Raffles Town Club Pte Ltd *v* Lim Eng Hock Peter and others and other appeals [2012] SGCA 62

Case Number : Civil Appeals Nos 108, 109 and 110 of 2010

Decision Date : 31 October 2012

Tribunal/Court : Court of Appeal

Coram : Chan Sek Keong CJ; Andrew Phang Boon Leong JA; Philip Pillai J

Counsel Name(s) : Ang Cheng Hock SC, William Ong, Ramesh Selvaraj, Kristy Tan and Lim Dao Kai (Allen & Gledhill LLP) for RTC (appellant in CA109/2010; 1st respondent in CA110/2010); Thio Shen Yi SC, Collin Seah, Adeline Chung (TSMP Law Corporation) for PL (as 3rd respondent in CA108/2010 and 1st respondent in CA109/2010); Alvin Yeo SC, Koh Swee Yen and Suegene Ang (WongPartnership LLP) for PL (as appellant in CA110/2010); Harry Elias SC, Michael Palmer, Andy Lem and Toh Wei Yi (Harry Elias Partnership LLP) for LA and WT (1st and 2nd appellants in CA108/2010; 2nd and 3rd respondents in CA109/2010; 4th and 5th respondents in CA110/2010); Johnny Cheo (Cheo Yeoh & Associates LLC) for DF (4th respondent in CA108/2010; 4th respondent in CA109/2010); Chelva Retnam Rajah SC and Burton Chen (Tan Rajah & Cheah) for MT and LJW (1st and 2nd respondents in CA108/2010; 2nd and 3rd respondents in CA110/2010).

Parties : Raffles Town Club Pte Ltd — Lim Eng Hock Peter and others

Companies

Tort – Conspiracy

[LawNet Editorial Note: This was an appeal from the decision of the High Court in [2010] SGHC 163.]

31 October 2012 Judgment reserved.

Chan Sek Keong CJ (delivering the judgment of the court):

Introduction

1 These three appeals arose from the decision of a High Court Judge ("the Judge") dismissing all the claims, counterclaims and third party claims in Suit No 46 of 2006 ("S 46/2006") (see *Raffles Town Club Pte Ltd v Lim Eng Hock Peter and others (Tung Yu-Lien Margaret and others, third parties)* [2010] SGHC 163 ("the Judgment")).

Background to these proceedings

2 These proceedings are the latest and, it is to be hoped, the last instalment of litigation between the various parties involved in the formation of a proprietary social club known as Raffles Town Club ("the Club"), and its subsequent travails. The Club was, from its inception, owned and operated by a company called "Raffles Town Club Limited". The company was incorporated in Singapore on 11 July 1996 as a public limited company, but it was subsequently converted into a private exempt company and renamed "Raffles Town Club Pte Ltd" ("RTC") on 5 November 1997. In S 46/2006, the claims brought by RTC (at the instance of its current shareholders) against its former directors were for, *inter alia*, breach of directors' duties concerning their conduct *vis-à-vis* the members of the Club and RTC prior to 5 November 1997. At all material times, the former directors

were also the shareholders of RTC.

3 In the course of inviting members of the public to join the Club in 1996, RTC had represented that the Club would be a "premier" and "exclusive" club. The membership drive was successful far beyond the expectations of RTC, following which the Club acquired 19,048 members, making it the largest social club in Singapore. This huge number (which for ease of reference will hereafter be referred to as "the 19,000 members") was never disclosed to the members of the Club until litigation between the current and former shareholders of RTC in Suit No 742 of 2000 arose. The disclosure led 4,885 members of the Club to commence a class action against RTC in 2001 for damages, claiming, *inter alia*, that RTC was in breach of contract in failing to provide a "premier" and "exclusive" club.

4 The members' class action was dismissed by the High Court (see *Tan Chin Seng & Others v Raffles Town Club Pte Ltd* [2002] SGHC 278). On appeal, this Court reversed the decision of the High Court and found RTC liable for damages for breach of contract (see *Tan Chin Seng and others v Raffles Town Club Pte Ltd* [2003] 3 SLR(R) 307). The decision entailed RTC having to pay similar compensation to other members of the Club who had not joined in the class action, but to whom similar representations had been made. Damages for the loss of amenities suffered by the members as a result of the Club having too many members were subsequently assessed at $3,000 for each member. As RTC did not have sufficient cash to pay the total damages payable to the members, the directors and shareholders proposed and eventually obtained the sanction of the court to a scheme of arrangement ("the Scheme of Arrangement") by which those damages would be fully satisfied by partial payment of cash and consumption of food and beverage and the use of chargeable facilities provided by the Club over a specified period of time. The Scheme of Arrangement cost RTC about $53mil.

5 Subsequently, proceedings were brought by some former directors against the current directors of RTC seeking damages for defamation in relation to certain statements published in connection with the Scheme of Arrangement. These proceedings resulted in the current directors being found liable by this Court (see *Lim Eng Hock Peter v Lin Jian Wei and another and another appeal* [2010] 4 SLR 331 and *Lim Eng Hock Peter v Lin Jian Wei and another and another appeal* [2010] 4 SLR 357).

6 The material facts of the appeals before us are set out fully in the Judgment at [3]–[31]. RTC was the plaintiff while its former directors were the defendants. Peter Lim ("PL"), the 1st defendant, was sued in his capacity as a *de facto* director of RTC at all material times. The 2nd defendant, Lawrence Ang ("LA") was a director of RTC from 10 October 1996 to 18 May 2001 and a director of a company known as Europa Holdings Pte Ltd ("EH") from 29 November 1993 to 13 May 2001. William Tan ("WT"), the 3rd defendant, was a director of RTC from 18 January 1997 to 1 October 1998 and a director of EH from 27 November 1992 to 1 October 1998. Dennis Foo ("DF"), the 4th defendant, was a director of RTC from 11 July 1996 to 12 September 2000 and a director of EH from 29 November 1993 to 30 April 2001.

7 PL, LA, WT and DF were also shareholders of RTC and EH at all material times. For ease of reference, these individuals shall hereafter be collectively referred to as "the Former Directors".

8 Margaret Tung ("MT") and Lin Jian Wei ("LJW"), the 1st and 2nd third parties in the proceedings, are the current directors and shareholders of RTC. MT became a shareholder of RTC on 12 May 2001 and was appointed to the board of directors of RTC on 30 April 2001. LJW became a shareholder of RTC on 12 May 2001 and was appointed to the board of directors of RTC on 26 June 2001. LJW's wife, one Zhang Shi Qing, was a shareholder of RTC from 20 June 2001 to 16 September 2004 and a director of RTC from 26 June 2001 to 16 September 2004.

RTC's claims against the Former Directors

9 RTC's claims against the Former Directors were for losses suffered by RTC or benefits acquired by the latter, by reason of the following acts allegedly committed by them:

(a) misrepresenting to the 19,000 members that the Club would be a "premier" and "exclusive" club, thereby causing RTC to be liable to pay damages amounting to $3,000 per member for such misrepresentation;

(b) causing RTC to pay management fees of $78,267,723.80 (hereafter referred to as "$78mil") to EH pursuant to a Management Agreement dated 28 September 1996 ("the MA");

(c) causing RTC to pay to themselves excessive directors' fees, expenses and consultancy/incentive fees amounting to about $15mil; and

(d) causing RTC to transfer to a subsidiary company, Raffles Town Club (International) Ltd ("RTCI"), the sum of $33mil which the Former Directors applied to earn interest for themselves.

