Lew Chee Fai Kevin *v* WBL Corp Ltd
[2010] SGHC 213

Case Number : Suit No 129 of 2008

Decision Date : 30 July 2010

Tribunal/Court : High Court

Coram : Lai Siu Chiu J

Counsel Name(s) : Thio Shen Yi SC, Leow Yuan An Clara Vivien and Charmaine Kong (TSMP Law Corporation) for the plaintiff Andrew Yeo Khirn Hin, Aaron Lee and Emmanuel Duncan Chua (Allen & Gledhill LLP) for the defendant.

Parties : Lew Chee Fai Kevin — WBL Corp Ltd

Contract – Illegality

[LawNet Editorial Note: The appeal to this decision in Civil Appeal No 149 of of 2010 was allowed in part and the cross-appeal in Civil Appeal No 150 of 2010 was allowed by the Court of Appeal on 10 February 2012.See [2012] SGCA 13.]

30 July 2010 Judgment reserved.

Lai Siu Chiu J:

1 This is the second action arising from the sale of shares in the defendant company, WBL Corporation Limited ("WBL"). The plaintiff here is Kevin Lew Chee Fai ("Lew"). The sale of shares took place on 4 July 2007.

2 In the first action before this court (*i.e*. Suit No. 71 of 2009), the Central Bank of Singapore *viz* the Monetary Authority of Singapore ("MAS") claimed a civil penalty from Lew under s 232(2), read with s 218, of the Securities and Futures Act (Cap 289, 2006 Rev Ed) ("the SFA"). There, MAS alleged that Lew had contravened the rules prohibiting insider trading under s 218 of the SFA by selling 90,000 WBL shares on 4 July 2007. For convenience, I will refer to the sale of shares by Lew on 4 July 2007 as the "Insider Trade". In my earlier judgment (see *Monetary Authority of Singapore v Lew Chee Fai Kevin* [2010] SGHC 166 ("*MAS v Lew*")), I held that Lew had contravened the relevant provisions of the SFA by entering into the Insider Trade and ordered him to pay a civil penalty amounting to $67,500. In the present action, Lew claimed for shares to be issued to him pursuant to an employee share option scheme that was operated by WBL, as he claimed to have validly exercised various options on 9 July 2007. WBL denied Lew's claims primarily on the grounds of illegality.

The facts

3 The salient facts are not in dispute and I shall set them out briefly.

4 WBL operated an Executive Share Options Scheme ("ESOS") to motivate and retain its key executives. The following are the key terms of the ESOS:

> 6. **Right to Exercise Option**
>
> (a) Subject as provided in this Rule 6 and Rule 7, an Option shall be exercisable, in whole or in

part, at any time during the Option Period.

(b) An Option shall, to the extent unexercised, immediately lapse without any claim against the Company:-

(i) subject to Rules 6(c) and 6(d), upon the Participant ceasing to be in the full-time employment of the Group for any reason whatsoever; or

(ii) upon bankruptcy of the Participant.

(c) If a Participant ceases to be employed by the Company or any of its subsidiaries by reason of ill-health, injury, disability (in each case evidenced to the satisfaction of the Committee), redundancy, retirement at or after attaining normal retirement age or for any other reason approved in writing by the Committee, subject to the written approval of the Committee in its absolute discretion, he may exercise any unexercised Option within the Option Period.

...

8. **Exercise of Options, Allotment and Listing of Stock Units**

(a) An Option may be exercised, in whole or in part, by a Participant giving notice in writing to the Company in or substantially in the form set out in Appendix C.... Such notice must be accompanied by a remittance for the Aggregate Subscription Cost. An Option shall be deemed to be exercised upon receipt by the Company of the said notice duly completed and the remittance for the Aggregate Subscription Cost.

(b) The Company shall, as soon as practicable after the exercise of an Option, allot the relevant Shares to the Participant and shall apply ... for permission to deal in and for quotation of such Stock Units. Subject to such consents or other required action of any competent authorities under regulations or enactments for the time being in force as may be necessary and subject to compliance with the Rules of the Scheme, the Shares shall be allotted and issued not later than ten (10) Market Days after the exercise of the Option.

...

19 **Conditions of Option**

Every Option shall be subject to the condition that no Shares shall be issued pursuant to the exercise of an Option if such issue would be contrary to any law or enactment, or any rules or regulations of any legislative or non-legislative governing body for the time being in force in Singapore or any other relevant country.

