, they decided to rent premises in Viet Huong Industrial Park located in Bing Duong Province. In order to reserve the chosen premises, the first defendant made a booking under the name of Instinct Silkscreen.

6 Elda Instinct Garments Pte Ltd ("Elda Singapore") was incorporated in Singapore on 27 September 2006, with the defendants and the Tans as directors and equal shareholders, having contributed capital of US$50,000 each according to Mr Tan. The paid-up capital was registered as S$200,000. On 6 October 2006, Elda Singapore sought and obtained a loan of US$100,000 from the first plaintiff for use as working capital for the new factory ("the Working Capital Loan"). A wholly-owned subsidiary of Elda

Singapore called Elda Instinct Garments Vietnam Co Ltd ("Elda Vietnam") was then incorporated in Vietnam on 24 October 2006 for the purposes of setting up and managing the new factory. Elda Singapore and Elda Vietnam will sometimes hereafter be collectively called the Elda Companies.

7 In Vietnam, each company is apparently required to have a legal representative, a person who, as the title suggests, has certain important rights and powers to represent the company in official matters. The legal representative holds the company seal, which is necessary for many official acts of the company, including obtaining the certificates of origin without which goods cannot be exported out of Vietnam. In addition, the charter of Elda Vietnam (which is akin to the memorandum and articles of association of a Singapore company) provides for two other officers, the authorised representative of Elda Singapore (as the owner of Elda Vietnam) and the general director. The general director had control over the day-to-day operations of the company, but the authorised representative had ultimate control over its management. On Elda Vietnam's Investment Certificate issued by the Bing Duong Industrial Zone Authority ("BDIZA"), the first defendant was stated to be Elda Vietnam's legal representative and general director. He was also the authorised representative of Elda Singapore. There was no objection to him holding these three positions at the time. The defendants and the Tans served as Elda Vietnam's *de facto* members' council, which is akin to a board of directors. The first defendant and Mr Peter Tan oversaw the preparatory work for the venture, including the official approvals, physical construction of the premises, and the recruitment and training of workers for the factory.

8 The intended mode of business in Vietnam was that the second plaintiff was to be the supplier to Esprit. Having obtained orders from Esprit, it would then subcontract the supply of garments to Elda Singapore. In turn, Elda Singapore would farm out the actual manufacturing work to Elda Vietnam. However, it would obtain the material and accessories for the Esprit garments from the second plaintiff.

9 On 8 May 2007, the second plaintiff and Elda Singapore entered into a contract setting out the general conditions of purchase and delivery ("the General Conditions") which would apply to all the orders subsequently placed by the second plaintiff. The General Conditions included clauses providing that "[t]he business relationship between the [second plaintiff] and [Elda Singapore] exists solely in the individual purchase agreements" and that there was "no obligation on the [second plaintiff]'s part to continue to purchase from [Elda Singapore]". Elda Singapore was also restrained from dealing directly or indirectly with the Buyers (defined as Esprit de Corps (Far East) Limited and Esprit Macao Commercial Offshore Limited) for a period of two years from the date of the second plaintiff placing its last order with Elda Singapore. However, there was no other restriction in the General Conditions on the Elda Companies manufacturing garments for parties other than the second plaintiff. Beginning in July 2007, a number of orders were placed by the second plaintiff and successfully fulfilled by Elda Vietnam. Payment for the second plaintiff's orders when fulfilled by Elda Vietnam was made by the second plaintiff to Elda Singapore, while setting off the cost of materials and accessories supplied. Elda Singapore in turn provided funds to Elda Vietnam. Elda Vietnam had no other source of funds.

10 Unfortunately, relations between the defendants and the Tans soon soured, largely due to conflict between the first defendant and Mr Peter Tan. Disputes arose over the first defendant's alleged failure to keep proper accounts in respect of money that Elda Singapore sent to him in Vietnam to pay for expenses incurred in the establishment of the factory and also over the manner in which the Tans kept the accounts for Elda Singapore. The first defendant also alleged that Mr Peter Tan had failed to seek the approval of the defendants before procuring from the first plaintiff a second loan to Elda Singapore amounting to US$116,780, this time for the purchase of sewing machines ("the Machinery Loan"), in December 2006. The first defendant and Mr Peter Tan increasingly came to consider each other to be mismanaging the affairs of Elda Vietnam, and would from time to time communicate their grievances to Mr Mok, who made some attempts to intercede. In September 2007, Mr Mok, who had formed the view that he would rather deal with Mr Peter Tan as the head of Elda Vietnam, persuaded the first defendant to agree to appoint Mr Peter Tan as the legal representative and general director of Elda Vietnam and the authorised representative of Elda Singapore ("the Appointment Agreement"). A resolution to that effect was passed on 1 October 2007 ("the October 2007 Resolution"). The first defendant then filed the necessary paperwork with BDIZA to appoint Mr Peter Tan as the legal representative and general director of Elda Vietnam, but, unknown to the others, he chose to retain his own position as authorised representative of Elda Singapore. BDIZA duly issued an amended investment certificate stating that Mr Peter Tan was the legal representative of Elda Vietnam.

11 By mid-2008, Elda Vietnam's design printing department and garment manufacturing department were effectively being run as two separate

fiefdoms, albeit working on the same orders and in the same premises. Each department was separately funded and even hired its own security guards. The two departments were physically separated by a wall within the factory and the defendants and the Tans rarely visited each other's departments.

12 It turned out that good fences were not enough to make good neighbours. Despite the *de facto* division between the defendants' and the Tans' operations, the first defendant and Mr Peter Tan continued to clash over issues such as the apportioning of Elda Vietnam's profits and shared expenses (such as utilities and rent of the premises) and the first defendant's accounting practices. In mid-2008, the first defendant proposed that Elda Vietnam be legally divided into two separate companies: a design printing company, to be run by the defendants, and a garment manufacturing company, to be run by the Tans. It was hoped that this would allow both resulting companies to continue fulfilling the second plaintiff's orders. Although the Tans were receptive to this proposal ("the Elda Division Agreement"), the agreement subsequently fell apart due to disagreement over certain financial and administrative details. The division never took place.

13 In November 2008, the defendants purported to convene a meeting of the members' council. As they were the only attendees there was no quorum. Despite this, they voted to remove Mr Peter Tan from his positions as legal representative and general director of Elda Vietnam and to reappoint the first defendant to those positions. The first defendant then used the minutes of the purported meeting in support of an application to BDIZA for an amended investment certificate stating that the first defendant was the legal representative of Elda Vietnam. This was issued in due course upon the

surrender of the previous amended investment certificate, which the first defendant had earlier obtained from Mr Peter Tan for the stated purpose of approaching a prospective investor or customer, who would wish to see the certificate.

14 On 11 December 2008, the first defendant obtained the company seal from Mr Peter Tan; the plaintiffs allege that he did so by snatching the seal from Mr Peter Tan after asking to meet him on false pretences. The first defendant asserted that he was entitled to retain the seal because he was the legal representative of Elda Vietnam, as reflected on the amended investment certificate. Mr Peter Tan filed a police report alleging that the first defendant had perpetrated a fraud on him and Elda Vietnam, and this led to the company seal and the amended investment certificate being confiscated by the police and handed over to BDIZA. Around the same time, the first defendant called Elda Vietnam's bank and instructed it to freeze the accounts to which Mr Peter Tan had access, preventing him from using those funds for expenses including the company's payroll. This, combined with the unavailability of the company seal, which had to be affixed to a certificate of origin in respect of the goods, caused significant delays in the export of garments ordered by the second plaintiff. The second plaintiff was displeased, as it incurred late delivery fees and faced a risk of losing Esprit's business.

