United Project Consultants Pte Ltd v Leong Kwok Onn (trading as Leong Kwok Onn & Co) [2005] SGCA 38

Case Number	: CA 1/2005
Decision Date	: 16 August 2005
Tribunal/Court	: Court of Appeal
Coram	: Chao Hick Tin JA; Tay Yong Kwang J; Yong Pung How CJ
Counsel Name(s)	: Hee Theng Fong (Hee Theng Fong and Co) for the appellant; N Sreenivasan and Valerie Ang (Straits Law Practice LLC) for the respondent
Parties	: United Project Consultants Pte Ltd — Leong Kwok Onn (trading as Leong Kwok Onn & Co)

Tort – Negligence – Defences – Company providing tax authority with incorrect information as regards to directors' fees – Company suing tax agent for failing to advise company on repercussions of filing inaccurate tax returns – Whether company's actions so culpable as to attract application of illegality defence

Tort – Negligence – Duty of care – Whether tax agent owing duty of care to company to warn company of consequences of filing inaccurate tax returns where tax agent acquiring knowledge of such inaccuracies – Whether tax agent liable for pure economic loss suffered by company as result of tax agent's failure to warn company accordingly

16 August 2005

Yong Pung How CJ (delivering the judgment of the court):

1 This was an appeal against the decision of Lai Kew Chai J in *United Project Consultants Pte Ltd v Leong Kwok Onn* [2005] 1 SLR 537 where he rejected the appellant's claim against the respondent for negligence and/or breach of contract in the discharge of the latter's duties as the appellant's auditor and tax agent. We could not agree with the reasoning of the trial judge below and accordingly allowed the appeal. We now give our reasons.

The facts

2 United Project Consultants Pte Ltd (the appellant) is a private limited company providing, amongst other things, engineering services. Mr Leong Kwok Onn (the respondent) is a certified public accountant operating under the name and style of "Leong Kwok Onn & Co". The respondent was appointed sometime in 1983 by the appellant to act as its auditor and tax agent. He continued to act in that capacity until the middle of 2000.

3 From its inception in 1983 until some time in 1998, the appellant had adopted certain practices in relation to the treatment of its directors' fees and the tax returns filed in that respect. In the middle of each calendar year (*ie*, the close of the appellant's financial year), the appellant's board of directors would determine how much profits were made in the course of the year and would accordingly declare a certain sum as directors' fees ("the declared fees"). However, not all the declared fees were distributed to the directors. In fact, the appellant only distributed a portion of the declared fees ("the paid fees") and retained the difference between the two amounts ("the retained fees") in a fixed deposit account to accrue, year on year, subject to any additional future distributions to its directors. In the appellant's books, the retained fees were recorded as a sum owing to the directors. This, unfortunately, was but one half of the story. What is more significant was the manner in which the tax returns for the declared fees were filed.

4 At the beginning of each following calendar year, the relevant income tax forms issued by the appellant to its directors (*ie*, IR8A forms) only declared the paid fees that were received by each director and not the declared fees due to each director. Furthermore, the appellant treated the whole of the declared fees, whether paid or retained, as a deductible expense item for the purposes of income tax assessment. The consequence of this accounting treatment was that neither the appellant nor its directors had to account to the Inland Revenue Authority of Singapore ("IRAS") for tax on the retained fees.

5 At all material times, the respondent acted as the auditor of the company and had, in that capacity, certified that the appellant's accounts were drawn up in such a manner as to give a true and fair view of the state of affairs of the company at the end of each financial year. In addition, he also attended to the appellant's income tax matters, including the filing of the appellant's income tax returns (*ie*, Form C), schedule and computations under the Income Tax Act (Cap 134, 2001 Rev Ed) ("the Act") and statements and correspondence with IRAS for each year of assessment. At the same time, the respondent acted as the personal tax agent of Mr Ken Tan, the appellant's managing director, and prepared all of his tax declarations, including the filing of his personal income tax returns (*ie*, Form B).

6 In 1992, the appellant decided to make an additional allocation of directors' fees from the pool of retained fees. The appellant alleged that its accountant ("Ms Yeo") had consulted a member of the respondent's staff ("Ms Chan") on how the allocation should be done. Ms Yeo was advised that once the additional amounts due to each director were determined, such payments should then be notionally spread over the previous years and retrospective additional IR8A forms ought to be prepared by the appellant to declare the directors' fees for each of the respective years.

7 At this juncture, we noted that the respondent had, in his written submissions, sought to convince us that no such advice was ever rendered by Ms Chan. In spite of this, the respondent subsequently conceded at the hearing before us that the meeting in which the advice was rendered had taken place. However, we felt that nothing turned on this issue and will say nothing more of it.