5 Between 2000 and 2004, Lew was granted (on a number of occasions) options to purchase WBL shares at various exercise prices. As of 9 July 2007, the following share options remained unexercised by Lew:

Date of Grant	No of shares granted	Exercise Price	Option Period
21 January 2000	37,500	$2.720	21 October 2002 – 20 December 2009

6 January 2004	146,000	$2.947	6 October 2006 – 5 December 2013
17 December 2004	153,000	$3.220	17 September 2007 – 16 November 2014

6 I have already set out the facts giving rise to the Insider Trade in *MAS v Lew* and will not repeat them here. Lew received a total of $446,773.26 from the Insider Trade. Lew does not now dispute that the loss which he avoided was $27,000.

7 On 9 July 2007, Lew submitted two notices to WBL (as required under clause 8(a) of the ESOS, see above at [4]) ("the "Notices"). The first notice was to exercise the share option granted on 21 January 2000 to purchase all the WBL shares allotted to him under that option. The second notice was to exercise the share option granted on 6 January 2004 to purchase 130,000 WBL shares. Lew tendered two cheques totalling $485,110 as payment for exercising those share options (the "Cheques"). It is not disputed that Lew had used the funds received from the Insider Trade to pay for the exercise of the options. Lew informed Tan Swee Hong ("Tan"), WBL's Group General Manager (Legal and Compliance) and Company Secretary, that he had sold the shares under the Insider Trade on the very same day (*i.e.*, 9 July 2007). After Tan informed Lew that his actions could be construed as an insider trading, Lew told Tan that he had executed the Insider Trade to "raise cash to exercise my WBL options".

8 On 19 July 2007, Lew resigned from WBL. In his letter of resignation, Lew highlighted that he had applied to exercise options to receive a total of 167,500 WBL shares on 9 July 2007 and sought confirmation that he was entitled to exercise the remaining share options which were either unexercised or unvested. WBL did not respond to Lew's question on the share options. As a result, on 27 December 2007, Lew wrote to the company seeking a response. WBL replied on 8 January 2008 as follows:

> …we are bound by legal restrictions from taking any action with respect to your attempt to exercise these options using the proceeds of your trades.
>
> With regard to your request for the vesting/exercising of the options/SARs, the company will reserve any decision pending the final outcome of the proceedings against you initiated by the authorities.

9 Subsequent letters were exchanged between WBL's and Lew's solicitors on this matter. WBL took the position that it was not in breach of any contract or liable in any way to Lew for the 167,500 WBL shares, and that Lew was not entitled to any of the unexercised or unvested options. Disagreeing with WBL, Lew commenced the present action to claim for the 167,500 shares and for damages.

Arguments before this court

10 I will now summarise the parties' main arguments, starting with Lew's case. He took the position that he was entitled, on 9 July 2007, to exercise the share options that had been granted to him on 21 January 2000 and 6 January 2004. Having submitted the Notices and Cheques on 9 July 2007, he had therefore accepted WBL's offer to issue and allot WBL shares to him and had consequently exercised those share options within time. As a result, Lew claimed that WBL was in breach of contract in refusing to allot and issue the 167,500 WBL shares to him. Lew sought specific

performance of the share options that he exercised as well as damages (*viz* dividends that were declared by WBL after Lew had submitted the Notices and Cheques and the lost opportunity to sell those WBL shares at a higher price than prevailing at the time of the issue and allotment).

11 WBL did not deny that Lew had submitted the Notices and Cheques on 9 July 2007. However, it took the position that Lew was not entitled to purchase the shares under those share options because Lew was in breach of s 218 of the SFA (which sets out the rules prohibiting insider trading) as well as of his common law, contractual and statutory fiduciary duties. WBL highlighted that Lew had used the proceeds of his Insider Trade to exercise the share options on 9 July 2007. It contended that it would be in contravention of the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Cap 65A, 2000 Rev Ed) (the "CDSA") if it was to allot and issue those 167,500 WBL shares to Lew. As a result, WBL's position was that under the ESOS, performance of the share options was unenforceable or illegal, as it was impliedly prohibited by the CDSA, and/or would offend the conscience of the court and/or was contrary to public policy to do so.

12 For the reasons stated in *MAS v Lew*, I had found that Lew had contravened s 218 (read with s 232) of the SFA (although I should state that he has been granted leave to appeal and has done so in Civil Appeal No 123 of 2010). For present purposes, there is no dispute that Lew was involved in some wrongdoing. Neither is there any doubt that Lew had used the proceeds from the Insider Trade to fund the exercise of his share options on 9 July 2007.