15 Subsequently, there were court proceedings in Vietnam which allowed Mr Peter Tan to temporarily retrieve the company seal and use it to secure the certification and export of some but not all of the outstanding garment shipments. There were also attempts to permanently resolve the dispute between the parties with BDIZA's assistance or through private negotiations.

One such attempt was a proposal by the first defendant that the defendants' shares in Elda Singapore be bought over by the Tans in order to allow the defendants to wash their hands of the business. This proposal was accepted in modified form ("the Share Purchase Agreement"), with the shares to be bought by Mr Mok rather than the Tans, but was abandoned due to a deadline set by Mr Mok for the export of the outstanding garment shipments not being met. Eventually, the delays caused Esprit to cease placing further orders with the second plaintiff and the tussle between the first defendant and Mr Peter Tan led to a cessation of Elda Vietnam's operations. The first plaintiff then served a statutory demand on Elda Singapore and succeeded in having it wound up by the court on 4 September 2009. Elda Vietnam was later wound up as well.

The plaintiffs' claims

16 The plaintiffs assert that the defendants breached contractual obligations which they owed the plaintiffs under:

(a) the Joint Venture Agreement;

(b) the Working Capital Loan and the Machinery Loan;

(c) the Appointment Agreement;

(d) the Elda Division Agreement; and

(e) the Share Purchase Agreement.

17 The plaintiffs further assert that the defendants are liable to them:

(a) for the torts of unlawful means conspiracy, inducing breach of contract, and negligence;

(b) for breach of fiduciary duty;

(c) under s 340(1) of the Companies Act (Cap 50, 2006 Rev Ed); and

(d) for an indemnity, arising in law or in equity, in respect of all their losses.

18 The defendants deny that they owed the plaintiffs any obligations in contract or any duty of care in tort. They also contest various factual assertions on which the plaintiffs depend.

19 Additionally, the defendants claim an indemnity or contribution from the third party on the basis that she was also to blame for the losses caused to the plaintiffs. The third party denies her involvement in the acts complained of.

The contractual claims

20 The foreign elements in this dispute could have given rise to numerous and potentially complex conflict of laws issues had they been pleaded. The defendants, however, have not pleaded foreign law and the plaintiffs have sought to prove foreign law only in respect of certain aspects of Vietnamese company law: specifically, the statutory requirements concerning incorporation and the appointment of representatives, the rights of a company's owner in respect of management decisions, and the duties of a company's officers. None of these issues affect the law governing the various

claims which the plaintiffs have brought. Where parties do not plead foreign law, the court will apply Singapore law by default: see *EFT Holdings, Inc and another v Marinteknik Shipbuilders (S) Pte Ltd and another* [2014] 1 SLR 860 ("*EFT Holdings*") at [58]–[61]. I shall therefore proceed on the basis that Singapore law applies, while giving due recognition to Vietnamese laws and regulations to the extent that they have been proven and where they are material to the issues which I must decide.

The Joint Venture Agreement

21 The plaintiffs argue that the July 2006 Discussions created an oral contract, which they refer to as the Joint Venture Agreement, between the plaintiffs, the defendants, and the Tans. Under the Joint Venture Agreement, the first defendant and Mr Peter Tan promised to set up the new factory and Mr Mok promised, on the second plaintiff's behalf, to place orders with the new factory. Further, this contract included an implied term that that the parties to the contract would perform it "diligently and lawfully". The defendants deny that the Joint Venture Agreement existed at all.

The details of the July 2006 Discussions

22 The scope of inquiry has been considerably narrowed by the state of the pleadings. It is trite that a party is bound by its pleadings and its case is confined to the issues raised in them. The plaintiffs have pleaded, and have sought to prove, that the Joint Venture Agreement was an oral contract formed in July 2006 during the July 2006 Discussions. Consequently, the only question to be addressed here is whether the July 2006 Discussions indeed led to the creation of the Joint Venture Agreement, and not whether a contract similar to the Joint Venture Agreement could have been formed at some later

point (for instance, around the time the Working Capital Loan was extended). In the analysis below, statements and conduct postdating the July 2006 Discussions have been disregarded except to the extent that they help to confirm or contradict claims concerning what was agreed at those discussions.

Mr Peter Tan's account

23 According to Mr Peter Tan's affidavit of evidence-in-chief ("AEIC"), the July 2006 Discussions were initiated by Mr Mok, who invited him and the first defendant to set up a business in Vietnam to carry out contract manufacturing for "Leonard Mok's group of companies" (*ie*, the Group). I note that he did not at any point claim that Mr Mok had proposed an agreement with the plaintiffs specifically. The context of these discussions was the increasing cost of manufacturing garments in Singapore. During these discussions, a firm agreement was reached that the defendants and the Tans would set up Elda Singapore to be the holding company of Elda Vietnam, which would operate a new factory in Vietnam, and that the Group would thereafter place orders with the new factory. There was no written record of the discussion or the agreement.

24 In his AEIC, Mr Peter Tan described the parties as personal friends and asserted that prior to the July 2006 Discussions, "[t]he business [between the parties] was such that it was run largely on trust and friendliness". Regarding the parties involved in the July 2006 Discussions, he stated that they were Mr Mok, the defendants, and the Tans. However, under cross-examination, he clarified that only he, Mr Mok, and the first defendant were involved in those discussions, and that the agreement was communicated to the second defendant and the third party after the fact. Mr Peter Tan also stated under

cross-examination that there was no suggestion that Elda Vietnam would be required to contract exclusively with the second plaintiff or the Group, and that Elda Vietnam was thus free to sell to other customers. He made no mention of Mr Mok promising any financial support other than the placing of orders.

Mr Mok's account

25 Mr Mok's account is consistent with Mr Peter Tan's in a number of respects (unsurprisingly, since his AEIC expressly adopted the account of events stated in Mr Peter Tan's AEIC). One significant point of departure is that he asserted, in his AEIC, that the July 2006 Discussions were conducted with reference to the plaintiffs in particular, and not the Group generally. Despite this, the language he used in recounting his conversation with the first defendant and Mr Peter Tan was notably vague with regard to the precise companies on whose behalf he was negotiating; for instance, he stated that "I told them *I* was willing to support them financially" (emphasis added). He also stated under cross-examination that "we use a lot of company names to do business".

26 Mr Mok asserted that the second plaintiff was to be Elda Vietnam's sole customer. However, he admitted on the stand that the General Conditions later agreed between the second plaintiff and Elda Singapore were inconsistent with this assertion. Additionally, Mr Mok stated in his AEIC, without providing further details, that part of the agreement was a promise that the plaintiffs would give the Elda Companies financial support in addition to placing orders. Mr Mok also attempted to explain the lack of a written record of the Joint Venture Agreement, stating, in his Supplemental AEIC, "I did not

request that an agreement be reduced to writing, as we were all traditional business people and I felt that everyone would act honourably based largely on trust and friendship." This was the manner in which he was accustomed to doing business with the defendants and the Tans, who were (as he emphasised under cross-examination) friends rather than mere business associates.

The first defendant's account

27 The first defendant stated in his AEIC that:

> On or around June 2006, the plaintiffs and Mr Tan Siew Kiah proposed to the 1st Defendant together with Mr Tan Siew Kiah to jointly set up a holding and administrative servicing company (ELDA INSTINCT GARMENTS PTE LTD) in Singapore and to set up a factory (ELDA VIETNAM) in Vietnam for the purpose of manufacturing Garments for the Plaintiffs[.]