8 Returning to the sequence of events, the appellant, having been so advised by Ms Chan, submitted the relevant forms and paid the additional taxes accordingly. All this was executed without incurring any adverse comment from IRAS.

9 This process was repeated a second time in 1997 – again, without attracting anything untoward from IRAS.

10 However, in July 1998, IRAS queried the appellant about the directors' fees declared and received for the year of assessment 1997. This led to the respondent's reply to IRAS, on behalf of the appellant, stating that the total directors' fees of $2.544m had been declared, and deducted, as an expense for the year ending 1996 whereas the total amount actually paid to the directors was $839,500. Further queries by IRAS prompted a meeting between Mr Ken Tan, Ms Yeo and the respondent. At this meeting, the respondent advised the appellant to distribute all the retained fees, amounting to roughly $6.5m, and to issue additional IR8A forms relating back to the years of assessment 1990 to 1997. This was done and IRAS subsequently imposed a penalty of $1.707m on the appellant, which was the same amount as the tax payable.

The trial in the court below

11 The appellant commenced its claim against the respondent, seeking compensation for losses which it had allegedly suffered by reason of the breach of contractual duty under the retainer and/or

breach of a similar duty in tort.

12 The respondent sought, in his defence, to raise four contentions. These were set out by the trial judge in [3] of his judgment as such: Firstly, it was contended that there was in the circumstances no duty in law for the respondent to discover and consequently advise the appellant not to breach the Act in relation to the issue of IR8A forms. Secondly, if there was such a duty, there was no breach. Thirdly, if there was such a duty and there was a breach, such breach did not cause the loss. Fourthly, whether the appellant was barred from recovering any damages by operation of the maxim *ex turpi causa non oritur actio*.

13 In deciding whether the respondent had breached his duty to the appellant as its auditor and tax agent, the trial judge noted that the respondent, in conducting the annual audit of the appellant's accounts and in submitting the appellant's Form C, was not required to know the distribution of directors' fees. The trial judge also observed that the respondent only received from the appellant the IR8A forms for Mr Ken Tan and not the other directors. It was further brought to his attention that, as a practical aspect, the respondent's involvement as an auditor took place in the middle of the calendar year, whereas his duties as tax agent occurred at the start of the following calendar year. Therefore, the treatment of the director's fees as a company expense and the manner in which the directors had declared their income for tax assessment were not reviewed concurrently.

14 Given the various factors above, the trial judge concluded that it would be unreasonable and unjust to impose on the respondent a duty to discover the issuance of incorrect IR8A forms. Consequently, there was no duty to warn the appellant of the attendant tax consequences. On the issue of breach, the trial judge accepted the respondent's contention that it was the responsibility of the company, and not the tax agent, to ensure that the IR8A forms reflected the directors' declared fees. As the preparation and issue of the IR8A forms were carried out by the appellant's internal accountant, and given that there was no way for the respondent to have known the actual amounts paid out to each director, there was no breach by the respondent of a duty to detect errors in the IR8A forms.

15 As for causation, it was held by the trial judge that the respondent had not caused the loss. He reasoned from the evidence adduced at trial that Mr Ken Tan and the appellant's other financial manager, Mr T L Tan, were the parties responsible for causing the appellant's loss. They knew what they were doing and had set out with the objective to minimise tax, take the benefit of the tax deductions and, unlawfully, evade having to pay tax on the retained fees. Finally, the trial judge concluded that the defence of *ex turpi causa non oritur actio* is not confined to illegal acts but also acts of the appellant which, although not illegal, are nevertheless regarded as socially unacceptable. In the premises, he held that there was no basis to award any remedy to the appellant which would relieve it from the known consequences of its actions at the expense of the respondent who could not have detected the breaches and prevented them.

16 The appellant appealed against the whole of the trial judge's findings.

The issues on appeal

17 The issues, as set out by the appellant, were:

(a) whether the respondent, in the circumstances, knew that there were errors in the directors' IR8A forms for the calendar years 1990 to 1997;

(b) if so, whether there was a duty imposed upon the respondent to warn the appellant of the tax consequences and to advise it to issue the proper IR8A forms to each director;

(c) whether the respondent was in breach of his duty in (b) above;

(d) whether the respondent had caused the penalty imposed by IRAS and therefore the loss suffered by the appellant; and

(e) whether the appellant should be barred from recovery against the respondent by virtue of the doctrine of *ex turpi causa non oritur actio*.

Knowledge of the error committed by the appellant

18 In concluding that the respondent was not under any duty to advise the appellant or its directors on the tax consequences of providing incorrect information to IRAS, the trial judge had relied upon two crucial findings of fact. First, he found that it was the appellant's responsibility to issue proper IR8A forms to its directors. Second, the manner in which the appellant's directors had apportioned the declared fees was never disclosed to the respondent and therefore precluded the respondent and his audit team from knowing whether the figure reflected in Mr Ken Tan's IR8A form represented the whole of the declared fees allocated to him.