10 RTC claims that in causing RTC in their capacity as directors to do all of the said acts, the Former Directors were in breach of their duties as directors of RTC in the following respects:

(a) the duty to act in good faith and in the best interests of RTC;

(b) the fiduciary duty of loyalty;

(c) the duty to exercise reasonable care and skill in the discharge of their managerial functions and responsibilities;

(d) the duty to act with due care and diligence; and

(e) the duty to act honestly and use reasonable diligence in the discharge of their duties pursuant to s 157 of the Companies Act (Cap 50, 1994 Rev Ed) ("the Companies Act").

11 LA and WT denied these allegations and claimed against MT and LJW by way of a third party notice for, *inter alia*, damages for breach of an agreement dated 6 June 2001 and a deed dated 18 February 2002 by causing and/or conspiring with RTC to commence S 46/2006 to injure them.

12 Similarly for PL, while denying these allegations against him, PL took out a third party notice against MT and LJW seeking, *inter alia*, an indemnity or contribution in the event that RTC succeeded in its claims against him, and damages for causing and/or conspiring with RTC to commence S 46/2006 to injure him.

13 At the end of the 87-day trial, the Judge dismissed RTC's claims against the Former Directors, LA's, WT's and PL's claims against MT and LJW in the third party proceedings as well as all other associated counterclaims arising therefrom. The appeals before us, *viz*, Civil Appeal No 108 of 2010 ("CA 108/2010"), Civil Appeal No 109 of 2010 ("CA 109/2010") and Civil Appeal No 110 of 2010 ("CA 110/2010"), are the appeals of the relevant parties against the Judge's decisions. We shall consider each of them, starting with CA 109/2010 which is the main appeal before us.

CA 109/2010

14 This is RTC's appeal against the dismissal of its claims against the Former Directors for the various breaches of directors' duties as set out at [9]–[10] above. We will now consider RTC's arguments and the Judge's findings and rulings on these claims.

Were the Former Directors in breach of their duties to RTC in accepting over 19,000 applicants as members of the Club?

15 The alleged breaches of directors' duties by the Former Directors under this head may be summarised as follows:

(a) that they dishonestly perpetrated a fraud on the 19,000 members by falsely representing to them that the Club would be a "premier" and "exclusive" club (when a club of such quality would not have more than 7,000 members);

(b) that, alternatively, they acted negligently in that no reasonable director would have believed that accepting more than 19,000 applicants would not cause RTC harm once the membership figures were revealed (the harm suffered being the damages which RTC would have to pay the members of the Club for failing to provide recreational and social facilities associated with an "exclusive" and "premier" club).

16 The Judge rejected both these allegations. In respect of the first allegation, the Judge held that the evidence did not show that the Former Directors had failed to act honestly and in good faith towards the members of the Club. In respect of the second allegation, the Judge held that it could not be said that "the reasonable man in the position of the [Former Directors] exercising due care and diligence would not have done what the [Former Directors] did" (see the Judgment at [106]).

17 Before us, RTC has reiterated the same allegations and arguments rejected by the Judge. We agree with the Judge's findings on the facts and his conclusion on the law. However, in our view, there is a more direct and simpler basis for dismissing RTC's claim and this appeal (*ie*, CA 109/2010). Even if RTC's allegations were true, its claim for damages was entirely misconceived. The claim made no commercial sense, and missed the wood for the trees. The claim, if allowed, would produce an absurd outcome as it would mean that the more members (and therefore the more subscription moneys) the Former Directors procured for RTC, the more egregious their breach of duties to RTC would be. However, the truth of the matter is that the more applicants the Former Directors accepted as members of the Club, the greater the financial benefit would accrue to RTC. Accordingly, their alleged misconduct in accepting the 19,000 members for the Club was entirely for the benefit of RTC, and therefore must be in the interests of RTC. In accepting over 19,000 membership applications rather than 7,000 at the entrance fee of $28,000 per member, the Former Directors substantially increased RTC's revenues from $196mil (*ie*, 7,000 x $28,000) to around $532mil (*ie*, 19,000 x $28,000) – a staggering increase of around $336mil.

18 Even assuming that the Former Directors had exposed RTC to claims for damages by the members of the Club in having misrepresented to them that they would be joining an "exclusive" and "premier" club (whatever these expressions were intended to mean), their actions nevertheless made RTC richer in the sum of $336mil. Thus, reduced to its essence, RTC's claim is based on the absurd proposition that the Former Directors would not have breached their duties to RTC if they had collected $196mil in membership fees for RTC, but that they were in breach because they had collected around $532mil instead! In our view, the Judge therefore need not have undertaken a long and arduous examination of the evidence in order to find for the Former Directors on this claim.

Was the MA a sham and were the management fees excessive?

19 RTC claimed that the MA (see [9(b)] above) was a sham because it was designed to siphon off RTC's funds by backdating and paying over excessive fees to EH for services rendered to RTC under the MA. According to RTC, the Former Directors resorted to this device because they could not apply the excess cash held in RTC to pay out dividends as the subscription moneys received from the 19,000 members had yet to be recognised as profits in RTC's accounts. At [110] of the Judgment, the Judge summarised RTC's argument on this issue as follows:

> 110 [RTC] strenuously argued that the [MA] was a "sham" agreement, conceived in mid-1997 as an afterthought. Its case is that the [Former Directors] realized in 1997 that they were "sitting on" a goldmine. However, [RTC] was unable to recognise the entrance fees as income until after the Club had opened. Without income, there could be no profits to speak of and the [Former Directors] would not be able to draw out the funds legally as dividends since dividends have to be declared out of profits under s 403 of the Companies Act. As RTC was not a private exempt company at that point of time, the [Former Directors] would also be unable to take loans from RTC. According to [RTC], the [Former Directors] thus hatched a plan to siphon out the monies via a sham [MA].

20 RTC also argued that the quantum of the management fees was grossly excessive as EH did not perform many of its obligations under the MA, and that the documentary evidence showed the following:

> (a) EH did not pay for all costs and expenses amounting to $2,579,923 (incurred in connection with the marketing and promotional campaign) as obliged under the MA.
>
> (b) EH did not "formulate, present … a suitable press relations programme … and a proposed time-table and budget covering all advertising, promotional materials and public relations costs and expenses" as required of it under cl 5 of the MA, and also did not "advise on and make recommendations as to the sales, marketing and promotional strategy" as required of it under cl 3 of the MA. Neither did it "organise, manage and co-ordinate" its appointed agents and the agents' sales, marketing and promotional efforts as required of it under cl 4.1.3 of the MA.
>
> (c) The quantum of commission paid to EH was not calculated according to the terms of the MA. Clause 7.1.1 of the MA provided that EH would be paid a 15% commission *only* on members which EH or its appointed agents introduced, and not on every member accepted by RTC. Yet, the $78mil paid over to EH was 15% of the total membership fees from *all* the 19,000 members (as admitted by PL).
>
> (d) There were also irregularities in the payment of the management fees. For example, some management fees were not made pursuant to invoices issued by EH as they were issued after the payments were made.
>
> (e) RTC (according to a management fees schedule ("MFS")) paid EH $90.1mil between November 1997 and August 1999, but between April 1998 and August 2000, EH refunded $8.2mil to RTC. Of the remaining $81.9mil, a sum of $3.6mil was entered as a "Transfer to Europa Holding Intercompany A/C", leaving $78.3mil. This balancing book entry showed that the Former Directors took steps to ensure that the total flow of funds recorded in the MFS matched the value of three invoices that were issued by EH.
>
> (f) The sum of $90.1mil paid to EH were used to acquire shares in ABR Holdings Ltd ("ABR") through Sullivan Developments Limited ("Sullivan") and Goldhurst Properties Limited ("Goldhurst"), both of which were controlled by LA, WT and DF (PL was also a beneficial shareholder). Of that