28 I do not consider the difference in the month to be material (particularly since the statement includes the words "or around") and, although Mr Mok's name does not appear here, it is uncontroversial that he was the person representing the plaintiffs in the negotiations. However, I note the ambiguity in this statement concerning the outcome of the proposal and the meaning of "for the purpose of manufacturing Garments for the Plaintiffs" (specifically, whether this implies an exclusive relationship). What is clear from the first defendant's AEIC is his position that the second defendant and the third party were not present at the discussions, that the proposal originated from the plaintiffs, and that its content included the setting up of Elda Vietnam and Elda Singapore and the purchase of garments by the plaintiffs.

29 After some initial confusion during cross-examination as to who, precisely, first proposed the setting up of the new factory, the first defendant

gave a more detailed account of the July 2006 Discussions which confirmed that Mr Mok had originated the idea:

> Q Well, was he [Mr Mok] part of the discussions with you, with you and Peter Tan? Did he offer you any---well, let---just keep it that way. Was he involved in any of the discussions between you and Mr Peter Tan on the Vietnam investment?
>
> A … *The involvement here is* ***he [Mr Mok] brought up the idea*** *because prior to that, Max-Sun has also asked us all---also asked another Singapore company to set up in Vietnam and he tell us it's doing well, doing good.* ***So he said he will need another factory to be set up but not exactly specified Vietnam. It could be China, it could be anywhere else for that matter. But did hint to us Vietnam wa---is a good place, asked us to go there and do a survey and see whether it suit our requirement.*** So me and Mr Peter [Tan] went over to Vietnam and we do a survey, visited the first factory. And we found that we can try, okay, we---because that's the nearest and we find it's the lowest investment on---put it that way that we can afford. So we went there. And after visiting a few of these places, factory, and we find out what are the costs involved, and we compare with what we have, we find that we are still not very comfortable, short. *That's when we approached Mr Mok, "If we were to set up in Vietnam, will you help to give us a loan?" And that's when he start to get involved.*
>
> [emphasis added in italics and bold italics]

30 Significantly, the proposal according to the first defendant was phrased in rather tentative terms, with the implementation of the plan being contingent on the first defendant's and Mr Peter Tan's assessment of its viability following their surveys in Vietnam. It can also be seen that the first defendant was, at this point in his testimony, still resisting the idea that Mr Mok made any kind of firm promise of support. He later admitted that a promise to place orders with the new factory was made, but denied that part of the bargain was for the second plaintiff to be Elda Vietnam's sole customer:

Q Mr Tang, who approached who first?

A Mr Mok approached us and telling us we should consider setting up a factory outside Singapore.

Q And did he say it was to produce garments for him, the plaintiffs?

A No.

Q But this is what you said in your affidavit.

A Yes. What I meant in---er, my usage is, *he would support us in a way that he will give us a order but it's not limited to solely the sole customer.*

Q Right. So now you are telling us that Mr Mok did say that he will support you by giving you orders?

A He can give us order but, mm, as you can see from the contract, there's no binding. *That means he can any time stop or at---continue. He said he will give us order just like in Singapore. There's no obligation between us or contract between us.*

[emphasis added]

31 The first defendant went on to acknowledge that Mr Mok's promise – although the first defendant objects to the word – was crucial to the first defendant's decision to proceed with the plan:

Q Right. He did keep his promise.

A It's not a promise. It's a business---business, er, kind of arrangement to help us. *If we set up, then he have to help us with something, somewhere*, mm---

Q He has to help you, did you say?

A That means in giving us the confident [*sic*], don't hesitate and go there because without any customer, we have to set up a factory and then look for buyer. It's very difficult.

Q Right. So if you didn't have the confidence that you have customers---

A Mm.

Q ---you would not have gone to set up the factory?

A *At that stage, yes.*

[emphasis added]

32 The first defendant strenuously denied, however, that Mr Mok's promises had included the extension of a loan or other kind of financial support other than the placement of orders. He also asserted that Mr Mok, the defendants, and the Tans were only business associates, not personal friends.

The second defendant's and third party's accounts

33 Both the second defendant and the third party stated that they were not present at the July 2006 Discussions and were only informed of the plans after agreement had been reached. Their evidence on this point was not disputed.

My conclusions on the evidence

34 All things considered, I am inclined to accept most of the first defendant's account of the July 2006 Discussions. I do so with caution as I found him at times to be somewhat evasive and self-serving, in the sense that he would adopt the interpretation which most suited him when confronted with an ambiguous or unclear question. I am also of the view that some of his testimony regarding other issues arising in this dispute was simply untrue (see [73] below). Despite this, his answers to clear and specific questions concerning the July 2006 Discussions struck me as convincing and reasonable.

35 Crucially, his account was supported in some key respects by Mr Peter Tan's evidence and by undisputed background facts. Regarding the questions of whether financial support was promised and whether the second plaintiff was to be Elda Vietnam's sole customer, Mr Peter Tan – a witness firmly in Mr Mok's camp as far as these proceedings were concerned, and whom I

found to be generally credible – made no mention of a promise of financial support. According to Mr Peter Tan's AEIC it was only after Elda Singapore was established that the first defendant asked Mr Mok for some financial support.

36 In fact, Mr Peter Tan did not suggest that either plaintiff was mentioned during the July 2006 Discussions. His evidence was that Mr Mok had made the proposal that the defendants and the Tans act as contract manufacturers in Vietnam for the Group, not the plaintiffs specifically. This would be consistent with Mr Mok's own oral testimony that "we use a lot of company names to do business." I understood this to mean that when entering a transaction, Mr Mok or Mr Wong would choose whichever of the companies in the Group would make the most convenient conduit for that particular purpose. It would make sense, therefore, for Mr Mok or Mr Wong to have decided only later that the first plaintiff was to make loans and the second plaintiff was to place orders, rather than to have committed the plaintiffs to those roles during the July 2006 Discussions.

37 I note that such a finding does not accord with the first defendant's own concession that the July 2006 Discussions concerned the plaintiffs or at least the first plaintiff. However, the first defendant Mr Tang is a litigant-in-person and cannot be expected to write and speak with the precision of a lawyer. When the full picture is assessed, it is clear to me that what mattered to the parties was that Mr Mok represented the Group generally, which no doubt included the first plaintiff; they were not concerned, at that point, with exactly which members of the Group they would eventually be dealing with. I therefore prefer Mr Peter Tan's evidence on this specific point.

38 Turning to the question of exclusivity, Mr Peter Tan corroborated the first defendant's assertions by stating in no uncertain terms that Elda Vietnam was free to contract with any customer it wished. Indeed, Mr Mok himself recognised that, with regard to the second point, the terms of the General Conditions were inconsistent with his position. Although the General Conditions were entered into much later, I can see no reason why they would omit any reference to exclusivity (and, to the contrary, provide that the relationship consisted only in the individual orders placed) if exclusivity had all along been contemplated.

39 I am also convinced that the first defendant and Mr Peter Tan did not firmly commit, during the July 2006 Discussions, to setting up the factory. Without suggesting that Mr Mok and Mr Peter Tan were intentionally misstating the content of the discussions, I find it unlikely that the first defendant and Mr Peter Tan would have been prepared to commit to Mr Mok's proposal before having had an opportunity to assess the many factors (such as site suitability and set-up costs) which would determine whether the proposal was viable. That they would make such a commitment is especially hard to believe given that on both the first defendant's and Mr Peter Tan's evidence, the only promise Mr Mok had made at the time was that the Group or the second plaintiff would place an unspecified quantity and value of orders after the new factory had been set up. Until such time, the Group was not to have any kind of obligation to the first defendant and Mr Peter Tan. In such circumstances, it was far more likely that the parties would have formed a loose, provisional understanding which might have led to firmer commitments depending on the outcome of the site survey and other inquiries.