19 We were of the view that the trial judge's first finding had little impact on the issue at hand. The emphasis ought not to be placed on whose responsibility it was to submit the IR8A forms. Rather, the focus should be on whether the *circumstances* were such that it was incumbent on the respondent to warn the appellant against the consequences of its acts.

20 Before proceeding any further, one should bear in mind the salutary principle that an appellate court should not interfere with the trial judge's finding of fact unless it can be shown that his findings were plainly wrong. It is only when the lower court's findings are shown to be unsustainable on the evidence that an appellate court will be free to evaluate the evidence and make its own findings: *MK (Project Management) Ltd v Baker Marine Energy Pte Ltd* [1995] 1 SLR 36.

21 Coming now to the trial judge's second finding, we noted that the appellant raised a total of 11 grounds to show that the respondent was, at some point in time before the intervention of IRAS, aware that the appellant was submitting incorrect information regarding its tax liabilities. In spite of the respondent's attempts to rebut the inference of knowledge in each of the grounds raised by the appellant, we found that the respondent's state of knowledge could clearly be established on a single ground: the respondent's submission of Mr Ken Tan's additional Form B and IR8A in 1993.

22 From the evidence before the trial judge, it could reasonably be inferred that the respondent was not, until 1993, privy to any information that would indicate that the appellant had been providing incorrect information to IRAS. During his appointment as the appellant's auditor and tax agent from 1983 to 1992, the respondent had only known:

(a) the sum of the declared fees announced each year by the company; and

(b) that the company had a policy of paying its directors a portion of its declared fees.

On this basis, the respondent correctly treated the declared fees as tax deductible in the appellant's Form C.

23 What the respondent did not know was whether the directors themselves were reporting the

whole of their respective portions of the declared fees in their IR8A forms, or whether they merely declared their paid fees. His knowledge, as Mr Ken Tan's tax agent, of the exact amount that the managing director actually reported did little to shed any light on the situation. There was just no additional information from which to derive the actual sum declared by all the directors in their income tax returns. Had the respondent known the amounts that each director was in fact declaring in his respective Form B, he would have been able to compare the total of the fees reported to IRAS to the actual declared fees to determine if any tax was paid for the retained fees. As things were, this information was not available to him. As such, the respondent was entitled to assume that the appellant was providing correct information in the IR8A forms issued to its directors.

24 However, the respondent's state of knowledge underwent a significant change as a result of a crucial event. In 1993, the appellant released to its directors a sizeable portion of the retained fees accumulated from previous years. This resulted in the appellant issuing additional IR8A forms to its directors to account for tax payable on the retained fees. In the circumstances, the respondent, in his capacity as Mr Ken Tan's tax agent, received the latter's additional IR8A that included the following information, which was eventually forwarded by the respondent to IRAS on 28 January 1993:

V. INCOME *NOT PREVIOUSLY REPORTED*		
Type of Income	Period	Taxpayer's Income $
Bonus & *director's fees*	1988, 1990 & 1991	397,000

[emphasis added]

From the table above, it became very clear that:

(a) Mr Ken Tan had previously failed to report certain income;

(b) the income that had not been reported included director's fees; and

(c) the director's fees was for the period spanning 1988 until 1991.

This was irrefutable evidence that the respondent had *actual knowledge*, as at 1993, that Mr Ken Tan had previously failed to report the full amount of the fees declared in his favour. On this basis, we were of the view that the trial judge's finding, that the respondent had no knowledge of the fact that the appellant's directors were under-reporting their fees in their respective Form Bs, was unsustainable on the evidence. We found that the respondent did know, as at early 1993, that some, if not all, of the appellant's directors were under-reporting their directors' fees to IRAS. The significance of this will become apparent as we address the following issue concerning the duty owed by the respondent to the appellant.

Whether there existed a duty to warn

25 As formulated by the appellant, the issue was whether the respondent, in his capacity as either an auditor or a tax agent, owed the appellant a duty in contract and/or tort to warn it of the

tax consequences of providing incorrect information to IRAS. While there may be some basis to establish a duty of care owed by an *auditor* to warn a client of the incorrect treatment of certain expense items as tax deductibles, such a claim may ultimately fail on the issue of causation, for the breach of an auditor's duties may not be taken as the dominant cause of the loss suffered by the appellant in the present case. We do not, however, wish to express any determinate view in this respect as the appellant's claim may be disposed of on other grounds.