amount, $89.6mil was deposited into EH's bank account. Out of the sum of $89.6mil, $61.7mil was remitted by EH to or for the benefit of the Former Directors in the following proportions: $39.3mil to LA as directors' advances; $5.6mil to WT as directors' advances; $4.1mil to DF as directors' advances; $1mil to PL and $11.7mil to stock-broking firms for purchase of shares in ABR on behalf of Sullivan and Goldhurst. Another $0.97mil was remitted to or on behalf of PL. However, in our view, the manner in which the Former Directors used the management fees that RTC had paid to EH is not relevant to the issue whether they were properly or improperly paid to EH under the MA.

21 The Judge made the following factual findings with respect to the allegation that the MA was a sham: (a) the backdating of the MA was not improper as management services were indeed provided by EH to RTC from 1996, and the oral agreement to do so was only reduced to writing in 1997; (b) the MA was not a sham as the Former Directors intended the MA to (and it did) create legal rights and obligations between RTC and EH (see *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786 at 802 (*per* Diplock LJ)); and (c) EH had provided management, consultancy and other services in accordance with and beyond the terms of the MA, having regard to the aggregate of the work done by EH. In the Judge's view, the management fees were therefore legitimate expenses. They were neither disguised loans made in contravention of s 162 of the Companies Act nor disguised dividends paid in contravention of s 403 of the Companies Act (see the Judgment at [35] and [137]–[138]).

22 On the issue of whether the management fees were excessive, the Judge found as follows (at [137] of the Judgment):

> 137 … the court is not as well placed as commercial men such as the [Former Directors] to ascertain what would be the appropriate amount of remuneration for all of the work done and services provided by EH. I find that the [MA] has not been proven to be a sham. EH had indeed adhered to the [MA]. Even though RTC pointed out that most of the marketing work had been outsourced to third parties, I am of the view that overall, judging from the aggregate of the work done by EH, it had done work both pursuant to the relevant clauses in the [MA] and beyond it. The work done by EH in launching the Club vis-à-vis RTC is difficult to quantify with exactitude but I find that 15% marketing commission is not an extortionate sum in the circumstances. Though RTC's experts valued EH's work at 1% and 3%, they had not taken into consideration the other aspects of the work done for and services provided to RTC by EH as conceded by them. It must be noted that EH cannot reasonably be expected to provide free work and services to RTC simply because such work and services do not fall within the description set out in clauses 3, 4 and 5. The [Former Directors] as directors of EH also have to ensure that EH is fairly remunerated for all the work and services EH has done for RTC, and as far as I am aware, this was the only written contract between EH and RTC under which RTC had made payments to EH. As such, I would not accord much weight to their evidence that only 1% or 3% commission was warranted and would defer to the 15% commission (resulting in a $78m payment to EH) as decided upon by the [Former Directors].

23 Having heard counsel's submissions for RTC, and having reviewed the materials that were before the Judge, we would agree with the findings of the Judge on this issue. It should also be remembered that it was the efforts of the Former Directors that resulted in RTC having secured cash receipts in the form of membership fees for the Club amounting to around $532mil (see [17] above).

Directors' fees and consultancy fees

24 The total fees paid to the Former Directors under this head (see [9(c)] above) may be divided into two categories: (a) sums paid out as "actual" remuneration/fees which were not recorded in a

set of private accounts maintained for each of the Former Directors ("the private accounts"), and (b) sums paid out and recorded under the private accounts. The total amount recorded in the private accounts was $15,211,690.48. [note: 1] RTC accepted that payments under category (a) were genuine and proper, but not those under category (b) which it considered unreasonable, unjustifiable and were in substance in the nature of disguised dividends paid out in contravention of s 403(1) of the Companies Act which prohibits a company from paying dividends to shareholders except out of profits.

25 In dealing with RTC's claim under this head, the Judge first set out the legal principles applicable to judicial scrutiny of directors' fees. At [150] of the Judgment, the Judge said as follows:

> 150 In *Gower and Davies' Principles of Modern Company Law* (Sweet & Maxwell, 8th Ed, 2008), the learned author observed at para 14-14, that:
>
> > The courts have been unwilling to scrutinise directors' remuneration decisions on grounds of excess or waste, refusing even to prescribe that pay must be set by reference to market rates, provided the decision on remuneration is a genuine one and not an attempt, for example, to make distributions to shareholders/directors where there are no distributable profits. This is probably a wise decision on the part of the courts, which might otherwise find themselves saddled with developing a general policy about the remuneration of directors in large companies.
>
> In a case involving impugned remuneration to husband-and-wife director-shareholders in a closely held company, *Re Halt Garage (1964) Ltd* [1982] 3 All ER 1016 ("*Halt Garage*"), Oliver J stated at 1039:
>
> > [A]ssuming that the sum is bona fide voted to be paid as remuneration, it seems to me that the amount, whether it be mean or generous, must be a matter of management for the company to determine in accordance with its constitution which expressly authorises payment for directors' services. Shareholders are required to be honest but … there is no requirement that they must be wise and it is not for the court to manage the company.

26 In the light of these principles, the Judge dismissed RTC's argument that the remuneration was excessive for the reasons set out at [154]–[157] of the Judgment:

> 154 Since the process by which the [Former Directors'] remuneration for their work as directors was approved was transparent, aboveboard and in line with the procedure provided for in cl 76(A) [of RTC's Articles of Association [note: 2]], the quantum of their remuneration is not a corporate decision that I am minded to disturb on the ground that it was excessive. There was work done by the [Former Directors] that would warrant the payment of the directors' remuneration. This was not a case in which payments were made to directors of a company in the absence of *any work* or oversight on the part of the directors.
>
> 155 In their capacity as directors, [LA, WT and DF] had exercised oversight and had ultimate responsibility for the business of RTC. I find that they had indeed put in the effort and hard work in all areas of [RTC's] affairs such as overseeing the construction and renovation of the Club, the marketing of membership and the launch of the Club, as well as procuring financing for [RTC's] business activities.
>
> 156 [PL], whether in his capacity as consultant or *de facto* director, had definitely tried to

contribute to substantial tax and interest savings for [RTC] by instituting the deferred accounting policy. Amongst other things, he also advised on corporate governance, assisted in appointing independent directors and arranged for loan facilities. Thus, I cannot accept [RTC's] claim that [PL's] consultancy fee was a sham. Whether the sum of money paid to [PL] is seen as consultancy fee or director's remuneration, it cannot be gainsaid that he had contributed substantially to the initial success of RTC's business.