40 I put to one side the question of whether the parties were friends or merely business associates, this being a highly subjective matter. Perhaps Mr Mok and the Tans perceived the whole circle as being friends; perhaps the defendants were less friendly and had a different perception. The relevant point is that regardless of how the relationship is labelled, the parties knew and trusted each other, which no one disputes.

41 For these reasons, I am of the view that during the July 2006 Discussions:

(a) Mr Mok on behalf of the Group:

(i) stated that the Group – and not either of the plaintiffs specifically – was looking for a new contractor to set up and operate a factory outside of Singapore which could manufacture garments for them to meet orders from Esprit;

(ii) suggested that the first defendant and Mr Peter Tan consider setting up and operating such a factory in Vietnam;

(iii) stated that if the first defendant and Mr Peter Tan did so, the Group would place orders which were to be fulfilled by the new factory;

(iv) did not specify a particular quantity of orders or the duration of the arrangement;

(v) did not state that the new factory would be required to have no other customers but the Group;

(vi) did not mention the possibility of the Group granting a loan or other funding; and

(vii) did not state any expectation that the Group would have a say in the management of the new factory or any company created to set up and operate it.

(b) The first defendant and Mr Peter Tan:

(i) stated that they were open to the proposal;

(ii) stated that they would go to Vietnam to assess the suitability of factory sites and the viability of the proposal;

(iii) did not give a firm commitment to actually set up the new factory; and

(iv) did not ask for a loan or other funding.

(c) The second defendant and the third party were not involved in the discussions.

The legal questions to be answered

42 As I indicated above, it has been established that Mr Mok proposed that the first defendant and Mr Peter Tan consider setting up the new factory and stated that the Group would be prepared to place orders for that factory to fulfil. It has also been established that the first defendant and Mr Peter Tan agreed to travel to Vietnam to assess the viability of the proposal. The main question is whether this created a binding contract or merely gave rise to an informal understanding binding only in honour. There are also the matters of

who the parties to it were, what the terms of the contract were, and whether those terms were breached.

Who were the relevant parties?

43 To begin with, it is plain to me that contrary to the plaintiffs' submission, the second defendant and the third party could not have been parties to the alleged oral contract. It is undisputed that neither of them was present at the July 2006 Discussions. They were only informed afterwards of the decision which their spouses had already made. It is true that that the second defendant and the third party were married to the first defendant and Mr Peter Tan respectively and were their long-time business partners. However, that is an insufficient basis to assume that in July 2006, the first defendant and Mr Peter Tan were authorised to contract on behalf of their spouses regarding the establishment of the new factory especially as there was no evidence of any prior consultation with the wives. It is also apparent to me that the first defendant and Mr Peter Tan were viewed by Mr Mok as (and viewed themselves as) the prime movers of their respective businesses. It would likely have been assumed by the men that the second defendant and the third party would assist their husbands as a matter of course as they had always done. It would not have been thought necessary to make them parties to any agreement.

44 Further, I find that the second plaintiff too could not have been a party to the Joint Venture Agreement. The plaintiffs failed to show that the second plaintiff was even in existence in July 2006. Although they adduced documentary evidence of the first plaintiff's date of incorporation, they did not state – let alone adduce any evidence of – the second plaintiff's date of

incorporation. This was a curious omission. In fact, the available evidence pointed toward a later date of incorporation. In the course of Mr Mok's testimony, it emerged that the second plaintiff was incorporated specifically to do business with Esprit using the Elda Companies as the manufacturer. Although no one enquired in court as to the date of the second plaintiff's incorporation, it is highly likely that this was some time after the Elda Companies were set up. Such a conclusion would be consistent with Mr Tan's assertion that the joint venture between the Tans and the defendants was to establish a factory in Vietnam to manufacture garments for the Group generally without identifying the particular company which would be the purchaser. If indeed the second plaintiff was only incorporated after the Elda Companies, the second plaintiff could not have been a party to the Joint Venture Agreement unless an argument could be made that this was a pre-incorporation contract which was subsequently ratified. No such argument was made before me.

45 Thus, I find that the Joint Venture Agreement, if it existed, could only have been between the first plaintiff, the first defendant, and Mr Peter Tan.

Did the Joint Venture Agreement exist?

46 The law distinguishes between contracts which are substantially complete, but have further terms remaining to be agreed, and purported contracts which lack certainty even as to essential terms. The former may be valid contracts; the latter are not. A common sub-species of the latter type is the agreement to negotiate a future contract. It is well-established that such agreements do not have contractual force: *United Artists Singapore Theatres Pte Ltd and another v Parkway Properties Pte Ltd and another* [2003]

1 SLR(R) 791 at [214], citing *Courtney & Fairbairn Ltd v Tolaini Brothers (Hotels) Ltd* [1975] 1 WLR 297 at 301 (affirmed on appeal without dispute on this point in *Parkway Properties Pte Ltd and another v United Artists Singapore Theatres Pte Ltd and another* [2003] 2 SLR(R) 103).

47 On the evidence, I am not persuaded that the so-called Joint Venture Agreement had contractual force even between the first plaintiff, the first defendant, and Mr Peter Tan. This is primarily because the statements made by the parties during the July 2006 Discussions were too tentative and vague to be the basis of a contract or to establish consideration for it. Terms which would be crucial to the contract pleaded by the plaintiffs were left unsettled, including:

(a) Whether the first defendant and Mr Peter Tan would set up the new factory at all (this being subject to their assessment of viability following their trips to Vietnam);

(b) Where the new factory would be located, and its attributes;

(c) The quantity of orders which the group would place;

(d) The broad terms on which such orders would be made;

(e) The type of financial assistance, if any, that the Group would be rendering to the new venture; and

(f) The identity of the parties to the contract (specifically, which members of the Group were contracting with the first defendant and Mr Peter Tan).

48 These were not terms which could have all been left to be negotiated later whilst still creating a contract. Without them, all the parties had was an understanding that one or more members of the Group would want to direct some amount of business to the new factory *if* it was set up, coupled with an expectation of further negotiations after they had had an opportunity to assess the viability of the proposal. The fact that Mr Mok did not specify which of the various companies he controlled or represented was entering into the agreement is particularly troubling. Conceivably, the understanding could have been that the entire Group was entering into the contract, though the actual orders could later come from any member of the Group. Even taking that charitable interpretation (which was not the plaintiffs' case), there would still be a great deal of uncertainty given that the Group not only consisted of "many" companies – some of which might not have been known to the first defendant and Mr Peter Tan – but could have members added to it at any time to suit Mr Mok's and Mr Wong's convenience. There was hence not only uncertainty as to whom the first defendant and Mr Peter Tan would ultimately be supplying garments to, but also uncertainty as to whom they could enforce the Joint Venture Agreement against.

49 It is also significant in my view that the parties did not, at the time of the discussion, have any idea of the investment that would be required from the defendants and the Tans or the amount of any possible shortfall which could be made up with assistance from the plaintiffs. In short, they had no way of knowing if the enterprise would be commercially viable. Thus, the July 2006 Discussions seem to me to have been more in the nature of exploratory talks on the possibility of doing business together rather than negotiations toward a definite agreement for a joint venture.

50 Moreover, it is telling that no mention was ever made of the Joint Venture Agreement – whether in documents such as e-mails and meeting minutes, or in oral discussions recounted by the witnesses – until these proceedings were instituted. Even when the conflict between the first defendant and Mr Peter Tan (into which Mr Mok was also dragged) was at its most heated, and both men were seeking ammunition to use against each other, it was never suggested that either of them might be in breach of personal obligations owed to each other and to the plaintiffs. Mr Mok himself, in a reply in late 2008 to an e-mail from the first defendant asking him to assist in forcing a final resolution to the conflict, took the view that the conflict was an internal matter for the first defendant and Mr Peter Tan to resolve between themselves, and that he did not wish to be bothered further. Such an attitude would be inexplicable if the parties had believed that they owed personal obligations to each other under the Joint Venture Agreement. I think it more likely that the Joint Venture Agreement was a late invention tailored to bring the plaintiffs' grievances against the defendants personally within a recognised cause of action.