Issues before this court

13 The main thrust of WBL's case was that it would infringe s 44(1) of the CDSA by allotting and issuing the 167,500 WBL shares to Lew pursuant to his exercise of the share options on 9 July 2007. Section 44(1) of the CDSA states:

> **Assisting another to retain benefits from criminal conduct**
>
> **44**. —(1) Subject to subsection (3), a person who enters into or is otherwise concerned in an arrangement, knowing or having reasonable grounds to believe that, by the arrangement —
>
> (a) the retention or control by or on behalf of another (referred to in this section as that other person) of that other person's benefits of criminal conduct is facilitated (whether by concealment, removal from jurisdiction, transfer to nominees or otherwise); or
>
> (b) that other person's benefits from criminal conduct —
>
> (i) are used to secure funds that are placed at that other person's disposal, directly or indirectly; or
>
> (ii) are used for that other person's benefit to acquire property by way of investment or otherwise,
>
> and knowing or having reasonable grounds to believe that that other person is a person who engages in or has engaged in criminal conduct or has benefited from criminal conduct shall be guilty of an offence.

14 Before I turn to consider whether WBL would be in contravention of s 44(1) of the CDSA had it acted on Lew's exercise of his share options, it would be useful for me to set out the exact parameters of the dispute in order to distil the issues that are before this court.

15 First, there is no dispute that the ESOS itself is legal. There is also no allegation that either party had any nefarious intentions at the time of entering into the ESOS.

16 It follows that what is, in truth, at the heart of the dispute is whether the performance of the ESOS by WBL would have been illegal. If it would have been illegal for WBL to perform its obligations to allot and issue the WBL shares, this court cannot hold WBL in breach of contract for failing to do so, or order WBL to specifically perform the ESOS (as Lew requested in his statement of claim): see *Treitel on the Law of Contract* (Peel gen ed) (Sweet & Maxwell, 12th Ed, 2007) at para 11-108.

17 Where one party forms a contract with an intention of performing it illegally at the outset and the other party is unaware of such an illegal intention (the "innocent party"), the innocent party is entitled to refuse to perform the contract if he becomes aware of the illegality subsequently, but before the contract is performed: see Buckley, *Illegality and Public Policy* (Sweet & Maxwell, 2nd Ed, 2009) at para 4.25. In *Cowan v Milbourn* (1867) LR 2 Exch 230, the court had little hesitation in dismissing the plaintiff's claim for breach of contract arising from the defendant's refusal to perform the contract by hiring his rooms to the plaintiff. The defendant was not aware of the plaintiff's illegal purpose when the contract was formed and came to realise that the plaintiff had intended to use those rooms to deliver lectures of an illegal nature at a later time. In my view, it should make no difference that, on the facts of the case here, the intention to perform the contract illegally came into being *after* the contract was legally formed.

18 This is supported by the UK Court of Appeal case of *K Ltd v National Westminster Bank plc (Revenue and Customs Commissioners and another intervening)* [2007] 1 WLR 311 *("K Ltd")*. There, the customer gave its bank certain instructions to pay various sums of money out of its account. The bank suspected that the money in the customer's account represented criminal property. By way of background, under the UK Proceeds of Crime Act 2002 (c 29) (the "POC Act"), it would have been an offence (under s 328) for the bank to be concerned in:

> ... an arrangement which [it, i.e. the bank] knows or suspects facilitates (by whatever means) the acquisition, retention, use or control of criminal property by or on behalf of another person.

19 The POC Act also provides that no offence would be committed if the bank had made a disclosure and received authorised consent to do so. I observe in passing that a similar provision exists under the CDSA (at s 44(3)). As such, the bank could not legally act on the customer's instructions without making the required disclosure and receiving authorised consent to do so. However, this was exactly what the customer sought against the bank in court. The customer applied for an interim injunction requiring the bank to comply with its instructions. It was in this context that Longmore LJ, delivering the judgment of the Court of Appeal, observed (in relation to the injunction) that (at [10]–[12]):