157 Thus, I find that since all the shareholders of RTC had assented properly to the [Former Directors'] remuneration and all the [Former Directors] had contributed in numerous ways to its business, the decision to pay them remuneration was a genuine one. [RTC] is not entitled to the remuneration paid under the private accounts to the [Former Directors] for their work as directors simply on the basis that these sums may have been paid out under the private accounts. The [Former Directors] had not acted in breach of their duties, either fiduciary or statutory, to RTC in approving such remuneration for their services to RTC as directors. It would be unreasonable to hold otherwise as that would deprive the [Former Directors] of any recognition or acknowledgement of their contributions to RTC.

[emphasis in original]

27 Again, having reviewed the evidence before the Judge, we are unable to disagree with his finding that the directors' and consultancy fees paid to the Former Directors were not excessive or unreasonable or that they amounted to an illegal taking of money out of RTC. We would agree that these were matters for the Former Directors – as directors and ultimately also shareholders – to decide. At all material times, RTC was a profitable company because of the nature of the business it was engaged in and the prowess of the Former Directors in recruiting so many members for the Club. Whether they had misled the members of the Club was a matter between the members and RTC. But as far as RTC and the Former Directors were concerned, RTC's interest in its assets as a separate legal entity and the Former Directors' interests in RTC's assets as shareholders were aligned. They were, in fact, the same as there was no other claim to or interest in the assets of RTC that the Former Directors as directors had to be concerned about or protect.

28 The decision of the English Court of Appeal in *Multinational Gas and Petrochemical Co v Multinational Gas and Petrochemical Services Ltd and Others* [1983] 1 Ch 258 illustrates this principle well. In that case, a Liberian company (whose directors were nominated by its shareholders who were American, French and Japanese oil companies) brought, *inter alia*, a claim against the shareholders for breaches of duty of care owed to the company as persons exercising the powers of management and direction in connection with certain acquisitions made by the company which led the company to financial difficulties. By a majority, the court held that the company existed for its shareholders' benefit and, provided they acted *intra vires* and in good faith, the shareholders could manage its affairs as they chose while it was solvent. Lawton LJ said (at 269):

… when the oil companies acting together required the plaintiff's directors to make decisions or approve what had already been done, what they did or approved *became the plaintiff's acts and were binding on it* … When approving whatever their nominee directors had done, the oil companies were not, as the plaintiff submitted, relinquishing any causes of action which the plaintiff might have had against its directors. When the oil companies, as shareholders, approved what the plaintiff's directors had done there was no cause of action because at that time there was no damage. *What the oil companies were doing was adopting the directors' acts and as shareholders, in agreement with each other, making those acts the plaintiff's acts*.

It follows, so it seems to me, that the plaintiff cannot now complain about what in law were its

own acts.

[emphasis added]

Dillon LJ, who delivered the other majority judgment, said (at 288):

> An individual trader who is solvent is free to make stupid, but honest commercial decisions in the conduct of his own business. He owes no duty of care to future creditors. The same applies to a partnership of individuals.
>
> A company, as it seems to me, likewise owes no duty of care to future creditors. The directors indeed stand in a fiduciary relationship to the company, as they are appointed to manage the affairs of the company and they owe fiduciary duties to the company though not to the creditors, present or future, or to individual shareholders. …
>
> The shareholders, however, owe no such duty to the company. Indeed, so long as the company is solvent the shareholders are in substance the company. …

29 Furthermore, in view of the Judge's findings (with which we agree) that all these payments were approved and ratified by RTC's shareholders, these payments were, and are, binding on RTC (see *Re Duomatic Ltd* [1969] 2 Ch 365 at 373).

Expenses

30 Like the directors' remuneration and the consultancy fees, there were several other expenses of RTC recorded in the private accounts between 1997 and 2000 which RTC now seeks to recover from the Former Directors on the basis that those expenses were not genuine expenses incurred by, on behalf of, or for the benefit of RTC. The Judge dismissed this claim on the ground that the expenses were generally legitimate as he was not convinced that those expenses were not incurred for the benefit of RTC and not incidental to the carrying on of RTC's business. With respect to some of the expenses which he found not to have been incurred by the Former Directors for the benefit of RTC or not reasonably incidental to the business of RTC, the Judge held that "the [Former Directors], acting in their capacity as shareholders of [RTC] and collectively embodying the interests of the company, had authorised and ratified the charging of these expenses to the company via the private accounts" (see the Judgment at [182]).

31 We find no reason to disturb the Judge's findings of fact and we agree with his ruling on the law.

The $33mil loan from RTC to RTCI

32 It is not disputed that sometime between February 1997 and April 1997, the Former Directors had caused RTC to extend an interest-free and unsecured $33mil loan ("the Loan") to RTCI (see [9(d)] above), a wholly-owned subsidiary incorporated in the British Virgin Islands in February 1997 with a paid up capital of US$1.00. The proceeds of the Loan were later deposited in the bank accounts of certain companies called Kestrel Capital Partners (Malaysia) Sdn Bhd, Kestrel Securities Sdn Bhd and Abadale Investments Ltd, which were linked to PL. [note: 3]

33 The Loan was fully repaid by RTCI to RTC sometime in early 1998, together with an additional sum of $120,987.82. The evidence is not clear as regards what this additional sum represented. In ordinary circumstances, it would be interpreted as either interest on the Loan or compensation for the

use of RTC's interest-free loan. The evidence however shows that the Former Directors had earned interest of between 7% – 8% per annum on the proceeds of the Loan between February 1997 and early 1998 when the Loan was repaid. Hence, the Former Directors had indirectly derived a benefit from the use of RTC's funds via RTCI.

34 RTC has argued that (a) the Loan was made in contravention of s 162(1) of the Companies Act, (b) the Former Directors were in breach of directors' duties owed to RTC by approving the Loan, and (c) the Former Directors must be disgorged of the interest which they earned on the proceeds of the Loan ("the Profits").

Was the $33mil loan made in breach of s 162(1) of the Companies Act?

35 Section 162(1) of the Companies Act provides:

> **Loans to directors**
>
> **162.** —(1) A company (other than an exempt private company) shall not make a loan to a director of the company or of a company which by virtue of section 6 is deemed to be related to that company, or enter into any guarantee or provide any security in connection with a loan made to such a director by any other person …

RTC's argument was that the Loan, although made in form to RTCI, was in truth a loan to the Former Directors as directors of RTC who had used RTCI as a conduit to channel RTC's funds to themselves for their own use. As the Loan was in contravention of s 162(1) of the Companies Act, the Former Directors were accountable to RTC for the Profits.

36 However, the Judge did not accept this argument. He held that the Loan came within the terms of s 163 of the Companies Act which states:

> **Prohibition of loans to persons connected with directors of lending company**
>
> **163.** —(1) Subject to this section, it shall not be lawful for a company (other than an exempt private company) —
>
> (a) to make a loan to another company; or
>
> …
>
> if a director or directors of the first-mentioned company is or together are interested in 20% or more of the total number of equity shares in the other company (excluding treasury shares).
>
> (2) Subsection (1) shall extend to apply to a loan, guarantee or security in connection with a loan made by a company (other than an exempt private company) to another company where such other company is incorporated outside Singapore, if a director or directors of the first-mentioned company —
>
> (a) is or together are interested in 20% or more of the total number of equity shares in the other company (excluding treasury shares); or
>
> (b) in a case where the other company does not have a share capital, exercises or together exercise control over the other company whether by reason of having the power to appoint directors or otherwise.