51 Finally, although I recognise that the first defendant and Mr Peter Tan, in assessing the new factory's viability, relied on Mr Mok's promise that the second plaintiff would give business to the new factory, that reliance cannot be the decisive factor. It is precisely to address such situations that the law recognises restitutionary remedies which allow parties in appropriate cases to receive compensation for work done, or losses incurred, by acting on an understanding falling short of a contract. Indeed, the case law is replete with examples of business people incurring significant expenses pursuing endeavours which had not been – and which they knew had not been –

contractually agreed: see, for example, the facts in *Cobbe v Yeoman's Row Management Ltd and another* [2008] 1 WLR 1752 at [12]. In that case, Mr Cobbe took it on faith that the other party would perform a promise which he knew to be binding only in honour. Similarly, if Mr Mok is right that the parties' relationship was governed by the expectation that "everyone would act honourably based largely on trust and friendship" – a sentiment echoed by Mr Peter Tan – I find it all the more probable that the first defendant and Mr Tan would have been prepared to take it on faith that Mr Mok would deliver on his promise in some form, without any expectation that that promise would be contractually binding.

52 For these reasons, I find that the Joint Venture Agreement did not exist.

If the Joint Venture Agreement did exist, did it contain an implied term that the parties to it would act diligently and lawfully?

53 Since I have decided that the Joint Venture Agreement did not exist, it is not strictly necessary for me to consider what its terms would have been and whether they were breached. For completeness, however, I set out below what my decision would be had I been persuaded that the Joint Venture Agreement did exist.

54 The only express obligations under the purported Joint Venture Agreement were (a) for the first defendant and Mr Peter Tan to set up a company to operate a factory in Vietnam and (b) for the second plaintiff to place at least some orders with that factory. Both of these obligations were performed. However, the plaintiffs argue that the oral contract also contained an implied obligation "to act lawfully and diligently in their implementation of

the said agreement" which the first defendant breached by the course of conduct described at [10] and [13]–[14] above.

55 I find this submission difficult to accept. Directors no doubt have a duty to act lawfully and diligently by virtue of their office – and this appears to be the case under Vietnamese law as well, according to the AEIC filed by the plaintiffs' expert witness – but that is a duty owed to the company and not to other parties who might deal with the company, such as the second plaintiff. I was not referred to any authority to suggest that a broader obligation can be implied in law, whether in contracts generally or in a relevant specific category of contracts. Indeed, such a duty seems to me to come perilously close to a general implied duty of good faith in the performance of contracts. It has already been established that such a duty does not, at present, exist in Singapore law: *Ng Giap Hon v Westcomb Securities Pte Ltd and others* [2009] 3 SLR(R) 518 at [60].

56 That leaves only implication in fact as a possibility (discounting the possibility of implication by custom, regarding which no relevant evidence was led). Even assuming that there was a suitable lacuna in the Joint Venture Agreement under the first stage of the test laid down by the Court of Appeal in *Sembcorp Marine Ltd v PPL Holdings Pte Ltd and another appeal* [2013] 4 SLR 193 at [94]–[95], the terms which the plaintiffs seek to imply fail both the business efficacy and the officious bystander tests. Given that the Joint Venture Agreement purportedly imposed absolute obligations on the first defendant and Mr Peter Tan to set up the new factory and on the second plaintiff to place orders with it, it is unclear how imposing a duty to act diligently and lawfully could add any business efficacy which would

otherwise be missing. If the first defendant and Mr Peter Tan had failed to set up the new factory, they would on the plaintiffs' own case have been in breach; had the second plaintiff failed to place any orders after the new factory had been set up, it would have been in breach. Diligence and lawfulness need not enter the picture. For the same reason, had an officious bystander suggested adding an express term of lawful and diligent implementation of the agreement, I see nothing to suggest that both parties would have said that the term goes without saying. On the contrary, I expect that the parties to the contract would have disputed the need for such a term.

57 For the foregoing reasons, I dismiss the plaintiffs' claims against the defendants under the Joint Venture Agreement.

The Working Capital Loan Agreement and the Machinery Loan Agreement

58 It is clear that the two loan agreements existed, that the loans were made, and that they were not repaid. I do not think it necessary to inquire further (*eg*, into the exact terms of the loan agreements and the disputes concerning the defendants' knowledge of the Machinery Loan Agreement) for the simple reason that neither loan agreement involved the defendants personally. These were loans made by the first plaintiff to Elda Singapore, and thus the only claims that could be made were claims by the first plaintiff against Elda Singapore. Indeed, in 2009 the first plaintiff had successfully applied to have Elda Singapore wound up on the basis of that indebtedness. That must be the end of the matter, unless the first plaintiff can show that the defendants had assumed personal liability in respect of the loans.

59 The only justification which the plaintiffs offer for seeking repayment from the defendants emerged in the course of a series of clarifying questions which I asked Mr Mok:

Court:	If the loan is not repaid, you have---
Witness:	Yes.
Court:	---to sue Elda Singapore. Is that not correct?
Witness:	Yes.
Court:	Yes. So why are you [suing] the defendant for a loan made to somebody else? Maybe you should explain that in Chinese?
Witness:	*Because we have, er, agreement and contract to go* [*sic*] *business with them to Vietnam.*

[emphasis added]

60 In other words, the two loan agreements were only raised in this dispute because it was alleged that the defendants' duty to act diligently and lawfully under the Joint Venture Agreement extended to procuring Elda Singapore's repayment of the two loans. In the light of my findings regarding Joint Venture Agreement, the first plaintiff's claim under the two loan agreements must also fail.

The Appointment Agreement

61 The plaintiffs assert that the Appointment Agreement amounted to a contract to give Mr Peter Tan absolute control of Elda Vietnam which the defendants breached by failing to appoint Mr Peter Tan to the position of authorised representative and, subsequently, by removing him from the other two positions of general director and legal representative. The plaintiffs' pleading in this regard was that in September 2007, Mr Mok informed the

defendants that as a condition to the second plaintiff continuing to place orders with Elda Singapore, the plaintiffs required Mr Peter Tan to be appointed to take charge of Elda Vietnam.

62 In court, however, Mr Mok's evidence fell short of an ultimatum. He stated in his AEIC that he had felt he would be more comfortable if Mr Peter Tan was fully in charge of Elda Vietnam's operations as the latter was more experienced in the general management of a garment manufacturing company. He said:

> I therefore spoke separately to both Steven Tang and Peter Tan. I told them both that once Elda [Vietnam] started production for the 2nd Plaintiff, we would be sending substantial amount of materials to Elda [Vietnam]. It would be a heavy responsibility to ensure that the operations went smoothly. They both agreed that Peter Tan would be put in charge of Elda [Vietnam]. Subsequently, sometime in November 2007, Peter Tan informed me that he had been formally appointed as the general director of Elda [Vietnam]. …

63 The evidence from the other parties was equivocal. The first defendant testified that he had understood Mr Mok to be making "a threat" to withdraw the Group's custom from the Elda Companies. However, Mr Peter Tan stated in his AEIC that Mr Mok had merely "requested" the appointment and said that "if he were to place orders with Elda [Singapore], and send his raw materials to Elda [Vietnam], he would *want* me to be in charge" (emphasis added). He denied under cross-examination that he had understood Mr Mok to be making a threat. The third party, too, described Mr Mok's statement as a request. Further, the first defendant and Mr Peter Tan agreed that the statement had been made in the context of Mr Mok's ongoing attempts to mediate between the parties with a view toward reconciliation.