> 10 If the law of the land makes it a criminal offence to honour the customer's mandate in these circumstances *there can, in my judgment, be no breach of contract for the bank to refuse to honour its mandate* and there can, equally, be no invasion (or threat of an invasion) of a legal right on the part of the bank such as is required before a claimant can apply for an injunction. If that is right, there would be no issue to be tried in any later legal proceedings and any application for an interlocutory mandatory injunction has to be dismissed.
>
> 11 It could be said that this puts the matter over-legalistically or overdramatically in the sense that it is not usually a defence to a claim for a breach of contract that the contract-breaker would, by performing the contract, be in breach of the criminal law. That is not, however, correct. *The conventional view is that, if a statute renders the performance of a contract*

illegal, the contract is frustrated and both sides are discharged from further performance. ***In a case, however, where a statute makes it temporarily illegal to perform the contract, the contract will only be suspended until the illegality is removed. That still means that, during the suspension, no legal right exists on which any claim to an injunction must depend*** .

12 Even if, for any reason, the above analysis is open to objection, the fact still remains that during the seven-working-day or 31-day period, as the case may be, the bank would be acting illegally by processing the cheque. *It would be entirely inappropriate for the court, interlocutorily or otherwise, to require the performance of an act which would render the performer of the act criminally liable*. As a matter of discretion any injunction should be refused.

[Emphasis added in italics and bold italics]

20 It is therefore clear that there can be no breach of contract where it would have been illegal to perform one's obligations under that contract. However, it seems to me that this proposition will depend on two factors. The first factor is whether there are any other ways of performing the contract legally. The second is whether the illegality can be removed subsequently at some point of time. In the latter circumstance, the contract will be suspended until the illegality is removed: *K Ltd* at [11]. Pertinently, both Lew and WBL relied on *K Ltd* in their submissions and did not disagree with Longmore LJ's observations. As such, the issues which I have to address are:

(a) Would it have been illegal for WBL to have allotted and issued shares to Lew?

(b) If so, could the illegality have been removed subsequently at some point or were there other legal means of performing the ESOS?

I will consider each issue in turn.

Would it have been illegal for WBL to have allotted and issued shares to Lew?

21 From its submissions, it appeared that WBL was relying on s 44(1)(b)(ii) of the CDSA to establish its illegality defence. Based on the wording of that provision (see above at [13]), WBL would have to show that:

(a) It entered into or was otherwise concerned in an "arrangement" with Lew;

(b) It knew or had reasonable grounds to believe that, by that arrangement, Lew's benefits of criminal conduct were used for Lew's benefit to acquire property; and

(c) It knew or had reasonable grounds to believe that Lew had engaged in "criminal conduct" or had "benefited from criminal conduct".

22 I accept WBL's submission that it would have entered into an "arrangement" with Lew by issuing the shares to Lew. Lew's argument was basically that an "arrangement" within the meaning of the CDSA had to involve an *agreement* between the accused person and the perpetrators of criminal conduct. It is noted that the term "arrangement" has been "frequently used in statute to describe the widest possible class of action in a particular context" (see *Jowitt's Dictionary of English Law*, vol 1 (Greenberggen Ed) (Sweet & Maxwell, 3rd Ed, 2010) at p 159). If Parliament had intended only for agreements to be caught, it would have used express words to that effect. In any case, if WBL was to issue those shares to Lew, there would have been an agreement between the two. I therefore

take the view that the first element had been made out.

23 Lew did not dispute that WBL knew that he had used the proceeds from the Insider Trade to fund the exercise of his share options. WBL also knew that Lew was in possession of information that was not generally available at the time of the Insider Trade. As such, if the proceeds Lew received from the Insider Trade were his "benefits from criminal conduct", a point which I will consider in greater detail below, the second element would be made out.

24 In respect of the third element, Lew argued that the Insider Trade was not criminal conduct within the meaning of the CDSA. Lew highlighted that he was sued by MAS in a *civil* action (for payment of a civil penalty under s 232 of the SFA) and was never *charged* under s 221 for an offence. Under s 2 of the CDSA, "criminal conduct" is defined as doing or being concerned in a "serious offence". In turn, a serious offence is defined any of the predicate offences set out in Schedule 2 of the CDSA (the "List"). The List provides that "Section 221 for contravention of s 218" is a serious offence. However, the List does not refer to an action brought under s 232 read with s 218 of the SFA as a serious offence. As a result, Lew contended that since MAS had chosen to proceed under s 232 of the SFA, WBL could not maintain that he *could* have been punished under s 221 of the SFA. WBL's response was that there was no requirement for the perpetrator to be charged before it can amount to a "serious offence", and whether there was a "serious offence' would depend on whether an offence had been *committed* instead.