…

(*4*) *This section shall not apply —*

(a) to anything done by a company where the other company (whether that company is incorporated in Singapore or otherwise) is its subsidiary or holding company or a subsidiary of its holding company; or

...

[emphasis added]

At [200] of the Judgment, the Judge concluded as follows:

200 … Therefore, on a plain reading of s 163(4) [of the Companies Act], since RTCI is a wholly-owned subsidiary of RTC, s 163(1) [of the Companies Act] does not apply to a loan made by [RTC] to RTCI. On this basis, I find that RTC has not contravened s 162 [of the Companies Act] by making the $33m loan to RTCI. It therefore follows that the [Former Directors] have not breached their fiduciary duties since they have not caused RTC to contravene s 162 [of the Companies Act].

37 In our view, the Judge's approach did not address RTC's argument that the Loan in substance was a sham – *ie*, that it was nominally made to RTCI (which was permitted by s 163(4) of the Companies Act), but was actually for the benefit of the Former Directors who exercised their powers wrongfully to avoid the statutory prohibition under s 162(1) of the Companies Act.

38 The Former Directors' defence to RTC's claim on the Profits was that the Loan to RTCI was approved by the Former Directors as directors as well as shareholders of RTC, or alternatively, it was ratified by the shareholders of RTC (see *Rolled Steel Products (Holdings) Ltd v British Steel Corporation and Others* [1986] 1 Ch 246 at 296 ("*Rolled Steel Products*")).

39 The Judge accepted the Former Directors' argument and dismissed RTC's claim to recover the Profits from the Former Directors. At [202] of the Judgment, the Judge said:

The rule against the making of "secret profit" by a director of a company is subject to the proviso that if such profit or benefit is disclosed by the director to the members of the company and approved by them, he will not be held liable to account for that profit. In [*Regal (Hastings) Ltd v Gulliver and others* [1967] 2 AC 134], Lord Russell of Killowen suggested, at 150, that:

[The defendants] could, had they wished, have protected themselves by a resolution (either antecedent or subsequent) of the Regal shareholders in general meeting. In default of such approval, the liability to account must remain.

On the present facts, I accept the [Former Directors'] submission that they, as the shareholders and directors of RTC had authorised the [Loan] to RTCI and were all fully aware of the profits from the investment of the [Loan] to RTCI. … At all times, the members of the company had knowledge of the [Loan] and that the [Loan] was intended for investment purposes. When the first tranche of the [Loan] was made in February 1997, the then shareholders of [RTC], Tan Buck Chye and Teriya had full knowledge of the [Loan] and authorised it. By the time the investments yielded profits, the [Former Directors] as the only shareholders of [RTC] had full knowledge of the

profits. Even though there was no resolution at a general meeting specifically authorising the distribution of such profits to the [Former Directors] as directors, since all the shareholders with the right to attend and vote at a general meeting had assented to the profits, that assent was as binding as a resolution in general meeting: *Re Duomatic Ltd* at 373.

40 There are two separate issues arising from the Loan. The first issue is whether the Loan to RTCI was to disguise what would otherwise be an unlawful loan to the Former Directors. In form, the Loan was a loan by RTC to RTCI, but the law looks at the substance of the matter and not the form (see *eg*, *Street v Mountford* [1985] AC 809). Why was the Loan made to RTCI if all that RTCI did with the Loan was to place the proceeds in the bank accounts of companies controlled by PL and the other Former Directors? Common commercial sense would yield no other reasonable explanation other than that the Loan was meant for the Former Directors and not RTCI. If, as such, the Loan was in substance a disguised loan to the Former Directors, it would be an illegal loan under s 162(1) of the Companies Act (albeit until RTC became an exempt private company in November 1997 whereupon the Loan was formally converted into a directors' loan), and would not be capable of being pre-approved or ratified by the shareholders (see *Macleod v The Queen* (2003) 214 CLR 230 (HCA); *Angas Law Services Pty Ltd v Carabelas* (2005) 226 CLR 507 at [24] (HCA)). Section 162(5) of the Companies Act provides that any loan made to a director contrary to the terms of that section may be recovered by the company. However, since the Loan has been fully repaid to RTC in early 1998, we do not find it necessary to make any finding as to whether the Loan was in breach of s 162(1) of the Companies Act since it would require us to determine whether or not the Former Directors had committed an offence under s 162(4) of the Companies Act.

41 The second issue is whether, assuming that the Loan was in breach of s 162(1) of the Companies Act, RTC can recover the Profits which the Former Directors had received. It is established law that directors of a company may not make use of their position to make a profit at the expense of the company as they owe a fiduciary duty to act in the interests of the company (see *Lim Koei Ing v Pan Asia Shipyard and Engineering Co Pte Ltd* [1995] 1 SLR(R) 15 at [54]; *Regal (Hastings) Ltd v Gulliver and others* [1967] 2 AC 134 at 153 ("*Regal (Hastings) Ltd v Gulliver*")). Applying this principle to the facts of this case, the Former Directors would be accountable to RTC for the Profits. However, this conclusion does not necessarily assist RTC in its claim for the Profits because the Judge had found as a fact that the Former Directors, as shareholders of RTC, had assented to themselves keeping the benefits (see [202] of the Judgment).

42 The question, therefore, is whether the Former Directors as shareholders could lawfully waive RTC's right to recover the Profits which the Former Directors gained from the proceeds of the Loan. In this regard, it may firstly be noted that RTC's claim for the return of the Profits is not based on the Loan being *ultra vires* in the sense that RTC had no power to make any loan. An unlawful loan made by a company would not be capable of ratification by its shareholders (see *Rolled Steel Products* at 296 (*per* Slade LJ); *Kinsela and Another v Russell Kinsela Pty Ltd (in liq)* (1986) 4 NSWLR 722 ("*Kinsela*")). However, an unlawful loan is not per se an *ultra vires* loan. Secondly, while any return of capital other than in accordance with the Companies Act or any transaction which is a fraud on creditors is incapable of being ratified by shareholders, even voting unanimously (see *Ridge Securities Ltd v Inland Revenue Commissioners* [1964] 1 WLR 479 at 495 (*per* Pennycuick J); *Aveling Barford Ltd v Perion Ltd and others* [1989] BCLC 626 at 633 (*per* Hoffmann J); *Barclays Bank plc & Ors v British & Commonwealth Holdings plc* [1995] BCC 19 at 23 (*per* Harman J); and *Progress Property Co Ltd v Moorgarth Group Ltd* [2010] 1 BCLC 1 at [23] (*per* Mummery LJ), affirmed on appeal in *Progress Property Company Limited v Moorgath Group Limited* [2010] UKSC 55), the claim in respect of the Profits is not made on the basis that the Loan was an illegal distribution of RTC's assets (*ie*, a return of capital) or that it was a fraud on creditors as the Loan had been repaid.