64 Whichever label is applied, I accept that Mr Mok expressed his proposal for Mr Peter Tan to take over in fairly robust terms, including the possibility that the Group might otherwise cease to deal with the Elda Companies. My doubts concern the existence of sufficient consideration and the intention to create legal relations necessary to form a contract. It was not clear that Mr Mok had made any firm promise on behalf of the plaintiffs in exchange for the promise to appoint Mr Peter Tan. The General Conditions, under which the second plaintiff had no continuing obligation to place orders, remained in force, and there was no suggestion that the second plaintiff was to relinquish or restrict its freedom under the General Conditions if Mr Peter Tan was appointed. I therefore cannot locate any consideration on the plaintiffs' part.

65 I am also not convinced that there was an intention to create legal relations. Although such intention is presumed in commercial contexts, I find that the surrounding circumstances militate against it in this case. The plaintiffs did not approach the discussion as a contractual negotiation. Rather, Mr Mok – having been invited to act as peacemaker – was attempting to use his influence to end the impasse within the Elda Companies so that they could get on with business. It is easy enough to understand why the defendants and the Tans would acquiesce in Mr Mok's proposal: as the representative of the Elda Companies' only customer, he was in a strong position to influence the Elda Companies' decisions. Such acquiescence reflected a bowing to commercial pressure (as well as the fact that the Tans' interests were furthered by the proposal), not an intention to create legal relations between the parties concerned.

66 In these circumstances, I cannot locate the legal elements required to make the so-called Appointment Agreement a legally binding contract, either between the second plaintiff, the defendants, and the Tans or, as alternatively argued by the plaintiffs, between the plaintiffs and the defendants alone.

The Elda Division Agreement

67 The plaintiffs assert that the defendants breached the Elda Division Agreement by not performing their side of the bargain, causing the process to stall. I am not inclined to deal with this argument in depth for the simple reason that the Elda Division Agreement had nothing to do with the plaintiffs. This is apparent from Mr Mok's statement in his AEIC that "[s]eeing that it was so difficult for Peter Tan and Steven Tang to work together, I told them that I had no objection to this". Mr Peter Tan puts it even more clearly in his AEIC, in which he states that:

> … sometime in July 2008, Steven Tang told me that he wanted to divide Elda [Vietnam] into two separate companies and we could then each go our way. I agreed to this. We informed Leonard Mok who said that he had no objection to this as well.

68 Clearly, the plaintiffs were outsiders with an indirect interest in the proposed division (and who thus deserved to be informed of the agreement through Mr Mok), but were not themselves parties to the Elda Division Agreement. They therefore have no standing to claim under it.

The Share Purchase Agreement

69 The plaintiffs assert that on or around 22 January 2009, the plaintiffs and the defendants arrived at an oral agreement for the plaintiffs to purchase the defendants' shares in Elda Singapore ("the Share Purchase Agreement"),

and that the defendants breached the Share Purchase Agreement. This argument is obviously unsustainable. The terms of the oral agreement were recorded in an e-mail sent by Mr Mok to the defendants on 22 January 2009. The e-mail shows a contract between the defendants, the Tans and Mr Mok. Nothing suggests that the plaintiffs were parties to this contract. Further, Mr Mok repeatedly confirmed under cross-examination that the Share Purchase Agreement was between the defendants and himself personally. Indeed, he even caused his wife to issue a cheque for S$10,000 in favour of the first defendant to serve as a deposit for the purchase. As such, the plaintiffs were not privy to the Share Purchase Agreement and have no right to claim under it.

70 In any event, it does not seem to me that the defendants breached the Share Purchase Agreement. Mr Mok stated in his AEIC that the Share Purchase Agreement was not performed because the first defendant, in breach of the agreement, did not allow the outstanding goods to be shipped out. But such a term does not appear in the Share Purchase Agreement as recorded in Mr Mok's e-mail. Instead, the shipping of the outstanding goods is phrased as a condition precedent to the obligations under the Share Purchase Agreement being triggered, such that if the garments were not shipped out, there would be no purchase of the defendants' shares. This interpretation is confirmed by a second e-mail which Mr Mok sent slightly over an hour after the e-mail recording the terms of the Share Purchase Agreement. In it, Mr Mok stated that "[t]he below agreement [*ie*, the Share Purchase Agreement] will be void" if the goods were not shipped out or delivered to the freight forwarder by the following day. Under cross-examination, Mr Mok reiterated that that was his intention. Whether Mr Mok meant "void" in the legal sense or meant that he

would not consider himself to be bound to perform his obligations under the Share Purchase Agreement, it is clear that the non-shipment of the outstanding garments the following day was not a breach of any obligation owed by the defendants.

71 Consequently, the plaintiffs' claim under the Share Purchase Agreement must fail.

The tortious claims

Conspiracy by unlawful means

72 The plaintiffs assert that the defendants committed the tort of conspiracy by unlawful means by agreeing to perform and then performing certain acts aimed at preventing the Elda Companies from fulfilling their obligations to the plaintiffs. The acts alleged are those described at [10] and [13]–[14] above.

73 I accept the allegations made by the plaintiffs concerning the first defendant's fabrication of the meeting minutes dated 25 November 2008. The translated minutes list all four persons on the member's council as being in attendance; indeed, without at least one of the Tans present, there could not have been a *quorum* for the meeting according to Elda Vietnam's charter. The translated minutes further state that the third party "disagreed" with the proposal to remove Mr Peter Tan from his positions and that at the end of the meeting "the meeting minutes was read in front of all members" and "[t]he members unanimously approved the meeting minutes". Yet the defendants admitted under cross-examination that only the two of them, out of the four persons on the member's council, were in fact present at the meeting. The first

defendant attempted to explain this glaring inconsistency as being the result of a mistranslation by the employee who recorded the minutes. I found this explanation entirely unsatisfactory given that the said employee would have been present at the purported meeting and would have been able to see with his or her own eyes that the Tans were absent and were therefore unable to disagree with or approve of anything. When I asked the first defendant to clarify his explanation, he was unable to do so, and merely stated that he understood the concern I was raising.

74 In the circumstances, I can only conclude that the first defendant intentionally misstated, or procured the misstatement of, the minutes of the 25 November 2008 meeting so as to give BDIZA the impression that the removal of Mr Peter Tan had been properly approved. In fact, the meeting was void for lack of a *quorum*, as the first defendant well knew. His deception was fraudulent and would no doubt qualify as an unlawful act. So would his reliance on the amended investment certificate, procured by that fraud, to justify retaining the company seal after he had taken it from Mr Peter Tan.

75 Nonetheless, I do not think the tort of unlawful means conspiracy is made out. As the Court of Appeal set out in *EFT Holdings* at [112], the tort of unlawful means conspiracy is committed where:

(a) there was a combination of two or more persons to do certain acts;

(b) the alleged conspirators had the intention to cause damage or injury to the plaintiff by those acts;

(c) the acts were unlawful;

(d) the acts were to be performed in furtherance of the agreement; and

(e) the plaintiff suffered loss as a result of the conspiracy.

I am of the view that the first and second elements are not present here.

76 The element of a combination between the conspirators requires more than agreement to perform a discrete act or to acquiesce in its performance. Rather, a plaintiff "must show that there was an agreement between the [conspirators] to *pursue a particular course of conduct*, and that concerted action was taken pursuant to that agreement" (*EFT Holdings* at [113], emphasis added). Further, all the conspirators must be "sufficiently aware of the surrounding circumstances and share the object for it properly to be said that they were acting in concert at the time of the acts complained of" (*EFT Holdings* at [113], citing *Kuwait Oil Tanker Co SAK v Al Bader* [2000] 2 All ER (Comm) 271 at [111]).