26 Having observed that the loss claimed by the appellant arose from the submission of incorrect information to IRAS, we thought it more appropriate to assess the respondent's liability in his capacity as a *tax agent* for the appellant. We also noted that the appellant, while initially bringing its claim under the twin heads of breach of contract and/or tort, had chosen in both its written and oral submissions before us to proceed on the basis of the latter. As such, the analysis hereafter will proceed on that footing.

27 In determining whether to impose a duty of care in cases such as the present, where the remedy sought is damages for "pure economic loss", the courts have consistently adopted a more restrictive approach. This in turn must be contrasted to judicial attitudes towards claims in negligence resulting in damage to the person or property: see *The Sunrise Crane* [2004] 4 SLR 715. Unfortunately, the ascertainment of the applicable test to determine if a duty of care arose in such cases is not without difficulty. Indeed, despite the best efforts by many a distinguished judge to identify the requisite elements to establish a duty of care in such cases, the authorities appear to be in a state of confusion.

28 The principle governing liability for pure economic loss was first established in the landmark decision of the House of Lords in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 ("*Hedley Byrne*"). The law lords in that case had adopted different expressions of the special relationship required to found liability. Lord Reid (at 486) had stated that the duty of care would arise "where it is plain that the party seeking information or advice was trusting the other to exercise such a degree of care as the circumstances required, where it was reasonable for him to do that, and where the other gave the information or advice when he *knew or ought to have known that the inquirer was relying on him*" [emphasis added]. Lord Morris, in turn, declared (at 502) that "it should now be regarded as settled that if someone possessed of a special skill *undertakes, quite irrespective of contract, to apply that skill for the assistance of another person who relies upon such skill*, a duty of care will arise" [emphasis added]. Lord Devlin, by contrast, contented himself (at 530) with an inquiry as to "whether there is an express or implied *undertaking of responsibility*" [emphasis added].

29 In *Smith v Eric S Bush* [1990] 1 AC 831, Lord Templeman identified the "assumption of responsibility" as the criterion for determining whether a duty of care arose. However, in that same case, Lord Griffiths doubted the utility of the "assumption of responsibility" test and, instead, formulated the threefold test of "foreseeability", "proximity" and "fairness".

30 Not long after, in *Caparo Industries plc v Dickman* [1990] 2 AC 605, the House of Lords again grappled with the thorny task of determining the necessary ingredients to establish a duty of care. Lord Bridge of Harwich observed that the requirements of "proximity" and "fairness" in Lord Griffiths' threefold test were "not susceptible of any such precise definition as would be necessary to give them utility as practical tests, but amount in effect to little more than convenient labels to attach to the features of different specific situations which, on a detailed examination of all the circumstances, the law recognises pragmatically as giving rise to a duty of care of a given scope". As such, it was advocated that the traditional incremental approach be adopted where the law should develop normal categories of negligence incrementally and by analogy with established categories.

31 *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 represented a return to the former criteria of "reliance" and "assumption of responsibility". Having observed that all the law lords in *Hedley Byrne* had spoken in terms of one party having assumed or undertaken a responsibility towards the other, Lord Goff of Chieveley went on to say at 180:

> [T]hough *Hedley Byrne* was concerned with the provision of information and advice, the example given by Lord Devlin of the relationship between solicitor and client, and his and Lord Morris's statements of principle, show that the principle extends beyond the provision of information and advice to include the performance of other services. It follows, of course, that although, in the case of the provision of information and advice, reliance upon it by the other party will be necessary to establish a cause of action (because otherwise the negligence will have no causative effect), nevertheless there may be other circumstances in which there will be the necessary reliance to give rise to the application of the principle. In particular, as cases concerned with solicitor and client demonstrate, where the plaintiff entrusts the defendant with the conduct of his affairs, in general or in particular, he may be held to have relied on the defendant to exercise due skill and care in such conduct.
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> …
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> and at 181:
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> [For] if a person assumes responsibility to another in respect of certain services, there is no reason why he should not be liable in damages for that other in respect of economic loss which flows from the negligent performance of those services. It follows that, once the case is identified as falling within the *Hedley Byrne* principle, there should be no need to embark upon any further enquiry whether it is "fair, just and reasonable" to impose liability for economic loss.

32 So it would seem, in so far as English case law is concerned, that there are now three approaches to determine whether a duty of care arose where the loss suffered was pure economic loss:

(a) the threefold test of "foreseeability", "proximity" and "fairness";

(b) the incremental approach; and

(c) the test of assumption of responsibility.

33 The confusion, however, does not stop there. Subsequent cases have not only failed to determine the appropriate test to adopt, but have exacerbated the state of affairs by choosing to apply all three tests in turn. In *Bank of Credit and Commerce International (Overseas) Ltd v Price Waterhouse (No 2)* [1998] Lloyd's Rep Bank 58, Sir Brian Neill, having rehearsed the abovementioned tests, went on to comment at [7.19] that:

> The fact that these approaches have been used and approved by the House of Lords in recent years suggests:
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> (a) that it may be useful to look at any new set of facts by using each of the three approaches in turn …
>
> (b) that if the facts are properly analysed and the policy considerations correctly evaluated the several approaches will yield the same result.