43 Instead, RTC's claim appears to have been made on the basis that the Former Directors were accountable to RTC as constructive trustees because, at the trial, RTC had argued (and the Judge had agreed with RTC on this point) that the proper provision under the Limitation Act (Cap 163, 1996 Rev Ed) ("Limitation Act") which applied to the present case was not s 22A(3) but s 22(1)(*b*) of the Limitation Act which stipulates that no period of limitation shall apply to an action by a beneficiary under a trust, being an action to recover from the trustees trust property or the proceeds thereof in the possession of the trustee, or previously received by the trustee and converted to his use (see the Judgment at [245]). As the Former Directors have not appealed against the Judge's decision on the issue of limitation, we do not propose to address it other than to note that this Court has recently discussed extensively the scope of s 22(1) of the Limitation Act, and dealt with it conclusively in *Yong Kheng Leong and another v Panweld Trading Pte Ltd and another* [2012] SGCA 59.

44 In the circumstances, we see no reason in principle why the shareholders of RTC may not waive the recovery of the Profits from the Former Directors by the exercise of their shareholding powers. They could not be said to have been negligent in waiving RTC's claim, nor could they be said to have acted fraudulently *vis-à-vis* RTC or any creditor (as RTC was solvent) in not causing RTC to take steps to commence proceedings against themselves. In deciding as shareholders to waive RTC's rights to recover the Profits, the Former Directors were not trustees for RTC or for one another (see *Peter's American Delicacy Company Limited v Heath and others* (1939) 61 CLR 457). They were entitled to make decisions in their own selfish interests, satisfying their own particular wishes and prejudices, and without any personal obligation to consider or act in the best interests of RTC or other shareholders. In *Pender v Lushington* (1877) 6 Ch D 70, Jessel MR stated the law as follows (at 75–76):

> [A] man may be actuated in giving his vote by interests entirely adverse to the interests of the company as a whole. He may think it more for his particular interest that a certain course may be taken which may be in the opinion of others very adverse to the interests of the company as a whole, but he cannot be restrained from giving his vote in what way he pleases because he is influenced by that motive. There is, if I may say so, no obligation on a shareholder of a company to give his vote merely with a view to what other persons may consider the interests of the company at large. He has a right, if he thinks fit, to give his vote from motives or promptings of what he considers his own individual interest.

45 In our view, in the absence of any factor that would disqualify shareholders from ratifying unauthorised or unlawful acts of directors, we see no reason why a company may not waive any claims it may have against its directors for any kind of liability where the company is solvent. As Street CJ said in *Kinsela* (at 730 and 732):

> … In a solvent company the proprietary interests of the shareholders entitle them as a general body to be regarded as the company when questions of the duty of directors arise. If, as a general body, they authorise or ratify a particular action of the directors, there can be no challenge to the validity of what the directors have done. But where a company is insolvent the interests of the creditors intrude. They become prospectively entitled to, through the mechanism of liquidation, to displace the power of the shareholders and directors to deal with the company's assets …
>
> …
>
> It is … legally and logically acceptable to recognise that, where directors involved in a breach of their duty to the company affecting the interests of shareholders, then shareholders can either authorise that breach in prospect or ratify it in retrospect. Where, however, the interests at risk

are those of creditors I see no reason in law or in logic to recognise that the shareholders can authorise the breach. …

46 In our view, the rationale of the above propositions is consistent with our decision that the Former Directors as shareholders of RTC had the power to waive RTC's claim for the Profits.

47 For the above reasons, we uphold the Judge's decisions on all the heads of claim raised by RTC and dismiss CA 109/2010.

CA 108/2010

Whether MT and LJW had breached cl 7 of the RTC S&PA

48 CA 108/2010 is LA's and WT's appeal against the Judge's dismissal of, *inter alia*, their third party claims against MT and LJW. In CA 108/2010, LA and WT claimed that MT and LJW:

(a) breached cl 7 of the "Agreement in respect of the Sale and Purchase of Shares in Raffles Town Club Pte Ltd" dated 6 June 2001 ("the RTC S&PA");

(b) breached Recital (F) and cl 4.3 of a deed dated 18 February 2002 ("the Deed");

(c) acted in bad faith and/or unconscionably in causing, directing and/or assisting RTC to commence the present suit; and

(d) conspired with each other and/or together with RTC with the sole or predominant intention or by unlawful means to cause injury, loss or damage to LA and WT by commencing S 46/2006 against them.

49 Clause 7 of the RTC S&PA comprised three sub-clauses:

(A) The Purchasers [*ie*, MT and LJW] hereby irrevocably acknowledge and agree with the Vendors [*ie*, LA and WT] that (save as provided in Clause 6 above [*ie*, warranties as to title]):-

(i) no representations, warranties or undertakings are made as to the Company [*ie*, RTC] and/or the Sale Shares [*ie*, 500000 RTC shares comprising 50% of its shareholding] and all and any such representations, warranties and undertakings (whether express or implied) are hereby excluded by the Vendors; and

(ii) notwithstanding anything contained in this Agreement, in no circumstances shall any of the Vendors be liable to any of the Purchasers as a result of or in connection with this Agreement (whether in contract, tort (including negligence or breach of statutory duty) or otherwise howsoever, and whatever the cause thereof) for any loss of profits, business, contracts, revenues, or anticipated savings, or for any special, indirect or consequential damage of any nature whatsoever.

The operation of this Clause shall survive the termination of this Agreement.

(B) Without prejudice to sub-Clause (A) above, the Purchasers hereby irrevocably acknowledge and agree with the Vendors that the Purchasers shall have no right of recourse and/or claim whatsoever against the Vendors in respect of any diminution in the value of the Sale Shares and/or claims, damages, losses, expenses and/or costs incurred or suffered by the Purchasers in connection with this Agreement and/or the Sale Shares, whether such diminution and/or claims,

damages, losses, expenses and/or costs is attributable to cause(s) occurring prior to, on or after completion, including, without limitation, any diminution and/or claims, damages, losses, expenses and/or costs as a result of any Claim made prior to, on or after completion attributable to cause(s) occurring prior to, on or after completion.

(C) The Purchasers undertake to the Vendors *not to* commence any action / proceedings or *assist any third party to commence or maintain or proceed with any action / proceedings against the Vendors in relation to the Company* and/or the Sale Shares.

[emphasis added]

50 Clause 4.3 of the Deed (which is reflected in Recital (F) of the Deed) provides as follows:

Other than obligations and liabilities arising from this Deed (in particular, [MT's and LJW's] obligations and liabilities under Clause 2 above), each party hereto irrevocably releases and discharges absolutely each of the other parties hereto from its/his entire *obligations and liabilities of whatsoever nature or cause, howsoever arisen from, related or connected to, or under the Discharged Agreements* with effect from the date of this Deed and each party hereto hereby waives its rights in respect of any claims or actions it may have (other than claims or actions arising under this Deed), of whatsoever nature, howsoever framed, in law or in equity, against each of the other parties hereto under the Discharged Agreements with effect from the date of this Deed Provided that there shall be no release and discharge nor waiver of rights in respect of claims or actions that [MT and LJW] may have against [LA or WT] in respect of any defect in the rights, title interest in the RTC shares purchased by [MT and LJW] pursuant to the First RTC Agreement and the Second RTC Agreement. [emphasis added]

51 The Judge rejected MT's and LJW's argument that cl 7 of the RTC S&PA contravened s 172(1) of the Companies Act (see the Judgment at [209]–[211]). Section 172(1) of the Companies Act provides that:

Any provision, whether in the articles or in any contract with a company or otherwise, for exempting any officer or auditor of the company from, or indemnifying him against, any liability which by law would otherwise attach to him in respect of any negligence, default, breach of duty or breach of trust of which he may be guilty in relation to the company, shall be void.