77 I am not satisfied that the second defendant agreed to pursue the particular course of conduct planned by the first defendant or that she shared his objectives. As Mr Mok admitted on the stand, the sole basis for the plaintiffs' complaints against her is that she had agreed to the removal of Mr Peter Tan and that she had failed to take the company seal back from the first defendant after he had taken it. Beyond this, Mr Mok simply assumed that the defendants, being husband and wife, would have shared all their information and plans with each other. I find this assumption to be unwarranted, especially since the first defendant was apparently accustomed to acting on his own initiative and expecting the second defendant to acquiesce as a matter of

course. Her own evidence was that although she and the first defendant were "doing fine" as far as the closeness of their relationship went, the first defendant's habit regarding his conflict with Mr Peter Tan had been to confide in her only "[s]ome problems, not all". It is entirely possible that the whole scheme was the first defendant's own invention and that the extent of the second defendant's involvement was to sign on the recorded minutes.

78 As for the taking of the company seal, the second defendant's evidence was that the first defendant had not informed her of his intention to take the company seal, and that although she was present for at least part of the meeting at which the company seal was taken, she had left partway through the meeting to attend to matters in the printing department and so was not present when the seal was taken. Against this, the third party asserted that although the third party was not initially present at the meeting, she had gone to investigate upon hearing the commotion accompanying the snatching of the company seal and had seen the second defendant there. Neither account seems markedly likelier than the other. At any rate, I do not think the second defendant's mere presence there would have been sufficient to raise an inference that she was more than a bystander to the taking of the seal.

79 I note that the plaintiffs' counsel had every opportunity to cross-examine the second defendant on all these matters. On the state of the evidence as it exists, I cannot in fairness infer the second defendant was more deeply involved than she had admitted being. I therefore find that the plaintiffs have failed to prove that there was a "combination" of conspirators within the meaning set out in *EFT Holdings*.

80 Turning to the requirement of an intention to injure the plaintiffs, the test to be applied was laid out in *EFT Holdings* at [101]:

> A claimant in an action for unlawful means conspiracy would have to show that the unlawful means and the conspiracy were *targeted or directed at the claimant.* ***It is not sufficient that harm to the claimant would be a likely, or probable or even inevitable consequence of the defendant's conduct.*** *Injury to the claimant must have been* ***intended as a means to an end or as an end in itself.*** …
>
> [emphasis added in italics and bold italics]

81 Applying that test to our facts, it seems that injury to the second plaintiff was a matter of indifference to the defendants, not an intended effect. The first defendant's relationship with Mr Mok and the plaintiffs, although tense, was not so bad as to be hostile. This can be seen in the fact that even toward the end of Elda Vietnam's operations, the first defendant continued to look to Mr Mok as a mediator and a person who might be able to force Mr Peter Tan to see sense (as the first defendant perceived it). Viewed in this context, the first defendant's fraud was aimed at forcing Mr Peter Tan out of power so that the first defendant could have sole control of Elda Vietnam. The first defendant may have been reckless as to the loss which would probably or inevitably be caused to the plaintiffs by the turmoil within Elda Vietnam, but it cannot be said that the plaintiffs' possible loss was a means to an end or an end in itself.

82 For both these reasons, I find that the plaintiffs' claims in the tort of unlawful means conspiracy are not made out.

Inducing breach of contract

83 This claim covers much the same factual ground as the claim of unlawful means conspiracy. The plaintiffs argue that the defendants' removal of Mr Peter Tan, among other acts and omissions, was an "unlawful interference in the contracts that Elda Singapore had with the Plaintiffs which were the loan agreements and the supply contracts". I understand this to be a claim in the tort of inducing breach of contract. I have concluded that this claim must fail.

84 As I stated in *M+W Singapore Pte Ltd v Leow Tet Sin and another* [2015] 2 SLR 271 ("*M+W*") at [88], the tort is committed where:

(a) the defendants knew of the contract and intended for it to be breached;

(b) the defendants induced the breach; and

(c) the contract was breached and damage was suffered.

85 Both plaintiffs' claims do not satisfy the first requirement. Although the defendants knew of the existence of the loan and supply contracts, they cannot be said to have intended for them to be breached. It is well-established that for such intention to be found, it is not enough for a defendant to have foreseen that his acts or omissions could lead to a breach of contract. Instead, the test is identical to the test for intention in the context of unlawful means conspiracy: the breach of contract must be intended either as a means to an end or an end in itself (see *M+W* at [90]–[91] and the authorities cited therein). For reasons similar to those set out at [81] above, I am not convinced that the first defendant had the requisite intention. It is even more difficult for

the plaintiffs to establish such intention on the part of the second defendant who was entirely passive.

86 It bears mentioning that as far as the loan contracts were concerned, the evidence was that Elda Singapore was in default long before the actions complained of. It paid no interest on either loan at all even though monthly invoices were sent out for the same by the first plaintiff. The Working Capital Loan fell due in January 2008 but no action was taken to enforce recovery. While the repayment terms of the Machinery Loan were unclear, the first plaintiff was content to send out monthly interest statements only until March 2009 which was well after the disputes between the Tans and the defendants had turned toxic. For the loans, it is clear that the first plaintiff cannot satisfy the second requirement either.

87 Although I have found that the claim against both defendants fails, I wish to add that the plaintiffs framed the claim extremely widely and without due consideration for the very different positions of the first and second defendants. Married they may be but they are not one person in law. Even if the claim had been made out against the first defendant, no evidence was led which could possibly have embroiled the second defendant in this alleged tort.

Negligence

88 The plaintiffs argue that the relationship between the defendants and the plaintiffs gave rise to a tortious duty of care on the defendants' part. This duty required them to take appropriate care in performing their duties relating to the fulfilment of Elda Vietnam's obligation to manufacture and deliver the garments ordered by the second plaintiff. The plaintiffs assert that

the defendants breached this duty through various acts and omissions which have been discussed above and which prevented Elda Singapore from fulfilling its contractual obligations to the plaintiffs.

89 The existence of a duty of care is determined by the two-stage test laid down in *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 ("*Spandeck*"). At the first stage, the court must consider the degree of proximity between the parties. It must be emphasised that proximity is not determined with reference to how well the parties know each other in a general sense, but rather with reference to "the relationship between the parties *in so far as it is relevant to the allegedly negligent act or omission* of the defendant and *the loss or injury sustained* by the plaintiff" (emphasis added): *Sutherland Shire Council v Heyman* (1985) 60 ALR 1 at 55, a decision of the High Court of Australia cited with approval in *Spandeck* at [78]. For this reason, the pre-existing friendship or business association between the parties is, on the present facts, irrelevant to the acts and omissions and the loss or injury with which I am concerned.

90 Further, where the parties have chosen to structure their commercial relationship by way of a contract, the court must ask whether the parties intended, by their choice of that structure, to exclude a tortious duty of care: *Animal Concerns Research & Education Society v Tan Boon Kwee* [2011] 2 SLR 146 at [71], citing *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 at 193–194. If the parties did so intend, there would be insufficient proximity to impose a tortious duty of care, because to do so would "cut across and be inconsistent with the structure of relationships created by the

contracts, into which the parties had entered": *Pacific Associates Inc v Baxter* [1990] 1 QB 993 at 1032, quoted with approval in *Spandeck* at [98].