The same reasoning was employed again by the English Court of Appeal in *Commissioners for Customs and Excise v Barclays Bank Plc* [2005] 1 Lloyd's Rep 165). While the learned authors of *Clerk & Lindsell on Torts* (Sweet & Maxwell, 18th Ed, 2000) may find this approach useful in that each test may be used to check the provisional conclusion reached by the application of the other tests, we found ourselves unable to agree with this state of affairs. The laws of any country must be sufficiently clear and capable of guiding parties in the regulation of their affairs. While a measure of uncertainty will always be present, for that is the consequence of any jurisdiction that founds its laws upon previously decided cases, it would be undesirable for a court to refrain from coming down in favour of any particular test when faced with various alternative approaches: see also Paul Mitchell & Charles Mitchell ("Negligence Liability for Pure Economic Loss") (2005) 121 LQR 194.

34 In contrast to the apparent uncertainty emanating from the UK courts, it would seem that the local approach is comparatively settled. The principles governing the imposition of a duty of care for pure economic loss were comprehensively considered by this court in *RSP Architects Planners & Engineers v MCST Plan No 1075* [1999] 2 SLR 449 ("*RSP Architects*"). In that case, L P Thean JA, after conducting a thorough review of all the authorities emanating from various Commonwealth jurisdictions, arrived at the following conclusion at [31]:

> Stripped of the verbiage, the crux of such approach is no more than this: the court first examines and considers the facts and factors to determine whether there is sufficient degree of proximity in the relationship between the party who has sustained the loss and the party who is said to have caused the loss which would give rise to a duty of care on the part of the latter to avoid the kind of loss sustained by the former. … Next, having found such degree of proximity, the court next considers whether there is any material factor or policy which precludes such duty from arising.

It was further noted at [42] that:

> It is important to understand that the concept of 'economic loss', just like the concept of 'reliance' does not run uniformly through the law of negligence. It may not be considered in abstraction, but must be considered together with all the other 'labels' of liability, such as 'foreseeablility', 'reliance', and 'reasonability'. Thus, where the loss is economic in nature, different requirements are necessary – depending on the nature of the negligent act or omission – to give rise to liability. As this court emphasised in *Ocean Front* [*RSP Architects Planners & Engineers v Ocean Front Pte Ltd* [1996] 1 SLR 113], the question is not whether a duty was owed by A to B, but whether a duty was owed by A to B to avoid the loss incurred by B.

35 It becomes apparent that this court has regarded the touchstone for liability to be "proximity". In essence, before liability may be imposed upon a defendant for pure economic loss, a court must be satisfied that all the circumstances of the case give rise to a relationship whereby the defendant owes a duty to the plaintiff to avoid the particular loss suffered by the plaintiff. In doing so, the court must likewise be satisfied that there are no policy reasons why such a duty ought not to be imposed.

36 We should also hasten to add, for the avoidance of doubt, that our restatement of the principle in *RSP Architects* should not be construed as reverting to the two-stage test in *Anns v Merton London Borough Council* [1978] AC 728. While the two-stage test propounded by Lord Wilberforce sought to focus entirely on foreseeability as the sole requirement of the first limb, the "proximity" requirement as understood in *RSP Architects* purports to encompass more than just the element of foreseeability. Other factors that would go towards the establishment of a duty of care would include the reliance placed upon the defendant's professed skill, the defendant's assumption of

duty and the exact relationship between the parties. However, we do not wish to set down a closed list of factors which a court must consider as each case will inevitably present a multitude of different factors.

37 We are equally aware that the foregoing discussion may be viewed by some as a mere exercise in semantics and that the various factors discussed may be nothing more than "labels" that a court chooses to adopt once it has predetermined that a duty of care must be imposed. Despite the rather unfortunate usage of the term "label" by Thean JA in *RSP Architects*, we say that the factors alluded to are crucial indicators that a court must look for in order to satisfy itself that there exist circumstances which justify the imposition of a duty of care.

38 Accordingly, we applied the local test of "proximity" and "policy" to determine if the respondent, in the present case, should be under a duty of care to avoid the loss that the appellant suffered.

39 From the facts, we were satisfied that the respondent would have foreseen the loss suffered by the appellant. In this, we noted that the respondent himself had admitted that he would have foreseen the loss if he had been in possession of actual knowledge that the appellant was giving false information. As we have found that the respondent, as of 1993, had in fact acquired the necessary knowledge of the appellant's conduct, the irresistible conclusion is that he should have foreseen the loss that the appellant would eventually suffer, *ie*, the penalty imposed by IRAS.