25 I agree with WBL's submissions. The objectives of the CDSA would be defeated if the perpetrator needs to be charged before the CDSA provisions can apply. It would allow a person to knowingly deal with the tainted property of a criminal until he is charged. I cannot accept that the Parliament could have intended for a person who assists a criminal, who is successful in evading arrest from the authorities and is never charged for the predicate offence, to fall outside the purview of s 44(1) of the CDSA. Notably, s 44(1) merely requires a person to know or have reasonable grounds to believe that the other person is engaging or has *engaged* in criminal conduct. It does not provide that a person must know or have reasonable grounds to believe that the other person has been *charged* for criminal conduct. In my view, where a person knows or has reason to believe that another person has committed an offence, it would fall squarely within the purview of s 44(1), and that person could be liable for assisting the other person in money laundering if the other elements are made out.

26 The present case is unique, as a person who infringes the rules prohibiting insider trading under the SFA can face either civil or criminal proceedings. This is distinguishable from the other offences which attract criminal consequences only. On 9 July 2007, when Lew exercised the two share options, it would not have been possible for WBL or even Lew himself to know if he would be charged for criminal insider trading or sued for payment of a civil penalty instead. However, given the present circumstances, WBL knew that Lew had sold shares while in possession of material non-public information. It would, at the very least, have had reasonable grounds to believe that Lew had committed an offence and could be punished under s 221 of the SFA. In those circumstances, I am of the view that WBL would (at least) have reasonable grounds to believe that Lew had engaged in criminal conduct within the meaning of the CDSA. If, however, the issue relating to these share options were to arise today (*i.e.*, after Lew has been found liable by this court for the payment of a civil penalty under s 232 of the SFA), it would not be possible to classify the money that Lew received from the Insider Trade as being the benefits of his criminal conduct, since s 221(2) of the SFA provides that no criminal proceedings can be instituted against him once the court has ordered him to pay a civil penalty under s 232 of the SFA.

27 Another point raised by Lew was that the quantum of the "benefits of criminal conduct" should

be assessed with reference to s 8 of the CDSA, which states:

> **Assessing benefits derived from criminal conduct**
>
> **8. —(1)** Without prejudice to section 28, for the purposes of this Act —
>
> (a) the benefits derived by any person from criminal conduct, shall be any property or interest therein (including income accruing from such property or interest) held by the person at any time, whether before or after 13th September 1999, being property or interest therein disproportionate to his known sources of income, and the holding of which cannot be explained to the satisfaction of the court; and
>
> (b) the value of the benefits derived by him from criminal conduct, shall be the aggregate of the values of the properties and interests therein referred to in paragraph (*a*).

28 Lew took the position that under s 8 of the CDSA, his benefits from criminal conduct, *i.e.*, the income disproportionate to his known sources of income and which cannot be explained to the court's satisfaction, were limited to the $27,000 loss that he avoided from the Insider Trade. WBL however maintained that the benefits of Lew's criminal conduct were the entire $446,773.26 he received from the Insider Trade. Even if the benefits were limited to the $27,000 loss that Lew avoided, WBL argued that an offence under s 44(1) of the CDSA would likewise be made out.

29 I accept WBL's submission. Notably, s 44(2) of the CDSA states:

> In this section, references to any person's benefits from criminal conduct include a reference to any property which, *in whole or in part*, directly or indirectly, represented in his hands his benefits from criminal conduct.
>
> [Emphasis italicised]

In turn, s 2 of the CDSA defines property as including "money". It is not disputed that the money received from the Insider Trade was used by Lew to fund the exercise of share options. As such, at least a part of the money which WBL received for the exercise of the share options represented Lew's benefits from criminal conduct, whether such benefits referred to the entire $446,773.26 proceeds he received or the $27,000 loss he avoided. As a result, I find that Lew had used his benefits from criminal conduct to exercise the two share options on 9 July 2007. I would therefore hold that WBL has satisfied the third element of the offence under s 44(1) of the CDSA. Therefore, it would have been illegal for WBL to have allotted and issued its shares to Lew on 9 July 2007.

Could the illegality have been removed subsequently at some point or were there other legal means of performing the ESOS?

30 As highlighted earlier, however, even if s 44(1) of the CDSA rendered it illegal for WBL to issue shares on 9 July 2007, it did not mean that WBL would necessarily be absolved of liability under the contract.