91 In the present case, although there is no express exclusion of the defendants' and the Tans' personal liability in tort, it is undisputed that the parties chose to structure their commercial relationship as (a) a series of supply contracts, governed by the General Conditions, between the second plaintiff and Elda Singapore and (b) two loan agreements between the first plaintiff and Elda Singapore. It is also undisputed that the parties contemplated that Elda Vietnam would operate as a subsidiary of Elda Singapore, which would be owned by the defendants and the Tans. No business person or commercial entity could be ignorant of the fact that such a structure of transactions would necessarily insulate the defendants and the Tans from the liabilities undertaken by the Elda Companies. That is one of the main benefits of incorporating a company instead of operating as a partnership. If Elda Vietnam failed in such circumstances, I do not see how there can be sufficient proximity to justify imposing a tortious duty of care on the defendants.

92 In any event, public policy considerations at the second stage of the *Spandeck* test militate against the imposition of a tortious duty on these facts. The plaintiffs are of course right when they state that the defendants must have known that if Elda Vietnam failed to perform its obligations, or if Elda Singapore failed to repay the two loans, loss would be caused to the second plaintiff and first plaintiff respectively. But that is the natural state of things: whenever a company enters a contract, its successful performance will necessarily depend, among other things, on the actions of the company's directors, and failure to perform the contract will usually cause loss to the

company's counterparty. If I were to accept the plaintiffs' submission that this nexus is sufficient to give rise to a tortious duty of care on the part of the defendants, I do not see how I could avoid imposing a similar duty of care on *any* director involved in *any* commercial transaction. Not only would such a position radically expand the domain of the tort of negligence, it would also erode the principle of separate corporate personality that undergirds contemporary commerce. That cannot be allowed.

93 For these reasons, I dismiss the plaintiffs' claim in the tort of negligence.

The fiduciary claim

94 The plaintiffs also argued that from the time of Elda Singapore's insolvency (which the plaintiffs said was 5 January 2008, being the date on which Elda Singapore failed to repay the Working Capital Loan), the plaintiffs were owed fiduciary duties by the defendants due to the plaintiffs' status as creditors of Elda Singapore. These fiduciary duties were allegedly breached by the defendants' use of Elda Vietnam's factory to manufacture garments for sale to customers other than the second plaintiff in or around April 2008 and, more generally, the defendants' acts and omissions which prevented Elda Vietnam from fulfilling the second plaintiff's orders.

95 I see no basis for the plaintiffs' assertion that Elda Vietnam was to work exclusively for the second plaintiff. The evidence, including the General Conditions, showed that exclusivity was never on the cards. More fundamentally, the plaintiffs' entire claim in fiduciary law is legally misconceived. In *Liquidators of Progen Engineering Pte Ltd v Progen*

Holdings Ltd [2010] 4 SLR 1089, the Court of Appeal made it clear (*per* V K Rajah JA, at [52]) that although the directors of an insolvent company have a fiduciary duty to take into consideration the interests of the company's creditors:

> … this fiduciary duty is strictly speaking owed *to the company*; there is *no duty owed directly to creditors*. In other words, individual creditors cannot, without the assistance of liquidators, directly recover from the directors for such breaches of duty (see *Yukong Line Ltd of Korea v Rendsburg Investments Corporation of Liberia (No 2)* [1998] 1 WLR 294; and more recently, *Re Pantone 485 Ltd, Miller v Bain* [2002] 1 BCLC 266). …
>
> [italics in original]

96 It follows that any claim against the defendants for failure to consider the interests of Elda Singapore's creditors must be brought by the liquidator of Elda Singapore, not by the plaintiffs. I dismiss the plaintiffs' claims for breach of fiduciary duty for that reason.

The claim under s 340(1) of the Companies Act

97 The plaintiffs further assert that they are entitled to relief under s 340(1) of the Companies Act, which allows any person to be made personally liable for a company's debts if he was party to the company's carrying on of business with fraudulent intent. The plaintiffs argue that the defendants' acts and omissions with respect to Elda Vietnam fit that description.

98 The plaintiffs seem to have overlooked the fact that s 340(1) can be engaged only "in the course of the winding up of a company or in any proceedings against a company". Additionally, "company" in the context of

the Companies Act is defined in s 4(1) as referring only to "a company incorporated pursuant to this Act or pursuant to any corresponding previous written law". This would include Elda Singapore but not Elda Vietnam, which was incorporated in Vietnam under the laws of Vietnam.

99 Since this action is against the defendants only and not against Elda Singapore, they are not entitled to rely on s 340(1) in these proceedings. Further, the acts which the plaintiffs complain of were done in respect of Elda Vietnam's business, not Elda Singapore's, and thus do not even fall within the scope of s 340(1). In any event, if I had to attribute a nefarious purpose to the acts of the defendants, it would be to harm Mr Tan and the third party, not to defraud the plaintiffs. I am not even sure that the wrongful acts could properly be described as "business of the company" since the whole basis of the complaint was that the first defendant did his best to stop Elda Vietnam carrying on any business at all. I therefore reject the plaintiffs' claim for relief under s 340(1).

The indemnity claim

100 Finally, the plaintiffs asserted that they had a general right, arising in law or in equity, to be indemnified by the defendants for their losses. They cited the Court of Appeal decision of *Goh Sin Huat Electrical Pte Ltd v Ho See Jui (trading as Xuanhua Art Gallery) and another* [2012] 3 SLR 1038 ("*Goh Sin Huat*"), particularly [60], and the Privy Council decision of *Eastern Shipping Company, Limited v Quah Beng Kee* [1924] AC 177 ("*Quah Beng Kee*") which *Goh Sin Huat* relied on.

101 I find this submission baffling. *Goh Sin Huat* and *Quah Beng Kee* did not concern a free-standing right of indemnity, but one which arose either as an express or implied contractual obligation or as a remedy available upon the breach of an equitable or legal duty (*eg*, breach of trust, an example given in *Quah Beng Kee* at 184–185). It followed that a right of indemnity could not operate unless the plaintiffs first identified the relevant contract or breach. As I have already found that the various contracts alleged by the plaintiffs either did not exist or did not concern the plaintiffs or the defendants, and that the plaintiffs' claims in tort, fiduciary law, and under statute also fail, the question of indemnity does not arise. The plaintiffs' attempt to use the right to indemnity as an alternative argument is therefore misconceived and their claim for an indemnity must be dismissed.

The defendants' claims against the third party

102 Having found that the defendants have no liability to the plaintiffs, there is no need for me to consider the defendants' claims for indemnity or contribution from the third party. For completeness, I would in any event have found that there was insufficient evidence to prove that the third party was sufficiently complicit in Mr Peter Tan's alleged wrongful acts and omissions to make her liable to indemnify the defendants.

Conclusion

103 The plaintiffs have done their best to fit their complaints within the bounds of the multifarious claims discussed above. It was an awkward fit. This is not to suggest that there was no factual basis at all for the plaintiffs' sense of injury. In particular, I recognise that some of the acts done by the first defendant in the course of his power struggle with Mr Peter Tan were

regrettable, dishonest, and detrimental to the Elda Companies' health. The first defendant may have been in breach of his fiduciary duty to the Elda Companies but if so, the cause of action and the remedy would vest in the Elda Companies alone. However, that is a separate matter from whether, as a matter of law, the defendants breached any obligation owed to the plaintiffs. It appears to me that they did not.

104 I therefore dismiss the plaintiffs' claims in their entirety. I also dismiss the defendants' claims for indemnity or contribution from the third party, there being nothing for the third party to indemnify or contribute towards.

105 I will hear the parties on costs.

Judith Prakash
Judge of Appeal

Tan Heng Thye and Rachael Williams (CSP Legal LLC)
for the plaintiffs;
The defendants in person;
The third party in person.