We agree with the Judge's ruling on this issue as s 172(1) of the Companies Act was applicable only if RTC had given the indemnity, which it had not. Here, the indemnity was given by MT and LJW in their capacity as purchasers of RTC shares from LA and WT.

52 The Judge went on to hold that (a) cl 7 of the RTC S&PA had been superseded by cl 4.3 of the Deed, (b) the scope of cl 4.3 was confined to claims or actions that the parties thereto might have against each other under the "Discharged Agreements" (which included the RTC S&PA), (c) the present suit and the attendant claims brought by RTC against LA and WT were not claims under the "Discharged Agreements" or did not arise out of or were connected with the "Discharged Agreements", and (d) none of the actions against LA and WT concerned, however remotely, the sale and purchase of RTC shares (see the Judgment at [215]).

53 In our view, while the Judge may be correct in holding that the Deed had superseded the RTC S&PA with respect to the relevant parties' mutual claims or actions against each other, cl 7(C) of the RTC S&PA provided that "[MT and LJW] undertake to [LA and WT] *not to commence any action / proceedings or assist any third party to commence or maintain or proceed with any*

action/proceedings against [LA and WT] in relation to [RTC] and/or the Sale Shares" (emphasis added). The issue is thus whether cl 4.3 of the Deed was intended to release MT and LJW from their undertaking not to assist any *third party* to commence any action against LA and WT in relation to RTC. Which third party was contemplated by this undertaking? In our view, that expression is broad enough to cover RTC itself, and in the prevailing circumstances, the only party that conceivably could have a claim against LA and WT as directors was RTC. The evidence here clearly shows that there was no reason for RTC to sue the Former Directors for damages or the return of RTC's assets, except at the behest of MT and LJW as the sole shareholders and controllers of RTC, and to increase the value of their shareholdings in RTC. In other words, RTC could only have acted in these proceedings by and on the decisions of MT and LJW as its current directors.

54 Accordingly, we must ask ourselves whether cl 4.3 of the Deed was intended to release MT and LJW from this particular undertaking. As the undertaking created a legal obligation, no doubt MT and LJW would argue that this obligation was released by cl 4.3 of the Deed. We do not agree with such an argument. In the present case, it is not really a case of MT and LJW *assisting* RTC to commence the present action against the Former Directors, or even *instigating* it to do so. It is a case of MT and LJW *initiating* the action in their capacity as shareholders/directors of RTC. As the sole and controlling shareholders, they were in a position to control what RTC might or might not do in relation to the Former Directors' past actions as directors of RTC.

55 It is therefore not necessary for us to make any finding as to whether cl 4.3 of the Deed had the effect of releasing MT and LJW from their obligation not to assist RTC in this matter. We would instead approach this issue on the basis that this is an isolated case where the disputed clause was drafted for a specific purpose in connection with a specific transaction, and which therefore created no binding precedent and raises no new principle of documentary construction. However, we would add that the conduct of MT and LJW may be relevant in connection with LA's, WT's and PL's arguments based on the tort of actionable conspiracy (see [61]–[68] and [71] below).

Lifting the corporate veil of RTC

56 The Former Directors have argued that the court should lift the corporate veil of RTC and treat RTC's claims against them as personal claims of MT and LJW in that the latter had made use of the separate legal personality of RTC to advance a claim which was in substance for their own benefit, and which they could not have made as purchasers of the RTC shares. Further, to allow MT and LJW to use RTC as a conduit to recover damages or losses suffered by RTC as a result of the alleged breaches of duties by the Former Directors would, if the action succeeds, result in their being unjustly enriched. In other words, it would lead to an unfair and unjust outcome for the Former Directors who otherwise would not be liable to RTC or MT and LJW.

57 The evidence shows that MT and LJW agreed to acquire the RTC shares at prices which took into account the net asset value of RTC, and that such value had been arrived at after discounting the management fees, consultancy fees, directors' fees and the Profits the Former Directors obtained in relation to the Loan. As purchasers of RTC shares from the Former Directors, they therefore have no claim whatsoever arising from the sale of those shares. However, if they were allowed to use RTC to claim damages against the Former Directors, and if RTC were to succeed in its claim, there is no doubt that MT and LJW would benefit personally as shareholders of RTC from any damages awarded to RTC. This would be an unfair and unjust outcome in the circumstances of this case. For this reason, we do not see any reason why we should allow the separate legal personality of RTC to assist MT and LJW in such a manner as to unjustly enrich them. Based on the evidence before the Judge, it is evident to us that MT and LJW were using RTC as a nominee to claim against the Former Directors for breaches of duties which the Former Directors as shareholders of RTC had already accepted or

ratified over many years.

58 In this connection, we should also point out that the Judge dismissed the Former Directors' arguments that MT and LJW (a) had acted in bad faith and/or unconscionably in causing, directing and/or assisting RTC to commence the suit below, (b) had knowledge of the alleged breaches of duties by the Former Directors, and even ratified them, (c) had depleted RTC's assets for their own benefit, and (d) had essentially obtained RTC for "free" (see [216]–[219] of the Judgment). In doing so, the Judge accepted the argument of MT and LJW that allegations of bad faith and unconscionable conduct *simpliciter* would not give rise to any reasonable cause of action (see [218] of the Judgment).

59 In our view, MT and LJW clearly acted unconscionably and in bad faith in causing RTC to commence S 46/2006 against the Former Directors for no reason other than to increase the assets of RTC directly and, correspondingly, the value of their shareholdings in RTC. In our view, RTC's action is in substance MT's and LJW's action as their economic interests are entirely aligned. If RTC were to succeed in its action, MT and LJW would effectively be able (with appropriate corporate actions) to retrieve the judgment proceeds for themselves.

60 For the above reasons, we find that the action below (*ie*, S 46/2006) is in substance an action by MT and LJW which has been disguised as an action by RTC. On the facts of this case, MT and LJW and RTC are indistinguishable, and therefore RTC should not be permitted to mount such an action against LA and WT.

The alleged conspiracy by MT and LJW against the Former Directors

61 LA and WT have further alleged that MT and LJW had by unlawful means and/or with the sole or predominant intention of injuring them, conspired and combined wrongfully together with RTC to commence the current claim against them. The Judge rejected this argument, holding *inter alia* that LA and WT had not proved that the predominant purpose of MT and LJW was to cause damage or injury to LA and WT. It was the Judge's view that the purpose of the suit (*ie*, S 46/2006) was, at its best, to recover the loss and damage allegedly caused by the Former Directors, and at its worst, to unjustly enrich MT and LJW as the sole shareholders of RTC. In either case, the Judge held, any injury caused to LA and WT was incidental to the bringing of the suit, and it would be a stretch to say that there was a conspiracy to injure them (see [224] of the Judgment).