40 The respondent had also stated in unequivocal terms in his submissions that his duties as a tax agent were to "file the appellant's tax returns and to *ensure that the returns complied with the requirements* under the Income Tax Act" [emphasis added]. Clearly the respondent had been engaged as a professional to assist the appellant in the filing of its tax returns and, to that end, must be taken to have assumed some responsibility to that effect. The question was whether the duty to warn fell within the ambit of that responsibility.

41 In attempting to exculpate himself from his responsibilities, the respondent sought to impress upon us that his duties as a tax agent did not extend to questioning the veracity of the IR8A forms provided to him by the appellant. While it must be conceded that a professional will, in the course of his engagement, have to rely upon the accuracy of the information provided by the client, it cannot be right to treat a professional tax agent as a mere form filler. As was observed by Denning LJ in *Fomento (Sterling Area) Ltd v Selsdon Fountain Pen Co Ltd* [1958] 1 WLR 45 at 61, a case concerning auditors duties

> An auditor is not to be confined to the mechanics of checking vouchers and making arithmetical computations. He is not to be written off as a professional "adder-upper and subcontractor". His vital task is to take care to see that errors are not made, be they errors of computation, or errors of omission or commission, or downright untruths. To perform his task properly, he must come to it with an inquiring mind – not suspicious of dishonesty, I agree – but suspecting that someone may have made a mistake somewhere and that a check must be made to ensure that there has been none.

The same reasoning applies, with the necessary adjustments, to a professional tax agent. His responsibility is to ensure that his client does not submit incorrect tax returns. Where some form of mistake has been brought to his attention, he cannot remain strongly silent and seek to exculpate himself by saying that the company was the one responsible for providing him with accurate information. He must take action, which includes making the necessary inquiries and warning the relevant persons in charge of the management or accounts of the company. If it were not so, then the rationale for retaining the services of a professional tax agent would be rendered redundant.

42 There are also no policy reasons why a duty to warn should not be imposed on the respondent. First, it was conceded by the respondent's own expert witness that, had he known that no tax was paid on the retained fees in the past, he would have warned the directors to declare their income correctly and would further have advised the company to issue the proper IR8A forms. Second, it is common sense that a tax agent who is a certified public accountant should warn his client of the possible penalties that IRAS would impose if he knows that his client is submitting incorrect tax information. To this end, the observations made by Bollen J in the Australian decision of *Walker v Hungerfords* (1987) 44 SASR 532 at 540 and 542 are instructive:

> As I have said, the defendants, [who were tax agents], say that in the circumstances of their contract they were entitled to rely on the information which [an employee of the company] gave them. *That submission pressed to a conclusion suggests that there was very little duty which the defendants owed to the plaintiffs. But that can hardly be correct. Accountants engaged to prepare taxation returns must owe some duty to their clients to prepare correct returns.* That duty must require the accountants to make some enquiry to be sure that they have got the correct information.
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> …
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> [T]he defendants' contract or relationship with the plaintiffs called upon the defendants to *take reasonable steps to submit accurate returns disclosing correct taxable income* … The defendants were not called upon to act with perfection. The mere fact that an error might appear in the returns does not necessarily mean or connote breach of contract or negligence. It depends on the circumstances. Reasonable care, the care to be expected of reasonably prudent and careful accountants, was all that was required of the defendants.
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> [emphasis added]

43 For all the reasons above, we found that the respondent had been employed as a professional to ensure that the appellant's tax returns were filed correctly and, further, that he was under a duty to warn of inaccuracies in the filing of tax returns should he acquire any knowledge to that effect.

Whether there was a breach of duty

44 As of 1993, the respondent knew of the manner in which the appellant had declared its taxes. The respondent, however, failed to warn the appellant of the potential consequences that would ensue if IRAS uncovered the mistake. The respondent was therefore, as of 1993, in breach of his duties as a professional tax agent.

Whether the acts of the respondent caused the loss

45 The trial judge decided this issue in the respondent's favour by placing reliance on his finding that the respondent was, at all times, unaware of the manner in which the appellant's directors were reporting their tax returns. He found the appellant's acts to be the sole product of its directors' machinations and that the appellant alone had caused the penalty imposed by IRAS. In view of our finding that the respondent knew of the appellant's conduct, the trial judge's conclusion cannot be sustained.

46 In *Sasea Finance Ltd v KPMG* [2000] 1 All ER 676, the English Court of Appeal held that it was an auditor's duty to warn either the directors or some relevant third party of any irregularity or fraud likely to result in material loss to the company with a reasonable amount of promptitude. More relevant to the present case are the Court of Appeal's observations pertaining to causation. It was held that where the loss was incurred in the course of activity in which the professional was under a duty to warn against, the fact that similar irregularities had occurred in the past could hardly be used to narrow the scope of the professional's duties to his client.