31 First, I would highlight that (as Lew pointed out) the CDSA provides an alternative and legal mean for WBL to perform its contractual obligations. Section 44(3) of the CDSA states that:

> (3) Where a person discloses to an authorised officer his knowledge or belief that any property, funds or investments are derived from or used in connection with criminal conduct or any matter

on which such knowledge or belief is based —

(a) if he does any act in contravention of subsection (1) and the disclosure relates to the arrangement concerned, he shall not be guilty of an offence under this section if the disclosure is made in accordance with this paragraph, that is —

(i) it is made before he does the act concerned, being an act done with the consent of the authorised officer; or

(ii) it is made after he does the act, but is made on his initiative and as soon as it is reasonable for him to make it;

(b) the disclosure shall not be treated as a breach of any restriction upon the disclosure of information imposed by law, contract or rules of professional conduct; and

(c) he shall not be liable in damages for any loss arising out of —

(i) the disclosure; or

(ii) any act done or omitted to be done in relation to the property, funds or investments in consequence of the disclosure.

In other words, if WBL had disclosed its knowledge (or reasonable grounds for believing) that the Cheques were derived from the proceeds of Lew's Insider Trade to the authorised officer and received consent to proceed with the transaction, WBL would have been able to perform its obligations legally.

32 I note that the scope of the CDSA is undoubtedly wide, targeting the proceeds of a wide range of crimes which may be financially motivated. The threshold for triggering the operation of s 44(1) is set at a low level. One needs only to show that he has "reasonable grounds to *believe*" [emphasis added] that the other party had engaged in or benefited from criminal conduct. However, given the subjective threshold employed by s 44(1) of the CDSA, it would not be difficult for a person to rely on s 44(1) of the CDSA to establish an illegality defence. I pause here to state that I am not at all suggesting that WBL had adopted such a stance here.

33 It is clear that s 44 of the CDSA is capable of causing transactions to reach a standstill, where one has reasonable grounds to believe that the counterparty is engaging or has engaged in criminal conduct and that the proceeds of such criminal conduct are involved in the transaction. Parliament was certainly mindful of the need not to adversely affect the operations of financial institutions in Singapore in passing the CDSA (see *Singapore Parliamentary Debates, Official Report* (6 July 1999) vol 70 at col 1733 (Mr Wong Kan Seng, Minister for Home Affairs)). In my view, it was for this reason that companies and institutions were provided with an alternative method, under s 44(3) of the CDSA, to perform their contractual obligations legally even where they have reasonable grounds to believe that the money or property received is tainted. As such, any company or individual that is unable to perform the contractual obligations should make the relevant disclosures to the authorities and seek the requisite consent from those authorities to proceed. Only where no such consent is given by the authorities can it then be said that the performance of the contract is illegal.

34 On the facts of the case, I note that the ESOS deems the share options to be exercised once the notice and remittance has been submitted to WBL (see cl 8(a) of the ESOS (reproduced at [4] above)). In other words, Lew had validly exercised his share options on 9 July 2007 by submitting the Notices and Cheques. More importantly, under cl 8(b) of the ESOS, while WBL was obliged to allot and

issue its shares "as soon as practicable", this time limitation was subject to:

> ... such *consents* or other required action of any competent authority under regulations or enactments for the time being in force *as may be necessary* ... [emphasis added]

Quite plainly, the ESOS contemplated the situation whereby WBL would need to obtain the consent of any of the authorities before it could issue shares. In my judgment, this obligation extends to seeking the consent of the relevant authorities under s 44(3) of the CDSA. Such consent was plainly necessary in the circumstances of the case for the reasons already explained above.

35 Although a Suspicious Transaction Report was filed by WBL under s 39 of the CDSA on 17 July 2007, there was no evidence that it had sought the consent of any authorities to carry out the issuance of shares at the material time which it could and should have been done.

36 For the reasons given above, I find that WBL was in breach of the ESOS in failing to seek the appropriate consents from the relevant authorities to issue the 167,500 WBL shares to Lew at the material time. I would therefore direct WBL to disclose Lew's exercise of his options to the relevant authorities and to seek their consent to issue him 167,500 WBL shares. If WBL does not obtain the requisite consent to issue the shares and hence is unable to do so, it would not be in breach of contract in refusing to issue the shares to Lew. To that extent, it would not be required to issue the 167,500 WBL shares to Lew. I also allow the parties liberty to apply in implementing this order.

37 Lew shall have his costs of the action which are to be taxed unless otherwise agreed.