62 We disagree with the Judge's finding on the issue of conspiracy. The law on the tort of conspiracy has been considered by this Court in *Quah Kay Tee v Ong and Co Pte Ltd* [1996] 3 SLR(R) 637 ("*Quah Kay Tee*"), *Chew Kong Huat and others v Ricwil (Singapore) Pte Ltd* [1999] 3 SLR(R) 1167 and *Beckkett Pte Ltd v Deutsche Bank AG and another and another appeal* [2009] 3 SLR(R) 452. The principles which apply are found in *Quah Kay Tee* at [45]:

> 45 The tort of conspiracy comprises two types: conspiracy by unlawful means and conspiracy by lawful means. A conspiracy by unlawful means is constituted when two or more persons combine to commit an unlawful act with the intention of injuring or damaging the plaintiff, and the act is carried out and the intention achieved. In a conspiracy by lawful means, there need not be an unlawful act committed by the conspirators. But there is the additional requirement of proving a "predominant purpose" by all the conspirators to cause injury or damage to the plaintiff, and the act is carried out and the purpose achieved.

63 In *OBG Ltd and another v Allan and others; Douglas and others v Hello! Ltd and others (No 3); Mainstream Properties Ltd v Young* [2008] 1 AC 1 ("*OBG v Allan*"), Lord Nicholls said (at [167]):

> 167 I add one explanatory gloss to the above. Take a case where a defendant seeks to advance his own business by pursuing a course of conduct which he knows will, in the very nature of things, necessarily be injurious to the claimant. *In other words, a case where loss to the claimant is the obverse side of the coin from gain to the defendant. The defendant's gain and the claimant's loss are, to the defendant's knowledge, inseparably linked. The defendant cannot obtain the one without bringing about the other. If the defendant goes ahead in such a case in order to obtain the gain he seeks, his state of mind will satisfy the mental ingredient of the unlawful interference tort* … [emphasis added]

64 The decision of *OBG v Allan* was not considered by the Judge when he held that any damage suffered by the Former Directors would be incidental to the suit. In our view, neither the "best" nor "worst" interpretation of MT and LJW's conduct would have materialised without any corresponding injury being occasioned to the Former Directors, since MT and LJW could not have brought about a loss to the Former Directors without bringing about a gain to themselves at the same time. Accordingly, we disagree with the Judge's finding that MT and LJW had no intention to injure the Former Directors in pursuing the suit below (see [227] of the Judgment).

65 However, we agree with the Judge that MT and LJW did not use unlawful means in their conspiracy to injure the Former Directors. Given thus, the question is whether there was a predominant purpose on the part of MT and LJW to cause financial harm to the Former Directors in commencing the suit below.

Conspiracy to injure (lawful means conspiracy)

66 In *Revenue and Customs Commissioners v Total Network SL* [2008] 1 AC 1174 ("*Total Network SL*"), the revenue and customs commissioners brought an action against the defendant for damages at common law for unlawful means conspiracy in sums equivalent to the amounts of VAT which they claimed to have lost as a result of "carousel frauds". In the course of his judgment, Lord Neuberger observed (at [226]–[228]) in relation to the law on conspiracy to injure (*ie*, conspiracy by *lawful* means) as follows:

> 226 … Conspiracy to injure cannot be relied on as injury to the commissioners was not, it is apparently accepted by the commissioners, the *primary aim* of the carousel fraud …
>
> …
>
> 228 However, it seems to me that, although this argument was abandoned by the commissioners, it may be that the better route to this conclusion is that this is a case of conspiracy to injure, and that, as [*Stevens on Torts and Rights* (2007)] suggests, there is no need for the tort of unlawful means conspiracy. I referred earlier … to the point that the reasoning in [*OBG v Allan*] … supports the view that, in this case, *there is little, if any, difference between the conspirators' intention to make money and their intention to deprive the commissioners of money: each is the obverse of the other*. On that basis, it may well be that it could be said that the predominant purpose of Total and the other conspirators was indeed to inflict loss on the commissioners just as much as it was to profit the conspirators, and hence the claim in tort is made out in conspiracy to injure.
>
> [emphasis added]

67 We find Lord Neuberger's approach applicable to the present case and, accordingly, we hold that the predominant purpose of MT and LJW in causing RTC to commence the present action against

the Former Directors was to cause financial harm to the Former Directors just as much as it was to profit MT and LJW.

68 We accordingly find that insofar as MT and LJW as the sole shareholders and directors of RTC had made use of RTC by causing it to commence the present action against the Former Directors, they had committed an actionable conspiracy in tort against the Former Directors.

LA's and WT's counterclaims against PL and DF for indemnity and/or contribution

69 In CA 108/2010, LA and WT also argue that the Judge was wrong to dismiss their counterclaims against PL and DF seeking indemnity and/or contribution in the event that RTC succeeded in the suit below. For the same reason that the Judge gave in dismissing LA's and WT's counterclaims (*viz*, that the counterclaims, being contingent upon RTC's success in the suit below, had become moot given that RTC had failed in the suit (see [236] of the Judgment)), we do not find it necessary to deal with this aspect of CA 108/2010. As such, LA, WT, PL and DF shall bear their own costs for this particular aspect of CA 108/2010.

CA 110/2010

PL's counterclaim against LA and WT for an indemnity and/or contribution

70 As against LA and WT in CA 110/2010, PL contends that he is entitled to an indemnity and/or contribution from LA and WT in the event that RTC succeeds in its appeal in CA 109/2010. For the same reason as [69] above, we find it unnecessary to deal with this contention. Accordingly, PL, LA and WT shall similarly bear their own costs for this particular aspect of CA 110/2010.

PL's third party claim against MT and LJW for committing the tort of conspiracy

71 As against MT and LJW in CA 110/2010, PL contends that RTC's claim for damages against him is essentially the personal claims of MT and LJW and that they had engaged in lawful and/or unlawful means conspiracy to injure him by causing RTC to commence S 46/2006 against him. As we have found that the predominant purpose of MT and LJW in causing RTC to commence S 46/2006 was to cause financial harm to the Former Directors by way of an actionable conspiracy in tort, we accept PL's contention and allow this aspect of CA 110/2010. However, as we have decided to dismiss RTC's appeal in CA 109/2010, PL has suffered no loss other than the costs of defending S 46/2006 against RTC, and accordingly, we will not order damages to be assessed, but that PL's (and for that matter, LA's and WT's as well, insofar as they have succeeded in their contention of conspiracy under CA 108/2010 (see [61]–[68] above)) costs of defending S 46/2006 to be personally borne by MT and LJW on an indemnity basis.

Conclusion

72 For the reasons stated, we make the following orders:

(a) the appeal in CA 109/2010 is dismissed with costs;

(b) the appeal in CA 108/2010 is partially allowed insofar as LA's and WT's claim of conspiracy against MT and LJW is concerned, with costs and no order for assessment of damages;

(c) the appeal in CA 110/2010 is partially allowed insofar as PL's claim of conspiracy against MT and LJW is concerned, with costs and no order for assessment of damages;

(d) PL's, LA's and WT's costs in defending S 46/2006 to be personally borne by MT and LJW on an indemnity basis; and

(e) the usual consequential orders.

[note: 1] Joint Record of Appeal Vol II(1), p 520 para 14(v).

[note: 2] Reproduced in [151] of the Judgment.

[note: 3] 1st Respondent's Case (CA109/2010) Vol 4, p 751 para 1438 and p 752 para 1440.