47 We found ourselves in agreement with the abovementioned reasoning. The appellant's loss was actuated by the negligence of the respondent. While it may be countenanced that any loss flowing from the conduct of the appellant prior to 1993 was the result of its own failings, the cause for the loss thereafter was due to the imposition of, and subsequent failure in, the respondent's duty as tax agent.

Whether the defence of illegality was applicable

48 Central to this issue was the respondent's contention that the appellant's claim was barred by the latter's commission of a statutory offence, in other words, an illegal act, under the Act. As a result of the illegal act, the respondent sought shelter under the maxim *ex turpi causa non oritur actio* ("the illegality defence"), or, as Lord Mansfield CJ had put it in the celebrated case of *Holman v Johnson* (1775) 1 Cowp 341; 98 ER 1120 at 1121, "no court will lend its aid to a man who founds his cause of action upon an immoral act or an illegal act".

49 The trial judge premised his rejection of the appellant's claim on the basis that to do otherwise was "to award [a] remedy to the [appellant] which would relieve it from the known consequences of its actions at the expense of the [respondent] who could not have detected the breaches and prevented them". As it has now been established that the respondent did have knowledge of the breaches and was under a duty to prevent them, the issue of illegality had to be considered afresh.

50 In doing so, we wished to focus on two aspects of the defence. These would be:

(a) the nature of the illegal acts contemplated in the illegality defence, and

(b) the fact that the loss suffered by the appellant was exactly the kind that the respondent was under a duty to prevent.

The nature of the appellant's illegal act

51 Before deciding whether the respondent in the present case could rely upon the illegality defence, the ambit of such a defence must first be appreciated. This requires an understanding of the kind of "*turpi*" or turpitude which would invoke the operation of the illegality defence.

52 At first blush, the terms "*ex turpi causa*" and "illegality" carry with them criminal connotations. But while the facts in most tort cases which discuss the illegality defence would often concern some form of criminal conduct on the part of the plaintiff, other cases have indicated that this did not convey the full potential range of the defence. In *Euro-Diam Ltd v Bathurst* [1990] 1 QB 1, a case considered in the court below, Kerr LJ reaffirmed the statement by Lord Mansfield in *Holman v Johnson* that the *ex turpi causa* defence was applicable to a plaintiff who was "guilty of illegal (or immoral) conduct". *Euro-Diam Ltd v Bathurst* was considered in the recent UK Law Commission Consultation Paper No 160 on "The Illegality Defence in Tort" where it was observed

that the "the operation of the illegality doctrine in tort cases is not confined to criminal illegality, but in principle can include other forms of reprehensible or grossly immoral conduct". As such, the Law Commission took the view that the illegality defence would include criminal wrongs, civil wrongs and immoral behaviour.

53 There appears to be only two strands of cases where the illegality defence has arisen in the context of acts that were *not* considered criminal. The first concerned the case of *Hegarty v Shine* (1878) 14 Cox CC 145 where the claimant had contracted venereal disease from her lover with whom she had been cohabiting. The Scottish Court of Appeal rejected her claim for assault on the basis that the relationship was immoral. The second line of cases concerned claims made by the dependants of persons who had committed suicide while in police custody: see *Kirkham v Chief Constable of the Greater Manchester Police* [1990] 2 QB 283 and *Reeves v Commissioner of Police of the Metropolis* [1999] QB 169. It should be noted that suicide was decriminalised in the UK at that time. In both cases, the illegality defence was unsuccessful.

54 What appears from the above discourse is that the illegality defence is commonly invoked where there is some form of culpability on the part of the plaintiff. In instances where the act of the plaintiff had been criminal, the illegality defence was readily invoked. The same was done where the conduct of the plaintiff was, at the time, considered morally reprehensible.

55 As stated in the appellant's submissions, the appellant had been fined once in respect of the tax payable for the sums previously under-declared. This penalty appears to coincide with that provided in s 95(1) of the Act which describes the offence of making incorrect tax returns by omitting or understating income, or by providing incorrect information in relation to matters affecting tax liability. This is in stark contrast to the punitive provisions such as ss 95(2) and 96(1) of the Act, which provide for the offences of negligent omission or understatement of income and the deliberate evasion of tax respectively. The latter provisions also provide for a fine and the potential imposition of a custodial sentence. It would seem, therefore, that the appellant was merely penalised for a lesser statutory offence.

56 Furthermore, the trial judge had formed the view that the appellant had, through its directors Mr Ken Tan and Mr K L Tan, pursued a course of conduct with the object of minimising tax and taking the benefit of the tax deductions. At best, this arose due to an honest misapprehension by the appellant as to its tax obligations. At worst, all that could be said was that the appellant saw what it thought was a legitimate way to reduce its tax liabilities and sought to benefit from the perceived loophole. Either way, it was a far cry from saying that the appellant had connived to cheat IRAS by evading tax. This was reinforced by the fact that IRAS itself had merely penalised the appellant under the lesser provision of s 95(1) of the Act.

57 The conduct of the appellant, in committing a statutory offence, was not criminal in nature. Nor was it an act that could be classified as reprehensible or grossly immoral. In short, we were of the view that the appellant had not engaged in an act that was so culpable as to attract the application of the illegality defence.

58 Even assuming that we were wrong in our conclusion that the illegality defence was of no application, we nevertheless found that the illegality defence must fail for the simple reason that the loss suffered by the appellant was precisely the loss that the respondent was engaged to avoid.

The appellant's loss was precisely the kind that the respondent was to prevent

59 It is a common enough practice that companies and individuals will employ professionals or

qualified persons who profess specialist skills to assist them in the execution of certain transactions. Thus, the appellant, as with any other layperson, should be entitled to rely upon its tax agent to warn it if the tax agent comes to realise that the appellant had filed its tax returns wrongly. In other words, one can say that the primary purpose of employing a tax agent to file one's taxes is precisely to avoid infringing the statutory provisions on tax reporting and, correspondingly, to avoid any tax penalties that may be imposed for such infringement.

60 The respondent, however, alleged that the commission by the appellant of a statutory offence constituted an illegal act that disentitled the latter from pursuing its claim in tort. This argument placed the proverbial cart before the horse. On a proper appreciation of the facts, the appellant's running afoul of the Act could be attributed solely to the fact that the respondent had failed in his duty to warn. To allow the respondent to rely upon a consequence that was directly caused by his own failings and to absolve him from liability, would be to reward the wrongdoer and punish the innocent party.

61 An example would, perhaps, be apposite. Suppose a layperson were to employ the services of a solicitor to execute a trust for the benefit of his dependants. The solicitor reviews the manner in which the client has structured his affairs and, whilst realising that there may be a potential statutory breach for evading stamp duties, chooses to remain quiet. IRAS subsequently imposes a penalty on the client for failing to pay the requisite amount of stamp duty. In these circumstances, it cannot be countenanced that the solicitor was not answerable to the client for having negligently failed to warn the latter of the potential liability for failure to pay stamp duty merely because the client had committed a statutory offence.

62 The abovementioned reasoning is not without judicial support. In *Vellino v Chief Constable of Greater Manchester* [2002] 1 WLR 218, the claimant had sued the local police commissioner for injuries sustained in the course of escaping from police custody. Sedley LJ commented, albeit in a dissenting judgment, that the "offences committed by the claimant and the defendant, while causally connected, were not joint". It was observed that the claimant's offence, in jumping out of a window on the second storey of a building to evade arrest, could be committed only because the constables' offence, in idly allowing the claimant to jump out of the window when they knew of his propensity to do so, had been committed first. This, it was said, was not a scenario that Lord Mansfield had had in mind when he formulated his test for the illegality defence. The same court had also decided, in the earlier case of *Reeves v Commissioner of Police for the Metropolis* [1999] QB 169 ([53] *supra*), that the illegality defence could not be afforded to the police, in a situation concerning a claim by the dependants of a deceased who had committed suicide in police custody, where the police were aware that the deceased was a suicide risk. The reason was that the claimant's conduct was the very act that the police were under a duty of care to prevent.

63 As the appellant had been penalised for a mistake in filing its tax returns, an act which resulted from the respondent's breach of a duty of care owed to the appellant, we found that the illegality defence could not apply.

Apportionment of damages and costs

64 The events that transpired between 1990 till 1998 showed that the respondent had no knowledge of the appellant's actions for the years of assessment 1990 to 1992. There was therefore no duty to warn the appellant and, consequently, no duty to avoid the loss represented by the tax payable for those years. As of 1993, however, circumstances had changed such as to impose a duty upon the respondent to warn the appellant of the consequences of its acts. The loss suffered by the appellant for the following years was therefore attributable to the respondent. In the premises, we

apportioned the damages in the following manner:

(a) losses arising from the penalty payable by the appellant for the years of assessment 1990 to 1992 to be borne by the appellant; and

(b) losses representing the penalty payable by the appellant for the years of assessment 1993 to 1998 to be borne by the respondent.

The interest earned on the retained fees in the fixed deposit account will be taken into consideration to reduce the amount of damages payable by the respondent.

65 The appeal is allowed with costs of 80% here and below to the appellant.

Appeal allowed.